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Jonathan William Dodds

Human Rights and Extraordinary Rendition: the International Responsibility of European States

*This paper considers the extent to which European States were involved in the CIA extraordinary rendition programme, either passively or actively. It opens with an account of the evolution of the programme from the largely lawful practice of rendition, through to extraordinary rendition. There is a consideration of a number of reported cases in order to place the practice in context, including those of Binyam Mohammed and Abu Omar. Chapter Two provides an overview of the evidence presented with regard to European States, with attention given to publications from human rights organisations such as Amnesty International, information gathered by the Council of Europe, and opinions offered by organisations such as the Eminent Jurists Panel and the Venice Commission. The focus then shifts to a number of international legal instruments which provide evidence for the illegality of extraordinary rendition, including the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and the Geneva Conventions of 1949. Customary international law is also considered. Chapter Four draws the previous two chapters together, beginning with a consideration of the rules put forward in the International Law Commission's Articles on State Responsibility regarding how international responsibility will attach to the actions of States. It is argued that in most instances, European States have acted in a way which was contrary to their obligations.*

Human Rights and Extraordinary Rendition:  
the International Responsibility of European  
States

Jonathan William Dodds

Master of Jurisprudence  
Law School, Durham University  
2011

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## Introducing Extraordinary Rendition

The threat of large scale terrorist attacks is a growing concern to all nations. In particular, attacks carried out by Islamic fundamentalists and extremists on Western nations have increased dramatically in the past decade. The 9/11 attacks on the World Trade Centre in New York, the 2004 Madrid train bombings and the July 7<sup>th</sup> bombings in London are just three examples of the level of danger posed by the organised, international terror cell al-Qaeda. Increasingly intelligence on the activities and plans of this cell is growing in importance. Accurate and detailed information helps save lives and protect States from attacks. It is essential that intelligence services receive this information promptly so as to provide them with the scope to take decisive action. This 'actionable intelligence' is by its very nature difficult to acquire with time being of the essence similar to so called 'ticking time-bomb scenarios'. In order to obtain this information, the CIA has utilised a process known as extraordinary rendition. This programme generally involves capturing and transporting terror suspects to third party countries in order to carry out interrogations.

This paper is separated into four main sections and one concluding chapter. Chapter I will introduce to concept of extraordinary renditions, analysing the evolution of the largely legal concept of 'rendition to justice' into the unlawful practice of extraordinary rendition. This section will sketch the outline of the paradigmatic extraordinary rendition operation, offering a working definition of the process. The extraordinary rendition programme offers up a wealth of areas where human rights abuses may be found. However, in order to allow for more detailed analysis, this paper will focus on four key areas where European involvement may be identified: unlawful detention, unlawful transfer, the practice of overflights and the association with torture, cruel, inhuman or degrading treatment and punishment (while it is accepted that renditions generally refer to methods of interstate

transfer, extraordinary rendition's inherent link with torture necessitates analysis of this aspect, particularly where European states receive information which is tainted by aggressive interrogation techniques). Some examples of extraordinary renditions will be offered in this section to demonstrate how the practice is carried out. Chapter II will then move on to consider how and when European states may have assisted in carrying out extraordinary renditions. There will naturally be a reliance on NGO reports in this section, as governments are understandably unwilling to confirm their involvement in the programme. It is hoped that this section will provide context for the following discussions. The relevant legal regimes are highlighted in Chapter III: the focus is on *international responsibility of European states for human rights abuses* arising from extraordinary rendition, and therefore it is beyond the scope of this paper to offer a pan-European analysis of domestic legal regimes, nor a general assessment of anti-terrorism law, including such aspects as surveillance. With the spotlight on human rights issues, three main treaties and legal orders are addressed: the European Convention on Human Rights and Fundamental Freedoms (ECHR), the International Covenant for Civil and Political Rights (ICCPR) and the Convention against Torture (CAT). As extraordinary renditions take place in the context of a 'war on terror', for completeness, there will be a brief consideration of the applicability of international humanitarian law, specifically the Geneva Conventions. There is also some consideration given to customary international law. Chapter IV seeks to demonstrate where European action (or inaction) towards the programme may lead to a finding of international responsibility in each of the regimes found in Chapter III. For this purpose, there is a consideration of the rules promulgated in the International Law Commission's Articles on State Responsibility, as well as a discussion of complicity in internationally wrongful acts. This Chapter seeks to bring together the previous two, offering conclusions on where European states are likely to have violated their



international obligations under a variety of legal regimes. The concluding remarks in Chapter V offer an overview of all areas considered in the thesis.

It is necessary to note that 'extraordinary rendition' does not exist as a term of art in international law. It is therefore essential to specify exactly what is meant when reference is made to the term. This discussion will consider the archetypal 'extraordinary rendition' which will generally involve the following aspects: identification of a potential terrorist suspect; unlawful detention of the suspect by national security forces and transfer of custody to the CIA; the illegal interstate transfer of the detainee to another country; the use of secret detention; and the application of 'enhanced interrogation techniques' upon the detainee (perhaps the single most important aspect of an extraordinary rendition).

#### *From rendition to extraordinary rendition*

Rendition, as distinct from *extraordinary* rendition, existed long before the attacks on the Twin Towers. Under the Reagan and Clinton presidencies the CIA developed rendition as a tool to apprehend terrorists and wanted criminals before transferring them to a different country where they would face criminal investigations and prosecutions.<sup>1</sup> A number of bodies, including international human rights NGOs and even the US Supreme Court<sup>2</sup>, felt that in this form rendition was lawful and within the international obligations of the United States.<sup>3</sup> It was subject to a number of controls and a strict procedure had to be followed before its use could be sanctioned.<sup>4</sup> There needed to be

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<sup>1</sup> Sharma, H 'Willing accomplices: third-party complicity in the policy of "extraordinary renditions" under international criminal law' (2006) *Crim Law* 5, 5

<sup>2</sup> See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), in which the Supreme Court upheld the jurisdiction of a US court to try a man brought to the US from Mexico by means of abduction rather than extradition.

<sup>3</sup> Committee on Legal Affairs and Human Rights 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states' (7 June 2006)

<[http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf)>, 11

<sup>4</sup> Weissbrodt, D and Bergquist, A 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123, 124-5

‘an “outstanding legal process” against the suspect, usually connected to terrorist offences in his country of origin; a CIA “dossier”, or profile of the suspect, based on prior intelligence and in principle reviewed by lawyers; a “country willing to help” in the apprehension of the suspect on its territory; and “somewhere to take him after he was arrested.”’<sup>5</sup>

While the programme initially targeted criminals and terrorists generally, in 1995 the ‘serious prospect of Osama bin Laden acquiring weapons of mass destruction’ forced the CIA to focus its endeavours on al-Qaeda.<sup>6</sup> Following the September 11<sup>th</sup> 2001 attacks, rendition underwent another alteration.

President Bush signed a classified directive in 2001 which approved expedited procedures and additional flexibility to the CIA and other state operatives in pursuing the aims of the rendition programme.<sup>7</sup> Rendition to justice was no longer the aim of the process, instead the aim was merely to capture and detain the targets before transporting them neither to their country of origin, nor to the United States.<sup>8</sup> Instead the detainees were allegedly held in ‘black sites’ in third party States, intentionally outside of the purview of any justice system.<sup>9</sup>

Given that rendition was now being used to gather intelligence, the focus shifted from transferring detainees for the purposes of criminal trials.<sup>10</sup> Rendition had been used as an investigative tool in the past, but there is no doubt that the ‘war on terror’ significantly

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<sup>5</sup> Above n3, 10

<sup>6</sup> Ibid, 9

<sup>7</sup> Amnesty International ‘United States of America / Yemen: Secret Detention in CIA “Black Sites”’ <<http://www.amnesty.org/en/library/asset/AMR51/177/2005/en/413e36cb-d493-11dd-8a23-d58a49c0d652/amr511772005en.pdf>>; Weissbrodt, D and Bergquist, A ‘Extraordinary Rendition and the Torture Convention’ (2005-2006) 46 Va. J. Int’l L. 586, 590

<sup>8</sup> ‘Egypt appears to be the most frequently used receiving country, and other participants include Jordan, Morocco, Saudi Arabia, Syria, Uzbekistan, and Yemen’ (Weissbrodt, D and Bergquist, A ‘Extraordinary Rendition and the Torture Convention’ (2005-2006) 46 Va. J. Int’l L. 586, 590)

<sup>9</sup> Above n3, 12

<sup>10</sup> International Commission of Jurists ‘Assessing Damage, Urging Action’ (Geneva, 2009) <<http://ejp.icj.org/IMG/EJP-Report.pdf>> 80

enhanced its application.<sup>11</sup> Given the intensified pressure the CIA was under to provide actionable intelligence, its operatives and its proxies turned to the use of 'enhanced interrogation techniques'.<sup>12</sup> The use of such techniques was what earned rendition the moniker '*extraordinary* rendition': it is claimed that their use pushed the limit of acceptable interrogation methods, and it is possible that they crossed the boundary into torture.<sup>13</sup> Indeed, there have been reports of a number of detainees being killed, with one CIA agent quoted as saying that "[i]f you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt."<sup>14</sup>

There is therefore a clear difference between rendition and extraordinary rendition. Rendition was a largely lawful process which aimed to capture wanted criminals and terrorists before transferring them to a location where they could be prosecuted for their crimes, and serve their sentences. Extraordinary rendition, on the other hand, seeks to hold suspected terrorists outside of the justice system in order to obtain intelligence relevant to the protection of States.

### *Europe Lends a Helping Hand?*

While the United States was the chief architect of this programme, European States cannot be said to be entirely innocent with regards to its use: many suspects have been captured in Europe, or with European assistance. Amnesty International has pointed out that 'evidence that European States have been implicated in "rendition" has come from many

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<sup>11</sup> Sadat, L.N. 'Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law' (2005-2006) 37 Case W. Res. J. Int'l L. 309, 316

<sup>12</sup> Above n3, 11

<sup>13</sup> Weissbrodt, D and Bergquist, A 'Extraordinary Rendition and the Torture Convention' (2005-2006) 46 Va. J. Int'l L. 586, 593; A detailed analysis on what constitutes torture will be provided in Chapter 3, for the current purposes, torture should be considered to refer to the definition provided in Article 1 of the UN Convention against Torture

<sup>14</sup> Above n11, 314

sources.<sup>15</sup> One such source is the Eminent Jurists Panel<sup>16</sup> which has produced a report where it is suggested that several European Union States have been complicit in the programme, naming Italy, Spain, Poland and the United Kingdom specifically.<sup>17</sup> The Council of Europe, led by Senator Dick Marty<sup>18</sup>, produced two reports highlighting incidents of European involvement in the extraordinary rendition programme including operating secret places of detention<sup>19</sup> and permitting overflights.<sup>20</sup> The report goes on to suggest that the extraordinary rendition programme operated through an international network which resembled 'a 'spider's web' spun across the globe'<sup>21</sup> which could not have performed effectively without 'the active participation, or at least the collusion of, national intelligence services' in Europe.<sup>22</sup>

### *The Programme in Action*

There is a wealth of personal testimony from those who have made claims suggesting they have been subjected to extraordinary rendition. A number of alleged victims have come forward to give their account of exactly what happened to them during the weeks, months and in some cases years that they had been detained. Of course, such claims are the

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<sup>15</sup> Amnesty International "'Rendition" and secret detention: A global system of human rights violations. Questions and Answers'

<<http://www.amnesty.org/en/library/asset/POL30/003/2006/en/db1dbfd1-d468-11dd-8743-d305bea2b2c7/pol300032006en.pdf>>

<sup>16</sup> The Eminent Jurists Panel, an initiative of the ICJ, is a group of senior judges and lawyers from around the world who, in the course of three years, examined the compatibility of laws, policies and practices, which are justified expressly or implicitly as necessary to counter terrorism, with international human rights law and, where applicable, with international humanitarian law

<<http://ejp.icj.org/sommaire.php3>>

<sup>17</sup> Above n10, 81

<sup>18</sup> Dick Marty has been a member of the Parliamentary Assembly for the Council of Europe since 2003. He is a member of the Committee on Legal Affairs and Human Rights and was charged with investigating the involvement of European States in the CIA extraordinary rendition programme:

<[http://assembly.coe.int/ASP/AssemblyList/AL\\_MemberDetails.asp?MemberID=4023](http://assembly.coe.int/ASP/AssemblyList/AL_MemberDetails.asp?MemberID=4023)>

<sup>19</sup> Committee on Legal Affairs and Human Rights 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report' (11 June 2007)

<<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>>, 2

<sup>20</sup> Ibid, 21-2

<sup>21</sup> Above n3, 65

<sup>22</sup> Ibid, 50

testimony of suspected terrorists, and so questions will always be asked about their reliability. However, the purpose of this discussion is not to determine the veracity of such assertions. Included below is a selection of four such accounts, each of which contains some element which hints at the involvement of European states.

A. Binyam Mohamed

Binyam Mohamed is an Ethiopian citizen who had been a resident in the UK since 1994, where he had been trying to claim asylum in an extended, and ultimately unresolved process.<sup>23</sup> In 2001, he travelled to Afghanistan and spent several months in the country. In early 2002, he intended to return to the UK and in order to do so he crossed into Pakistan through Karachi Airport: it was here that Pakistani officials detained him in April 2002.<sup>24</sup> Although initially held for allegedly travelling with a false passport, he was later interrogated by British and American officials who suggested that he could be transferred to Jordan because “[w]e can’t do what we want here, the Pakistanis can’t do exactly what we want them to do...”<sup>25</sup> After three months in Pakistani custody, he was handed over to the US who transferred him to Morocco on a CIA registered plane.<sup>26</sup> His detention in Morocco lasted for 18 months and Mr Mohamed alleges that he was subjected to torture during his time there which he suggests took part in phases including ‘an initial ‘softening up’; a routine ‘circle of torture’; and eventually a ‘heavy’ abuse involving the infliction of physical injury.’<sup>27</sup> This included being suspended from the ceiling, repeated beatings and having his penis cut with a razor.<sup>28</sup>

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<sup>23</sup> Above n3, 44

<sup>24</sup> Amnesty International ‘UK: Government must provide information about rendition, disappearance and torture’ <<http://www.amnesty.org/en/for-media/press-releases/uk-government-must-provide-information-about-rendition-disappearance-and>>

<sup>25</sup> Above n3, 45

<sup>26</sup> Above n24; Above n3, 45: Official flight records obtained by this inquiry show that the known rendition plane, N379P, took off from Islamabad on 21 July 2002 and flew to Rabat, Morocco.

<sup>27</sup> Above n3, 46

<sup>28</sup> Ibid

Mr Mohamed was held in Morocco for approximately two years before being transferred to the 'dark prison'<sup>29</sup> in Kabul, Afghanistan in January 2004. He alleges that he was tortured again in Afghanistan, before being transferred to Guantanamo in September 2004.<sup>30</sup> His daily routine of interrogations continued throughout his detainment at Guantanamo and as an act of protest he took part in a hunger strike. The authorities responded to this by force feeding those taking part, with Mr Mohamed being subjected to three force feedings a day.<sup>31</sup> Mr Mohamed has stated that his interrogators often questioned him on very specific aspects of his life, including 'details of his education, his friendships in London and even his kickboxing trainer.'<sup>32</sup> After more than six years of detention, during which he never faced a court for any charge, he was released back to the UK in February 2009.<sup>33</sup> Since his release, Mr Mohamed has unsuccessfully petitioned the UK courts in order to seek some recompense for the ordeal he claims he suffered.<sup>34</sup>

### B. Khalid el-Masri

Khalid el-Masri is a German national of Lebanese origin. In December 2003, while travelling across the Serbian-Macedonian border, he was apprehended by Macedonian officials because of supposed passport irregularities.<sup>35</sup> After being held at the border for a few hours, he was transported to a hotel in the capital, Skopje, where he was detained under

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<sup>29</sup> For details see <<http://www.hrw.org/en/news/2005/12/18/us-operated-secret-dark-prison-kabul>>

<sup>30</sup> Above n24

<sup>31</sup> Amnesty International 'Document - USA: Ill-treatment/ health concern/ legal concern' <<http://www.amnesty.org/en/library/asset/AMR51/018/2009/en/122746c3-f76e-11dd-8fd7-f57af21896e1/amr510182009en.html>>

<sup>32</sup> Above n3, 46

<sup>33</sup> Amnesty International 'Binyam Mohamed released from Guantánamo' <<http://www.amnesty.org/en/news-and-updates/good-news/binyam-mohamed-released-guant-namo-20090224>>

<sup>34</sup> *Regina (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 W.L.R. 2579 Further facts are set out in the case

<sup>35</sup> Above n3, 24

armed guard for 23 days.<sup>36</sup> He claims he was interrogated in English about his links to Islamist extremists, links he fervently denied.<sup>37</sup> After this time, he was handed over to American officials who transported him, blindfolded and shackled, to an airport before beating him and dressing him in a jumpsuit.<sup>38</sup> At the airport, he alleges that he was drugged before being forced to board a plane bound for Afghanistan. The Council of Europe later determined that this was the same plane which had only days earlier transported Binyam Mohamed from Rabat to Kabul.<sup>39</sup>

Upon his arrival in Afghanistan, Mr el-Masri was allegedly kicked and beaten before being confined to a cell which would be his home for the next four months. Isotope analysis of his hair has confirmed the geographical location of his prison, and his lawyers have contended that he was being held in the 'Salt Pit', an abandoned brick factory in the North of Kabul.<sup>40</sup> While in detention in Kabul, Mr el-Masri says he was repeatedly interrogated about his links to the 9/11 conspirators Muhammed Atta and Ramzi Bin Al-Shibh, and he alleges that German officials actively participated in this questioning.<sup>41</sup> After four months of this detention, Mr el-Masri was transported from the Kabul prison and transferred to an "airport somewhere in the Balkans, probably Tirana, Albania."<sup>42</sup> He believes he was then driven for approximately six hours before being removed from the back of the car and instructed to walk without looking back.<sup>43</sup> It later emerged that Mr el-Masri's detention was the result of mistaken identity: the officials who had initially detained him believed him to be Khalid *al-Masri*, a member of the "Hamburg cell" and a conspirator in the 9/11

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<sup>36</sup> Amnesty International 'Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention' <<http://www.amnesty.org/en/library/asset/EUR01/023/2010/en/3a3fdac5-08da-4dfc-9f94-afa8b83c6848/eur010232010en.pdf>> 25

<sup>37</sup> Amnesty International 'Document – USA/Macedonia/Germany: the rendition of Khaled el-Masri' <<http://www.amnesty.org/en/library/asset/AMR51/133/2006/en/8d67075e-d404-11dd-8743-d305bea2b2c7/amr511332006en.html>>

<sup>38</sup> Above n3, 25

<sup>39</sup> Ibid, 16

<sup>40</sup> Ibid, 7

<sup>41</sup> Ibid, 24

<sup>42</sup> Ibid, 7

<sup>43</sup> Ibid

attacks.<sup>44</sup> The Council of Europe reports contend that it was known long before his release that Mr el-Masri was an innocent man.<sup>45</sup>

### C. Abu Omar

Abu Omar was an asylum seeker who had travelled from Egypt to Milan, Italy. In 2003, while walking to his local mosque, he was stopped by a plain clothes *carabiniere* (Italian military police officer) who asked to see his documentation. While searching for his identification, he was bundled into a white van by more plain clothes officers, some of whom were US officials.<sup>46</sup> The van transported him to Aviano airbase where Mr Omar was forced to board a Learjet which departed for Ramstein airbase in Germany, the headquarters of US Air Forces Europe,<sup>47</sup> before being transferred to Cairo, Egypt.<sup>48</sup> He was detained in Egypt for approximately seven months, first at the Egyptian military intelligence headquarters in Cairo and later at Torah prison.<sup>49</sup>

Mr Omar alleges that during his time in Cairo, he was subjected to brutal treatment including electrocution. If his claims are true his treatment almost certainly amounts to torture.<sup>50</sup> His description of his conditions of incarceration paint a graphic picture: his cell was underground and temperatures swung wildly from -5°C in winter to 50°C in summer. His cell was rat and cockroach infested and he was provided only one blanket on which to sleep.<sup>51</sup> Since his release, a criminal investigation has been launched in Italy which is

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<sup>44</sup> Ibid, 32

<sup>45</sup> Ibid, 24

<sup>46</sup> Messineo, F "'Extraordinary renditions" and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy' (2009) 7 J.I.C.J 1023, 1023-4

<sup>47</sup> Amnesty International 'Document - Europe: Partners in crime: Europe's role in US renditions' <<http://www.amnesty.org/en/library/asset/EUR01/008/2006/en/e70e45ed-d42a-11dd-8743-d305bea2b2c7/eur010082006en.html>>

<sup>48</sup> Ibid

<sup>49</sup> Above n46, 1024

<sup>50</sup> Ibid, 1028

<sup>51</sup> Amnesty International 'Document – Italy: the Abu Omar case' <<http://www.amnesty.org/en/library/asset/EUR30/012/2009/en/90188bdf-a31f-40b6-85e0-acaad4606277/eur300122009en.html>>



focussing on the involvement of both US and Italian agents in the abduction. Evidence that has surfaced includes a computer belonging to Robert Seldon Lady (who at the time was the highest ranking CIA agent in Milan) which contained pictures of Mr Omar, a map showing the best route to Aviano airbase and further damaging emails implicating up to 25 CIA operatives.<sup>52</sup>

#### D. The Gambia Case

Bisher al-Rawi and Jamil al-Banna are Iraqi and Jordanian nationals respectively and both had a legal right of residency in the UK. In November 2002, they intended to travel to Gambia in order to help Mr al-Rawi's brother set up a mobile peanut processing plant.<sup>53</sup> Upon their arrival in Banjul Airport on the 8<sup>th</sup> November, Mr al-Rawi and Mr al-Banna were arrested along with two other men by Gambian authorities.<sup>54</sup> As with other cases of extraordinary rendition, they were initially told that there was a problem with their visa applications, but subsequent questions focussed on alleged links to terrorist organisations, including specifically their supposed links with Abu Qatada.<sup>55</sup> Mr al-Banna and Mr al-Rawi were detained in Banjul for some two months where they continued to be questioned by US authorities.<sup>56</sup> Wahab al-Rawi, the brother of Bisher and one of the other two men detained at Banjul, suggested that the American agents constantly told the four men that it was the British who had ordered the arrest through MI5.<sup>57</sup>

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<sup>52</sup> Ibid

<sup>53</sup> Above n3, 39

<sup>54</sup> Ibid

<sup>55</sup> Amnesty International 'Document - Gambia: Incommunicado detention/Fear of ill-treatment/Health concern'

<<http://www.amnesty.org/en/library/asset/AFR27/006/2002/en/3049afd3-d76f-11dd-b024-21932cd2170d/afr270062002en.html>>; Above n2, 40

<sup>56</sup> Amnesty International 'Document - USA: Who are the Guantánamo detainees? Case sheet No.3: Detainees from the UK'

<<http://www.amnesty.org/en/library/asset/AMR51/072/2004/en/20917673-d5df-11dd-bb24-1fb85fe8fa05/amr510722004en.html>>

<sup>57</sup> Above n3, 40

Mr al-Rawi and Mr al-Banna were transported to Kabul in December 2002. During their two month incarceration at the 'dark prison' and Bagram air base the two men were allegedly subjected to degrading treatment, and their captors made threats against their families in London in an attempt to induce testimony against Abu Qatada.<sup>58</sup> The two men were then taken across the Atlantic to Guantanamo Bay where Mr al-Rawi says several MI5 agents participated in his interrogations.<sup>59</sup> Despite their status as legal UK residents, the UK government refused for some time to make representations to the US for the release of the two men, arguing that their obligation to do so only extended to UK nationals.<sup>60</sup> They remained in Guantánamo for several years until they were eventually released, without charge, back to the UK: al-Rawi in April 2007 and el-Banna in December 2007.<sup>61</sup>

## II

### The European Experience

#### *Cooperation in Intelligence Gathering*

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<sup>58</sup> Ibid, 40

<sup>59</sup> Ibid, 41

<sup>60</sup> Above n56

<sup>61</sup> Amnesty International 'Amnesty UK: Briefing to the Human Rights Committee'  
<<http://www.amnesty.org/en/library/asset/EUR45/011/2008/en/c4a03540-519a-11dd-ad62-d31ddb019522/eur450112008eng.html>>

In the hunt for intelligence in the post 9/11 world, cooperation between the intelligence services of nations such as the US and those in Europe has become of paramount importance. Lessons were learnt following the Madrid train bombings of March 2004: several of the suspects had been watched closely by the French in 2001, another two had been identified by the Moroccan police, and retrospective investigation has unearthed connections in Germany and Iceland.<sup>62</sup> Despite the many pieces of information, the lack of cooperation meant the puzzle was never put together. Intra-European collaboration has increased since then<sup>63</sup>, and it is of no surprise that 'transatlantic intelligence relations are now closer than ever'<sup>64</sup> in order to more effectively generate actionable intelligence.

Inter-service, transatlantic cooperation had existed in the rendition programme long before the events of September 2001 and the advent of extraordinary rendition. Using the UK as an example, in 1997 the Security Service and the Secret Intelligence Service were formally briefed on the US strategy of 'rendition to justice' with the understanding that the process involved capturing known terrorists and bringing them to the US in order to face trial.<sup>65</sup> UK assistance was offered on a case-by-case basis but would not proceed without approval from the Foreign Secretary.<sup>66</sup> Further, where appropriate, UK airspace and airports would be available to the US for transfers and in 1998, there were four requests for such clearances: two were granted while the other two were denied.<sup>67</sup>

Following the acceleration of the rendition programme, and its change in focus to intelligence gathering and detention, European States were able to assist in different ways, as well as receive different benefits from the process. Providing information which would

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<sup>62</sup> Aldrich, R 'Transatlantic intelligence and security cooperation' (2004) 80(4) *International Affairs*, 731, 732

<sup>63</sup> Aldrich, R 'US-European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion' (2009) 11(1) *The British Journal of Politics & International Relations*, 122, 126

<sup>64</sup> *Ibid*, 123

<sup>65</sup> Intelligence and Security Committee 'Rendition' <<http://isc.independent.gov.uk/committee-reports/special-reports>> (July 2007) 14

<sup>66</sup> *Ibid*, 15

<sup>67</sup> *Ibid*, 16

lead to the capture of terrorist suspects or even capturing the suspects themselves would allow EU members access to the CIA and its vast resources of intelligence generated through extraordinary rendition. Other European States, such as Poland and Romania, in return for substantial American support for their accession to NATO and the EU respectively, offered to assist in the detention of those captured.

While extraordinary rendition has allowed European States to assist in a multitude of ways, this paper will focus on the following four paradigmatic aspects of the process:

- Complicity in torture
- Allowing the CIA to operate secret detention facilities within European territorial boundaries
- Unlawful or Irregular transfers of terrorist suspects
- Allowing CIA planes to 'overfly' European airspace, and allowing stopovers for refuelling

It must be borne in mind throughout that the information provided in this Chapter is included for the purpose of contextualising the later analysis on the law related to the four areas considered. It demonstrates that there is a need to consider the *potential* application of the law to the issue of European assistance in extraordinary rendition. However, for the most part these are accusations, not proven facts.

### *Complicity in Torture*

One of the most consistent claims made against extraordinary rendition has been that it was primarily used to outsource torture. There have been few, if any, credible allegations that European nations were actively participating in the torture of detainees. However, under a number of international human rights and humanitarian treaties, it is unlawful to even be complicit in torture. A more detailed analysis of complicity will be provided in

Chapter IV; for now complicity shall be considered to refer to situations when (a) one State asks another to carry out an unlawful action; (b) where a State knowingly takes advantage of an unlawful situation or (c) where a State has actively participated in an unlawful action.<sup>68</sup>

There are several ways in which European states could be considered to have been complicit in torture. First of which is the provision of information which leads to the capture and detention of an individual or is relied upon during interrogation, which would fall under the third conception of complicity mentioned above. Citing the UK as an example, Amnesty International suggests that there is reliable evidence that government officials passed information which led to the arrest and detention of individuals in situations where it was known, or where it ought to have been known, that these individuals were at risk of torture or ill-treatment.<sup>69</sup> There are two distinct instances where an accusation such as this could be applied. In the case of Binyam Mohammed there are allegations that during his interrogation in Morocco, he was asked questions about his life which contained such specific details that the information must have come from the British Security Service.<sup>70</sup> These allegations have been confirmed to a certain extent: in its 2007 report on Rendition the Intelligence and Security Committee concluded that '[t]here is a reasonable probability that intelligence passed to the Americans was used in [Binyam

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<sup>68</sup> UN Human Rights Council 'Joint study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin' (February 2010) <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/a-hrc-13-42.pdf>> 82-4

<sup>69</sup> Amnesty International 'Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention' <<http://www.amnesty.org/en/library/asset/EUR01/023/2010/en/3a3fdac5-08da-4dfc-9f94-afa8b83c6848/eur010232010en.pdf>> p34 and p35; Amnesty International 'United Kingdom: Time for an enquiry into the UK's role in human rights violations overseas since 11 September 2001' <<http://www.amnesty.org/en/library/asset/EUR45/001/2010/en/6b65c47e-c1a1-42e6-b382-eae6a948b42a/eur450012010en.pdf>> 3

<sup>70</sup> See previous discussion in Chapter 1

Mohammed's] subsequent interrogation'<sup>71</sup> while the European Parliament Temporary Committee on Illegal Detention (TCID) found that questions put to Mr Mohammed during his detention in Morocco 'appear to have been inspired by information supplied by the UK.'<sup>72</sup> Given the treatment suffered by Mr Mohamed, and the way in which information regarding his personal life could have been used, it is possible to allege that the UK had been complicit in his ordeal.

