The 'war on terror' and International Law

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10 *Case study III*: Extraordinary Rendition

> We also have to work, though, sort of the dark side, if you will. … That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.… It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission."
>
> US Vice President Dick Cheney, 16 September 2001[1]

10.1 Introduction

Immediately following the 11 September 2001 attacks, the US government decided that a key component of its 'war on terror' would include covert international CIA action targeting 'high value targets' they would be subject to lethal use of force or detention for intelligence gathering purposes. On 17 September 2001, President Bush signed a classified Presidential Memorandum of Notice granting the CIA authority to detain terrorist suspects and to set up secret detention facilities (sometimes known as 'black sites') outside the US where it could subject 'high-value detainees' to 'enhanced interrogation techniques'.[2] The result was an innovative, systematic and complex programme of 'extraordinary rendition,' operated by the CIA, designed and authorized

1 Interview with U.S. Vice President Cheney on Meet the Press (16 September 2001), quoted in Human Rights Watch, 'Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees' (2005), available at http://hrw.org/reports/2005/us0405/us0405.pdf.

2 Classified 17 September 2001 Presidential Memorandum of Notice: See Statement of Michael F. Scheuer, former Chief of bin Laden Unit of the CIA, at United States House of Representatives – Committee on Foreign Affairs¯Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations, Serial No. 110-28, 17 April 2007, p. 12, available at: http://foreignaffairs.house.gov/110/34712.pdf (last accessed 7 November 2012) and 'The CIA's Secret Detention Program', *Human Rights First*, 1 May 2008, available at: http://www.humanrightsfirst.org/2008/05/01/the-cias-secret-detention-program.

at the highest levels of the Bush administration, and made possible by a global network of cooperation and support.[3]

'Extraordinary rendition' involved the state-sponsored abduction from one country, with or without the cooperation of the government of that country, and the extra-judicial transfer to another country for detention and abusive interrogation outside the normal legal system.[4] Several characteristics of the extraordinary rendition programme (ERP) make it worthy of special consideration as a case study. Firstly, extraordinary rendition may represent the nadir of the descent into international illegality of the 'war on terror'. It not only involved serious illegality, but a scheme specifically designed and meticulously carried out to nullify the effect of the law – removing entirely its protection, avoiding oversight and leaving no trace, and permitting no prospect for accountability. It was shaped around a policy of systematic torture, a violation of the most firmly enshrined prohibitions in international law. The ERP embodied and epitomised the dehumanisation of individuals and their reduction to objects of 'intelligence' value, pursuant to the all-consuming end of intelligence gathering.

Secondly, although the programme was largely operated by the CIA, and designed and authorised at the highest levels of the Bush administration,[5] it is now a matter of public knowledge that it was carried out with, and

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3 '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, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances', A/HRC/13/42, 19 February 2010, § 103, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf (last accessed 7 November 2011) (hereinafter 'UN Joint Study on Secret Detention); Parliamentary Assembly of the Council of Europe (hereinafter PACE), 'Alleged Secret Detention and Unlawful Inter-State Transfers of Detainees involving Council of Europe Member States', PACE, Doc. 10957, 12 June 2006, available at: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf (first CoE Rendition Report 2006). Council of Europe Committee on Legal Affairs and Human Rights, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report', 7 June 2007, available at: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf (Second 'CoE Rendition Report (7 June 2007)').

4 Various working definitions are used; e.g. the European Court of Human Rights (ECtHR) adopted the definitions of the UK Intelligence and Security Committee, taking 'extraordinary rendition' to mean the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment: *Babar Ahmad and Others* v. *United Kingdom*, Appl. Nos. 24027/07, 11949/08, and 36742/08 (ECtHR 6 July 2012), at para. 113).

5 See, e.g., 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees, Human Rights Watch, July 2011, available at http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf.

depended upon, a multitude of other states as well as private actors.[6] As such it exposes unique levels of inter-state cooperation and with it interesting questions concerning state and individual responsibility.[7]
Thirdly, the ERP is not an atrocity that can be relegated to history. It is a matter of speculation to what extent the programme is on-going: while the CIA 'black sites' that housed rendition victims have been closed, and the US has committed itself not to torture,[8] as noted further below the rendition programme is reported to continue in other forms. Notably, extra-legal transfers to foreign states for unlawful detention and intelligence gathering are said to have reduced the US fingerprint, but not necessarily stopped extraordinary renditions. Moreover, it is in relation to this programme that the demands for justice discussed elsewhere in the book are most strident and concerted, and perhaps where the greatest resistance to accountability is encountered.

This chapter is in five parts. The second provides a brief factual overview of extraordinary rendition, and illustrates the practice by reference to a few of the many victims behind the ERP programme. The third highlights briefly aspects of the international legal framework discussed in previous chapters – in particular use of force, IHL and IHRL, and issues regarding state and individual responsibility – as they apply to the ERP. The fourth considers how the law applies in various scenarios which arose in the ERP, from states that housed secret prisons to those that provided or received intelligence information for example, and issues of state and individual responsibility arising. The fifth sketches out limited progress towards justice and accountability, as well as some of the challenges arising in this respect.

10.2 Factual Overview

Facts concerning the extraordinary rendition programme are predictably untransparent. It was designed as a secret detention programme, was driven by the CIA and targeted those detainees deemed to be of the highest intelligence value (High Value Detainees or 'HVD's). Its *modus operandi*, and the wall of secrecy that has surrounded it since, reveals the resolute determination to ensure that no information would ever come to light. It concerns serious criminality, apparently at the highest levels. It is no surprise then that the

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6 'CoE Rendition Reports, above, note 3; Report of the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners(2006/2200(INI)), 30 January 2007 (hereinafter 'Fava Report (30 January 2007)'). Open Society Justice Initiative Report, Globalising Torture: CIA Secret Detention and Extraordinary Rendition, 2013.
7 See Parts 10.3.4 and 10.3.5 below.
8 'Executive Order 13491 – Ensuring Lawful Interrogations', *The White House*, 22 January 2009, available at: http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

elucidation of 'facts' relating to the practice of extraordinary rendition has been a slow, painstaking and faltering process.

However, due to determined and systematic research by a range of actors – NGOs,[9] journalists,[10] academics,[11] certain governments and national parliaments,[12] prosecutors' offices,[13] and regional and international institutions (notably the Council of Europe and the European Parliament reports) and ultimately insiders' revelations,[14] considerable and consistent information has come to light on the nature of the US led rendition programme. President Bush confirmed in September 2006 that, while he would not reveal 'the specifics of this programme, including where detainees have been held and the details of their confinement',[15] the CIA held captives in secret detention for interrogation using 'tough' and 'alternative sets of procedures'.[16] By 2007 the Council of Europe Parliamentary Assembly's Rapporteur began his ground-

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9 See, e.g., 'U.S.A: Below the Radar: Secret Flights to Torture and "Disappearance"', *Amnesty International*, 4 April 2006, available at: http://www.amnesty.org/en/library/asset/AMR51/051/2006/en/b543c574-fa09-11dd-b1b0-c961f7df9c35/amr510512006en.pdf ; 'The Road to Abu Ghraib', *Human Rights Watch*, June 2004, available at: http://www.hrw.org/reports/2004/usa0604/usa0604.pdf.

10 For one of the earliest accounts to grasp public attention, see D. Priest and B. Gellman, 'U.S. Decries Abuse but Defends Interrogations' *Washington Post*, 26 December 2002, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

11 See, e.g., M. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 (2007) *George Washington Law Review* 1333, 1336; L.N. Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law', 309 (2006) *Case Western Reserve Journal of International Law* 320; L.N. Sadat, 'Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror', 75 (2007) *George Washington Law Review* 1211-15.

12 'Report of the Events Relating to Maher Arar – Analysis and Recommendations', Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (hereinafter 'Arar Commission'), available at: http://epe.lac-bac.gc.ca; UK Parliamentary Joint Committee On Human Rights, 'Nineteenth Report', 18 May 2006, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/ 18502.htm ; German Bundestag, 'Report of the 1st Inquiry under Article 44 of the Basic Law' (18 June 2009) <http://www.cducsu.de/Titel__bericht_des_1_untersuchungsausschusses_nach_artikel_44_des_grundgesetzes/TabID__1/SubTabID__2/InhaltTypID__12/InhaltID__2607/BtID__2607/Inhalte.aspx ('German Bundestag Report').

13 See e.g. trial of those responsible for the Abu Omar abduction, in F. Messineo, '"Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy', 7 (2009) *Journal of International Criminal Justice* 1023.

14 See information from former interrogators, e.g. A. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (W.W. Norton & Co., 2011).

15 *Id*.

16 'President Discusses Creation of Military Commissions to Try Suspected Terrorists', President G.W. Bush, *The White House*, 6 September 2006, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html. See further, 'Declaration of Ralph S. DiMaio' (21 April 2008), *Amnesty International et al* v. *CIA et al*, Case 1:07-cv-05435-LAP, Southern District of New York (9 August 2007), at pp. 114-6; Bush: "We're fighting for our way of life"', *CNN Politics*, 6 September 2006, available at: http://www.cnn.com/2006/POLITICS/09/06/bush.transcript/index.html.

breaking second report on extraordinary renditions by announcing that '[w]hat was previously just a set of allegations is now proven'.[17]

In light of the Presidential authorization of 17 September 2001,[18] , the CIA developed and tested a set of 'enhanced interrogation techniques (EITs)' with a view to the extraction of information from 'high value detainees.'[19] At first these were authorized orally, but on 1 August 2002, the US Department of Justice Office of Legal Counsel issued a memorandum authorising in writing the use of ten identified 'enhanced interrogation techniques' that provided general guidelines for determining the lawfulness of additional EITs.[20] Deputy Defence Secretary Paul Wolfowitz reportedly issued a directive removing the requirement that detainee treatment adhere to the Nuremburg Directives for Human Experimentation.[21] The ERP was put into practice when the first so-called 'high value target', Abu Zubaydah, was captured and flown to a secret prison in Thailand; he was described by a former national security officer as 'an experiment, a guinea pig' for the enhanced interrogation techniques and their limits.[22]

According to an FBI special agent present during CIA interrogations, who subsequently resigned,[23] the purpose of such interrogations 'was to make [the detainee] see his interrogator as a god who controls his suffering' through

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17 Second 'CoE Rendition Report' (7 June 2007), above, note 3, p. 6.

18 Presidential Memorandum of Notice, 17 September 2001, note 2.

19 'Inquiry into the Treatment of Detainees in US Custody', US Senate Armed Services Committee, 20 November 2008, available at: http://armed-services.senate.gov/Publications/Detainee Report Final April 22 2009.pdf.

20 'U.S. Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', 1 August 2002, available at http://www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf. The CIA began EITs on the basis of verbal legal authorisation from the Department of Justice Office of Legal Counsel (OLC): Interview with John Helgerson, 'Ex-CIA Inspector General on Interrogation Report, "The Agency Went over Bounds and Outside the Rules"', *Spiegel Online*, 31 August 2009, available at http://www.spiegel.de/international/world/0,1518,646010,00.html.

21 'U.S. Department of Defence Directive, Number 3216.02' (cancelled 8 November 2011) (25 March 2002), available at http://www.dtic.mil/whs/directives/corres/pdf/321602p.pdf ; *see* J. Leopold and J. Kaye, 'Wolfowitz Directive Gave Legal Cover to Detainee Experimentation Program', *Truthout*, 14 October 2010, available at http://www.truth-out.org/wolfowitz-directive-legal-cover-human-experimentation-detainees64184; see also 'U.S. National Institutes of Health, Office of Human Subjects Research, Directives for Human Experimentation, Nuremberg Code', available at http://www.hhs.gov/ohrp/archive/nurcode.html.

22 J. Leopold, 'Torture Diaries, Drawings and the Special Prosecutor', *Truthout*, 29 March 2010, available at http://archive.truthout.org/torture-diaries-drawings-and-special-prosecutor 58108. See 'Practice Illustrated' below. Author is counsel for Abu Zubaydah before the ECtHR.

23 A. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (W.W. Norton & Co., 2011). Ali Soufan is a former FBI agent who first interrogated Zubaydah shortly after he was captured. He reportedly resigned over the introduction of a cramped 'confinement box' in May 2002.

the use of coercive techniques.[24] Exorbitant claims have been made by the government as to the utility of intelligence that was achieved from certain detainees or pursuant to certain methods,[25] while the FBI agent present at the time, like others, claims that 'actionable intelligence' was in fact achieved by traditional methods and the torture was counterproductive.[26]

As set out in memorandum from the US Department of Justice Office of Legal Counsel, the authorised treatments comprised 'conditioning', 'corrective', and 'coercive techniques.'[27] The list of methods of interrogation, approved and employed, is chilling. The list stems not from allegations, but from official and publicly available US government documents, including the CIA's Inspector General Report and a report by the US Senate Armed Services Committee, among others, which specify in some detail the nature and effect of the torture and ill-treatment authorized and employed by the CIA.[28] Among the standard techniques referred to in US government documents are the following: whipping by the neck into concrete walls; chaining to a chair for a period of weeks; the use of the 'box', including forcing into a small box for up to 18 hours; stripping and hanging naked from the ceiling; sleep deprivation, including keeping detainees awake for 11 consecutive days; exposure to extreme

24 Ibid, p. 394.

25 Dick Cheney's memoir, published 30 August 2011, claims that the CIA's 'enhanced interrogation techniques' on Abu Zubaydah led to a 'fount of information' and saved 'thousands of lives.' D. Cheney, *In My Time: A Personal and Political Memoir*, 2nd ed. (Threshold Editions, 2012), pp. 357-58.

26 Soufan, *The Black Banners*, above. Other professional interrogators, Matthew Alexander of the Air Force and Glenn Carle of the CIA, have publicly stated that torture was counterproductive to the intelligence gathering aim: see M.D. Davis, 'Consign Bush's "torture memos" to history', *LA Times*, 30 July 2012, available at: http://articles.latimes.com/2012/jul/30/opinion/la-oe-davis-torture-memos-bybee-20120730.

27 Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, CIA, on Application of 18 §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees, 10 May 2005 (hereinafter 'OLC Combined Techniques Memo'), p. 12-14. Conditioning techniques were to 'demonstrate to the [detainee] that he has no control over basic human needs,' including nudity, dietary manipulation and sleep deprivation. Corrective techniques 'dislodge expectations that the detainee will not be touched' and instill fear and apprehension. Coercive techniques impose "more physical and psychological stress" including walling, cramped confinement and the waterboard.

28 Special Review, Counterterrorism Detention and Interrogation Activities Report, CIA Office of Inspector General, 7 May 2004, available at: http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf (hereinafter 'CIA OIG Special Review (2004)'); 'Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', Department of Justice, Office of Professional Responsibility, 29 July 2009,at: http://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf ; 'Inquiry Into the Treatment of Detainees in U.S. Custody', Report of The Senate Committee on Armed Services, 20 November 2008, at: http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

noise;[29] exposure to cold until the victim turned blue;[30] denial of pain medication for injuries;[31] 'waterboarding' or simulated drowning, constituting a 'threat of imminent death.'[32] An ICRC Report documents the extent to which rendition victims were cut off from the outside world, with:

> 'no knowledge of where they were being held, no contact with persons other than their interrogators or guards. Even their guards were usually masked and, other than the absolute minimum, did not communicate in any way with the detainees. None had real – let alone regular – contact with other persons detained… None had any contact with legal representation... None of the fourteen had any contact with their families …As such, the fourteen had become missing persons….'[33]

The authorised conditions of detention and transfer applicable at the relevant time also provide an insight into the mistreatment of the detainees.[34] Official guidelines and subsequent legal reviews reveal certain "standard conditions of confinement," including the following: hooding to disorient the detainee and keep him "from learning his location or the layout of the detention facility"; shackling to a chair and shaving the head upon arrival at the detention facility; solitary confinement for years[35]; continuous noise in cells and

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29 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' (in public domain as of 30 April 2009), International Committee of the Red Cross, February 2007, pp. 28-31, available at: http://humansecuritygateway.com/documents/ICRC_Report_TreatmentOfFourteenHighValueDetainees_CIACustody.pdf (hereinafter 'ICRC Report on CIA Detainees'); CIA OIG Special Review (2004), *ibid.* at § 15; J. Leopold, 'Zubaydah's Torture, Detention Subject of Senate Inquiry', *Truthout*, available at http://archive.truthout.org/zubaydahs-torture-detention-subject-senate-intelligence-inquiry58666.

30 K. Eban, The War on Terror, Rorschach and Awe, *Vanity Fair*, 17 July 2007, available at: http://www.vanityfair.com/politics/features/2007/07/torture200707.

31 D. Priest, 'CIA Puts Harsh Tactics on Hold', *Washington Post*, 27 June 2004, available at: http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html.

32 CIA OIG Special Review (2004), above, note 32 at § 223; A CIA memo makes clear that through waterboarding 'any reasonable person undergoing this procedure ... would feel as if he is drowning ... due to the uncontrollable physiological sensation he is experiencing ... .' Legal Adviser Bybee's memo noted that '[i]t constitutes a threat of imminent death.' Davis, 'Consign Bush's "torture memos" to history, above, note 28.

33 ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' 2007, 28-31

34 The conditions of detention at CIA detention facilities were officially governed by the Guidelines signed by the CIA Director, George Tenet on 28 January 2003: Guidelines on Confinement Conditions for CIA Detainees, Appendix D of CIA OIG Special Review (2004), above, note 32 available at http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc11.pdf. The actual conditions and techniques may have been more abusive than those prescribed in law.

35 Memorandum for John A. Rizzo, Acting General Counsel, CIA, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities (31 August 2006) (released 24 August 2009), p. 17, available at: http://www.justice.gov/olc/docs/memo-rizzo2006.pdf (hereinafter 'OLC DTA

walkways; continuous light such that 'each cell [was] lit by two 17-watt T-8 fluorescent tube light bulbs, which illuminate the cell to about the same brightness as an office'; use of leg shackles 'in all aspects of detainee management and movement,' in some cases for 24-hours per day.[36] These conditions have been described as 'unrelenting and, in some cases, hav[ing] been in place for several years,' and as having exacted, over time, 'a significant psychological toll.'[37]

In turn, the conditions of *transfer* of victims during rendition contain evidence of comparable abusive treatment.[38] The ICRC report refers to 'a fairly standardised' transfer procedure which included photographing the detainee clothed and naked; dressing the detainee in a diaper; denying access to the toilet (if necessary, the detainee was obliged to urinate or defecate into the diaper); blindfolding, putting on goggles, earphones or taping ears, shackling by hands and feet; transportation in semi-reclined position or lying flat on the floor of the plane with hands cuffed behind their backs, causing severe pain and discomfort.

Support for the regime came from many states and non-state entities and took many forms. NATO states apparently agreed in the immediate aftermath of 9/11 to a series of measures that have been described as providing 'permission' and 'protection' to CIA operational activity under the guise of the provisions on 'collective self defence' in Article 5 North Atlantic Treaty 1949.[39] The extent of collaboration from particular states is also uncertain, but has been estimated that some 54 states have participated in various ways.[40] In some cases, foreign authorities have been involved in the arrest, detention, and transfer of individuals into US custody.[41] Others have taken custody of rendered individuals following their abduction and transfer.[42] Some have housed CIA-operated 'black sites' for interrogation and detention, including Afghanistan, Guantánamo Bay, Lithuania, Morocco, Poland, Romania, and Thailand.[43] Additional states, including many outside Europe such as Syria,

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Memo (31 August 2006)') notes that 'the solitary confinement of detainees continued for years and may have altered their ability to interact with others'.

36 *Id*.

37 *Id*.

38 'Background Paper on CIA's Combined Use of Interrogation Techniques', Central Intelligence Agency, 30 December 2004, available at: http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf.

