

Extraordinary rendition in international law: criminalising the indefinable?

by

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Annexure G

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TABLE OF CONTENTS

List of abbreviations	iii
Summary	v
Introduction	1
Chapter 1: Traditional methods of expulsion and rendition under international law	8
1.1 Extradition	11
1.1.1 Factors that obstruct extradition	15
1.1.2 Human rights considerations in cases of extradition	23
1.1.3 Issues related to extradition	25
1.2 Deportation	26
1.3 Other legal methods of expulsion	28
1.3.1 Military rendition	28
1.3.2 Asylum	32
1.4 Conclusion	34
Chapter 2: Extraordinary rendition as opposed to other illegal expulsion methods ...	35
2.1 Extraordinary rendition	38
2.2 History and evolution of extraordinary rendition	41
2.3 Other forms of illegal expulsion and/or rendition	47
2.3.1 Disguised extradition	48
2.3.2 Abduction	54
2.3.3 Responsibility of the state in matters of illegal expulsion and/or rendition	61
2.4 Conclusion	62
Chapter 3: Issues created by extraordinary rendition	66
3.1 Disrespect for the rule of law	67
3.2 Secret facilities and arbitrary detention	75
3.3 Lack of accountability and transparency	80
3.4 Violation of state sovereignty	86
3.5 Torture and other forms of cruel, inhuman and degrading treatment or punishment ..	89
3.5.1 Case studies	97
3.6 Conclusion	103
Chapter 4: Legal regimes applicable to extraordinary rendition	106
4.1 International Humanitarian Law	107
4.1.1 International armed conflict	109
4.1.2 Non-international armed conflict	112
4.1.3 Special consideration of “unlawful combatants” in the Global War on Terror	115
4.1.4 Special debate on detention in IHL and IHRL	124

4.2 International Human Right Law.....	125
4.2.1 Customary International Law.....	129
4.2.2 International Human Rights Treaties	134
4.2.3 Convention on Enforced Disappearances	141
4.4 Conclusion.....	143
Chapter 5: Is the Global War on Terror a new type of war?	146
5.1 Introduction.....	146
5.2 New type of war?	149
5.3 Is there a gap in IHL?	150
5.4 Expanding the traditional parameters of warfare.....	152
5.4.1 Asymmetrical warfare.....	152
5.5 Conclusion.....	167
Chapter 6: Criminalising extraordinary rendition	169
6.1 Introduction.....	169
6.2 The International Criminal Court	171
6.2.1 Jurisdiction of the ICC	172
6.2.2 Immunity to criminal liability before the ICC.....	178
6.3 The right of the victim to redress.....	180
6.4 The special issue of criminal responsibility incurred by states.....	183
6.5 US concerns regarding the Rome Statute of the International Criminal Court.....	189
6.6 International crimes in terms of the ICC Statute.....	192
6.6.1 <i>Jus cogens</i> norms and <i>erga omnes</i> obligations.....	192
6.6.2 Categories of international crimes in terms of the ICC Statute	193
6.7 Alternative international tribunals.....	197
6.7.1 Inter-American Court of Human Rights.....	197
6.7.2 International Court of Justice.....	198
6.8 Foreign government responsibility for extraordinary rendition	199
6.9 Conclusion.....	208
Conclusion	211
Bibliography	221

LIST OF ABBREVIATIONS

AUMF	Authorisation to Use Military Force
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984
ECE	European Convention on Extradition of 1957
ECHR	The European Convention on Human Rights of 1950
EIT	Enhanced Interrogation Techniques
FARRA	Foreign Affairs Reform and Restructuring Act of 1998
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
GCs	Geneva Conventions
GWOT	Global War on Terror
HVD	High value detainee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights of 19 December 1966
ICESCR	International Convention on Economic, Social and Cultural Rights of 1966
ICJ	International Court of Justice
ICRC	The International Committee of the Red Cross

IMT	International Military Tribunal
JSCO	Joint Special Operations Command
OAD	Official Acknowledgement Doctrine
OMS	Onsite Medical Services
POW	Prisoner of War
RC	Convention Relating to the Status of Refugees of 19 December 1951
UDHR	United Nations Universal Declaration of Human Rights of 1948
UN	United Nations
UN Charter	The Charter of the United Nations and Statute of the International Court of Justice of 1945
UN HRC	Human Rights Committee

Summary

After 9/11 the media shocked the public when it uncovered that states, especially the US, used illegal methods to bring suspected terrorists within the jurisdiction of certain countries as part of the Global War on Terror. Although the US seemed to be the biggest culprit, other governments assisted in the capture, detention, interrogation and torture of these suspected terrorists, to which end secret facilities known as “black sites” were used.

Growing public awareness of extraordinary rendition has elevated the discussion around the criminalisation of it. The existence of the practice is common cause at this juncture. However, since the practice is largely shrouded in secrecy little is known and understood about it, with the result that a severe lack of conclusive evidence about the phenomenon further aggravates the conditions under which the struggle against it has to be waged.

The aim of this thesis is to establish if there is a current judicially acceptable method of criminalising and defining extraordinary rendition, and to determine if it can be categorized as a *jus cogens* norm in international law which creates *erga omnes* obligations for states. In order to fulfil this aim the thesis will deal with the following:

- (i) The legal methods of expulsion from a state in contrast to extraordinary rendition;
- (ii) Illegal methods of expulsion from a state, in contrast to extraordinary rendition;
- (iii) International legal issues created by extraordinary rendition;
- (iv) Possible international legal regimes applicable to it;
- (v) The implications of the so-called Global War on Terror on seemingly unlawful state practices; and
- (vi) Criminalising extraordinary rendition under international criminal law.

INTRODUCTION

“The first time I proposed a snatch, in 1993, the White House Counsel, Lloyd Cutler, demanded a meeting with the President to explain how it violated international law. Clinton had seemed to be siding with Cutler until Al Gore belatedly joined the meeting, having just flown overnight from South Africa. Clinton recapped the arguments on both sides for Gore: ‘Lloyd says this. Dick says that.’ Gore laughed and said, ‘That’s a no-brainer. Of course it’s a violation of international law, that’s why it’s a covert action. The guy is a terrorist. Go grab his ass.’” *Richard Clarke*¹

A connecting flight from Seattle lands and a passenger disembarks the plane and enters the airport. The passenger is halted by security and taken to an interrogation room. The passenger’s whole world is about to change in the next twenty minutes.² He is escorted to a dark room where he is subjected to interrogation about his past, his family, his friends, even his colleagues. His numerous requests for legal representation are denied. Due to unsatisfactory answers to their questions the passenger is threatened with deportation. Legal representation is still denied. He is injected with an unknown substance that will render him immobile and incoherent. Whilst blindfolded with a piece of cloth a foreign object is inserted into his anus and he is strapped with a diaper. Still blindfolded, he is escorted to a desolate airport with a single-engine jet aircraft, waiting to whisk him away to an unknown country and foreign legal system where torture is the order of the day. No press, no legal representation, no judicial procedure — and no mercy. An innocent man has just been extraordinarily rendered to torture.

¹ Richard Alan Clarke worked for the US State Department during the Reagan administration and is the former National Coordinator for Security, Infrastructure Protection, and Counter-terrorism. This quote is from his book Clarke R *Against all enemies: Inside America’s War on Terror* (2004) Free Press 143-144.

² This twenty-minute period is commonly referred to as the “twenty minute take-out”. See Johnston P “Leaving the invisible universe: Why all victims of extraordinary rendition need a cause of action against the United States” 16 2007 *Journal of Law and Policy* 357; see also Marty D “Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states” (27 June 2006) *Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights* available at http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf in which the “twenty-minute take-out” is explained as the “security check” used by CIA agents. It is said that a detainee can be fully prepared for transportation within twenty minutes by rendering him immobile and incoherent and by dressing him in a diaper.

The sad reality about the above scenario is that this is not where the story ends. The person will be detained indefinitely in a prison at an unknown location, denied due legal process, and will probably disappear in the sense that his/her physical whereabouts will be untraceable. This is the nature of extraordinary rendition: it is a carefully crafted clandestine operation that ensures complete opacity, a smokescreen serving as a perfect guarantee against accountability.

Upon embarking on the journey of writing my thesis and choosing an appropriate topic for my research, it became clear that there was a very limited understanding of exactly what extraordinary rendition is. I was introduced to this concept for the first time through the film *Rendition*.³ Although this film paints a very emotional picture of the effects on the victims of extraordinary rendition and their families, I perceived it from a legal point of view.⁴ As a legal professional, I was immediately interested in the international legal consequences created by this practice and the effect that would have on global human rights.

A further motivation for this research was the lack of public knowledge concerning the meaning of the term extraordinary rendition and all it entails. Although some could argue that this is a moot point since the Obama administration took over,⁵ further films were released,⁶ books were published,⁷ academic papers written,⁸ and

³ *Rendition* film released in 2007 starring Reese Witherspoon, Jake Gyllenhaal, Peter Sarsgaard and Meryl Streep. More information on the film available at <http://www.imdb.com/title/tt0804522/>.

⁴ The film centres on the journey of one unorthodox capture and interrogation of an innocent Arabic family man, apprehended at the airport on his way home to his family after being placed on the CIA list of suspected terrorists.

⁵ Refer to footnote 51, paragraph 2.2 in chapter 2 and chapter 3 in general where reference is made to Obama's plans to close Guantanamo Bay, and the call for the release of information by human rights organisations into the investigations launched regarding the CIA involvement in extraordinary renditions.

⁶ *Extraordinary rendition* film released in 2007 starring Omar Berdouni, Andy Serkis and Ania Sowinski. More information on the film available at <http://www.imdb.com/title/tt0826613/>. A *most wanted man* film released in 2014 starring Philip Seymour Hoffman, Rachel McAdams, and Daniel Brühl. More information on the film available at <http://www.imdb.com/title/tt1972571/>. There have also been a score of journalist interviews published on YouTube cf. https://www.youtube.com/results?search_query=extraordinary+rendition.

⁷ Grey S *Ghost plane: The true story of the CIA rendition and torture program* (2007) Saint Martin's Griffin 1st ed., Mayer J *The dark side* (2009) Anchor Books 1st ed., Hendricks S *A kidnapping in Milan: The CIA on trial* (2010) W.W. Norton and Company which tells the story of Abu Omar. The Abu Omar case is also discussed Chapters 3 and 4 of this thesis.

⁸ There are a vast number of academic papers written on extraordinary rendition and various references are made to these throughout this thesis. The most notable academic works to list as an introduction are: Singh A "Globalizing torture: CIA secret detention and extraordinary rendition" (2013)

full reports from human rights organisations released,⁹ my social research indicated that there was still a vast lack of knowledge regarding this practice.¹⁰

While working on a PhD thesis one tends to consult books, texts and also your peers for advice and guidance toward writing a thesis that will accurately portray your research and successfully culminate in your conclusions and findings. One such book by Patrick Dunleavy¹¹ indicates that you should “go public” with your research. He suggests that you talk about your research with peers, friends, supervisors, at social gatherings etc. in order to test your arguments and content. Through this social experiment I discussed the topic of my thesis with many different individuals.

Once I mentioned the word “extraordinary rendition” I would receive a somewhat blank stare and inevitably they would ask: “what is that?”, or state “I’ve never heard of this before, what it is?”, or “what does that mean/entail?” Bear in mind that these conversations were initiated with various different individuals that have different backgrounds, ranging from friends at social gatherings with no legal experience whatsoever to seasoned academics and practicing legal professionals, over a period of a number of years. However, the presence or absence of an academic or legal background made no difference to the lack of knowledge concerning the term “extraordinary rendition” and all it entails.

This practice of extraordinary rendition gained momentum post-9/11 under the administration of President George W. Bush,¹² who signed directives authorising extraordinary rendition without the prior approval of the White House or the Departments of State and Justice.¹³

Open Society Justice Initiative, Satterthwaite M “Rendered meaningless: Extraordinary rendition and the rule of law” 75 2007 *The George Washington Law Review* 1333.

⁹ Various reports are referred to throughout this thesis.

¹⁰ It should also be noted that even though all these information sources exist, what actually happens to the individual is not common knowledge due to the lack of transparency associated with extraordinary rendition.

¹¹ Dunleavy P *Authoring a PhD thesis: How to plan, draft, write and finish a doctoral thesis or dissertation* (2003) Palgrave Macmillan.

¹² Sadat L “Extraordinary rendition, torture, and other nightmares from the war on terror” 75 2007 *George Washington Law Review* 1200, 1215.

¹³ Jehl D & Johnston D “Rule change lets CIA freely send suspects abroad to jails” (6 March 2005) *The New York Times Online* available at <http://www.nytimes.com/2005/03/06/politics/06intel.html?th=&pagewanted=print&position=>, cf. Grey (2007) 149; Singh (2013) 15. “Black sites” also emerged, which are facilities reportedly erected by the

Besides a whole series of other legal issues caused by extraordinary rendition, its perpetrators flout the rule of law and human rights.¹⁴ The veil of secrecy drawn over extraordinary rendition clouds estimates of the numbers of victims of this practice. Estimates vary uncertainly from 70¹⁵ to 100-150¹⁶ and have even been as high as several thousands¹⁷. According to an article in the *Washington Times*, Egypt has allegedly admitted to detaining 60-70 victims.¹⁸ However, a recent report containing the most detailed account to date lists 54 countries that have resorted to or have somehow participated in the practice.¹⁹

Extraordinary rendition presents a real and present threat to the upholding of international laws and human rights. However, a clear consensual definition of the practice has yet to materialise, which adds to the uncertainty about numbers of victims, particularly since divergent misconceptions about the nature of extraordinary rendition are patent among sources.²⁰ Similarly, the clandestine nature of the practice prevents reliable identification of the countries and agencies involved, which

US at unknown sites across the world. Cf. "Secret CIA black sites and globalizing torture" (5 February 2013) *Human Rights Investigations* available at <http://humanrightsinvestigations.org/2013/02/05/secret-cia-black-sites-globalizing-torture/#more-2604>; "Lithuania: Reopen investigation into secret CIA prisons: New EU presidency should set example for justice" (25 June 2013) *Human Rights Watch* available at <http://www.hrw.org/news/2013/06/25/lithuania-reopen-investigation-secret-cia-prisons>.

¹⁴ The Charter of the United Nations and Statute of the International Court of Justice of 1945 (UN Charter), and the United Nations Universal Declaration of Human Rights of 1948 (UDHR) advocate respect for the rule of law and the protection of human rights by states. The preamble of the UN Charter determines that the people of the United Nations should "reaffirm faith in fundamental rights" and "...establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Also see article 1(2) and 1(4) of the UN Charter. Article 7 of the UDHR also states that "All are equal before the law and are entitled without any discrimination to equal protection of the law ..." Also see the preamble of the UDHR. The issues arising from extraordinary rendition are sketched in brief outline in paragraph 3 below.

¹⁵ These detainees are considered to be of lower priority as they are not directly involved in or connected to terrorism. It is nonetheless rumoured that they are rendered to countries such as Jordan and Afghanistan, where they are allegedly subjected to torture. The CIA is deemed to have influence in these operations according to the following article in the *Washington Post*: Priest D "CIA hold terror suspects in secret prisons" (2 November 2005) *The Washington Post* A01 available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644_pf.html.

¹⁶ Mayer J "Outsourcing torture: The secret history of America's 'extraordinary rendition' program" (14 February 2005) *The New Yorker* 106 available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

¹⁷ Satterthwaite M Fisher A "Beyond Guantánamo: Transfers to torture. One year after *Rasul v Bush*" (28 June 2005) *Center for Human Rights and Global Justice New York University Law School* available at <http://chrgj.org/wp-content/uploads/2012/07/Beyond-Guantanamo-Report-FINAL.pdf>.

¹⁸ Waterman S "Terror Detainees Sent to Egypt" (16 May 2005) *The Washington Post Online* available at <http://www.washingtontimes.com/news/2005/may/15/20050515-115906-5452r/>.

¹⁹ Singh (2013) 2-4. Although my article focuses on the practice of extraordinary rendition, the United States' use of this procedure is used as the prime example of extraordinary rendition throughout this article.

²⁰ Satterthwaite (2007) 5.

suits the entities concerned very well since the object is to render the victims untraceable. The dense fog of obscurity surrounding the practice takes a heavy toll on efforts to substantiate charges, with the result that despite an increase over the past decade in the number of cases that have reached the courts, most have run into an impasse with no prospects of further progress.

In light of the above the issues associated with and created by extraordinary rendition can be summarised as follows:

- (a) There is no formal and clear definition.
- (b) It creates a host of international and domestic legal issues.
- (c) There is no consensus on the legal regimes applicable to it.
- (d) The various legal arguments presented by the US in defence of extraordinary rendition have taken a toll on respect for the rule of law, international customs and rules and human rights.²¹
- (e) Prosecution of extraordinary rendition is complicated at best.²²

Ultimately my aim is to analyse all these issues and facts to ascertain whether it is possible to define a complex issue like extraordinary rendition as a single illegal phenomenon, and to establish whether there is a current judicially acceptable method of criminalising it. Can it be categorised as a *jus cogens* norm in international law which creates *erga omnes* obligations for states? In order to fulfil this aim the thesis will deal with the following:

(i) The legal methods of expulsion from a state, considered in context with extraordinary rendition.

Before extraordinary rendition can be discussed it is necessary to give the reader a glimpse of traditional methods of expulsion of individuals from a state. This will enable the reader to better understand the difference between legal methods of expulsion and extraordinary rendition.

²¹ Refer to Chapter 4 to 6.

²² Refer to Chapter 6.

These concepts are discussed in Chapter 1, and deals with extradition and the legal factors that can obstruct a legal extradition, deportation, and other legal methods of expulsion such as military rendition.

(ii) Illegal methods of expulsion from a state, considered in context with extraordinary rendition.

Chapter 2 deals with extraordinary rendition as opposed to other illegal expulsion methods. This chapter will enable the reader to draw a distinction between extraordinary rendition and other forms of illegal expulsion that is already criminalized in international law. The chapter explores illegal methods such as disguised extradition, abduction, and the responsibilities of the state in cases of illegal expulsion. A brief history of the evolution of extraordinary rendition is also provided for further perspective on the matter, and a description of extraordinary rendition it provided.

(iii) International legal issues created by extraordinary rendition.

Various international legal issues are created by extraordinary rendition. Chapter 3 explores these issues in detail in order to enable the reader to understand why this phenomenon should be criminalized and why the international community should care to take action.

The issues associated with extraordinary rendition are vast. Chapter 3 discussed the following issues: Disrespect for the rule of law, secret facilities and arbitrary detention, lack of accountability and transparency, violation of state sovereignty, and torture and other forms of cruel, inhuman and degrading treatment.

(iv) International legal regimes that may be applicable to it

International scholars, human rights organisations and the US disagree on the applicability of the correct legal regimes to extraordinary rendition. These arguments are documented and discussed in chapter 4 of this thesis. Although these arguments largely centred on the Bush Administration's viewpoints, it still creates problems today as will be discussed in Chapters 5 and 6 regarding criminal prosecution and attaching responsibility to those guilty of extraordinary rendition.

There are arguments supporting the applicability of international humanitarian law, others rather choosing to support the applicability of international human rights law, and a final school of thought which argues that extraordinary rendition is part of the Global War on Terror which is a new type of war and therefore new legal regimes should be adopted and applied.

(v) The effect of the so-called Global War on Terror on purportedly unlawful practices perpetrated by states.

Chapter 5 discussed the argument that the GWOT is a new kind of war and therefore new rules should be adopted and applied. The arguments suggest that international law, in this sense, is out-dated and should grow and change with the times.

(vi) Extraordinary rendition considered in context with international criminal law.

Chapter 6 explores the difficulties of prosecuting those guilty of extraordinary rendition if it were to be accepted that it can be criminalized and clearly defined.

Criminalising and defining extraordinary rendition is a difficult journey with many obstacles. The mere lack of transparency associated with this practice severely influences the probabilities one can explore. Therefore, I begin this journey with a quote from Sophocles' *Oedipus Rex*:

OEDIPUS: Where are they? Where in the wide world to find the far, faint traces of a bygone crime?

CREON: In this land, said the god, 'who seeks shall find; who sits with folded hands or sleeps is blind.'²³

²³ Sophocles *Oedipus Rex* (2014) Amazon Paperback Edition 107-110.

CHAPTER 1

TRADITIONAL METHODS OF EXPULSION AND RENDITION UNDER INTERNATIONAL LAW

“Nobody has a more sacred obligation to obey the law than those who make the law.”

*Sophocles*¹

This thesis focuses on the illegal practice of extraordinary rendition;² however, a parallel extrajudicial practice of major concern in international law is targeted killing.³ Both of these practices have developed around the threat of terrorism in the sense that they are aspects of the “Global War on Terror” (GWOT) engaged in after the 9/11 attacks. The difference between targeted killing and extraordinary rendition is that the purpose of the latter is to extract information from a detainee,⁴ usually by resorting to extraordinary coercive measures which can amount to torture,⁵ while the object of the former is simply to eliminate a targeted person with a view to achieving a strategic gain in the GWOT. Drones are the weapon of choice in this regard.⁶

These practices are preferred tactics because it is easier to eliminate an individual or to subject the individual to extraordinary interrogation techniques to gain information than it is to proceed in a court of law against persons believed to constitute a threat to the national security of a state.⁷

¹ This quote is from the play, *Antigone*, by Sophocles. See *Encyclopaedia Britannica* available at <http://www.britannica.com/EBchecked/topic/28036/Antigone>. Sophocles was one of the three great Greek playwrights of the 5th century. See *Encyclopaedia Britannica* available at <http://www.britannica.com/EBchecked/topic/554733/Sophocles>.