The Gambia case exemplifies an instance whereby information passed between intelligence services leads to the capture and detention of suspected terrorists. The two men in question were the subject of a series of telegrams from the UK Security Service to US authorities which painted them in a bad light. Jamil el-Banna was described as being 'a Jordanian Palestinian veteran of the Afghan-Soviet war... [He] is in close contact with members of [two North African terrorist groups]' while Bisher al-Rawi was depicted as 'an Iraqi Islamist extremist... He has previously come to our attention for his financial activities...'<sup>73</sup> Information has come to light which suggests that the two men only maintained the confidence of those they were accused of being in cahoots with because they had been ordered to do so by MI5 in order to collect information.<sup>74</sup> While it has been argued by the UK Security Service that the telegrams were supplied with the caveat of the recipients taking no action on the information provided, the TCID had no problem in asserting that 'the abduction of Bisher Al-Rawi and Jamil El-Banna was facilitated by partly erroneous information supplied by the UK security service.' The question then becomes to what extent were UK officials aware of the potential misuse of the information they

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<sup>71</sup> International Commission of Jurists 'Assessing Damage, Urging Action' (Geneva, 2009) <<http://ejp.icj.org/IMG/EJP-Report.pdf>>6, 34

<sup>72</sup> Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, Giovanni Claudio Fava, 'Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (2006/2200(INI)) <[http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf)> 15

<sup>73</sup> Above n71, 37

<sup>74</sup> Danchev, A 'Accomplicity: Britain, Torture and Terror' (2006) 8(4) The British Journal of Politics and International Relations 587, 591

provided? If they suspected that the information would indeed have been acted upon, there is again the possibility that the UK was complicit in the treatment of the two men.

There is also the possibility that European states have provided questions to be asked by foreign interrogators during torture sessions, or indeed have put questions to the detainees directly. Germany has been implicated in two such scenarios: the cases of Khaled el-Masri and Muhammad Zammar. With regards to el-Masri, Amnesty International has reported the allegation that a uniformed German-speaker, who identified himself only as 'Sam', interrogated him during his detention. Following his release, Mr el-Masri picked 'Sam' out of a police line-up: the man he selected was Gerhard Lehmann of the German Federal Criminal Police.<sup>75</sup> If this accusation is true, there is certainly a case for Germany having been complicit in the treatment of Mr el-Masri. With regards to the second case, both the UN Joint Study on Secret Detention as well as the TCID raised the issue of German involvement in the treatment of Muhammad Zammar.<sup>76</sup> The Joint Study report suggests that on 20<sup>th</sup> November 2006, German security agents interrogated Mr Zammar while he was held in secret detention in Syria.<sup>77</sup> The TCID suggests that the interrogation was allowed to proceed after charges were dropped against several Syrian citizens being held in Germany.<sup>78</sup> Amnesty International has also suggested that the UK has been involved in questioning those detained under the extraordinary rendition programme.<sup>79</sup> Martin Mubanga, a dual British-Zambian citizen, was captured in Zambia before being transported

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<sup>75</sup> Amnesty International 'Document – USA/Macedonia/Germany: The rendition of Khaled el-Masri' <<http://www.amnesty.org/en/library/asset/AMR51/133/2006/en/8d67075e-d404-11dd-8743-d305bea2b2c7/amr511332006en.html>>

<sup>76</sup> Muhammad Zammar was captured in Morocco in 2001, before being transferred to Syria by the CIA: UN Joint Study, Weissbrodt, D and Bergquist, A 'Extraordinary Rendition and the Torture Convention' (2005-2006) 46 Va. J. Int'l L. 586, 74

<sup>77</sup> Above n71, 82

<sup>78</sup> Sadat, L.N. 'Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law' (2005-2006) 37 Case W. Res. J. Int'l L. 3093, 16-17

<sup>79</sup> Ibid, 3

to Guantanamo Bay in 2002.<sup>80</sup> The TCID refers to this case specifically, and unequivocally suggests that UK agents interrogated him during his detention.<sup>81</sup> If this is indeed the case, once again a case for complicity in torture could be made out against the UK.

### Secret Detention

The CIA has used a system of prisons throughout the world known as 'black sites' within which they detain those captured through extraordinary rendition.<sup>82</sup> Many are located in the Middle East in countries such as Syria, Afghanistan and Iraq. However, evidence has emerged which suggests that as many as three European states have provided sites for secret detention. Poland, Romania and Lithuania have been accused by numerous sources of running detention centres where prisoners are held and questioned by CIA operatives.

#### A. Poland

The alleged detention facility in Poland is located at Stare Kiejkuty, an intelligence training base not far from the airport at Szymany.<sup>83</sup> These allegations are based on the testimony of a Szymany Airport employee who claims to have seen a medical emergency vehicle attend a CIA registered plane, thought to be transferring prisoners, before leaving the airport in the direction of Stare Kiejkuty.<sup>84</sup>

Several of the extraordinary rendition detainees, including Abu Zubaydah, Khaled Sheikh Mohamed and Adb al-Rahim al-Nashiri are thought to have been held in Poland at various

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<sup>80</sup> After his capture by Zambian officials, Mubanga alleges that he was handed over to the US, and interrogated by both UK and US officials. After being held in Zambia, he was transferred to Guantanamo. He was ultimately released following negotiations between US and UK diplomats: Above n65; Above n71, 31

<sup>81</sup> Above n78, 15

<sup>82</sup> Amnesty International "'Rendition" and secret detention: A global system of human rights violations. Questions and Answers' <<http://www.amnesty.org/en/library/asset/POL30/003/2006/en/d3c8c373-d468-11dd-8743-d305bea2b2c7/pol300032006en.html>>

<sup>83</sup> Above n78, 27

<sup>84</sup> Ibid, 27



times.<sup>85</sup> Khaled Sheikh Mohamed has asserted that he was definitely held in Poland, and cites the provision of a water bottle with a Polish label as proof of his incarceration in the country.<sup>86</sup>

Evidence of Poland's involvement has been examined in a number of publications. The Temporary Committee on Illegal Detention has investigated the personal testimony of employees at Szymany Airport. This has included references to six civilian registered Gulfstream jets landing at the airport between 2002 and 2003 which the employees were instructed not to approach; the fact that excessive landing fees were paid in advance; and that a number of military vehicles awaited the arrival of these jets.<sup>87</sup> However the TCID felt that on this evidence alone, it was unable to say definitively whether or not a secret detention facility existed in Poland. However, the Parliamentary Assembly of the Council of Europe headed by Senator Dick Marty believes that it has been factually established that Poland had hosted a secret detention facility.<sup>88</sup> Sources for PACE suggested that in 2003 several high value detainees were being transported out of Kabul, Afghanistan which coincides with reports that a number of CIA registered planes arrived at Szymany from Kabul.<sup>89</sup> Senator Marty believes that these flights bore all the hallmarks of a rendition flight, and can be considered to have taken place with the purpose of transferring detainees to a different detention facility.<sup>90</sup> Amnesty International has also highlighted that on a number

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<sup>85</sup> Ibid, 28-9

<sup>86</sup> International Committee of the Red Cross, Regional Delegation for United States and Canada 'ICRC Report on the treatment of fourteen "High Value Detainees" in CIA custody' (Feb 2007) <<http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>> 35

<sup>87</sup> Ibid, 27

<sup>88</sup> Committee on Legal Affairs and Human Rights 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report' (11 June 2007) <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>> 2

<sup>89</sup> Committee on Legal Affairs and Human Rights 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states' (7 June 2006) <[http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf)> 17

<sup>90</sup> Above n88, 36

of occasions, flights into Szymany arrived with passengers on board, but departed with only the crew.<sup>91</sup>

### B. Romania

The alleged detention facility in Romania is situated near the capital, Bucharest, at a facility codenamed 'Britelite'.<sup>92</sup> It has been suggested that this black site was established following the offer of formidable US support for Romania's accession to NATO.<sup>93</sup> CIA sources suggest that it was based in a renovated building, on a busy Bucharest street.<sup>94</sup> During its existence, it is believed that Khaled Sheikh Mohamed was held at this facility having been transferred from the detention centre in Poland.<sup>95</sup>

PACE highlights a landing at Timisoara Airport, Romania of the N313P rendition plane in January of 2004. The flight had arrived from Kabul and remained on the ground for only 72 minutes before leaving for Palma de Mallorca. The PACE report points out that there would have been no prisoners aboard the plane when it arrived in Palma de Mallorca as this location is a 'staging point' used for recuperation for the rendition teams, and documentation proves that the crew and passengers of this flight stayed at a hotel on the island for two nights. In addition to this fact it must be considered that the plane, a Boeing 737, had the capacity to fly non-stop from Kabul to Palma de Mallorca, potentially negating the possibility that the stop in Romania was for refuelling.<sup>96</sup> Given this evidence, it is possible that the reason for the landing in Romania was in order to facilitate a detainee drop-off. The UN Joint Study into Secret Detention also looked into Romania's involvement in the detention of prisoners, considering the arrival of a rendition plane into the country in September 2003: the plane was following a well known rendition circuit involving stops in

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<sup>91</sup> Above n78, 26-7

<sup>92</sup> Ibid 31

<sup>93</sup> Above n88, 44

<sup>94</sup> Above n71, 50

<sup>95</sup> Above n78, 31

<sup>96</sup> Above n89, 16-17

Afghanistan, Morocco and Poland but the report could not conclude whether or not any detainees were left to be detained in Romania.<sup>97</sup> The TCID suggested that it cannot be definitively stated that a secret detention facility existed in Romania, but also points out that there has been no conclusive evidence to rebut the allegations.<sup>98</sup>

### C. Lithuania

Claims of a secret detention facility in Lithuania have centred on a horseback riding facility near Vilnius: an interior concrete structure was assembled – a ‘building within a building’ – with space enough to house eight detainees.<sup>99</sup> The Lithuanian parliament initiated an inquiry into the accusations with three substantial questions to answer:

1. Were CIA detainees subject to transportation and confinement on the territory of the Republic of Lithuania? 2. Did secret CIA detention centres operate on the territory of the Republic of Lithuania? 3. Did state institutions of the Republic of Lithuania (politicians, officers, civil servants) consider the issues relating to the activities of the CIA with respect to the operation of detention centres on the territory of the Republic of Lithuania, and the transportation and confinement of detainees on the territory of the Republic of Lithuania?<sup>100</sup>

The UN Joint Study was provided with the draft findings of the inquiry. The Seimas Committee felt that the facility near Vilnius was indeed equipped to hold detainees but once again it could not be definitively proven that any detainees were held there.<sup>101</sup>

None of these states has entertained the possibility that extraordinary rendition detainees could have been held within their territory. Indeed, with the exception of Lithuania, none

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<sup>97</sup> Above n71, 53

<sup>98</sup> Above n78, 25

<sup>99</sup> Ibid, 22

<sup>100</sup> Ibid, 21-2

<sup>101</sup> Above n71, 55

of them has countenanced the possibility that there was even a facility where detainees could have been held.

### *Unlawful or Irregular Transfer*

The practice of extraordinary rendition naturally involves the transfer of a person from the country in which they are captured to another country for detention. The Venice Commission<sup>102</sup> has identified the four instances where a transfer takes place lawfully: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country.<sup>103</sup> Deportation refers to the expulsion of an alien, which is governed by Article 1, Protocol 7 to the ECHR.<sup>104</sup> Extradition and Transit are governed by both interstate agreements, national law and also the European Convention on Extradition 1957.<sup>105</sup> Transfer may be governed by the Convention on the Transfer of Sentenced Persons 1983.<sup>106</sup> The Commission goes on to consider instances where a transfer may be unlawful, identifying two specific instances: where a person is transferred from one state to another without his or her consent in a procedure not set out in law

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<sup>102</sup> The European Commission for Democracy Through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. For further information see: <[http://www.venice.coe.int/site/main/Presentation\\_E.asp](http://www.venice.coe.int/site/main/Presentation_E.asp)>

<sup>103</sup> European Commission for Democracy Through Law (Venice Commission) 'On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners' (Venice, March 2006) <[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf)> para 10

<sup>104</sup> Article 1, Protocol 7 to the ECHR (Procedural safeguards relating to expulsion of aliens) provides: "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a to submit reasons against his expulsion, b to have his case reviewed, and c. to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

<sup>105</sup> Article 1 of this Convention obliges Contracting Parties to surrender 'persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order'. Article 21 covers transit and requires that requests for transit are made in writing, or through other channels as agreed by the parties.

<sup>106</sup> This Convention requires Parties to 'afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention' (Article 2(1))

(domestic or international)<sup>107</sup> and also where state officials from one state participate in a transfer of an individual in a process not set out in law, or contrary to domestic law (such as arresting and handing over a prisoner, or participating in a kidnap).<sup>108</sup>

States which have allegedly assisted in deporting individuals from their territory include Macedonia and Italy. The extraordinary rendition of Khaled el-Masri from Macedonia was carried out with the assistance of the Macedonian security service, the UBK. The PACE report makes reference to evidence which suggests that the UBK was to assist in 'securing and detaining Mr El-Masri until he would be handed over to the CIA for transfer.'<sup>109</sup> This transfer clearly falls within the second type of irregular transfer described by the Venice Commission. Italy's alleged involvement in the rendition of Abu Omar could also be considered sufficient to constitute an unlawful transfer. While walking through Milan one morning, he was captured by plain clothed officers before being bundled into the back of a white van and transported to Aviano Airbase and handed over to the CIA before ultimately finding himself incarcerated in Egypt. Abu Omar has accused the Italian military security and intelligence services (SISMI) as well as the *carabinieri* of being involved in his original capture on the streets of Milan. The TCID report accepts this accusation and condemns the involvement of SISMI in the abduction.<sup>110</sup>

Sweden too could be considered to have carried out an unlawful transfer of Ahmed Agiza when he was deported to Egypt in 2001. Despite the deportation being ordered in a manner consistent with national law, the fact that the Human Rights Committee found it to violate the Convention against Torture suggests that the deportation itself was not consistent with a procedure set out in law. Further, the Swedish authorities handed Agiza

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<sup>107</sup> Above n103 para 24

<sup>108</sup> Ibid para 28

<sup>109</sup> Above n89, 29

<sup>110</sup> Above n78, 13

over to the US who executed the transfer<sup>111</sup>: this again seems to exemplify the second of the Venice Commissions paradigms of an unlawful transfer.

### Overflights

A large number of states have been accused of allowing planes suspected of being involved in extraordinary renditions to use their airspace, or even to land in their airports in order to refuel and allow the crew to recuperate. The TCID reports that at least 1245 flights of planes with links to the extraordinary rendition programme have used European airspace.<sup>112</sup> The most common include those with the tail numbers N313P (the 'Guantanamo Express') and N379P.<sup>113</sup> Of course not all of those flights will have been carried out with prisoners on board. It is for this reason that Senator Dick Marty is quick to play down exaggerated claims of thousands of rendition flights through Europe for fear of losing credibility; however if even one of these allegations is proven to be true, that may be sufficient to find a number of states responsible for breaches of their international obligations.<sup>114</sup>

Almost all European states have been implicated in one way or another for allowing aircraft known to carry out extraordinary rendition operations to enter national airspace or land in airports within their territory. With regards to landing at European airports, the PACE reports suggest that there are four distinctive categories of airports: *stopover points* (for refuelling) including Prestwick, Shannon, Roma Ciampino and Athens Airports; *staging points* (where operations are launched from) including Frankfurt, Ramstein and Palma de Majorca; *one-off pick up points* (where on one occasion, a detainee was picked up) including Stockholm-Bromma, Skopje and Aviano; and finally *detainee drop off points* (near

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<sup>111</sup> Joseph, S 'Rendering terrorists and the Convention Against Torture' (2005) 5 HRLR 339, 340

<sup>112</sup> Above n78, 11

<sup>113</sup> Above n74, 593

<sup>114</sup> Above n89, 15

detention facilities) including Bucharest and Szymany.<sup>115</sup> If these allegations are correct, that could implicate Ireland, the UK, Italy, Spain, Germany, Sweden, Macedonia, Romania and Poland in being complicit in the extraordinary rendition programme.

The TCID believes it to be factually established that a number of extraordinary renditions took place using a variety of European countries throughout the process and believes that in some of the cases the detainee was aboard a plane while it was grounded in a European state: Ahmed Agiza and Sweden (from Stockholm Bromma to Cairo on 18 December 2001 (departure: 20.48, arrival: 1.30 on 19 December) aboard the plane registered N379P); Maher Arar and Italy (from Bangor, Maine (USA) to Roma Ciampino (Italy) on 8 October 2002 (departure 13h45, arrival 20h22); from Roma Ciampino to Amman on 8 October 2002 (departure: 20h59, arrival: 23h54) aboard the plane registered N829MG); Abu Omar through Germany and Ireland (flight from Ramstein to Cairo on 17 February 2003 (departure: 18h52, arrival: 22h32); from Cairo to Shannon on 18 February 2003 (departure 00h22, arrival: 05h42); and from Shannon to Washington on 18 February 2003 (departure: 14h52, arrival: 21h43) aboard the plane registered N85VM); and Khaled el-Masri through Macedonia (from Skopje to Baghdad on 24 January 2004 (departure: 01h30, arrival: 05h53) aboard the plane registered N313P).<sup>116</sup> The TCID report also highlights a number of other flights of rendition planes through European airspace without any detainees aboard.<sup>117</sup> The Joint Committee on Human Rights report suggests that there is a reasonable suspicion that UK airspace was used to transport a detainee to a country where they were likely to face torture.<sup>118</sup> The Intelligence and Security Committee suggests that while up to 400 CIA

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<sup>115</sup> Ibid, 13

<sup>116</sup> Above n72, 9, 16-17, 20-21 & 22-3 respectively

<sup>117</sup> Ibid, 9-23

<sup>118</sup> Joint Committee on Human Rights, 'The UN Convention Against Torture (UNCAT)' Nineteenth Report of Session, Volume I – Report and formal minutes (HL Paper 185-I HC 701-I) (26 May 2006) London: The Stationery Office Limited  
<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>> 55

flights may have used UK *airspace*, there are only four where the plane subsequently used a UK *airport* and on each occasion, there was no detainee aboard.<sup>119</sup>

Information regarding the use of European airspace and airports has been gathered and released in a number of reports. In terms of discerning the flight plans of aircraft associated with CIA front companies linked to extraordinary rendition, the data has primarily been sourced by cross referencing Eurocontrol and Federal Aviation Authority (FAA) flight records<sup>120</sup>, and also from the Polish Air Navigation Services Agency (PANSAs). Senator Dick Marty and the Committee on Legal Affairs and Human Rights, and the TCID focussed on the data available from Eurocontrol. The flight logs produced by Eurocontrol can be grouped into two distinct categories: *Central Flow Management Unit (CFMU)* data which comprises initial flight plans submitted by air operators before a flight takes place and *Central Route Charges Office (CRCO)* data which provides information on flights which have taken place.<sup>121</sup> Through the analysis of this information, Senator Marty and his team feel they have been able to corroborate ten claims of extraordinary rendition involving European airspace or airports.<sup>122</sup>

The second source, PANSAs, has been utilised by the Helsinki Foundation for Human Rights (HFHR) and the Open Society Justice Initiative (OSJI). The two organisations made an application under the Polish statute on Access to Public Information which resulted in the release of 19 pages of raw flight data.<sup>123</sup> As the HFHR and OSJI rightly point out, this release

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<sup>119</sup> Above n71, 57-8

<sup>120</sup> Eurocontrol controls European airspace, while the FAA monitors flights into and out of the USA: Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, Giovanni Claudio Fava 'Working Document N° 8 on the companies linked to the CIA, aircraft used by the CIA and the European countries in which CIA aircraft have made stopovers' (2006) <<http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf>> p6

<sup>121</sup> Above n82, 6

<sup>122</sup> Above n89, 15

<sup>123</sup> The raw flight data is available at <<http://www.soros.org/initiatives/justice/focus/foi/news/poland-rendition-20100222/disclosure-20100222.pdf>>; Above n78, 27



is significant as the information came directly from a Polish state authority and represents the first time that there has been public confirmation that CIA registered planes linked to extraordinary rendition have landed in Poland.<sup>124</sup> Specifically, the data demonstrates that the known rendition aircraft with the tail numbers N379P and N313P made six flights into Szymany Airport: five came in from Kabul with the sixth arriving from Rabat.<sup>125</sup> More concerning is the revelation that for at least four of these flights, PANSAs brought the plane into Szymany despite not having a valid flight plan for that airport.<sup>126</sup> While this evidence is only circumstantial, when considered alongside accusations that Poland hosted a secret detention facility, it obtains greater credibility.

Given the evidence gathered surrounding the use of European airspace it is difficult to suggest that they were completely in the dark about the practice of overflights. As this is the case, questions must be asked as to why no CIA registered flight was ordered to land so as to allow a search to take place. This in itself may be sufficient to engage the responsibility of European states.

### Conclusion

Clearly it is not in the interest of States to admit to the international community that they have been involved in the practice of extraordinary rendition. To do so would be to open themselves up to international condemnation and engage their responsibility under numerous treaties and conventions. It is therefore of no surprise that the allegations against various States have been met with either flat out denial (for example Poland or Romania) or the acceptance of the most minor aspects of the accusations (the UK and Lithuania). Despite this, the evidence against a number of European States cannot simply

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<sup>124</sup> Open Society Justice Initiative and Helsinki Foundation for Human Rights 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency' <<http://www.statewatch.org/news/2010/feb/poland-cia-flight-records-explanantion.pdf>> 1

<sup>125</sup> Ibid, 2

<sup>126</sup> Ibid, 3

be brushed aside: circumstantial or not, the testimony and corroborative investigations against several States is substantial.

The regimes governing the potential abuses are varied, ranging from the regional European Convention on Human Rights, to international documents such as the International Covenant on Civil and Political Rights and the UN Convention against Torture. Once again it must be noted that the information in this Chapter is included for illustrative purposes, and should not be taken as concrete evidence for European involvement in extraordinary rendition. My attention will next turn to the consideration of the regimes which are in play when the paradigm case of extraordinary rendition has been alleged, by first introducing the documents in question and subsequently considering the potential breaches of the international obligations which arise.

### III

## The Legal Regime

There are a number of treaties which come into play when considering the legal obligations of European states. Of course within the scope of this discussion perhaps the most important of these, given its geographical application, is the European Convention on Human Rights. Other relevant, more international documents to be considered include the United Nations Convention against Torture and the International Convention on Civil and Political Rights. Each of these instruments contains specific provisions dealing with torture, detention and the right to be heard before a competent legal tribunal. Further, given the nature of the war on terror, brief consideration will also be given to the Geneva Conventions and international humanitarian law. Beyond specific treaties, an analysis of Customary International Law and the *jus cogens* peremptory norms encapsulated by this must be made.

#### *The Continued Applicability of International Human Rights Law*

Most proponents of extraordinary rendition point out the *sui generis* nature of the conflict as a means of justifying the departure from the accepted norms of human rights treaties and international humanitarian law. The claim relies on the idea that terrorism and terrorists represent an exceptional and unique threat which the current body of international law was not designed to deal with. Advocates for this position have been at pains to justify this argument and in doing so have constructed what many call a 'legal vacuum'. This is a troubling new approach to the dealing with the issue of international terrorism. The use of legal subterfuge which is neither plausible nor persuasive represents a 'sortie against the laws of war themselves'.<sup>127</sup> Satterthwaite (while discussing transfers during the war on terror specifically) provides a general overview of the legal vacuum in the following terms

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<sup>127</sup> Sadat, LN 'Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror' (2006) 75 Geo. Wash. L. Rev. 1200, 1209

...since the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al Qaeda members, however, are unprivileged combatants and thus unprotected by rules found in the Geneva Conventions concerning the transfer of prisoners of war or other protected persons. Finally, the argument concludes, the rules of human rights law do not apply either, since humanitarian law operates as *lex specialis* to oust such rules from application.<sup>128</sup>

There are three elements to this analysis: (1) that international humanitarian law (IHL) is the applicable legal regime to the war on terror; (2) that al-Qaeda operatives do not enjoy the protection of IHL; and (3) that IHL was the *lex specialis* and therefore precluded the application of any other body of international law, including international human rights. The applicability of IHL to the war on terror generally, as well as specifically to al-Qaeda operatives, is dealt with in more detail later in this Chapter. Focus now is on whether international human rights law applies to the War on Terror.

The US's position is that IHL and the existence of an armed conflict precludes the application of international human rights law. However, this position is inherently misguided, and represents a misinterpretation of the *lex specialis* rule. Indeed, as Christopher Greenwood states, '[t]he fact that the events of September 11 may demonstrate a need to re-examine some of the assumptions on which the international legal system rests does not mean that those events occurred in a legal vacuum.'<sup>129</sup> To suggest that international human rights law operates solely in times of peace is demonstrably incorrect. Numerous authors have argued that human rights law continues to apply: de Londras states that '[r]egardless of whether a belligerent state accepts or denies that international humanitarian law applies, refuses to implement it or refuses to effectively implement it, international human rights law remains applicable and binding on

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<sup>128</sup> Satterthwaite, M 'De-Torturing the Logic: The Contribution of Cat General Comment 2 to the Debate over Extraordinary Rendition' (2008) 11 New York City Law Review 281, 289-90

<sup>129</sup> Greenwood, C 'International law and the 'war against terrorism'' (2002) 78 International Affairs 301, 301

the nation state' before going on to say that '[t]he United States' claim that the application of international humanitarian law precludes the application of international human rights law is uncontrovertibly incorrect.<sup>130</sup> Borelli has stated that 'the existence of a state of armed conflict does not justify the suspension of fundamental human rights guarantees.'<sup>131</sup> This position can be inferred from the pronouncements of international oversight bodies. Firstly, the Committee against Torture has responded specifically to the US's position that the Convention against Torture was suspended by the War on Terror, asserting that the "Convention applies at all times, whether in peace, war or armed conflict, in any territory under [States Party's] jurisdiction."<sup>132</sup> Secondly, the International Court of Justice unequivocally stated in the *Nuclear Weapons Advisory Opinion*<sup>133</sup> and again in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*<sup>134</sup> that international human rights treaties apply in times of war. In the second of the two cases, the ICJ opined that

"The protection offered by human rights conventions does not cease in case of armed conflict... As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."<sup>135</sup>

It is therefore clear that the US has misinterpreted the *lex specialis* rule: this rule does not completely remove the application of international human rights law, rather it delimits the

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<sup>130</sup> de Londras, F 'The right to challenge the lawfulness of detention: an international perspective on US detention of suspected terrorists' (2007) 12 J Conflict Security Law 223, 236

<sup>131</sup> Borelli, S 'Casting light on the legal black hole: International law and detentions abroad in the "war on terror"' (2005) 87 IRRC 39, 53

<sup>132</sup> Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, May 18, 2006, CAT/C/USA/CO/2 (Advance Unedited Version) at para. 14.