39 'CoE Rendition Report (7 June 2007)', above, note 3, paras. 85-90.

40 Globalizing Torture OSJI 2013, note 6. See e.g.s below in 10.4.

41 UN Joint study note 3.

42 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights', ICJ (Geneva, 2009), p. 81 (hereinafter 'ICJ Eminent Jurists Report'), available at: http://ejp.icj.org/IMG/EJP-Report.pdf.

43 For a report on European states's involvement see e.g.'CoE Rendition Report (7 June 2007)', above, note 3, para 117, EU Parliament Resolution 11 Sept 2012, and for a map of the states alleged to have been involved by Amnesty International at http://www.unlockthetruth.org/l/en/.

Jordan, Egypt, and Morocco are now known to have received prisoners from the US for the purpose of using interrogation techniques amounting to torture.[44] Many others are alleged to have provided airports and military bases for 'staging' or 'stopover' by aircraft carrying detainees.[45] Some states are accused of allowing agents to participate in interrogations on foreign soil,[46] of providing intelligence to those carrying out this programme, or of systematically relying on intelligence information extracted under it.[47] In addition to state partners, the programme appears to involve a range of private companies, including those that have disguised flight plans, and provided and operated the aircraft for rendition flights.[48] This multiple-actor global system led the Council of Europe to refer to the rendition programme as a 'spider's web spun across the globe.'[49]

An unparalleled level of secrecy has surrounded the rendition programme, from the outset up to the present time.[50] The detainees were flown to multiple 'black sites' and moved on repeatedly to ensure they could not be traced, and sites were closed if information concerning their existence threatened to come to light.[51] The CIA at times operated in unmarked planes, and filed false flight plans showing erroneous destinations, or flew without the flight plans al-

44 UN Joint Study (2010), above, note 3.

45 'CoE Rendition Report (12 June 2006)' above note 3; Statement by T. Lloyd to OSCE parliamentary assembly on the adoption of OSCE resolution, reminding parliamentarians that there were 1,245 CIA flights from European territory to countries where suspects faced torture. '6 July 2012 OSCE PA Annual Session in Monaco 3rd Committee Meeting', *YouTube*, available at: http://www.youtube.com/watch?list=UUThKCTu7zkfJn0KgaYufK9g&v=ovjAw3GRM94&feature=player_detailpage#t=900s. See also http://www.unlockthetruth.org/l/en/ For a discussion of legal obligations see Part 3, and Part 4, 'Keeping them Airborne.'

46 See, for example, 'Report of the Special Rapporteur on The Protection and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin', UNHRC, (hereinafter 'Scheinin Report 2009'), 4 February 2009, UN Doc A/HRC/10/3. See below Part 4 for legal issues arising and examples.

47 *Id*. at paras 51-57.

48 *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (9th Cir. 2010) (*en banc*), available at: http://www.ca9.uscourts.gov/ datastore/opinions/2010/09/08/08-15693.pdf.

49 CoE Rendition Report (12 June 2006), above, note 3.

50 The Presidential memo was reportedly not made public or provided to members of Congress, and CIA attorneys argued that the level of classification was so exceptional that even the font is classified. Eighth Decl. of Marilyn A. Dorn ¶ XX, *Am. Civil Liberties Union* v. *Dep't of Def.*, No. 1:04-CV-4151 (AKH) (S.D.N.Y. 12 May 2003), available at http://www.aclu.org/files/pdfs/natsec/20070105_Dorn_Declaration_8.pdf.

51 On 4 December 2002, the secret detention facility in Thailand was closed down, reportedly as information on its existence had come to light: D. Priest, CIA holds terror suspects in secret prisons, *Washington Post*, 2 November 2005, available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644_pf.html

together.[52] The widely reported use of 'front companies' made it possible to more effectively obscure the programme's activities.[53]

Despite information firmly entering into the public domain, a broad reaching approach to national security and state secrets continues, at time of writing, to seek to suppress information about the programme. As noted below, the US and other states have used secrecy or national security laws to obstruct both judicial and parliamentary proceedings.[54] Individuals that were subject to the programme and remain in detention at Guantánamo are under court orders that render any comment from them 'classified.'[55] Any reference to CIA detention or torture leads to immediate censoring of the military commission's proceedings.[56]

Other states are described as being under 'enormous pressure from Washington' and 'instructions from the CIA, with the support of the White House,[] not to give any facts on this ...'.[57] The US has refused to cooperate with foreign processes related to the rendition programme;[58] the extent of its determination to avoid disclosure is illustrated by a case before the UK Court of Appeals in which the US 'threatened' the British government to withhold intelligence information in the future if any information concerning the pro-

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52 See, e.g., official documents disclosed by the Polish government through FOIA requests in Poland revealing "dummy" and false flight plans, or no flight plans at all, and the collaboration of aviation authorities. 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency', Open *Society Justice Initiative*, p. 3, available at: http://www.europarl.europa.eu/document/activities/cont/201203/20120326ATT41895/20120326ATT41895EN.pdf.

53 *Id*.; S. Shane et al., 'C.I.A. Expanding Terror Battle Under Guise of Charter Flights', *New York Times*, 31 May 2005, available at: http://www.nytimes.com/2005/05/31/national/31planes.html ; C. Bollyn, '"Ghost Planes" Make Suspects Disappear, Pentagon has new secret weapon in "war on terror"', *American Free Press*, 14 January 2004, available at: http://www.americanfreepress.net/html/ghost_planes.html.

54 'PACE, Secret Detentions and Illegal Transfers', above, note3, at 1, refers to U.S., Poland, Romania, Macedonia, Italy, Germany, and the Russian Federation in the Northern Caucuses as having used national security or state secrecy to obstruct judicial or parliamentary scrutiny aimed at ascertaining responsibility for renditions. See Part 5 below on victims pursuing justice in U.S. courts who have had their proceedings wholly vacated on the basis of the 'state secrets' doctrine.

55 See Abu Zubaydah's case below and in the chapter 8 on Guatánamo Bay (where he continues to be detained).

56 Chapter 7A, 'Fair Trial.'

57 T. Hammarberg, European Commissioner of Human Rights stated that there was 'enormous pressure from Washington to keep all this secret. In fact, instructions from the CIA, with the support of the White House, are not to give any facts on this ... .' 'Who takes the rap for rendition?', *RT News*, 8 September 2011, available at: http://rt.com/news/hammarberg-cia-prisons-guantanamo-861.

58 See examples of refusal to cooperate with investigations, eg *al Nashiri v Poland, Abu Zubaydah v Poland*, recognsied by the governments in ECtHR litigation, though there are many other examples: 10.5 below and 7B.14.

gramme emerged.[59] The information in question – a few passages written by the Court itself summarizing the treatment of one rendition victim – was considered by the Court to be of genuine public interest on the one hand, and not to have any national security significance on the other.[60] This lead to unusually stinging condemnation by the Court:

> 'it was, in our view difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials or officials of another State where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be.'

While the US approach to state secrecy may stand apart, other states have also been criticized for unsurpassed levels of secrecy and obfuscation. European states have been found to have been involved in 'carefully and deliberately' covering up facts related to the programme.[61] The 'cult of secrecy' that made the rendition programme possible in the first place seeks to obscure the truth and access to justice ex-post facto.[62]

On his second day in office President Obama signed executive orders to end secret detention and ensure 'lawful interrogations'.[63] The President ordered an end to torture by the US, withdrawing the infamous 'torture memos', and the closure of CIA detention sites.[64] He qualified the latter commitment in a footnote by noting that 'short term' or 'transitory' detention is

59 *R (Binyam Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs* (No 4) [2009] EWHC 152 (Admin), available at: http://www.bailii.org/ew/cases/EWHC/Admin/2009/152.pdf.

60 In the end the Court did not make public the passages, having found the public interest in their disclosure was outweighed by the national interest – not in protecting the substance of the information, but in preserving the on-going intelligence relationship with the U.S. Mohamed, above, note 65 at 33-34.

61 'CoE Rendition Report (7 June 2007)', above, note 3; See also Hammarberg who notes that crimes led by the U.S. have been 'carefully and deliberately covered up' by European states. 'Rights chief: Europe "complicit" in U.S. torture', *CBS News*, 1 September 2011, available at: http://www.cbsnews.com/2100-202_162-20100368.html.

62 D. Marty, Report to PACE, 'Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations', p. 6, available at: http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf. He describes resort to secrecy laws to shield intelligence agencies from accountability within the Council of Europe states as 'simply unacceptable.' See the Pursuit of Justice, 10.5 below.

63 See 'Executive Order 13491 – Ensuring Lawful Interrogations', above, note 8; for the Executive Order on Guatanamo see Chapter 8.

64 *Id*.

not covered by the ban,[65] and it appears to indicate that it may resort to rendition in the future under certain, unspecified, circumstances.[66] It is a matter of on-going speculation to what extent similar ends to those pursued by the ERP are achieved through other means, notably the use of other states as 'proxies.' This has come to the fore for example in relation to reports exposing US rendition to sites in Somalia, where local authorities detain at US behest and the US has unfettered access to detainees for interrogation purposes.[67] While not CIA-run sites, true to the letter of the President's commitment, the consequences for detainees is no less grave, the sites no less 'black', and US responsibility no less real than under CIA-run facilities.[68] Alternative Department of Defence operated detention sites are also reported in Afghanistan raising comparable if less egregious concerns.[69]

– *The Practice Illustrated: Victims of the ERP*

While information on the number of victims subject to these abusive techniques, and the true scale and nature of the extraordinary rendition programme continues to unfold, a senior US official has acknowledged that the CIA held approximately 100 persons in its extraordinary rendition programme.[70] This appears in light of subsequent reports to be an underestimate,[71] and some

65 'The terms "detention facilities" and "detention facility" in ... this order do not refer to facilities used only to hold people on a short-term, transitory basis.' 'Executive Order 13491 – Ensuring Lawful Interrogations', above, note 8, at Sec. 2 (g).

66 'Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President', *Department of Justice*, 24 August 2009, available at: http://www.justice.gov/opa/pr/2009/August/09-ag-835.html; D. Johnston, 'U.S. Says Rendition to Continue, but With More Oversight', *New York Times*, 24 August 2009.

67 See A. McCoy, 'Impunity at Home, Rendition Abroad', *Huffington Post*, 14 August 2012: 'In July 2009, for example, Kenyan police snatched an al-Qaeda suspect, Ahmed Abdullahi Hassan, from a Nairobi slum and delivered him to that city's airport for a CIA flight to Mogadishu. There he joined dozens of prisoners grabbed off the streets of Kenya inside "The Hole" -- a filthy underground prison buried in the windowless basement of Somalia's National Security Agency. While Somali guards (paid for with U.S. funds) ran the prison, CIA operatives, reported the Nation's Jeremy Scahill, have open access for extended interrogation.'

68 *Id*.

69 H. Andersson, 'Afghans "abused at secret prison" at Bagram airbase', *BBC*, 15 April 2010, available at: http://news.bbc.co.uk/1/hi/8621973.stm. Unlike in the CIA programme, however, the ICRC was aware of the facility and was notified of the names of detainees within fourteen days of their detention. See H. Andersson, 'Red Cross confirms "second jail" at Baghram', *BBC*, 11 May 2010, available at: http://news.bbc.co.uk/1/hi/8674179.stm. On the lack of any due process surrounding their detention, see Chapters 7B.3 and 11.

70 M.V. Hayden, 'Remarks of Central Intelligence Agency Director Gen. Michael V. Hayden at the Council on Foreign Relations (as prepared for delivery)', 7 September 2007, available at: http://www.fas.org/irp/cia/product/dcia090707.html.

71 See Globalizing Torture, OSJI (2013), supra note 6, which details 136 known cases.

estimates put the figure significantly higher into hundred or even thousands.[72] Whatever the number of victims, the practice of extraordinary rendition, and the legal issues it gives rise to which will be explored in the next section, are perhaps best illustrated and understood by brief reference to the experiences of real individual victims. Prominent among them are Abu Zubaydah, Binyam Mohamed, Khalid El-Masri, Abu Omar, and Maher Arar, whose situations are summarised below.

– *Abu Zubaydah, the First 'High Value Detainee', Still Detained without Charge*
Abu Zubaydah, the first so-called 'high value detainee' in the ERP was captured in Pakistan in March 2002,[73] and transferred to a secret CIA facility in Thailand.[74] From Thailand he was transferred to the site characterised as 'the most important' secret prison by the Executive Director of the CIA at the time, in northern Poland.[75] From there he was sent to secret detention in several undisclosed facilities believed to include Lithuania, Morocco and Afghanistan, from where he was later transferred to Guantánamo Bay, Cuba. The US authorities have publicly acknowledged inflicting extreme physical and psychological coercion, including a battery of waterboarding, on Abu Zubaydah[76] and the ICRC report indicates that he was subject to all of the EITs referred to above.[77] In an attempt to justify the detention and ill-treatment of Abu Zubaydah, the US originally publicly asserted that he was the 'third or fourth man' in al

72 See 'CoE Rendition Report (12 June 2006),' note 3, noting 'hundreds' while M. Satterthwaite and A. Fisher, 'Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law', 6 (2006) *The Long Term View* 4, 52-71, available at http://www.mslaw.edu/MSLMedia/LTV/6.4.pdf refer to thousands.

73 The author is one of the applicant's counsel in the case. On capture, see CIA OIG Special Review (2004) note 32; *Abu Zubaydah* v. *Lithuania* Application 46454/11, ECtHR, 27 October 2011 and *Abu Zubaydah v Poland* Application No. 7511/13, ECtHR, 26 March 2013 at http://www.interights.org/abu-zubaydah/index.html. While Zubaydah was the first 'HVD', other victims, such as Agiza and el-Zari, had been detained from December 2011.

74 'CoE Rendition Report (7 June 2007)', above, note 3, para 70; *Abu Zubaydah* ECHR litigation ibid.

75 See S. Shane, 'Inside the Interrogation of a 9/11 Mastermind', *New York Times*, 22 June 2008.

76 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Interrogation of al Qaeda Operative, 1 August 2002, available at http://dspace.wrlc.org/doc/bitstream/2041/70967/00355_020801_004display.pdf (hereinafter 'OLC Abu Zubaydah Memo (1 August 2002)'); Background Paper on CIA's Combined Use of Interrogation Techniques, 30 December 2004, at: http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf (hereinafter 'CIA Background Paper on Combined Techniques (2004)'); CIA OIG Special Review (2004), above, note 32. Interrogator James Mitchell is reported to have described Zubaydah's interrogation as 'like an experiment, when you apply electric shocks to a caged dog, after a while he's so diminished, he can't resist.' J. Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (Doubleday, 2008), p. 156.

77 ICRC Report, note 33.

Qaeda, with a role in every major al Qaeda terrorist operation, including 9/11,[78] though upon access to a lawyer such claims were dropped.[79] He is currently held in Guantánamo and has been detained, for reasons which are not publicly known,[80] without charge or even habeas review, for over a decade.[81] He appears to be one of those designated for indefinite detention.[82] Abu Zubaydah is also one of those on whom the US courts have placed a ban on communication with the outside world through the 'presumptive classification' of all information from or about him.[83] Requests for the release of basic information have thus far been unsuccessful.[84] His experience of the ERP may therefore never be heard. Applications concerning his secret detention and other violations in Lithuania and Poland are currently pending before the ECtHR.[85]

– *Maher Arar*

A dual Canadian and Syrian citizen, Maher Arar was detained at John F. Kennedy airport in New York while changing planes on his way home from

78 See, e.g., President Bush, Remarks by the President at Thaddeus McCotter for Congress Dinner, 14 October 2002 (describing Zubaydah as 'one of the top three leaders'), available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html; see likewise Remarks by the President at Connecticut Republican Committee Luncheon, 9 April 2002 at http://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020409-8.html; Remarks by the President in Address to the Nation, 6 June 2002 (describing Zubaydah as 'al Qaeda's chief of operations'), at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020606-8.html. See, e.g., S. Benen, 'Another Al Qaeda Number 3', Guest Posting, *The Washington Monthly*, 31 January 2008 (questioning how many 'number three' men one terrorist organization could have) at www.washingtonmonthly.com/archives/individual/2008_01/013025.php.

79 See Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Discovery and Petitioner's Motion for Sanctions, *Husayn* v. *Gates* (D.D.C. October 27 2009) (No. 08-1360) and Chapter 8.

80 See Respondent's Memo Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay, available at http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

81 *Husayn v. Gates*, Case no. 1:08-cv-1360, Factual Return for Abu Zubaydah (ISN 10016), 29 July 2009, at pp. 1-2 ('As described below, and based on the materials submitted with this Factual Return, Abu Zubaydah [eight lines redacted]. Consequently, for these and other reasons, Zubaydah is lawfully subject to detention pursuant to the Authorisation for the Use of Military Force and the laws of war.')

82 Chapter 8A.4.

83 Re: Guantánamo Bay Detainee Litigation, Case 1:08-cv-01360, Amended Protective Order (9 January 2009).

84 This includes drawings and writings by him during his period of detention and torture, an affidavit and even a simple power of attorney form for proceedings before the ECtHR. See eg. 'Abu Zubaydah and the Silencing of Guantánamo's "High-Value Detainees," as the CIA Censors His Drawings', available at: http://www.andyworthington.co.uk/2011/10/09/abu-zubaydah-and-the-silencing-of-guantanamos-high-value-detainees-as-the-cia-censors-his-drawings.

85 Abu Zubaydah v. Lithuania, and Abu Zubaydah v Poland,. above, note 73.

a family holiday. He was detained and interrogated by US authorities for one week before being transferred to Syria, via Jordan, despite assertions of the risk of torture, a risk which materialized during his year-long detention, interrogation and torture in Syria.[86] As noted below, a Canadian commission of enquiry investigating his case found him to have no alleged al Qaeda links and to be free of wrong-doing, and that Canadian authorities had provided inaccurate information to the US authorities which, it could reasonably be inferred, had lead to his capture and torture.[87] Attempts at justice in US courts, or individual accountability for wrongdoing have, however, yet to bear fruit.[88]

– *Khalid el Masri*

Khalid el Masri is a German national, detained by Macedonian officials at the border in 2003. He was held and interrogated there before being transferred, on a 'private' plane to Afghanistan, where he was interrogated and tortured, and eventually sent on to Albania.[89] There his detention followed a similar pattern for five months, until his mistaken identity was revealed and he was released, without support in finding his way home or re-establishing his life. His family, having not heard from him for many months had since left Germany. Efforts to secure justice in US courts have been blocked,[90] and efforts at accountability elsewhere have floundered. However, on 12 December 2012, a judgment of the European Court of Human Rights found Macedonia in violation of multiple rights and ordered compensation.[91]

– *Binyam Mohamad*

Binyam Mohamad is an Ethiopian national and UK resident who was captured in Pakistan and held incommunicado at secret undisclosed locations for 2 years before being rendered to Morocco. There he was tortured, before being returned to US custody in Afghanistan and on to Guantánamo. Unlike the other cases mentioned, Mohamed was eventually charged under the Military Com-

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86 'Testimony of Maher Arar, Joint Oversight Hearing: Rendition to Torture: The Case of Maher Arar, Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight', *United States House of Representatives*, 18 October 18 2007, available at: http://foreignaffairs.house.gov/110/ara101807.pdf.

87 A separate report found collaboration between the Canadian police and Syrian officials contributed to torture.

88 Arar's attempts to secure justice in U.S. courts have been dismissed on 'state secrets' grounds. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), paras. 162-3. No-one has been prosecuted for his torture and secret detention.