² A full description and discussion of extraordinary rendition will follow in chapter 2, but to lay the foundation for the discussion concerning extraordinary rendition it is necessary to first discuss various legal methods of expulsion from a state. This study includes full sources and events until 2014.

³ A brief discussion of targeted killing as a possible alternative to extraordinary rendition will follow in later chapters.

⁴ A full explanation follows in chapter 2.

⁵ A detailed case study regarding torture associated with extraordinary rendition will follow in chapter 3.

⁶ A short discussion of targeted killing will follow in later chapters.

⁷ One of the reasons for this is the fact that there is a lack of conclusive evidence against the individual and therefore the individual cannot be brought before court. This will become clearer in chapter 2 when the term “suspected terrorists”, for purposes of this thesis, is explained. Refer to footnote 3 and 4 above.

The perpetrators of extraordinary rendition disrespect the rule of law and human rights,⁸ and the practice also creates a host of other legal issues such as issues with accountability and transparency.⁹ Although the reality and serious consequences of the GWOT¹⁰ are acknowledged,¹¹ acts that deliberately flout the rule of law and human rights to counteract threats (putative or otherwise) of terrorism cannot be justified for that reason.¹²

In light of the above the introductory chapter to this thesis deals with the legal methods of expulsion and/ or rendition of an individual from a state. This explanation is necessary to prepare the reader to distinguish sufficiently between legal and illegal expulsion and rendition methods.

⁸ The UN Charter, and the UDHR promote respect for the rule of law and the protection of human rights by states. The preamble of the UN Charter determines that the people of the United Nations should “reaffirm faith in fundamental rights” and “...establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.” Also see article 1(2) and 1(4) of the UN Charter. Article 7 of the UDHR also states that “All are equal before the law and are entitled without any discrimination to equal protection of the law...” Also see the preamble of the UDHR.

⁹ All the issues created by extraordinary rendition will be discussed and explained throughout this thesis, especially in chapters 2-4.

¹⁰ The US formally declared an international war on terrorism after 9/11 during the address to the nation delivered by President George W. Bush in his speech to Congress. See Selected Speeches of George W. Bush 2001-2008 available at http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf, 68, 69, and “Text: President Bush addresses the nation” (20 September 2001) *The Washington Post* available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html, and Stevenson R “President makes it clear: Phrase is ‘War on Terror’” (4 August 2005) *The New York Times Online* available at <http://www.nytimes.com/2005/08/04/politics/04bush.html?pagewanted=print&r=0>. In his address to Congress President Bush stated that “our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated ... and we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists ... ”

¹¹ The horrific events of 11 September 2001 are examples of such consequences. See in general Schmemmann S “Hijacked jets destroy Twin Towers and hit Pentagon” (12 September 2001) *The New York Times Online* available at <http://www.nytimes.com/2001/09/12/national/12PLAN.html>, Kleinfield N “U.S. Attacked: Hijacked jets destroy Twin Towers and hit Pentagon in day of terror” (12 September 2001) *The New York Times* available at <http://www.nytimes.com/2001/09/12/us/us-attacked-hijacked-jets-destroy-twin-towers-and-hit-pentagon-in-day-of-terror.html>, Grunwald M “Terrorists hijack 4 airliners, destroy World Trade Center, hit Pentagon; Hundreds dead” (12 September 2001) *The Washington Post* available at <http://www.washingtonpost.com/wp-dyn/content/article/2001/09/12/AR2005033107980.html>, Powell M “New York: A city turned upside down” (12 September 2001) *The Washington Post* available at <http://www.washingtonpost.com/wp-dyn/content/article/2001/09/12/AR2005033108349.html>.

¹² This will be explained in chapter 3.

Scenarios often arise in international law where states need to expel individuals from their territory,¹³ or where states seek to obtain custody of an individual by way of rendition procedures.¹⁴ Certain legal rules have been put in place to ensure lawful surrender and/or expulsion of these individuals.¹⁵ Various international law instruments regarding legal methods of expulsion and rendition of an individual have been adopted.¹⁶ Some rules governing these procedures have become customary international law¹⁷ and states have incorporated these international norms into their domestic laws.¹⁸ Once this incorporation is completed states are expected to respect and adhere to the fundamentals of these laws.¹⁹

There are various legal methods of expulsion and rendition in international law,²⁰ but in-depth discussion of these remedies is not the main focus of this thesis. A brief

¹³ This deals with deportation. See *Ouriaghi v Belgian State* (1960) 31 ILR 352 where the complainant was a French national living in Belgium. The Belgian Minister of Justice issued an order for his expulsion from Belgian territory which he contested. Also see *Hearn v Consejo de Gobierno* (1962) 32 ILR 257 where the complainant was a US citizen living in Costa Rica. The Costa Rican government issued an order cancelling his status as a permanent resident of Costa Rica and ordered his expulsion. Cases of deportation will also be discussed in paragraph 1.2 below.

¹⁴ For examples see *R v Evans ex parte Augusto Pinochet Ugarte* (1999) 38 ILM 68, *United States v Rauscher* (1886) 119 U.S. 407, 7 S.Ct. 234, *In re extradition of John Demjanjuk* (1985) 612 F.Supp 544 US D. Ct., Ohio, *Hilton v Guyot* (1895) 159 U.S. 133, 16 S.Ct. 139, *Geuking v President of the RSA* (2003) 3 ALL SA 34 (CC).

¹⁵ These rules and regulations are usually contained in extradition agreements or in the municipal law of the specific state in cases of deportation (cf. the full discussion of these legal expulsion methods in paragraphs 1.1 – 1.3 of this chapter).

¹⁶ See articles 31 – 32 of the Convention Relating to the Status of Refugees of 19 December 1950 (RC) which contains various safeguards against the expulsion of refugees. Also see articles 12 - 13 of the International Covenant on Civil and Political Rights of 19 December 1966 (ICCPR), articles 12 - 14 of the UDHR, and articles 2 – 4 of Protocol 4 of the The European Convention on Human Rights of 1950 (ECHR).

¹⁷ Such as article 49 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV) relating to deportations, transfers and evacuations. See Henckaerts J “Deportation and transfer of civilians in time of war” 26 1993-1994 *Vanderbilt Journal of Transnational Law* 469 at 482.

¹⁸ As of 2011 144 states are party to the RC, (see “States parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol” available at <http://www.unhcr.org/3b73b0d63.html>). There are currently 167 state parties to the ICCPR. For a full list of all state parties to the ICCPR please peruse the United Nations website at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en%23EndDec.

¹⁹ Article 2(1) and (2), for example, states that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ... each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Also see article 1 of GC IV in which each state party is expected to respect and ensure respect for the Convention in all circumstances. Also see the preambles of the ECHR and the UDHR.

²⁰ Some of which will be discussed in paragraphs 1.1 – 1.3 of this chapter.

overview is therefore sufficient to prepare the reader for the task of distinguishing between legal expulsion and extraordinary rendition.

1.1 Extradition

Extradition²¹ is a legal procedure whereby one state²² can request the delivery into its custody of a person accused of committing a crime against its laws while within its territory.²³ In *R v Evans ex parte Augusto Pinochet Ugarte*²⁴ the court defined extradition as

the formal name given to a process whereby one sovereign state, ‘the requesting state’, asks another sovereign state, ‘the requested state’, to return to the requesting state someone present in the requested state, ‘the subject of the request’, in order that the subject of the request may be brought to trial on criminal charges in the requesting state. The process also applies where the subject of the request has escaped from lawful custody in the requesting state and is found in the requested state.²⁵

Extradition for international crimes²⁶ is based on the general principle of *aut dedere aut judicare*.²⁷ In terms of this principle the state from which extradition is requested has a duty to either prosecute the individual sought or to extradite him.²⁸ The question whether this rule has achieved the status of customary international law has

²¹ In general cf. Botha N *The history, basis and current status of the right or duty to extradite in public international and South African law* (1992) LLD Thesis UNISA.

²² Hereafter referred to as “the requesting state.”

²³ Hereafter referred to as “the requested state.” Also see Dugard J *International law: A South African perspective* (2011) Juta 4th ed. 214, and Shaw M *International law* (2008) Cambridge University Press 6th ed. 686.

²⁴ *Pinochet* (1999) 68.

²⁵ *Pinochet* (1999) 71.

²⁶ It is difficult to determine whether the principle of *aut dedere aut judicare* applies to non-international crimes because extradition for domestic crimes requires extradition treaties, or national legislation or both. See Bassiouni M *International extradition: United States law and practice* (1996) Oceana Publications Inc. 3rd ed. 10.

²⁷ See in general Buatte T “The time of human justice and the time of human beings: Belgium v Senegal and temporal restraints on the duty to prosecute” 45 2013 *George Washington International Law Review* 349 at 360–367, Erakat N “The U.S. v The Red Cross: Customary International Humanitarian Law and universal jurisdiction” 41 2013 *Denver Journal of International Law and Policy* 225 at 246-274, Murphy S “The expulsion of aliens and other topics: The sixty-fourth session of the International Law Commission” 107 2013 *American Journal of International Law* 164 at 174-177.

²⁸ The International Committee of the Red Cross (ICRC) argues that the *aut dedere aut judicare* principle determines that states should not harbour criminal suspects or provide a safe haven for them. States should surrender the person to an international court or a national court with the capacity to prosecute the crimes he is accused of, or they should prosecute him under their own domestic laws. See Erakat (2013) 246.

been a subject for debate²⁹ because some treaties³⁰ (but not all)³¹ impose extradition or prosecution as an obligation. However, Bassiouni contends that obligatory extradition or prosecution can be seen as a general principle, and that states that default on this rule fail to meet their obligations in terms of international law.³²

Extradition can be regulated by a bilateral treaty,³³ which is an agreement entered into between two states, which sets out the requirements for extradition and regulates the procedure to be followed.³⁴ Due to the flexibility of the provisions of bilateral treaties, and therefore the changing nature of such, bilateral treaties are the least stable because they provide little to no uniformity.³⁵

In 1990 the United Nations General Assembly enacted the Model Treaty on Extradition,³⁶ which aims to provide guidelines to states for drafting bilateral extradition agreements.³⁷ This Model Treaty provides a working example of a

²⁹ Survey of the multilateral conventions which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” (2010) *UN General Assembly Secretariat* 62nd session A/CN.4/630, also see *Belgium v Senegal* (20 July 2012) ICJ, and Buatte (2013) 360-375.

³⁰ Such as article 7(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (CAT) which states that “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

³¹ Bassiouni (1996) 10.

³² Bassiouni (1996) 9-11. The most recent case concerning a state’s obligation under international law to extradite or prosecute was addressed in *Belgium* (2012) par 106, 117. *In casu* Belgium instituted proceedings against Senegal for not prosecuting or extraditing the former President of Chad, Hissène Habré, in accordance with their international obligations under CAT and customary international law. The court held that in accordance with article 7(1) of CAT, a state in whose territory the person is present cannot indefinitely delay prosecution, and consequently found that Senegal defaulted in meeting its obligations under CAT. In regard to the customary international status giving rise to this obligation the court found that the matter did not take its cue from international customary law (cf par 55). The General Assembly of the United Nations also released a report regarding the obligation to extradite or prosecute and stated that in the absence of a request to extradite, an obligation to prosecute is not negotiable, but if a request is made the state has the discretion to choose between extradition and prosecution. UN General Assembly Secretariat Survey (2010) 65.

³³ Examples of such bilateral treaties are: Antigua and Barbuda International Extradition Treaty with the United States of 1996, Albania International Extradition Treaty with the United States of 1933, China (Hong Kong) International Extradition Treaty with the United States of 1996 (cf. <http://www.pch.gc.ca/eng/1356023800347/1356023991852> for a list of Canadian bilateral treaties).

³⁴ The *Cambridge Advanced Learner’s Dictionary* (2004) Cambridge University Press 2nd ed. defines “bilateral” as “involving two groups or countries”, and “treaty” as written agreement between two or more countries formally approved and signed by their leaders”.

³⁵ The increasing number of signatories to multilateral treaties does seem to settle this problem to some extent, as it creates greater uniformity in treaty provisions. See Bassiouni (1996) 17.

³⁶ General Assembly Model Treaty on Extradition Resolution 45/116 of 1990 (UN Model Treaty).

³⁷ “Recognising the importance of a UN Model Treaty as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions, Adopts the

bilateral extradition agreement and provides all the necessary contractual terms that can be included.³⁸

Extradition can be effected through a multilateral treaty concluded by a number of participating states, such as the European Convention on Extradition of 1957 (ECE), which was ratified by numerous states.³⁹ These multilateral treaties can be relied upon by states that require a treaty to extradite, and they can be used as a basis for extradition by states that are not necessarily dependent on an extradition treaty.⁴⁰

Extradition can also be granted even though there is no formal treaty or agreement in place between the requesting state and the requested state,⁴¹ by relying on the international principles of comity or reciprocity.⁴² Normally, however, common law countries will not respond to requests for extradition without the backing of a treaty or an explicitly enabling agreement.⁴³

Reciprocity is the mutual giving and receiving of a favour (which serves the interests of both parties in equal or comparable measure),⁴⁴ while comity is a mere courtesy

UN Model Treaty contained in the annex to the present resolution as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice ...". See preamble of the UN Model Treaty.

³⁸ See the Annex to the UN Model Treaty which is an example of a drafted bilateral treaty agreement which can be used by states.

³⁹ For a list of state signatories to this convention visit <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=024&CM=8&DF=&CL=ENG>; See also Dugard J *International law: A South African perspective* (2011) 4th edition 218.

⁴⁰ Bassiouni (1996) 8.

⁴¹ In 1953 the Supreme Court of Venezuela released an American national to Panama although no extradition treaty was in place, stating that "in conformity with the public law of nations friendly states recognize a reciprocal obligation to surrender offenders who have taken refuge in their respective countries", see *Re Tribble* (1953) 20 ILR 366. Also see Bassiouni (1996) 7.

⁴² States rely on reciprocity and comity, which form part of the principles of friendly cooperation between states, in the absence of a treaty. See Bassiouni (1996) 17.

⁴³ The US, for example, requires a treaty or convention for extradition to be in place before extradition can be granted. See section 3184 of United States Code of 1948 Title 18. However, there is an exception to this rule as indicated by section 3181(b) which states that "The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies in writing, that—(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and (2) the offenses charged are not of a political nature."

⁴⁴ The *Cambridge Dictionary* (2004) defines reciprocity as "Reciprocate: to share same feelings as someone else, or to behave in the same way as someone else" and "Reciprocity = behaviour in which

granted by one state to another.⁴⁵ Comity eliminates issues regarding the extraterritorial application of national laws because one state gives deference to the laws of another state.⁴⁶ Comity is within the sole discretion of the state granting it,⁴⁷ and the granting state could decide to relinquish jurisdiction to a foreign tribunal even though it has legal jurisdiction over a case.⁴⁸ *Hilton v Guyot*⁴⁹ provided a good definition of “comity”:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.⁵⁰

The principle of reciprocity can become binding under international law if it becomes a state custom.⁵¹ Some states require a guarantee of reciprocity if there is no extradition treaty in place.⁵² Comity can never be binding under international law as it is merely a courtesy granted by one state to another.⁵³

two people or groups of people give each other help and advantages”. Also see Bear R “Reciprocity and comity: Politically manipulative tools for protection of intellectual property rights in the global economy” 30 1999 *Texas Tech Law Review* 155 at 156 where he defines “reciprocity” as being achieved when “two independent entities agree 'overtly or tacitly, to conduct one or more aspects of its business so as to confer a benefit on the other party to the agreement; the consideration being the return promise in kind by the other party.’ Simply stated, the concept of reciprocity is '[y]ou scratch my back and I'll scratch yours.’”

⁴⁵ “Comity is defined as ‘the recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to the rights of its own citizens. In the application of comity, many courts will consider the requirement of reciprocity.’ See Bear (1999) 156.

⁴⁶ Janis M *An introduction to International Law* (1999) Aspen Publishers 3rd Ed. 331.

⁴⁷ Janis (1999) 333.

⁴⁸ Janis (1999) 332.

⁴⁹ (1895) 139.

⁵⁰ *Hilton* (1895) 163-164.

⁵¹ Bassiouni (1996) 17.

⁵² Since the early years the U.S. Republic, has considered reciprocity as “an appropriate standard of behaviour” and even included clauses governing reciprocal trade in its first trade concession treaty with France of 1778. Due to US threats against Britain, the UK enacted the Reciprocity of Duties Act of 1823, and during 1896 the US Republic stated that protection and reciprocity are both measures of the Republican policy and go “hand in hand”. See Keohane R “Reciprocity in international relations” 40 1986 *International Organization* 1 at 3.

⁵³ Bassiouni (1996) 17.

1.1.1 Factors that obstruct extradition

On receiving a request for an extradition a state should verify whether there are factors that present a hindrance to extradition.⁵⁴ These factors include: extradition of nationals, the double criminality principle, speciality and offences of a political nature (excluding terrorist activities).⁵⁵

(a) Nationality

The Convention on Extradition, ratified by numerous states,⁵⁶ provides that a state may refuse a request to extradite if the accused is a national of the requested state.⁵⁷ The Model Extradition Treaty also lists this as one of the grounds for refusal of extradition.⁵⁸

When considering the nationality principle a distinction must be drawn between common-law countries and civil-law countries.⁵⁹ Common-law countries do not exercise extraterritorial jurisdiction over its nationals and therefore usually allows extradition,⁶⁰ while civil-law countries prefer to try their nationals on home ground since they are subject to extraterritorial jurisdiction.⁶¹ South Africa is a common-law country⁶² and extradition of its nationals is therefore countenanced. This was illustrated in *Geuking v President of the RSA*⁶³ where the appellant appealed, on grounds of nationality, against the President's consent to his extradition.⁶⁴ The court held that the President acted correctly when he gave permission to extradite the appellant because South Africa does not prosecute its nationals for crimes

⁵⁴ Dugard (2011) 219-222.

⁵⁵ Shaw (2008) 687; Cf. Dugard (2011) 219-222; the special issue of terrorist activity related to offences of a political character will be dealt with in more detail below.

⁵⁶ Refer to footnote 39 above.

⁵⁷ Article 6(1) (a) of the ECE. The convention determines that each contracting party may define the term "national" for purposes of this convention and that nationality will be determined at the time of the decision. However, if the person is only recognised as a national of the requested party during the period between the decision and the surrender the requested party may invoke article 6(1) (a). If the requested party does not extradite the national it must submit the case to its competent authorities at the instance of the requesting state. See article 6(1) (b) – (2).

⁵⁸ Article 4(a): "If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested".

⁵⁹ Dugard (2011) 218.

⁶⁰ Shaw (2008) 663.

⁶¹ Article 4(a) of the UN Model Treaty, section 6 of the ECE, Dugard (2011) 218, Shaw (2008) 663.

⁶² Dugard (2011) 219.

⁶³ (2003) 34 (CC).

⁶⁴ See *Geuking* (2003) par 11 (CC); See also Dugard (2011) 219.

committed outside its borders.⁶⁵ The court concluded that extradition should be allowed, otherwise the crime in question would go unpunished.⁶⁶

Russia, on the other hand, is an example of a civil-law country where the 1993 Constitution of the Russian Federation provides that no national may be deported or extradited to another state.⁶⁷ The Russian Federation's Criminal Code of 1996 also provides that nationals accused of crimes abroad may not be extradited for such crimes.⁶⁸

(b) Double criminality

The principle of double criminality requires that the criminal offence, for which the accused is to be extradited, must be a criminal offence in both the requesting state and the requested state.⁶⁹ The crime in question does not have to be similarly named or even categorised, but the similarity should reside in the general substance of the offence.⁷⁰ This was also confirmed *John Demjanjuk*,⁷¹ where the defendant

⁶⁵ "In the present case, the President stated in the affidavit he filed in the High Court that in deciding whether to grant his consent under section 3(2) of the Act the citizenship of the appellant would not have been a relevant consideration. I can find no constitutional ground for attacking that policy decision. Unlike the FRG and many other civil law jurisdictions, South Africa does not ordinarily prosecute its citizens for crimes committed beyond its borders." See *Geuking* (2003) par 28 (CC).

⁶⁶ *Geuking* (2003) par 28 (CC); See also Dugard (2011) 219.

⁶⁷ Article 61(1) – (2). "A citizen of the Russian Federation may not be deported from Russia or extradited to another State." "The Russian Federation shall guarantee its citizens protection and patronage abroad."

⁶⁸ Article 13(1). "Citizens of the Russian Federation who have committed crimes in foreign states shall not be subject to extradition to these states." Germany also does not permit the extradition of its nationals; see the article 16(2) of the Basic Law for the Federal Republic of Germany of 1949 which states that "No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed."