<sup>133</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226

<sup>134</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136

<sup>135</sup> *Ibid* para 106

extent to which it may apply, and the way in which it must be interpreted. The rule seeks to overcome *conflicts* between norms where international humanitarian law takes precedence. Satterthwaite gives the example of a soldier killing another combatant: '[it] looks like a human rights violation (the deprivation of life without due process) until the international humanitarian law rule is applied (privileged combatants may kill other combatants, or civilians taking a direct role in hostilities).'<sup>136</sup> Many of the alleged human rights violations in the war on terror have corresponding prohibitions in IHL, and it can be argued that harmonisation between the two regimes is the preferred approach where such a position arises.<sup>137</sup>

### *The European Convention on Human Rights*

Drafted in 1950, and entering into force in 1953, the European Convention on Human Rights (ECHR) is the preeminent human rights instrument in Europe. It is a requirement of accession to the Council of Europe that all members also become signatories to the ECHR, and therefore fall under the jurisdiction of the European Court of Human Rights (ECtHR).<sup>138</sup> The ECtHR is able to hear cases which refer to 'the interpretation and application of the Convention and the protocols thereto'<sup>139</sup> which includes interstate applications and individual petitions.<sup>140</sup> In order to petition the Court, the applicant must have exhausted all domestic remedies and must make the application within six months of the final decision of the member state provided it is not manifestly ill-founded or an abuse of the process.<sup>141</sup>

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<sup>136</sup> Satterthwaite, M 'Human Rights and Humanitarian Law in the 'War on Terror': The Story of El Masri v. Tenet', in Ford, D, Hurwitz, D and Satterthwaite, M (eds), *Human Rights Advocacy Stories* (Foundation Press, 2009), 562

<sup>137</sup> Chesney, R 'Leaving Guantánamo: The Law of International Detainee Transfers' 40 U. Rich. L. Rev. 657, 703

<sup>138</sup> Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe <<http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1031.HTM>> para 9

<sup>139</sup> Article 32 ECHR The Jurisdiction of the Court

<sup>140</sup> Articles 33 and 34 ECHR respectively

<sup>141</sup> Article 35 ECHR Admissibility Criteria

The ECHR is an extensive document, covering a variety of human rights, many of which may be infringed by the process of extraordinary rendition. However for the present discussion, the focus will be on Articles 3 (the prohibition of torture) and 5 (the right to liberty and security) as well as a brief consideration of Article 6 (the right to a fair trial).

### A. Article 3

Torture is entirely prohibited under the ECHR. Article 3 articulates this prohibition as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.<sup>142</sup>

This Article is expressed in absolute terms and is one of only two Articles of the ECHR (alongside the Article 2 right to life) for which the Convention allows for absolutely no exceptions or derogations whatsoever.<sup>143</sup> The European Court of Human Rights (ECtHR) has heard a number of cases regarding Article 3, and has not refrained from expressing the importance of this Article. Indeed, it has regularly reiterated that Article 3 'enshrines one of the fundamental values of democratic society'<sup>144</sup> and that it 'makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency.'<sup>145</sup> Specifically referring to terrorism, the Court in *Chahal* said that it was 'aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence' yet went on to state that Article 3 may still not be derogated from in these circumstances.<sup>146</sup> The Court is also cognisant of the various other

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<sup>142</sup> Article 3 ECHR

<sup>143</sup> Cooper, J 'Article 3 and the road to ultra-violence' (2007) 13 UCL Juris. Rev. 61, 61

<sup>144</sup> *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, 585 para 62

<sup>145</sup> *Soering v UK* (1989) 11 E.H.R.R. 439, 467 para 88

<sup>146</sup> *Chahal v UK* (1997) 23 E.H.R.R. 413, 566-457, para 79

international obligations of European States, and it is extremely unlikely that Article 3 will ever be interpreted in a narrow way.<sup>147</sup>

Article 3 prohibits three different types of ill-treatment: torture, inhuman treatment or punishment, and degrading treatment or punishment. These are often considered to be hierarchical in nature (or a 'ladder principle'), with torture as the worst type of treatment, and degrading treatment or punishment worthy of the least censure.<sup>148</sup> It was said by the ECtHR in *Aksoy* that this was deliberate construction, in order to allow a special stigma to attach to any finding of torture.<sup>149</sup> There is a threshold requirement, or a minimum level of severity, which must be attained before treatment may even be considered to fall within the protection of Article 3.<sup>150</sup> In *Ireland* the ECtHR suggested that considerations such as 'the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and health of the victim' will play a factor in determining whether Article 3 has been engaged.<sup>151</sup> Where someone has been subjected to the deliberate infliction of physical or mental pain, this is likely to amount to at least degrading treatment, unless it was especially trivial.<sup>152</sup> The Court in *Selmouni* utilised the UNCAT definition in reaching its decision: having found that the actions of the police, in the course of their duties, occasioned pain and suffering, the Court turned to the ladder approach to see to what extent the actions engaged Article 3.<sup>153</sup> This approach has been followed in subsequent cases such as *Ilhan v Turkey* and *Salman v Turkey*.<sup>154</sup>

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<sup>147</sup> Lester, A and Beattie, K, 'Risking Torture' (2005) 6 EHRLR 565, 566; Above n172 para 88

<sup>148</sup> Above n143, 62

<sup>149</sup> Above n144, 585 para 63

<sup>150</sup> Joint Committee on Human Rights 'The UN Convention Against Torture (UNCAT)' Nineteenth Report of Session 2005–06 Volume I – Report and formal minutes HL Paper 185-I HC 701-I Published on 26 May 2006 by authority of the House of Lords and the House of Commons London: The Stationery Office Limited  
<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>> 9

<sup>151</sup> *Ireland v UK* (1979-80) 2 E.H.R.R. 25, 79 para 162

<sup>152</sup> Evans, M.D. 'Getting to grips with torture' (2002) 51 I.C.L.Q. 365, 371

<sup>153</sup> *Selmouni v France*(2000) 29 E.H.R.R. 403, 441 para 97 and 442 para 100

<sup>154</sup> Above n152, 377



There are some suggestions that the ECtHR does not fully subscribe to the ladder principle approach to Article 3. In *Raninen v Finland* it was said by the Commission that consideration must be given to 'whether or not the treatment in question denotes contempt or lack of respect for the personality of the person subjected to it and whether it was designed to humiliate or debase him instead of, or in addition to, achieving other aims' which the court considered in its judgment.<sup>155</sup> This approach, as Evans points out, is far more subjective than merely questioning the severity of the suffering for the victim.<sup>156</sup> It is suggestive of a more expansive approach to the determination of whether an applicant has been tortured, especially when considering the fact that what the Court considers to constitute torture will change over time.

As previously mentioned, the ECtHR has considered a number of cases which required analysis of Article 3 and it is important to examine how the Court has interpreted the facts in those cases. A sensible starting point would be *Ireland v UK*. The case concerned the use of the so called 'Five Techniques' which the UK security services and the police employed against suspected terrorists in Northern Ireland. The techniques consisted of wall standing, hooding, subjection to noise, sleep deprivation and food deprivation.<sup>157</sup> The Commission considered that these techniques amounted to torture, but when the case reached the ECtHR it was found that they amounted only to inhuman treatment or punishment:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.<sup>158</sup>

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<sup>155</sup> *Raninen v Finland* (1998) 26 E.H.R.R. 563, 587 para 54

<sup>156</sup> Above n152, 371

<sup>157</sup> Above n151, 59 para 96 (where a more detailed account of the five techniques is provided)

<sup>158</sup> *Ibid*, 80 para 167

The Court felt that while the treatment aroused in the victims feelings of fear, anguish and inferiority so as to amount to degrading treatment, as well as causing if not actual bodily injury at least intense physical and mental suffering amounting to inhuman treatment, the severity of the suffering could not be said to have risen to the level of torture.<sup>159</sup>

A case in which torture was said to have taken place is *Aksoy*. The applicant complained of a variety of mistreatments including having been kept blindfolded during interrogation, to having been suspended from his arms (which were tied together behind his back in a manner known as 'Palestinian hanging'), to having been given electric shocks, and to having been subjected to beatings, slapping and verbal abuse.<sup>160</sup> The ECtHR, having only considered the Palestinian hanging, felt that this was sufficient to allow for a finding of torture.<sup>161</sup>

The decision in *Selmouni* was also significant for what it tells us about the approach the ECtHR may take in future cases considering Article 3. Much is made of the fact that the ECHR is an organic instrument, which develops alongside society's view on moral values, and once again the Court raised this issue. Following *Ireland* it was thought that the five techniques considered by the Court could never be considered to be anything more than inhuman treatment in any subsequent cases. However, in *Selmouni*, the court made it clear that the ECHR is a 'living instrument which must be interpreted in the light of present-day conditions' and also that acts classified as inhuman or degrading treatment in the past could in subsequent cases be considered torture.<sup>162</sup> In support of this analysis, the Court suggested that the level of protection afforded to human rights is attaining an increasingly

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<sup>159</sup> Ibid

<sup>160</sup> Above n144, 584 para 60

<sup>161</sup> 'In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time.' Ibid, 586 para 64

<sup>162</sup> Above n153, 442, para 101

higher standard.<sup>163</sup> Cooper correctly points out that while the severity of the treatment may not be changing, society has altered its approach to what it considers to be torture, inhuman or degrading treatment or punishment; the ECtHR must correspondingly alter its position as it attempts to keep up with the moral consensus.<sup>164</sup>

As previously discussed in Chapter 1, Article 3 ECHR has also been interpreted in such a way as to prohibit refoulement. *Soering* and *Chahal* are authority for the position that where there are reasonable grounds for believing that a person will be ill-treated following a deportation, the country seeking removal cannot effect the transfer. This reasoning was approved recently by the Court in *Saadi*<sup>165</sup>, a case which also held that diplomatic assurances from the receiving country providing that the detainee will not be ill-treated were not in and of themselves sufficient to discharge the obligations of the removing country.<sup>166</sup>

As can be seen from the preceding analysis, Article 3 is a wide ranging, and effective prohibition against torture. The ECtHR seems willing to take a more subjective approach to the determination of torture than merely considering the severity of the suffering as early case law suggested. The Court has also recognised that the protection of human rights requires firm judicial oversight, suggesting a strong defence of the absolute nature of Article 3.

### B. Article 5

The practice of extraordinary rendition also impinges on the right guaranteed by Article 5 ECHR:

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<sup>163</sup> Ibid

<sup>164</sup> Above n143, 63

<sup>165</sup> (2009) 49 E.H.R.R. 30

<sup>166</sup> Elliott, M 'The "war on terror", UK style: the detention and deportation of suspected terrorists' (2010) 8 I.J.C.L., 131, 139

Everyone has the right to liberty and security of person...<sup>167</sup>

This right is qualified with a list of exceptions provided in Article 5(1)(a-f) whereby the State is able to infringe the liberty of a person. These exceptions include such things as detention after conviction<sup>168</sup>, detention in order to bring a person before a competent legal tribunal on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence<sup>169</sup> and also the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country.<sup>170</sup> The list of exceptions provided in Article 5(1)(a-f) is exhaustive.<sup>171</sup>

Article 5(2-4) provide guidance on what must happen when a person has been denied his right to liberty. These subsections require that those who are detained must be informed of the reasons why<sup>172</sup> and have the opportunity to challenge the detention.<sup>173</sup> Similarly to Article 3, this Article has been characterised by the ECtHR as of the utmost importance. The Court in *Guzzardi v Italy* suggests that the protection afforded by Article 5 is 'of the highest importance "in a democratic society" within the meaning of the Convention' and therefore deserving of strict interpretation.<sup>174</sup>

Any arrest or detention which is not covered by the exceptions listed in Article 5(1)(a-f) cannot be considered lawful and would therefore constitute a breach of the ECHR. Furthermore, the Venice Commission argues that the protection of Article 5 covers arrests made by *foreign* authorities within the territory of a Council of Europe member state<sup>175</sup>:

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<sup>167</sup> Article 5(1) ECHR

<sup>168</sup> Article 5(1)(a) ECHR

<sup>169</sup> Article 5(1)(c) ECHR

<sup>170</sup> Article 5(1)(f) ECHR

<sup>171</sup> *Engel v Netherlands* (1979-80) 1 E.H.R.R. 647, 669, para 57

<sup>172</sup> Article 5(2) ECHR

<sup>173</sup> Under Article 5(3) if detained under Article 5(1)(c), or generally under Article 5(4)

<sup>174</sup> *Guzzardi v Italy* (1979-80) 2 E.H.R.R. 387

<sup>175</sup> European Commission for Democracy Through Law (Venice Commission) 'On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and

authority for this position comes from the vestigial European Commission of Human Rights which opined that an arrest by ‘the authorities of one State on the territory of another State, without the prior consent of the State concerned’ raises questions of the affected person’s right to security under Article 5.<sup>176</sup>

The ECtHR has said that the Article 5 right to liberty contemplates liberty in the classic sense: ‘that is to say the physical liberty of the person’.<sup>177</sup> The case of *Guzzardi v Italy* concerned a member of the Italian Mafia who was the subject of a compulsory residence order on the island of Asinara. The court considered it possible that Mr Guzzardi’s detention was effected in line with the exception in Article 5(1)(c).<sup>178</sup> However, upon analysis of this section, the ECtHR felt that its phrasing referred to the prevention of a ‘concrete and specific offense’, and could not be employed against a group (such as Mafiosi, or terrorists) which had a propensity to crime in general.<sup>179</sup> Another important point highlighted in this case and others is the pronouncement by the ECtHR that the exceptions in Article 5(2)(a-f) must be interpreted narrowly.<sup>180</sup> That is to say, where the exceptions are relied upon, they should be interpreted in the widest terms so as to afford the maximum protection to the applicants. Further, in the *Guzzardi* case, the Court highlighted the need to avoid arbitrariness in detention. The court stressed in its judgment that it is essential that the conditions for the deprivation of liberty be clearly defined and that the law itself foreseeable in its application.<sup>181</sup> This question was also addressed in *Winterwerp v Netherlands* a case which considered the detention of a man following the decision that he was of unsound mind. The court suggested that the object and purpose of

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Inter-State Transport of Prisoners’ (Venice , March 2006)  
<[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf)> 116

<sup>176</sup> *Stocké v. Germany* (1991) 13 E.H.R.R. 839

<sup>177</sup> Above n171 , 669, para 58

<sup>178</sup> Above n174, 367-8, para 102

<sup>179</sup> *Ibid*, 368 para 100

<sup>180</sup> *Winterwerp v Netherlands* (1979-80) 2 E.H.R.R. 387, 402 para 37

<sup>181</sup> Above n173, 922-3 para 80

Article 5 was to ensure that 'no one should be dispossessed of his liberty in an arbitrary fashion.'<sup>182</sup> This requirement to avoid arbitrariness is closely linked to the idea of lawfulness, and the Court in *Winterwerp* went as far as to say that no detention that is arbitrary can ever be regarded as 'lawful'.<sup>183</sup>

*A v United Kingdom*<sup>184</sup> also considered the question of intermittent and preventative detention. The Court determined that in the absence of a valid derogation, such practices are often found to be incompatible with Article 5 ECHR.<sup>185</sup> The same case looked at the question of the lawfulness of detention regimes especially in terms of derogations from the Convention. The United Kingdom had sought to derogate in order to indefinitely detain suspected terrorists. The Court accepted that the national authorities are better placed to judge whether there is an emergency threatening the life of the nation and therefore a wide margin of appreciation should be afforded.<sup>186</sup> It was noted that terrorism had been considered a threat to the life of the nation in *Ireland v UK* and also in *Aksoy*, and it was again found to be so in *A v UK*.<sup>187</sup> However, despite this finding, it was concluded that the derogation was invalid in that it disproportionately discriminated in an unjustifiable way between UK nationals and non-nationals.<sup>188</sup> Given the threat of terrorism is generally considered to emanate most greatly from overseas, it is difficult to see how a valid derogation could be set up, which does not discriminate in the same way.

### C. Article 6

Extraordinary rendition could also be said to impinge on the victim's rights under Article 6 ECHR. Generally speaking, Article 6 ECHR offers the following protection:

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<sup>182</sup> Above n180, 402 para 37

<sup>183</sup> *Ibid*, 403 para 39

<sup>184</sup> (2009) 49 E.H.R.R. 29

<sup>185</sup> *Ibid*, 707 para 172

<sup>186</sup> *Ibid*, 707 para 173

<sup>187</sup> *Ibid*, 709 para 176 & 710 para 181

<sup>188</sup> *Ibid*, 712 para 190

In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...<sup>189</sup>

In order to come under the protection of Article 6, the applicant must demonstrate the existence of a dispute.<sup>190</sup> Further, this dispute must be genuine and of a serious nature.<sup>191</sup>

In *Perez v France* the ECtHR posited that 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Art.6(1) restrictively.'<sup>192</sup> The concept of what may be arguable as a 'civil right or obligation' has been the subject of a number of decisions of the Court. In *Georgiadis v. Greece* it was opined that the term 'civil rights and obligations' is an autonomous concept which may be determined irrespective of the State's domestic law, and the status of the authority which decides disputes in a particular area.<sup>193</sup> Whether a dispute is 'civil' may also be determined in terms of the substantive content of the right in question, and the Court may refer to both domestic law and the Convention in reaching its conclusion.<sup>194</sup> It relates not only to the existence of the right, but also the extent it may be enjoyed by the individual.<sup>195</sup> However, the right must have a legal basis in domestic law: the Court is not capable of creating a new substantive right for the applicant if they cannot point to its existence on the statute book.<sup>196</sup>

This right can be infringed either through the impossibility of bringing a claim, or can be considered to be breached because of an unreasonable delay in proceedings. In terms of delays, the Court emphasised that reasonableness is to be judged, amongst other

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<sup>189</sup> Article 6(1) ECHR

<sup>190</sup> European Court of Human Rights '*Practical Guide on Admissibility Criteria*' (31/12/2009) available at <[www.echr.coe.int](http://www.echr.coe.int)>

<sup>191</sup> *Sporrong and Lönnroth v. Sweden* (1983) 5 E.H.R.R. 35 para 81

<sup>192</sup> (2005) 40 E.H.R.R. 39, 924 para 64

<sup>193</sup> (1997) 24 E.H.R.R. 606, 619 para 34

<sup>194</sup> *König v Germany* (1979-80) 2 E.H.R.R. 170, 194 para 90

<sup>195</sup> *Bentham v. the Netherlands* (1986) 8 E.H.R.R. 1, 8 para 32

<sup>196</sup> *Fayed v. the United Kingdom* (1994) 18 E.H.R.R. 393 para 65

considerations, in terms of what is at stake for the applicant.<sup>197</sup> The ECtHR went on to say that what is at stake for the applicant should be 'acute'.<sup>198</sup> It is not a stretch to consider that a significant delay in a civil claim for compensation following extraordinary rendition would affect an acute interest.

#### D. The Application of the ECHR

Article 1 states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.<sup>199</sup> In *Bankovic v Belgium*<sup>200</sup> the ECtHR decided that 'the jurisdictional competence of a State is primarily territorial' and that 'Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction...'.<sup>201</sup> States will therefore be in breach of the ECHR when they act contrary to its Articles within their own territory. This would suggest, however, that the actions of state officials in other territories would not attract the attention of the ECHR. So, for example, states could allow their intelligence officers to interrogate individuals held in conditions which violate their Convention rights, or who may be being subject to treatment contrary to Article 3, provided this took place outside of the *espace juridique* of the ECHR. This potential loophole was closed by the Court in *Issa v Turkey*<sup>202</sup> where it was stated that states could be liable for the actions of their officials outside of their territory: '[a]ccountability in such situations stems from the fact that art 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.'<sup>203</sup>

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<sup>197</sup> *Blake v UK* (2007) 44 E.H.R.R. 29 641 para 41

<sup>198</sup> *Ibid*, 641 para 43

<sup>199</sup> Article 1 ECHR

<sup>200</sup> Application No. 52207/99, Admissibility Decision of December 12, 2001; (2007) 44 E.H.R.R. SE5

<sup>201</sup> *Ibid* paras 57 and 59

<sup>202</sup> (2005) 41 E.H.R.R. 27

<sup>203</sup> *Ibid*, 588 para 71



The obligations placed on states by the ECHR can be both substantive and procedural. For example, with article 3, states must refrain from behaviour which may constitute a breach (the substantive element), and must also investigate reasonable claims of torture or other ill treatment (the procedural element).<sup>204</sup> Investigations should seek to end the breach, as well as identify those responsible.<sup>205</sup> The various elements of extraordinary rendition discussed in this thesis may each require states to take action to end or prevent a breach of the Convention. Credible claims of torture, incommunicado detention or overflights may reasonably be investigated and prevented from continuing, as required by the Convention. Potentially unlawful transfers may be stopped if individuals have access to their Article 6 rights. If such breaches are found to have taken place, Article 13 requires that '[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'<sup>206</sup>

Overall, the ECHR offers significant protection to all those who fall under the jurisdiction of the Court. In terms of torture, the absolute prohibition found in Article 3 is rigidly upheld by the ECtHR. With the Court willing to consider a subjective approach, as well as its willingness to review previous decisions, ensures that what constitutes torture will keep up with modern values and morals. Articles 5 and 6 are regularly noted for their importance to a democratic society. While there is the possibility of derogation, the court will police these carefully to ensure that they truly meet the exigencies of the situation. The overall protections they offer also interpreted in a liberal way allowing for the protection to be extended as far as possible, while the exceptions are required to be interpreted narrowly to

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<sup>204</sup> '...where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 ... requires by implication that there should be an effective official investigation.' *Assenov and Others v. Bulgaria* (1999) 28 E.H.R.R. 652, 701 para 102

<sup>205</sup> Ibid

<sup>206</sup> Article 13 ECHR

limit their misuse. Having considered the primary regional text, attention will now turn to the international documents, beginning first with the United Nations Convention against Torture.

### *The United Nations Convention against Torture*

The second international treaty relevant to the practice of extraordinary rendition which will be considered is the United Nations Convention against Torture (CAT). While the vast majority of international treaties have a more general nature and address a variety of themes, the CAT deals specifically with the prohibition of torture and cruel, inhuman and degrading treatment or punishment, and issues substantially related to these areas. The text of the CAT was adopted by the General Assembly during its 39<sup>th</sup> Session on 10<sup>th</sup> December 1984 under resolution 39/46.<sup>207</sup> In accordance with Article 27(1) of the CAT, it entered into force upon ratification by the 20<sup>th</sup> state party on 26<sup>th</sup> June 1987.<sup>208</sup> As of March 2011, the CAT has 147 parties. While the specific details of a number of articles will be considered shortly, it is worth noting the broad aims of the CAT as a whole. Generally speaking, the Convention sought to reinforce the existing prohibition on torture through the use of preventive and remedial measures.<sup>209</sup> Indeed, a Dutch court, in considering the CAT, went as far as to say that the Convention simply codified what was already known: that the prohibition of torture was absolute and could not be overridden.<sup>210</sup> In seeking to realise this aim, the CAT contains a number of innovative provisions including the requirement of a specific crime of torture within the national law of signatories, the

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<sup>207</sup> United Nations Treaty Collection

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en)>

<sup>208</sup> Ibid. The 26<sup>th</sup> June is now recognised as the International Day in Support of Victims of Torture:

<<http://www.un.org/events/torture/>>

<sup>209</sup> Rodley, N and Pollard, M 'Criminalisation of torture: state obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 E.H.R.L.R. 115, 115

<sup>210</sup> De Wet, E 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law' (2004) 15 E.J.I.L. 97, 116

requirement to exert jurisdiction over those suspected of having committed torture, and a duty to investigate reasonable claims of torture within its jurisdiction.<sup>211</sup>

#### A. The Committee against Torture

The UN, upon the adaptation of the CAT, promulgated a strong defence of its position in saying that 'this valuable instrument [is not merely] a body of principles and pious hopes, the implementation and observance of which would not be guaranteed by anything or anyone.'<sup>212</sup> Under Article 17, the CAT also established a treaty body – the Committee against Torture (the Committee) – which possesses a variety of competencies related to the CAT.<sup>213</sup> The Committee began to function on 1<sup>st</sup> January 1988 and met for the first time in April of the same year. Meetings of the Committee take place in Geneva twice a year in April/May and November.<sup>214</sup> Its composition is made up of 10 independent experts who are required to be of high moral character and have recognised competence in the field of human rights.<sup>215</sup> Members of the Committee serve in their personal capacity and may seek re-election should they be nominated.<sup>216</sup>

The competencies of the Committee, and the requirements of States Parties to the Committee, are laid down in Articles 19-22. Article 19 requires States Parties to submit to the Committee a report which highlights the 'measures they have taken to give effect to their undertakings under this Convention...'<sup>217</sup> The first of these reports should be submitted no later than one year after acceding to the CAT and from then every four

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<sup>211</sup> Evans, M.D. 'Getting to grips with torture' (2002) 51 I.C.L.Q. 365, 376

<sup>212</sup> United Nations Fact Sheet No.17, The Committee against Torture, 1  
<<http://www.ohchr.org/Documents/Publications/FactSheet17en.pdf>>

<sup>213</sup> Article 17 United Nations Convention against Torture

<sup>214</sup> UN Fact Sheet No.4, 4 <<http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf>>

<sup>215</sup> Office of the High Commissioner for Human Rights, Committee Against Torture – Membership  
<<http://www2.ohchr.org/english/bodies/cat/members.htm>>

<sup>216</sup> Article 17(1) and 17(5) United Nations Convention against Torture

<sup>217</sup> Article 19(1) United Nations Convention against Torture

years.<sup>218</sup> These reports may be commented upon by the Committee and included in the annual report submitted to the General Assembly.<sup>219</sup> Article 20 permits the Committee to make inquiries where it receives reliable information that a State Party is systematically practising torture.<sup>220</sup> The State Party in question is invited to cooperate in this investigation, including allowing Committee members to make a visit to the State Party.<sup>221</sup> It is important to note, however, that such inquiries are carried out in confidence for the vast majority of the proceedings.<sup>222</sup> The findings of the inquiry may only become public should the Committee choose to include them in its annual report.<sup>223</sup> Articles 21 and 22 refer to inter-state and individual complaints respectively and each require that the State Parties recognise the competence of the Committee to consider such complaints.<sup>224</sup> The Article 21 procedure begins initially with one State Party notifying another that it is not acting in accordance with the CAT before reverting to the Committee should the reporting State Party feel that the situation has not been satisfactorily remedied.<sup>225</sup> Article 22 permits individuals to complain to the Committee that a State Party has violated the CAT.<sup>226</sup> Strict rules apply: the communication cannot be anonymous or incompatible with the provisions of the Convention, cannot constitute an abuse of the right to submit a communication under article 22, and cannot have been examined (under be under examination) by another international investigation; furthermore, all domestic remedies must have been exhausted.<sup>227</sup> The Committee then considers the merits of the communication with the decisions being handed to the State Party concerned and the author of the complaint;

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<sup>218</sup> *Ibid*

<sup>219</sup> Article 19(3-4) United Nations Convention against Torture

<sup>220</sup> Article 20(1) United Nations Convention against Torture

<sup>221</sup> Article 20(3) United Nations Convention against Torture

<sup>222</sup> Above n212, 3

<sup>223</sup> *Ibid*, 3

<sup>224</sup> Articles 21(1) and 22(1) United Nations Convention against Torture

<sup>225</sup> Article 21(1a-h) United Nations Convention against Torture

<sup>226</sup> Article 22(1) United Nations Convention against Torture

<sup>227</sup> Above n212, 5

where the Committee finds that there has been a violation, the State Party has 90 days to present to the Committee any measures taken to rectify the position.<sup>228</sup>

One final area to note is that the Committee is able to issue general comments which contain guidance on the interpretation of the provisions of the CAT, or on thematic grounds. Although these are not legally binding, they have an important impact in terms of norm-setting.<sup>229</sup> General comments 1 and 2, regarding non-refoulement and inhuman or degrading treatment or punishment respectively, are of particular interest and will be considered in more detail below.

### B. Article 1

The first substantive provision of the CAT is Article 1, which defines torture in the following terms:

‘...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...’<sup>230</sup>

The same article requires that this infliction of pain must be with the view to one of the following: extracting information or a confession, as a punishment, for intimidation or coercive purposes or for discriminatory reasons.<sup>231</sup> There are therefore three requirements for an act to be properly classified as torture under the CAT: (1) that it causes severe pain or suffering, (2) it is inflicted for a purpose (i.e. it is intentional), and (3) it was carried out

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<sup>228</sup> Above n214, 15

<sup>229</sup> UNA-UK Document, Natalie Samarasinghe ‘The UN System and Extraordinary Rendition – Prevention through international law and norms, and protection via mechanisms for redress’ <<http://www.una.org.uk/dosomething/exrend.pdf>>, 2

<sup>230</sup> Article 1(1) United Nations Convention against Torture

<sup>231</sup> Ibid

by or with the acquiescence of state officials.<sup>232</sup> When considering these requirements, it becomes apparent that the definition proffered in Article 1 can be closely assimilated with the requirement that torture is carried out as a purposive, official act.