89 See D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: a Human Rights Analysis', 19 (2006) *Harvard Human Rights Journal* 123, p. 124 describes the plane, arriving from Majorca as belonging to 'a CIA front company'. See his case set out in the application before the ECtHR al Nashiri v Poland, www.osji.org

90 See Chapter 11 on human rights litigation, highlighting the obstacles to litigation in this area.

91 *El Masri v the Former Yugoslav Republic of Macedonia*, [GC], No.39630/09, 13 December 2012.

mission Act, though these proceedings were later dropped and the case was not referred for trial.[92] UK intelligence services are alleged to have facilitated interviews by or on behalf of the US, in the knowledge of the allegations of ill treatment, and to have been present in his interrogation while in secret detention overseas. There has been no accountability in respect of his case.[93]

– *Abu Omar*

Hassam Osama Mustafa Nasr (known as Abu Omar), is an Egyptian national with political refugee status in Italy. He was abducted from the centre of Milan in 2003 and flown, via Germany, to Egypt where he was interrogated and tortured.[94] The second applicant, his wife, had no information as to what had happened to her husband. As discussed further below, his case has led to intense litigation through Italian criminal courts, part of which culminated in the convictions in absentia of numerous CIA agents and Italian officials, though other cases are on-going.

Although each victim's story is unique, their stories demonstrate numerous obvious similarities.[95] Each was captured by US and local authorities, rendered to US and/or proxy detention, often under the control of the CIA, and interrogated under torture. In several cases foreign agents, including in some cases agents of their own states, are alleged to have been present and involved at some point in interrogations. They suffered similar forms of ill treatment and/or torture, various combinations of the standard conditions of detention, transfer and 'EITs'.[96] They were transferred to multiple locations for interrogation, in a manner that caused physical and psychological harm and disorientated them as to time or location. No information was provided to families or to independent third parties including the ICRC. In many cases the secret detentions that followed lasted several years. Today, only Abu Zubaydah remains in US detention. All others have sought redress from courts in the US, in other countries that participated in their abuse, and increasingly internationally. While they have had limited success to date, as discussed in Part

92 The U.S. authorities had agreed in the context of UK court proceedings that, should his case proceed to trial, the information would be revealed. The UK court had found that 'the necessity of a fair trial inevitably defeats a claim for public interest immunity' (para. 29 at p. 11), and noted the concession by the U.S. in the course of proceedings that 42 documents which it wished to keep secret would be disclosed if the charges were referred for trial before a military commission. In the event, whether for this reason or another, his case was not referred for trial.

93 See Part 5 on UK enquiries and refusal to prosecute. Mohamad has been given an ex gratia award, as noted below and lives again in the UK.

94 CoE Rendition Report (12 June 2006), above, note 3, para 162.

95 Some examples of the cases are discussed in the text below. See also 'ICRC Report on CIA Detainees', *supra* note 33.

96 Some eg. Maher Arar and Abu Omar were tortured by other governments, others apparently only by the US.

5, their pursuit of justice is on-going and momentum may be gathering, at least outside the US[97]

It may be no coincidence that many of the stories to gain greatest prominence concern nationals or residents of Germany, Canada, UK and Australia,[98] and an abduction in Italy, while other cases continue to gradually emerge.[99]

10.3 Extraordinary Rendition: The Legal Framework

10.3.1 Wronging Other States: Territorial Integrity of States, Extradition Treaties and Consular Relations

While this chapter focuses on violations of human rights, IHL, and individual criminal responsibility, abduction by state agents within the territory of another state may also constitute a violation of obligations owed towards other states discussed in Chapter 5. The duties of non-intervention in the internal and external affairs of another state and respect for territorial integrity are relevant to incursions onto another state's territory without its consent, to effect an arrest or abduction operation for example. As noted in Chapter 5, at least the predominant view is that incursions by one state onto the territory of another without its consent violate the principles set down in Article 2(4).[100]

There are several examples in international practice of such abductions beyond the state's boundaries having been deemed to engage the international responsibility of the abducting state. The most notorious example is the Eichmann case, where Argentina challenged the abduction of the former Gestapo official on its territory by Israeli agents; the operation was condemned as a violation of Argentina's sovereignty and territorial integrity by Israel.[101]

The ERP may also fall foul of applicable rules under the Vienna Convention on Consular Relations 1963,[102] which are aimed at ensuring that individuals in states of which they are not nationals (as was the case in each of the examples named above), are afforded consular protection.[103] It has been the subject of criticism, for example, in the case of Maher Arar, that the Canadian consulate was not informed of Arar's detention, and became aware of it only

97 See 10.7 below.
98 Mammdouh Habib was another rendition victim, tortured in Egypt, and given compensation by the Australians reportedly in exchange for not pursuing legal action; his is not one of the cases highlighted above.
99 Globalizing Torture, OSJI 2013 identifies 139 cases.
100 On the rules governing the use of force see Chapter 5.
101 SC Res. 138 (1960), 23 June 1960, UN Doc S/RES/748 (1960).
102 Adopted 24 April 1963, entered into force 19 March 1967 (hereinafter 'Vienna Consular Convention').
103 Vienna Consular Convention Art. 36.

through his family. The US also allegedly refused to acknowledge Arar's transfer even after inquiries by Canadian consular officials.[104]

Also potentially relevant are the rules governing the circumstances in which civil aircraft may fly through or land in another State's territory, enshrined in the Chicago Convention on International Civil Aviation.[105] It has been suggested that the use of *civil* aircraft for extraordinary rendition would be a breach of the Convention, which excludes state aircraft.[106] A rendition flight landing on a state's territory absent prior agreement, or concealing the nature of the flight, would violate of the Chicago Convention.

Finally, it has been suggested that extra-legal abduction contravenes the spirit if not the letter of other legal arrangements which are put in place to regulate situations where persons suspected of involvement in international terrorism are found on one state's territory but are wanted by another state.[107] Extraordinary rendition flies in the face of the existing international framework for international cooperation, including extradition treaties and mutual legal assistance arrangements, which states may reasonably be expected to rely on in such situations.

As these rules, unlike human rights law, are primarily obligations due to the territorial state, a critical question is whether the operations on other states' territories – abductions, detentions or landing/flight of aircraft – were preceded by the consent of the territorial states. This is a question of fact that in some situations remains uncertain. In most of the cases that have come to prominence, it would certainly seem to be the case that such consent was forthcoming.[108] This is patently so for abductions conducted jointly, and almost certainly the case for establishment of detention sites that depended on state

104 *Arar v. Ashcroft* Complaint 60 18 CA No 04-CV-249-DGT-VVP (EDNY 2004) (hereinafter 'Arar Complaint' paras 39-40. See also D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition'above note 99, at 146

105 See Chicago Convention on International Civil Aviation, signed at Chicago on 7 December 1944, and Richard Gardiner, Working paper: EEDP 04/07: Blair's foreign policy and its possible successors www.chathamhouse.org.uk 12.

106 The convention facilitates the entry of civilian aircraft – Art 3 – while State aircraft are excluded from the Chicago Convention regime and may only enter the airspace of another State if authorized under special (ad hoc or standing) agreements concluded with that State – Article 4. State flights include military or police flights and would appear to cover rendition flights. As regards the sometimes unclear distinction between state and civilian aircraft, 3 possible approaches based on command and control, use and purpose, and registration, or a combination thereof explored by Gardner, ibid. In practice, some but not all rendition flights were logged as 'state' flights.

107 See extradition arrangements, discussed in Chapter 4. As reflected in SC Res. 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001), states are obliged to provide (and presumably to seek) this sort of cooperation in criminal matters, with the use of force not acting as an optional alternative.

108 The act of state consent is often murky and states may never acknowledge consent that is given, as illustrated e.g. by the killing of Osama bin Laden.

engagement in one form or another.[109] In respect of flights landing for refuelling, for example it may be less clear. If there were no consent, the acts of CIA agents on foreign territory would appear to give rise to responsibility on the part of the US (or any accompanying foreign state).

10.3.2 International Humanitarian Law

As in relation to other practices in the 'war on terror', international humanitarian law (IHL) has been invoked as an apparent panacea to the unlawfulness of the ERP and to preclude oversight by human rights bodies. The Bush administration asserted, in the face of the Human Rights Committee's (HRC) recommendation to close secret detention sites and grant access to the ICRC, that it: '... is engaged in an armed conflict with al-Qaeda, the Taliban, and their supporters [and as] part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not [human rights law], is the applicable legal framework governing these detentions.'[110] As set out in Chapter 6, the Obama administration also continues to assume that the US is engaged in a non-international armed conflict against al Qaeda, and to question the relevance of the human rights framework in this context.[111]

The applicability of IHL to the issue of ERP should be treated with particular reserve. First, it governs only those detentions and transfers carried out in association with a genuine armed conflict, international or non-international. While successive administrations claim to be at war with al Qaeda, the Taliban, and associated groups,[112] Chapter 6 explores the reasons why the concept of an armed conflict does not encompass a conflict with a loose ideological network and all those individuals who form part of or support it.[113] The conflicts in Afghanistan, Iraq or elsewhere could provide such a link; some

109 See Abu Zubaydah v Poland, note 83 – allegations that a document was drawn up agreeing to the site, and the state actively removed the normal processes of law. Less information is available in some other cases. Marty report considers there were 'operating agreements' for black site detention in Romania.

110 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America, Addendum, Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee', UNHRC, 1 November 2007, UN Doc CCPR/C/USA/CO/3/Rev.1/Add.1, available at: http://www.univie.ac.at/bimtor/dateien/usa_ccpr_2008_govresponse.pdf.

111 'Executive Order 13491 – Ensuring Lawful Interrogations', above, note 8; *Al-Bihani v. Obama (Al-Bihani II)*, 590 F.3d 866, 872-73 (D.C. Cir. 2010); *Hamlily v Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009). This is a proposition that all three branches of the US government have accepted. See R. Goodman, 'The Detention of Civilians in Armed Conflict', 103(2009) *American Journal of International Law* 48.

112 *Al-Bihani v. Obama, id.*

113 See Chapter 6B1 on the nature of armed conflict and applicability of IHL.

of the detainees in Guantanamo Bay, discussed in Chapter 8, were detained in the broad context of the conflict in Afghanistan or arguably its 'spillover' into Pakistan.[114] However, it is far more doubtful that individuals detained on the streets of Milan,[115] Bosnia,[116] Djibouti[117] or Macedonia[118] could plausibly be said to be engaged in that conflict at the relevant time.[119] As the documentation makes clear, they were targeted for their perceived intelligence value and there is little in the facts known in relation to the individuals rendered, including the specific examples highlighted in Part A, to support the suggestion that their detention and transfer had any direct and meaningful association with an armed conflict.

Second, as regards the few individuals to whom IHL may in principle be relevant, no lawful basis for ERP can be found in the letter or spirit of IHL. Although specific provisions vary depending on the status of the detainee, as set out fully in Chapter 8, all detainees in the context of armed conflict are entitled to protection from torture and cruel, inhuman, and degrading treatment, and to some degree of oversight and procedural guarantees in respect of their detention.[120] Several provisions of the Geneva Conventions also impose specific requirements in relation to registration of detainees and access by, among others, the ICRC, that are at odds with an extra-legal detention and transfer system.[121]

Some specific provisions of IHL explicitly prohibit the transfer of detainees from the territory on which they were detained. These prohibitions apply irrespective of whether that transfer is across borders or from the control of one state to another – the critical question is whether there is a transfer between detaining powers, to which the IHL protections apply.[122] If entitled to be treated as prisoners of war, the detainees are protected under Geneva Convention III, which allows transfer only into the hands of a party to the

114 The existence of conflict does not mean individuals were in fact detained in connection with that conflict, but some of them may well have been.

115 Abu Omar, above.

116 E.g. Boumediene, whose case eventually went to the Supreme Court – see Chapter 8.

117 See the case of *Mohammed al-Asad* v. *Djibouti* filed before the ACHPR, where the author is one of the legal team before the Commission. Mr. Asad is a Yemeni national who alleges he was detained in Djibouti in December 2003 and January 2004 as part of the CIA's secret detention and rendition program and transferred into 'black site' detention where he spent some sixteen months in secret detention. In May 2005, al-Asad was transferred to Yemen where he now lives. See al-Asad v Djibouti, INTERIGHTS, available at: http://www.interights.org/al-asad/index.html.

118 *El Masri v. Macedonia* judgement, above note 91.

119 See Chapter 6B1 on the 'Global' nature of the purported 'war with al Qaeda and associates'

120 Chapter 8. See J. Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', 87 (2005) *International Review of the Red Cross* 375 (hereinafter 'Safeguards for Armed Conflict').

121 'ICRC Report on CIA Detainees', above, note 33.

122 Pejic, 'Safeguards', above, note 120.

conflict where the transferring power has satisfied itself 'of the willingness and ability of such transferee Power to apply the convention.'[123]

Specific rules also preclude transfer of civilians unless the detaining power is satisfied that their rights will be protected by the transferee power.[124] If it transpires that this is not so measures must be taken to request their return.[125] In situations of occupation, such as post-invasion Iraq, 'forcible transfer as well as deportation of protected persons' is 'prohibited, regardless of their motive.'[126] Violations, *inter alia*, of Article 49 concerning forced transfers constitute a 'grave breach' of the Geneva Conventions, a serious war crime carrying individual criminal responsibility, which all states are obliged to repress. Although US Assistant Attorney General Jack Goldsmith advised that transfer of illegal aliens in Iraq or temporary transfers of nationals of the occupied state to facilitate interrogation are not prohibited under IHL,[127] it is difficult to see any legal basis for such exceptions in the wording or literature surrounding Article 49.[128]

Although there are no comparable explicit rules for non-international conflicts, IHL protects against ill treatment and ensures basic fair trial guarantees in all conflicts;[129] as explored below, in the human rights context it has been recognised that extraordinary rendition and secret detention violate both. Transfer to a situation in which there is a clear risk of such violations cannot be consistent with the positive obligations to safeguard respect for the Geneva Conventions, applicable in either type of conflict.

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123 Geneva Convention Relative to the Treatment of Prisoners of War 1949, 6 U.S.T. 3316, Art. 12(2), 74 U.N.T.S. 135 (adopted 12 August 1949, entered into force 21 October 1950) (hereinafter 'GCIII').

124 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 6 U.S.T. 3516, Art. 45(3), 75 U.N.T.S. 287 (adopted 12 August 1949, entered into force 21 October 1950) (hereinafter 'GCIV').

125 *Id*.

126 Art. 48 GCIV: 'article 49 Geneva Convention IV 1949 states that: 'Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'

127 See J.L. Goldsmith, 'Memorandum for Alberto R. Gonzales, Counsel to the President, Re: The Permissibility on Relocating Certain "Protected Persons" from Occupied Iraq', *Washington Post*, 19 March 2004, available at: http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf.

128 The ICRC Commentary to Article 49 describes this provision as 'absolute and allows of no exceptions.' For a more detailed analysis of the argument, see Sadat, 'Ghost Prisoners and Black Sites', above, note 12, at 309.

129 See eg Common Article 3 Geneva Conventions and other provisions: J. Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in E. Wilmshurst (ed.), International Law and the Classification of Conflicts, OUP, 2012, p 18.

States are obliged to respect the Geneva conventions and to 'do everything in their power' to ensure that they are respected universally,[130] which also require a positive response from all states parties where such violations come to light. This is relevant to all states that cooperated or supported the programme in whatever form or even that knew of it and failed to take measures within their power to ensure that it cease. Moreover, aspects of the ERP could amount to grave breaches of the 1949 Geneva Conventions,[131] in which case states are obliged to 'search for all persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'[132] Military and civilian superiors are also obliged to punish subordinates for crimes they know or have reason to know the subordinates have committed in the past. A superior can sufficiently discharge this obligation by reporting breaches of IHL to a competent authority for investigation and prosecution.[133]

IHL not only fails to provide a legal basis for the secret detention, transfer and abuse associated with the rendition programme, it also makes provisions relevant to ensuring justice and accountability in its aftermath.[134]

10.3.3 Human Rights Law

The practice of ERP is self evidently and straightforwardly a violation of many human rights, on account not only of its eventual purpose – torture, secret and arbitrary detention, or other serious violations – but also due to the procedural arbitrariness that attends the rendition. The following is a brief overview of affected rights and issues arising.

10.3.3.1 'Extraterritorial' Renditions and Human Rights Obligations

Violations have arisen on the territories of many states around the globe. A preliminary question raised by the US, relates to the relevance, in human rights law, of the fact that generally the state driving the rendition programme, and in some cases other states involved in various forms in supporting it, have

130 Common Article 1, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, adopted 8 June 1977, entered into force 7 December 1978 (hereinafter 'API')..

131 For a list of grave breaches, see ICRC, 'Grave breaches specified in the 1949 Geneva Conventions and in additional Protocol I of 1977', available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jp2a?opendocument

132 For common articles on this see GCI Art. 49, GCII Art. 50, GCIII Art. 129, and GCIV Art. 146.

133 G. Mettraux, *The Law of Command Responsibility* (OUP, Oxford 2009).

134 For practice in this respect, see below 10.5 and further Ch 7B.14.

acted outside their own territories.[135] As noted elsewhere in this book, the US government has asserted that its obligations under human rights treaties – such as the International Convention on Civil and Political Rights 1966 (ICCPR), and UN Convention against Torture 1984 (CAT) – do not arise in respect of the ERP on the basis of its 'extra-territorial' nature.[136] For example, in line with its position that the ICCPR does not apply extraterritorially, the US responded to the HRC that it was not bound by the ICCPR in respect of ERP.[137]

However, as explained in Chapter 7, an assessment of the international legal framework suggests a different interpretation. The state's obligations under human rights treaties arise where individuals are within the state's territory or where they are subject to its jurisdiction, which can arise where it controls territory abroad *or* in certain circumstances where its agents act abroad.[138] It is now the consistent approach across courts and human rights bodies that if the state exercises its power abroad by taking physical custody or control of individuals, it is accountable for those actions under its human rights obligations.[139] In an important Grand Chamber judgement of July 2001 the ECtHR reasserted that *'what is decisive ... is the exercise of physical power and control over the person in question.'*[140] In the context of the ERP, the US might be said not to have controlled black detention sites abroad, but certainly to have controlled the individuals abducted, transferred detained or tortured by CIA agents.[141]

There are many comparable cases involving individuals being forcibly removed from one state to the jurisdiction of another, where courts have found their extra-territorial human rights obligations have been held to arise. For

135 See Chapter 7A.2 and 7B.1 'Extra-territorial application of IHRL'.

136 Chapter 7B.2, referring to the Second, Third and Fourth Periodic Reports of the U.S.to the UN Committee on Human Rights For the Committee's response, see e.g. 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America', *UNHRC*, 18 Dec 2006, UN Doc CCPR/C/USA/CO/3/Rev.1.

137 Periodic Reports of the USA, *id*.

138 The UN Committee against Torture (CAT), the Human Rights Committee (UNHRC), and International Court of Justice (ICJ) have consistently held that the provisions of both the ICCPR and CAT arise where the state exercises its authority or control on its own territory or abroad. Chapter 7A2 'General Comment no. 31 [80] The nature of the General Legal Obligation Imposed on States Parties to the Covenant', *UNHRC*, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13; 'Concluding Observations of the Human Rights Committee on the United States of America', *UNHRC*, 15 September 2006, UN Doc CCPR/C/USA/CO/3.

139 Uncertainty that crept into ECtHR jurisprudence has not related to detentions abroad, where governments have accepted that IHRL obligations apply in the course of *Bankovic and Ors* v *Belgium and Ors*, App. 52207/99, (2001)) and *Al-Skeini and Ors* v *United Kingdom*, Appl. No. 55721/07 (2011). See also *Al-Saadoon and Mufdhi* v *United Kingdom*, Appl. No 61498/08 (2010) on transfer.