⁶⁹ Sluiter G "The surrender of war criminals to the international criminal court" 25 (2003) *Loyola of Los Angeles International and Comparative Law Review* 605 at 634. This requirement is found in a lot of extradition treaties, such article 2(1) of the ECE which states that "Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty." Also see article 2(1) of the UN Model Treaty which reflects the same provision and article 1(b) of the Inter-American Convention on Extradition of 1933 (hereafter referred to as "the Inter-American Convention on Extradition").

⁷⁰ Article 2(2) of the UN Model Treaty: "In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether: (a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology; (b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account." Also see Dugard (2011) 219.

⁷¹ (1985) 12 F.Supp 544 US D. Ct. *Geuking* (2003) par 45 (CC) also confirmed this principle, where the court held that the court must be satisfied that the conduct of the individual, as alleged by the foreign state, constitutes criminal conduct. Also see *Wright v Henkel* (1903) 23 S.Ct 781 at 785 where

was wanted for serious war crimes committed during the Second World War. The charge of “mass murder” was not a prosecutable offense in the requesting state, namely the United States, whose Court of Appeals held that the crime need not be similarly defined or carry the same liabilities in both states, but merely had to be extraditable in both countries. Quoting *Collins v Loisel*⁷² the court held:⁷³

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.⁷⁴

Since the actions of the defendant constituted murder, which was an extraditable offence in both countries, the extradition was granted.⁷⁵

In *Factor v Laubenheimer*⁷⁶ the US court went even further to hold that the act of receiving money knowing that it was fraudulently obtained⁷⁷ was an offence for which the accused could be extradited to the UK, because it fell under the list of offences specified in the Webster-Ashburton treaty of 1842, even if it was not a crime in the State of Illinois.⁷⁸

The practice is to broadly define the crime in the extradition agreement and to set the punishment as a guideline, as was done in the extradition agreement between South

the court held that the offense “must be made criminal in both countries.” Also see *Glucksman v Henkel* (1911) 31 S.Ct 704 at 705 where the court went a bit further to state that even if it is proven through a somewhat “untechnical” form that there are reasonable grounds to suppose the individual guilty of an offense he should be tried and “good faith to the demanding government requires his surrender.”

⁷² (1922) 42 S.Ct. 469, 66 L.ed 956.

⁷³ *Demjanjuk* (1985) 562.

⁷⁴ *Collins* (1922) 470-471.

⁷⁵ *Demjanjuk* (1985) 566. The court also dismissed as absurd the argument that a person who kills one individual is extraditable, but that extradition is not possible in the case of a person who kills more than one person (at 562).

⁷⁶ (1933) 54 S.Ct 191.

⁷⁷ *Laubenheimer* (1933) 192. Also see *Jones A Jones on extradition and mutual assistance* (2001) Sweet and Maxwell 2nd ed. 55.

⁷⁸ *Factor* (1933) 199 where the court held: “As the crime with which petitioner is charged is an extraditable offense under the Dawes-Simon Treaty, the effective promulgation of that treaty and the consequent abrogation of earlier ones would not abate the pending proceedings. The obligation of the later treaty, by its terms, extends generally to fugitives charged with the several offenses named, without regard to the date of their commission.” The court also held the Webster-Ashburton treaty did not contain any provisions that limited extradition to acts which are crimes in both countries (at 202).

Africa and the People's Republic of China.⁷⁹ The South African Extradition Act also confirms these guidelines by stating that to be extraditable an offence must be punishable under the foreign law of the requesting state by imposition of a prison term of six months or more.⁸⁰ Some doubt exists as to whether the offence should be deemed a crime at the time of commission, or rather at the time of a request to extradite. In *R v Evans ex parte Augusto Pinochet Ugarte*,⁸¹ for example, the House of Lords held that the crime in question did not have to qualify for extradition in the UK at the time of commission, but that it must have been a crime at the time of the extradition request and be punishable by a sentence of twelve months or more.⁸²

(c) Speciality

The rule of speciality ensures the integrity of the extradition process⁸³ by providing that an extradited person can only be tried for the crime which he is accused of in the extradition request.⁸⁴ The person cannot be extradited for an offence for which he was previously acquitted or convicted by the requesting state.⁸⁵ This rule cannot serve as a ground for refusal of extradition, but it imposes conditions on the legal consequences of extradition.⁸⁶

Speciality also creates a safeguard against abuse of the requested state's discretionary power to grant extradition,⁸⁷ and it would be a violation of the doctrine of speciality to prosecute the accused for crimes other than those agreed upon.⁸⁸ *United States v Rauscher*⁸⁹ confirms that the accused acquires a right to be exempted from prosecution from any except the agreed crime on grounds of the

⁷⁹ Article 2(1) of the Treaty between the Republic of South Africa and the People's Republic of China on Extradition of 2002 determines that extradition will be granted for conduct that constitutes an offence in both countries and which is punishable by imprisonment for a period of at least a year, or by a more severe penalty.

⁸⁰ Section 1 of the Extradition Act 67 of 1962; See also Dugard (2011) 220.

⁸¹ *Pinochet* (1999) 68.

⁸² *Pinochet* (1999) 79.

⁸³ Morvillo C "Individual rights and the doctrine of speciality: The deterioration of *United States v Rauscher*" 14 1990-1991 *Fordham International Law Journal* 987.

⁸⁴ Article 101 (1) of the Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute): "A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered."

⁸⁵ See article 101 (1) of the ICC Statute, Dugard (2011) 221.

⁸⁶ Sluiter (2003) 643.

⁸⁷ Morvillo (1990-1991)992, Sluiter (2003) 643.

⁸⁸ Morvillo (1990-1991) 993.

⁸⁹ (1886) 234.

doctrine of speciality.⁹⁰ The applicant was extradited for murder but the jury convicted for a previous assault on the deceased.⁹¹ The court held that the doctrine of speciality was violated because the accused was convicted for a crime other than murder.⁹²

Individual rights under the doctrine of speciality are the subject of debate centred on questions such as who benefits by the right of speciality, and if it transpires that the defendant has standing, to raise objections regarding violation of the doctrine of speciality.⁹³ The courts tend to differ on these matters.⁹⁴

In *Shapiro v Ferrandina*⁹⁵ the court held that under international law speciality is a privilege afforded to the requested state to protect its “dignity and interests”, and not a right afforded to an accused.⁹⁶ The court also expressed this view in *Donnelly v Mulligan*.⁹⁷

Extradition treaties are for the benefit of the contracting parties and are a means of providing for their social security and protection against criminal acts, and it is for this reason that rights of asylum and immunity belong to the state of refuge and not to the criminal.⁹⁸

⁹⁰ *Rauscher* (1886) 243: “...the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought.”

⁹¹ *Rauscher* (1886) 234, Jones (2001) 66.

⁹² *Rauscher* (1886) 243 “That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings, and for which he was delivered up; and that, if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.” Also see Morvillo (1990-1991) 999.

⁹³ Morvillo (1990-1991) 1000.

⁹⁴ Courts that argue that defendants (individuals) do not have rights under the doctrine view speciality as a right of the requested country. Other courts hold that the individual may invoke the doctrine of speciality even if the requested country raises no objections. See Morvillo (1990-1991)1001.

⁹⁵ (1973) 478 F.2d 894.

⁹⁶ *Shapiro* (1973) 906.

⁹⁷ *United States ex rel. Donnelly v Mulligan* (1935) 76 F.2d 511.

⁹⁸ *Donnelly* (1935) 513. See *Fiocconi v Attorney General of the United States* (1972) 462 F.2d 480 where the court stated: “But the rule of domestic law conferring a judicial remedy on the extraditee can be a rule according him the remedy only if the surrendering government would object, since the underlying substantive wrong, which grows out of international law, is only to the latter...” Also see *United States v Paroutian* (1962) 299 F.2d 486 at 490-491. The court held that the defendant was tried in accordance with the rules governing extradition and relied on the principle of comity. It also stated that “So the test whether trial is for a ‘separate offense’ should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried ‘separate.’”

In *United States v Najohn*⁹⁹ the court held that the extraditee can raise any objections that the sending country might have.¹⁰⁰ In this case the extradition treaty stated that no extradited person will be charged for any offense other than the offense countenanced as grounds for extradition.¹⁰¹ However, the court also held that the right of the extraditee to raise objections under the doctrine of speciality only obtains in situations where the requested country also objects to the offences he is charged with.¹⁰² Therefore the person charged in the case cannot raise objections under the doctrine of speciality unless the requested country objects to the additional charges brought against him.¹⁰³

(d) Crimes of a political character

As customarily stated in extradition agreements, crimes of a political character are exempt from extradition¹⁰⁴ on the grounds that states should not interfere in the political issues of other states by permitting extradition for political crimes; cogent grounds for this position being that the purported threat posed by the accused to the political dispensation of the requesting state does not extend to the requested state.¹⁰⁵

There has been some controversy regarding the definition of a “political offense”. In *In re Castioni*¹⁰⁶ the court held that an act would be a “political offense” if it was “incidental to and formed part of the political disturbance.”¹⁰⁷ This is the so-called

⁹⁹ (1986) 785 F2d 1420.

¹⁰⁰ *Najohn* (1986) 1422. See also Morvillo (1990-1991) 1014.

¹⁰¹ *Najohn* (1986) 1422.

¹⁰² “The doctrine of specialty would ordinarily protect *Najohn* from being tried for offenses other than the one for which he was originally extradited. The doctrine, however, contains a specific exception. “[T]he extradited party may be tried for a crime other than that for which he was surrendered if the asylum country consents.” See *Najohn* (1986) 1422

¹⁰³ *Najohn* (1986) 1422. Also see Morvillo (1990-1991) 1014-1015.

¹⁰⁴ Such as Article 3(e) of the Inter-American Convention on Extradition and the European Convention on Extradition which states “Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.” Article 3(1). “The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.” Article 3(2). An exception to the concept of a political offence shared by these two agreements is that an attempt on the life of the Head of State or his family will not be considered a political crime. See article 3(e) of the Inter-American Convention on Extradition and article 3(3) of the ECE.

¹⁰⁵ Dugard (2011) 221.

¹⁰⁶ *In re Castioni* (1890) 1 Q.B 149.

¹⁰⁷ *Castioni* (1890) 166.

“incidence test” which was applied to similar cases in the UK and the USA, but these states interpret the incidence test differently.¹⁰⁸ In the UK the courts tend to consider the motives of the accused and the requesting state when applying the incidence test,¹⁰⁹ while the US is more hesitant in using this approach, preferring to follow the original incidence test more closely.¹¹⁰ A case in point was *Quinn v Robinson*.¹¹¹ Here the court held that the test would hinge on the occurrence of an uprising or a political disturbance related to the struggle of individuals to alter or abolish an existing government and an offence committed in furtherance of such uprising.¹¹² In other words: To qualify as a “political offence” the act in question must be related or consequent to a political struggle since insufficient weight is assigned to the parties’ motives.¹¹³

Acts of international terrorism are excluded from acts of a political character and do not enjoy the same protection.¹¹⁴ The European Convention on the Suppression of Terrorism of 1977¹¹⁵ expressly provides that acts of international terrorism will not be treated as political offenses for purposes of extradition.¹¹⁶ The following acts do not fall within the ambit of political offences:

¹⁰⁸ *Quinn v Robinson* (1986) 783 F 2d 776 C.A. 9th Ct. at 796.

¹⁰⁹ There have even been broader applications to the incidence test, see *R v Governor of Brixton Prison, Ex parte Kolczynski & others* (1951) 1 Q.B 540 at 551 where the court stated that “reasons of humanity gave a more generous meaning of the term political offense.” Also see *Schtraks v Government of Israel* (1964) AC 556 HL in which Lord Radcliffe held that to qualify as political the act in question had to exemplify the perpetrator’s antagonism towards the state requesting extradition, and that the reasons for the attribution of such antagonism had to relate to some sort of political control, or to operation of the mechanisms of government of the country.

¹¹⁰ *Robinson* (1986) 796.

¹¹¹ *Robinson* (1986) 776.

¹¹² *Robinson* (1986) 817.

¹¹³ “For extradition to be denied for an otherwise extraditable crime on the basis that it falls within the protective ambit of the political offense exception, the incidence test must ordinarily be met ... The incidence test has two components, designed so that the exception comports with its original justifications and protects acts of the kind that inspired its inclusion in extradition treaties. First, there must be an uprising—a political disturbance related to the struggle of individuals to alter or abolish the existing government in their country. An uprising is both temporally and spatially limited. Second, the charged offense must have been committed in furtherance of the uprising; it must be related to the political struggle or be consequent to the uprising activity. Neither the objectives of the uprising nor the means employed to achieve those objectives are subject to judicial scrutiny. And while the nature of the uprising group and any evidence of the accused’s motivations may be relevant, proof on these elements is not required or necessarily determinative.” *Robinson* (1986) 817.

¹¹⁴ Jones (2001) 96, Dugard (2011) 225, *Robinson* (1986) 817.

¹¹⁵ Hereafter referred to as “the European Convention on Terrorism”.

¹¹⁶ Article 1 of the European Convention on Terrorism.

- Serious offences which involve attacks against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;¹¹⁷
- Offences involving kidnapping, hostage-taking and unlawful detention;¹¹⁸
- Offences involving the use of explosive devices used to endanger others.¹¹⁹

The adoption of the Declaration on Measures to Eliminate International Terrorism, adopted by the United Nations General Assembly in 1994¹²⁰ gave rise to the International Convention for the Suppression of Terrorist Bombings¹²¹ which is a general anti-terrorism convention¹²² that also restores the principle that acts of terrorism should not be exempted under the “political offence” exception.¹²³

After 9/11 the Security Council adopted Resolutions 1373 and 1566. Resolution 1373¹²⁴ calls upon states “to prevent and suppress the financing of terrorist acts”,¹²⁵ to prevent any form of support whatsoever for terrorist entities or persons aiding such entities,¹²⁶ and to find ways of accelerating the delivery of “operational information.”¹²⁷ It also states that acts of terrorism are contrary to the purposes of the United Nations, with the result that aiding such activities runs counter to the purposes of the United Nations.¹²⁸

Resolution 1566¹²⁹ imposes an obligation on states to suppress terrorism and adhere to the principle of “extradite or prosecute”.¹³⁰ This resolution also gave a comprehensive definition of terrorism in article 3, defining it as:

¹¹⁷ Article 1 (c) of the European Convention on Terrorism.

¹¹⁸ Article 1 (d) of the European Convention on Terrorism.

¹¹⁹ Article 1 (e) of the European Convention on Terrorism.

¹²⁰ United Nations General Assembly Resolution 49/60 of 9 December 1994.

¹²¹ of 1997.

¹²² Dugard (2011) 163-164.

¹²³ “Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.” Article 5 of the International Convention against Terrorist Bombings, For general reference, see also articles 4 and 6.

¹²⁴ United Nations Security Council Resolution 1373 of 28 September 2001 (hereafter referred to as “Resolution 1373”).

¹²⁵ Article 1(a) of Resolution 1373.

¹²⁶ Article 2 of Resolution 1373.

¹²⁷ Article 3 of Resolution 1373.

¹²⁸ Article 5 of Resolution 1373.

¹²⁹ United Nations Security Council Resolution 1566 of 8 October 2004 (hereafter referred to as “SC Resolution 1566”).

... criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

As confirmed by the Interlocutory Decision of the Appeals Chamber of the Special Tribunal for Lebanon in 2011,¹³¹ international terrorism is currently seen as a crime under customary international law.

1.1.2 Human rights considerations in cases of extradition

The ECHR provides for extradition and detention pending extradition.¹³² The ECHR states that no-one should be deprived of his/her liberty and security of person¹³³ except persons being held with a view to their deportation or extradition, or the lawful arrest or detention of a person to prevent unauthorised entry into the country.¹³⁴ In all other cases due process must be followed.¹³⁵

The human rights of the accused should be taken into account when considering extradition,¹³⁶ and the accused should not be extradited to a requesting state which

¹³⁰ “*Calls upon* States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.” (Preamble par 2 of SC Resolution 1566).

¹³¹ Dugard (2011) 165.

¹³² Section 5(1) (f) of section 1 of the ECHR.

¹³³ Article 5(1) of the ECHR.

¹³⁴ Article 5(1) (f) of the ECHR.

¹³⁵ Article 5(1) of the ECHR.

¹³⁶ In general see Jones (2001) 133-142.

imposes the death penalty, unless assurances have been sought by the requested state that the death penalty will not be imposed.¹³⁷

Extradition should also be refused if there is reason to believe that the requesting state will subject the accused to torture, or any other form of cruel, inhumane or degrading treatment.¹³⁸ The requested state has a duty to gain assurances from the requesting state that these human rights violations will not be committed against the accused, and should take into account any history of “flagrant or mass violations of human rights”¹³⁹ perpetrated by the requesting state on past occasions.

A case in point is *Jeebhai v Minister of Home Affairs*.¹⁴⁰ Here the court neglected to consider the possible human rights violations the accused could be subjected to in Pakistan.¹⁴¹ The argument could also be raised that if the court had known that the extradition destination was Pakistan the history of this requesting state’s “flagrant or mass violations of human rights” should have been taken into consideration,¹⁴² as Pakistan is flagged by Human Rights Watch for precisely this reason.¹⁴³

¹³⁷ *Mohamed v President of the RSA* (2001) 3 SA 893 (CC) par 43, 46; The ECE supports this view in article 11; See also article 4(d) of the UN Model Treaty; Murphy (2013) 168, Shearer I *Starke’s International Law* (1994) Butterworths 11th ed. 328 – 333, in general also see Jones (2001) 134-138.

¹³⁸ Article 3 (f) of the UN Model Treaty; See also article 3 of CAT, see also Dugard (2011) 227.

¹³⁹ Article 3(2) of CAT.

¹⁴⁰ *Jeebhai v Minister of Home Affairs and another* (2007) 4 All SA 773 (T). Although it must be noted that upon appeal in *Jeebhai and Others v Minister of Home Affairs and Another* (2009) 5 SA 54 (SCA) par 53 it was held that his deportation and detention was unlawful.

¹⁴¹ *Jeebhai* (2007) 773 (T) where the court held: “It follows that Rashid’s deportation cannot be declared invalid for the reason that the South African authorities did not extract an undertaking from the Pakistani government that his life would not be in danger. Such a duty cannot routinely exist in respect of every deportee. Rashid was sent back to his own country.”

¹⁴² It is common cause that Pakistani police officials abduct individuals and subject them to torture to extract information from them. It is common cause, too, that in that country confessions are often secured under torture in criminal investigations. It is also common cause that in Pakistan military intelligence operatives routinely resort to torture to gain their objectives. Children have been tortured in order to obtain confessions or information from their parents. During 2003 hundreds of children were detained in torture cells where they were stripped and whipped to extract information from them by force. See also Hasan A: “Soiled hands: The Pakistan army’s repression of the Punjab farmers’ movement” 16 2004 *Human Rights Watch* 28; Javed Anjum was also one of many Christians tortured by Islamic extremists in Pakistan due to his religious beliefs. See “Pakistani Christian dies of torture at hands of Islamists” (5 May 2004) available at http://www.exorthodoxforchrist.com/moslems_torture_-_pakistan.htm; although Pakistan has signed CAT, the ICCPR and the International Convention on Economic, Social and Cultural Rights of 1966 (ICESCR) no provision has been made for protection against torture in their domestic laws. See Country Reports on Human Rights Practices for 2013: Pakistan (2013) *United States Department of State Bureau for Democracy, Human Rights and Labor* available at <http://www.state.gov/documents/organization/220614.pdf>.

¹⁴³ See “Torture worldwide” *Human Rights Watch* available at <http://www.hrw.org/topic/torture> for a full menu of options detailing torture in various countries.

Similarly, in *Soering v the United Kingdom*¹⁴⁴ the court held that the UK was responsible for any consequences of extradition, as it ordered the extradition of an accused to the state of Virginia in the United States. The argument was led that the accused would be subjected to cruel and inhumane treatment by being held on death row for an inordinate length of time.¹⁴⁵

1.1.3 Issues related to extradition

International crimes have increased significantly in recent years, yet the personnel complement assigned to dealing with extradition processes has not increased accordingly.¹⁴⁶ This lack of expertise includes judges who specialise in this field and are duly qualified to adjudicate relevant cases are scarce, which only frustrates the process further.¹⁴⁷ Flying witnesses to the prosecuting country is also expensive and in many cases courts will be forced to rely on insubstantial written depositions.¹⁴⁸

The rising number of signatories to bilateral and multilateral treaties further complicates the process because each treaty has different and unique provisions relating to the extradition process.¹⁴⁹

Obstacles to extradition may also arise as a result of state succession and war.¹⁵⁰ For example, given that the U.S. does not rely on customary law in the absence of extradition treaties,¹⁵¹ if state succession occurs and the U.S., or the successor in such event ceases to consider the extradition treaty valid, the U.S. will have no extradition treaty to fall back on. The same is true in war, as the treaty may cease to exist until hostilities end.¹⁵²

¹⁴⁴ (1989) ECHR Application 14038/88.

¹⁴⁵ *Soering* (1989) par 111 where the court held that “having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3).”

¹⁴⁶ Bassiouni (1996) 18.

¹⁴⁷ Bassiouni (1996) 18.