For Article 1 to be engaged very little state action is necessitated as subsection 1 requires only that the act is carried out 'by or at the instigation of or with the consent or acquiescence of' a state official.<sup>233</sup> In its Second General Comment, the Committee stated international responsibility will attach to acts carried out by 'officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.'<sup>234</sup> While it is clear that positive *acts* are covered by the definition in Article 1, what is less obvious is whether omissions may fall under its purview. Rodley and Pollard have argued that intentional omissions, such as intentional failure to provide a prisoner with food or water, would be covered by the CAT, provided the other requirements of Article 1 are satisfied.<sup>235</sup> Indeed, such an interpretation would be in keeping with the purpose of the CAT and the Committee has suggested that omissions are indeed covered by the CAT.<sup>236</sup>

### C. Criminalisation of Torture

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<sup>232</sup> Joint Committee on Human Rights, 'The UN Convention Against Torture (UNCAT)' Nineteenth Report of Session, Volume I – Report and formal minutes (HL Paper 185-I HC 701-I) (26 May 2006) London: The Stationery Office Limited, 10

<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>>

<sup>233</sup> Article 1(1) Convention against Torture; see Weissbrodt, D and Bergquist, A 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 Harvard Human Rights Journal 123, 141-2

<sup>234</sup> United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.9 (Vol.II) (27 May 2008) UNCAT General Comment No.2 – Implementation of article 2 by States parties, 379 <<http://www2.ohchr.org/english/bodies/cat/comments.htm>>

<sup>235</sup> Above n209, 120

<sup>236</sup> United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.9 (Vol.II) (27 May 2008) UNCAT General Comment No.2 – Implementation of article 2 by Sta, 379

Article 4 of the CAT requires States Parties to criminalise torture in line with the characterisation proffered in Article 1. Unlike Article 3 of the ECHR, this definition does not include any reference to cruel, inhuman or degrading treatment or punishment. It would therefore seem that the criminalisation requirements of Article 4 refer strictly to torture.<sup>237</sup> It was initially believed that States Parties, in seeking to criminalise torture, would be able to adopt whatever definition they saw fit (provided it generally encompassed the approach taken in the CAT) rather than enacting the precise wording found in Article 1.<sup>238</sup> However, this approach has been discredited to a large extent by the work of the Committee. In a number of concluding observations, including those on France<sup>239</sup>, Sweden<sup>240</sup>, Italy<sup>241</sup> and Spain<sup>242</sup>, the Committee has stated its preference for States Parties to enact a definition of torture which is in strict conformity with Article 1. Indeed, the European Parliament, through the Temporary Committee on Illegal Detention, has suggested that European states should 'ensure that their definition of torture is in accordance with Article 1 of the Convention [against Torture]...'<sup>243</sup>

While there is only explicit reference to torture in Article 1, the Committee has stated that '[t]he obligation to prevent ill-treatment in practice overlaps with and is largely congruent

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<sup>237</sup> Above n209, 118

<sup>238</sup> Burgers, J.H. and Danelius, H. *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (Dordrecht, Martinus Nijhoff Publishers, 1988), 122

<sup>239</sup> UNCAT, Consideration of reports submitted by States parties under article 19 of the Convention 'Concluding Observations of the Committee against Torture: France' (20 May 2010) 3 <[http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-FRA-CO-4\\_6.pdf](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-FRA-CO-4_6.pdf)>

<sup>240</sup> UNCAT, Consideration of reports submitted by States parties under article 19 of the Convention 'Concluding Observations of the Committee against Torture: Sweden' (4 June 2008) 3 <<http://www2.ohchr.org/english/bodies/cat/cats40.htm>>

<sup>241</sup> UNCAT, Consideration of reports submitted by States parties under article 19 of the Convention 'Concluding Observations of the Committee against Torture: Italy' (16 July 2007) 3 <<http://www2.ohchr.org/english/bodies/cat/cats38.htm>>

<sup>242</sup> UNCAT, Consideration of reports submitted by States parties under article 19 of the Convention 'Concluding Observations of the Committee against Torture: Spain' (9 December 2009) 3 <<http://www2.ohchr.org/english/bodies/cat/cats43.htm>>

<sup>243</sup> Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, Giovanni Claudio Fava, 'Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (2006/2200(INI)) <[http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf)> 31

with the obligation to prevent torture' as well as the fact that the 'definitional threshold between ill-treatment and torture is often not clear'.<sup>244</sup> Therefore, it is the opinion of the Committee that any methods to prevent torture, must also be applied so as to prevent ill-treatment.<sup>245</sup>

#### D. Article 2

While Article 1 establishes what constitutes torture for the purposes of the CAT, Article 2 provides when this prohibition applies, as well as what steps may be taken to prevent torture:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.<sup>246</sup>

Article 2 paragraph 1 suggests that each State Parties' obligations extend to 'any territory under its jurisdiction.' The Committee addressed this wording as part of its Second General Comment saying that it covers any territory and facilities, and must be applied to all people, without discrimination, who fall under the de facto or de jure control of a State Party.<sup>247</sup> The Committee further expanded on its interpretation of 'any territory' in saying that this prohibition applies to areas where States Parties exercise effective control (including during military occupation) and would therefore extend to detention centres and includes situations where a State Party 'exercises, directly or indirectly, de facto or de jure

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<sup>244</sup> Above n234, 376

<sup>245</sup> Ibid

<sup>246</sup> Article 2 Convention against Torture

<sup>247</sup> Above n234, 377



control over persons in detention.’<sup>248</sup> This position has been reaffirmed by the Committee in its concluding observations on the UK where it stated that ‘this principle includes all areas under the de facto effective control of the State party’s authorities.’<sup>249</sup>

Closely linked to the idea that the protection afforded by the Convention extends to all areas, is the concept that it applies at all times: that is to say the CAT is non-derogable. Article 2 paragraphs 2 and 3 state explicitly that no grounds may be used to justify the use of torture.<sup>250</sup> The Second General Comment of the Committee expanded on the wording of Article 2(2) by saying that the non-derogability of the CAT specifically extends to the threat of terrorist violence.<sup>251</sup>

The Committee Against Torture has expanded on the obligations of the states parties to the Convention in General Comment 2. Article 2 requires that States Parties ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture’.<sup>252</sup> The criminalisation of torture (as required by Article 4) and punishment of those who engage in acts of torture are thus necessary steps in adhering to the requirements of the Convention. But Article 2 goes beyond this, and the Committee has stated that where there are reasonable grounds to suspect that torture or other ill treatment is taking place, States have a duty to investigate.<sup>253</sup> Where this is not fulfilled ‘officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts’ since ‘the State’s indifference or inaction provides a form of encouragement and/or de facto permission.’<sup>254</sup> Where states fail to adhere to their obligations, Article 14 requires that any victim ‘obtains redress and has an enforceable right

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<sup>248</sup> Ibid, 380

<sup>249</sup> UNCAT, Consideration of reports submitted by States parties under article 19 of the Convention ‘Concluding Observations of the Committee against Torture: UK’ 4 (10 December 2004) <<http://www2.ohchr.org/english/bodies/cat/cats33.htm>>

<sup>250</sup> Article 2(2-3); and see Weisbrodt and Bergquist, above n233, 142

<sup>251</sup> Above n234, 377

<sup>252</sup> Article 2 Convention against Torture

<sup>253</sup> Above n234, 380

<sup>254</sup> Ibid

to fair and adequate compensation, including the means for as full rehabilitation as possible.<sup>255</sup>

### E. Article 3

In terms of extraordinary rendition, perhaps the most important provision of the CAT is Article 3 which contains the following:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>256</sup>

This article clearly plays a pre-emptive role in the prevention of torture as it attempts to limit an individual's potential to be exposed to such ill-treatment. In terms of the content of Article 3, the term 'another State' may be interpreted as either the immediate state to which an individual is being expelled, returned or extradited, or to any other state to which he may subsequently be sent.<sup>257</sup> Regarding the practice of extraordinary rendition, in terms of the wording of Article 3 there have been arguments put forward specifically with reference to 'expel, return ("refouler") or extradite'. A 2004 study by the Congressional Research Service (CRS) argued the possibility of disapplying Article 3 to forcible transfers of detainees from one country to another in which they have never previously resided as this would not strictly constitute expulsion or returning and would not have been carried out in

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<sup>255</sup> Article 14 Convention against Torture

<sup>256</sup> Article 3 Convention against Torture

<sup>257</sup> United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.9 (Vol.II) (27 May 2008) UNCAT General Comment 1 – Refoulement and communications (implementation of article 3 in the context of article 22), 374 (Accessed via <<http://www2.ohchr.org/english/bodies/cat/comments.htm>>)

line with any extradition treaty.<sup>258</sup> However, such an interpretation (as noted by the author of the CRS study) is against the spirit of the CAT: the fact that States Parties are required to criminalise torture in their national law, and no exceptional circumstances whatsoever may be invoked to justify torture 'arguably imply that a state party may never exercise or be complicit in the use of torture, even when it occurs extraterritorially.'<sup>259</sup> Furthermore, in looking at the drafting history of the CAT it is apparent that it was intended that Article 3 would have extraterritorial effect: initially, reference was made only to expulsion and extradition, but return (refoulement) was included in order to make the provision more complete: the Article now covers all measures by which a person is physically transferred to another state.<sup>260</sup>

Before Article 3 can apply, it is necessary to determine whether there are substantial grounds for believing a transferee will be tortured. Different States Parties have entered different understandings of when there is a substantial risk of torture. For example, the UK has adopted the 'real risk' standard, whereas the US has interpreted the requirement of the transferee being more likely than not to be tortured.<sup>261</sup> These two interpretations are quite different and it does not appear as though the Committee has given a *definitive* interpretation of this part of Article 3. In its First General Comment, the Committee stated that the risk must be assessed on grounds 'that go beyond mere theory or suspicion' yet this does not require that the risk must be highly probable.<sup>262</sup> The UN has also elucidated when a State may exhibit a consistent pattern of gross, flagrant or mass violations of

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<sup>258</sup> Garcia, M.J. 'The UN Convention Against Torture: Overview of US Implementation Policy Concerning Removal of Aliens March 11, 2004 (Congressional Research Service, CRS Report for Congress Order Code RL32276), 18

<sup>259</sup> Ibid

<sup>260</sup> Weissbrodt, D and Bergquist, A 'Extraordinary Rendition and the Torture Convention' 46 Va. J. Int'l L. 586 (2005-2006), 612; Above n238, p126

<sup>261</sup> Intelligence and Security Committee 'Rendition' <<http://isc.independent.gov.uk/committee-reports/special-reports>> (July 2007), 9-10

<sup>262</sup> United Nations International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.9 (Vol.II) (27 May 2008)UNCAT General Comment 1 , 375

human rights. As reported in a UN factsheet, the Committee has stated that such a situation exists ‘...when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the country in question.’<sup>263</sup> This situation need not be the direct result of government action, but an inadequate legal regime outlawing torture may be taken into consideration.<sup>264</sup>

As the majority of Article 22 applications to the Committee are related to Article 3, there is some valuable information relating to its interpretation to be found in the Committee’s decisions. *Mutombo v Switzerland*<sup>265</sup> concerned a man who had fled Zaire following his desertion from the army and a period of ill-treatment in a Zairian military camp. The Committee opined of Article 3 applications, that ‘the aim ... is to establish whether the *individual concerned* would be *personally at risk* of being subjected to torture in the country to which he would return.’<sup>266</sup> Therefore, it follows that even though there may be a pattern of gross, flagrant or mass violations of human rights in a given state, if it would not threaten the individual seeking to rely on Article 3, he is prevented from doing so. Similarly, if there is no such situation, it is possible that an individual may still be at risk of torture.<sup>267</sup> This decision is also grounds for the position that removing an individual to a country which is not a State Party to the Convention is an important factor in considering if that individual is at risk of torture.<sup>268</sup> The Committee also considered Article 3 in the case of *Aemei v Switzerland*<sup>269</sup> which involved an Iranian citizen who had become a People’s Mojahedin activist and demonstrated against the Iranian government. After Switzerland sought to

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<sup>263</sup> Above n214, 12

<sup>264</sup> *Ibid*

<sup>265</sup> *Balabou Mutombo v Switzerland* (Communication N° 13/1993) 1 Selected Decisions of the Committee against Torture 15

<sup>266</sup> *Ibid*, para 9.3, 19 (emphasis added)

<sup>267</sup> *Ibid*

<sup>268</sup> *Ibid*, para 9.6, 20

<sup>269</sup> *Seid Mortesa Aemei v. Switzerland* (Communication N° 34/1995) 1 Selected Decisions of the Committee against Torture 21

deport him back to Iran, he claimed he would be tortured and hoped to rely on Article 3 to block his deportation. Switzerland questioned some of his testimony for inconsistencies. However, the Committee felt that in attempting to guarantee the applicant's security 'it is not necessary that all the facts invoked by the author should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.'<sup>270</sup> Further, the Committee suggested that when considering someone's Article 3 rights, '[t]he nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision...'<sup>271</sup> Article 3 therefore represents a very strong protection for individuals against deportation with any risk of being subjected to torture.

As Article 3 protects against refoulement, the use of diplomatic assurances is of particular concern. In its concluding observations on the UK, the Committee reported its concern at the use of such assurances on the grounds that they are not wholly clear on the obligations on either state, and therefore could not be assessed for compatibility with Article 3.<sup>272</sup> The Special Rapporteur on torture<sup>273</sup>, while not ruling out their use entirely, suggested that there are strong indications that they would not be respected.<sup>274</sup> The Joint Commission on Human Rights agreed with this assessment, adding that they presented a substantial risk of the UK being found in breach of its obligations under Article 3.<sup>275</sup>

#### F. The CAT Regime

Overall, the Convention against Torture, as a treaty with a narrow, specific aim, represents a very strong defence of the prohibition against torture. Its innovative provisions for the

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<sup>270</sup> Ibid, para 9.6, 25-6

<sup>271</sup> Ibid, para 9.8, 26

<sup>272</sup> Above n249 , 4

<sup>273</sup> Information on the role of the Special Rapporteur can be found on the website of the Office of the UN High Commissioner for Human Rights at <<http://www2.ohchr.org/english/issues/torture/rapporteur/>>

<sup>274</sup> UNHCR Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2004) A/59/324, 9 <<http://material.ahrchk.net/notorture/N0449852.pdf>>

<sup>275</sup> Above n232 , 42

incorporation of a specific crime of torture in the legislature of States Parties allows for an improved level of protection for citizens. Further, the Committee against Torture is able to further the aims of the Convention and has not been shy in doing so, such as in extending the non-derogable nature of torture to other forms of ill-treatment. However, its applicability is limited in the overall scheme of extraordinary rendition as it offers no protection for irregular transfers or indefinite detention. Therefore, attention will now turn to a more general international treaty: the International Covenant on Civil and Political Rights.

### *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR; the Covenant) was one of the earliest general international treaties concerned with human and civil rights. Upon the adoption of the Universal Declaration of Human Rights (UDHR), the UN General Assembly requested the Commission on Human Rights to prepare draft covenants on the human rights enumerated in the UDHR.<sup>276</sup> The Commission completed two drafts in 1954 (one of which became the ICCPR, the second being the International Covenant on Economic, Social and Cultural Rights) and they were reviewed by the General Assembly in the same year.<sup>277</sup> The text of the two Covenants was approved by the General Assembly under Resolution 2200 of its 21<sup>st</sup> session in December 1966.<sup>278</sup> In accordance with Article 49, the ICCPR entered into force on 23<sup>rd</sup> March 1976 upon the deposit of the 35<sup>th</sup> instrument of

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<sup>276</sup> UN Fact Sheet 2 – The International Bill of Rights, 2  
<<http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>>

<sup>277</sup> Ibid

<sup>278</sup> UN General Assembly 'Resolutions adopted on the reports of the Third Committee' 49  
<<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>>

ratification by a State Party, 10 years after the adoption of the text.<sup>279</sup> As of March 2011, there are 167 States Parties to the Covenant.<sup>280</sup>

The ICCPR broadly consists of five distinct sections with Parts I and II comprising overarching or structural provisions, Part III containing the list of substantive rights and fundamental freedoms, Part IV is concerned with the establishment of the Human Rights Committee, while Parts V and VI provide for the Covenant's application and ratification procedure respectively. Like the ECHR, the ICCPR addresses a variety of themes and issues. A more detailed analysis of specific Articles follows below, but generally speaking the ICCPR may be seen as covering areas such as the prohibition on torture, the right to liberty and security, the right to proper procedure before a court of law, and also expulsion of aliens. Importantly States Parties, under Article 4, have the power to derogate from certain provisions of the Covenant, though this is not a general power; derogations may only be applied during a time of declared public emergency, and a number of the Articles of the ICCPR are non-derogable.<sup>281</sup>

#### A. The Human Rights Committee

As with the CAT, the ICCPR sets up a treaty body which carries out many functions similar to that of the Committee against Torture. Article 28 establishes of the Human Rights Committee (HRC) as a panel of 18 members elected from amongst the nationals of State Parties to the Covenant.<sup>282</sup> The HRC has four major responsibilities derived from the ICCPR.<sup>283</sup> Under Article 40, the HRC receives reports from States Parties on the measure they have taken to implement the Covenant. The first must be made within one year of

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<sup>279</sup> UN Treaty Collection Database, ICCPR

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)>

<sup>280</sup> Ibid

<sup>281</sup> Article 4(1-3) International Covenant on Civil and Political Rights

<sup>282</sup> Article 28(1-3) International Covenant on Civil and Political Rights

<sup>283</sup> UN Fact Sheet No.15 – Civil and Political Rights: the Human Rights Committee p14-15

<<http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>>

entry into the Covenant, and then whenever the HRC requests.<sup>284</sup> Secondly, the HRC enumerates general comments on the ICCPR which serve as a statement of the law as interpreted by the Committee.<sup>285</sup> Thirdly, in compliance with Article 41, the HRC deals with written communications from States Parties which claims that another State Party is not fulfilling its obligations under the Covenant.<sup>286</sup> However, the Committee only has this competence where States Parties have recognised it to do so.<sup>287</sup>

Finally, the HRC, in line with the First Optional Protocol to the ICCPR, is able to receive written communications from individuals who believe that their rights under the Covenant have been breached. This Protocol is optional, but once a State Party agrees to it, any person subject to its jurisdiction may lodge a complaint with the HRC. This includes not only nationals of the State Party, but also people who are directly subject to the authority of a State Party (see discussion below).<sup>288</sup> Individuals may only complain to the HRC where the application would not be an abuse of process<sup>289</sup>, and may not complain where the issue is being decided under another international investigation<sup>290</sup>, or where they have not exhausted all domestic remedies.<sup>291</sup> As of March 2011, there are 113 signatories to the First Optional Protocol.<sup>292</sup>

### **B. The Scope of the ICCPR**

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<sup>284</sup> Article 40(1)(a-b) International Covenant on Civil and Political Rights

<sup>285</sup> Above n283, 24

<sup>286</sup> Article 41(1)(a) International Covenant on Civil and Political Rights

<sup>287</sup> 'A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.' Article 41(1) International Covenant on Civil and Political Rights

<sup>288</sup> Above n285, 11

<sup>289</sup> Article 3 First Optional Protocol to the International Covenant on Civil and Political Rights

<sup>290</sup> Article 5(2)(a) First Optional Protocol to the International Covenant on Civil and Political Rights

<sup>291</sup> Article 5(2)(b) First Optional Protocol to the International Covenant on Civil and Political Rights

<sup>292</sup> UN Treaty Collection Database First Optional Protocol to the ICCPR

<[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en#top](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#top)>



In terms of giving effect to the provisions of the ICCPR, it is understood that States Parties must undertake a three-part approach. The three steps are enumerated as follows: (1) the state must *respect* the rights in the ICCPR, that is to say refrain from a particular action which could infringe upon the rights (a negative duty); (2) the state must *protect* the enjoyment of the rights by, for example, establishing an effective legislative regime (a positive obligation); and (3) the state must *fulfil* the right by taking the required steps to create an environment in which the rights may be fully realised (another positive obligation).<sup>293</sup>

The ICCPR is binding on all branches of government (at whatever level) within a particular State Party, including the legislature, the judiciary and the executive.<sup>294</sup> The Human Rights Committee, in General Comment 31, has highlighted what is to be expected of States Parties. Beyond mere legislative or administrative actions, the aims of the ICCPR must be furthered through educative and other appropriate measures so as to raise the levels of awareness amongst the population at large.<sup>295</sup> Further, States Parties are expected to give effect to the Covenant rights in their domestic order: while this may not take the shape of direct incorporation, it is necessary to remedy any inconsistencies or to fill any gaps.<sup>296</sup>

Once it is established how States Parties should give effect to the Covenant, it must be decided to whom they owe these obligations. Article 2(1) of the ICCPR states that its provisions must be applied to 'all individuals within its territory and subject to its jurisdiction...'<sup>297</sup> This could be read as two separate requirements where satisfying one is sufficient for protection or it could suggest that anyone claiming the protection of the ICCPR would need to be both within the territory *and* subject to the jurisdiction of a State

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<sup>293</sup> Above n285, 5

<sup>294</sup> General Comment 31 – relative to The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2  
(<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>)

<sup>295</sup> Ibid 3

<sup>296</sup> Ibid 6

<sup>297</sup> Article 2(1) International Covenant on Civil and Political Rights

Party. There is some debate as to whether the ICCPR should be applied extraterritorially (i.e. to those who fall within only one of the requirements of Article 2(1)). Some, like Dennis & Surena, believe that it should not be<sup>298</sup>, while others such as Rodley argue that given the object and purpose of the Covenant, it would be perverse not to apply it in such a way.<sup>299</sup> The Human Rights Committee, in considering the *Lopez Burgos v Uruguay*<sup>300</sup> case, stated that not applying the ICCPR extraterritorially would frustrate its purpose. The International Court of Justice made its position clear in *Congo v Uganda*, and is also of the opinion that “international human rights instruments are applicable ‘in respect of acts done by a state in the exercise of its jurisdiction outside its own territory,’ particularly in occupied territories.”<sup>301</sup> Following these decisions, in 2004 the HRC released General Comment 31 which provides that States Parties ‘must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’ before adding that ‘[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory...’<sup>302</sup>

### C. Derogations and Denunciations

Under Article 4, the ICCPR allows States Parties to derogate from its provisions subject to certain requirements. There must exist a proclaimed state of emergency which threatens

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<sup>298</sup> ‘...States generally do *not* appear to apply the international human rights instruments such as the ICCPR extraterritorially’ Dennis & Surena ‘Application of the International Covenant on Civil and Political Rights in times of armed conflict and military occupation: the gap between legal theory and state practice’ (2008) 6 E.H.R.L.R 714

<sup>299</sup> Relying on ICJ and HRC statements he argues that ‘the ICCPR could apply extraterritorially and in international armed conflict’ Rodley ‘The extraterritorial reach and applicability in armed conflict of the International Covenant on Civil and Political Rights: a rejoinder to Dennis and Surena’ (2009) 5 E.H.R.L.R 628

<sup>300</sup> *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979 , UN Human Rights Committee (HRC), 29 July 1981, <<http://www.unhcr.org/refworld/docid/4028d4954.html>>

<sup>301</sup> *Democratic Republic of the Congo v Uganda* Armed Activities on the Territory of the Congo, Judgment, I.C.J. Reports 2005, p. 168, p243 <<http://www.icj-cij.org/docket/files/116/10455.pdf>>

<sup>302</sup> Above n294 p4

the life of the nation.<sup>303</sup> Further, the State Party must notify the Secretary General of the UN of the derogations and its reasons for doing so.<sup>304</sup> Any measures which a State adopts must be strictly required by the exigencies of the situation.<sup>305</sup> This is in effect a proportionality test, which implies that derogations will not be permitted where the same result could be achieved through means which do not require derogation.<sup>306</sup> The HRC has stated that such measures must be used only in exceptional circumstances and must also be temporary in nature.<sup>307</sup> There are also a number of rights which may never be derogated from regardless of the existence of a severe public emergency. Article 4(2) provides that the 'rights to life, to freedom from torture, to freedom from enslavement or servitude, to protection from imprisonment for debt, to freedom from retroactive penal laws, to recognition as a person before the law, and to freedom of thought, conscience and religion' are absolute and non-derogable.<sup>308</sup> Further, according to the UN Joint Study on Secret Detention, derogations from Articles which would inhibit the effective functioning of non-derogable Articles were likewise not subject to limitation.<sup>309</sup>

It is also worth noting that the ICCPR may not be subject to denunciation or withdrawal.<sup>310</sup>

The HRC based this reasoning on the fact that the rights guaranteed by the ICCPR belong to

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<sup>303</sup> Article 4(1) International Covenant on Civil and Political Rights

<sup>304</sup> Article 4(3) International Covenant on Civil and Political Rights

<sup>305</sup> Art 4(1) International Covenant on Civil and Political Rights

<sup>306</sup> UN Human Rights Council 'Joint study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin' (February 2010)

<<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/a-hrc-13-42.pdf>> 23

<sup>307</sup> General Comment 29 – States of Emergency (article 4), 2

<[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf)>

<sup>308</sup> Article 4(2) ICCPR; Above n276, 5

<sup>309</sup> Above n285, 24

<sup>310</sup> General Comment 26 – Continuity of Obligations Para 1

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/06b6d70077b4df2c8025655400387939?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/06b6d70077b4df2c8025655400387939?Opendocument)>

the people, and continue to protect them regardless of a change in government, including dismemberment of a State Party, as successor states are automatically assumed to accede to the Covenant.<sup>311</sup>

#### D. Article 7 and Torture

Like the CAT and ECHR, the ICCPR contains a provision which prohibits torture absolutely.

Article 7 states this prohibition in the following terms:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.<sup>312</sup>

This prohibition covers both actions which constitute torture, and also those which do not reach this threshold and are characterised as cruel, inhuman or degrading treatment or punishment. As such, this provision is wider in its application compared to Article 1 of the CAT. This is further exemplified on grounds that in considering complaints, the HRC may take into account more issues, such as the right to family and private life, and the right to freedom of movement.<sup>313</sup>

It is important to note that this article is formulated in absolute terms. As with the previous treaties, the ICCPR holds the prohibition on torture in the highest regard, classifying it as non-derogable regardless of the existence of a state of emergency threatening the life of the nation.<sup>314</sup> The HRC has elaborated on this provision in General Comment 20 by saying that no justification may be offered which draws upon extenuating circumstances, or based upon any order from a superior officer or public authority.<sup>315</sup> It is evident that the drafters

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<sup>311</sup> Ibid para 4

<sup>312</sup> Article 7 International Covenant on Civil and Political Rights

<sup>313</sup> Duffy, A 'Expulsion to face torture? Non-refoulement in international law' 20 (2008) I.J.R.L. 373, 381

<sup>314</sup> Article 4(2) ICCPR

<sup>315</sup> General Comment 20 – Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) para 3

of the ICCPR foresaw absolutely no circumstances during which the protection of Article 7 could be removed.<sup>316</sup>

While the protection afforded by Article 7 is broad, it does not contain a definition of torture like the CAT, nor does it provide any guidance as to what may be considered to constitute the various forms of ill-treatment it covers. This formulation was deliberate<sup>317</sup>, and it allows the HRC to determine complaints presented to it on an evolving basis, rather than having to follow a prescriptive approach which may not take into account the changing morals of society. The HRC has provided limited guidance on issues it will consider when making a determination on whether torture has been committed. Firstly, the Committee notes that both acts which cause physical discomfort, and acts which cause mental torment, may run afoul of Article 7.<sup>318</sup> Considerations of the nature, purpose and severity of the treatment applied will affect the Committee's determinations.<sup>319</sup> Further, prolonged solitary confinement may also engage Article 7.<sup>320</sup> The Human Rights Committee has considered a number of cases which concern Article 7. For example, in *Pustovalov v. Russian Federation*<sup>321</sup> the author complained of beatings during interrogation which were intended to force him to confess his guilt. In the absence of substantive refutation, the Committee found a breach of Article 7.<sup>322</sup> In *C v Australia*<sup>323</sup> the complainant alleged that his lengthy incarceration had led to the development of a psychiatric illness. In the face of

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<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)>

<sup>316</sup> Rodley, N *The Treatment of Prisoners Under International Law* (2nd edition 1999, Clarendon Press, Oxford) p54

<sup>317</sup> Above n315, para 4

<sup>318</sup> *Ibid* para 5

<sup>319</sup> *Ibid*

<sup>320</sup> *Ibid* para 6

<sup>321</sup> CCPR/C/98/D/1232/2003, UN Human Rights Committee (HRC), 10 May 2010

<<http://www.unhcr.org/refworld/docid/4c1893792.html>>

<sup>322</sup> *Ibid* para 8.2

<sup>323</sup> CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002,

<<http://www.unhcr.org/refworld/docid/3f588ef00.html>>

overwhelming evidence in his favour, as well as the State Party's awareness of his condition, the HRC again felt that there had been a breach of Article 7.<sup>324</sup>

While Article 7 does not explicitly mention non-refoulement, this has not prevented the HRC from finding it to be within its ambit. In General Comment 20, the Committee stated that States Parties must not expose individuals to the risk of treatment prohibited by Article 7 when returning them to another country.<sup>325</sup> The HRC further elaborated on this position in General Comment 31. The Committee suggested that States Parties must not

extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>326</sup>

The HRC does not however definitively determine what constitutes a 'real risk', and as with the CAT it may be left to States Parties to formulate their own interpretation. However in *ARJ v Australia*<sup>327</sup>, the Committee argued that to constitute a 'real risk' there must be a 'necessary and foreseeable consequence'. In the same case, the Committee felt that to apply Article 7 in a way which does not protect against refoulement would run counter to its object and purpose.<sup>328</sup>

#### E. Article 9 and Liberty and Security

The ICCPR also guarantees a right to liberty and security. Article 9 provides the following general prohibition:

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<sup>324</sup> Ibid Para 8.4

<sup>325</sup> Above n315 para 9

<sup>326</sup> Above n294, para 12

<sup>327</sup> CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997, <<http://www.unhcr.org/refworld/docid/4028adfa7.html>>

<sup>328</sup> Ibid para 3.3

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.<sup>329</sup>

Article 9 also requires more of States Parties where an individual under their jurisdiction is deprived of their liberty. It is necessary to inform the person, at the time of their arrest, of the reasons for his arrest<sup>330</sup>, anyone who has lost their liberty must be given the opportunity to take proceedings before a court and challenge the lawfulness of their detention<sup>331</sup>, and anyone who's detention is found not to have been lawful must have an enforceable right to compensation.<sup>332</sup> Taken as a whole, Article 9 offers a very broad protection against arbitrary denial of liberty.