140 *Al-Skeini and Ors* v *United Kingdom*, *id*. at para. 136.

141 Intelligence agencies are clearly within the state apparatus for purposes of responsibility; see Chapter 3.

example, the seminal cases of *Lopez Burgos & Ors* v. *Uruguay* – in which the HRC famously described it as 'unconscionable' that the state could be permitted to do abroad what it was prohibited from doing to its own citizens at home – concerned abductions from Argentine soil.[142] The *Ocalan*, *Freda* and *Sanchez Ramirez* cases before the European Court all concerned individuals suspected of terrorism being detained and forcibly removed from another state without due protection of law.[143] There is little room for doubt that where an individual is subject to the sort of direct and overwhelming power and control envisaged in detention, interrogation or transfer within the ERP, he or she would come within the jurisdiction of the state.

10.3.3.2 Positive Obligations to Prevent, Protect and Respond to Human Rights Violations

As noted above, the ERP unfolded in many states worldwide. In some, the territorial states may be the instrument of the torture or other violation, as 'proxy' for the US or otherwise. In others wrongs may have resulted from joint operations. In others yet the state's territory may simply be being 'used' by foreign agents. In each case, the territorial state's responsibility may well be engaged on the basis of a failure to meet its positive obligations to secure to those within its jurisdiction the rights guaranteed under human rights law.

As Chapter 7 indicates, the notion of positive obligations under human rights law requires that the State take all feasible measures to prevent violations, and to respond where they arise.[144] Responsibility may arise where there is 'consent or acquiescence' by the states in the use of their territory by private or foreign state actors for human rights violations, but giving such consent is not however necessary. The test according to IHRL is whether the state exercised 'due diligence' to prevent the violations. The elements of this test are met where 'the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* ... from the criminal acts of a third party and that they *failed to take measures within the scope of their powers* which,

142 *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No. R.12/52, UN Doc Supp. No. 40 (A/36/40) at 176 (1981) at para. 2.2.

143 *Al-Skeini and Ors* v *United Kingdom*, above, note 140, at para. 36, noting that 'irregular rendition' is recognized 'exception' to the territoriality principle, citing the *O¨calan*, *Freda* and *Sanchez Ramirez* cases all of which concerned an applicant being forcibly removed (albeit to stand trial not torture and arbitrary detention) in another state with the consent of the territorial state. *O¨calan* v *Turkey*, Appl. No. 46221/99, Merits (ECtHR 12 March 2003); *Illich Sanchez Ramirez* v *France* (dec.), Appl No. 28789/95 (ECommHR 24 June 1996); *Freda* v *Italy*, Appl. No. 8916/80, Admissibility Decision (ECommHR 7 October 1980).

144 *Osman v United Kingdom*, Appl. No. 23452/94, 29 EHRR 245 (1998), at para. 116; *Z and Ors v United Kingdom*, Appl. No. 29392/95, 34 EHRR 3 (2002), para. 73;*Velasquez Rodriques v Honduras*, above, note 165, at paras. 172-5.

judged reasonably, might have been expected to avoid that risk.'[145] The 'due diligence' obligation also requires that the state must act with 'exemplary diligence' to investigate, prosecute, and provide redress in the event of breach.[146]

10.3.3.3 Particular Rights Implicated by Extraordinary Rendition

– *Liberty and Security of the Person*

Incommunicado and unacknowledged detention are clearly at odds with the guarantees in respect of the right to liberty under international law.[147] Unacknowledged detention has been described as a 'complete negation of the guarantees of liberty and security of the person … and a most grave violation of that Article.[148] Incommunicado and unacknowledged detention by their nature entail also that the detainee does not have the benefit of the essential safeguards, discussed in Chapters 7 and 8, which have been held – by courts and bodies across human rights systems – to be an integral aspect of the protection of liberty.[149]

The failure to register and monitor detainees '... allows for serious violations of rights to occur, and enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime so as to cover their tracks and to escape accountability for the fate of a detainee.'[150] Access to a lawyer, and to medical personnel, are among the critical safeguards accepted by human rights bodies as essential in recent years,[151] along with the right to challenge the lawfulness of detention before a judge, with sufficient fair trial rights to make such a challenge meaningful.[152] The most basic legal principles on

145 *Osman, id.*; see also *Kilic v Turkey*, Appl. No. 22492/93 (ECtHR 9 January 1995); *Kaya v Turkey*, above, note193. The jurisprudence of various courts and human rights bodies reflect a similar test: *Velasquez Rodriguez v Honduras*, above, paras. 172-5 ; 'General Recommendation No. 19, UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Eleventh session, 1992, available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

146 Chapter 7A.2 See *Isayeva and Ors v Russia* (n 93) paras 208-13; and *Menesheva v Russia*, Appl. No. 59261/00, (ECtHR 9 March 2006), at para. 64.

147 Art. 5 ECHR; Art. 9 ICCPR; Art. 14 ACHR; Art. 6 ACHPR, Chapter 7A.5.3. *See eg Öcalan v. Turkey*, *id.* at § 103, and *Cyprus v. Turkey*, Grand Chamber, Appl. No. 25781/94, Grand Chamber (10 May 2001), at § 147.

148 *Kurt v. Turkey*, Appl. No. 15/1997/799/1002 (ECtHR 25 May 1998) at § 124.

149 See Chapters 7A.5.3 and 4, and 8.B.4. See eg *Sabbeh & Others* v *Egypt*, ACHPR, and Joint Report on Secret Detention 2010.

150 *Ibragimov and Others v. Russia*, Appl. No. 34561/03 (ECtHR 29 May 2008), at § 114.

151 E.g. 'Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment', UNGA, 9 December 1988, UN Doc A/Res/43/173, Principles 16 and 19; 'Standard Minimum Rules for the Treatment of Prisoners', 1977, UN Doc E/5988 rule 37.

152 As noted elsewhere, such protections are guaranteed in all circumstances; See e.g. IACHR Habeas Corpus in Emergency Situations, HRC GC 29 in Chapter 8.

lawful detention are patently vitiated by a clandestine programme of abduction and transfer to secret detention.[153]

– *Torture and Cruel, Inhuman, and Degrading Treatment*

Where states engage in torture or ill-treatment (TCIDT), alone or with other states, they are responsible for violation of the absolute prohibition of such treatment in human rights treaties and customary law.[154] Where states fail to exercise 'due diligence' to ensure that these rights are respected, whether by private actors or foreign states operating on their territory, they also fall foul of their positive obligations to prevent and protect from such ill-treatment.[155]

It is beyond doubt that, despite questions arising in the context of the war on terror in recent years, the prohibition on torture or cruel inhuman or degrading treatment or punishment is absolute, admitting of no exceptions or derogations.[156] It applies irrespective of a victim's alleged wrongdoing,[157] perceived 'intelligence value' or the purported need to extract information to prevent terrorism.[158] As has been seen, courts and bodies maintain a high threshold for the definition of TCIDT, consistent with the opprobrium associated with this absolute prohibition.[159]

There would seem to be little doubt that the interrogation techniques referred to above would amount to both torture and ill-treatment under human rights law. In respect of certain CIA 'enhanced interrogation techniques',

153 See, e.g., *Babar Ahmad and Ors v United Kingdom*, above, note 4 (opining in para. 114 that 'extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention.')

154 Allegations in respect of rendition include that in some instances or for certain periods of time U.S. officials directly engaged in torture, while in other cases, other states may have done so at its behest.

155 Procedural rights and judicial oversight have also been held to constitute essential safeguards against torture which must therefore be guaranteed by the state, e.g., *Mohammed Alzery v. Sweden*, HRC Communication No. 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (2006), 10 November 2006; *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99 (ECtHR 8 July 2004) at § 318.

156 Chapter 7A5.2. See *Shamayev and Others v. Georgia and Russia*, Appl. No. 36378/02 (ECtHR 12 April 2005) at § 335.

157 See *Chahal v. the United Kingdom*, Appl. No. 70/1995/576/662 (ECtHR 15 November 1996) at § 79, and *Saadi v. Italy*, Appl. No. 37201/06 (ECtHR 28 February 2008) at § 127.

158 See *Gäfgen v. Germany*, Grand Chamber, Appl. No. 22978/05 (ECtHR 1 June 2010) at § 107, where a child's life may have been at stake but the prohibition was absolute.

159 See Chapter 7A.5.2; 'Inhuman' or 'degrading' treatment must attain a minimum level of severity (e.g.*Saadi v. Italy*, above, note 156; at § 135) while torture has a higher severity causing very serious and cruel suffering (eg. *Akkoç v. Turkey*, Appl. Nos. 22947/93 and 22948/93 (ECtHR 10 October 2010), at § 115).

159 See e.g., 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Addendum: Mission to the United States of America', UN General Assembly, November 2007, available at: http://www2.ohchr.org/english/issues/terrorism/docs/A.HRC.6.17.Add.3.pdf.

international human rights bodies have found them to constitute torture and ill-treatment.[160] The UN CAT has expressed its concern in respect of compliance with the UNCAT, called on the US to 'rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.'[161]

The Committee on the Prevention of Torture has similarly concluded that: 'interrogation techniques applied in the CIA-run overseas detention facilities have certainly led to violations of the prohibition of torture and inhuman or degrading treatment. Any doubts that might have existed on this subject were removed by the publication of a Special Review of CIA counterterrorism detention and interrogation activities covering the period September 2001 to October 2003, carried out by the Agency's own Inspector General.[162] Despite being extensively censored, the published version of the Special Review makes clear the brutality of the methods that were being used when interrogating terrorist suspects at sites abroad.'[163]

The system of incommunicado and/or secret detention may itself amount to torture or inhumane treatment, as several courts and human rights courts and bodies have recognised. The European Court has specifically recognised that the extreme fear, anguish and vulnerability arising from the secret and arbitrary nature of the extraordinary rendition programme gave rise to torture.[164] The UN Joint Experts in their Report on Secret Detention have noted that secret detention may itself constitute torture.[165] The ICRC report on the 14 high value detainees indicated to similar effect that the extreme 'distress' resulting from rendering individuals 'missing persons' constitutes ill-treatment.[166] This is consistent with jurisprudence in other contexts, where for example the UN Human Rights Committee found the threshold of torture to have been reached in a case where an individual has been detained for three

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160 See 'Report of the Special Rapporteur on Terrorism, Addendum', *id*.; Annex 7: UN Committee against Torture, Conclusions and Recommendations of the Committee against Torture to the United States of America, CAT/C/USA/CO/2, 25 July 2006, § 17 'ICRC Report on CIA Detainees', above, note 33, p. 26.

161 Annex 7: UN Committee against Torture, *id*.

162 CIA OIG Special Review, dated 7 May 2004 but released on 24 August 2009.

163 'CPT Report' on Lithuania Visit, below, note 310.

164 *El Masri v the Former Yugoslav Republic of Macedonia*, [GC], No.39630/09, 13 December 2012, para 202-3.

165 See UN Joint Study(2010), above, note 3, at § 31-35; see also UNGA Res. 148 (2005), 15 December 2005, UN Doc A/RES/60/148 (2005).

166 'ICRC Report on CIA Detainees', above, note 33, pp. 7-8.

years incommunicado and in a secret location.[167] It reflects a much broader body of human rights law recognising that the denial of safeguards – such as access to medical examinations, to a lawyer, to contact third parties and to judicial scrutiny[168] – may constitute violations of the positive obligations in respect of torture or ill-treatment.

Rendition may itself amount to cruel or degrading treatment not only of the individual involved, but also their family members.[169] Human rights courts and bodies have noted that the disappearance of a close relative with no information provided to the family, nor an effective investigation, may lead to anguish amounting to cruel, inhuman, or degrading treatment.[170]

– *Rendition as Enforced Disappearance*

Renditions have as their design and effect the removal of the person from the protection of law, and withholding information from that person and his/her family. As such, it meets the criteria of enforced disappearance in accordance with the definition in the Convention on Enforced Disappearance, which refers to ' ... the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'[171]

In recent years the ERP has come to be recognised as secret detention amounting to the enforced disappearance of persons.[172] Disappearances may

167 *Yussef El-Megreisi v. Libyan Arab Jamahiriya*, UN Human Rights Committee (HRC) Communication No. 440/1990, UN Doc CCPR/C/50/D/440/1990, 23 March 1994 at § 5.4. See also *Velasquez Rodriguez* case, Judgment of 29 July 1988, Inter-American Court of Human Rights, (Ser. C); No. 4 (1988), availble at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm , at §187.

168 See Chapters 7A4.2 and 5.2.Eg include *Akkoc v. Turkey*, above, note 158, at § 118; *Kurt v. Turkey*, above, note 148, at § 123 and Sabbeh & Ors v Egypt, ACHPR February 2012.

169 'ICRC Report on CIA Detainees' note 33. See, for example, *Quinteros v Uruguay* (Communication No 107/1981), HRC, 15 October 1982, at para. 14; *Varnava and Ors v Turkey*, Grand Chamber, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/ 90, 16072/90, and 16073/90 (ECtHR. 18 September 2009);, at paras. 200-2; *Tanis and Ors v Turkey*, Appl. No. 65899/01 (ECtHR 2 August 2005), at para 219; *Cyprus v Turkey*, above, note 147, at paras 155-8; and *Kurt v Turkey*, above, note 148, at para 134; *Avdo and Esma Palić v Republika Srpska* (Decision on Admissibility and Merits), Human Rights Chamber for Bosnia and Herzegovina, Case no CH/99/3196 (December 2000), at paras. 79-80.

170 See e.g., *Bazorkina v Russia*, Appl. No. 69481/01 (ECtHR 27 July 2006); see also 'ICRC Report' supra.

171 International Convention for the Protection of All Persons from Enforced Disappearance, *UNGA* (adopted 20 December 2006, entered into force 23 December 2010). See also 'Report to the General Assembly on the First Session of the Human Rights Council', *UNHRC*, 2006, UN Doc A/HRC/1/L.10.

172 See e.g., the UN Joint Study (2010), above, note 3, at § 28 noting that "Every instance of secret detention also amounts to a case of enforced disappearance (para 28)".

in turn constitute torture, as recognised by the U.N. Human Rights Committee,[173] and the Working Group on Enforced or Involuntary Disappearances, which notes that 'the very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture.'[174]

– *'Non-refoulement' to Serious Violations*

As discussed fully in Chapter 7, the *'non-refoulement'* obligation requires that states refrain from transferring an individual to a state where there is a 'real' and 'foreseeable' risk of serious rights violations arising.[175] Developing practice suggests that the obligation not to transfer an individual arises where there is a risk not only of torture or ill-treatment, but also of a violation of the right to life, of a 'flagrant denial of justice', and potentially of other serious violations of human rights.[176] All of these issues arise in respect of the transfer by various states of individuals to CIA black sites, or to third states notorious for such violations, with the specific purpose of interrogation and 'intelligence gathering'.

The obligation not to transfer if there are 'substantial grounds' for believing that a non-derogable right would be violated is itself non-derogable.[177] It cannot be offset against any risk of terrorism or threat to national security, and is not affected by the alleged conduct of the individual in question.[178] Although the US has denied that it is bound by the *non-refoulement* prohibition,

173 See *María del Carmen Almeida de Quinteros et al. v. Uruguay,* HRC Communication No. 107/1981, UN Doc CCPR/C/OP/2 (1990), at 138at §14; see also *El-Megreisi v. Libyan Arab Jamahiriya*, HRC Communication No. 440/1990, UN Doc CCPR/C/50/D/440/1990, 21 March 1994, at §§ 2.1-2.5; *Mojica v. Dominican Republic*, HRC Communication No. 449/1991, UN Doc CCPR/C/51/D/449/1991, 10 August 1994,at § 5.7. In the IACtHR see*eg. Velásquez Rodríguez* Case, Judgment of 29 July 1988, Inter-Am Ct. HR (Ser. C) No. 4 (1988), at §187.

174 *See* UN Doc E/CN.4/1983/14, § 131.

175 Chapter 7A.5.10 on jurisprudence including *Chahal v United Kingdom*, above, note 156; *Saadi v Italy*, above, note 158; *Othman (Abu Qatada)* v. *the United Kingdom*, Appl. No. 8139/09 (ECtHR. 14 December 2010); and *Agiza v Sweden*, Communication No. 233/2003, UN Doc CAT/C/34/D/233/2003 (2005). See further K. Wouters, 'Reconciling National Security and *Non-Refoulement*: Exceptions, Exclusion, and Diplomatic Assurances', in N. White et al., *Counter-Terrorism: International Law and Practice* (OUP, Oxford 2012), at Ch. 22, p. 579.

176 Chapter 7 (Human Rights); *Othman, ibid.; Baysakov and Ors* v. *Ukraine*, Appl. No. 54131/08, (ECtHR. 18 February 2010).

177 Chapter 7A.5.10 and practice post 9/11 in 7B.10; eg *Saadi v. Italy,* above, note 158, at § 127.

178 Ibid. See eg. *Saadi v Italy*, *id.*; *Chahal v UK*, above, note 158. *Agiza v Sweden*, above, note 175, at para 13.8; *Aemei v Switzerland*, Communication No. 34/1995, CAT, 29 May 1997, at para 9.8; *MBB v Sweden*, Communication No. 104/1998, CAT, 5 May 1999, at para 6.4; *Arana v France*, Communication No. 63/1997, CAT, 2 June 2000, para 11.5; and *Babar Ahmad and Ors v United Kingdom*, above, note 4; *Othman (Abu Qatada) v. the United Kingdom*, Final Judgement, Appl. No. 8139/09 (ECtHR 9 May 2012).

this is at odds with long standing jurisprudence of human rights bodies.[179] Human rights courts and bodies have repeatedly expressed concern that the rendition programme violates the *non-refoulement* rule.[180] In the context of an ECtHR case concerning transfer of terrorist suspects from the UK to the US, it was clear that one question courts will want to satisfy themselves in the future that there is no risk of the individual being subjected to unlawful rendition.[181] The rendition programme has also exposed the unreliability of diplomatic assurances, discussed in Chapter 7,[182] as several of those rendered to torture were supposedly subject to 'assurances' that they would not be mistreated.[183]

– *Procedural Rights applicable to Transfers*

Alongside due process rights in respect of detention, the legal framework indicates additional procedural rights applicable in respect of transfer,[184] safeguarding the *non-refoulement* right set out above. Human rights treaties have been interpreted as encompassing basic due process rights in the context of transfer cases.[185] Chapter 7 discusses how the precise parameters of the procedural rights arising in relation to transfer remain unclear in certain respects,[186] but there appears to be consensus among human rights courts and bodies that, as a minimum, the individual be given a 'meaningful' oppor-

179 See 'United States Written Response to Questions Asked by the Committee Against Torture', U.S. Department of State, 28 April 2006, available at: http://www.state.gov/g/drl/rls/68554.htm. See also Periodic Reports of the USA, above, note 138, where the U.S. notes it is bound neither by the ICCPR which it denies gives rise to a non-refoulement obligation, nor by the explicit *non-refoulement* obligations under CAT as a result of its reservation to Art. 3. It has said its policy is not, however, to transfer individuals where it is 'more likely than not' that they will be tortured; see e.g. in: *In re Guantanamo Bay Detainee Litigation* Case No 1:05-cv-01220 (D.D.C. 2007), at para 6.

180 See *Agiza v Sweden*, above, note 174; 'Report of the Committee against Torture Thirty-third Session (16-26 November 2004) Thirty-fourth Session (2-20 May 2005)', UNGA, Supplement No 44 (3 October 2005), UN Doc A/60/44 227.