¹⁴⁸ Shearer I *Extradition in International Law* (1971) Manchester University Press 69.

¹⁴⁹ Shearer (1971) 69.

¹⁵⁰ Bassiouni (1996) 100-105.

¹⁵¹ Bassiouni (1996) 101.

¹⁵² Bassiouni (1996) 101.

1.2 Deportation

Deportation is a means of expelling an individual from a state,¹⁵³ but it differs from extradition and a clear distinction must be drawn.

Critical requirements for extradition are that the two parties to the prospective extradition must be sovereign states, and that one of them (the requesting state) must request delivery of an accused person to the latter for the prosecution and/or subsequent punishment of the accused.¹⁵⁴

By contrast, deportation is a unilateral act performed by the state in which the individual is present, and it is this state that initiates the removal process.¹⁵⁵ Unlike extradition, the destination of the deportee is immaterial where deportation is concerned, hence the purpose of deportation is duly achieved when deportation has been accomplished.¹⁵⁶ Deportation is associated with post-entry criminal activity.¹⁵⁷

Legal deportation procedures require that an individual either be deported to his country of nationality or to a state of his own choice, should the chosen state accept his request.¹⁵⁸ Usually the deporting state would seek to send the individual either back to the state where he boarded the plane or vessel,¹⁵⁹ or to the individual's home country, the latter being an acceptable alternative as the home state has an obligation to accept him.¹⁶⁰ This was confirmed in *R v Governor of Brixton Prison ex parte Soblen*¹⁶¹ where Dr Soblen was convicted of espionage in the USA and sentenced to life imprisonment. He fled the USA once he was granted bail pending

¹⁵³ Strauss A "A global paradigm shattered: The jurisdictional nihilism of the Supreme Court's abduction decision in Alvarez-Machain" 67 1994 *Temple Law Review* 1209 at footnote 39, Dugard (2011) 231.

¹⁵⁴ Dugard (2011) 214, Shaw (2008) 686, *Pinochet* (1999) 71. Also refer to paragraph 1.1 above.

¹⁵⁵ The court defined deportation in *Fong Yue Ting v United States* (1893) 149 U.S. 698, 13 S. Ct. 1016 at 1020: "Deportation' is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken." The court also stated that deportation is merely the return of an alien to whoever has not complied with conditions set by the government for his continued stay in the country (at 1029). See Banks A "Proportional deportation" 55 2009 *Wayne Law Review* 1651 at 1654-1655.

¹⁵⁶ *Mohammed* (2001) par 29.

¹⁵⁷ Banks (2009) 1652.

¹⁵⁸ See for example article 32(3) of the RC, and article 13 of the ICCPR.

¹⁵⁹ Shearer (1971) 77.

¹⁶⁰ Shearer (1971) 78.

¹⁶¹ *R v Governor of Brixton Prison ex parte Soblen* (1962) 3 All E .R. 641.

appeal. He was arrested in Israel and sent back to the USA via London. *En route* to London he tried to commit suicide which necessitated an emergency landing in London. Once he was there he applied for political asylum. The House of Lords held that in accordance with the law of deportation, the Crown was within its rights to send an alien back to his home country if his presence in the UK was attended by the risk that it could destabilise public order. It stressed further¹⁶² that in terms of international law the only state entity that was obliged to receive him was his home country.¹⁶³

If the home state indicates clear motivation to prosecute or punish this individual for certain crimes such proposed action might rather be seen as an extradition and legal procedures for extradition would need to be followed.¹⁶⁴ This situation is fraught with difficulty and inclined to lead to the illegal practice of “disguised extradition” (see chapter 3 below).

The European Convention on Human Rights (ECHR) and the Refugees Convention (RC)¹⁶⁵ are directly relevant to deportation, but irrelevant to extradition as these conventions specifically refer to expulsion.¹⁶⁶ In accordance with the ECHR a state should only consider deportation when the expulsion is necessary for reasons of national security and in the interest of public order.¹⁶⁷ In cases where the deportee is married or has a family in the state seeking to deport him, deportation is only considered appropriate if it is a lawful option and is deemed necessary for reasons of national security and public safety, and to prevent disorder or crime.¹⁶⁸

The general principle seems to be that aliens who have been resident in the state for two or more years should only be deported if appropriate reasons for the deportation

¹⁶² *Soblen* (1962) 660 par B where the court held that “Although every alien, as soon as he lawfully sets foot in this country, is free, nevertheless the Crown is entitled at any time to send him home to his own country, if, in its opinion, his presence here is not conducive to the public good; and it may for this purpose arrest him and put him on board a ship or aircraft bound for his own country.”

¹⁶³ *R v Governor of Brixton Prison ex parte Soblen* (1962) 662 par F.

¹⁶⁴ Shearer (1971) 78.

¹⁶⁵ European Convention of Human Rights of 1950 and the Convention on the Status of Refugees of 1951. Also see Henckaerts (1993-1994) 469 for a general overview of the human rights considerations that need to be taken into account during deportation.

¹⁶⁶ Shearer (1971) 85.

¹⁶⁷ Article 1(2) of Protocol 7 to the ECHR.

¹⁶⁸ Article 8 of the ECHR.

are given.¹⁶⁹ The deportee should also be afforded the opportunity to submit reasons to desist from expulsion, to have the reasons reviewed, and to be represented by an appropriate authority.¹⁷⁰ If the deportee has been resident in the state for ten or more years, and has reared a family he should only be expelled for reasons of grave importance.¹⁷¹

Special allowances should also be made for refugees, and the RC states that refugees are only to be expelled for reasons of national security or public order.¹⁷² The decision to expel also needs to be reached by a competent authority and in accordance with the law unless grave reasons compel the opposite course.¹⁷³ The refugee will be afforded a reasonable period within which to seek legal admission to another state.¹⁷⁴ The RC further states that no contracting state may expel “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁷⁵

Deportation should also be distinguished from exclusion. Whereas deportation is an expulsion of an unwanted alien from state territory, exclusion occurs before the alien even enters the state territory.¹⁷⁶

1.3 Other legal methods of expulsion

1.3.1 Military rendition

The United States is a prime example of a state that relies on different forms of military rendition.¹⁷⁷ US policy and agreements will therefore be the primary concern

¹⁶⁹ Shearer (1971) 85.

¹⁷⁰ Article 1 of Protocol 7 to ECHR.

¹⁷¹ *Hearn* (1962) 258 where the court held that Hearn’s expulsion decree violated his rights as a permanent resident in Costa Rica as he had been living there for over ten years and had reared a family; also see Shearer (1971) 85.

¹⁷² Chapter 5 Article 32(1) of the RC.

¹⁷³ Chapter 5 Article 32(2) of the RC.

¹⁷⁴ Chapter 5 Article 32(3) of the RC.

¹⁷⁵ Chapter 5 Article 33(1) of the RC.

¹⁷⁶ Murphy (2013) 165: “At the same time, expulsion of a person “does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State.” This last exclusion means that persons who are stopped at the border of a state or at a port of entry (such as an airport) and who are identified as ineligible to enter the country lawfully...”

of this section in order to shed light on the nature of these alternatives to extradition. These are all legal alternatives to extradition, governed by agreements between two states, which are in no way limited to the US.

Status of Forces Agreements (SOFAs)¹⁷⁸ can be relied upon when the occupying state maintains a military presence in another state, being the host state.¹⁷⁹ These agreements can be multilateral or bilateral and are stand-alone executive agreements whose main purpose is to determine which domestic laws of a foreign country will apply to US military personnel stationed in that (the host) country.¹⁸⁰ SOFAs are peacetime documents that do not affect parties' inherent right to act in self-defence; consequently the SOFA becomes invalid if war breaks out.¹⁸¹

SOFAs operate on the basis of either exclusive or shared jurisdiction.¹⁸² Exclusive jurisdiction grants the US sole jurisdiction over all crimes committed abroad, including crimes committed under foreign domestic laws, while shared jurisdiction only grants the US sole jurisdiction over crimes that constitute offences in both countries.¹⁸³ Any other crimes fall under the jurisdiction of the foreign country, but the right of the US to request that the foreign country waive jurisdiction remains unaffected.¹⁸⁴

The SOFA governs the rendition procedure to be applied and adhered to during this form of military rendition.¹⁸⁵ Using the USA as an example: the procedure usually dictates that the accused be held in custody by US armed forces before the host

¹⁷⁷ See in general Mason R "Status of forces agreement (SOFA): What is it, and how has it been utilized" 2012 *Congressional Research Service Report for Congress* 1, and Bassiouni (1996) 56-65.

¹⁷⁸ Hereafter referred to as "SOFA or SOFAs".

¹⁷⁹ Mason (2012) 1, Bassiouni (1996) 56.

¹⁸⁰ Mason (2012) 1.

¹⁸¹ Mason (2012) 1, 5.

¹⁸² Kramer D "Criminal jurisdiction of courts of foreign nations over American armed forces stationed abroad" 17 1973 *American Law Reports* 725 at section 2A.

¹⁸³ Mason (2012) 3-4. If the crime was committed solely against members of the US armed forces, military dependants, members of civilian components, or in the line of duty. See Kramer (1973) at section 2A.

¹⁸⁴ Mason (2012) 3-4. For a good example of shared jurisdiction as stated in a SOFA refer to Article VII of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 1949 (hereafter referred to as "NATO SOFA".)

¹⁸⁵ Bassiouni (1996) 56-58.

state hands down a criminal conviction.¹⁸⁶ The US will then surrender the accused to the military authorities of the host state to serve his sentence.¹⁸⁷

Although a SOFA may closely resemble an extradition there are important points of difference between them.¹⁸⁸ The need for a judicial enquiry by a US tribunal to precede surrender of the accused to a host state is precluded in the case of a SOFA, and denial of such surrender by US executives is similarly precluded.¹⁸⁹

Furthermore, a SOFA covers a wide range of crimes that can fall within the criminal jurisdiction of the host state, but in extradition cases an accused can only be surrendered for specific crimes mentioned in the extradition treaty.¹⁹⁰ Lastly, whereas extradition can prohibit the surrender of a national to the host state, such surrender is admissible in terms of a SOFA¹⁹¹ where the accused is a member of the armed forces or the civilian personnel of the armed forces of the occupying state, and where the alleged crime was committed in the host state.¹⁹² The NATO SOFA provides for such surrender in article VII (3):

In cases where the right to exercise jurisdiction is concurrent the following rules shall apply: The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent; offences arising out of any act or omission done in the performance of official duty. In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction. If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of

¹⁸⁶ Bassiouni (1996) 56-58.

¹⁸⁷ The United States' willingness to enforce SOFAs accordingly was confirmed in the judgment of *Holmes v Laird* (1972) 459 F.2d 1211 par 35 where the court held that the mere fact that on grounds of a SOFA similar constitutional rights, as laid down by the American constitution, had not been afforded to a US citizen during a trial abroad, on grounds of a SOFA, does not call for a dismissal of the conviction.

¹⁸⁸ Bassiouni (1996) 58.

¹⁸⁹ Bassiouni (1996) 58.

¹⁹⁰ Bassiouni (1996) 58. For an example see article VII of the NATO SOFA.

¹⁹¹ US courts have upheld this principle. In *Holmes* (1972) 1219, American servicemen sought an order from a US court to prevent them from serving a sentence in Germany for crimes committed on German soil. They claimed that the German court's failure to adhere to the guarantees set forth in the applicable SOFA rendered their convictions invalid. However, the court held that the applicants' convictions and subsequent surrender could not be considered void merely because the foreign judicial system didn't guarantee the same safeguards as America.

¹⁹² Bassiouni (1996) 58.

the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance.

In very rare cases the US agreed to rendition without an agreement while they were militarily present on foreign soil.¹⁹³ However this is very rare as the US will usually enact a SOFA when they have occupational forces stationed in a foreign country.¹⁹⁴ In *Neely v Henkel*¹⁹⁵ this exception was granted by the US. Mr Neely, an American citizen, was found guilty of embezzlement in Cuba, where the US had occupying power. There was no extradition treaty in place between Cuba and the US. The court held that Neely's guilt was proven and that he needed to be tried under the laws of Cuba. The court held that:

... we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.¹⁹⁶

US citizens may also be returned to the US to serve their sentences on home soil after conviction by a foreign country.¹⁹⁷ This process is referred to as the return of transferred offenders; alternatively the individual concerned may also be sent back to the sentencing state to serve out the rest of his sentence there.¹⁹⁸

¹⁹³ Section 3185 of the United States Code of 1948 Title 18.

¹⁹⁴ Bassiouni (1996) 59.

¹⁹⁵ *Neely v Henkel* (1901) 180 U.S. 109, 21 S.Ct. 302.

¹⁹⁶ *Neely* (1901) 123.

¹⁹⁷ Bassiouni (1996) 59.

¹⁹⁸ Sections 4001-4114 of the United States Code of 1948 Title 18.

1.3.2 Asylum¹⁹⁹

Asylum is the process through which one state, the refuge state, grants immunity to an alien who is subject to its jurisdiction, by granting protection to the effect that renders the alien immune to arraignment for foreign legal processes.²⁰⁰ This is basically a form of personal immunity granted by the refuge state,²⁰¹ or a protection against seizure.²⁰²

Asylum operates on the basis of three rights: the right of the state to grant asylum, the right of the individual to seek asylum, and the right of the individual to be granted asylum.²⁰³ The first stems from the principle of state sovereignty which dictates that each state has power over its own territory and can therefore decide whether to grant asylum or not.²⁰⁴ This principle is enforced by article 14(1) of the Universal Declaration of Human Rights²⁰⁵ which states that each individual has the right to seek asylum. It is clear from the wording of this section that although the right to seek asylum is held by every person across the board the same is not necessarily true of the right to be granted asylum.²⁰⁶ The second stems from the right held by all persons to leave any country including their own,²⁰⁷ whether to seek asylum or for another reason, and this has become a rule of customary international law.²⁰⁸ The right to be granted asylum is obviously somewhat halted by article 14(1) of the UDHR. However, within the auspices of this right the state must still adhere to the non-refoulement rule, which means that a state cannot return a person to a place of persecution.²⁰⁹ Therefore, in these instances the refuge state should at least grant temporary asylum until it finds a more suitable destination.²¹⁰

¹⁹⁹ Although asylum is not a form of extradition, but rather a form of protection from extradition and other means of exercising jurisdiction over an accused, it can still play a vital role in the law of extradition and therefore warrants discussion in brief outline.

²⁰⁰ Boed R "The state of the right of asylum in International Law" 5:1 1994 *Duke Journal of Comparative and International Law* 1 at 2-3, Bassiouni (1996) 141, Shearer (1994) 323.

²⁰¹ Bassiouni (1996) 141.

²⁰² Boed (1994) 2.

²⁰³ Boed (1994) 1.

²⁰⁴ Boed (1994) 3.

²⁰⁵ UDHR.

²⁰⁶ Boed (1994) 4-5.

²⁰⁷ This is confirmed in section 13(2) of the UDHR which states: "Everyone has the right to leave any country, including his own, and to return to his country." Also in article 12(2) of the ICCPR. Also in article 2(2) of the ECHR of Protocol 4.

²⁰⁸ Boed (1994) 6.

²⁰⁹ Boed (1994) 9.

²¹⁰ Boed (1994) 16.

Although asylum places a positive duty on the granting state to provide entrance, residence and protection, the principle of non-refoulement also imposes a negative duty on the state not to return a person to a place of persecution.²¹¹ However, the asylum seeker cannot be returned or sent to a place of non-persecution.²¹²

Asylum can be territorial or extraterritorial. In the first instance the alien is present within the territorial limits and under the jurisdiction of the refuge state, which therefore grants immunity from rendition or extradition;²¹³ secondly, the alien is on foreign soil and the refuge state provides asylum in an embassy or seagoing vessel.²¹⁴

Asylum granted before an extradition request is made would serve to indicate to the requesting state that the requested state will likely refuse extradition, but if asylum is granted after receiving an extradition request the requested state will deny extradition on grounds of the political-offence exception or state discretion.²¹⁵

The logical basis for asylum is twofold and divided into *rationae materiae* and *rationae personae*.²¹⁶ The legal basis for asylum is found in municipal law and international law.²¹⁷ *Rationae materiae* is based on the principle of state sovereignty and state territory.²¹⁸ It is in the very nature of sovereignty that a state holds and asserts the right to deny any foreign state the ability to exercise jurisdiction on its soil, and territorial asylum emanates from the same sovereignty principle. *Rationae personae*, on the other hand, deals with certain groups of persons who are disqualified in virtue of their stature from the jurisdictional control of a state that would otherwise exercise such control.²¹⁹ This is why it is said that *rationae materiae* affirms while *rationae personae* denies territorial jurisdiction.²²⁰

²¹¹ This is confirmed in article 3(1) of CAT: “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

²¹² Boed (1994) 17.

²¹³ Shearer (1994) 323.

²¹⁴ Shearer (1994) 323.

²¹⁵ Bassiouni (1996) 141-142.

²¹⁶ Bassiouni (1996) 140 -142.

²¹⁷ Bassiouni (1996) 142.

²¹⁸ Bassiouni (1996) 143.

²¹⁹ Bassiouni (1996) 143 – 145.

²²⁰ Bassiouni (1996) 143-145.

1.4 Conclusion

As discussed in this chapter, there are legal grounds for all the above methods of expulsion, whether it is in the form of customary international law, precedents set through case law, international law, signed treaties and conventions, or resolutions adopted by the General Assembly or Security Council of the United Nations. It follows, therefore, that all these methods have a solid foundation in law with clear procedures to be followed and requirements to be met, without which expulsion could not proceed with legal sanction.

The above exposition on the legalities of expulsion will assist the reader to understand how the law is flouted by the illegal practice of extraordinary rendition, as well as the consequences arising from such infraction, when the said practice is discussed in the next chapter.

CHAPTER 2

EXTRAORDINARY RENDITION AS OPPOSED TO OTHER ILLEGAL EXPULSION METHODS

“There are known knowns; there are things we know that we know. There are known unknowns; that is to say, there are things that we now know we don't know. But there are also unknown unknowns – there are things we do not know we don't know.” *Donald Rumsfeld – US Secretary of Defence*¹

Since the charge of resorting to extraordinary rendition as an anti-terror measure after the 9/11 attacks was mainly levelled at the Bush Administration, his remark - which can shed some light on the phenomenon of extraordinary rendition discussed below - is truly ironic, coming from Donald Rumsfeld, US Defence Secretary during the era of Ford and George W. Bush.² Rumsfeld explains that there are certain things in this world that are clearly evident to us as incontrovertible fact, things we absolutely know to be true³ (for example: the sky is blue, the sun rises in the East and sets in the West). Then there are things of which we have conscious knowledge and things of which we consciously lack knowledge, and yet other things whose existence we are not aware of and are not aware of our ignorance about them.⁴ Until recently extraordinary rendition fell into this last category, being an unknown

¹ Rumsfeld D *Known and unknown: A memoir* (2011) Penguin Group 12-14. Donald Rumsfeld served two separate terms as the US Secretary of Defence.

² Donald Rumsfeld served as the 13th and the 21st US Secretary of Defence. During the Ford Administration he served as the US Secretary of Defence from 1975 – 1977. He was the youngest Secretary of Defence in US history. During the George W. Bush Administration he also served as the Secretary of Defence from 2001 – 2006. In his second term he was the oldest person ever to serve as US Secretary of Defence. See Rumsfeld (2011) 29; Department of Defence United States of America: Secretaries of Defence *Official US government website* available at <http://www.defense.gov/bios/biographydetail.aspx?biographyid=90>. After 9/11 the Bush Administration implemented extensive interrogation techniques and irregular procedures to gain custody of certain suspected terrorists. The effect of this expansion led to extraordinary rendition as currently known. The development of this phenomenon is explained in detail in section 2.2 of this chapter dealing with the history of extraordinary rendition. For research relating to the use of extraordinary rendition by the Bush Administration see Hersh J “Extraordinary rendition report finds more than 50 nations involved in global torture scheme” (4 February 2013) *The Huffington Post* available at http://www.huffingtonpost.com/2013/02/04/extraordinary-rendition-torture-report_n_2617809.html; Sadat (2007) 1200; Sadat L “Ghost prisoners and black sites: Extraordinary rendition under international law” 37 2006 *Case Western Reserve Journal of International Law* 309; Weissbrodt D & Bergquist A “Extraordinary rendition and the humanitarian law of war and occupation” 47 2007 *Virginia Journal of International Law* 295; Weissbrodt D and Bergquist A “Extraordinary rendition and the torture convention” 46 2006 *Virginia Journal of International Law* 586; Priest (2 November 2005) A01; Mayer (14 February 2005) 106; Satterthwaite *et al* (28 June 2005); Satterthwaite (2007) 1333.

³ He states that these are known knowns such as laws, rules and the fact that we all know gravity will surely cause something to fall to the ground (cf. Rumsfeld (2011) 12).

⁴ He explains that this is the most difficult category since there are gaps in our knowledge but we don't know that these gaps exist (cf. Rumsfeld (2011) 12).

unknown, which is to say that the world at large was unaware of its existence and had no inkling that such a phenomenon might even exist, let alone what its consequences might be.