In terms of the coverage of Article 9, in General Comment 8, the HRC stated that paragraph 1 is applicable to all deprivations of liberty including criminal cases, preventative detention, immigration purposes and so on.<sup>333</sup> The HRC has specifically commented on preventative detention stating that all the elements of Article 9 will apply to such incarceration.<sup>334</sup> That is to say the detention must not be arbitrary, should be established by law, and all those who have their liberty unlawfully curtailed via preventative detention must have the opportunity to challenge it before a court of law. In terms of arbitrariness, the HRC has considered this issue on a number of occasions. In *A v Australia*, the Committee stated that arbitrariness must not be equated solely with 'against the law'; additional considerations such as 'inappropriateness and injustice' may also lead to a finding of arbitrariness.<sup>335</sup>

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<sup>329</sup> Article 9(1) International Covenant on Civil and Political Rights

<sup>330</sup> Article 9(2) International Covenant on Civil and Political Rights

<sup>331</sup> Article 9(4) International Covenant on Civil and Political Rights

<sup>332</sup> Article 9(5) International Covenant on Civil and Political Rights

<sup>333</sup> General Comment 8 – Right to liberty and security of persons (Art. 9), para 1

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument)>

<sup>334</sup> *Ibid* para 4

<sup>335</sup> *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 30 April 1997, para 9.2, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html> [accessed 18 April 2011]

Further, in *C v Australia*, the Committee held that in order to avoid the accusation of arbitrariness 'detention should not continue beyond the period for which the State party can provide appropriate justification'.<sup>336</sup> It therefore becomes apparent that to avoid being considered arbitrary, detention must be a justifiable and appropriate to the facts of any particular case.

In order for a practice to be established by law, connotations of legitimacy and lawfulness come into play. Secret detention cannot be said to be a form of detention established by law: such detainees are necessarily outside of the reach of the law, and further '[e]ven if a State authorized in its domestic laws the practice of secret detention, such laws would in themselves be in violation of the right to liberty and security and would therefore not stand.'<sup>337</sup> The HRC has also considered the question of lawfulness in a number of communications. In *Basilio Laureano Atachahua v Peru* the Committee stated that detention would be unlawful where those carrying out the arrest do not act 'on the basis of an arrest warrant or on orders of a judge or judicial officer.'<sup>338</sup> It has also stated that detention will be unlawful where a court is unable to provide legal qualification for the detention.<sup>339</sup>

Alongside questions of lawfulness, the ICCPR provides for any person deprived of their liberty to take proceedings before a competent court to challenge the lawfulness of their detention. The Committee has said, in both *A* and *C v Australia*, that the power of the court must extend to ordering the release of a person deprived of their liberty where it is found

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<sup>336</sup> *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, para 8.2, available at: <http://www.unhcr.org/refworld/docid/3f588ef00.html> [accessed 18 April 2011]

<sup>337</sup> Above n285, 15

<sup>338</sup> *Basilio Laureano Atachahua v. Peru*, CCPR/C/56/D/540/1993, UN Human Rights Committee (HRC), 16 April, 1996, para 8.6, available at: <http://www.unhcr.org/refworld/docid/3ae6b70910.html> [accessed 18 April 2011]

<sup>339</sup> *Kirpo v. Tajikistan*, CCPR/C/97/D/1401/2005, UN Human Rights Committee (HRC), 3 December 2009, para 6.4 available at: <http://www.unhcr.org/refworld/docid/4b66cd3a0.html> [accessed 18 April 2011]



to be unlawful.<sup>340</sup> The lack of ambiguity in paragraph 4, that *anyone* deprived of their liberty may challenge the lawfulness of such a decision, demonstrates its importance. Indeed, while article 9 is not in its entirety non-derogable, certain aspects may be considered as such. Given the link between judicial oversight and the rights highlighted in Article 4, the HRC has stated that the provisions of the Covenant relating to procedural safeguards 'could never be made subject to measures that would circumvent the protection of non-derogable rights.'<sup>341</sup> Therefore, as the UN Joint Study into secret detention states, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention should not be diminished by a State party's decision to derogate from the Covenant.'<sup>342</sup>

Linked with the right encapsulated by Article 9 are Articles 14 and 16 which provide that 'all persons shall be equal before the courts...' and that 'everyone shall have the right to recognition everywhere as a person before the law' respectively.<sup>343</sup> In their totality, the three Articles detailed here can be seen to provide a strong safeguard against arbitrary detention and improper processes before a court of law.

### *The Geneva Conventions*

As extraordinary rendition takes place in the context of an 'international war on terror', it is essential to consider the application of International Humanitarian Law, and specifically the 1949 Geneva Conventions, to the practice.<sup>344</sup> The Geneva Conventions are a detailed collection of four treaties which delimit the accepted conduct of parties during armed conflict. Each Convention contains specific articles which should be applied in favour of those who fall under their purview. Of particular importance to extraordinary rendition are

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<sup>340</sup> Above n335 para 9.5 and Above n336 para 8.3

<sup>341</sup> Above n306, 24

<sup>342</sup> Ibid

<sup>343</sup> Articles 14 and 16 International Covenant on Civil and Political Rights

<sup>344</sup> For the full text of the 1949 Geneva Conventions and the Additional Protocols see <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>>

Geneva Conventions III (relative to the Treatment of Prisoners of War) and IV (relative to the Protection of Civilian Persons in Time of War). Several articles are common to all four Geneva Conventions. Perhaps of most importance in this discussion is Common Article 3, which Jakob Kellenberger, the President of the International Committee of the Red Cross, has stated in its totality aims to prevent abuses arising from warfare.<sup>345</sup>

#### A. The Scope of the Conventions

The Geneva conventions will only apply in the case of armed conflict. This is a threshold question and must be answered before the application of the Geneva Conventions can be considered. The ICTY considered the question of what constitutes an armed conflict in the *Tadic* case where it stated that

‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached’.<sup>346</sup>

The Rome Statute of the International Criminal Court<sup>347</sup> also provides guidance on where an armed conflict exists: in Article 8(2)(f) it states that armed conflicts ‘take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’.<sup>348</sup> If it is decided that there is an armed conflict, attention must turn to Common Articles 2 and 3 of the Geneva Conventions.

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<sup>345</sup> International Commission of Jurists ‘Assessing Damage, Urging Action’ (Geneva, 2009) <<http://ejp.icj.org/IMG/EJP-Report.pdf>> 18

<sup>346</sup> *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A.Ch., 2 October 1995 para 70

<sup>347</sup> Rome Statute of the International Criminal Court <[http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf)>

<sup>348</sup> *Ibid*

There are two potential forms of armed conflict which the Geneva Conventions address: International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC).<sup>349</sup> A situation will fall under Common Article 2, and will therefore be classified as an IAC for which the entirety of the Geneva Conventions will apply, at times of 'declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...'<sup>350</sup> As the ICRC points out, such international armed conflict 'occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.'<sup>351</sup> If a conflict cannot be characterised in such a way, then recourse must be had to Common Article 3 which applies (and is the *only* Convention Article to apply) to cases of NIACs occurring in the territory of one of the High Contracting Parties. The ICRC states that non-international armed conflicts occur when there are 'protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups' and such confrontations 'must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.'<sup>352</sup> So, for example, the situation in Afghanistan was from October 2001 to June 2002 an international armed conflict, and since June 2002 has been classified as a non-international armed conflict (the ICRC took a similar approach to the situation in Iraq).<sup>353</sup> Different regimes would apply to detainees captured at different times during this conflict. This is important, as European states may have had access to detainees captured in Afghanistan or Iraq, and therefore, it would be expected that such detainees would be treated in accordance with the Geneva Conventions.

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<sup>349</sup> Common Articles 2 & 3 Geneva Conventions respectively.

<sup>350</sup> Common Article 2 Geneva Conventions 1949

<sup>351</sup> ICRC Opinion Paper 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (March 2008) p1 available at <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>

<sup>352</sup> *Ibid*, 5

<sup>353</sup> Pejic, J 'The protective scope of Common Article 3: more than meets the eye' (2011) 93(881) IRRC 1, 8

A more interesting analysis applies to the war on terror in general, and specifically against al-Qaeda. Initially, the Bush Administration argued that this ‘transnational’ war fell between the requirements of Common Articles 2 and 3 and therefore international humanitarian law could not apply.<sup>354</sup> This position was later reformulated: the Geneva Conventions did apply in the war on terror, but al-Qaeda operatives could not qualify for protection as al-Qaeda was not a state party to the Conventions. However, in the *Hamdan* case the US Supreme Court superseded this position stating that the armed conflict between the US and al-Qaeda was at least governed by Common Article 3.<sup>355</sup> It is thus apparent that Common Article 3 represents the minimum standard which must apply to the war on terror.<sup>356</sup> However, it may be argued that the war on terror falls under the provisions of Common Article 2 and is therefore an IAC. In *Public Committee Against Torture in Israel v Israel*<sup>357</sup> the Israeli Supreme Court addressed the question of targeted killings and terrorists. The Court found that ‘the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict’ before adding that ‘Confronting the dangers of terrorism constitutes part of the international law dealing with armed conflicts of international character’.<sup>358</sup> If this conception of Israel’s struggles with terrorists can be applied to the fight against al-Qaeda, the war on terror may take on the form of an IAC. While it is accepted that the Geneva Conventions do not apply to the ‘war on terror’ generally, it is worth considering their *potential* applicability.

### B. Common Article 3

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<sup>354</sup> Ibid, 7

<sup>355</sup> *Hamdan v Rumsfeld*, 548 U.S. 557 (2006)

<sup>356</sup> U. S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 “serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’ ” (quoting *Nicaragua v. United States*, 1986 I. C. J. 14, 218, 25 I. L. M. 1023))

<sup>357</sup> 7 B.H.R.C. 31 (Sup Ct (Isr))

<sup>358</sup> Ibid, para 21

If the conflict is characterised as NIAC, then Common Article 3 will apply. This article sets the minimum standard of treatment that must be extended to those taking no active part in hostilities, including through reasons of detention.<sup>359</sup> The Article requires that all people are treated humanely and without discrimination.<sup>360</sup> Common Article 3 specifically states that they shall be protected from ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’<sup>361</sup> as well as ‘outrages upon personal dignity, in particular humiliating and degrading treatment.’<sup>362</sup> It is clear then, that the Geneva Conventions prohibit the three types of mistreatment covered by international human rights treaties previously discussed – torture, cruel and inhuman treatment, and degrading treatment. The Geneva Conventions do not provide a specific definition for any of these categories of ill-treatment, preferring instead a general characterisation. This was perhaps a deliberate formulation: narrow definitions (naturally) limit the scope of application for legal provisions and so the general classifications leave room for flexible interpretations.<sup>363</sup> Further, what constitutes ill-treatment may change over time, and the general definitions allow for changing moral standards.<sup>364</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) has considered the concept of torture as a war crime and promulgated several opinions on the matter. The *Delalic* case is important as it provides a definition for when the ICTY should find there has been inhuman treatment or torture: “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or

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<sup>359</sup> Article 3(1) Geneva Conventions, 1949

<sup>360</sup> Ibid

<sup>361</sup> Article 3(1)(a) Geneva Conventions, 1949

<sup>362</sup> Article 3(1)(c) Geneva Conventions, 1949

<sup>363</sup> Droege, C “‘In truth the leitmotiv’’: the prohibition of torture and other forms of ill-treatment in international humanitarian law’ (2007) 89 Int. Rev. of the Red Cross 515, 518

<<http://www.icrc.org/eng/assets/files/other/irrc-867-droege.pdf>>

<sup>364</sup> Ibid, 519

physical suffering or injury or constitutes a serious attack on human dignity’’.<sup>365</sup> This formulation is very similar to the definition of torture provided in the CAT, except there is no requirement for the involvement of a public official. Indeed, the ICTY has expressed and determined that there is no need for the perpetrator to be a public official in order for a finding of torture.<sup>366</sup> The purposive requirement (that the treatment must be inflicted intentionally, and for a purpose such as the extraction of information) of the CAT has also been transferred to IHL, yet it does not have to be the sole, or even main, reason for inflicting the pain and suffering.<sup>367</sup> Whether or not a particular act constitutes torture or inhuman treatment is determined by the intensity of the treatment, with ‘severe’ pain required for torture, and ‘serious’ pain for inhuman treatment.<sup>368</sup> All the circumstances must be considered, including where necessary cultural influences.<sup>369</sup> Factors which will have an impact on the assessment include the context in which the pain was inflicted, the manner and the methods used, and also “the position of inferiority of the victim’’.<sup>370</sup> Ultimately, all instances of ill-treatment, and whether or not they amount to torture or something less, must be judged on a case by case basis.<sup>371</sup>

### C. Prisoners of War

If it is decided that Article 2 does in fact cover the conflict with al-Qaeda – that is to say the conflict is an IAC – then it must be determined whether or not members of the organisation receive the protection of Geneva Convention III relative to the Treatment of Prisoners of

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<sup>365</sup> ICTY, *Prosecutor v Delalic and Others*, Case No. IT-96-21 (Trial Chamber), 16 November 1998, para 543

<sup>366</sup> Above n363, 525-6

<sup>367</sup> ICTY, *Prosecutor v. Kvočka and Others*, Case No. IT-98-30/1-A (Appeals Chamber), 28 February 2005, para 153

<sup>368</sup> Above n363, 527

<sup>369</sup> ‘...in certain circumstances the suffering can be exacerbated by social and cultural conditions and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.’ ICTY, *Prosecutor v. Limaj and Others*, Case No. IT-03-66-T (Trial Chamber), 30 November 2005, para 237

<sup>370</sup> ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber), 15 March 2002, para 182

<sup>371</sup> Above n363, 521; *Prosecutor v. Limaj and Others*, para 232

War.<sup>372</sup> Therefore, detainees must qualify as prisoners of war under the definition proffered in Article 4. Paragraph 4A sets out who will fall within this category:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.<sup>373</sup>

It is difficult to see where members of a terrorist organisation such as al-Qaeda will fit into the requirements of Article 4.<sup>374</sup> However, if those captured were able to satisfy the requirements of Article 4, the following aspects of the Third Geneva Convention will apply. Article 13 protects POWs from inhumane treatment, including both acts and omissions.<sup>375</sup> Article 130 sets out the grave breaches of the Convention and includes torture or inhuman treatment, or being wilfully subjecting a detainee to great suffering.<sup>376</sup> Such grave breaches are classified as war crimes and States Parties to the Conventions must make these actions

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<sup>372</sup> There cannot be prisoners of war in a NIAC

<sup>373</sup> Article 4A Geneva Convention III 1949

<sup>374</sup> However, where there is some question as to whether persons 'having committed a belligerent act and having fallen into the hands of the enemy' are covered by the Third Geneva Convention, they must enjoy the protection of the Convention until 'such time as their status has been determined by a competent tribunal.' Article 5, Geneva Convention III 1949

<sup>375</sup> Article 13 Geneva Convention III 1949

<sup>376</sup> Article 130 Geneva Convention III 1949

illegal in their national law.<sup>377</sup> While internment of POWs is allowed<sup>378</sup>, it may only take place in premises located on land, with every guarantee of hygiene and healthfulness: where this is breached, POWs must be moved to a less injurious area.<sup>379</sup> Article 48 requires POWs to be notified, and be allowed the opportunity to notify next of kin, should their location change.<sup>380</sup>

#### D. The Civilian Convention

If al-Qaeda operatives do not fall under the protection of the Third Convention, it can be argued that they will enjoy the protection of the Fourth Convention: in the *Delalic* case, the ICTY stated that “There is no gap between the Third and Fourth Geneva Conventions and ... if an individual is not entitled to protection of the Third Convention ... he or she necessarily falls within the ambit of Convention IV.”<sup>381</sup> Article 27 of the Fourth Convention provides protection from violence or the threat of violence, as well as requiring all civilians to be treated humanely.<sup>382</sup> In a similar vein, civilians may not be subject to ‘physical or moral coercion ... in particular to obtain information from them or from third parties.’<sup>383</sup> The prohibition against torture is reiterated further, with Article 32 requiring the High Contracting Parties to agree that ‘each of them is prohibited from taking any measure of such a character as to cause the physical suffering’ applying not only to torture, but also any other ‘measures of brutality whether applied by civilian or military agents.’<sup>384</sup> Again, internment is allowed but only where it is the last resort for and reasons of safety. The decision to intern civilians must include the right to appeal, and also to periodic review of

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<sup>377</sup> Article 129 Geneva Convention III 1949. Further, such grave breaches give rise to universal jurisdiction, and any state is able to prosecute

<sup>378</sup> Article 21 Geneva Convention III 1949

<sup>379</sup> Article 22 Geneva Convention III 1949

<sup>380</sup> Article 48 Geneva Convention III 1949

<sup>381</sup> Above n8, *Prosecutor v Delalic and Others* para. 271

<sup>382</sup> Article 27, Geneva Convention IV, 1949

<sup>383</sup> Article 31, Geneva Convention IV, 1949

<sup>384</sup> Article 32, Geneva Convention IV, 1949



the internment.<sup>385</sup> Grave breaches of the Civilian Convention include torture or inhuman treatment, wilfully causing suffering and wilfully depriving a protected person of the right to a fair trial.<sup>386</sup>

#### E. Unlawful Combatants and Customary International Humanitarian Law

There are however arguments against the position that an individual is definitely protected either by GC III or GC IV: 'a person who purports to be a civilian, but engages in military activities against the enemy can be considered neither civilian nor combatant'<sup>387</sup>; 'a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier'.<sup>388</sup> The result of this is that such persons are designated as unlawful combatants and receive protection neither from the Third nor the Fourth Conventions.<sup>389</sup> It is not the case however that such persons are beyond the scope of international humanitarian law: instead they will be protected by customary rules. Article 1 of the First Additional Protocol to the Geneva Conventions (which relates to the protection of victims of IACs) states that 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'<sup>390</sup> Further, Article 75 (which applies where an individual does not 'not benefit from more favourable treatment under the Conventions or under this Protocol'<sup>391</sup>) lists a number of acts which are prohibited and will apply at any time and in any place whatsoever including 'violence to the life, health, or physical or mental well-

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<sup>385</sup> Article 78, Geneva Convention IV, 1949

<sup>386</sup> Article 147, Geneva Convention IV, 1949

<sup>387</sup> Crawford, E *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford, Oxford University Press 2010) 54

<sup>388</sup> Dinstein, Y *The Conduct of Hostilities under the Law of International Armed Conflict* (2<sup>nd</sup> edn, Cambridge, Cambridge University Press 2010) 29

<sup>389</sup> Above n387, 54-5

<sup>390</sup> Article 1(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

<sup>391</sup> Article 75(1) Additional Protocol 1

being of persons, in particular ... torture of all kinds, whether physical or mental'.<sup>392</sup> Additionally subsection 3 provides that 'Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.'<sup>393</sup>

The Geneva Conventions provide a series of provisions which aim to protect against many of the constituents of the archetypal extraordinary rendition. Torture and inhuman treatment, prolonged secret detention and access to the courts are all covered in the Conventions, with some aspects covered in the grave breaches provisions. Overall, the Geneva Conventions should provide a robust protection of the rights extraordinary rendition seeks to infringe.

### Customary International Law

While treaties create laws which must be followed by States Parties, there is another important source of international law which must be considered. Customary international law may bind states in the absence of an express treaty or covenant. There are historically<sup>394</sup> two main requirements for the formation of new customary international laws: the first being consistent state practice and the second being *opinio juris sive necessitatis* (that the states in question were acting in such a way because they believed they were under a legal obligation to do so): it was stated in the *Continental Shelf case* that 'it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.'<sup>395</sup> Therefore, where 'enough states act in such consistent manner, out of a sense of legal obligation, for a long enough

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<sup>392</sup> Article 75(2) Additional Protocol 1

<sup>393</sup> Article 75(3) Additional Protocol 1

<sup>394</sup> It can be argued that there are other ways for international norms to develop, see Baker, RB 'Customary international law in the 21st century: old challenges and new debates' (2010) 21 EJIL 173, 173-4

<sup>395</sup> International Court of Justice, *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)*, judgment, 3 June 1985, ICJ Reports 1985, pp29-30, para 27

period of time, a new rule of international law is created.<sup>396</sup> There is also a sub-category of customary international law known consisting of peremptory norms of international law which enjoy a higher status in the international legal hierarchy: they are non-derogable and must be adhered to at all times, in all places, and by all states. These intransgressible norms have the capacity to render void any national laws which prima facie breach their provisions.<sup>397</sup>

#### A. State Practice

The International Review of the Red Cross (IRRC) has analysed how new norms of customary international law develop.<sup>398</sup> In terms of state practice, the IRRC suggested that the requirement of state practice comprises both physical and verbal acts: physical acts may refer to the treatment of persons in custody while verbal acts may include the opinions of official legal advisors.<sup>399</sup> The weight that ought to be attached to these acts is debatable. There are some who would say that 'talk is cheap' and that in the absence of any physical acts no state practice can be demonstrated.<sup>400</sup> However, verbal acts are in fact the far more common form of state practice, and international tribunals regularly consider them when taking decisions.<sup>401</sup> While verbal acts constituting state practice may include the decisions of *national* courts, it does not generally include the decisions of *international*

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<sup>396</sup> Above n394, 176

<sup>397</sup> Referring specifically to torture 'It would be senseless to argue, on the one hand that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law' in de Wet, E 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' (2004) EJIL 97, 98

<sup>398</sup> Henckaerts, J-M 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 IRRC 175  
<[http://www.icrc.org/eng/assets/files/other/irrc\\_857\\_henckaerts.pdf](http://www.icrc.org/eng/assets/files/other/irrc_857_henckaerts.pdf)>

<sup>399</sup> *Ibid*, 179

<sup>400</sup> International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, 13

<sup>401</sup> "*Lotus*" case (1927), *PCIJ Ser. A*, No. 10, pp. 23, 26-30; *Nottebohm case (2nd Phase)*, *ICJ Rep.* 1955, p. 4 at pp.21-23; *Nuclear Weapons*, *ICJ Rep.* 1996, p. 226, e.g. at 259-61 (paragraphs 86, 88)

courts which are not state organs. However, where an international court declares the existence of a norm of customary international law, this may constitute 'persuasive evidence to that effect'.<sup>402</sup> Perhaps the most important case for the determination of the existence of a new norm of customary international law is the *North Sea Continental Shelf case*.<sup>403</sup> In that case, it was declared that state practice must be 'both extensive and virtually uniform' in order for it to be deemed consistent.<sup>404</sup> However, it is not the case that the practice must be universal, it can be sufficient that the practice is 'general'.<sup>405</sup> There are no time constraints for the formation of state practice, with the ICJ stating that

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked ..."<sup>406</sup>

Rather it is necessary that state practice develop, in whatever timeframe, to the point that it is sufficiently dense in terms of uniformity, extent and representativeness.<sup>407</sup>

### B. *Opinio Juris*

The second criterion of *opinio juris* is a far harder concept to demonstrate. It is a subjective assessment which relies upon the analysing the reasons why states have acted in the way they have. For both the International Law Association (ILA) and the IRRRC the process of determining whether or not *opinio juris* existed proved difficult or even impossible, and

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<sup>402</sup> Above n398, 179

<sup>403</sup> International Court of Justice, *North Sea Continental Shelf cases*, judgment, 20 February 1969, ICJ Reports 1969, p.3

<sup>404</sup> Ibid, 43 para 74

<sup>405</sup> Above n400, 23

<sup>406</sup> ICJ, *North Sea Continental Shelf cases*, Judgement, 20 February 1969, *ICJ Reports 1969*, p. 44, para 74

<sup>407</sup> Above n400, 20

largely theoretical.<sup>408</sup> This is because where there is sufficiently dense state practice, it is perhaps unnecessary to then begin looking for the second requirement: it is highly likely that states are acting in such a way because they believe they are obliged to do so.<sup>409</sup> The IRRIC argues that the need for *opinio juris* is most where states do not act or react: in other words omissions.<sup>410</sup> The ILA prefers to say that while *opinio juris* is not necessary all of the time, proof of its absence may be sufficient to prevent the formation of new customary international law.

### C. The Vienna Convention on the Law of Treaties

Customary international law is also referred to in the Vienna Convention on the Law of Treaties (VCLT)<sup>411</sup> and the Statute of the International Court of Justice (ICJ)<sup>412</sup>. The VCLT states that there is nothing in the Convention which prevents states becoming bound by provisions of treaties to which they are not parties, as provisions may become part of customary international law.<sup>413</sup> Further, the VCLT contains the provision that *jus cogens* norms will override treaties:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>414</sup>

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<sup>408</sup> Ibid, 7; Above n398, 182

<sup>409</sup> Above n398, 182

<sup>410</sup> Ibid

<sup>411</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

<sup>412</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946

<sup>413</sup> VCLT Article 38 Rules in a treaty becoming binding on third States through international custom

<sup>414</sup> VCLT Article 53 Treaties conflicting with a peremptory norm of general international law (“*jus cogens*”)

Similarly, Article 64 states that the emergence of a new *jus cogens* norm will void and terminate any treaty signed before its emergence.<sup>415</sup> The Statute of the ICJ states that in the determination of any matter brought before it, the Court will apply 'international custom, as evidence of a general practice accepted as law' when making its decisions.<sup>416</sup>

#### D. The Rules

There are certain aspects of international law relevant to extraordinary rendition which have reached the level of customary international law. The IRRC provides a list of rules which it believes have attained the level of customary international law. This list includes enforced disappearance (Rule 98) and the arbitrary deprivation of liberty (Rule 99).<sup>417</sup> Through analysis of a variety of legal resources including treaty law, legal scholarship and general comments amongst other sources, it has been argued that the principle of non-refoulement has attained the level of customary international law.<sup>418</sup> In terms of indefinite, secret or incommunicado detention, the UN Joint Study on Secret Detention stated that where the detention is coupled with a breach of non-refoulement, it will also constitute a breach of customary international law.<sup>419</sup> The IRRC also stated that the prohibition on torture is another norm of customary international humanitarian law. However, it is almost certainly the case that the prohibition on torture has reached the level of *jus cogens* and therefore cannot be derogated from at any time for any reason. This position is 'clear beyond cavil' and evidence for this can be found in the numerous international human

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<sup>415</sup> VCLT Article 64 Emergence of a new peremptory norm of general international law ("jus cogens")

<sup>416</sup> Article 38(1)(b) Statute of the International Court of Justice available at <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>

<sup>417</sup> Above n398, 207

<sup>418</sup> Duffy, A 'Expulsion to face torture? Non-refoulement in international law.' (2008) 20 I.J.R.L. 373, 389

<sup>419</sup> Above n306, 28

rights and humanitarian law treaties which prohibit torture<sup>420</sup>, as well as decisions such as *Pinochet (No. 3)*.<sup>421</sup>

## IV

### Applying the Law to the Facts

Having laid out the alleged facts relating to European States, and having considered which legal regimes may apply to these facts, it is now necessary to determine whether the circumstances lead to the conclusion that European States bear some responsibility for their part in the extraordinary rendition programme. As a useful starting point, the International Law Commission's Articles on State Responsibility will be considered as a tool for determining when conduct may be attributed to a particular State. Secondly, attention will turn to the concept of complicity and how that affects the assessment of the facts.