181 *Babar Ahmad and Ors v United Kingdom*, above, note 4

182 Chapter 7.B.10

183 Eg. in the Arar case the US has relied on having sought sssurances: Transcript of Attorney General Alberto R. Gonzales, Press Conference, Department of Justice http://www.usdoj.gov/ag/speeches/2006/ag_speech_0609191.html. See also remarks of Secretary of State Condoleezza Rice December 5, 2005, online at http://2001- 2009.state.gov/secretary/rm/2005/57602.htm. Likewise Sweden claimed that assurances lay behind its decision to assist in the CIA's rendition to Egypt of Egyptian asylum seeker Ahmed Agiza in December 2001; see *Agiza v. Sweden*. See Ch 7A.6 and B.10 on refoulement post 9/11.

184 Chapter 7A5.10.

185 See e.g., *Jabari v. Turkey*, Appl. No. 40035/98 (ECtHR 11 July 2000), at § 40; *Shamayev and Ors v Georgia and Russia*, above note 155. For additional protections on the non-expulsion of foreign nationals see Article 13 ICCPR and Article 1 Protocol 7 ECHR.

186 Ch 7A.5 and B.10, on how rights regimes differ as to fair trial guarantees in transfer proceedings.

tunity to challenge detention and transfer.[187] In this context there is little doubt as to the unlawfulness of a system which entirely bypasses the legal process, allowing no right of challenge and with the specific design of ensuring that no one, including family or lawyers,[188] even know of the abduction and transfer, never mind having the opportunity to invoke judicial or other democratic oversight.[189]

– *The Right to Remedy and Reparation*

The fundamental nature of the right to a remedy is set out in Chapter 7.[190] What does the right entail for victims of the rendition programme? The right to a remedy embraces the right to restitution, and the state is obliged to 'whenever possible, restore the victim to the original situation before the gross violations of international human rights law ... occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.'[191] Offending states are also obliged to provide compensation for pecuniary and non-pecuniary damage flowing from breaches.[192] In addition, symbolic measures such as recognition of the wrong, provision of information, and where appropriate apology, can form part of the measures of reparation that states may be obliged to provide in the face of serious human rights violations such as those involved in extraordinary rendition.

Where a right to a remedy is not afforded by the state, victims have a right to pursue their claim through a court of law. In the context of US secret detentions and unlawful interrogation techniques by intelligence agencies, the HRC found that 'the State party should ensure that there are effective means to follow suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of the now prohibited techniques.'[193] An

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187 See, e.g., *Shamayev and Ors v Georgia and Russia*, above, note 156; *Agiza v Sweden*, para 13.7. The UN CAT has for its part held that the remedy against *refoulement* requires 'an opportunity for effective, independent, and impartial review of the decision to expel or remove.'

188 Arar Complaint, above, note 106, para. 46: Arar alleged that his lawyers were purposely not informed of his pending transfer and transfer to Syria.

189 *Shamayev and Ors v Georgia and Russia*, above, note 156 at paras 333-9

190 Chapter 7A.4.2. E.g. ICCPR Art. 2(3)(a) or ECHR Art. 13, inherent in the duty to 'ensure' the protection of rights, and a principle of customary law.

191 Eg UNGA 'Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 December 2005, UN Doc A/RES/60/147; Resolution 2005/35 on the Basic Guidelines and Principles, UNCHR, 19 April 2005, UN Doc E/CN.4/RES/2005/35 ('Basic Principles on the Right to a Remedy and Reparation'), at Principle 19.

192 *E and Ors v UK*, Appl No. 33218/96 (ECtHR 26 November 2002), at para. 110; *Keenan v UK*, Appl. No. 27229/95, 33 EHRR 913, at para. 130.

193 Concluding Observations of the Human Rights Committee on the United States of America, CCPR/C/USA/CO/3/Rev.1, UNHRC, 18 December 2006.

integral aspect of the right to reparation is the obligation to investigate and prosecute those responsible, addressed below.[194]

– *The Right to Truth and Justice and the Duty to Investigate and Prosecute*
The rights of victims of serious rights violations to know the 'truth' concerning the violations committed against them has been the subject of growing recognition internationally,[195] and is integral to the right of reparation.[196] The extent of secrecy that has continued to surround the ERP, and the official refusal to disclose information even when it is in the public domain, run counter to this right. Access to information has consistently been blocked by what has been criticised as an overreaching approach to national security.[197] The public interest in information concerning the rendition programme has also been recognised by the Court.[198]

These rights correspond to the duty on states to respond to violations that involve serious allegations of criminality by carrying out a prompt, impartial and thorough investigation.[199] The investigation must avoid unwarranted delays in collecting evidence and initiating investigations, and ensuring progress within a reasonable time.[200] It must be capable of leading to the identification and prosecution of those responsible and the provision of effective and transparent remedies for victims.[201] This duty has been held to apply in security sensitive circumstances, including in situations of armed

194 Chapter 7A.4.2. Eg. *Keenan v UK*, above, note 191, at para 132. Article 13 has been held to imply obligations to investigate: , *Kaya v Turkey*, Appl. No. 22535/93 (ECtHR 28 March 2000) (right to life) *Aksoy v Turkey*, Appl. No. 21987/93, 23 EHRR 533 (1996) (torture); *Orhan v Turkey*, Appl. No. 25656/94, (ECtHR 18 June 2002) (disappearance); and *Mentes v Turkey*, Appl. No. 23186/94 (ECtHR18 November 1997) (destruction of homes).

195 See e.g., *el Masri v Macedonia, para 191; Gomes-Lund et al (Guerrilha do Araguaia) v Brazil* (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No 219 (24 November 2010). See survey of jurisprudence in Expert Opinion in the *Garzon v Spain* case before the ECHR at www.interights.org/garzon.

196 Chapter 7A.4.2.

197 E.g., the UN Special Rapporteur on human rights and counter-terrorism, Ben Emmerson expressed profound regret at a U.S. court decision that refused freedom of information requests concerning the involvement of the United Kingdom in the U.S. ERP. 'UN expert regrets US court decision preventing oversight of intelligence services', *UN News Centre*, 12 April 2012, available at: http://www.un.org/apps/news/story.asp?NewsID=41765#.UKHCuuOe_KA.

198 *El Masri v the Former Yugoslav Republic of Macedonia*, paras 191-192.

199 As Chapter 7 notes, the duty is recognised across IHRL and explicit in some provisions e.g. Article 12 CAT requiring 'prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction', and Article 5 CAT obligates a State Party to extradite or prosecute accused torturers who are present in any territory under its jurisdiction..

200 *Bati and Ors v Turkey*, Appl. Nos. 33097/96 and 57834/00 (ECtHR 3 September 2004).

201 *Hugh Jordan v United Kingdom*, Appl. No 24746/94 (ECtHR 4 May 2001), at para. 109, and Ch 7A4.2

conflict.[202] Several U.N. sponsored reports, including some addressing extraordinary rendition specifically, have noted mechanisms to investigate or oversee security and intelligence agencies '*should have access to any information, including sensitive information,*'[203] and that bodies investigating human rights abuses should have '*unhindered*' access to all confidential secret service materials.[204] A European Parliament report of 2012 notes that:

> "in no circumstances State secrecy takes priority over inalienable fundamental rights and that therefore arguments based on state secrecy can never be employed to limit legal obligations of states to investigate serious human rights violations; considers that definitions of classified information and State secrecy should not be overly broad and that abuse of State secrecy and national security constitute a serious obstacle to democratic scrutiny.[205]

Where serious violations arise, a thorough investigation must lead to a rigorous approach to prosecution.[206] IHRL recognises a duty to prosecute those responsible,[207] including the imposition of proportionate penalties.[208] Egregious crimes must be appropriately prosecuted as crimes that reflect the gravity of the underlying acts.[209] Thus acts of torture should not be prosecuted as 'abuse of office' offences for example, or concerns would arise as to whether these obligations had been met.[210]

The human rights law obligation does not necessarily entail the prosecution of all individuals conceivably tarnished by criminality; however, the scope of the investigation, and potentially the prosecutions policy, should include not only the immediate perpetrators of the crimes, but also the intellectual

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202 *Isayeva, Yusupova and Bazayeva v Russia*, Appl. Nos. 57947/00, 57948/00, 57949/00, 41 EHRR 39 (2005), at paras. 209-13; see also P. Alston, 'Report to the Human Rights Commission', 8 March 2006, UN Doc E/CN.4/2006/53 1125-6. Ch 7A4.2

203 UN Joint Study, para 292 (d).

204 Report of M Scheinin, Special Rapporteur on Terrorism, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight', para 15.

205 The European Parliament's Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report,' Aug 2012.

206 See, for example, *Barrios Altos v Peru* (Judgment) IACtHR Series C No 7 (14 May 2001). For analysis of the duty to prosecute and its limits, see F. Guariglia, 'Los límites de la impunidad: la sentencia de la Corte Interamericana de Derechos Humanos en el caso Barrios Altos' in *Nueva Doctrina Penal, 2001/A* (Editorial del Puerto, Buenos Aires 2001), at 209-30.

207 See eg *Velasquez Rodriques v Honduras*, above, note 165; *Assanidze v Georgia*, Appl. No. 71503/01, 39 EHRR 653 (2004); *Isayeva v Russia,* above, note 202, at paras 209-13.

208 Chapter 4.B.2.2 OR 7.a.55. Eg *Gafgen v Germany*, at para. 123 on the duty to ensure against 'manifest disproportion between the gravity of the act and the punishment imposed.'

209 Article 4 CAT makes explicit the obligation to ensure that all acts of torture, as well as attempts to commit torture, be criminalized and punished proportionately.

210 See uncertainty surrounding the Polish investigation, which reports suggest is based on 'abuse of office' offfences, 10.4 below.

authors behind the programme.[211] Cases against higher level officials will tell a broader story, and generally contribute more to clarifying the historical understanding of the nature of the programme.[212] Measures such as statutes of limitations or amnesties that act as a bar to investigation and prosecution for the most egregious crimes in international law are generally considered inconsistent with these obligations.[213] Personal or functional immunities should, likewise, not preclude investigation and prosecution of conduct that amounted to crimes under international law.[214]

- *Other Rights*

The effect of rendition is the undermining of a whole host of other rights, beyond those most obviously implicated and itemised above.[215] These include freedom of movement, the right to private life,[216] family rights,[217] freedom of expression,[218] the right to health among other economic and social rights, and the right to life itself.[219] As the UN Joint Study on Secret Detention notes,

211 Barrios Altos, in Guariglia, supra note 215.

212 See Chapter 4.1 and P. Akaban, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' 20 (1998) *Human Rights Quarterly* 737 on criminal process, and Chapter 11 on the role of human rights litigation.

213 See Chapter 7A42, and for more detail the survey of practice on amnesty and prescription in the Expert Opinion Garzon v Spain (ECtHR).

214 Immunity *ratione personae* should not apply to acts such as torture or crimes under international law; see eg the famous *Pinochet* case, 1998 All ER 97 (Pinochet 3) concerned the torture specifically, and the Lords found that a former head of state was not immune for the purposes of criminal process. The immunities of sitting heads of state, as an extension of the immunity of the state itself, is more controversial. See also Arrest Warrant Case (Congo v Belgium), ECHR

215 Weissbrodt and Bergquist, 'Extraordinary Rendition', at 239.

216 See, e.g., allegations against Zubaydah which he had no opportunity to refute; video recording his suffering; and the gagging order which leaves him without a voice, all violations of the right to private life. See *Abu Zubaydah* v. *Lithuania*, above, note 29.

217 Both Khalid El Masri and Abu Omar emphasise the impact on family life of their families having no idea where they were. In the case of El-Masri, his family had no information of his fate or whereabouts for years, assumed he was not returning and had relocated to another country. This case demonstrates the devastating impact on the rights of the individual and his family.

218 See, e.g., the complete gagging order on all 'high value detainees,' including Abu Zubaydah, highlighted above, eviscerating his right to expression of any type which cannot be justified as necessary and proportionate limitation.

219 Little information has emerged about deaths in CIA custody though Gul Rahman reportedly died in November 2002 at a CIA-run prison in Afghanistan known as the Salt Pit after being shackled to a concrete wall. 'CIA interrogation probe ends without any charges', *BBC News*, 31 August 2012, available at: http://www.bbc.co.uk/news/world-us-canada-19432553 ; S. Shane, 'No Charges Filed on Harsh Tactics Used by the C.I.A.', *New York Times*, 30 August 2012, available at: http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?pagewanted=all ; See also allegations by rendition victim Mamdouh Habib of detainees dying through torture at hands of Egyptian interrogators in M. Habib and J. Collingwood, *My Story: The Tale of a Terrorist Who Wasn't* (Scribe Publications Pty Ltd., 2009).

it may also violate the right to fair trial as it is used to circumvent the normally applicable criminal procedure and safeguards.[220] Rendition illustrates the extent of rights violations arising for immediate victims, as well as the range of the victims affected, going beyond those directly subject to the rendition to include family members and dependants.[221]

Likewise, ERP also violates the right to seek asylum from persecution in other states, or to enjoy such asylum where it has already been granted.[222] Where a person has a well-founded fear of persecution and is transferred to their country of nationality or habitual residence, the Refugee Convention and Protocol are also violated.[223]

10.3.4 State Responsibility

As the rules on state responsibility in international law make clear, several states may be responsible for an international wrong at the same time.[224] This is particularly obvious where some states may engage directly in wrongdoing while others fail in their positive human rights obligations of protection. Extraordinary renditions and the web of states that have, in various forms, made possible or contributed to the ERP, raise numerous issues concerning the nature of multiple states' responsibility.

10.3.4.1 Responsibility for Organs and Agents

The starting point for an assessment of state responsibility in this context is the basic rule that the state is responsible for the acts of the organs of the state, or its agents, as discussed in Chapter 3. Plainly intelligence agencies are part of the state apparatus and the state is responsible for their wrongful acts carried out by them, even if it should transpire that they acted beyond their authority. The same goes for police, customs officers or other state officials

220 UN Joint Study, p. 16-17. Notification of charges, trial without undue delay and the right to defend oneself are cited specifically. See also the working group on arbitrary detention which finds secret detention to violate fair trial: Opinions No. 5/2001 (E/CN.4/2002/77/Add.1), para. 10 (iii) and No. 14/2009 (A/HRC/13/30/Add.1).

221 Abu Omar's ECHR case is brought by him and his wife, both as victims of the ERP. As noted above, this is common is cases of disappearance that the family members are treated as victims.

222 Universal Declaration of Human Rights 1948 (adopted 10 December 1948) Art. 14.

223 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); Protocol Relating to the Status of Refugees 1967 (adopted 31 January 1967, entered into force 4 October 1967). Weissbrodt and Bergquist, 'Extraordinary Rendition', above, note 91, at 139-40.

224 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts', November 2001, UN Doc Supplement No. 10 A/56/10 67 (hereinafter 'ILC Articles on State Responsibility').

that may have collaborated in the ERP. In addition states are responsible for private actors outwith the state infrastructure where they acted under the 'direction or control' of the state.[225]

10.3.4.2 Responsibility of Third States for Aiding and Assisting, Directing, Controlling or Coercing

State responsibility arises not only where the state is directly involved in carrying out violations, or where the violations arise on its territory and it fails to take all feasible measures to prevent the violations. As made clear in Chapter 3, general international law on state responsibility provides that states may contribute to, and bear responsibility for, international wrongs in a variety of ways. This may take the form of 'aiding and assisting' other states (Article 16 International Law Commission Articles on State Responsibility 2001 (ILC Articles)), as well as 'directing or controlling' their actions (Article 17), or 'coercing' them into international wrongs (Article 18).

In light of the fact pattern that has been revealed to date, and allegations of 'conspiracy' and support for the ERP, it seems that most relevant to an assessment of the involvement of other states with the US rendition programme is 'aiding and assisting.'[226] Not every form of 'assistance' will give rise to responsibility. As a matter of general international law, a state is responsible for providing aid or assistance to another state in breach of its international obligations if it does so with *knowledge* of the circumstances of the internationally wrongful act of that state.[227] A '*close connection*' is then required between the actions of the states, and a *causal link* must exist between the state's conduct and the wrong.[228] While accusations are often lodged in terms of conspiracy, collusion, or encouragement, the law does not provide for responsibility of states for incitement, or for conspiracy as such, absent '*concrete* support'.[229] The CAT refers to states obligations to criminalise 'conspiracy' to commit

225 See Chapter 3 for principles of state responsibility, and discussion on responsibility for non-state actors including private contractors. These principles would also be relevant to the private actors employed in the ERP, including aviation companies and private firms.

226 It is not inconceivable that questions may arise regarding the 'control' or conceivably even 'coercion' of certain states by the U.S., though to the author's knowledge no such claims have been made. As regards aiding and assisting, Chapter 3 notes that the International Court of Justice (ICJ) has recognized the rules concerning aiding and assisting in the commission of a wrongful act, as enshrined in Article 16, as part of customary international law. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ, para. 420.

227 ILC Articles on State Responsibility 16 requiring also that the act would be internationally wrongful if committed by the accessory state.

228 Except for coercion, it must also be an obligation which is binding on both the aider and the state aided.

229 ILC Articles on State Responsibility 64. See Chapter 4 and below for individual responsibility.

torture, and it has been questioned whether 'conspiracy' might provide a more flexible and appropriate approach to hold to account a broader range of states.[230]

10.3.4.3 Broader Obligations in Face of Serious Breach of Peremptory Norm

As noted in previous chapters, it has been recognized increasingly in international standards and practice that some wrongful acts engage the responsibility of the state concerned towards several or many states or even towards the international community as a whole.[231] In certain circumstances international law enshrines obligations on all states to act to prevent and/or respond to very serious violations of international law. Where a violation amounts to a breach of *jus cogens* norms, all states have obligations to 'cooperate' to bring to an end, and not to recognize as lawful, a situation created by a serious breach, and not to render aid or assistance in maintaining that situation. This is reflected in articles 40 and 41 ILC Articles, and in the jurisprudence of the ICJ and other courts and tribunals.[232]

While these broader obligations apply only to a small group of 'peremptory norms' and only in respect of gross, flagrant, systematic, or organized violations of those norms, there is a strong case that these criteria are satisfied by the widespread and systematic nature of torture, secret detention and enforced disappearance intrinsic to the ERP.[233] Moreover they complement the particular positive obligations under IHL and IHRL referred to above.

10.3.5 Individual Criminal Responsibility

Individual criminal responsibility for involvement in ERP can arise under both international law and domestic law. Under international law, the principle categories of relevant crimes are war crimes and crimes against humanity. The ERP could entail war crimes such as torture, enforced disappearance, and illegal transfer, among others, if the acts are committed 'in the context of' or 'associated with' an armed conflict, whether international or not of an inter-

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230 See eg S Fulton, *Cooperating with the enemy of mankind: can states simply turn a blind eye to torture?* International Journal of Human Rights, Vol. 16, June 2012, 773-795.

231 ILC Articles on State Responsibility 33; *Barcelona Traction, Light and Power Company, Limited, Second Phase* (Judgment) [1970] ICJ Reports 32, at para. 33: 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.'

232 Chapter 3.

233 See UN Joint Study, above, note 3; 'CoE Rendition Report (7 June 2007)', above, note 3; 'ICRC Report on CIA Detainees', above, note 37.

national character, and whether committed against civilians or combatants.[234] The same acts, with the requisite *mens rea*, would also amount to crimes against humanity if committed as part of a widespread or systematic attack directed against a civilian population.[235] It is critical that the individual is punished only to the extent of their conduct and intent, as set out in Chapter 4. While the requirement that an individual participating in the ERP have knowledge of the broader criminal enterprise[236] may raise issues for lower level participants (or indeed high level officials in some states may claim ignorance as is often done), it is clear that he or she need not have knowledge of the scale or precise details of the ERP.[237]

In accordance with forms of responsibility recognized in international law, an individual may be responsible for directly committing crimes, individually, jointly, and through other persons,[238] or for indirectly participating in their commission, including by ordering[239] or aiding and abetting,[240] or by acting in 'common purpose'[241] or through a 'joint criminal enterprise'.[242] In addition, superiors, whether civilian or military, may also be held responsible under the doctrine of superior responsibility if they fail to prevent or punish the criminal acts of subordinates over whom they have effective control.