After 9/11 the media shocked the public when it uncovered that states, especially the US, used illegal methods to bring suspected terrorists within the jurisdiction of certain countries.⁵ Although the US seemed to be the biggest culprit, other governments assisted in the capture, detention, interrogation and torture of these suspected terrorists,⁶ to which end secret facilities known as “black sites” were used.⁷

Growing public awareness of extraordinary rendition has changed its status from third category – that of an unknown unknown - to the second category - that of a known unknown. The existence of the practice and its use for the illegal capture,

⁵ Priest (2 November 2005) A01; Mayer (14 February 2005) 106; Priest D “Wrongful imprisonment: Anatomy of a CIA mistake” (4 December 2005) *The Washington Post* available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html>; Mayer (2009) 287; Grey (2007) 149; Verkaik R “The big question: What is extraordinary rendition, and what is Britain’s role in it?” (8 June 2006) *The Independent* available at <http://www.independent.co.uk/news/uk/crime/the-big-question-what-is-extraordinary-rendition-and-what-is-britains-role-in-it-481452.html>; Murphy K “A story of extraordinary rendition from South Africa. Where is Khalid Rashid?” (14 March 2006) *Indymedia Ireland* available at <http://www.indymedia.ie/article/74841>; “Rice defends US policy” (5 December 2005) *BBC News Online* available at <http://news.bbc.co.uk/2/hi/4500630.stm>; Amy Goodman and Juan González presented an entire radio segment on extraordinary rendition and the war on terror, and after the show they also posted a video related to the subject (cf. Goodman A & González J “Outlawed: Extraordinary rendition, torture and disappearances in the ‘war on terror’” (15 September 2006) *Democracy Now!* available at http://www.democracynow.org/2006/9/15/outlawed_extraordinary_rendition_torture_and_disappearances).

⁶ When extraordinary rendition first became known to the public considerable speculation arose about the participation of other governments and the numbers of suspected terrorists who had been subjected to extraordinary rendition at that stage. Governments like Egypt, Iraq, Iran, Cuba and Thailand were among many who were accused of aiding the US pursuit of its extraordinary rendition programme. During 2005 it was estimated that more than 100 suspected terrorists had been rendered by the US government, 70 of these having been accounted of lesser importance with relatively insignificant ties to terrorist activities. They were originally taken to secret facilities, also known as “black sites”, and then transferred to intelligence services in Egypt, Morocco, Jordan, Afghanistan and other countries (cf. Priest (2 November 2005) A01; Mayer (14 February 2005) 106; Satterthwaite *et al* (28 June 2005); Satterthwaite (2007) 5. In 2013 a comprehensive report was released which confirmed that 54 governments had assisted the US, in one way or another, with its extraordinary rendition programme. These governments included Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Ireland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Yemen, and Zimbabwe, cf. Singh (2013) 6.

⁷ Refer to comprehensive Singh (2013) 6 report.

detention and torture of suspected terrorists is common cause at this juncture.⁸ However, since the practice is largely shrouded in secrecy,⁹ given its known purpose to huddle captives away from public scrutiny and the oversight of the law, little is known and understood about it, with the result that a severe lack of conclusive evidence about the phenomenon further aggravates the conditions under which the struggle against it has to be waged.¹⁰

It is important to note that although the main focus is on the use of extraordinary rendition by the U.S., other countries are also involved,¹¹ and since key elements of extraordinary rendition would not be possible without their assistance it stands to reason that such assistance should be investigated with a view to its being criminalised.¹²

This chapter will centre on the description of extraordinary rendition and an overview of its history and development, keeping in mind that the main focus will be on the US, that is to say the history and development of this practice as a (US) home-grown product will be reviewed in some detail.

⁸ Weissbrodt D & Bergquist A “Extraordinary rendition: A human rights analysis” 19 2006 *Harvard Human Right Journal* 123; ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody (2007) *International Committee of the Red Cross Regional Delegation for United States and Canada* available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; Sadat (2007) 1200; Sadat (2006) 309; Weissbrodt *et al* (2007) 295; Weissbrodt *et al* (2006) *Summer Virginia Journal of International Law* 586; Satterthwaite (2007) 1333.

⁹ A detailed description of extraordinary rendition and all it entails will follow in part 1.1 below which will explain the secret nature of extraordinary rendition. Also see Satterthwaite *et al* “Torture by proxy: International and domestic law applicable to ‘extraordinary renditions’ ” (2004) *Association of the Bar of the City of New York & Centre for Human Rights and Global Justice* 15.

¹⁰ The entire purpose of extraordinary rendition is to place the suspected terrorists outside the legal framework. This ensures that the perpetrators can avoid accountability and any other legal repercussions, but lack of accountability and transparency complicates investigations into extraordinary rendition which leads to a severe lack of evidence.

¹¹ As indicated in Singh (2013) and 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 (19 February 2010) *UN Human Rights Council A/HRC/13/42* available at <http://www.refworld.org/docid/4d8720092.html>.

¹² Assistance received by the US from other governments in this regard will be discussed in following chapters of this thesis, with particular reference to the nature and extent of such assistance and the appurtenant consequences. Foreign governments may (and do) assist by providing secret facilities, by torturing suspects on behalf of the US, by assisting with the capture of suspected terrorists, or by merely granting flyover zones or landing strips.

2.1 Extraordinary rendition

“We also have to work, through sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of what needs to be done here needs to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be valid for us to use any means at our disposal, basically, to achieve our objective.” *United States Vice President: Dick Cheney*¹³

Exploratory reading shows that academics, writers and legislatures are not handling extraordinary rendition appropriately.¹⁴ There is a general tendency to try and fit its characteristics into the definitions of other forms of illegal expulsion, such as disguised extradition, abduction and other forms of irregular rendition. The reason for this misrepresentation is that the nature of the phenomenon and its implications are not understood, not least because no formal definition has been generated in law to shape and authenticate the meaning. Various writers have attempted to describe or define extraordinary rendition for purposes of their own work, but they never fail to stress that there is no formal definition.¹⁵

¹³ Froomkin D “Cheney’s ‘Dark Side’ is showing” (7 November 2005) *The Washington Post* available at <http://www.washingtonpost.com/wp-dyn/content/blog/2005/11/07/BL2005110700793.html>, also quoted in Singh (2013) 5 & 120. Dick Cheney was the US Vice President during the Bush Administration from 2001 – 2009.

¹⁴ Instead of speaking directly of extraordinary rendition academics seem to ‘talk around the subject’ by referring to irregular rendition, disguised extradition, kidnapping or abduction. Dugard discusses the return of fugitives by means other than extradition, including deportation and disguised extradition (as a singular and interchangeable term which could lead to confusion regarding the distinct difference between disguised extradition and deportation) as well as abduction. Certain possible phases of extraordinary rendition are identifiable in abduction or even perhaps disguised extradition, but extraordinary rendition cannot be placed in the same category as either of these. Furthermore, Dugard describes the alternatives to extradition as “the return of fugitives by means other than an extradition treaty to their country of origin.” (cf. Dugard (2011) 231-237). As will be explained later in this paragraph, extraordinary rendition is not concerned with fugitives that need to be returned to a specified state. The individuals captured and illegally rendered are only suspected terrorists in the eyes of their captors since no appropriate evidence regarding the captive individual’s connection to terrorism can be gathered, which is why such individuals are not arraigned before a court (cf. footnote 21 below). The UN General Assembly also enacted the Declaration on the Protection of All Persons from Enforced Disappearances of 1992 Resolution 47/133 (hereafter referred to as “the Declaration on Enforced Disappearances”), but this declaration is not comprehensive enough to include all the intricacies of extraordinary rendition (more about this in chapter 4). Although Shaw refers to the Committee on Enforced Disappearances in Shaw (2008) 354, he also only discusses abduction, kidnapping, deportation and disguised extradition as alternatives (both legal and illegal) to extradition. However, he takes the discussion further to include unlawful seizure and irregular rendition devices, but once again stops short of the comprehensive specifics that need to be addressed in regard to extraordinary rendition.

¹⁵ Sadat stresses that the definition of extraordinary rendition seems to change depending on the source and cites the New York City Bar Association Report as an example (cf. Sadat (2007) 1248). Satterthwaite comments that the concept of extraordinary rendition has not stabilised into a firm definition and therefore remains fluid and controversial, with the result that interpretations of what it

Extraordinary rendition is a breed apart from all other illegal expulsion and/or rendition methods and is informed by a hybrid theory¹⁶ which needs to be thoroughly perused and taken into account in formulating a cogent definition of the phenomenon. The unconscionable range of consequences arising from extraordinary rendition has led to the writer's conviction that this practice needs to be criminalised under international law. However, in the absence of a formal definition of the practice that will stand up in court the criminalising process would have no leg to stand on, so to speak. The first step towards understanding and defining extraordinary rendition would be to elaborate a detailed description of the phenomenon with all its ramifications.

Extraordinary rendition¹⁷ is a process that consists of various phases and cannot be defined as a mere singular illegal act. The first phase is the wilful taking of suspected terrorists into custody through illegal means such as abduction, followed by forcible detention and transportation under the induced influence of drugs,¹⁸ to facilities that are well-nigh untraceable at undisclosed destinations¹⁹ where torture will be used as an interrogation technique.²⁰ Public scrutiny and the oversight of the law cannot

entails proliferate (Satterthwaite (2007) 1335). She defines extraordinary rendition as "the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture." Yet, she stresses that even her definition of extraordinary rendition for purposes of this specific paper is not quite the same as definitions given in her other works (Satterthwaite (2007) 1336). In Satterthwaite *et al* (2004) 13 the authors aver that "extraordinary rendition appears to be an unauthorised version of rendition." The use of the word "appears" again underscores the lack of a definitive description. In Satterthwaite *et al* (28 June 2005) 3 the term "extraordinary rendition" is used rather loosely to describe all sorts of renditions of which some do not even fall within the true ambit of extraordinary rendition. The authors stress, yet again, that the confusion regarding the definition and meaning of extraordinary rendition is causing unfortunate and misleading misrepresentations.

¹⁶ Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 127; Johnston (2007) 381.

¹⁷ This is the writer's detailed description of extraordinary rendition for the purposes of this thesis and the arguments and statements it contains. I acknowledge that there are various descriptions, definitions and interpretations of it, as pointed out in footnote 21 above.

¹⁸ The word "suspected" is definitely apposite here, given the scant evidence that would certainly not persuade a court to prosecute. Many suspects have such tenuous links to terrorism that legal processes could not provide grounds for arrest, let alone detention, which is why torture is used as an aid to interrogation.

¹⁹ Numerous articles refer to the existence of "black sites" which are secret facilities maintained for the purposes of torture, illegal detention and the like. The existence of these facilities and the disappearance of detainees from them have led to the detainees being dubbed "ghost prisoners." See Grey (2007); Sepper E "The ties that bind: How the constitution limits the CIA's actions in the war on terror" 81 2006 *New York University Law Review* 1807; Sadat (2007) 1215; Weissbrodt *et al* (2006) *Summer Virginia Journal of International Law* 588; Sadat (2006) 315; Priest (2 November 2005) A01.

²⁰ Extraordinary rendition is also referred to as "torture by proxy" because torture seems to go hand-in-hand with extraordinary rendition. See in general Satterthwaite *et al* (2004); Hasbargen A

reach them, with no assurances required from the receiving state.²¹ The suspected terrorists are captured by state agents, or agents acting under the guise of pseudo-legality (i.e. purporting to act under the aegis of the US, but hailing from a variety of countries whose governments have invested them with powers of dubious legality to capture, detain, hold for questioning,²² transfer and/or torture the suspects thus detained)²³ without following due legal process (e.g. allowing suspects to access legal counsel).²⁴

After transfer the suspects are detained indefinitely without trial, and the governments involved deny their involvement and any knowledge of the state of well-being of the detainees.²⁵ No access to humanitarian aid groups or legal representation is allowed throughout and after such detention.²⁶

The last phase of extraordinary rendition is the lack of justice for released victims as states that are sued take refuge behind the defence of state secrecy.²⁷ In light of the

“Appropriately rendering disappearances: The despair between extraordinary renditions and forced disappearances” 34 2012 *Hamline Journal of Public Law and Policy* 89-90.

²¹ Marty D “Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report” (2007) *Report Committee on Legal Affairs and Human Rights Parliamentary Assembly Council of Europe* Doc 11302 at 22-23, 47.

²² Marty (2007) 49. This is a twenty-minute period commonly referred to as the “twenty minute take-out” or the CIA “security check.” A detainee can be fully prepared for transportation within these twenty minutes by rendering him immobile and incoherent. The detainee is blindfolded, brutalised and shackled by highly trained operatives wearing masks. His clothes are taken and he is photographed naked. Tranquilisers are inserted in his anus and he is strapped with a diaper. Finally he is blindfolded with a hood that provides nearly no holes for breathing, and transferred to a plane where he is strapped to a stretcher or bound in a very uncomfortable position for the entire course of the flight (which can be up to a full day). Again, this entire process takes twenty minutes; see Johnston (2007) 357-360.

²³ Johnston (2007) 357-359; Singh (2013) 6.

²⁴ Wolf S “An emerging paradigm for the enforcement of human rights: How the courts’ recent refusal to prosecute U.S. agents for extraordinary rendition may create a new reinforcement model” 59 2007 *The State University of New Jersey Rutgers Law Review* 917.

²⁵ These detainees are naked when they’re placed in cells that are temperature controlled to produce temperature extremes from freezing to extreme humidity and heat. They will also likely go through a “four month isolation regime” during which they are denied contact with human beings and their cells are under constant surveillance; see Johnston (2007) 358-362; Ross J “Black letter abuse: the US legal response to torture since 9/11” 89 2007 *International Review of the Red Cross* 562.

²⁶ Sepper (2006) 1807; Satterthwaite M “Extraordinary rendition and disappearances in ‘the war on terror’” 10 2006-2007 *Gonzaga Journal of International Law* 72.

²⁷ A good example is the case of Khaled El-Masri. It was proved that the CIA participated in the abduction and transfer of El-Masri from Skopje to a secret detention facility in Kabul Afghanistan. He was held for a period of four months before the CIA realised they could not bring any charges against him. He was subjected to solitary confinement for several weeks. He was eventually blindfolded and flown to Europe, where the captors drove around with him for several hours in order to confuse his sense of location. They eventually stopped and instructed him to get out of the vehicle and walk down an unpaved road in the dark in mountainous terrain. He was also instructed not to look back. He

above extraordinary rendition is clearly not just a singular term to define one illegal act, but rather an entire process comprising a concatenation of interlocking phases that individually and collectively contribute to the illegal nature of extraordinary rendition as a whole, that is to say, each phase is fraught with illegality in its own right and confirms and compounds the illegality of the whole. It cannot be reduced to a single act but is a process comprising of a complex web of illegality.

The difference between traditional expulsion and rendition (e.g. extradition) on the one hand, and extraordinary rendition on the other is that the latter is entirely beyond the pale in a dark underworld where the protective framework of the rule of law, international or domestic, and respect for human rights in the international sphere does not apply, this is in contrast to traditional methods which are clearly defined and subject to legal process.

2.2 History and evolution of extraordinary rendition

The earliest alleged use of extraordinary rendition was reported during the Reagan Administration in 1986.²⁸ Although it does not embody all the elements of the extensive procedure of extraordinary rendition known today, the foundation was definitely laid during this administration. President Reagan signed directives enabling and allowing “renditions to justice”, but only from countries where America could not secure surrender through extradition treaties.²⁹ Through the explanation and description of extraordinary rendition it will become clear that extradition treaties, whether they exist or not, are of no consequence where extraordinary rendition is concerned.

feared for his life and thought he would be shot in the back, but the captors merely drove off and left him there. Three years after his ordeal his case was still being investigated extensively (cf. Marty (2007) 51. El-Masri’s civil suit against the US was eventually rejected on grounds of state secrecy, with the result that he cannot hold anyone accountable for the ordeal he suffered (cf. Marty (2007) 54). The writer agrees with Rapporteur Marty’s statement that to continue to invoke state secrecy doctrine years after the event is unacceptable in a democratic society (implies an adversarial relationship between the state and its subjects). He also argues that state secrecy cannot conceal criminal acts or acts of gross human rights violations (cf. Marty (2007) 55).

²⁸ I.e. extraordinary rendition in the current sense, which specifically took shape at the time, unlike other illegal forms of rendition, such as abduction and unlawful seizure, which can be traced back to at least the early 1800s, but these early forms will be passed over for now as they are not relevant to the current form.

²⁹ Singh (2013) 14.

During the 1993 administration of George HW Bush, President Bush signed further directives that authorized specific procedures for renditions to the US.³⁰ All of these directives remain classified³¹ and have never been examined. One can only speculate whether these directives took procedures drastically further than those allowed under the Reagan Administration.

During the nineties rendition of terrorist suspects to the US for criminal prosecution continued, but a major change in these rendition directives came in 1995 under the Clinton Administration.³² It is believed that CIA officials formulated the extraordinary rendition program during the mid-nineties. President Clinton signed a number of directives which authorized the rendition of terrorist suspects to foreign governments.³³ American officials argued:

“When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbours or assists them.” If extradition procedures were unavailable or put aside, the United States could seek the local country’s assistance in a rendition, secretly putting the fugitive in a plane back to America or some third country for trial.³⁴

³⁰ Renditions to justice were seen as an imperative measure to bring suspected terrorists to the US to stand trial during this time, but they were also limited measures, authorised in virtue of National Security Directive 77 (a partially declassified copy is available at <http://www.fas.org/irp/offdocs/nsdd/nsdd-207.pdf>). See Satterthwaite M & Fisher A “Tortured logic: Renditions to justice, extraordinary rendition, and human rights law” 6 2006 *The Long Term View* 57 (cf. Singh (2013) 14).

³¹ Except for the partially declassified directive referred to in footnote 30 above; see Singh (2013) 14.

³² Satterthwaite *et al* (2006) 57. Also see Presidential Decision Directive / NSC-39 (21 June 1995) 4 available at <http://www.fas.org/irp/offdocs/pdd/index.html> which contains a passage dealing with the return of indicted terrorists to the US. It reads: “...When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in the bilateral relations with any state that harbours or assists them. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, where possible and appropriate, through negotiation and conclusion of new extradition treaties.” “If we do not receive adequate cooperation from a state that harbours a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government...”

³³ Singh (2013) 14.

³⁴ Diplomacy: Staff statement no. 5 (2004) *National Commission on Terrorist Attacks upon the United States* 2 available at http://permanent.access.gpo.gov/websites/www.9-11commission.gov/hearings/hearing8/staff_statement_5.pdf. It would seem that the initial idea, as evident from this quote, was to abduct the individual in order to bring him before court to stand trial. The aim of abduction was to therefore vest jurisdiction over the individual. Cf. in general *Nduli v The Minister of Justice* 1978 (1) ALL SA 893 (AD). This is not the case with extraordinary rendition because the main goal of it is to capture the individual and to place him outside any form of legal framework where he cannot be brought before a court or stand trial. After abduction all objects of the due process of law will be adhered to, but in the case of extraordinary rendition due process of law is entirely circumvented.

The US then allegedly took the matter further by seeking to conclude agreements with foreign governments to enlist their aid in effecting these renditions.³⁵ The first notable agreement seems to have been an arrangement that enlisted Egypt's assistance in capturing and rendering terrorist suspects on behalf of the US.³⁶ It is believed, too, that Egypt may have been made the ally of choice in this nefarious scheme on grounds of its reputation for subjecting its subjects to torture.³⁷

Michael Scheuer, a former CIA counter-terrorism agent confirmed that the CIA knew where the suspected terrorists were, but the difficulty barring their apprehension was that the US had nowhere to take them on its own soil and therefore had to bring in a third party to the scheme.³⁸ It is alleged that Egypt embraced the idea as America could apparently assure the capture and transportation of the suspects to Egypt, at the expense of the American government.³⁹ Considering these alluring benefits, and since Egypt was eager to capture Egyptians implicated in Al Qaeda activities,⁴⁰ the authorities in that country seemed eager to participate. Although US law requires an assurance that suspects will not be subjected to torture in the country they are being rendered to,⁴¹ no written evidence to this effect exists.⁴²

In September 1995 Talaat Fouad Qassem, a suspect in the assassination of Anwar Sadat, was kidnapped by American agents and rendered to Egypt. After his rendition he vanished and is thought to have been executed.⁴³ A total of 80 renditions took place before the 9/11 attacks during September 2001.⁴⁴

³⁵ Singh (2013) 14.

³⁶ Mayer (14-02-2005) 109; Singh (2013) 14.

³⁷ Mayer (14-02-2005) 107; Johnston (2007) 364.

³⁸ Mayer (14-02-2005) 109.

³⁹ Mayer (14-02-2005) 109.

⁴⁰ Mayer (14-02-2005) 109.

⁴¹ Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, which states that "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Also see Mayer (14 February 2005) 107.

⁴² Former CIA counter-terrorism agent Michael Scheuer told reporter Jane Mayer that the assurances were sought but he was "not sure" whether any documents confirming the arrangement were signed. See Mayer (14 February) 109.

⁴³ Mayer (14 February 2005) 109; Singh (2013) 14.

⁴⁴ Singh (2013) 14.