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<sup>420</sup> Sharma, HR 'Willing accomplices: third-party complicity in the policy of "extraordinary renditions" under international criminal law' (2006)Crim Law 5, 5

<sup>421</sup> Sands, P 'The international rule of law: extraordinary rendition, complicity and its consequences' (2006) EHRLR 408; '...the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction...' R v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147, 276 per Lord Millett

Finally, the discussion will focus on the areas European States have offered assistance (which were identified in Chapter II) namely secret detention, torture, overflights and unlawful transfers.

### *The ILC Articles on State Responsibility*

The International Law Commission's (ILC) Articles on State Responsibility<sup>422</sup> set out in four parts a map for determining when a State should be held responsible under international law. They represent a valuable tool which may be applied to the law and facts previously laid out and utilised to determine whether or not European states may be responsible for their part in the extraordinary rendition programme. Part One details the requirements for the international responsibility of a State to arise; Part Two deals with the legal consequences of international responsibility; Part Three identifies which States may enforce responsibility; and Part Four contains some general provisions.<sup>423</sup> The Articles deal with responsibility in its entirety: that is to say responsibility arising out of treaty law as well as customary international law, and they cover instances where a duty is owed to a single State or a multitude of States.<sup>424</sup> The Articles do not purport to elucidate the primary obligations owed by States – the rules laid down in treaties or by customary international law – but rather provide a framework for determining which State is responsible where there has been a prima facie breach of a primary rule.<sup>425</sup> In that sense they provide a series of secondary obligations which apply immediately by operation of the law of state responsibility<sup>426</sup>

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<sup>422</sup> International Law Commission 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001)  
<[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>

<sup>423</sup> Ibid, 32

<sup>424</sup> Ibid

<sup>425</sup> Ibid, 31

<sup>426</sup> Crawford, J 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 American Journal of International Law 874, 876



Article 1 opens with the statement '[e]very internationally wrongful act of a State entails the international responsibility of that State.'<sup>427</sup> The commentary makes clear that any reference to an 'act' includes omissions.<sup>428</sup> This position reflects international case law emanating from both the Permanent Court of International Justice (PCIJ) and its successor the International Court of Justice (ICJ). In the *Phosphates in Morocco* case the PCIJ stated that upon the commission of an internationally wrongful act by one State against another, international responsibility is established "immediately as between the two States".<sup>429</sup> Article 1 may also find a basis in the *Corfu Channel* case which dealt with Albania's failure to warn British ships of the threat of sea mines. The ICJ stated that '[t]hese grave omissions involve the international responsibility of Albania.'<sup>430</sup>

Article 2 lays out the parameters of an 'internationally wrongful act'. Such an act occurs when an act or omission of one State is '(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.'<sup>431</sup> The PCIJ referred to such requirements when it stated that for a State to be internationally responsible any acts or omissions must be 'attributable to the State and described as contrary to the treaty right[s] of another State.'<sup>432</sup> The crucial requirement of this Article, as the commentary makes clear, is that any act or omission in question must be sufficiently attributable to the conduct of a State before responsibility can attach to that State.<sup>433</sup> The Articles do not specify what type of conduct may be considered, or indeed whether

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<sup>427</sup> Article 1 ILC Draft Articles on State Responsibility

<sup>428</sup> Above n422, 32

<sup>429</sup> *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28

<sup>430</sup> *Corfu Channel*, Merits, Judgment, I.C.J. Reports 1949, 4, 23

<sup>431</sup> Article 2 ILC Articles on State Responsibility

<sup>432</sup> *Phosphates in Morocco* case above n8

<sup>433</sup> Above n422, 35

attribution is derived from objective or subjective analysis of the conduct; instead this is left to the primary rules.<sup>434</sup>

In order for conduct to be attributed to a State, it must have been carried out by a State organ, and that organ may be legislative, executive, judicial or carry out any other function of the State.<sup>435</sup> The ICJ has categorised this rule as having 'customary character'.<sup>436</sup> Article 7 of the Draft Articles further clarifies this position. Under this Article, conduct may be imputed to that State even though it was carried out *ultra vires* or even where the act contravenes official instructions.<sup>437</sup> This rule has its basis in the *Caire* case by the French-Mexican Claims Commission where it was found that the actions of two Mexican officers would be attributed to the State 'even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order' because at all times they acted under the 'cover of their status as officers...'<sup>438</sup> This rule has also been applied in the *Velásquez Rodríguez* case by the Inter-American Court of Human Rights which has stated that '...under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.'<sup>439</sup>

Article 12 deals with the term 'breach', and provides an explanation of where a breach occurs. According to this Article '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation,

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<sup>434</sup> That is to say, whether the act in and of itself is sufficient for attribution, or whether the individual carrying out the act must have knowledge of the situation in which he is acting: Above n422, 34

<sup>435</sup> Article 4 ILC Articles on State Responsibility

<sup>436</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion, I.C.J. Reports 1999, p. 62, p. 87, para. 62

<sup>437</sup> Article 7 ILC Articles on State Responsibility

<sup>438</sup> *Caire* case UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929)

<sup>439</sup> *Velásquez Rodríguez v. Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988)

regardless of its origin or character.<sup>440</sup> The nexus between Article 12 and the primary rules is clear: no infringement will be proven by reference to Article 12 alone as one must always look back to the obligation which may potentially have been breached. The commentary makes clear that 'international obligations' may arise from customary international law, through treaties or by a general principle of international law.<sup>441</sup>

Article 16 is important in allocating responsibility for a State which is not the primary actor in a breach, and may be particularly pertinent in terms of extraordinary rendition. It provides that

'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.'

Article 16 effectively sets out a definition of complicity which is discussed in greater detail below. The commentary offers examples of when Article 16 may apply and includes '...knowingly providing an essential facility [or] facilitating the abduction of persons on foreign Soil...'<sup>442</sup> While providing for the responsibility of the assisting State, Article 16 does not preclude the responsibility of the acting State. Instead, as the commentary makes clear, the assisting state will assume liability only so far as its own conduct 'caused or contributed to the internationally wrongful act.'<sup>443</sup>

Part II of the Draft Articles begins with Article 28 stating that an internationally wrongful act entails legal consequences for the responsible State.<sup>444</sup> Article 29 makes clear that

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<sup>440</sup> Article 12 ILC Articles on State Responsibility

<sup>441</sup> Above n422, 55

<sup>442</sup> Ibid, 66

<sup>443</sup> Ibid

<sup>444</sup> Article 28 ILC Articles on State Responsibility

responsible States are under a duty to continue to perform their obligations.<sup>445</sup> Article 30 requires that the responsible State cease carrying out the unlawful act and make assurances as to its non-repetition.<sup>446</sup> Cessation is one of the two general consequences of an internationally wrongful act.<sup>447</sup> The second, reparation, is set out in Article 31. Responsible States must make reparation in full for any injury its unlawful conduct has caused including both material and moral damage. In the *Factory at Chorzów* case the PCIJ stated that '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'<sup>448</sup> Further, reparation must as far as possible put the injured State back into the same position as it was prior to the breach.<sup>449</sup> Reparation does not necessarily accrue in favour of the injured States: human rights treaties are for the good of individuals and it is individuals who should be the ultimate beneficiaries of any reparation.<sup>450</sup>

Article 34 sets out three ways in which reparation may take place: restitution, compensation and satisfaction.<sup>451</sup> Restitution requires the responsible state to restore the injured state to the position it would have been in had the breach not occurred, provided it is not materially impossible and does not involve a cost out of proportion to the benefit.<sup>452</sup> The *Factory at Chorzów* case makes clear that where the cost of restoring the undertaking is exponentially high, the appropriate response is to pay compensation at the undertaking's 'value at the time of the indemnification'.<sup>453</sup> Compensation is therefore not intended to be

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<sup>445</sup> Article 29 ILC Articles on State Responsibility

<sup>446</sup> Article 30 ILC Articles on State Responsibility

<sup>447</sup> Above n422, 89

<sup>448</sup> *Factory at Chorzów, Jurisdiction* 1927, P.C.I.J., Series A, No. 9, p. 2, 21

<sup>449</sup> *Factory at Chorzów, Merits* Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29, 47

<sup>450</sup> Above n422, 95

<sup>451</sup> Article 34 ILC Articles on State Responsibility

<sup>452</sup> Article 35 ILC Articles on State Responsibility

<sup>453</sup> Messineo, F '“Extraordinary renditions” and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy' (2009) 7 J.I.C.J 10236, 48

punitive or exemplary.<sup>454</sup> Satisfaction becomes possible where restitution and compensation are not and may involve 'an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.'<sup>455</sup>

Article 40 addresses the resultant responsibility arising out of a serious breach of a peremptory norm of general international law. The Article applies only where the breach is serious; this means either gross (referring to the intensity of the violation or its effects) or systematic (whereby the violation is carried out in an organised or deliberate way).<sup>456</sup> The commentary suggests that evidence of a serious breach may come from a clear intention to violate a norm, the scope or number of violations and the gravity of the consequences for the victims.<sup>457</sup> The definition of a peremptory norm of international law is to be taken from Article 53 of the Vienna Convention on the Law of Treaties 1969.<sup>458</sup> Article 41(2) prohibits States from rendering 'aid or assistance in maintaining that situation [of a breach of a peremptory norm of international law].'<sup>459</sup> This is to be read with Article 16, but also goes beyond the provisions contained within that Article: it applies to the situation after the fact whereby one State helps another State maintain a breach of a peremptory norm.<sup>460</sup>

In terms of invoking the responsibility of a State, Article 42 makes clear that any injured State may do so, provided the obligation breached was owed to that State individually, or to a group of States including that State, or the international community as a whole.<sup>461</sup>

However, under Article 48 any State other than an injured State may invoke the

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<sup>454</sup> *Velásquez Rodríguez v. Honduras* case, Inter-American Court of Human Rights Series C, No. 4, para. 134 (1988)

<sup>455</sup> Article 37 ILC Articles on State Responsibility

<sup>456</sup> Article 40 ILC Articles on State Responsibility

<sup>457</sup> Above n422, 113

<sup>458</sup> A norm which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' Article 53 Vienna Convention on the Law of Treaties 1969

<sup>459</sup> Article 41(2) ILC Articles on State Responsibility

<sup>460</sup> Above n422, 115

<sup>461</sup> Article 42 ILC Articles on State Responsibility

responsibility of another State if the obligation is owed to a group of States including that State or if the obligation is owed to the international community as a whole. Such obligations are often referred to as 'obligations *erga omnes*' and will usually include human rights obligations. In the *Barcelona Traction* case the ICJ stated that where such universal obligations are breached, any State may invoke the responsibility of the breaching State.<sup>462</sup>

### *The Concept of Complicity*

Of course, while accusations of European involvement in the extraordinary rendition programme are rife, there are very few people who suggest that the states involved were themselves directly carrying out the prohibited acts. That is not to say that they were unaware that certain acts were taking place. Indeed, as Senator Marty makes clear, '[i]t is inconceivable that certain operations conducted by American services could have taken place without the active participation, or at least the collusion, of national intelligence services'.<sup>463</sup> Therefore, responsibility may still arise from the concept of complicity in an internationally outlawed act.

Complicity is an internationally recognised juridical construct which is based on one state's knowledge of the actions or intended actions of another state.<sup>464</sup> It remains to be seen whether this knowledge must be actual, constructive or imputed. Even so, given the widespread reporting of extraordinary rendition, it seems inconceivable that European States would not have some level of knowledge of the programme.<sup>465</sup> Terry Davis (former Secretary General of the Council of Europe) stated European governments are under an obligation to investigate reports of such gross human rights abuses: "Not knowing is not

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<sup>462</sup> *Barcelona Traction, Light and Power Company, Ltd.* case [1970] ICJ Rep. 3

<sup>463</sup> Committee on Legal Affairs and Human Rights 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states' (7 June 2006)  
<[http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf)> 50

<sup>464</sup> See above in the discussion on the ILC's Articles on State Responsibility

<sup>465</sup> Amnesty International 'Document – "Rendition" and secret detention: A global system of human rights violations. Questions and Answers'  
<<http://www.amnesty.org/en/library/asset/POL30/003/2006/en/d3c8c373-d468-11dd-8743-d305bea2b2c7/pol300032006en.html>>

good enough regardless of whether ignorance is intentional or accidental.”<sup>466</sup> Further, where security services share information with, or facilitate the transfer of detainees, to other states which are known to have a poor record in terms of human rights, it is ‘difficult to resist the argument that States are complicit, wittingly or unwittingly’ in any human rights violations which may follow.<sup>467</sup>

Article 1 ECHR requires states to provide the protection of the ECHR throughout its territory.<sup>468</sup> The effect of this is to render European States liable for breaches which take place on their territory as if they had committed the breach themselves provided they had prior knowledge of its occurrence. Similarly, the ICCPR requires that States Parties provide protection for ‘all individuals within its territory and subject to its jurisdiction...’<sup>469</sup> This would therefore imply that where a state is involved in a human rights violation by another state within its territory or against an individual subject to its jurisdiction, it would be difficult to dismiss the charge that it was complicit and therefore responsible for the breach under the ICCPR.

The UN Joint Study on Secret Detention has outlined a detailed definition of complicity taking place in the context of secret or unlawful detention. A state will be complicit where it

(a) has asked another State to secretly detain a person; (b) knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person, or solicits or receives information from persons kept in secret detention; (c) has actively participated in the arrest and/or transfer of a person when it knew, or ought to have known, that the person would disappear in a secret detention facility, or otherwise be detained outside the legally regulated detention system; (d) holds a person for a short

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<sup>466</sup> Ibid

<sup>467</sup> International Commission of Jurists ‘Assessing Damage, Urging Action’ (Geneva, 2009) <<http://ejp.icj.org/IMG/EJP-Report.pdf>> 85

<sup>468</sup> Article 1 ECHR - Obligation to respect human rights

<sup>469</sup> Article 2(1) ICCPR

time in secret detention before handing them over to another State where that person will be put in secret detention for a longer period; and (e) has failed to take measures to identify persons or airplanes that were passing through its airports or airspace after information of the CIA programme involving secret detention has already been revealed<sup>470</sup>

Clearly there are numerous ways in which a European State may be responsible through complicity. Indeed, the Venice Commission states that in terms of secret detention, the complicit state may be active or passive and highlights the ECtHR ruling that “the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention.”<sup>471</sup> States also must not take advantage of a person who is detained incommunicado in terms of forcing confessions or extracting testimony against a third person.<sup>472</sup>

In terms of complicity in acts of torture, it may be determined that States will be responsible where one state offers another state information for use during interrogations, where a state receives information knowingly derived from torture, or allows an individual to be transported to a country where torture is known to be used during interrogations. The Convention against Torture, the key international treaty regulating torture, requires only a minimum level of state action for its provisions to be engaged. Pain or suffering

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<sup>470</sup> UN Human Rights Council ‘Joint study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin’ (February 2010)

<<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/a-hrc-13-42.pdf>> 3-4

<sup>471</sup> European Commission for Democracy Through Law (Venice Commission) ‘On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners’ (Venice, March 2006)

<[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf)> para 126; *Ilascu and others v. Moldova and Russia*, (2005) 40 E.H.R.R. 46, para 318

<sup>472</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, 9 December 1988, principle 21.



which may amount to torture need only be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>473</sup> Specifically referring to the receipt of information obtained through torture, the Temporary Committee on Illegal Detention (TCID) stated that it was ‘outraged’ by the legal opinion of Michael Wood<sup>474</sup> who stated that where there is no direct participation in the torture, it is not per se unlawful to receive or possess information extracted under torture.<sup>475</sup> There is of course a middle ground to be struck in terms of the constraints to be placed upon security services in regarding the receipt of information. Further, the TCID neglects to include a reference to the knowledge surrounding the receipt of such information.

It is useful here to draw on the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR respectively). While these tribunals deal with individual responsibility, the concepts could be analogously applied on an international level. Specifically, the tribunals have looked into the concept of ‘accomplice liability’ which applies in international criminal law, and which some have argued could apply to States who are complicit in the extraordinary rendition programme.<sup>476</sup> The ICTR determined that “anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.”<sup>477</sup> The ICTY concluded that the accomplice’s involvement need only have a ‘substantial effect’ on the commission of the offence; this is satisfied where but for the accomplice’s assistance, the criminal act ‘most probably would not have occurred in the

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<sup>473</sup> Article 1(1) UN Convention against Torture

<sup>474</sup> At the time, Legal Advisor to the Foreign and Commonwealth Office

<sup>475</sup> Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, Giovanni Claudio Fava, ‘Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners’ (2006/2200(INI)) <[http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf)> 15

<sup>476</sup> ‘The applicable standards under international law leave little room for doubt that a criminal charge of accomplice liability could be made against the European states and actors who assisted and encouraged the U.S. in pursuing its policy of “extraordinary renditions.”’ H. Rajan Sharma ‘Willing accomplices: third-party complicity in the policy of “extraordinary renditions” under international criminal law’ (2006) *Crim Law* 5, 6

<sup>477</sup> ICTR Trial Chamber, *Prosecutor v. Akayesu*, ICTR-96-4-T, judgment, 2 Sept. 1998, at para 539

same way...<sup>478</sup> The ICTY goes further, in establishing a conception of complicity which seems to contain the elements of actus reus and mens rea.<sup>479</sup> In the *Tadic* case, it was determined that in order to prove accomplice liability, there must be intent which 'involves awareness of the act of participation coupled with a conscious decision to participate' as well as actual participation in the commission of the crime.<sup>480</sup> Applying this logic on an interstate level, this would seem to imply that States require knowledge of the violation of international law, coupled with actions which facilitate this violation.

Awareness of the potential for complicity in extraordinary rendition was demonstrated by the UK through the Joint Committee on Human Rights (JCHR). In its nineteenth report of session, the JCHR stated that cooperation with foreign intelligence services (in terms of receiving information, attending interrogations or providing information either for facilitating the initial detention or for use in subsequent interrogations) must take place in a way which does not lead to accusations of complicity.<sup>481</sup> Where procedural safeguards which protect against the appearance of 'active or tacit approval' of actions which breach a number of international human rights treaties are not effected, accusations of complicity will become easier to prove.<sup>482</sup>

Given the numerous ways in which complicity may arise, this represents a serious threat for international responsibility for breaches of human rights treaties and covenants by European states.

### *Applying the Law to the Facts*

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<sup>478</sup> ICTY Trial Chamber, *Prosecutor v. Tadic*, IT-94-1, judgment, 7 May 1997, at para 688

<sup>479</sup> *Prosecutor v Akayesu*, 6 CHANGE PROBABLY 495

<sup>480</sup> *Tadic* at para 674

<sup>481</sup> Joint Committee on Human Rights 'The UN Convention Against Torture (UNCAT)' Nineteenth Report of Session 2005–06 Volume I – Report and formal minutes HL Paper 185-I HC 701-I Published on 26 May 2006 by authority of the House of Lords and the House of Commons, London: The Stationery Office Limited, 22

<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>>

<sup>482</sup> *Ibid* 23

Having laid out the alleged facts relating to European States, and having considered which legal regimes may apply to these facts, it is now necessary to determine whether the circumstances lead to the conclusion that European States bear some responsibility for their part in the extraordinary rendition programme. It bears repeating at this stage that the accusations levelled at European states are for the most part unsubstantiated. The analysis offered in this section seeks to address whether the claims made could lead to a finding of international responsibility should they be verified.

#### A. Secret Detention

The most pointed accusations for responsibility for secret detention are directed at Poland, Romania and Lithuania and these states will be considered below. These accusations include the establishment of secret facilities for holding detainees captured during the war on terror. The evidence for these accusations come from a variety of sources, but includes especially eyewitness testimony from state officials, as well as inferences drawn from flight records into and out of the aforementioned countries.<sup>483</sup> The European Convention on Human Rights (ECHR), International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture each address the issues raised by secret detention. Responsibility in this area can potentially be as the primary State actor (actually carrying out the detention) or as the secondary State actor through complicity (providing the conditions for the breach to take place).

Assuming that the facilities in questions were actually used to carry out detentions, their establishment may be attributed to the States themselves.<sup>484</sup> If the national security forces in question were themselves detaining individuals, the following provisions will apply. Article 5 of the ECHR provides to all the right to liberty and security. Secret detention sites

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<sup>483</sup> See Chapter 2 above

<sup>484</sup> According to the ILC's Articles on State Responsibility, actions of state officials allow actions to be imputed to the State and this is the case even where the actions were *ultra vires*: Articles 4 and 7 ILC Articles On State Responsibility, see discussion above

will violate this Article on account of the arbitrary nature of the detention. The European Court of Human Rights (ECtHR) has regularly suggested that where detention is arbitrary in nature, it is often the case that a breach of Article 5 ensues.<sup>485</sup> Secret detention for the purposes of extraordinary rendition can also not be considered to fall within one of the exceptions defined in Article 5(1)(a-f), which must be construed narrowly<sup>486</sup>, and will therefore once again constitute a breach of the ECHR.<sup>487</sup> Article 5 requires that individuals detained by the State must be told promptly of the reasons for their incarceration, as well as being given the opportunity to challenge the grounds upon which they have been detained.<sup>488</sup> It is a necessary element of a secret detention that any challenge is not permitted and it follows that it is highly likely that the reasons for detention are never fully revealed, thus providing yet another aspect upon which a finding of international responsibility may be determined. Secret detention will also violate Article 6 which demands that individuals must have access to a fair and public hearing in the determination of his civil rights and obligations.<sup>489</sup> Secret detainees are prevented from accessing the court system in order to challenge their treatment in detention, or indeed the detention itself. Detainees are often held for years at a time which must certainly constitute an unreasonable delay in allowing a claim to be brought. Reasonable delays are judged relative to the 'acuteness' of what is at stake for the applicant.<sup>490</sup> It is not a stretch to consider that a significant delay in a civil claim for challenging secret detention would affect an acute interest.

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<sup>485</sup> *Winterwerp v Netherlands* (1979-80) 2 E.H.R.R. 387

<sup>486</sup> *Ibid*

<sup>487</sup> Above n471, para 50

<sup>488</sup> Article 5(2-4) ECHR

<sup>489</sup> Article 6 ECHR

<sup>490</sup> *Blake v UK* (2007) 44 E.H.R.R. 29 p641 paras 41 and 43

Article 9 of the ICCPR contains a similar provision which states that deprivations of liberty must not be arbitrary and must take place through a procedure as established by law.<sup>491</sup> Article 9 applies to all forms of deprivation of liberty, and must therefore apply to extraordinary rendition (which may be considered to be preventative detention).<sup>492</sup> Arbitrariness may be judged as 'against the law' but considerations of injustice and inappropriateness must also be considered.<sup>493</sup> Secret detention is not a process established by law, and must be considered inappropriate in the circumstances; other less extreme measures ought to be available, including legitimate detention following a full criminal trial. The UN Joint Study on Secret Detention argues that even where secret detention is permitted by national law it would still not be legitimate as it would contravene international law.<sup>494</sup> None of those captured via extraordinary rendition and allegedly held in Poland, Romania or Lithuania were done so in accordance with an arrest warrant, or at the behest of the orders of a properly constituted court. According to the Human Rights Committee this makes the detention unlawful for the purposes of the Covenant.<sup>495</sup> The ICCPR also contains a provision whereby individuals deprived of their liberty must be able to challenge the legitimacy of their detention.<sup>496</sup> Again, as secret detention does not permit this, it must be considered to breach the ICCPR.

The act of secret or incommunicado detention has also been addressed by the Committee Against Torture. The Committee feels that prolonged isolated detention can amount to

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<sup>491</sup> Article 9 ICCPR

<sup>492</sup> General Comment 8 – Right to liberty and security of persons (Art. 9), paras 1 and 4  
<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument)>

<sup>493</sup> *A v Australia* CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 30 April 1997

<sup>494</sup> Joint Committee on Human Rights 'The UN Convention Against Torture (UNCAT)' Nineteenth Report of Session 2005–06 Volume I – Report and formal minutes HL Paper 185-I HC 701-I Published on 26 May 2006 by authority of the House of Lords and the House of Commons London: The Stationery Office Limited

<<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>> p15

<sup>495</sup> *Basilio Laureano Atachahua v Peru* CCPR/C/56/D/540/1993, UN Human Rights Committee (HRC), 16 April, 1996

<sup>496</sup> Article 9(4) ICCPR

cruel and inhuman treatment; Satterthwaite suggests that when combined with 'coercive interrogation techniques' the issue of secret, prolonged detention is more accurately characterised as torture.<sup>497</sup> In its Conclusions and recommendations relating to the US in 2006, the Committee stated that secret detention is *per se* a violation of the Convention.<sup>498</sup>

In terms of liability through complicity, it is difficult to see how Poland, Romania and Lithuania, through the provision of places of detention, could not fall within the requirements of Article 16 of the Articles on State Responsibility. It is hard to resist the argument that such facilities would have been set up without any knowledge of their purpose. Indeed, the facility in Lithuania was found by a Lithuanian government inquiry (the Seimas Committee) to be perfectly equipped to house detainees.<sup>499</sup> As the Commentary to the ILC's Articles makes clear, the provision of an essential facility engenders State responsibility through complicity and secret detention cannot take place without a place to detain prisoners. If the facts as presented are accurate, it seems impossible to come to any conclusion other than a finding of State responsibility through complicity for the three States considered.

Secret or incommunicado detention is patently unlawful in international law. However, the current international legal regime does not attempt to completely remove States' ability to detain individuals. Rather, it seeks to remove arbitrariness from the process, to ensure that those detained are done so with good reason, and having been given the opportunity to challenge the lawfulness of their detention. De Londras states that freedom from arbitrary detention 'constitutes a 'moral fence' protecting us from unjust interference in our

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<sup>497</sup> Satterthwaite, M 'De-Torturing the Logic: The Contribution of Cat General Comment 2 to the Debate over Extraordinary Rendition' (2008) 11 New York City Law Review 281, 285

<sup>498</sup> See Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture; United States of America, 17, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) (finding that detaining individuals in secret sites constitutes a "per se" violation of the Convention), (available at <[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf)>)

<sup>499</sup> See Chapter 2

liberty'.<sup>500</sup> She is cognisant of States' obligations to protect their citizens from threats, and readily accepts that this may be achieved through a system of preventative detention. However, she correctly asserts that the extraordinary rendition programme bypasses international law: while '[t]he notion of non-arbitrary preventative detention may appear to be somewhat paradoxical' the arbitrariness arises where there is no mechanism to challenge the process.<sup>501</sup> Even if this mechanism rightly takes into account that the threat of international terrorism demands a more relaxed approach to detention, that extraordinary rendition completely does away with any form of protection seems extreme. The Human Rights Committee has had opportunity to assess laws regarding the detention of terrorist suspects in *Alegre v Peru*.<sup>502</sup> Despite Peru arguing that the threats justified the measures taken, the Committee felt that emergencies cannot allow for a total abandonment of the right to challenge the lawfulness of detention.<sup>503</sup> The ECtHR has also had an opportunity to assess this position. In *al-Nashif v Bulgaria* the Court assessed the detention of a stateless Palestinian who Bulgaria had subsequently summarily expelled. It was held that "everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court" and that "[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved ..."<sup>504</sup> Martin Scheinin, in his role as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, feels that the mere administrative detention of individuals represents a violation of international law, and calls for States to recognise their duty to bring such individuals before a court in order to determine whether any criminal charges may be brought against them: 'arbitrarily detain[ing] terrorist suspects

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<sup>500</sup> de Londras, F 'The right to challenge the lawfulness of detention: an international perspective on US detention of suspected terrorists' (2007) 12 J Conflict Security Law 223, 223

<sup>501</sup> Ibid, 244

<sup>502</sup> Communication No. 1126/2002

<sup>503</sup> Ibid para 7.3

<sup>504</sup> *Al-Nashif v. Bulgaria*, Eur. Ct. H.R. App. No. 50963/99 92, 94 (2002)

can never be justified as a legitimate intelligence-led preventive approach to counter-terrorism<sup>505</sup>

As stated, no one is suggesting that States should not be able to detain terrorist suspects in order to prevent attacks, or to have the opportunity to legitimately interrogate them. This process could be given the veneer of credibility if individuals were able to challenge the grounds upon which they are detained before a court. *Habeas corpus* petitions represent the perfect method whereby preventative detention could remove the charge of arbitrariness, by making it more akin to 'ordinary' detention.<sup>506</sup> Indeed, the UN Special Rapporteurs on States of Emergency, Torture and a Right to a Fair Trial each suggest that *habeas* petitions ought to be non-derogable.<sup>507</sup> Substantive *habeas* reviews of detention would eliminate to a large degree the threat of arbitrary, secret detention.