A wide range of individuals – members of intelligence agencies, officials of various governments, and private actors – could be held to account for the commission of these crimes, for ordering or inducing them, for failing to prevent or punish them (while under a duty to do so), for 'aiding and abetting', or for acting in 'common purpose' or 'joint criminal enterprise' with those directly responsible.

234 In the context of' and 'associated with' mean that the conduct must be 'closely related to a surrounding armed conflict in order to constitute a war crime': ICTY, *Prosecutor v Kunarac et al* (Judgment) IT96-23 and IT-96-23/1-A (22 February 2002), at para. 58.

235 See Chapter 4A11 on The definition of 'crimes against humanity': definitions of the terms widespread, systematic, attack, directed against, and civilian population have been elaborated upon by the international criminal tribunals in numerous judgments, though some e.g. civilian population remain open to questions. See, for example, ICTY cases: *Prosecutor v Kordić, Mario Cerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004), at para. 93; *Prosecutor v Tihomir Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004), at para. 102; *Prosecutor v Dragoljub Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002), at para. 85.

236 Chapter 4, ICC Elements of Crimes document, Art. 7 para 2.

237 ICC EOC doc, at para. 2, above, making clear that 'knowledge of all characteristics of the attack or the precise plan or policy' is unnecessary.

238 Rome Statute Art. 25(3)(a).

239 Rome Statute Art. 25(3)(b).

240 Rome Statute Art. 25(3)(c).

241 Rome Statute Art. 25(3)(d).

242 ICTY jurisprudence is replete with cases of joint criminal enterprise and has described it as established in customary law: see, e.g., *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 18 (May 21, 2003).

It flows from the obligation to investigate and prosecute serious crimes, set out in relation to IHRL above and reflected in international criminal law, that certain legal norms that purport to preclude accountability for serious violations or crimes under international law are invalid. Thus, immunities, amnesties, and statutes of limitations have been held to be invalid in respect of these crimes.[243] These issues may become relevant in states investigations into the ERP that are currently stalled or extremely slow to progress, and which have statutes of limitations for certain crimes: if crimes are appropriately charged, e.g. as torture rather than 'abuse of office,' domestic law may not recognise the bar on prosecution in any event. However if states attempt to apply such limitations to the ERP they are likely to be challenged as invalid in face of the nature of the crimes under international law. The same arguments will arise if immunities are pled in forthcoming cases: when the issue of immunity arose in the Milan case concerning the abduction of Abu Omar, it was rejected.[244]

The ERP also, undoubtedly, violates multiple provisions of domestic criminal law. While national laws obviously vary, many states have incorporated the international crimes referred to above in their own systems, particularly because of widespread domestic incorporation of crimes covered by the Rome Statute of the International Criminal Court, and the obligations under Article 4 CAT.[245]

10.4 Applying the Law: State and Individual Responsibility in various 'Rendition' Scenarios

This section questions the extent to which the multiple states and individuals involved in the ERP might bear responsibility for different aspects of the programme.

10.4.1 Abduction and Black Site Detention on the State's Territory

In some cases, territorial states' organs or agents carried out the arrest, detention, interrogation/torture, or ill-treatment albeit in conjunction with or at behest of US authorities, for which they have direct responsibility for wrongs

243 See expert opinion in the case *Garzón v Spain*, available at: www.interights.org/garzon, which surveys national and international practice.
244 See 10.5.
245 CAT Art. 4 obliges states to criminalize all acts of torture, including any act by any person which under domestic law constitutes complicity or participation in torture.

arising.[246] An example of an operation that raises such questions is the case of Abu Omar, the Egyptian national with refugee status in Italy who was abducted from a street in Milan by CIA officers, apparently with the assistance of several Italian agents.

In the cases of secret prisons,[247] such as those allegedly housed on Lithuanian, Polish, and Romanian soil, facts continue to come to light raising questions as to the extent of the involvement of territorial states, in the establishment, running or facilitating of those sites. It is difficult to conceive of such prisons existing without some degree of consent and cooperation of 'host' states. In any event the legal question is whether, at a minimum, the state knew or *should have* known of violations and failed to take reasonable measures to prevent them. In light of the scale and nature of the secret prison and ERP operations, and the extent of information as to arbitrary detention and abuse by the US authorities and the CIA itself, it is difficult to see how states can hide behind ignorance.

States may seek to hide behind the autonomous functioning of CIA prisons. A case in point may be the Djiboutian state's response to a case brought against it for its role in the ERP currently before the African Commission, in which it asserts US control over its Camp Lemonier site and lack of knowledge of US activities.[248] In some cases at least, preliminary enquires may support the view that the CIA was given free reign without close oversight or engagement by local authorities.[249] However, as the framework makes clear, the state is assumed to exercise jurisdiction throughout its territory,[250] and it will be responsible for violations on its territory to which it turned a blind eye, or

246 *El-Masri v Tenet* Complaint (providing information about the rendition flight), available at: http://www.aclu.org/national-security/el-masri-complaint (hereinafter '*El-Masri v Tenet* Complaint').

247 See, for example, UN Report paras 112, 114, 120; Abu Zubaydah applications to the ECHR, available at: http://www.interights.org/abuzubaydah/index.html.

248 Al Asad v Djibouti, above, note 119; the author is one of the applicant's counsel in the case. Para 38 of the respondent state's submissions on admissibility (public document, on file with author) states: 'Djibouti has no knowledge of the United States ever violating this provision [prohibiting detention and violation of human rights] of the Lease Agreement. The United States has assured Djibouti that it was in full compliance with the Lease Agreement at all times.'

249 See eg public comments of the chairman of the Lithuanian Parliament's Committee on National Security and Defence (CNSD) that U.S. partners were able 'to carry out activities without VSD control and to use the place however they liked.' The CNSD concluded that it was 'evident that the SSD did not seek to control the [CIA's] activities. The SSD did not monitor and record cargoes brought in and out and did not control the [CIA's] arrival and departure ... . In addition, the SSD did not always have the possibility to observe every person arriving and departing.' Seimas CNSD Report, below, note 327, p. 6; *Abu Zubaydah v. Lithuania*, above, note 29.

250 *Ilascu v Moldova and Russian Federation* Application 48787/99 (ECtHR, 8 July 2004); *Ivantoc v Moldova and Russian Fed*. Application 23687/05 (ECtHR 15 November 2011); *Catan &Ors v Moldova and Russian Federation*, Application 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012).

where it failed to take reasonable measures to know, and to protect. Assertions of complete lack of knowledge may therefore incriminate, not protect, the state.

10.4.2 Keeping them Airborne: Staging, Stopover, and Logistical Support

As regards the many states accused of providing logistical support to the renditions programme in the form of, for example, refuelling at airports and allowing use of airspace,[251] slightly more complex issues arise. One question is whether planes landing on the state's territory or passing through its airspace provides sufficient link between the violations and the state for the 'jurisdictional' requirement of human rights treaties. Where an individual is present on the aircraft on the state territory, however briefly, the obligations of prevention of violations on that territory, and particularly of non-refoulement to violations elsewhere, would however appear to arise, provided knowledge of the risk can be proved or inferred.[252] Another approach might be to see the ERP as encompassing on-going violations, part of which took place within the territory used for refuelling or other purposes.[253]

In some cases, airports and airspace were used in circumstances where it was disputed whether the territorial state knew of the nature of the flights.[254] Inherent in its positive obligations to protect, a state has a reasonable duty of enquiry as to how its territory is to be used and for what purpose. Moreover, a state's lack of knowledge would not excuse it from its positive obligation to take all reasonable measures to investigate, prosecute, and provide redress in the event of plausible allegations of breach.

Where it is unclear whether detainees were on the flights that came through the states territory (and therefore fell within its jurisdiction for IHRL purposes), most relevant may be secondary rules on 'aiding and assisting' which do not require any territorial or physical control nexus. Aiding and assisting would not arise from the failure to prevent or from providing moral support or political cover; it is likely to arise, however, from concrete support such as providing airports, airspace, or other logistical support without which rendition

251 See, e.g., Marty 2011 report, UN Joint Study at 84. Scheinin Report 2009, above note 53, para 54. J.M. Irujo, 'La CIA vuela bajo, muy bajo' *El País*, 10 October 2010, available at: http://www.elpais.com/articulo/reportajes/CIA/vuela/elpepuint/20101010elpdmgrep_4/Tes. See also 'Portugal: Evidence of illegal CIA rendition flights surfacing', *Statewatch*, October 2006, alleging that 150 CIA rendition flights landed in Portugal. On 6 Sept 2006, the Government admitted knowledge of flights passing between Guantanamo and another destinations.

252 IHRL courts often rely on 'concordant inferences' to prove violations where information lies within the exclusive control of the state. See Zubaydah brief v. Lithuania or Poland.

253 This is consistent with the continuing nature of enforced disappearance; see Convention for Enforced Disappearance art 8.

254 Scheinin Report 2009, at para 54.

programme could not have operated as it did, in circumstances where knowledge of a risk of violations is established or can be inferred.

10.4.3 Transnational Intelligence Cooperation

The ERP is an enormous transnational intelligence operation. It has given rise to difficult questions concerning the responsibility of the state in respect of certain forms of 'intelligence cooperation' with other states, in light of the nature of the violations involved and the legal obligations set out above.[255] It has contributed to a renewed consideration of states' policies and their implications, as reflected in for example the UK Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees.[256] This may prove to be one of the most significant developments to arise from the exposure of the ERP. It is worth considering briefly some forms of cooperation and whether they may give rise to legal responsibility under current law.

10.4.3.1 Presence at Interrogations and Questioning Detainees?

While the nature and extent of their involvement remains unknown, it appears that foreign intelligence officials have been present during interrogations in CIA secret prisons, and have themselves questioned prisoners in the ERP, as they have in Guantanamo. Evidence suggests that British, Canadian, and Australian intelligence agents questioned persons held by US, Pakistani, and other intelligence services during incommunicado detention (e.g. Mohammad, el Masri).[257]

In addition to factual questions regarding the role of foreign personnel are legal questions as to what form of responsibility such presence might give rise to. In the circumstances, was there a joint operation, or was there sufficient causal connection between the participation of foreign officials and the wrongs to amount to 'aiding and assisting'? Presence certainly limits plausible deniability on the nature of the programme, and would appear to imply a level of

255 UN Joint Study, above, note 3; ICJ Eminent Report, above, note 52.

256 Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (Consolidated Guidance) 2010.

257 E.g., el Masri alleged a German was present, Mohamed that UK officials were present, during their interrogation/arbitrary detention Scheinin Report 2009, above note 53, fn. 63: 'Evidence proves that Australian, British and United States intelligence personnel have themselves interviewed detainees who were held incommunicado by the Pakistani ISI in so-called safe houses, where they were being torture". Many states have sent interrogators to Guantánamo Bay, see Chapter 8.

condoning of the conduct that is on its face inconsistent with any obligation to cooperate to end the wrong. The Special Rapporteur on Terrorism for his part has described the involvement of foreign officials as amounting to 'condoning', 'encouraging', or 'even support' for unlawfulness which, in his view, constitutes as an 'internationally wrongful act'.[258] He concludes that "the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention." In this vein, the Supreme Court of Canada has likewise found that the presence of Canadian interrogators in Guantanamo fell foul of the Canadian Charter.[259]

10.4.3.2 Provision of Intelligence?

A secondary form of cooperation is the provision by foreign states of intelligence information that is relied upon to subject individuals to the ERP, or used during abusive interrogation. Examples of information transmission include Arar's case, where the Canadian intelligence agents handed what transpired to be erroneous information to their US counterparts, leading to Arar's detention and torture.[260] In Binyam Mohamed's case, the UK government was found to have 'facilitated interviews … by or on behalf of the US government in the knowledge of what had been reported to them in relation to his detention and treatment.'[261] Several other cases have been reported of lesser forms of engagement, such as authoritative sources reporting western governments providing questions to interrogating governments.[262]

Where the intelligence contributed directly to the programme, perhaps without which an individual may not have been identified, located and their rights violated, this would constitute concrete support. Where the knowledge of its purpose was or should have been accessible to the state, and its causal link apparent, allegations of 'aiding and assisting' in the commission of an international wrong would seem well founded.

States must exchange intelligence to fulfil their obligations to protect against serious crime, including terrorism. The principle of effectiveness demands that

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258 Scheinin Report 2009, above note 46, at 20

259 Omar Khadr case, Supreme Court of Canada 2010, found Canadian officials participating in interrogations was a breach of Charter.

260 Arar Commission; ICJ Report, at 84.

261 *R (B Mohamed) v Foreign Secretary* [2008] EWHC 2048 (Admin) (21 August 2008).

262 Scheinin Report 2009, note 46, at para. 54, fn. 63 states: 'German and Canadian intelligence agencies provided questions to Syrian Military Intelligence in the cases of Muhammad Zammar and Abdullah Almalki. Both detainees were tortured afterwards while in Syrian custody.' He concludes that '...the active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices.'

the law is not interpreted so as to impede such intelligence cooperation. As such, not every act of intelligence sharing that may ultimately contribute to a violation can be accountable to the source state. However, the 'Eminent Jurists Panel' suggested that where 'intelligence and other agencies are systematically sharing information with countries and agencies with a known record of human rights violations it is difficult to resist the argument that States are complicit, wittingly or unwittingly, in the serious human rights violations committed by their partners in counter-terrorism.'[263]

10.4.3.3 Receipt of Intelligence?

Particular complexity surrounds the legal responsibility of states for the receipt of intelligence information obtained from other states, including from the ERP. This could implicate many states that rely on intelligence from states engaged in international wrongs, notably extraction of information under torture.

Article 15 of the Convention against torture makes explicit that information obtained through torture cannot be used in legal proceedings.[264] Less clear however is the situation in respect of other, operational, uses of such information. In some contexts, it has been suggested that a distinction might be drawn between the admissibility of evidence and reliance on information for other purposes,[265] though whether a sharp distinction is justified is open to question. The House of Lords in *A&Ors* suggested that the principled basis for the ban to torture evidence was, that the reliance on such evidence in legal proceedings has the effect of 'encouraging' torture.[266] So far as this rationale of prevention applies, the same encouragement, assistance or complicity arises, whatever the nature of the use to which the information is put.[267]

Undoubtedly, however, the idea of a ban on receipt of certain intelligence information raises tensions, including between the duty to obtain information to protect citizens from violence on the one hand, and the obligations to prevent the practice on torture on the other.[268] (A separate but related ques-

263 ICJ Report, at 85. See also Scheinin Report 2009, above note 46, at 20.

264 Admissibility of torture evidence is specifically proscribed in Art. 15 CAT, as well as part of the general prohibition on torture in international law. Art. 15 CAT, Chapter 7A5.2.

265 See the A & Ors (torture evidence) case, in Chapter 11 and H. Duffy, 'Human Rights Litigation and the "war on terror"', 90 (2008) *International Review of the Red Cross* 871. This has since been upheld in *R v Ahmed* discussed in Chapter 4.

266 The Lords found that states could not condemn torture while making using for torture confessions as 'the effect is to encourage torture' A & Ors, p. 30.

267 Chapter 4B4. Cf where preservation of the 'integrity of proceedings' is given as rationale for the exclusion of torture evidence.

268 The UK's Intelligence and Security Committee Report of 2005 describes as 'for debate' whether such intelligence should be rejected as a matter of principle. 'Intelligence and Security Committee, The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq', 2005, para. 32.

tion is of course whether such information is, in any event, reliable.)[269] It has been described as a 'debatable' legal matter whether information that may be obtained through TCIDT should be rejected as a matter of principle, not merely in court proceedings, and if so in what circumstances.[270] It would certainly have to be assessed in light of particular facts whether there was 'concrete support' as required for aiding and assisting. Particular practical challenges arise as regards proof of the 'knowledge' of a state as to its assistance in the wrong, and the extent of any effective duty to enquire.

It has been suggested by Special Rapporteurs and other expert groups that receipt of intelligence in such circumstances may amount to complicity or to aiding and assisting under the rules of state responsibility,[271] though outstanding controversy was highlighted by an English court recently rejecting this as an expression of current law.[272] Where intelligence is sought and obtained from a state known to engage in serious rights violations, such that states become 'consumers of torture'[273] or create a 'market' for human rights violations, it has been suggested with some force that the state may contribute to the occurrence of torture.[274] Whether this amounts to aiding and assisting (as opposed to highlighting the gap between these rules and a looser approach to 'complicity',[275]) may remain a matter of dispute. The scope of complicity, and its implications in this context, may well be an area ripe for further development through evolving law and practice in the counter-terrorism field.[276]

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269 ISC Report 2005, para. 32, *id.*, ends: 'There are separate questions as to whether intelligence obtained under torture is likely to be reliable, and whether principled refusal would deter those who might use such methods.' See also Davis, 'Consign Bush's "torture memos" to history', note28, noting that 'Torture is counter-productive. Professional interrogators – Ali Soufan of the FBI, Matthew Alexander of the Air Force and Glenn Carle of the CIA – have said this clearly.'

270 UK Parliamentary Joint Committee On Human Rights, 'Nineteenth Report', 18 May 2006 Supra.

271 Scheinin Report 2009, note 53; UK Joint Committee on Human Rights.

272 In *R v Ahmed* where the applicant had allegedly been tortured in Uzbekistan and Pakistan, the Court was asked (and refused) to stay proceedings. Its justifications included that there was no link between the alleged torture and his trial, including that there was no evidence of wrong doing by UK authorities. See Chapter 4.B.4.

273 ICJ Eminent Jurists Panel, 2009, para 85.

274 See Scheinin Report 2009, ICJ Report, and UK Joint Committee on Human Rights Report, above.

275 See eg S Fulton, *Cooperating with the enemy of mankind,* note 246, arguing that a broader approach to complicity is required than that covered by aiding and assisting enshrined in current law, and referring to eg passive acquiescence as part of complicity as understood under the Torture Convention.

276 Eg Juan Mendez, Special Rapporteur on Torture, identifies this as an area for future attention. See also Chapter 4B4 on implications for the criminal process.

In any event, the creation of markets for torture information and reliance upon it would certainly seem to fall foul of positive obligations to safeguard against, and to cooperate to stop, egregious violations of international law.[277]

10.5 The Pursuit of Truth and Justice for Extraordinary Rendition

The legal framework, considered alongside the facts concerning the ERP, indicates the commission of a range of crimes under national and international law, for which a range of states have obligations to investigate, where appropriate to prosecute, and to provide victims with reparation. How does international state practice to date measure up to these obligations? The following section highlights developments in the pursuit of justice, and illustrates some of the impediments faced by victims and their advocates.

10.5.1 Investigation and Prosecution in Practice?

The provisions of the legal framework on investigation, accountability and reparation contrast starkly to the lack of investigation and accountability in practice. This is most striking in the US, given its leading role in the ERP. While in its communications to the HRC for example,[278] the US has cited provisions of its domestic law that make relevant prosecutions possible, it has yet to rely on these laws.[279] To date, no indictments have been filed in the US against CIA agents, other officials, or government contractors for their role in ERP, and at the time of writing there is little concrete prospect of accountability.[280]

Under the Bush administration, the CIA Inspector General referred a few specific incidents to the Department of Justice and federal prosecutors, reportedly including incidents involving the use of death threats and torture

277 See Art 1 Geneva Conventions, 10.3.2, so far as applicable, and 10.3.4.4 above regarding duties in respect of gross violations of peremptory norms. The principle is reflected in IHRL positive obligations also, even if not treaties are not strictly applicable.