During 1998 an indictment was obtained that permitted the CIA to extradite Bin Laden and associates to the United States.⁴⁵ The CIA, fully aware of the transparency of American courts, knew they would have to unveil their intelligence methods and sources if the accused persons were to be brought to justice in American courts.⁴⁶ Foreign states could also not be called as witnesses, as they too would not divulge their intelligence sources and methods.⁴⁷ The CIA admitted that its operatives generally knew where these suspects were, but they could not apprehend them as they had nowhere to detain these suspected criminals.⁴⁸ Another problem was the fact that international law did not compel states to render suspects; in most circumstances legal extraditions were secured by extradition agreements signed between states.⁴⁹ This served as further motivation for the continued use and expansion of the extraordinary rendition program.

After the relationship with Egypt was solidified agreements to the same effect were apparently made with other states for the provision of other secret facilities.⁵⁰ It is believed that some of the detainees were held at Guantánamo Bay in Cuba⁵¹ (an

⁴⁵ Mayer (14 February 2005) 109.

⁴⁶ Mayer (14 February 2005) 109.

⁴⁷ Johnston (2007) 363.

⁴⁸ Singh (2013) 14; Mayer (14 February 2005) 109.

⁴⁹ Botha N "The basis of extradition: The South African Perspective" 17 1992 *South African Yearbook of International Law* 131-3.

⁵⁰ Since these were early days for this type of rendition the exercise was limited to a small group of allies and the operations were somewhat more conservative than at present, although there were nevertheless reports of torture and inhumane treatment (cf. Singh (2013) 14). After the assistance the US granted Egypt in the capture of Talaat Fouad Qassem, more elaborate renditions followed. In 1998 Albanian security forces helped the US and Egypt to capture Shawki Salama Attiya who was Osama Bin Laden's deputy; see Singh (2013) 14 and Mayer (14 February 2005) 109-110.

⁵¹ Considerable debate about the status of Guantánamo Bay and of the detainees held there has been stirred, especially during recent years under the Obama administration which promised the closure of this facility but has yet to do so. (cf. Fisher M "Why hasn't Obama closed Guantánamo Bay?" (30 April 2013) *Washington Post*, article and video available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/30/obama-just-gave-a-powerful-speech-about-the-need-to-close-gitmo-so-why-hasnt-he/>. The matter at issue here is the rights that should be afforded to the detainees, such as not being subjected to detention without trial or to cruel and inhumane treatment. See "Top court rejects Guantánamo test" (2 April 2007) *BBC News Online* available at <http://news.bbc.co.uk/2/hi/americas/6518979.stm>. Part of the issue concerns the lease agreement between the US and Cuba which was signed in 1903, and the attendant issue regarding jurisdiction over the detainees and which municipal laws apply to them, and what rights the detainees are afforded, if any, under US law (cf. De Zayas A "2003-04 Douglas Mck.Brown Lecture – Vancouver, 19 November 2003: The status of Guantánamo Bay and the status of the detainees" 37 2004 *University of British Columbia Law Review* 279). The lease agreement states that the US recognises the "continuance of the ultimate sovereignty" of Cuba over the leased property; however it also states that during the lease, and therefore the period of occupation, the US will "exercise complete jurisdiction and control" over the leased property (cf. De Zayas (2004) 289). The lease can only be terminated by mutual consent, but thus far the US has not made the concession (cf. De Zayas

existing US facility)⁵² and some at Abu Ghraib in Afghanistan.⁵³ No hard evidence to this effect was found, however, with the result that the matter remained in the realm of speculation.⁵⁴

Post 9/11 (under the George W. Bush Administration) extraordinary rendition truly gained momentum and the execution of renditions escalated to what we know as extraordinary renditions today.⁵⁵ President Bush signed directives authorising extraordinary rendition without the prior approval of the White House or the Departments of State and Justice.⁵⁶ “Black sites” also emerged, which are facilities reportedly erected across the world by the United States of which the co-ordinates

(2004) 290). It is therefore inferred that the US is effectively exercising complete control and jurisdiction over the area, which is therefore a quasi-dependent territory of the US. (Cf. De Zayas (2004) 290) where C US military and civilian law, along with international humanitarian and international human rights law, will supplant Cuban law (cf. De Zayas (2004) 309-310). The legal provision prevailing in the leased territory under American jurisdiction protects detainees from detention without trial. More specifically, the US is a signatory to the ICCPR and these rights apply to all persons under the jurisdiction of the US whether they are on US sovereign territory or not. The only test would be effective control, which has been determined by the relevant clause in the lease agreement between the US and Cuba (cf. De Zayas (2004) 314). The US argument is that these detainees are unlawful combatants and therefore cannot sue US courts, nor are they entitled to prisoner-of-war (POW) status (cf. De Zayas (2004) 324). However, academics such as Professor De Zayas argue that under present international law the detainees are not in a “legal black hole” because they are protected by various human rights laws, which include the right not to be arbitrarily detained and the right not to be subjected to cruel or inhuman treatment. Therefore, the detainees have a cause of action and can sue US courts (cf. De Zayas (2004) 329).

⁵² Former President Jimmy Carter held a press conference on 15 September 2003 in which he addressed the Guantánamo Bay situation: “[The Guantánamo detainees] have been held in a prison without access to their families, or a lawyer, or without knowing the charges against them. We’ve got hundreds of people, some of them as young as 12, captured in Afghanistan, brought to Guantánamo Bay and kept in cages for what is going on two years. It’s difficult for international aid workers to spread the message of human rights to places like Cuba, Africa and the Middle East when the US government doesn’t practice fairness and equality...I have never been as concerned for our nation as I am now about the threat to our civil liberties.” (cf. De Zayas (2004) 341).

⁵³ Since the nineties the existence of these facilities has been common cause and even more facilities have been discovered, including facilities in Afghanistan, Morocco, Thailand and Jordan (cf. Priest (2 November 2005) A01); “Double jeopardy CIA renditions to Jordan” 2008 *Human Rights Watch* 6-31 available at <http://www.hrw.org/reports/2008/jordan0408/jordan0408webwcover.pdf>. Also see in general Singh (2013); Mayer (14 February 2005) 100 & 113; Sadat (2006) 309; Sadat (2007) 1202.

⁵⁴ Until proven by the comprehensive report by the Open Society for Justice; see Singh (2013) 6.

⁵⁵ Sadat (2007) 1215.

⁵⁶ Jehl *et al* (6 March 2005); Grey (2007) 149; Singh (2013) 15.

are unknown.⁵⁷ The most recent map (see below) of the suspected “black sites” was published by Amnesty International in 2010:⁵⁸



Condoleeza Rice⁵⁹ vehemently defended these renditions, contending that they served a crucial purpose in curbing terrorism.⁶⁰ However, she failed to mention the

⁵⁷ “Secret CIA black sites and globalizing torture” (5 February 2013); “Lithuania: Reopen investigation into secret CIA prisons: New EU presidency should set example for justice” (25 June 2013); Ross A “CIA faces new accusations of torture” (6 September 2012) *The Bureau of Investigative Journalism* available at <http://www.thebureauinvestigates.com/2012/09/06/cia-faces-new-allegations-of-waterboarding/>.

⁵⁸ Koettl C “Mapping CIA black sites” (5 April 2010) *Amnesty International Human Rights Blog* available at <http://blog.amnestyusa.org/us/mapping-cia-black-sites/>. The information displayed in the map was derived from a General Assembly report (cf. 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 (19 February 2010) *UN Human Rights Council A/HRC/13/42* available at <http://www.refworld.org/docid/4d8720092.html>). Since this map was drawn in 2010 it may not reflect the true situation as it stands today, but it does provide a helpful general overview of global participation in extraordinary rendition. In 2013 a detailed report was released by the Open Society for Justice that confirms which governments assisted the US with extraordinary rendition procedures, but “black sites” are not necessarily present in all of these government territories for that reason (cf. Singh (2013) 6).

⁵⁹ Condoleeza Rice was the US National Security Advisor from 2001 - 2005 under the George W. Bush administration, and the US Secretary of State from 2005-2009 under the same administration.

⁶⁰ After the media published the article accusing the US government of maintaining secret detention facilities (Priest (2 November 2005) A01) she held a press conference to mount a public defence

significant expansion of these renditions and that captured suspects were being rendered to foreign governments.⁶¹ One can only speculate as to whether due assurances were sought by the US government during this time. However Peter Goss, director of the CIA, confirmed that his organization did try to seek assurances where possible, but once the suspect was in foreign custody hardly any possibilities of rendering assistance remained.⁶² The CIA office of the Inspector General conducted investigations into “erroneous renditions”⁶³ and found that the CIA “picked up the wrong people, who had no information” and in “many, many cases there was only some vague association” with terrorism, one case being an innocent academic of professorial rank who had given an Al Qaeda member enrolled for his class a bad grade.⁶⁴ The Open Society for Justice has made numerous requests for the disclosure of these investigations, but they still remain classified, even under the Obama administration.⁶⁵

2.3 Other forms of illegal expulsion and/or rendition

In order to define extraordinary rendition as a crime, and to avoid confusion, a clear distinction must be drawn between extraordinary rendition and other forms of illegal expulsion or rendition. Although it is fair comment that extraordinary rendition shares elements of other illegal methods of expulsion in its overall makeup⁶⁶ it cannot for that reason be identified with any of the other illegal methods since that would create

against the accusations. She addressed the matter as follows: “For decades, the United States and other countries have used ‘renditions’ to transport terrorist suspects from the country where they are captured to their home country or to other countries where they can be questioned, held or brought to justice.” “In conducting such renditions, it is the policy of the United States, and I presume of any other democracies that use this procedure, to comply with its laws and comply with its treaty obligations.” See Rice C *No higher honour: A memoir of my years in Washington* (2011) Crown Publishing 499-500. She admits in her book that she had hoped that the latter statement would appease the public, but she continued to receive numerous inquiries from the press regarding the secret detentions and their existence. Thereafter she made another statement to the press that hinted that the CIA was indeed operating facilities overseas. See Rice (2011) 501-502. She also admits in her book that she defended these renditions and gave personal credence to the practice (cf. Rice (2011) 502).

⁶¹ Singh (2013) 15.

⁶² Singh (2013) 15. In Jehl *et al* (6 March 2005) a government official was quoted as stating: “We get assurances, we check on those assurances, and we double-check on these assurances to make sure that people are being handled properly in respect to human rights,” but added that “nothing is 100 percent unless we’re sitting there staring at them 24 hours a day.”

⁶³ Priest (4 February 2005); Mayer (2009) 287.

⁶⁴ Priest (4 February 2005).

⁶⁵ Singh (2013) 15.

⁶⁶ As will be explained throughout this chapter.

an unjustifiably reduced impression of extraordinary rendition and its full range of implications, issues and consequences.⁶⁷

2.3.1. Disguised extradition

Disguised extradition is not illegal *per se*,⁶⁸ but it is considered inappropriate from a moral-ethical viewpoint.⁶⁹ It amounts to the misuse of immigration laws by people who seek to exploit legal loopholes between extradition and immigration laws in order to secure the deportation of an individual to the state requesting his deportation, and in which he is accused of a crime.⁷⁰ During disguised extradition states conveniently ignore all judicial and proper procedures that are indicated in valid extradition treaties.⁷¹ Some states, including the US, even argue that their domestic immigration law overrides international law.⁷² But this argument is questionable, because in some instances the opposite may be true (i.e. certain domestic laws are subordinate to international law - e.g. laws governing treatment and status of refugees).⁷³

Disguised extradition can be achieved through expulsion,⁷⁴ but a prime consideration in this regard is that the object of legal expulsion is merely to remove the person

⁶⁷ Refer to paragraph 2.1 of this chapter together with paragraph 2.4.

⁶⁸ Bassiouni M "Unlawful seizures and irregular rendition devices as alternatives to extradition" 7:1 1973-1974 *Vanderbilt Journal of Transnational Law* 37.

⁶⁹ Bassiouni states that disguised extradition is not illegal under international law because it is not classed with abduction, and its conduct is supposed to conform to the provisions of municipal law and/or administrative proceedings, although certain elements of disguised extradition may contravene international law (cf. Bassiouni (1996) 167). This selective contravention clearly distinguishes disguised extradition from extraordinary rendition which is wholly against international law. Refer to the description of extraordinary rendition under paragraph 2.1 of this chapter.

⁷⁰ Bassiouni (1996) 168.

⁷¹ Cowling M "Unmasking 'disguised' extradition – Some glimmer of hope" 109 1992 *South African Law Journal* 242.

⁷² Bassiouni (1973-1974) 37.

⁷³ RC of 1951, specifically articles 7 and 12. Also the Vienna Convention on the Law of Treaties 1969 contains various articles that have become international custom. Cf. Bassiouni (1973-1974) 37.

⁷⁴ Through exploratory reading it has become apparent that the terms "expulsion" and "deportation" are used synonymously. Both terms seem to refer to the deportation and the legal removal of an individual from a state. Cowling uses these terms interchangeably by first referring to the expulsion of an individual from a state and then later referring to it as "expelling or deporting", which creates the impression that these terms are synonymous (cf. Cowling (1992) 242-243). Bassiouni also uses these terms as synonyms in referring to one of the ways of effecting disguised extradition through "expulsion/deportation". (cf. Bassiouni (1996) 167). Whereas the verb "to deport" is defined as "to force someone to leave a country, especially someone who has no legal right to be there or who has broken the law", "expulsion" is defined by the same source as "forcing someone, or being forced, to leave somewhere", cf. *Cambridge Dictionary* (2004). Furthermore, deportation and expulsion are listed as synonyms: "Deportation (noun) = expulsion, banishment, eviction, exile, oust." (cf. *Paperback*

from the state concerned, rather than to relocate him to a specific destination, which is immaterial in this case.⁷⁵ Not so, however, in the event of disguised extradition where the destination of the expelled individual is of the essence.⁷⁶ Expulsion is also easier than trying to get rid of the individual through deportation, because he is afforded certain rights during the deportation process, such as due legal process and being able to nominate possible countries to which he is to be deported.⁷⁷ Once a country other than the requesting country accepts the prospective deportee's request that it serves as the destination of the expelled person's deportation, the expelling state has no further right to alter the destination of the prospective deportation.⁷⁸ The deportee also has various other relief options such as applying for asylum.⁷⁹

*Horn v Mitchell*⁸⁰ is a prominent expulsion case dealing with a Canadian individual whose extradition was requested from and acceded to by America.⁸¹ The court held that expulsion is not a valid alternative if the individual can prove that he has broken no immigration laws, that he is legally present in the expelling country, and that he is a national of the state seeking him.⁸² The court held further that expulsion is precluded if the individual can prove that the charges brought against him are baseless.⁸³

Apart from expulsion, disguised extradition can also be effected through exclusion⁸⁴ In that the expelling state can order the expulsion of the individual while the state

Thesaurus: The Ultimate Word Finder (2001) HarperCollins Publishers 4th Ed.). It can be assumed, therefore, that "deportation" and "expulsion" both refer to the forced removal of an individual from a state. The terms will therefore be used as synonyms for the purpose of this thesis.

⁷⁵ Cowling (1992) 242.

⁷⁶ Cowling (1992) 242.

⁷⁷ Apart from the benefits of due process the immigration judge's decision regarding the individual's deportability "must be based on reasonable, substantial, and probative evidence and must be established by clear, convincing, and unequivocal evidence." (cf. Bassiouni (1996) 185). This, at least, is the US position.

⁷⁸ The US position is clearly indicated in section 1253(a) of the United States Code of 1988 Title 8 which states that the alien may designate one country to which he wishes to be deported. Provided that the country is willing to accept him and unless the Attorney General, in his discretion, concludes that deportation to such a country would be prejudicial to the interests of the United States the alien will be deported to such country (cf. Bassiouni (1996) 185).

⁷⁹ Bassiouni (1996) 185.

⁸⁰ *Horn v Mitchell* (1917) 232 U.S. 819 (1st Circuit); appeal (1917) 243 U.S. 247 as discussed in Bassiouni (1996) 172.

⁸¹ Bassiouni (1996) 172-173.

⁸² Bassiouni (1996) 173.

⁸³ Bassiouni (1996) 173.

⁸⁴ Bassiouni (1973-1974) 43.

seeking jurisdiction over the individual can request other states to exclude him, thereby effectively barring escape routes to refuge from the seeking state.⁸⁵

*Soblen*⁸⁶ is the landmark exclusion case.⁸⁷ In this case the United States wanted Dr Soblen for a political crime, but since this is a non-extraditable offence⁸⁸ the English court held that Dr Soblen had gained illegal entry into that country and put him on the first flight out of the United Kingdom.⁸⁹ The court held that an intention to hand the applicant over to the United States at the instance of that country for political crimes he had allegedly committed while on US territory would have been unlawful.⁹⁰ Alternatively, however, it would have been lawful if the intent had been to deport him to Israel that is to his own country, because his presence in the United Kingdom was considered a threat to public order.⁹¹ This decision is interesting because although Soblen was purportedly booked on a flight to Israel he was actually placed on a flight bound for New York which happened to be the same flight by which he had initially arrived in the UK.⁹²

A distinguishing characteristic of disguised extradition is that the perpetrators act under the guise of municipal laws. Slow judicial procedures lead perpetrators to believe that they can only vest jurisdiction over the accused by bending the law.⁹³ This process makes inroads on the basic human rights of the individual which need to be duly approved in cases of deportation (e.g. the political-offence exception⁹⁴ and the accused's right to choose the destination of his deportation).⁹⁵

⁸⁵ Bassiouni (1973-1974) 43.

⁸⁶ (1962) 641. This case is discussed in Chapter 1 above.

⁸⁷ Bassiouni (1996) 173.

⁸⁸ In general see *Soblen* (1962) 641.

⁸⁹ *Soblen* (1962) 662 par E-F.

⁹⁰ *Soblen* (1962) 661 par D.

⁹¹ *Soblen* (1962) 661 par D-E.

⁹² Bassiouni (1996) 174.

⁹³ Bassiouni (1996) 168.

⁹⁴ Dugard (2011) 232; Bassiouni (1996) 167.

⁹⁵ Section 1253(a) of the United States Code of 1988 Title 8. Consideration needs to be given to the deportation laws of the country, and whether the individual is in fact deportable or not. The US, for example, has various grounds for lawful deportation, divided into six main categories: Aliens that were excludable at the time of their entry into the country, other violations of lawful alien status, economic grounds, security and political grounds, failure to register as an alien, falsification of documents, and criminal grounds (cf. Bassiouni (1996) 185, as well as sections 1251(a)(a)(A), 1251(a)(1)(B), 1251 (a) (2), 1251(a)(3), 1251(a)(4), 1251 (a)(5) of the United States Code of 1988 Title 8.

*Mohamed v President of the RSA*⁹⁶ addressed an instance where human rights were disregarded. The applicant was a Tanzanian national wanted by the United States for the bombing of an American embassy.⁹⁷ After fleeing to South Africa the United States requested his deportation.⁹⁸ Although there is a valid extradition treaty in place between South Africa and the US,⁹⁹ Mohamed was declared a prohibited person in South Africa and deported to America without gaining the necessary assurances that the accused would be exempt from capital punishment.¹⁰⁰ An important consideration in this regard was that the deportation order was Mohamed's only connection to the United States. The court held that by making and executing the deportation order South Africa was reneging on its commitment to eschew participation in cruel, inhuman and degrading treatment,¹⁰¹ with the result that the trial against Mohamed continued in New York where he was convicted. However, the U.S. agreed not to pass the death sentence as punishment.¹⁰²

The *Mohamed* judgment correctly attests to states' commitment to international law, but unfortunately this decision has frequently been disregarded in legal process. Consider, for example, the High Court decision in *Jeebhai v Minister of Home Affairs*.¹⁰³ The High Court upheld the irregular transfer of Khalid Rashid and declared that the government could not be expected to gain assurances for all transfers.¹⁰⁴

⁹⁶ *Mohamed* (2001).

⁹⁷ *Mohamed* (2001) par 9.

⁹⁸ *Mohamed* (2001) par 13.

⁹⁹ *Mohamed* (2001) par 14.

¹⁰⁰ *Mohamed* (2001) par 48.

¹⁰¹ *Mohamed* (2001) par 38, 59. The court also stated that "a 'deportation' or 'extradition' of Mohammed without first securing an assurance that he would not be sentenced to death or, if so sentenced, would not be executed would be unconstitutional." See par 48.

¹⁰² *Mohamed* (2001) par 74(5); Dugard (2011) 232.

¹⁰³ (2007) 773 (T).

¹⁰⁴ The court held that "...The prayer sought, namely, that the South African government be ordered to intervene as Rashid could be facing a death sentence, cannot be granted if the authorities were not aware of those facts. It cannot be that the duty arises in respect of every person deported without such prior knowledge; this would be unworkable. All the authorities knew that he was being taken back to his own country. As it is, it can be argued that on Mohamed's judgment, all that a person anywhere in the world facing capital crimes in their country need to do is to come to South Africa, even illegally, and receive insurance against the death penalty. It follows that Rashid's deportation cannot be declared invalid for the reason that the South African authorities did not extract an undertaking from the Pakistani government that his life would not be in danger. Such a duty cannot routinely exist in respect of every deportee. Rashid was sent back to his own country."