### B. Unlawful Transfer

The archetypal involvement of a European State in an unlawful or irregular transfer can be seen in the cases of Abu Omar and Italy, and Khaled el-Masri and Macedonia. In each, the European States involved assisted in the kidnapping of an individual before handing him over for transfer to another country. The responsibility of these States may be assessed either for their involvement in a transfer which breached the principle of non-refoulement, or because the transfer ignored the requirements of allowing a challenge to be made to the grounds upon which it occurred.

As previously discussed, there are only a limited number of legitimate ways in which an individual may be transferred across borders.<sup>508</sup> The practice of extraordinary rendition

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<sup>505</sup> Scheinin, M 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' General Assembly Distr. GENERAL A/HRC/10/34 (February 2009), 12 para 38; 14 para 43

<sup>506</sup> Above n500, 244

<sup>507</sup> Ibid, 251

<sup>508</sup> See Chapter II



cannot be said to be lawful. It is not a form of deportation, extradition, transit or transfer for the purposes of serving a sentence.<sup>509</sup> The programme is not set out in law, and its association with kidnap makes it inherently unlawful. As a general rule, States are not absolutely bound by any extradition agreements which they have entered into: 'whether or not a state insists upon or waives compliance with bilateral extradition procedures in force between it and another state is a question for those two states alone.'<sup>510</sup> However, while formal procedures may be ignored, transfers must always respect the fundamental rights of the detainee in question.

Perhaps the most egregious breach which arises from transfers and extraordinary rendition is through refoulement. The principle of non-refoulement (that a State may not transfer an individual to another state where there is a substantial risk that they may be subjected to torture) is set out in a number of treaties. While ECHR Article 3 does not specifically reference refoulement, the ECtHR has ruled that it is covered by its wording. *Soering v UK*<sup>511</sup> and *Chahal v UK*<sup>512</sup> initially laid the groundwork for this position, which was recently confirmed in *Saadi v Italy*.<sup>513</sup> The CAT refers to refoulement in Article 3 and absolutely prohibits any transfer where non-refoulement may be breached.<sup>514</sup> Subsection 2 refers to grounds where individuals may be at risk, including the existence in the destination country of a pattern of gross, flagrant or mass violations of human rights.<sup>515</sup>

Abu Omar was a member of the Islamic political organisation al-Gama'a al-Islamiyya which was declared illegal by Egypt. That he was transferred to Egypt ignored the fact that the Egyptian State is well known for torturing its political prisoners. Therefore, it can

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<sup>509</sup> See Chapter II

<sup>510</sup> Borelli, S 'Rendition, torture and intelligence cooperation' in Born, H, Leigh, I and Wills, A (eds.) *International Intelligence Cooperation and Accountability. Studies in intelligence series.* (London: Routledge, 2011), 103

<sup>511</sup> (1989) 11 E.H.R.R. 439

<sup>512</sup> (1997) 23 E.H.R.R. 413

<sup>513</sup> (2009) 49 E.H.R.R. 30

<sup>514</sup> Article 3(1) Convention against Torture

<sup>515</sup> Article 3(2) Convention against Torture

reasonably be argued that Mr Omar was at personal risk of being tortured. Personal risk is something which the Committee against Torture makes clear is indicative of a breach of the principle of non-refoulement.<sup>516</sup> Similarly with Mr el-Masri, the Salt Pit prison in Afghanistan is another location known where mistreatment of prisoners was rife. For their part in the transfer of these two men, Italy and Macedonia are likely to be internationally responsible for a breach of Article 3 of the CAT and Article 3 of the ECHR. State operatives from each country participated in the capture of the two men and as such these actions must be imputed to the state in question according to Article 4 of the ILC's Articles on State Responsibility. Given the fact that the transfers may not have occurred at all had it not been for the two countries in question, it is difficult to resist the argument that they should be found responsible for a breach of Article 3 ECHR.

Article 7 of the ICCPR has also been characterised as bearing on non-refoulement.<sup>517</sup> The Human Rights Committee stated that where there are substantial grounds for believing that there is a real risk of irreparable harm upon transfer, that transfer cannot be effected. In *ARJ v Australia*<sup>518</sup> the HRC stated that where such harm was a necessary and foreseeable consequence of a transfer, then a real risk exists. As with Article 3 of the CAT, such a risk must have existed prior to the transfers of Mr Omar and Mr el-Masri. As it did, the two states are likely also to be responsible for a breach of Article 7 ICCPR. Further, it has also been argued that customary international law also upholds the non-refoulement principle due to its association with torture: Duffy argues that with 90% of the world's sovereign States signed up to the Convention against Torture which prohibits refoulement, there is

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<sup>516</sup> *Balabou Mutombo v Switzerland* (Communication N° 13/1993) 1 Selected Decisions of the Committee against Torture 15

<sup>517</sup> HRC General Comment 20 – Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) para 3  
<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)>

<sup>518</sup> CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997,  
<<http://www.unhcr.org/refworld/docid/4028adfa7.html>>

the necessary state practice and *opinio juris* to suggest that non-refoulement is part of customary international law.<sup>519</sup>

Clearly, the principle of non-refoulement represents a substantial bar to States' ability to transfer individuals out of their territory. European states may argue that transferring an individual into the custody of the US does not represent exposing them to the risk of torture, as the US has regularly made clear that it does not torture detainees. However, this would be out of line with international law. As Satterthwaite makes clear, '...a state cannot discharge its duty not to expose a detainee to risk by first sending the individual to a safe state. The trajectory is irrelevant; what matters is the knowing transfer in the face of a risk.'<sup>520</sup> Borelli too notes this concern when arguing that a State which transfers an individual to the jurisdiction of another, the former is responsible for 'every foreseeable violation of any human right and fundamental freedom' which the transferee may suffer as a consequence of the transfer<sup>521</sup>, and that the non-refoulement principle bars transfers of detainees 'to countries which are likely, in turn, to surrender them to States where their fundamental rights may be breached.'<sup>522</sup> Further, it is the mere act of transferring the individual which engenders the State's responsibility; it does not matter whether or not they are tortured, or subject to cruel or inhuman treatment, but that there was such a risk inherent in the transfer. As the Human Rights Committee stated in *Ng v Canada*: 'The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.'<sup>523</sup>

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<sup>519</sup> Duffy, A 'Expulsion to face torture? Non-refoulement in international law.' (2008) 20 I.J.R.L. 373, 384

<sup>520</sup> Satterthwaite, M and Fisher, A 'Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law' (2006) 6 The Long Term View, 61

<sup>521</sup> Borelli, S 'The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation' in Bianchi, A (ed.), *Enforcing International Law Norms Against Terrorism* (Hart Publishing, 2004), 340

<sup>522</sup> Borelli, S 'Casting light on the legal black hole: International law and detentions abroad in the "war on terror"' (2005) 87 IRRC 39, 64

<sup>523</sup> *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. A/49/90, Vol. II 189 (1993)

In order to overcome this issue, several states have argued for a balancing act to be struck. There is an interesting nexus between expulsion of terrorist threats and the protection of a State's citizenry. If states are under an obligation to protect their citizens from threats, and also under an obligation to prevent people from being exposed to ill treatment through expulsion, where should the balance lie? A Working Document from the European Commission of the European Communities argued that the ECtHR should seek to strike the balance somewhere closer to the protection of a State's citizens. However, this raises a number of difficult questions, such as those identified by Bruin and Wouters: 'First, how will the European Court of Human Rights deal with the political pressure in adopting a 'balancing act' between the protection needs of the individual and the security interests of a State? Second, a more fundamental question is whether or not Article 3 ECHR leaves any room for adopting a 'balancing act'.<sup>524</sup> The determinations of the ECtHR – and the Committee against Torture regarding CAT Article 3 – seem to be absolute. Indeed the Committee has stated that

Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the Activities in which the person is engaged cannot be a material consideration when making a determination under article 3 of the Convention.<sup>525</sup>

Thus it would seem apparent that to suggest that a balancing act could be achieved is contrary to the obligations States are under through international law.

Another method by which States have sought to overcome the prohibition on refoulement is through diplomatic assurances. Essentially, these are agreements which purport to

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<sup>524</sup> Bruin, R and Wouters, K 'Terrorism and the Non-derogability of Non-refoulement' (2003) 15 Int. J. Refugee Law 5, 10

<sup>525</sup> *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997, para 14.5

ensure the receiving nation treats the detainees in a way which is consistent with their national law and international obligations, and in particular seem to be used in order to avoid the obligation on states to prevent *refoulement*. Some assurances contain visitation rights in order for the deporting country to monitor the situation. In its Second Periodic Report to the Committee against Torture, the United States suggested that it will avoid breaching its international responsibilities through the use of diplomatic assurances:

The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred. If assurances were not considered sufficient when balanced against treatment concerns, the United States would not transfer the person to the control of that government unless the concerns were satisfactorily resolved.<sup>526</sup>

The US believes that where these assurances are granted, this removes the risk of torture or ill treatment.<sup>527</sup> European states, including the UK and Italy, have also entered into such agreements with countries such as Jordan, Tunisia and Algeria.<sup>528</sup>

In the abstract, these assurances may seem entirely reasonable: there is a demonstration by the sending state that they are concerned enough about the potential mistreatment of an individual to seek assurances that they will not be subject to mistreatment. Indeed, in Europe assurances are often sought in order to ensure that an individual extradited to, for example, the US will not be subject to the death penalty.<sup>529</sup> Further, international law does not explicitly prohibit their use.<sup>530</sup> For example, the CAT allows for 'relevant considerations'

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<sup>526</sup> Second Periodic Report of the United States of America to the Committee Against Torture <<http://www.state.gov/g/drl/rls/45738.htm>>

<sup>527</sup> Above n465

<sup>528</sup> Jones, K 'Deportations with assurances: addressing key criticisms' (2008) 57 I.C.L.Q. 183, 184; Moeckli, D 'Saadi v Italy: the rules of the game have not changed' (2008) 8 HRL Rev 534, 537-8

<sup>529</sup> See following discussion on *Soering v UK*

<sup>530</sup> 'CAT itself has little to say about the mechanics of determining whether a person is likely to be tortured if transferred, and does not speak at all to the diplomatic assurances issue, let alone forbid their use.' Chesney, R 'Leaving Guantánamo: The Law of International Detainee Transfers' 40 U. Rich. L. Rev. 657, 697

to be taken into account when a decision to expel an individual is taken, and it could be that diplomatic assurances have a role to play in this.<sup>531</sup>

De Londras has identified three requirements which must be present in order for diplomatic assurances to offer adequate protection: '(i) the promise itself must be adequate; (ii) the matter in relation to which the promise is made must be within the control of the promisor; and (iii) the promisor must enjoy credibility in relation to the matter at hand and in relation to the promisee state.'<sup>532</sup> These requirements may be demonstrated in the relevant case law. The first requirement can be seen both in *Soering v UK*<sup>533</sup> (an ECtHR decision) and *Aylor-Davis v France*<sup>534</sup> (a Committee against Torture decision). In the former, a promise was made that should Soering be convicted of murder in Virginia, the UK would be able to make representations that he should not be executed. In that case, the assurance was seen as being inadequate, as Soering may still have been subject to death row phenomenon which was considered a form of cruel treatment. In the latter case however, the promise not to subject the individual to the death penalty was adequate, as it was within the power of the promisor. The second requirement is evidenced by *Chahal v UK*<sup>535</sup> whereby it was felt by the ECtHR that while the promise by the Indian government that Chahal would be well treated was made in good faith, it lacked the power to ensure that the promise would be adhered to.<sup>536</sup> Finally part three is

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<sup>531</sup> Article 3(2) Convention against Torture; The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, New York University School of Law, 'Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"' (2004, modified 2006) Project director: Margaret Satterthwaite, <<http://www.chrgj.org/docs/TortureByProxy.pdf>>, 85

<sup>532</sup> de Londras, F 'Ireland's potential Liability for Extraordinary Renditions Through Shannon Airport' (2007) 25 Irish Law Times 106

<sup>533</sup> (1989) 11 EHRR 439

<sup>534</sup> Application No. 22742/93, 20 January 2004

<sup>535</sup> (1997) 23 EHRR 413

<sup>536</sup> Although the Strasbourg court did not doubt the good faith of the Indian government in giving this assurance, it noted that ill-discipline was common within the Indian security services and that the torture of Sikh activists such as Chahal happened on a relatively regular basis in the Punjab province. This demonstrated that notwithstanding their bona fides the Indian government simply did

demonstrated by *Agiza v Sweden*<sup>537</sup> whereby an Egyptian man was transferred to Egypt after having been convicted in absentia for terrorism offences. Despite promises by Egypt that he would not be mistreated, the Committee against Torture found against Sweden as it ought to have known that security-related and political prisoners are routinely mistreated in Egyptian prisons, and therefore the promisor did not 'enjoy the required level of credibility in relation to the matter at hand and their assurance could not be relied upon.'<sup>538</sup> Objectively assessed, diplomatic assurances therefore seem to be a legitimate method whereby sending states may seek to prevent ill-treatment in the receiving state.

However, there are obvious issues with diplomatic assurances, and especially in the field of extraordinary renditions. First of all, in Satterthwaite's words they seem to be a 'circumvention of the absolute prohibition against torture and refoulement to torture – the creation of "an island of legality, in a sea of illegality."<sup>539</sup> A requirement of the Human Rights Committee and Committee Against Torture relating to diplomatic assurances is that they must be subject to judicial review.<sup>540</sup> As extraordinary rendition seems to rely on secret transfers, the opportunity to challenge the lawfulness of such transfers is necessarily diminished beyond semblance.<sup>541</sup>

Secondly, the assurances are almost always sought from a country whose human rights record is less than perfect and which therefore has no interest in adhering to the

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not have sufficient control within the security services to ensure that their promise could be fulfilled:  
Above n532

<sup>537</sup> Opinion of the Committee against Torture, 24 May 2005, UN Doc. CAT/C/34/D/233/2003

<sup>538</sup> Above n532

<sup>539</sup> The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, New York University School of Law, 'Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"' (2004, modified 2006) Project director: Margaret Satterthwaite, <<http://www.chrgj.org/docs/TortureByProxy.pdf>> 85

<sup>540</sup> Satterthwaite, M 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law' (2006) 75 Geo. Wash. L. Rev. 1333, 1381

<sup>541</sup> Ibid, 1391

agreement.<sup>542</sup> There is also a more sinister scenario whereby assurances are a front, obtained purely to add a veneer of legality to an unlawful transfer. As Satterthwaite points out, 'if renditions are being conducted with the intent of subjecting an individual to coercive interrogations, the incentive structure is classically and horribly perverse: the sending country has an investment in the receiving country's abusive practices, and both states want those abuses to remain secret.'<sup>543</sup> This would suggest that any monitoring mechanism which assurances may call for will not be adhered to or will be ineffective: it would be embarrassing to the sending state if mistreatment were discovered, many of the destination states for extraordinary renditions are adept at hiding their misdeeds, and detainees are often reluctant to reveal mistreatment.<sup>544</sup>

It would seem then that while diplomatic assurances are prima facie within the law, as the authors of 'Torture by Proxy' point out, their implementation in practice raises significant doubts about their reliability as a means of safeguarding against the danger or risk of torture to an individual.

Irregular transfer may also be said to breach the requirement that individuals have the right to challenge decisions which affect their civil rights. Article 6 ECHR provides that 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'<sup>545</sup> The ECtHR requires an analysis of what is actually at stake for the applicant; further what is at risk for an applicant must be 'acute'.<sup>546</sup> It can be argued that the possibility of being transferred to a country where you face the threat of mistreatment,

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<sup>542</sup> Above n467, 105

<sup>543</sup> Satterthwaite, M 'Human Rights and Humanitarian Law in the 'War on Terror': The Story of El Masri v. Tenet', in Ford, D, Hurwitz, D and Satterthwaite, M (eds), *Human Rights Advocacy Stories* (Foundation Press, 2009), 554

<sup>544</sup> Above n539, 89; Chesney, R 'Leaving Guantánamo: The Law of International Detainee Transfers' 40 U. Rich. L. Rev. 657, 696

<sup>545</sup> Article 6 ECHR

<sup>546</sup> *Blake v UK* (2007) 44 E.H.R.R. 29, 641 paras 41 and 43



and indefinite incarceration could be characterised as acute. The ICCPR contains a similar provision in Article 14.<sup>547</sup> Article 14 is of particular importance in safeguarding other rights guaranteed by the Covenant and as such cannot be circumvented where this would impact on non-derogable rights: '[d]eviating from fundamental principles of fair trial ... is prohibited at all times.'<sup>548</sup> Further, according to the Human Rights Committee, States Party to the Covenant must ensure that no individual is deprived of their right to claim justice. This position applies to all individuals regardless of nationality or statelessness who may find themselves in the territory or subject to the jurisdiction of the State party.<sup>549</sup> An all encompassing Article, it would appear to be breached where an individual is unable to challenge their deportation. More specifically, the Covenant also contains an article which refers specifically to the expulsion of aliens. Article 13 states that such an expulsion may only take place where the alien has previously been given the opportunity to challenge the grounds upon which his expulsion has been based. In *Samira Karker v France*, the Committee criticised the State Party on the grounds that the applicant had initially not been afforded the opportunity to challenge his expulsion.<sup>550</sup> In *Mansour Ahani v Canada*, the Committee stated that Article 13 must be read with Article 7 where an expulsion would lead to a potential infringement of the non-refoulement principle.<sup>551</sup> The Committee further stated that even where a State Party can raise compelling reasons of national security as to why an individual should be denied the opportunity to challenge his deportation, this does not obviate the protection of Article 13.<sup>552</sup> A process such as

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<sup>547</sup> 'All persons shall be equal before the courts and tribunals. In the determination of any ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal' Article 14 ICCPR

<sup>548</sup> Human Rights Committee, Ninetieth session, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial', 2 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>>

<sup>549</sup> *Ibid*, 2-3

<sup>550</sup> *Samira Karker v. France*, CCPR/C/70/D/833/1998, UN Human Rights Committee (HRC), 30 October 2000 para 9.2

<sup>551</sup> *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), 15 June 2004 para 10.8

<sup>552</sup> *Ibid*

extraordinary rendition is absolutely dependent upon secrecy, and preventing detainees from gaining access to the courts to challenge their treatment is an obvious requirement. Based on the case law identified above, the involvement of European States in facilitating the secrecy could certainly lead international responsibility for a breach of Article 6 ECHR, or Articles 13 and 14 ICCPR.

Common Article 3 of the Geneva Conventions, which applies as a minimum to the war on terror, does not contain any specific reference to transfers of individuals. However, given the link between these transfers and their ultimate aim, it could be argued that the prohibition on cruel treatment and torture should protect individuals exposed to extraordinary rendition in much the same way as with ECHR Article 3 and ICCPR Article 7. Should an individual fall under the protection of the Geneva Convention III relative to the protection of Prisoners of War (that is to say that war on terror were considered an international armed conflict, and other requirements are fulfilled<sup>553</sup>), Article 48 prohibits transfer where the individual concerned is not fully informed that it is taking place, and also where he is not given the possibility of notifying next of kin.<sup>554</sup> As previously discussed, it is highly unlikely that a terrorist captured in the course of the war on terror would qualify for protection under GC III. It is more probable that protection would be afforded under GC IV. If this is the case, Article 49 states that individual or mass forcible transfers to another country are forbidden.<sup>555</sup> European States which assist in transfers of extraordinary rendition detainees are likely to fall foul of the restrictions placed on transfers found in the Geneva Conventions, regardless of whether the war on terror is a non-international or international armed conflict. In the case of Abu Omar, Italy facilitated his forced transfer without his knowledge of the destination contrary to both Article 48 of the Third Convention and Article 49 of the Fourth Convention. Similarly, Macedonia provided

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<sup>553</sup> See discussion in Chapter 3

<sup>554</sup> Article 48 Geneva Convention III

<sup>555</sup> Article 49 Geneva Convention IV

assistance in transferring Khaled el-Masri without his knowledge, again indicating a likely breach of the aforementioned Articles.

Individuals have been forcibly moved across borders before. Perhaps the most famous of these cases involved Adolf Eichmann and his removal from Argentina to Israel. Of fundamental importance to previous cases was the ability to challenge the lawfulness of the transfer. As Sadat states, in extraordinary rendition, not only are there 'no clear legal procedures used regarding the person's seizure and detention, but there is generally little or no opportunity to challenge either the legality of the detention and rendition, or the substance of the charges against the detainee in a subsequent judicial proceeding.'<sup>556</sup> This relates to the right to challenge the transfer after it has been effected. Of more use to the individuals in question is the right to challenge prior to transfer. Satterthwaite believes there is a nascent procedural right in international law to challenge the lawfulness of transfer.<sup>557</sup> Such a procedure would allow individuals to access a neutral decision maker who would determine whether the individual in question was personally at risk of ill treatment post-transfer, thereby removing the right of the transferring state to determine of its own accord whether someone it was seeking to expel was at risk.<sup>558</sup> This avenue has been explored by the ECtHR in the case of *Shamayev v Georgia and Russia*<sup>559</sup> where individuals suspected of terrorist crimes were transferred from Georgia to Russia following an extradition request. The applicants were not afforded the opportunity to challenge this extradition, and as such the Court found that Georgia had violated ECHR articles 3 and 13 (the right to an effective remedy). The Convention was violated the moment Georgian authorities prevented the applicants from seeking relief from transfer on the basis that

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<sup>556</sup> Sadat, LN 'Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror' (2006) 75 Geo. Wash. L. Rev. 1200, 1226

<sup>557</sup> Satterthwaite, M What's Wrong with Rendition?, (2007) 29 Nat'l Security L. Rep. (available at: <[http://www.abanet.org/natsecurity/nslr/2007/API\\_ABA\\_National\\_Security\\_Newsletter\\_68384.pdf](http://www.abanet.org/natsecurity/nslr/2007/API_ABA_National_Security_Newsletter_68384.pdf)>), 4

<sup>558</sup> Ibid

<sup>559</sup> (36378/02) April 12, 2005

they feared torture if returned to Russia. This demonstrates that as soon as European states hand individuals over to the US, there is the potential for them to have breached their international obligations.

Clearly there are a number of provisions in several international treaties which restrict the ability of European States to transfer suspected terrorists outside of their national boundaries. The Abu Omar and Khaled el-Masri cases are exemplary instances where European States have assisted the CIA contrary to the legal standards to which they are subject. The inherent risk of torture and the secrecy in which the transfers were carried out are indicative of a clear disregard for the rights which should have been afforded to the two men in question. Italy and Macedonia therefore are responsible for breaches of their international responsibilities.

### C. Torture

There are no direct accusations that European States are torturing detainees. However, there have been numerous allegations of European complicity in torture committed by other states holding detainees. Of particular note are those identified by the Joint Committee on Human Rights. They include (but are not limited to) the provision of information to foreign intelligence agencies which leads to the apprehension or extraordinary rendition; participation in interrogation of individuals who have been tortured; and receipt of information known or thought likely to have been obtained from tortured detainees.<sup>560</sup>

However, accusations *have* been made that suggest that individuals were tortured in European States, only not by European agents (for example in Poland, Romania and Lithuania). Thus, the breaches will have taken place under the jurisdiction of States Parties

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<sup>560</sup> Joint Committee on Human Rights, Twenty-Third Report 'Allegations of UK Complicity in Torture' (London: The Stationery Office Limited), 17  
<<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf>>

to the ECHR, as required by Article 1, rendering states liable. Similarly, the ICCPR requires that its protections are extended to all people within the territory of a State Party.<sup>561</sup> To that extent, any instances of torture which take place within the boundaries of European States and which they have knowledge of, will create the necessary conditions for responsibility of the European State.

In terms of determining international responsibility for European States where the ill-treatment takes place overseas, it must first be determined whether or not human rights instruments such as the ECHR, ICCPR and the CAT apply. With regards to the ICCPR, the extensiveness of its protection has been said to extend to those under the jurisdiction of a State Party, regardless of whether they are within its territory or not. Therefore, acts of agents overseas may be attributed to the state for the purposes of the ICCPR. The extent of the meaning of jurisdiction within Article 1 ECHR is more problematic. In the *Banković* case the Grand Chamber of the ECtHR stated that 'the jurisdictional competence of a State is primarily territorial' and that 'Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction...'<sup>562</sup> This would suggest that European involvement in interrogations which took place outside of the jurisdiction of the EU would not be covered by the ECHR. However, in subsequent cases, the Court has undermined the rationale behind the *Banković* decision. In *Issa v Turkey* the Court (while finding the application inadmissible on factual grounds) reasoned that where an individual is under the 'effective control' of a State Party to the ECHR, the Convention will apply even where abuses take place in a third party country with the court stating that '[a]ccountability in such situations stems from the fact that art 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on

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<sup>561</sup> Article 2(1) ICCPR

<sup>562</sup> (2007) 44 E.H.R.R. SE5 paras 57 and 59

the territory of another State, which it could not perpetrate on its own territory.<sup>563</sup> Such reasoning was expanded upon in *Öcalan v. Turkey*<sup>564</sup> where the Court found it had jurisdiction over the actions of Turkish agents acting in Kenya. If this line of reasoning is followed, European states will be responsible for actions which breach the convention but which happen outside of their territory. Finally, the CAT will apply wherever there torture which is carried out ‘...by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...’ This would suggest that actions which take place outside of national borders, but which have their genesis within the boundaries of States Parties, may still be covered by these instruments.

There are three separate facets which then must be considered: (1) providing information which leads to the detention of an individual; (2) providing information or questions to be utilised during interrogation and torture sessions, or being present during interrogations; and (3) does the receipt of information derived from torture immediately engender international responsibility for complicity in torture? These questions are particularly relevant vis-à-vis the accusations made against the UK regarding Binyam Mohammed and in the Gambia case, as well as allegations of German involvement in the cases of Khalid el-Masri and Mohammed Zammar. They also bear on the cases of Poland, Romania and Lithuania and their participation in detention, as well as Macedonia’s involvement in the el-Masri case.

The difficulty with the scenario in part (1) is that while the information may well lead directly to the capture of an terrorist suspect, there can be no guarantee that this information played any part in what happens subsequently. That is to say, States may argue that to the best of their knowledge, the information was merely provided in order to detain the individuals, and that there was never any reason to believe that it would eventually

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<sup>563</sup> *Issa v Turkey* (2005) 41 E.H.R.R. 27, 588 para 71

<sup>564</sup> (2005) 41 E.H.R.R. 45

lead to torture and other ill-treatment. However, there could be instances (particularly where the UK provided information about Binyam Mohammed knowing that it would be first used to detain him, and subsequently during his interrogations) where the information was provided knowing that individuals would be detained and subsequently tortured. Here, the CAT may be engaged. Question (2) may also fall under the purview of the CAT which requires only that any action which may constitute torture be carried out ‘...by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...’<sup>565</sup> While the provision of information may not amount to instigation, a case can certainly be made for consent or acquiescence; acquiescence being a comparatively low threshold. Providing information, or sending questions, knowing that such provisions are likely to lead to, and be used during, interrogations of extraordinary rendition detainees is indicative of a general nonchalance to the use of enhanced interrogation techniques in order to extract information. This would seemingly apply to the UK (for its involvement in Binyam Mohammed’s interrogation).