278 'Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America', UNHRC, 18 December 2006, UN Doc CCPR/C/USA/CO/3/Rev.1, available at: http://www.unhcr.org/refworld/docid/ 45c30bec9.html.

279 At least two U.S. statutes appear to provide U.S. courts with criminal jurisdiction over ERP. One statute criminalizes violations of Common Article 3 Geneva Conventions committed by U.S. personnel abroad. U.S. Code, War Crimes Statute, 18 U.S.C. 2441, available at http://www.law.cornell.edu/uscode/18/usc_sec_18_ 00002441----000-.html.

280 See, e.g., S. Ackerman, 'CIA Exhales: 99 Out of 101 Torture Cases Dropped', *WIRED*, 30 June 2011, available at: http://www.wired.com/dangerroom/2011/06/cia-exhales-99-out-of-101-torture-cases-dropped. On accountability for rights violations in the WOT more broadly see Chapter 7 'Justice and Accountability'.

that resulted in deaths, but prosecutors declined to prosecute in each instance.[281] The two out of 101 cases of suspected detainee abuse that were reportedly being taken forward ended with the closure of the investigation by the Attorney-General Holder.[282] The extent of impunity is perhaps illustrated by the former head of counter-terrorism office in the CIA promoting his book on the ERP[283] by admitting to authorising waterboarding and the destruction of 92 videotapes of interrogation session,[284] prompting the comment that 'We look forward, and not back, and we don't put our torturers on trial. We put them on book tours.'

While they have not gained prominence in practice due to the lack of accountability in the US, issues such as potentially broad-reaching defences or immunities that conflict with international law obligations may yet become contentious if the tide changes on accountability in the war on terror.[285]

Investigation and accountability obligations arise also in the many other states alleged to have participated in the CIA programme.[286] In some, the authorities continue to simply deny any role without enquiries or investigation, but developments in a number of states, suggest momentum towards investigation and accountability may be gathering. Progress is particularly apparent in numerous European states accused of involvement in the ERP, impelled by regional reports such as by the Parliamentary Assembly of the Council of Europe reports or the European Parliament which have contributed to clarifying facts and generating pressure for greater transparency and accountability.[287] Several states have responded by carrying out some form of investigation, and in a few cases moving towards prosecution. While the nature and progress of such proceedings is constantly in flux, and opaque given the extent of secrecy, the following illustrate these developments as well as some of the challenges and limitations.

– *United Kingdom:* In the UK, investigations were opened into M16's role in unlawful interrogations abroad, including in relation to the UK intelligence

281 See U.S. Office of the Inspector General, 'CIA OIG Special Review of Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)', note 32.
282 See Chapter 7B.14.
283 J. Rodriguez, *Hard Measures* (Threshold Editions, 2012); P. Taylor, '"Vomiting and screaming" in destroyed waterboarding tapes', Interview with Jose Rodriguez, *BBC Newsnight*, 9 May 2012, available at: http://www.bbc.co.uk/news/world-us-canada-17990955
284 C. Pierce, 'Waterboards, Drones, and the Drones Who Love Them', *Esquire Politics Blog*, 30 April 2012, available at: http://www.esquire.com/blogs/politics/jose-rodriguez-cia-book-8484289.
285 Chapter 7 on human rights obligations; Chapter 4 on criminal law principles and practice.
286 These would include e.g., Afghanistan, Egypt, Jordan, Libya, Morocco, Pakistan, Syria, and Thailand: see generally UN Joint Study, above, note 3.
287 Note 3 above. Regrettably some initiatives have been marred by lack of cooperation by national authorities; see report by the European Parliament's Special Rapporteur Helen Flautre, Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report,' DocRef (2012/2033(INI), and the Parliamentary Resolution of 11 September 2012.

agencies' role in the detention and interrogation of Binyam Mohamad.[288] These shone a light on the facts, findings for example that "members of the Security Service provided information to the US authorities about Mr. Mohamed and supplied questions for the US authorities to put to Mr. Mohamed."[289] In relation to both, however, the crown prosecution service concluded that there was insufficient evidence to pursue criminal charges against any identifiable individual,[290] in part due to lack of access to relevant witnesses and non-cooperation from the US.[291] The UK's failure to conduct adequate enquiries, investigate and to hold to account have been criticised, for example by the UN Committee against Torture.[292] Demands for information and accountability as to what the UK knew and when (in light of information that the authorities knew of the ERP from the outset),[293] and its role in the 'improper treatment of detainees' post

288 See 'UK investigations guide into Torture and Rendition', http://www.guardian.co.uk/world/2012/jan/12/uk-investigations-torture-rendition-guide, for details on Operation Hinton. The police investigation lasted two and a half years as detectives attempted to trace responsibility up the chain of command, but concluded there was insufficient evidence to press charges. See 'Joint statement by the Director of Public Prosecutions and the Metropolitan Police Service', 12 January 2012 http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service (hereinafter 'DPP and MPS Joint Statement'). Another inquiry concerned interrogations at the notorious Baghram facility in Afghanistan See 'UK investigations guide', supra note 295, for details on Operation Iden.

289 'DPP and MPS Joint Statement', *id*.: 'Having reviewed the further evidence carefully, the CPS has concluded that there is sufficient evidence to show that: (a) members of the Security Service provided information to the US authorities about Mr Mohamed and supplied questions for the US authorities to put to Mr Mohamed while he was being detained between 2002 and 2004, including at times when Mr Mohamed's precise whereabouts was not known to them; (b) that Mr Mohamed was held in Morocco for at least some time between July 2002 and early 2004. In relation to the interviewing of Mohamad in Pakistan in 2002 it had already been decided in October 2010 that there was not a realistic prospect of a conviction for any criminal offences arising out of that conduct.'

290 The CPS concluded that there is insufficient evidence to prove to the standard required in a criminal court that any identifiable individual provided information to the U.S. authorities about Mr Mohamed or supplied questions for the U.S. authorities to put to Mr Mohamed, or was party to doing so, at a time when he or she knew or ought to have known that there was a real or serious risk that Mr Mohamed would be exposed to ill treatment amounting to torture. See 'UK investigations guide', supra note 288.

291 See 'DPP and MPS Joint Statement' referring to the refusal of eye witnesses to speak to the police or CPS.

292 CAT Concluding Observations on the Fifth Periodic report of the United Kingdom, 31 May 2013.

293 See. e.g., allegations in I. Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books Ltd, 2012)., reported on 22/10, that within days of 9/11, the CIA told British intelligence officers at the British embassy in Washington of its plans to abduct al Qaida suspects and fly them to secret prisons where they would be interrogated.

9/11 generally,[294] and in identified incidents specifically,[295] continue to grow.

– *Italy*: The first convictions in this field arose in Italy, where CIA agents and some of their Italian counterparts were found guilty of aiding and abetting the kidnapping of Abu Omar.[296] As the Italian court could not obtain an extradition request, still less the presence of the accused CIA officials,[297] nine Italians agents and 26 Americans, mostly CIA agents, were however tried *in absentia*.[298] The Italian prosecution is an example of tenacious investigative work, but also of the challenges to effective criminal prosecutions: much of the evidence was deemed inadmissible on state secrecy grounds,[299] and some cases were dropped on this basis[300] or because US individuals were considered to have diplomatic immunity from prosecution.[301] The fact that prosecutors were themselves charged with violating

294 In July 2010, Prime Minister David Cameron announced an inquiry to 'look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11' but the Inquiry was criticized by NGOs for its lack of independence and its secrecy, and ultimately suspended pending Scotland Yard police investigations into UK-led rendition of individuals and their families to Libya. 'Torture Claims: Cameron announces enquiry', *BBC News*, 6 July 2010, available at: http://www.bbc.co.uk/news/ 10521326.

295 See 'DPP and MPS Joint Statement', above, note 295,on the investigation of two further cases of rendition of named individuals to Libya and their alleged ill-treatment. It also deals with 'the setting up of an advisory panel for scoping other complaints about ill-treatment by detainees in similar circumstances.'

296 J. Hooper, 'Italian court finds CIA agents guilty of kidnapping terrorism suspect', *Guardian*, 4 November 2009, available at: http://www.guardian.co.uk/world/2009/nov/04/cia-guilty-rendition-abu-omar.

297 The prosecutor asked the Minister of Justice to submit an extradition request to the US but it declined.

298 Twenty three were convicted, including Robert Seldon Lady, the CIA station chief in Milan sentenced to eight years imprisonment. Trials in absentia arguably fall short of providing a suitable rule of law based criminal response, and they individuals would have to be retried if they ever were to appear in Italy. The scope of charges was also limited as the prosecutor did not originally pursue charges against Italian nationals;see Messineo, 'Extraordinary Renditions', above, note 14, at 1023 and 'CoE Rendition Report (7 June 2007)', note 3, at para. 316. However, further prosecutions look set to unfold, see below.

299 The Constitutional Court ruled that the interests of state security took precedence over any other interest, and deemed inadmissible much of the evidence on which the case had been built, including material seized from Italian and American intelligence operatives. See CoE Rendition Report (12 June 2006), above, note 3, para. 162; R. Donadio, 'Italian Court Upends Trial Involving C.I.A. Links', *New York Times*, 11 March 2009, available at: http://www.nytimes.com/2009/03/12/world/europe/12italy.html?_r=3. Messineo, 'Extraordinary Renditions', above, note 14, at 1039-40.

300 'Italy Prevents Trial of Intelligence Agents over Abu Omar Rendition', *Amnesty International*, 16 December 2010, available at: http://www.amnesty.org/en/news-and-updates/italy-prevents-trial-intelligence-agents-rendition-abu-omar-2010-12-16.

301 'Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention', Amnesty International, November 2010, at 18-20, available at: http://www.amnesty.org/en/

state secrets through their investigation was condemned as an 'intolerable impediment to the independence of justice'.[302] A less broad-reaching approach to state secrecy appeared to emerge, however, when in 2012 the Italian Supreme court ordered the re-trial of several high level intelligence officials (whose cases had been thrown out by the court on state secrecy grounds).[303] It also upheld existing convictions despite US arguments, via the Italian Ministry of Justice, that the acts or omissions alleged arose from official duty, and that the US personnel were protected by SOFA agreements.[304]

– *Canada*: The Canadian government convened a commission of enquiry to explore Mahar Arar's case,[305] which vindicated Mr Arar by clearing him of any alleged al Qaeda links, and found that Canadian authorities had provided inaccurate information to the US authorities which, it could reasonably be inferred, had led to his capture and torture.[306] Somewhat uniquely in practice to date, the government apologised, awarded him compensation and set in train the implementation of the inquiry's wide-ranging recommendations. Mr Arar has, however, had no success in US courts, where his case has been dismissed on state secrets grounds.[307] Progress has also yet to be made in holding to account individuals responsible for wrongdoing.[308]
– *Germany*: Attempts to pursue accountability for the case of Khalid el Masri in Germany got underway with the issuance of arrest warrants for CIA agents in 2007.[309] However, the German Justice Minister announced that,

library/asset/EUR01/023/2010/en/3a3fdac5-08da-4dfc-9f94-afa8b83c6848/eur010232010en.pdf.

302 Resolution of the Parliamentary Assembly, note 3, para. 14.

303 Supreme Court decision, 19 September 2012 in 'Italy/USA: Supreme Court orders re-trial of former high-level intelligence officials and upholds all convictions in Abu Omar kidnapping case' 21 September 2012. Former head and deputy head and three other high-ranking officials of the Italian intelligence agency (formerly Servizio per le informazioni e la sicurezza militare or SISMI), are to be retried.

304 The US also challenged Italian jurisdiction on the basis, inter alia, that the US had primary jurisdiction to try any criminal acts. Despite this, the convictions were upheld and the individuals affected, while still in the US, cannot leave the U.S. without fear of arrest and forfeiture of assets. AI Index: EUR 30/015/2012, 21 September 2012.

305 The Inquiry was established 5 February 2004 under Part I of the Inquiries Act 1985, to investigate and report on the actions of Canadian officials in relation to Maher Arar and to recommend review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security. See Arar Commission, above, note 12.

306 A separate report found that collaboration between the Canadian police and Syrian officials had resulted in his torture.

307 *Arar v Ashcroft*, 532 F.3d 157 (2d Cir. 2008), paras. 162-3

308 See 'Message from Maher Arar', available at: www.maherarar.ca.

309 'Germany issues CIA arrest orders', *BBC News*, 31 January 2007, available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/6316369.stm; see also 'CoE Rendition Report (7 June 2007)' note 3 at p. 57 on the limitations in that process including the lack of progress in identifying the German alleged to have been present.

as the US had made clear that it would not cooperate, the German authorities would therefore not be pursuing a formal request for the extradition of the 13 CIA agents involved in el-Masri's abduction.[310] Leaked cables indicate the extent of pressure from the US not to pursue the cases, and German responsiveness.[311] There has been a parliamentary inquiry into the role of German agents in several cases, including El-Masri's,[312] but the German government has been criticised for suppressing information.[313]

– *Poland:* An investigation was launched into the CIA secret prison at Stare Kiejkuty, Poland, in which rendition victims Abu Zubaydah and Abdal-Rahim al-Nashiri have been granted victim status.[314] The investigation has been criticised as protracted and untransparent, raising doubts as to the promptness, thoroughness and effectiveness required by the legal framework.[315] However, reports suggested that the former head of intelligence had been charged in relation to the secret prison, representing a first opportunity for significant accountability in relation to the secret prison system,[316] though the cloak of secrecy surrounding proceedings has rendered it difficult to assess the true nature and scope of charges and the real prospect for accountability in Poland.[317]

310 See, e.g., J. Shawl, 'US rejects Germany bid for extradition of CIA agents in el-Masri rendition', *JURIST*, 22 September 2007, available at: http://jurist.org/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php.

311 'Cables Show Germany Caved to Pressure from Washington', *de Spiegel*, 12 September 2010, available at: http://www.spiegel.de/international/germany/the-cia-s-el-masri-abduction-cables-show-germany-caved-to-pressure-from-washington-a-733860.html.

312 German Bundestag Report, above, note 12.

313 'CoE Rendition Report (7 June 2007), note 3, 'A German Constitutional Court decision which came out on the same day the parliamentary inquiry report, found the German government to have violated the Constitution by failing to disclose relevant information and failing to cooperate with the inquiry.'

314 The investigation is brought under Art. 231 of the Polish criminal code. See e.g. UN Joint Study, above, note 3, at para. 118. See *Abu Zubaydah v Poland,* INTERIGHTS, note 83.

315 See eg ECHR application, id.

316 See 'Supreme Court: UK unlawful rendition may have been war crime', *REPRIEVE*, 31 October 2012, available at: http://www.reprieve.org.uk/press/2012_10_31_rahmatullah_judgement_rendition.

317 See, e.g., 'List of issues to be taken up in connection with the consideration of the third periodic report of Poland (CCPR/C/POL/6)', UNHRC, 17 September 2010, UN Doc CCPR/C/POL/Q/6/Add.1, available at: http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.POL.6.Q.Add.1_en.doc. Uncertainty remains e.g. as to whether, in light of official statements, the investigations and prosecutions will be limited to Polish officials and to the question whether they 'abused their authority' in creating an 'extraterritorial zone' in Poland. Based on press reports charges may relate, erroneously, to 'war crimes' rather than e.g. torture or crimes against humanity.

- In a number of other states, such as *Romania*[318] and *Lithuania*,[319] also alleged to have housed secret prisons, there have been cursory 'enquiries,' followed by decisions not to proceed to prosecution, reflecting the pressure to respond in some way to allegations while plainly falling short of meaningful attempts towards accountability.[320] These processes and other initiatives, such as the Freedom of Information request referred to above, have however revealed crucial information on how the CIA operated with close cooperation of other states, using through false flight plans and other methods of cover-up.[321]
- *Spain:* The Spanish investigations into mistreatment of detainees, including one case against the so-called 'Bush 6' legal advisors whose advice is alleged to have paved the way for practices of torture and ill-treatment in detention sites around the world, have been discussed elsewhere.[322] An investigation was opened, but suspended, in deference to investigation

318 Confirmation by the PACE of the existence of a Romanian black site in 2007 prompted a cursory Romanian Senate committee investigation. Fava, 'Report on the alleged use of European countries by the CIA', above, note 6, at para. 157. 'CoE Rendition Report (7 June 2007)', above, note 3 at 25-6. European Parliament Temporary Committee, 'Working Document No. 9 on certain European countries analysed during the work of the Temporary Committee', 26 February 2007, at 44, available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/working_docs/pe382420_en.pdf (citing Romanian Senate decision No. 29/2005).

319 The first report of a CIA-operated detention site in Lithuania emerged in 2009; an enquiry was conducted by the Lithuanian Parliament (the Seimas), which reported in January 2010 that there were high levels of cooperation between the CIA and Lithuanian State Security Department for the establishment of two buildings 'suitable' for housing detainees, but wound up concluding that it could not determine whether it actually held detainees: see Annex to the Resolution of the Seimas of the Republic of Lithuania, Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the Alleged Transportation and confinement of Persons Detained by the Central Intelligence Agency of the United States of America in the Territory of the Republic of Lithuania (hereinafter 'Seimas CNSD Report'), available at: http://www3.lrs.lt/pls/inter/w5_show?p_r=6143&p_d=100241&p_k=2. See also on-site visit conducted by the European Committee for the Prevention of Torture, 14-18 June 2010, available at http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.htm (hereinafter 'CPT Report'); see also *Abu Zubaydah v Lithuania and Poland.*

320 Eg. on 14 January 2011, the Romanian Prosecutor closed the pre-trial investigation, claiming: that "no data on illegal transportation of any persons by [CIA] aircraft was received during the pre-trial investigation"; Office of the Prosecutor General of the Republic of Lithuania, Resolution on the Termination of the Pre-Trial Investigation. *Abu Zubaydah v Lithuania*, above, note 29. The Lithuanian investigation addressed only 'abuse of official position' and was also closed within the year. See Amnesty International, 'Lithuania Must Reopen CIA Secret Prison Investigation' (18 January 2011) <http://www.amnesty.org/en/news-and-updates/lithuania-must-reopen-cia-secret-prison-investigation-2011-01-18> accessed 3 Nov 2012.

321 See official documents disclosed by the Polish government through FOIA requests in Poland. 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency' above, note 58.

322 Those concerning Guantanamo were discussed in Chapter 8C and more generally 7B.14.

by the Justice Department, but the timeliness of such deferral, and whether it should endure, may be open to question in light of inertia within the US itself.[323]

In several of the many other states that were involved in the rendition operation, in one capacity or another, enquiries have been lodged, investigations continue to unfold and demands for justice grow.[324] In such a dynamic area of practice, it is perhaps wise to avoid untimely conclusions. Undoubtedly the lack of accountability is striking, notably in the US, but also elsewhere.[325] Pressure to investigate and prosecute continues to mount, though whether the many 'investigations' or 'enquiries' underway ultimately represent a genuine attempt to uncover the truth, as opposed to themselves forming part of the 'cover up,' is open to question. What investigations and enquiries have undoubtedly done is to prise open information, contributing to building momentum towards fuller accountability.

They also expose the obstacles and challenges to justice and accountability (beyond the inevitable challenges of investigating in such an opaque area), including lack of cooperation from the US authorities, pressure by that state on others not to investigate, and the lack of political will within certain European states themselves.[326] The robust criticism of US non-cooperation or the OSCE parliament 'insistence' that the US improve cooperation with European investigations, for example, may be indications that indignation around these obstacles is, like the evidence of it, growing.[327] The record remains limited and it remains to be seen whether momentum towards criminal accountability continues to grow and bears fruit.