Should a person be irregularly deported to a state by way of disguised extradition the courts of the receiving country should refuse to exercise jurisdiction,¹⁰⁵ but this isn't the case in practice¹⁰⁶ as is evident in *Regin v Secretary of State Home Affairs, Duke of Thierry*.¹⁰⁷ The United Kingdom flouted immigration laws by deporting the applicant to France. The court *a quo* held that the Home Secretary did not have the authority to decide the destination of an individual's deportation.¹⁰⁸ Moreover, the court took exception to the fact that the individual was being deported for political offences.¹⁰⁹ Added to this irregularity was the fact that the Home Secretary admitted that the intention in the UK was to deport the applicant to France although this intention was not mentioned in the deportation order.¹¹⁰ The intention was clear, therefore the deportation was unlawful.¹¹¹

This decision was reversed¹¹² on appeal on grounds that although it was true that the Home Secretary lacked standing to decide the destination of the applicant's deportation no such destination was mentioned in the order in any case, hence the deportation was lawful regardless of intent.¹¹³ The court also stated that this means of deportation is lawful when securing military deserters.¹¹⁴

¹⁰⁵ Academics are of the opinion that this would be a good deterrent to the practice of disguised extradition and other forms of irregular rendition (cf. Dugard (2011) 231 & 234; Bassiouni (1973-1974) 29; Loan J "Sosa v Alvarez-Machain: Extraterritorial abduction and the rights of the individuals under international law" 12 2005 *International Law Students Association Journal of International and Comparative Law* 253 at 282-283).

¹⁰⁶ See for example *S v Rosslee* 1994 (2) SACR 441 (C) where the Cape Provincial Division of South Africa held that the court did not have to deny jurisdiction if an individual was brought before it by resorting to disguised extradition.

¹⁰⁷ *Regin v Secretary of State Home Affairs, Duke of Thierry* (1917) 1 K.B. 552.

¹⁰⁸ *Duke of Thierry* (1917) 552.

¹⁰⁹ *Duke of Thierry* (1917) 552.

¹¹⁰ *Duke of Thierry* (1917) 552.

¹¹¹ The court held as follows: "In form the order is correct, but the court must look behind the mere form, and, when there is no doubt that the intention is to deport the alien to a particular country, though the form of the order does not state that that is the object and intention of the Executive in making the order, we must treat it as if the order did in effect state that the alien was to be deported to France. See *Duke of Thierry* (1917) 555-556.

¹¹² *Duke of Thierry* (1917) 922.

¹¹³ *Duke of Thierry* (1917) 922.

¹¹⁴ The court held that "we were informed that there exists an agreement between this country and France by which this country undertakes to return to France subjects of that country who are of military age and liable to military service, and that it was by reason of that agreement that the Secretary of State made this order." See *Duke of Thierry* (1917) 932.

*Klaus Barbie*¹¹⁵ followed the *Duke of Thierry* judgment. In *Klaus Barbie* a Nazi war criminal was wanted by France. However, America helped him escape to Bolivia which in turn refused his extradition to France. After a change in government Bolivia expelled Klaus Barbie to a French territory in South America from which he was deported to France. The French courts held that they had jurisdiction over Barbie even if it was secured through disguised extradition.

In cases of disguised extradition courts have shown their support for the *mala captus bene detentus* rule,¹¹⁶ which basically determines that once the accused is bodily present before the court it thereby has a vested right to exercise jurisdiction regardless of how the accused was arraigned. In *Ex parte Elliott*,¹¹⁷ one Elliot was arrested in Belgium by the United Kingdom and Belgium officials, and deported to England to stand trial. He objected, arguing that Belgium had no authority to arrest him. The court dismissed this argument and held that it had proper jurisdiction and that the court could not simply release a criminal regardless of whether he was correctly arrested in either state.¹¹⁸ The court's decision amounts to a very narrow interpretation as the it is only concerned with the course of events during the actual arrest, and not with the events leading up to it.¹¹⁹

In *R v Hartley*¹²⁰ the applicant was a New Zealand national who had fled to Australia. Australian officials, acting upon the request of New Zealand, apprehended him and transferred him back to New Zealand.¹²¹ The court held that it had jurisdiction to hear the case, but also stated that the trial judge had the right to deny such jurisdiction if it became evident that illegalities had contributed to the person's presence in court.¹²²

¹¹⁵ *Klaus Barbie* matter as discussed in Bassiouni (1996) 174.

¹¹⁶ For general discussions regarding the *mala captus bene detentus* principle, see Bassiouni (1973-1974) 45-49).

¹¹⁷ *Ex parte Elliott* (1949) 1 ALL ER 373.

¹¹⁸ The court held that "If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being in lawful custody in this country: 'I was arrested contrary to the laws of the State of A or the laws of the State of B where I was actually arrested.' He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case." See *Ex Parte Elliott* (1949) 376.

¹¹⁹ Cowling (1992) 244.

¹²⁰ (1978) 2 NZLR 199.

¹²¹ Selleck K "Jurisdiction after international kidnapping: A comparative study" 8:1 1985 *Boston College International Comparative Law Review* 261.

¹²² *Hartley* (1978) 215, 217.

This at least indicates that there should have been some measure of consideration for the means resorted to in securing the person's presence in court.

2.3.2. Abduction

Whereas disguised extradition is not illegal per definition but does flout immigration laws in order to cause the victim to fall into the hands of the state seeking his deportation, abduction is illegal and prohibited by international law.¹²³ It disrupts world public order, state sovereignty and territorial integrity and the human rights of the abducted individual.¹²⁴

Abduction is the forcible seizure of an individual by officials from another state than the state in which the individual finds himself, without the knowledge of the state from which he is being abducted.¹²⁵ Abduction must not be confused with unlawful seizure or informal rendition because unlawful seizure is when agents of the state in which the abductee is present seize him, outside of the legal framework, in connivance with another state.¹²⁶ Informal rendition, on the other hand, is when the agents of the state of refuge act outside of the legal framework to cause the abduction of the individual by another state.¹²⁷

Therefore, the key characteristic of abduction is that it is done without the knowledge of the state in which he finds himself upon abduction.¹²⁸ The injured state, if they had no knowledge of the abduction, can demand the return of the individual and if there is a valid extradition treaty in place the injured state can request the extradition of the abductors in order to stand trial in the injured state.¹²⁹ Whereas in cases of unlawful

¹²³ Article 1(1) of the Declaration on Enforced Disappearances states no one shall be subjected to enforced disappearance. Furthermore, the definition of an "enforced disappearance" given in article 2 includes "abduction". Article 5(1) of the ECHR states that any person has the right to liberty and security of person and that no-one will be deprived of this liberty. Article 9(1) and (2) of the ICCPR also states that every person has the right to liberty and security of person; moreover that anyone who is arrested must be informed of the reason for such arrest at the time when the arrest is made.

¹²⁴ Bassiouni (1996) 219.

¹²⁵ Loan (2005) 255, Dugard (2011) 233, Bassiouni (1996) 217.

¹²⁶ Bassiouni (1996) 224.

¹²⁷ Bassiouni (1973-1974) 33.

¹²⁸ Bassiouni (1973-1974) 33.

¹²⁹ Dugard (2011) 233.

seizure and informal rendition the state of refuge has no right to raise a complaint as they assisted in the unlawful seizure or informal rendition.¹³⁰

Abduction is only illegal if effected by public agents or agents acting with the permission of the government of another state than the one in which the abduction takes place. Therefore the abduction cannot be effected by volunteers acting individually and of their own accord as international law only aims to restrict state conduct.¹³¹

Abduction also differs from other forms of informal rendition as there is no consent between the states.¹³² In the case of other forms of informal rendition there is some kind of agreement between the states regarding the means of seizure and transfer of the seized individual, and therefore no one is offended and there is no infringement upon state sovereignty.¹³³

Abduction can be avoided if the courts of the abducting state refuse to exercise jurisdiction, but there is no international obligation upon domestic courts to decline jurisdiction over an abductee.¹³⁴ Therefore, courts assert jurisdiction due to the mere personal presence of the individual in the court, regardless of the means through which the individual was brought before the court,¹³⁵ which further fuels the use of illegal and irregular alternatives to extradition.¹³⁶ This method of vesting jurisdiction mainly flows from the judgments in two very prominent cases being *Ker v Illinois*¹³⁷ and *Frisbie v Collins*,¹³⁸ both of which created the so-called *Ker-Frisbie* principle.

¹³⁰ There is no infringement of sovereignty or state territory when both states connive to abduct an individual and therefore there can be no grounds for raising a complaint. This was confirmed in *United States v Sobell* 1957 244 F.2d 520 2d Cir. Mexican officers worked in connivance with US authorities to ensure the capture of one Sobell. The fact that Mexico was involved robbed them of any kind of complaint even if it wanted to raise an objection of any kind, see Bassiouni (1996) 225, and Bassiouni (1973-1974) 34-35.

¹³¹ Bassiouni (1996) 222; an example of this would be the *Vincenti* case as referred to in Bassiouni (1973-1974) 32. In this case America seized a citizen in the United Kingdom. Upon complaint from the United Kingdom, America issued an apology stating that the seizure was carried out by state agents acting on their own volition without state consent.

¹³² Bassiouni (1996) 222.

¹³³ Bassiouni (1996) 223.

¹³⁴ Loan (2005) 283.

¹³⁵ This is the *mala captus bene detentus*-rule.

¹³⁶ Loan (2005) 255-256; Bassiouni (1996) 219.

¹³⁷ *Ker v Illinois* (1886) 119 US 436.

¹³⁸ *Frisbie v Collins* (1952) 342 US 519, 72 S.Ct, 509.

In *Ker* the applicant was wanted for theft in Illinois and the Governor requested the United States to request the extradition of the applicant from Peru in accordance with their extradition treaty. Instead of following the treaty procedures, the agent sent to apprehend Ker forcibly abducted him and took him to America. The court held that the abduction of Ker was merely an irregularity which could not reasonably preclude the court from exercising jurisdiction.¹³⁹

In *Frisbie* the applicant was forcibly abducted from the State of Illinois to Michigan to stand trial. The court held that the *Ker*-principle still stood and that forcible abduction did not impair the court's power to try a person for a crime.¹⁴⁰ The court also held that due process is duly achieved when the person is present in court when he is convicted of a crime, was duly informed of the charges against him and a fair trial was held.¹⁴¹

Unfortunately the judgments in these cases have set a standard for many abduction cases. The biggest issue comes when the *Ker-Frisbie* principle¹⁴² is misused and misunderstood by courts seeking to apply it, as was the case in the *Faik Bulut* case. A Turkish citizen was seized by Israel in a Palestinian refugee camp in Lebanon. The Israeli court vested jurisdiction citing the *Ker-Frisbie* rule.¹⁴³ This is a questionable approach because in *Ker* the court could vest jurisdiction because the crime was

¹³⁹ *Ker* (1886) 440. The court also went further to hold that "The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the state court for the offense now charged upon him, is one which we do not feel called upon to decide; for in that transaction we do not see that the constitution or laws or treaties of the United States guaranty him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court." See *Ker* (1886) 444.

¹⁴⁰ *Frisbie* (1952) 511.

¹⁴¹ The court held that "...due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." See *Frisbie* (1952) 512.

¹⁴² Also refer to *Nduli* (1978) for a South African perspective. In this case the South African court decided that where an accused was abducted from Swaziland by members of the South African Police in breach of orders from their commanding officer, the South African state was not responsible and accordingly there was no violation of international law. Consequently the trial court was not deprived of its competence to try the accused.

¹⁴³ The court in *Faik Bulut* (as referred to in Bassiouni (1973-1974) 30-31) also relied on *Attorney General of Israel v Adolf Eichmann* 1962 36 ILR 5 D.Ct, 1962 36 I.L.R. 277 for purposes of vesting jurisdiction. However, in *Eichmann* jurisdiction could be vested due to the universality principle, due to the severity of the heinous crimes Adolf Eichmann was accused of, which is not the case in *Faik Bulut*. Cf. Bassiouni (1973-1974) 30-32.

committed in its territory.¹⁴⁴ In *Faik Bulut* there was no crime committed in Israel or against an Israeli citizen.¹⁴⁵

A significant change came about in *United States v Toscanino*¹⁴⁶ when the court of appeals ruled against the *Ker-Frisbie* principle.¹⁴⁷ In this case Toscanino was kidnapped from Uruguay by the United States, tortured and then sent to New York to stand trial.¹⁴⁸ Leaning on the *Ker-Frisbie* principle the court *a quo* ruled that the manner in which the person is brought before the court is of no consequence and does not influence the vesting of jurisdiction.¹⁴⁹ On appeal this decision was reversed and the appeal court held that the principle of due process indicated that the courts have no jurisdiction over an individual illegally obtained or abducted in order to be brought before the court.¹⁵⁰ The court also indicated that Uruguay objected to the abduction which led to a violation of state sovereignty.¹⁵¹ This judgment was a welcome turnaround from the *Ker-Frisbie* principle and reflected the intention of international laws and procedures to protect individuals from abduction and to condemn such behaviour.¹⁵²

¹⁴⁴ Bassiouni (1973-1974) 31.

¹⁴⁵ Bassiouni (1973-1974) 31.

¹⁴⁶ (1974) 500 F.2d 267, 504 F.2d 1380, 2nd Ct.

¹⁴⁷ The court remarked that the *Ker-Frisbie* principle has been “criticized and its continued validity repeatedly questioned.” See *Toscanino* (1974) 272. Finally the court concluded that “In light of these developments we are satisfied that the *Ker-Frisbie*’ rule cannot be reconciled with the Supreme Court’s expansion of the concept of due process, which now protects the accused against pre-trial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part.” See *Toscanino* (1974) 275.

¹⁴⁸ *Toscanino* (1974) 267.

¹⁴⁹ *Toscanino* (1974) 271.

¹⁵⁰ The court held that the *Ker-Frisbie* principle had to “yield” and concluded accordingly that “...we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.” *Toscanino* (1974) 275.

¹⁵¹ The court remarked that the US had made formal or informal request to the Uruguay government regarding the extradition of Toscanino, and stressed that Uruguay neither had prior knowledge of, nor had consented to the abduction, cf. *Toscanino* (1974) 270.

¹⁵² *Lujan v Gengler* (1975) 510 F.2d 62 2nd Ct. as referred to in “The effect of illegal abductions by law enforcement officials on personal jurisdiction” 35:1 2012 *Maryland Law Review* 148-149 set severe limits to the *Toscanino* judgment. In *Lujan* the seized individual was arrested in Bolivia after being hired to fly there from Argentina by people acting on behalf of the United States. The American court held that it had jurisdiction on grounds that there was no objection from Bolivia and that the *Ker-Frisbie* principle applied because the abduction was not carried out with notable reprehensibility. Through this judgment the court limited *Toscanino* to only apply in cases where the individual was tortured or brutalised during the abduction. *Bennett v Horseferry* 1993 (3) ALL ER 138 (HL) followed the *Toscanino* judgment. In *Horseferry* the applicant was a New Zealand national, present in South Africa, and wanted by the United Kingdom. There was no extradition treaty between South Africa and the United Kingdom and therefore South Africa deported the applicant to New Zealand via the United Kingdom in order to stand trial in the United Kingdom. The House of Lords refused jurisdiction, stating

*S v Ebrahim*¹⁵³ was also a remarkable judgment. In this case the Appellate Division reversed the earlier judgment of the court *a quo*. The appellant was abducted from Swaziland and forcibly removed to South Africa and brought before the court. The court relied heavily on the interpretation of Roman-Dutch law in its judgment and held that the removal of a person by illegal means from one jurisdiction to another amounted to abduction, which is a criminal offence in Roman-Dutch law,¹⁵⁴ which still informs South African law in principle but does not rule on court jurisdiction over abductees,¹⁵⁵ but sets limits to jurisdiction by upholding the principles of protection, enforcement and promotion of human rights, due legal process, respect for state sovereignty and promotion of good interstate relations, and which may therefore not be set at nought.¹⁵⁶ The court concluded that if the state were implicated in the abduction its hands would not be clean, and that despite *Ker-Frisbie*, the court would have no standing in South African common law to hear the case.¹⁵⁷

Although *Ebrahim* was a South African judgment it had an impact on international perception of this position. Unfortunately, a year after *Ebrahim* a dramatic reversal of this position occurred in the decision handed down in *United States v Alvarez-Machain*-case¹⁵⁸ in 1992, with the latter decision¹⁵⁸ leading to a contrary international precedent being set.

Dr Alvarez-Machain was a Mexican physician who was considered by the US to have been involved in the torture of a DEA agent. The United States paid Mexican officials to deliver the doctor to US officials. The court held that there would be no violation of a treaty if it did not expressly prohibit abduction, and therefore the court could rely on the *mala captus bene detentus* principle in *Ker-Frisbie* and exercise

that although the process of extradition was in place to enable prosecution of the accused, its further purpose was to protect the rights of the accused. The Lords also held that there can be no respect for the rule of law if law enforcers themselves flout international laws in order to secure a person's appearance in court.

¹⁵³ 1991 (2) SALR 553 (AD), also available at <http://www.saflii.org/za/cases/ZASCA/1991/3.pdf> where page numbering starts at 1, latter version used hereafter.

¹⁵⁴ See *Ebrahim* (1991) 49 where the court held that it was clear that the removal of a person across country borders, from the state in which he was illegally captured to another jurisdiction, is in essence abduction and a serious violation of law under Roman-Dutch principles.

¹⁵⁵ *Ebrahim* (1991) 60.

¹⁵⁶ *Ebrahim* (1991) 68.

¹⁵⁷ *Ebrahim* (1991) 69, 77.

¹⁵⁸ (1992) 504 US 655, 112 S.Ct 2188.

jurisdiction.¹⁵⁹ The court remarked that although the doctor's forcible removal was "shocking" and might violate international law it left the treaty between Mexico and America intact.¹⁶⁰ Justice Stevens took unqualified exception to this decision and declared that he considered it a major oversight that a party to an extradition agreement could assume that the mere absence of a specific prohibition against abduction in a treaty could imply that abduction was an option that could be exercised with impunity if it was deemed expedient,¹⁶¹ and that state sovereignty would be violated by acting on such an assumption.¹⁶² Doctor Alvarez-Machain brought a further case under the American Federal Torts Claim Act. This Act makes the government as liable for tortious acts as an individual, but his claim failed because the Act also renders the government immune against any claim arising in a foreign country.¹⁶³

¹⁵⁹ See *United States v Humberto Alvarez-Machain* (1992) 504 U.S. 655, 112 S.Ct 2188 at 21961-2197 where the court held: "In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice ... By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions ... We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States."

Also see Loan (2005) 258.

¹⁶⁰ *Alvarez-Machain* (1992) 2189, 2196; Bassiouni (1996) 241; Loan (2005) 259.

¹⁶¹ *Alvarez-Machain* (1992) 2201 where Justice Stevens remarks that "It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory." See also *Alvarez-Machain* (1992) 2199: "It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other nation ... Relying on that omission, the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self-help whenever they deemed force more expeditious than legal process. If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty."

¹⁶² See also *Alvarez-Machain* (1992) 2205: "The Court's failure to differentiate between private abductions and official invasions of another sovereign's territory also accounts for its misplaced reliance on the 1935 proposal made by the Advisory Committee on Research in International Law...The Court's admittedly "shocking" disdain for customary and conventional international law principles (cf. *ante*, at 2195) is thus entirely unsupported by case law and commentary." (cf. Bassiouni (1996) 244).

¹⁶³ Loan (2005) 259.

One of the main points that rendered the *Alvarez-Machain* judgment problematic was that the court rode roughshod over international custom.¹⁶⁴ States are only bound to what they consent to, but over time state practice can create law, which would fall under customary law.¹⁶⁵ Therefore, state practice combined with the belief that a specific course of action is dictated by customary international law is in fact universally binding; thus by the same token the right to be exempt from being arbitrarily detained has gained customary international law status.¹⁶⁶ States can only be exempt from the strictures of customary international law if there is a proven history of the state's denial of the rule.¹⁶⁷ However, in *Alvarez-Machain* the argument was raised, albeit questionably, that although international customary law applied in the United States, it had no domestic effect if a branch of the United States government denied its application.¹⁶⁸

In light of the above it follows that there are two exceptions to vesting jurisdiction as indicated in *Ker-Frisbie*: shocking and outrageous conduct on the part of government officials,¹⁶⁹ and no violation of treaty obligations.¹⁷⁰ However, *Alvarez-Machain*

¹⁶⁴ International abduction violates the human rights of the individual as well as state sovereignty, therefore it undermines the principles of the UN and more specifically the principles set forth in the UDHR. The court noted that the declaration imposes no obligations under international law, but then failed to investigate the human rights norms established by the UDHR over time, especially the fact that the right to be free from arbitrary detention under the UDHR has become international customary law (cf. Loan (2005) 254, 271); Wilske S Schiller T "Jurisdiction over persons abducted in violation of international law in the aftermath of United States v Alvarez-Machain" 5 1998 *University of Chicago Law School Roundtable* 210.

¹⁶⁵ Loan (2005) 267-270.

¹⁶⁶ Article 2(4) of the UN Charter, articles 3 and 9 of the UDHR, article 9(1) of the ICCPR, article 5(1) of the ECHR.

¹⁶⁷ Loan (2005) 268.