However, the ECHR and ICCPR do not contain a similar reference to acquiescence or consent. There are two arguments which may be made in such a case. The first of these may be made out relying on the reading into Article 3 ECHR and Article 7 ICCPR of the prohibition on refoulement, an interpretation which is not there on a literal reading of the texts. It could be argued that this prohibition is part of a wider obligation not to ‘not to engage in activity which exposes the person to that risk of torture’<sup>566</sup> and to make Article 3 ECHR and Article 7 ICCPR more complete. If this is indeed the basis for the inclusion of the non-refoulement principle within these two articles, a suggestion can be made for a widening of this principle: that is that States may not generally engage in actions which

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<sup>565</sup> Article 1 UN Convention against Torture

<sup>566</sup> UK Case on Complicity by UK Intelligence Agencies in Torture Abroad, Dapo Akande  
<<http://www.ejiltalk.org/uk-case-on-complicity-by-uk-intelligence-agencies-in-torture-abroad/>>  
Tuesday Jul 5, 2011

expose an individual to a risk of torture. This could include providing information or questions. If this line of reasoning were to be followed, this would lead to a breach of the primary obligation on States not to torture.

An alternative approach would be to argue that those carrying out the torture were the agents of the European States which were sending questions. State responsibility may be engendered by attribution of actions of actual and *de facto* agents to the State. Article 6 of the ILC's Articles on State Responsibility (ASR) holds that the 'conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.'<sup>567</sup> If agents of third party States were 'placed at the disposal' of European States in the sense that they could be directed to put questions to detainees, a case could be made that Article 6 is engaged, and there is therefore a breach of Article 3 of the ECHR or Article 7 of the ICCPR could be made out. With that being said, Article 6 applies in a limited and precise situation where the benefitting state receives the exclusive service of the organ of the sending state, and the organ must act under the receiving state's exclusive direction.<sup>568</sup> Another, similar, option is presented by Article 8 of the ASR. This will apply where a State is directing or controlling individuals who commit breaches of the State's international obligations.<sup>569</sup> In order for this to occur, there must be a 'specific factual relationship between the person or entity engaging in the conduct and the State.'<sup>570</sup> Again this would be a very difficult scenario to prove. As the commentary to the ASR make clear, conduct will only be attributed to the state where the directions were specific and in this instance would require that the State ordered detainees to be mistreated as part of sending questions to

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<sup>567</sup> Article 6 ILC's Articles on State Responsibility

<sup>568</sup> Above n422, 44

<sup>569</sup> Article 8 ILC's Articles on State Responsibility

<sup>570</sup> Above n422, 47



be asked during interrogations: 'In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way.'<sup>571</sup> However, if such an argument can be made, it represents a potential ground for demonstrating a breach of Article 3 ECHR and Article 7 ICCPR.

It has been alleged that some European States have actively sent officials to be part of interrogations conducted overseas. Martin Scheinin, in his report on protecting human rights while countering terrorism, believes that '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 or other prohibited treatment...'<sup>572</sup> The Centre for European Policy Studies (CEPS) suggests that such behaviour 'would also appear to be legally borderline, and most probably beyond what is legal.'<sup>573</sup> This line of reasoning can certainly be based in the CAT where mere acquiescence in torture is sufficient to amount to a breach of a State's obligations. Whether it could apply to the ICCPR or ECHR would remain to be seen based on the idea that States must not even expose individuals to the threat of torture or cruel, inhuman or degrading treatment, as discussed above. CEPS argues however that there is a 'categorical misunderstanding' by some states in arguing that they will not engage in interrogations where there is evidence that torture has occurred or may take place.<sup>574</sup> The reasoning follows that complicity or 'entanglement' in extraordinary rendition is present as soon as a State engages with the process: '[i]ndeed the 'simple' fact of illegal rendition and

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<sup>571</sup> Ibid, 48

<sup>572</sup> Scheinin, M 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' General Assembly Distr. GENERAL A/HRC/10/34 (February 2009), 20 para 54

<sup>573</sup> Geyer, F 'Fruit of the Poisonous Tree: Member States' Indirect use of Extraordinary Rendition and the EU Counter-Terrorism Strategy' Centre for European Policy Studies, Working Document No. 263/ (April 2007), 9

<sup>574</sup> Ibid, 10

detention is already a violation of human rights and a breach of law severe enough to prohibit member states from taking any advantage of it.<sup>575</sup>

A harder question to pin down is identified by scenario (3); that is whether receiving information derived from torture amounts to a breach of Article 1 CAT, Article 3 ECHR and Article 7 ICCPR. Where a State knowingly receives information which has been derived from enhanced interrogation techniques, or has an expectation that it will receive answers to specific questions it has sent to be asked, or where a state receives information over a long period of time without seeking to verify the genesis of the information, a case can be made for acquiescence in torture. As the Joint Committee on Human Rights states, such actions 'create a market for the information produced by torture [and] encourages States which systematically torture to continue to do so' and is thus 'likely to be in breach of the UK's international law obligation not to render aid or assistance to other States which are in serious breach of their obligation not to torture.'<sup>576</sup> The Centre For European Policy Studies uses the metaphor 'fruit of the poisonous tree' stating that 'if the source of the evidence (the tree) is tainted, then anything deriving from it (the fruit) bears the same flaw'.<sup>577</sup> Philippe Sands, in providing information to the Joint Committee on Human Rights argues that this type of behaviour will be caught under Article 4(1) of the CAT.<sup>578</sup> While this refers to individual liability, an analogy may be drawn through the reasoning employed: Sands suggests that where the holder of the information knows, or would have known but for wilful blindness, that the information was obtained by torture, he is complicit in direct or indirect encouragement of torture, or certainly failing to take preventative steps.<sup>579</sup>

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<sup>575</sup> Ibid

<sup>576</sup> Joint Committee on Human Rights, Twenty-Third Report 'Allegations of UK Complicity in Torture', 18 (as per Article 41(2) of the Articles on State Responsibility)

<sup>577</sup> Above n573, 1

<sup>578</sup> Joint Committee on Human Rights - Allegations of UK Complicity in Torture Written Evidence - Memorandum submitted by Professor Philippe Sands QC (2009) (available at <<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf>> para 11

<sup>579</sup> Ibid

Extending this logic, it could be argued that states which know that information has been derived from torture have been complicit in the acts which led to it being ascertained. Martin Scheinin, the UN Special Rapporteur on Torture, sees actions such as these as implying a 'recognition of lawfulness' in the methods used to obtain information: he states that this represents a position which is 'irreconcilable with the obligation erga omnes of States to cooperate in the eradication of torture'.<sup>580</sup> Scheinin does however state in another publication that it is difficult, *in abstracto*, to delimit precisely where complicity begins, and that ultimately a case-by-case analysis would be needed.<sup>581</sup> Borelli, on the other hand, notes that there is no legal prohibition on the receipt of information possibly derived from torture.<sup>582</sup> She argues that calls for legal sanctions to apply to states which do make use of such information 'seem to go far beyond the current state of the international law of state responsibility'.<sup>583</sup>

The difficult question in this area is *should* intelligence agencies be subject to an absolute prohibition on the mere receipt of intelligence derived from torture? There is no suggestion that these states are intending to use the information in court proceedings, where it is acceptable that such a position applies. However, its use in security operations is certainly not so clear cut: as noted in the House of Lords by Lord Nicholls,

Should [the security services] discard [information derived from torture] as 'tainted', and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained? The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it... The government is using information obtained

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<sup>580</sup> Above n572, 20 para 55

<sup>581</sup> Scheinin, M and Vermeulen, M 'International Law – Human Rights Law and State Responsibility' in Born, H, Leigh, I and Wills, A (eds.) *International Intelligence Cooperation and Accountability. Studies in intelligence series.* (London: Routledge, 2011) 264

<sup>582</sup> Borelli, S 'Rendition, torture and intelligence cooperation' in Born, H, Leigh, I and Wills, A (eds.) *International Intelligence Cooperation and Accountability. Studies in intelligence series.* (London: Routledge, 2011) 106

<sup>583</sup> *Ibid* p113

by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.<sup>584</sup>

On the one hand, States certainly should seek to ensure that torture as an institutionalised practice is eradicated throughout the world. On the other, they owe a duty to their citizens to ensure that they are not exposed to the threat of loss of life or serious injury. It is difficult therefore to know where the balance should be struck. Where States knowingly receive information derived from torture, or actively seek the assistance of States they know will employ harsh interrogation techniques, a clear argument for acquiescence in torture can be made. However, where a state *passively* receives information such a case is considerably harder to make out. Passive receipt of information, especially in 'one-off' cases, cannot be said to fall under the requirements of the aforementioned articles: there is and lack of knowledge on the part of the State where information is received passively, and therefore no State official could have acquiesced to the torture under which it was obtained.<sup>585</sup> In these instances, as Lord Nicholls says it is arguably absurd to deny the State the right to make use of such information.

Customary international law represents another ground upon which to demonstrate international responsibility for torture. The prohibition on torture has attained the status of a peremptory norm of customary international law which cannot be derogated from at any time. One option would be to rely on Articles 40 and 41 of the ASR. Article 40 provides the following:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

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<sup>584</sup> *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2005] UKHL 71, para. 67-69 per Lord Nicholls

<sup>585</sup> Above n560

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation<sup>586</sup>

The Articles then make clear that States may not recognise as lawful, nor assist in maintaining, a serious breach of a peremptory norm of international law.<sup>587</sup> An argument may be made (though perhaps tenuous) that sending questions or receiving information derived from torture, represents tacit approval of the use of torture and therefore recognises the breach as lawful, or assists in maintaining the breach through a sense of moral encouragement. The Joint Committee on Human Rights in the UK has considered this type of argument and came to the conclusion that the UK government does not fully appreciate 'these positive obligations in relation to torture, not to acquiesce in torture or to validate the results of it' suggesting that it too sees Articles 40 and 41 as of genuine concern.<sup>588</sup>

International humanitarian law as encapsulated in the Geneva Conventions may also come into play, depending on the extent to which the war on terror may be considered an armed conflict. The minimum standard of treatment which applies to the war on terror and is set forth in Common Article 3, which requires that individuals be treated humanely and be protected from torture. Should individuals detained during the war on terror be classified as POWs for the purposes of Geneva Convention III (meaning that the war on terror is classified as an international armed conflict) Article 13 requires they be treated humanely, while Article 130 provides that to subject them to torture would amount to a grave breach of the Third Geneva Convention. Similarly, should they be classified as civilians for the purposes of Geneva Convention IV (again requiring that the war on terror is an international armed conflict), Article 27 demands they be treated humanely, while Article 31 prohibits 'physical or moral coercion ... in particular to obtain information from them or

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<sup>586</sup> Article 40 ILC's Articles on State Responsibility

<sup>587</sup> Article 41 ILC's Articles on State Responsibility

<sup>588</sup> Above n560, 14

from third parties.<sup>589</sup> Torture is again specifically proscribed.<sup>590</sup> There is also the alternative protection of Article 75 of the First Additional Protocol to the Conventions which also proscribes torture. Once again, however, the question remains to what extent European States were primarily responsible for breaches which may arise from these areas.

However, similar difficulties arise due to the fact that European States have not themselves been engaging in torture. Therefore, with regards to IHL, the most likely avenue for European responsibility would be through complicity. However, Article 16 of the ASR which requires 'aid or assistance' on the part of the complicit state seems only to be effective where sending information which leads to capture is concerned: at a stretch this could amount to assistance. However, in the case of sending questions, or receiving information derived from torture, Article 16 is arguably irrelevant. Nevertheless, a more general conception of complicity, such as that presented by the UN Joint Study into Secret Detention, could be employed. This would require that a State could be complicit where it takes advantage of the situation of secret detention by sending questions to be asked or by providing information leading to secret detention.<sup>591</sup> If it is possible to be complicit in secret detention in this way, there is no reason not to extend the application of this form of complicity to include torture and other forms of mistreatment. Besides its application to the Geneva Conventions, this argument could also be applied to international human rights instruments as another way to engender international responsibility.

Given the nature of the accusations made by victims of extraordinary rendition, it is highly likely that all of the legal instruments considered will be engaged, at a minimum for cruel, inhuman or degrading treatment, and possibly for torture. The difficulty with regards to European States is determining in what way responsibility is likely to attach to their

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<sup>589</sup> Article 31, Geneva Convention IV

<sup>590</sup> Article 32, Geneva Convention IV

<sup>591</sup> Above n470, 3-4

involvement in the process. There are a number of arguments which can be made in this area, including the idea of a general prohibition not to expose someone to the risk of torture, or through an analysis of a number of articles in the ILC's Articles on State Responsibility, or further through a more general understanding of complicity. It is likely that some responsibility will affix to the actions of European States.

#### D. Overflights

Extraordinary rendition relies on the use of European airspace and airports if individuals are to be transported to black sites for detention and interrogation. As this is the case, overflights in all their guises represent a potential avenue for a finding of primary state responsibility, as well as the most likely route to a finding of complicity in extraordinary rendition. A vast number of European states have been implicated in allowing US planes known to be active in the rendition programme to fly through their airspace or land at their airports for refuelling recuperation.<sup>592</sup> As an absolutely necessary part of the extraordinary rendition process, overflights can be linked to all constituent aspects such as torture, illegal transfer and secret detention.

ingly allows an individual to pass through its territory en route to a secret detention site, or to face 'enhanced interrogation techniques', this may engender the responsibility of the passive state. As discussed in the previous section on torture, allowing an overflight could be a breach of a general prohibition not to expose anyone to the risk of torture or mistreatment.<sup>593</sup> The Venice Commission has taken this approach in its analysis of overflights and the application of the ECHR, stating that '[t]he requirement of not exposing any prisoner to the real risk of ill-treatment also applies in respect of the transit of prisoners through the territory of Council of Europe member States: member States should

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<sup>592</sup> See discussion in Chapter II

<sup>593</sup> See discussion on torture above

therefore refuse to allow transit of prisoners in circumstances where there is such a risk.<sup>594</sup> The Commission goes on to conclude that it is not just the risk of torture that states are obliged to avoid; merely exposing someone to a breach of their Convention rights also engages state responsibility.<sup>595</sup> Further, states have an obligation to take necessary preventative measures, within their powers to protect all persons on board a rendition plane, for they are subject to the jurisdiction of the territorial state.<sup>596</sup> The UK Joint Committee on Human Rights has looked into the impact of the CAT on states which permit overflights. The Committee's report highlights the positive obligations which the CAT places on states to investigate credible claims that their airspace may have been used as a means to transport individuals to face torture and other forms of ill-treatment.<sup>597</sup> Failing to investigate such claims can lead to a breach of European State's obligations under the CAT. Overflights may also fall under the purview of Article 1 of the Convention against Torture provided that state officials had knowledge of the reasons for such flights being made. If this were the case, an argument for acquiescence in torture could be made. Further, the Committee has argued that simply to allow an individual to be transported through the territory of a European State could lead to a breach of the non-refoulement principle, and hence responsibility for a breach of ECHR Article 3, CAT Article 3 and ICCPR Article 7.<sup>598</sup>

In terms of complicity, the use of sovereign airspace to transport individuals could be characterised as the provision of an essential facility for the purposes of Article 16 of the ILC's Articles on State Responsibility. Indeed, the Venice Commission explicitly states that to knowingly provide transit through sovereign airspace may amount to providing assistance as per the requirements of Article 16.<sup>599</sup> Scheinin and Vermeulen likewise argue

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<sup>594</sup> Above n471 para 143

<sup>595</sup> Including the right to security of person: *Ibid*, para 146

<sup>596</sup> Above n471, para 145; *Z v. United Kingdom* judgment of 10 May 2001

<sup>597</sup> Above n481, 51

<sup>598</sup> Above n481, 52

<sup>599</sup> Above n471, para 45



that such permissive agreements on overflight clearance or provision of refuelling facilities constitute the vital assistance which Article 16 calls for, stating that these permissions 'trigger state responsibility, as it has been proven that these types of assistance were vital to exercise practises of extraordinary renditions and secret detentions which are by definition in breach of international law.'<sup>600</sup> However, it must be questioned whether such an omission (that is, a failure to prevent a rendition plane travelling through sovereign airspace) can constitute 'aid or assistance'. In the *Genocide Convention Case* the ICJ ruled out the possibility of complicity by omission because, on the facts, the genocide would have occurred regardless of Serbia's action or inaction.<sup>601</sup> Overflights are a different proposition, however; it may be that European States explicitly granted permission to use their airspace (in which case, on the preceding analysis, responsibility for complicity may arise) or they simply did not object as they have no reason to believe the flights were unlawful, and chose not to act (whereby their inaction has not altered the ultimate consequences and responsibility may not be incurred). This is a factual question which would only be determined should such a case make it before a judicial body.

Of course, each of these accusations will only be substantiated where the European states in question had knowledge of the situation. It is the opinion of the Temporary Committee on Indefinite Detention that it is an impossibility that the States in question possessed no knowledge whatsoever of the situation at hand.<sup>602</sup> Indeed in working documents 7 and 8, the Temporary Committee believes the evidence it has collected irrefutably point to the conclusion that European states must have had some knowledge of the programme, and

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<sup>600</sup> Martin Scheinin and Mathias Vermeulen, 'International Law – Human Rights Law and State Responsibility' in Born, H, Leigh, I and Wills, A (eds.) *International Intelligence Cooperation and Accountability*. Studies in intelligence series. (London: Routledge, 2011), 262

<sup>601</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007 at para 432

<sup>602</sup> Above n475 , 12

the planes which were being used during it.<sup>603</sup> The EU Network of Independent Experts on Fundamental Rights has stated that in its opinion the amount of evidence which is available to European States, particularly regarding CIA front companies, could mean that EU states have the level of knowledge which would be sufficient to lead to a breach of their primary obligations.<sup>604</sup> They present the situation whereby

If an airplane with a registration number listed on the "black list" of aircraft, operated by a company known to be a front company for the CIA, with route Guantánamo Bay via, for example, Shannon, Ireland or Ramstein, Germany to Mitiga, Libya asks overflight clearance or landing permission for technical maintenance, then this should be enough suspicious information to justify a search of the aircraft.<sup>605</sup>

If this is indeed the case, it may be reasonably suggested that European States should bear some responsibility for allowing CIA rendition planes to fly through their airspace unimpeded. Knowingly permitting overflights does more than simply *expose* an individual to the risk of torture; it is a tacit agreement that such torture may take place, no questions asked. For this reason, States which explicitly granted permission for rendition flights to take place should be internationally responsible for their role in the process, and the breaches of numerous legal regimes that overflights entail.

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<sup>603</sup> Rapporteur: Giovanni Claudio Fava, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners 'WORKING DOCUMENT No 7 on 'extraordinary renditions'' <<http://www.statewatch.org/cia/documents/working-doc-no-7-nov-06.pdf>>; and 'WORKING DOCUMENT N° 8 on the companies linked to the CIA, aircraft used by the CIA and the European countries in which CIA aircraft have made stopovers' <<http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf>>

<sup>604</sup> '...EU Member States are now more than ever under an obligation to be more vigilant regarding future use of their airspace and airports by US private flight, in particular if the companies and aircraft numbers are on one of the published "black lists"...' E.U. Network of Independent Experts on Fundamental Rights, Opinion No 3-2006: The Human Rights Responsibilities of the EU Member States in the Context of the CIA Activities in Europe ('Extraordinary Renditions') 25 May 2006, 28

<sup>605</sup> Ibid, 30

However, despite the preponderance of evidence to suggest that European States were aware of what was happening in their airspace, there is one main reason as to why the flights continued to take place. This problem presents itself in the way in which the planes presented themselves – as civil aircraft. The Convention on International Civil Aviation (the Chicago Convention) sets forth the rules governing airspace. Aircraft are either of State or Civil character. Of particular importance is the Convention's provision that civil aircraft may fly through the airspace, or make a technical stop at an airport of another nation, without prior notification.<sup>606</sup> State aircraft do not enjoy this privilege, as Article 3(c) of the Chicago Convention provides that state aircraft may not fly over sovereign territory without express authorisation from the state concerned.<sup>607</sup>

By using private civil jets, the US seemingly avoids the need to seek prior authorisation before entering sovereign airspace. However, the two types of aircraft are distinguished by examining the *function* of the flight. "Aircraft are recognised as state aircraft when they are under the control of the State and used exclusively by the State for state intended purposes"<sup>608</sup> such as carrying out "military, customs and police services".<sup>609</sup> Also of import is Article 4 of the Chicago Convention which holds that "Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention".<sup>610</sup>

Extraordinary rendition flights must be considered to be carrying out a state function. The question then is whether these aircraft are abusing civil aviation. The Venice Commission makes specific reference to this point and concludes that

...state aircraft can only claim immunity inasmuch as they make their state function known to the territorial State through the appropriate channels. If the public purpose was not declared in order to circumvent the requirement of

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<sup>606</sup> Article 5 Convention on International Civil Aviation (Chicago Convention)

<sup>607</sup> Article 3(c) Convention on International Civil Aviation (Chicago Convention) Article 3(c)

<sup>608</sup> Above n471, para 91

<sup>609</sup> Article 3(b) Convention on International Civil Aviation (Chicago Convention) Article 3(b)

<sup>610</sup> Article 4 Convention on International Civil Aviation (Chicago Convention) Article 4

obtaining the necessary permission(s), then the State will be estopped from claiming State aircraft status and the airplane will be deemed to be civil and thus falling within the scope of application of the Chicago Convention, including its Article 16 providing for the territorial State's right to search and inspection.<sup>611</sup>

Therefore, if a European nation has any reason to suspect that an aircraft claiming civil flight clearance is committing a human rights abuse, it may order the flight to land so that it may be visited and searched. If the captain of the flight claims that the plane is a state aircraft and therefore immune from inspections this will be an abuse of civil aviation.

It seems apparent that overflights represent a clear basis for a finding of responsibility for a breach of European States' obligations under international law. The fact that they represent an absolute necessity with regards to transporting detainees suggests that overflights may be linked to every aspect of the extraordinary rendition programme. Further, given the likelihood that European States were aware of the nature of rendition flights, this would suggest that they possessed the requisite knowledge for a number of potential avenues to responsibility, including acquiescence under the CAT and complicity under Article 16 of the ASR. There remain, however, difficulties in seeing how European States could prevent such flights taking place, as presented by the Chicago Convention and the designation of such planes as civil aircraft. Should those difficulties be overcome, it can be strongly suggested that overflights could lead to international responsibility for European States.

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<sup>611</sup> Above n471, para 103

## V

### Concluding Remarks

There is a vast amount of evidence which suggests that European States were at least aware of extraordinary rendition operations taking place within their territory, and perhaps even actively participating in the procedure. This paper has highlighted four main areas in an archetypal extraordinary rendition: secret detention, unlawful transfer, the practice of overflights and torture. It can be argued that European States have been involved to some extent in each of these areas. Poland, Romania and Lithuania have allegedly provided the CIA with secret detention facilities. Italy and Macedonia reportedly assisted in the unlawful

transfer of Abu Omar and Khaled el-Masri respectively. Almost all EU countries have to some extent allowed planes known to be linked to the extraordinary rendition process to fly through their airspace unimpeded. And finally, there are several reports that countries such as the UK and Germany have benefited from the torture of individuals suspected to have undergone extraordinary rendition.

Each one of these aspects is in some way prohibited in international law. There is a high degree of correlation between the ECHR, ICCPR, CAT and Geneva Conventions of 1949. These instruments demonstrate that the prohibition on the infliction of torture, cruel or inhuman treatment or punishment, and the prohibition on refoulement are absolutely guaranteed in international law. Further, the right to freedom of person is expressed in several treaties and while not absolute, the limited grounds upon which an individual may be detained cannot be said to include a process which is arbitrary and results in secret, incommunicado detention. Overflights present a more difficult problem, though their unlawfulness can be demonstrated by analysis of States' responsibilities to investigate reports of abuse, as well as acquiescence in torture. It is possible that many European States will be responsible for a direct breach of their legal responsibilities, especially in the case of the CAT and also where refoulement is involved. However, this is not necessarily the only way by which these States will be responsible. Complicity, either as a general legal construct, or through assistance provided in accordance with Article 16 of the International Law Commission's Articles on State Responsibility, represents an alternative route to responsibility as the secondary actor in a breach.

That States have been flouting their international obligations in such an egregious manner is worrying. The law in this area cannot be called deficient, as there are myriad international treaties dealing with the issues which are raised. The problem then is that States are simply ignoring their responsibilities, seeing them as an obstacle to protecting

their territory as they would like. This begs the question of whether States should be permitted to utilise processes such as extraordinary rendition where national security is at risk. Security services have suggested that they should be allowed to utilise information which is derived from torture, especially where they were not responsible for the actual treatment in question. Italy and the UK have argued before the ECtHR that the expulsion of a suspected terrorist should be possible even where it would breach the principle of non-refoulement.<sup>612</sup> Several States have seemingly sought to circumvent the right to security of person in the case of alleged terrorist offences. Such assertions rely on the notion that terrorism in the 21<sup>st</sup> century represents a unique and previously unseen threat to the stability of nation states.

This argument is demonstrably flawed. The law does not prevent governments around the world from effectively dealing with terrorism; on the contrary, it offers a framework that protects citizens, while respecting the rights of the accused.<sup>613</sup> It may be unpalatable to some that suspected terrorists, who are willing to cause immense suffering and fear to further their aims, deserve human rights protections. Yet States cannot be allowed to fall to this level, to do so would be to propagate the very ills they seek to prevent. It will take a strong reiteration of the international legal regime, with major powers leading from the front to prove that human rights remain respected, even when fighting those who would flout them.

Given the extent to which the current international legal regime covers the issue, extraordinary rendition does not necessarily require a new, specific treaty to be

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<sup>612</sup> *Saadi v Italy* (2009) 49 E.H.R.R. 30

<sup>613</sup> This argument has been effectively dealt with in a number of publications including Senator Marty's Council of Europe investigation and the Eminent Jurist Panel's investigation where it is stated in each that the international regulatory regime does not inhibit States' ability to combat terrorism effectively: Committee on Legal Affairs and Human Rights 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states' (7 June 2006) <[http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf)> 57; and International Commission of Jurists 'Assessing Damage, Urging Action' (Geneva, 2009) <<http://ejp.icj.org/IMG/EJP-Report.pdf>> 24

introduced. However the international community has shown that it is willing to act and create a new legal document if deemed necessary, for example in the case of enforced disappearances. Enforced disappearances bear many similarities with extraordinary rendition: victims are often tortured and the practice violates the right of security of person. Initially, instances of this practice were analysed in light of the various treaties such actions breached, but in December 2006, the UN adopted the text for the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>614</sup> This Convention is considered to be very robust, with a number of novel provisions which effectively tackles the phenomenon of enforced disappearances specifically.<sup>615</sup> While not essential, were something similar to be introduced for extraordinary rendition, it could be useful in preventing such abuses becoming a permanent tool in the fight against terrorism.

What must also be remembered is that States volunteered to adhere to the principles set down in international human rights and humanitarian law instruments. No nation was forced to sign any of the treaties which they now claim to be an unnecessary encumbrance on their security services. For this reason it is difficult to be sympathetic to the States' arguments that they should be released from their obligations. It must be the States who lead the way in righting the wrongs of extraordinary rendition. Yet as long as they continue to cloak themselves in state secrets and national security, there are unlikely to be any positive steps taken. It is for this reason that the work of supranational organisations such as the Council of Europe and campaign groups such as Amnesty is so important: one traditional tool to encourage change is embarrassment.<sup>616</sup> By highlighting the involvement of States in such highly questionable activities, governments may experience a groundswell

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<sup>614</sup> The text of which may be found at <<http://www2.ohchr.org/english/law/disappearance-convention.htm>>

<sup>615</sup> Amnesty International, Enforced Disappearances <<http://www.amnesty.org/en/enforced-disappearances>>

<sup>616</sup> Weissbrodt & Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 Harv. Hum Rts. J. 123, 153



of opinion against them. Indeed, states have already begun the process of looking into their potential role in human rights abuses. In Italy several high ranking CIA officers had arrest warrants issued against them, and they along with some members of SISMI (the Italian security service) were convicted following their involvement in the Abu Omar affair.<sup>617</sup> In the UK a judge led investigation is (at the time of writing) about to begin to look into the role of the UK security services in questioning terror suspects.<sup>618</sup> Individuals who have allegedly undergone ER should be given the opportunity to present their case before national or international tribunals in order to determine the facts and reach a sensible conclusion to their ordeals. Governments should not be able to hide behind the doctrine of state secrets where this may prevent individuals from securing the recompense they deserve. To do so is to insult them a second time. With States appearing to take these necessary steps, there may come a time where the areas identified here eventually lead to international responsibility for the guilty parties.

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<sup>617</sup> Messineo, F '“Extraordinary renditions” and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy’ (2009) 7 JICL 1023, 1044

<sup>618</sup> The Detainee Enquiry <<http://www.detaineeinquiry.org.uk/>> However, several human rights organisations have declined to involve themselves in the investigation as they feel it is not sufficiently public: <<http://www.bbc.co.uk/news/uk-14397601>>

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