323 Judge Velasco's decision of 13 April 2011. See Chapter 8.C.8. 'Justice for Guantanamo?'

324 See eg the 2012 decision of the Finnish Ombudsperson to investigate. For an overview of developments in Europe see Amnesty International 'Unlock the Truth' http://www.unlockthetruth.org/l/en/ or Reprieve http://www.reprieve.org.uk/investigations/eucomplicity/. Parliamentary enquiries were completed in Denmark and Portugal, see also Chapter 7B.14 on accountability more broadly.

325 'In almost no recent cases have there been any judicial investigations into allegations of secret detention, and practically no one has been brought to justice.' 'UN experts point to widespread use of secret detention linked to counter-terrorism, *UN NEWS Centre*, 26 January 2010, available at: http://www.un.org/apps/news/story.asp?NewsID=33586#.UKc6N-Oe_KA. UN Joint Study, above, note 3, p. 5 and para. 291.

326 Thomas Hammamberg then Council of Europe Commissioner for Human Rights described "*enormous pressure from Washington … [and] instructions from the CIA, with the support of the White House, are not to give any facts on this. Therefore, it is not easy to investigate....*" He refers also to 'concealment' and 'cover up' by European states, note 63..

327 On 9 July 2012, a unanimous resolution of the OSCE parliamentary assembly 'insists that the United States government cooperates with European investigations.'

10.5.2 Civil Accountability and Human Rights Litigation

Diverse obstacles have also been visible for victims seeking a remedy or reparation through civil litigation. As some of these are discussed in Chapter 11, suffice to recall briefly here that various obstacles have impeded victims claims for damages in respect of the ERP. Prime among them is the broad reaching approach to the state secrets doctrine, exemplified by the rejection of claims for damages brought by for example El-Masri,[328] Mahar Arar,[329] or Binyam Mohamad.[330] The Courts have held that the government's assertion of state secrets privilege required the court to dismiss the entire action, rather than simply withholding particular pieces of information or otherwise take measures to accommodate national security concerns while also recognising the victims' right to a remedy.[331] Petitions seeking leave to appeal to the Supreme Court have been rejected.[332] Other obstacles of relevance include the courts' approach to the acceptance of official immunities from civil suit, and findings that torture and rendition are part of official duties.[333]

The lack of effective investigations and prosecutions, and the obstacles that victims have encountered in national level litigation, underline the importance of international oversight and the availability of remedies outside national jurisdictions. It is unsurprising, therefore, that victims of rendition are increasingly turning to transnational justice alternatives, and beginning to bring their cases to human rights supervisory mechanisms.

Due to the extensive roles played by European states in the CIA programme, the ECtHR is set to play a particularly significant role in determining the extent to which European states breached their obligations in each of the ways outlined above. As noted above, a first international judgement[334] has been handed down by the European Court in *El Masri v Macedonia* condemning the state of Macedonia for its role in the rendition programme, by detaining

328 See *El-Masri v Tenet*, 437 F.Supp.2d 530, 532-4 (E.D. Va. 2006).

329 *Arar v Ashcroft*, 532 F.3d 157 (2d Cir. 2008), paras. 162-3

330 *Mohamed v Jeppesen Dataplan Inc.*, above, note 55

331 *Id*.

332 *Id*., including third party intervention on international standards by INTERIGHTS, Redress, International Commission of Jurists, and World Organisation against Torture.

333 As noted in Chapter 8, in the Guantánamo related case of *Rasul v Myers*, 512 F.3d 644, 660 (D.C. Cir. 2008) (*Rasul I*), *vacated Rasul v Myers* 129 S. Ct. 763 (2008), *aff'd Rasul v Myers* 563 F.3d 527 (D.C. Cir. 2009) (per curiam), torture was held by U.S. court to fall within the scope of the employment of government officials who were as a consequence immune from civil suit. As explained by the Court of Appeal for the District of Columbia: 'the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence. Therefore, the alleged tortious conduct was incidental to the defendants' legitimate employment duties.' Paras. 658-9.

334 The first case brought to that Court by ERP victims was found inadmissible because Bosnia was not a party to the ECHR at the time that six detainees were transferred to U.S. custody: *Boumediene and Ors v Bosnia*, Appl. No. 38703/06 (ECtHR 18 November 2008).

at US behest and transferring to the CIA and to Afghanistan. This case is the tip of the rendition litigation iceberg, with numerous other cases having been brought to the Court against Lithuania,[335] Poland,[336] Italy[337] and Romania,[338] with others in preparatory stage.

Cases against the US are now pending in the Inter-American system, before the Inter-american Commission on Human Rights.[339] *Al Asad v Djibouti* was the first ERP case opened before the African Commission on Human Rights in respect of an African state's involvement in the CIA rendition programme,[340] while another case concerning Kenyan/Ugandan rendition before the East African Court of Justice,[341] and others are unfolding on the domestic level.[342]

A number of challenges arise for victims, however, and for the courts themselves, in these international and regional cases, as they do on the national level. In addition to normal admissibility challenges relating to time limits applicable before some courts, and the general requirement of exhausting domestic remedies, are other challenges of a less common nature.[343] Regional and international courts do not operate a doctrine of states secrets or defer automatically to states' own assessments of the need for restrictions on rights

335 *Abu Zubaydah v Lithuania, and Poland*, ECHR (pending) www.interights.org.

336 *'Al-Nashiri v. Poland'*, *Open Society Foundations*, 17 July 2012, available at: http://www.opensocietyfoundations.org/litigation/al-nashiri-v-poland ; Abu Zubaydah v Poland, above, note 29.

337 *Nasr and Ghali v. Italy*, Appl. No. 44883/09 (ECtHR 22 November 2011).

338 *'Al-Nashiri v. Romania'*, *Open Society Foundations*, 6 August 2012, available at: http://www.opensocietyfoundations.org/litigation/al-nashiri-v-romania.

339 E.g. *Khaled El-Masri v United States*, P-419-08, Inter-American Commission on Human Rights. See too American Civil Liberties Union website, http://www.aclu.org/national-security/el-masri-v-tenet. Given the U.S. refusal to accept the jurisdiction of the Inter-American Court, those cases will never proceed to judicial determination, though the decisions of the Commission may play a role in historical clarification and providing a degree of vindication for the survivors of the programme.

340 See, *al Asad v Djibouti*, above, note 117.

341 The petitioners accuse the Kenyan government of violating the rule of law by sending a number of its citizens, who were accused of involvement in the July 2010 Kampala bombing, to Uganda through extraordinary rendition rather than the normal extradition process.

342 These may proceed to the sub-regional bodies or African Commission and eventually the African Court on Human and People's Rights.

343 In some courts there are time limits that normally apply: e.g. under Art 35(1) ECHR limits admissibility to applications filed within a period of six months from the date on which the final domestic decision was taken. The particular challenges of these cases, including limited access to counsel and the trauma suffered by the victims, have tended to give rise to delays in submission but the Court may be assumed, in light of the ECtHR's emphasis on ensuring that remedies are 'practical and effective', that a flexible approach will be adopted to ensure access to justice is not precluded. Multiple challenges for victims to use domestic remedies in these sorts of cases, though applicants need only exhaust meaningful, available and effective remedies.

in the interests of national security,[344] and there is no risk of cases not being considered on national grounds. But there are early indications of states seeking to have blanket 'confidentiality' over cases as a whole, thereby excluding proceedings and arguments from public view, which the Court will need to continue to resist, while finding a way of considering documents confidentially where this is necessary and appropriate.[345] These cases remain in their infancy and time will tell whether the court will regulate future cases consistently with its existing rules and principles in relation to secrecy, confidentiality and publicity, and avoid the unnecessary secrecy that it has criticised on the national level.

Evidentiary challenges also remain, given the peripatetic, deliberately disorientating, and clandestine nature of the rendition programme and its associated cover up. The difficulties that victims inevitably face in cases of disappearance and detention in one state are multiplied in this context. Additional novel challenges arise for some victims from the ban on all communication by the high value detainees referred to above, who cannot therefore give direct testimony in support of their cases, which are therefore based largely on public source documents.[346] However, the rules of human rights courts are flexible enough to accommodate these realities within a fair process; for example legal presumptions and shifting burdens seek to ensure that litigants have the opportunity can establish their case even in circumstances where the evidence lies wholly within the grasp of the respondent state.[347] Where a *prima facie* case can be made against the state, in the circumstances of these cases, the onus is likely to shift to the state to demonstrate the steps it took to protect the rights of persons subject to their jurisdiction and to investigate as credible allegations of abuse came to light.[348]

International litigation is no panacea and no replacement for effective national courts. Among its many limitations are the lack of political support and a relatively weak record of implementation. But in the absence of a

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344 Rather, as ECtHR jurisprudence demonstrates, they adopt a more nuanced approach to national security that seeks to respect genuine national security concerns but retaining the right to be the ultimate arbiter of the necessary and proportionality of any limitation on rights.

345 In eg. the cases *Al Nashiri v Poland and Abu Zubaydah v Poland*, the state has sought broad confidentiality as regards the case file and hearings, the implications of which remain uncertain.

346 *Abu Zubaydah v Lithuania, and Abu Zubaydah Poland* note 29.

347 See for example, *Carabulea v Romania* (App no 45661/99) ECtHR 13 July 2010.

348 See, for example, *Saadi v Italy* (App no 37201/06) ECtHR 28 February 2008 para 129; *Astamirova v Russia* (App no 27256/03) ECtHR 26 February 2009 paras 70-81 (applicants had made out a prima facie case that their family member was abducted by servicemen. In the light of the Government's failure to provide relevant documents, the burden of proof shifted to the Government to disprove the applicants' allegations. Drawing inferences from the Government's failure to produce documents or to provide a plausible explanation for the events, it was found that Mr. Astamirov had been arrested by state servicemen).

national remedy, these avenues may finally provide the opportunity for victims to state their case and obtain a measure of vindication and justice, to clarify the range of states responsible for the ERP. The ultimate value of these proceedings[349] may lie in further impelling national systems to address the violations themselves, to conduct thorough investigations, hold those responsible to account and to provide a measure of the recognition and redress that has thus far proved elusive.

10.6 CONCLUSION

A US driven and internationally supported practice of enforced disappearance of persons has unfolded in the name of security and counter-terrorism. The 'extraordinary rendition' programme may come to epitomise how far certain states have stooped, and how far others have been willing to cooperate, accommodate, support or turn a blind eye, without constraint by the rule of law.

Political dispute surrounds the programme's effectiveness and implications. In 2006, then President Bush described it as 'one of the most successful intelligence efforts in American history.'[350] This assessment has been challenged by others who note, consistent with victim's testimonies, that the programme of torture reaped false testimony and doubtful actionable intelligence. As one US representative put it to the US government:

> "We can't measure the accuracy of this program by saying we've gone out and brought hard and fast cases based on it. You cannot tell me whether any of these individuals or all of these individuals have lied. You conceded to me that someone facing extreme anxiety and pressure could yield false information. I add all that up and I come to one simple conclusion: We can't tell if this program is working… [W]e want to get the real terrorists and we don't know if you are succeeding in doing that or if you're unearthing a bunch of lies."[351]

The modus operandi of the ERP has certainly curtailed the use of intelligence gathered as evidence, as the military commissions process described at chapter 8 or other criminal trials at Chapter 4, illustrate. It has further tarnished a much

349 See Chapter 11 on the various roles that human rights litigation can play.

350 President G.W. Bush, 'President Bush Signs Military Commissions Act of 2006', 17 October 2006, stating that the CIA detention and interrogation 'program has been one of the most successful intelligence efforts in American history ... . And the bill I sign today will ensure that we can continue using this vital tool to protect the American people for years to come.' (available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/2006 1017-1.html.

351 Representative Artur Davis (D-AL), House Judiciary Subcommittee Hearing on the Justice Department's Office of Legal Counsel, 14 February 2008, responding to Assistant Attorney General Steven Bradbury's description of the CIA's interrogation program. 'Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects', Human Rights First, 2008.

damaged US reputation, and may well make it more difficult to achieve such cooperation in the future.

What is beyond doubt – in light of the legal framework set out in other chapters of this book and recalled above – is that the ERP involved flagrant violations of international law. The most basic human rights were flouted through prolonged, arbitrary, secret detention, involving techniques which fall foul of the ban on torture and cruel, inhuman or degrading treatment. Arbitrary extra-legal transfer was blind to the rules on refoulement and due process, making a mockery of the careful crafted norms and jurisprudence on international cooperation, the improvement of which appeared to be a priority post 9/11. It violated other obligations owed towards states as well as to the individual victims. In many ways, then, the ERP is not a scenario that pushes on legal boundaries or tests the framework as much as constitutes an alarming violation of it.

Where the ERP may nudge legal boundaries, and therefore lead to the development or clarification of legal standards, is in relation to the various forms of state responsibility for the spider's web of cooperation that planned, implemented, facilitated, supported or otherwise made possible the ERP. As the scope of the rendition operation – and the number of states 'deeply complicit' in it[352] – becomes clearer, so too does the importance of understanding and clarifying what level of support, what amount of intelligence information, what sort of cooperative relationships, should be considered to fall foul of states obligations in the future. Among the issues of state responsibility that are gaining currency as a result of the illumination of facts around the extradition rendition programme, for example, is the nature of aiding and assisting in the commission of human rights violations. Increased attention by a broad range of state and non-state actors, public enquiries, and judicial proceedings, is serving to give emphasis to – and may potentially clarify – legal standards in this respect.

Rendition exposes, in extreme form, the implications of the increasingly central and multifaceted role of intelligence agencies in the 'war on terror'.[353]

352 'Britain and European governments helped US commit "countless" crimes colluding with torture', *The Telegraph*, 1 September 2011, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8735518/Britain-and-European-governments-helped-US-commit-countless-crimes-colluding-with-torture.html .T. Hammarberg, the Council of Europe's rights commissioner, accused governments of being 'deeply complicit' in illegal activities carried out by the U.S. over the last 10 years, and noting that "Many of those crimes have been carefully and deliberately covered up." Likewise, see 'CoE Rendition Report (7 June 2007)', above, note 3.

353 On the problematic role of intelligence agencies arresting and detaining if they do not have law enforcement mandates under domestic law, see 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while

Those responsible were state agents, or acting under the direction and control of the state, and clearly come within the state's responsibility.[354] Yet it has been suggested that the legal framework is 'lighter' in respect of the governance of intelligence agencies than other arms of the state, which may contribute to a sense of a lack of international regulation, and ultimately impunity.[355] One by-product of the ERP has been increased attention dedicated to the need for greater oversight and accountability of intelligence agencies and agents.[356]

The ERP has shone a harsh light on the dark side of cooperation, however, and the need to ensure that state practices in international cooperation do not 'participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose,' as reflected in the UK's 'Consolidated Guidance' to Intelligence officers in the field.[357] The regulation of cooperation in intelligence matters raises other difficult issues that raise tensions within the legal framework that need to be grappled with. These includes the limits on transparency in light of the 'control principle' on which much cooperation is predicated and which is often relied upon to limit disclosure of information that was supplied by another state.

Further debate and developments on law and policy in this area may be one of the positive developments to emerge from the rendition programme, bringing greater transparency and accountability into a notoriously im-

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countering terrorism, including on their oversight' (hereinafter 'Good Practice Report'), Fourteenth session, 17 May 2010, UN Doc A/HRC/14/46, Practice 28.

354 Most relevant actors were intelligence agents, clearly part of the state apparatus. Where private actors were also employed, while this may help to shield the state, de facto, from accountability, so far as the private actors worked under the 'direction and control' of the state, they were clearly covered by the law of agency, and feel within the responsibility of the state. See Chapter 3 on the issues of state responsibility.

355 G. Staberock, 'Intelligence and Counter-Terrorism', in *Counter-Terrorism: International Law and Practice*, above, note 174, suggesting that international law is normatively 'light' on the role of intelligence agencies, compared to special detailed rules on lawyers, judges, prison service, law enforcement and fair trial, yet no comparable guidelines on intelligence agencies. While it may be doubted that there is any normative void, or even real lack clarity re legality in this case, it may be true to say as Staberock does that the lack of detailed provisions contributes to a false perception of exemption from the international legal oversight (p. 355).

356 Eg the Special Rapporteur on Terrorism and Human Rights' Framework Principles on Accountability for Counter-terrorism, March 2013, A/HRC/22/52, emphasise accountability for intelligence agents and agencies. ICJ Eminent Jurists Report, above, note 49, at 84 with recommendations as to the role of intelligence services and its separation from policing functions and the limits of international cooperation. See also UN Special Rapporteur Good Practice Report, A/HRC/14/46, 17 May 2010; above, note 341.

357 UK Consolidated Guidance 2010. The Guidance was welcomed by the otherwise critical CAT report of May 2013.

penetrable area of international practice. Renewed priority has to be afforded to enhancing cooperation within a rule of law framework.[358]

Given the excessive secrecy surrounding the ERP, the extent to which the facts have been, and continue to be, exposed is noteworthy. Information concerning the nature of the ERP and those responsible for sustaining it continues to be uncovered, documented, and made public, making possible both historical clarification of the facts, and appropriate reflections on lessons for the future. It may be a reminder to states that their ability to suppress information, even with the complex scheme and elaborate cover-up, is time limited.

Likewise, as obstacles to justice for victims continue to emerge, so too do innovations in pursuit of the truth, justice or reparation to which victims are entitled. The right of victims of rendition to information, redress and reparation, and the obligation to investigate and prosecute, is beyond dispute. Yet a generalized reluctance to treat them as victims deserving of recognition and redress – related apparently to lingering perceptions regarding the nature or activities of those individuals – compounds the original wrong. Payment of compensation has been rare, and unaccompanied by recognition of responsibility or regret.[359] The contrasting approach of the Arar enquiry – where investigation and clarification were followed by compensation and an unqualified apology – provides a model that others may be inspired to follow. All victims of serious rights violations, not least those associated with ERP, have the right to reparation, and public acknowledgement of their victimisation is long overdue. Bringing legal challenges where sensitive information is at stake is enormously challenging, as practice in this and other chapters shows.[360] The courts – national and where necessary international -have a crucial role to play in enabling victims to vindicate their rights, but also in restoring the authority of the state and the rule of law, as discussed in the next chapter.

As knowledge grows, so too does momentum towards accountability for a range of actors that drove and facilitated the rendition programme, including individual criminal responsibility. As discussed in Chapters 4 and 7, accountability norms are well established, developed through years of global

358 The question of political will is clearly key. As Commissioner Hammerberg noted, accusing Europe's governments of blocking investigations into rendition in line with Washington's wishes: 'The message is clear – good relations between the security agencies are deemed more important than preventing torture and other serious human rights violations.' 'Britain and European governments helped US commit "countless" crimes colluding with torture'.

359 Examples include al-Zery, compensated by the Swedish government, Mamdouh Habib by the Australian government (reportedly on condition that he not pursue legal proceedings against them), and Binyam Mohamed by UK authorities; see 'Compensation to Guantanamo Detainees "was necessary"', *BBC News*, 16 November 2010, available at: http://www.bbc.co.uk/news/uk-11769509.

360 See eg the novel 'closed material proceedings' and impediments on courts disclosing 'sensitive information' in the UK Justice and Security Act 2013 at Chapter 7B7 and other challenges in Chapter 11.

experience in addressing, among other things, state responsibility for enforced disappearances and torture, and international criminal law. Whether these norms can be brought to bear to ensure a measure of truth, justice, and accountability for ERP remains unclear, but may prove a key test of the rule of law and the extent to which states are determined to learn and move on from the worst excesses of the war on terror.