¹⁶⁸ Wilske *et al* (1998) 216 See in general Glennon M "Raising the Paquete Habana: Is violation of customary international law by the executive unconstitutional?" 80 1985 *Northwestern University Law Review* 321.

¹⁶⁹ *Lujan v Gengler* (1975) 66 where the court discussed this exception. The court held that "Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process. Unlike Toscanino, Lujan does not allege that he was knocked unconscious by someone wielding a handgun when he was not first taken into captivity, nor does he claim that drugs were administered to subdue him for the flight to the United States. Neither is there any assertion that the United States Attorney was aware of his abduction, or of any interrogation. Indeed, Lujan disclaims any acts of torture, terror, or custodial interrogation of any kind. In sum, but for the charge that the law was violated during the process of transporting him to the United States, Lujan charges no deprivation greater than that which he would have endured through lawful extradition. We scarcely intend to convey approval of illegal government conduct. But we are forced to recognize that, absent a set of incidents like that in Toscanino, not every violation by prosecution or police is so egregious that Rochin and its progeny require nullification of the indictment." (cf. also Wilske *et al* (1998) 208-209).

¹⁷⁰ This is also known as the *Rauscher* exception (cf. Wilske *et al* (1998) 209); also *Rauscher* (1886) S.Ct. 422, 424).

declared that there had been no treaty violation.¹⁷¹ In the aftermath of *Alvarez-Machain* and in response to the international outcry, an appointed spokesperson acting for the United States articulated the position that the “decision did not represent a green light for future abductions, and that only in extreme cases would kidnapping be justified.”¹⁷²

2.3.3. Responsibility of the state in matters of illegal expulsion and/or rendition

Violations committed by a government in cases of disguised extradition, abduction and other forms of unlawful seizure¹⁷³ can be placed in three categories: violation of state sovereignty and territory; violation of the individual’s human rights; and violation of international law.¹⁷⁴

The law of state responsibility regarding the violation of state sovereignty and territory was duly applied in *Eichmann*¹⁷⁵ where Israel abducted Adolf Eichmann from Argentina to stand trial in Israel for Nazi war crimes. Argentina objected to the abduction and Israel had to offer a formal apology to Argentina, where after Argentina waived all rights to jurisdiction.¹⁷⁶

State responsibility attaches to agents of the state or private individuals acting for the benefit of the state, but the further the connection between the private individual and the state is, the harder it is to attach state responsibility even if the acts benefited the state.¹⁷⁷ The remedies in accordance with the law of state responsibility are the issuing of a formal apology to the injured state and, although the return of the

¹⁷¹ *Alvarez-Machain* (1992) S.Ct 2197.

¹⁷² Loan (2005) 282. At the request of the Organisation of American States the Inter-American Juridical Committee handed down an opinion on the *Alvarez-Machain* decision that was worded to the effect that the decision contravened international law, and that besides that infraction the US government had neglected to return the doctor to Mexico. The Caribbean Community (CARICOM) also rejected the decision on grounds that it violated some of the most fundamental principles in international law.

¹⁷³ As discussed in paragraphs 1.3 – 1.3.2.

¹⁷⁴ Loan (2005) 256; Bassiouni (1973-1974) 47.

¹⁷⁵ *Eichmann* (1962) 277.

¹⁷⁶ Wilske *et al* (1998) 225.

¹⁷⁷ Bassiouni (1973-1974) 49.

unlawfully seized is not seen as a remedy, some states require this as part of the apology.¹⁷⁸

There regularly is an issue with states accepting responsibility for the violations of the human rights of the individual as they usually distinguish between municipal and international law.¹⁷⁹ Courts easily vest jurisdiction and ignore the fact there are violations of international law at play, and simply decide the case by applying municipal law.¹⁸⁰ There are various sources¹⁸¹ of international law that can be consulted to determine whether there is a source with enough specific content to be legally binding on states and which would require enforcement. Violations of certain protected human rights lead to internationally enforceable rights for the individual and the right to not be arbitrarily detained or arrested falls within this scope as it is one of the most important protected rights, being the right to liberty.¹⁸²

Bassiouni¹⁸³ proposes certain remedies to be instituted by states: States must abide by specific human rights and fulfil the purposes of the UN Charter, illegal renditions or improper seizure should lead to sanctions,¹⁸⁴ and the International Court of Justice must be empowered to hear petitions by states on behalf of the wronged individual.

2.4 Conclusion

Apart from extraordinary rendition, three other categories of irregular rendition methods were discussed in this chapter: abduction, unlawful seizure (or informal surrender) and disguised extradition.¹⁸⁵ These methods are all extra-legal, but in some cases there are no deterrents or sanctions because some of these devices

¹⁷⁸ Bassiouni (1973-1974) 50.

¹⁷⁹ Bassiouni (1973-1974) 51.

¹⁸⁰ Bassiouni (1973-1974) 51-52.

¹⁸¹ Article 1(3), 13(1)(b), 55, 56, 62(2), and 76(c) of the UN Charter; article 3, 9, and 10 of the UDHR; ICCPR, the Convention relating to the Status of Stateless Persons (hereafter referred to as "the CSSP"); the RC; the ECHR; and international court decisions.

¹⁸² Bassiouni (1973-1974) 59.

¹⁸³ Bassiouni (1973-1974) 61.

¹⁸⁴ Bassiouni suggests the following sanctions: The perpetrators, aiders and abettors should be held responsible by international law standards; the seized person should be returned to the state whence he was transported; and the state where the act occurred must be given the opportunity to sue for reparations and apologies (cf. Bassiouni (1973-1974) 61).

¹⁸⁵ See paragraphs 2.3.

produce legally valid results.¹⁸⁶ In the case of extraordinary rendition there is also no deterrent or sanction, but extraordinary rendition does not produce legally valid results.¹⁸⁷ In fact, it is a process aimed at avoiding the legal framework surrounding rendition and/or expulsion, and aimed at producing illegal results such as, amongst other things, detention without trial and torture.¹⁸⁸

Abduction subsists primarily in the forced abduction of the individual without consent having been given thereto by the receiving state.¹⁸⁹ Besides the possibility that extraordinary extradition may subsume all these elements of illegality, it also exceeds the bounds of mere abduction. In cases of extraordinary rendition the element of abduction is present, but the state serving as the destination of the refugee's flight may either consent to it, or he may simply be unaware of it. The actual abduction is also merely one of the first stages of extraordinary rendition.¹⁹⁰

The key elements of disguised extradition are the misapplication of immigration laws, the unlawful deportation of the individual, collusion between the seeking and the sending state, alternatively the states concerned acting separately on their own initiative.¹⁹¹ The focal point here is the fact that the individual is deprived of the human rights to which he is naturally entitled during the deportation process. Without considering the matter at any great depth it would seem that the elements of disguised extradition are also evident in the description of extraordinary rendition.

Once again, therefore, extraordinary rendition goes much further than the misapplication of immigration laws and the other elements of disguised extradition in that it obtrudes into the other stages of the process of extraordinary rendition as discussed in 1.1 above. The first stage of extraordinary rendition (capturing the suspected terrorist) can be effected by the falsified application of immigration laws in order to ensure that the individual is caught in the toils of the web spun collusively for his capture and delivery to the seeking state, except that it should be noted in this

¹⁸⁶ E.g. disguised extradition (cf. paragraph 2.3.1).

¹⁸⁷ As indicated in the description and discussion of extraordinary rendition in the introduction and paragraph 2.1.

¹⁸⁸ Refer to paragraph 2.1.

¹⁸⁹ Refer to paragraph 2.3.2.

¹⁹⁰ Refer to paragraph 2.1.

¹⁹¹ Refer to paragraph 2.3.1.

regard that there will never be such a degree of transparency as is found in disguised extradition because the suspected terrorist will never be brought before a court but will simply disappear.

Extraordinary rendition is also not an unlawful seizure where states collude to secure abduction of the individual because many cases of extraordinary rendition are executed without the knowledge of the state where the individual was taken captive,¹⁹² although instances have been known to occur where a suspected terrorist was seized illegally by means agreed collusively by the states concerned.¹⁹³

In reality extraordinary rendition can be abduction, disguised extradition and unlawful seizure, all of these being elements of irregular rendition stratagems resorted to in a case of extraordinary rendition, but this is not where it all ends, and hence the argument that extraordinary rendition is a hybrid theory.¹⁹⁴

To force extraordinary rendition into the same definition as abduction, disguised extradition or unlawful seizure is like trying to force the definition and characteristics of leukaemia into the definition of bone cancer. They are both forms of cancer, but they are each unique with unique traits and unique characteristics.

In the same way abduction, disguised extradition, unlawful seizure and extraordinary rendition can all fall under forms of irregular or illegal rendition, but they are different in their own right in each individual case and, most important of all, extraordinary rendition has been transformed from a mere irregular or illegal rendition to the hybrid theory of all irregular or illegal renditions, encompassing all the characteristics of abduction, disguised extradition and unlawful seizure, and even going beyond all these characteristics to form an entirely new illegal form of rendition consisting of not

¹⁹² See footnote 36 above.

¹⁹³ This was the case when Albanian security officials assisted the US and Egypt in the abduction of Shawki Salama Attiya. See footnote 50 above.

¹⁹⁴ See Weissbrodt *et al.* (2006) *Harvard Human Rights Journal* 127 where the authors observe that “Extraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals.” Also see Johnston (2007) 381: The author remarked that “Extraordinary rendition itself is a ‘hybrid’ human rights violation, as it encompasses multiple acts, including elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals, each of which independently constitutes a rights violation.”

one illegal act but various illegal acts perpetrated in various phases by various role players. Extraordinary rendition leads to abduction, disrespect of privacy of person, abuse, torture, detention without trial, denial of legal representation and ultimately denies the victim the right to seek recourse. Apart from these issues it also causes infractions on state sovereignty and various other political issues in the international community. Hence, the argument that this truly is a hybrid theory, one that should be properly explored and researched to find a plausible solution that will lead to the prohibition of this practice.

CHAPTER 3

ISSUES CREATED BY EXTRAORDINARY RENDITION

“Whoever fights monsters should see to it that in the process he does not become a monster. And if you gaze long enough into the abyss, the abyss will gaze back into you.” *Friedrich Nietzsche*¹⁹⁵

The Global War on Terror (GWOT) was declared by the US as a consequence of the 9/11 attacks, and in short order the invasion of Afghanistan took place in 2001 and the invasion of Iraq in 2003.¹⁹⁶ The former exercise resulted in 1 000 – 3 000 civilian deaths among the Afghan population, followed by 600 000 civilian deaths in the latter (Iraqi) case.¹⁹⁷ American invasion casualties surpassed the 9/11 death toll.¹⁹⁸

The US employed extraordinary measures to fight the GWOT which ultimately resulted in the use of extraordinary rendition. Human-rights advocates concede that waging the GWOT may necessitate extraordinary (i.e. unconventional) measures, but they nevertheless contend that the measures taken by the US redound to its discredit and are unlikely to earn the sympathetic cooperation of other countries,¹⁹⁹ which the US and the world at large can ill afford to lose at this stage, given the nature of the global scourge of international terrorism.

Extraordinary rendition leads to torture, detention without trial, denial of legal representation, enforced removal from public view and normal surrounds, forcible

¹⁹⁵ Quote found can be accessed at <http://www.goodreads.com/quotes/tag/monsters>. Friedrich Nietzsche was a late nineteenth century German philosopher who challenged the principle of blindly conforming to set society rules and principles, such as the foundations of Christianity and traditional morality.

¹⁹⁶ Sadat (2007) 1240.

¹⁹⁷ These figures are contested cf. Kinsley M “Bush’s conception conflict” (29 September 2006) *Washington Post* A21.

¹⁹⁸ Kinsley (29 September 2006) A21. Tavernise S “Iraqi dead may total 600 000, study says” (11 October 2006) *New York Times* A16, Tavernise S “Iraqi death toll exceeded 34,000 in 2006, U.N. says” (17 January 2007) *The New York Times* A1. There seems to be no consensus on the exact number killed in Iraq, cf. Herold M “Daily casualty count of Afghan civilians killed by US bombing and special forces attacks, 7 October until present day” (15 March 2003) full report found at <http://0-pubpages.unh.edu.innopac.up.ac.za/~mwhero1d/AfghanDailyCount.pdf>. These estimates were taken between 2003-2007 and the death toll could be significantly higher today, however there still seems to be no consensus on the exact number of casualties, cf. <http://www.iraqbodycount.org/> which posts daily updates on Iraq death counts (this is not an accredited website and is merely cited to provide an estimate).

¹⁹⁹ Sadat (2006) 314.

transfer, arbitrary arrest, and the absence of assurances from receiving states, to name but a few.²⁰⁰ Victims of extraordinary rendition came forward to attest to its existence,²⁰¹ which was corroborated by the media²⁰² and a variety of formal investigations.²⁰³

Extraordinary rendition is the perfect smokescreen to avoid moral opprobrium and condemnation and cut through the red tape of compliance with international regulations, all of which could effectively disable efforts to act expeditiously to counter and/or retaliate against terrorist action. Although the US has admitted to extraordinary rendition as an established practice,²⁰⁴ many other countries are reportedly involved in this practice (e.g. Sweden, Russia, Bosnia, Canada, Croatia, Indonesia, Iraq and Pakistan),²⁰⁵ extraordinary rendition can therefore be assumed to have reached epidemic proportions worldwide.²⁰⁶

In light of the above a discussion regarding the various legal issues created by extraordinary rendition will follow in this chapter.

3.1 Disrespect for the rule of law

The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.”²⁰⁷

²⁰⁰ As will be proved in this chapter.

²⁰¹ Case studies are provided in paragraph 3.5 below.

²⁰² Priest (2 November 2005) A01, Mayer (14 February 2005) 106, cf. Satterthwaite (2007) 1337-1338.

²⁰³ Satterthwaite (2007) 1338.

²⁰⁴ Smith R “Gonzales defends transfer of detainees” (8 March 2005) *Washington Post* at A03.

²⁰⁵ These are merely a few of the countries that have been involved in extraordinary rendition in some way or another (cf. Singh (2013) 62-118).

²⁰⁶ The most up to date, detailed report is Singh (2013); See also Weissbrodt *et al* (2006) 128-129; Finn P “Tajik defendant details abduction by Russian police” (11 August 2005) *Washington Post* available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/10/AR2005081001917.html>, which implicates Russia; Whitlock C “New Swedish documents illuminate CIA action” (21 May 2005) *Washington Post* 21 available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/20/AR2005052001605.html>, which alleges Swedish involvement in a CIA rendition.

²⁰⁷ Scholtes J ‘Smart power in action – A rule of law Judge Advocate’s reflections from Basrah, Iraq’ 44 2011 *Creighton Law Review* 1091, 1096.

Extraordinary rendition is clearly unlawful,²⁰⁸ but manages to escape active sanction by exploiting legislative *lacunae* and taking action that circumvents and prevents the administration of justice as would happen in the normal course.²⁰⁹

The Nuremberg Principles²¹⁰ adopted by the General Assembly in 1950 is a founding document that commands respect for the rule of law,²¹¹ and is essentially a set of principles that aimed to set a guideline for future international criminal law cases. This was a strong effort by the UN to compile a number of principles that would further strengthen the rule of law in international law.

One of its principles determine that irrespective of the identity and status of an offender against international law, all such offenders, including heads of state and government officials, shall be liable to criminal sanction under it.²¹² As noted, therefore, the Principles are the cornerstone of international criminal law.²¹³ However, the Bush administration repudiated the Principles and contended that they needed to be amended and their purport narrowed in order to secure the safety of US citizens' post 9/11.²¹⁴

Apart from the Nuremberg Principles, various international instruments exist that enunciate the rules of international law.²¹⁵ Some of these instruments embody rules of customary international law (i.e. the Geneva Conventions²¹⁶ and CAT).²¹⁷ Infringements of these rules (cf. Nuremberg Principles) therefore constitute a grave breach of the rule of law irrespective of the status or identity of the perpetrator.

²⁰⁸ As will be argued throughout this Chapter.

²⁰⁹ Satterthwaite (2007) 1333.

²¹⁰ Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal of 1950 (hereafter referred to as "the Nuremberg Principles").

²¹¹ The Nuremberg Principles, Sadat (2007) 1207.

²¹² Principle 3 and 4 of the Nuremberg Principles.

²¹³ Coincidentally it is also the basis of twelve anti-terrorism acts which the US still uses to capture and prosecute suspected terrorists (cf. Sadat (2007) 1208).

²¹⁴ Sadat (2007) 1208-1209.

²¹⁵ I.e. the ICCPR, the Geneva Conventions (GCs) consisting of Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II), Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), CAT.

²¹⁶ Hereafter referred to as "the GCs".

²¹⁷ Sadat (2007) 320.

After 9/11 the Bush administration attempted to create a zone where the constraints of the rule of law would be suspended per definition so that within the presumed “sanctuary” of this legal hiatus suspected terrorists could be detained and interrogated undeterred; however, this proposal met with a storm of public outrage to the extent that the proposal was moderated to a “least law alternative”.²¹⁸ This was achieved by establishing military commissions and tribunals (that replaced federal courts) which could authorise indefinite detention without trial and manipulate detainees’ right to file a writ of *habeas corpus*.²¹⁹

When President Obama took office his administration called for the closure of Guantánamo Bay, but the Department of Justice offered the same justification that was severely castigated when offered by the Bush administration, namely the state-secrecy defence to avoid litigation and to establish grounds to continue incarceration of the detainees held in that facility after they had been found innocent of terrorist activities.²²⁰ When the Republicans resumed control of the House of Representatives in 2010 they further interfered with the plan to close Guantánamo Bay by denying federal courts jurisdiction over that precinct and determining that detainees would be incarcerated indefinitely under the supervision of military commissions and tribunals.²²¹

It follows that extraordinary rendition violates international laws and international human rights by creating an extra-legal means of capturing, detaining and subjecting suspected terrorists to torture.²²² The US has made various attempts to justify their supposedly short-term actions in the interest of waging the GWOT, the object being to circumvent compliance with the rule of law, but none of these attempts are admissible in law or even particularly persuasive.²²³

²¹⁸ Alexander J “The law-free zone and back again” 2013 *University of Illinois Law Review* 551.

²¹⁹ Alexander (2013) 551.

²²⁰ Alexander (2013) 554.

²²¹ Alexander (2013) 551.

²²² Sadat (2007) 1205.

²²³ Sadat (2007) 1205. One of the main arguments proffered by the US administration was that the GCs don’t apply to the GWOT, because it is not an international armed conflict nor a non-international armed conflict. If the GCs don’t apply then the individuals captured do not enjoy protection of the GCs. This is a lengthy argument which is dealt with in detail in chapter 5.

The first argument was that the principles of CAT did not apply to the GWOT²²⁴ and that it had no extraterritorial application²²⁵ because the words “expel, return, and extradite”²²⁶ in CAT presupposed that the individual was already present in US territory.²²⁷ This argument was summarily dismissed by the Human Rights Committee against Torture²²⁸ in 2006.²²⁹ The HRC against Torture concluded that the provisions of CAT are absolute and apply globally, whether in times of peace or war.²³⁰

Article 3(1) of CAT states:

“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

To this the US argued that the meaning attributed to the words “substantial grounds” should be that it was “more likely than not” that torture would occur.²³¹ The HRC against Torture also stated that “substantial grounds” should be read to mean “more than theory or suspicion”, but without necessarily being “highly probable”.²³² To read “substantial grounds” to mean “highly probable” (as the US was attempting to do) would go against the object and purpose of CAT and would therefore be an unlawful

²²⁴ Sadat (2007) 1221. There was a constant debate regarding the scope application of International Human Rights law to the GWOT (cf. Satterthwaite (2007) 1351-1353). The Bush administration continuously argued that the GWOT is a new kind of war and therefore traditional laws relating to wars could not be applied to the GWOT. They argued that a new rules and regulations had to be set in place (cf. Alexander (2013) 551, Satterthwaite (2007) 1350). They also argued that the human rights treaties they signed did not have extraterritorial application and therefore the provisions only applied within US territory. The US only considers their fifty states and limited areas such as Puerto Rico and Guantanamo Bay (cf. Satterthwaite (2007) 1352).

²²⁵ The US accepted the extraterritorial application of article 3 of CAT by implementing the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), cf. Satterthwaite (2007) 1376.

²²⁶ Article 3 of CAT.

²²⁷ Satterthwaite (2007) 1378. They also argued that article 3 does not explicitly state that it has extraterritorial application, therefore it should be understood that it only applies within a state party's territory.

²²⁸ Hereafter referred to as the HRC against Torture.

²²⁹ Consideration of reports submitted by states parties under article 19 of the Convention: Conclusions and recommendations of the Committee against Torture on United States of America” (2006) *Committee against Torture* 36th session CAT/C/USA/CO/2 available at <http://www.state.gov/documents/organization/133838.pdf> (hereafter referred to as “Committee against Torture Report on US”).

²³⁰ Committee against Torture Report on the US (2006) par 14 where the Committee stated: “The State party should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction...”

²³¹ Satterthwaite (2007) 1376, Sadat (2007) 1221. The US stated that they added an “understanding” on the date they ratified CAT which stated that they would interpret “substantial grounds” to mean “more likely than not”. However, this was not a formal reservation to CAT.

²³² Sadat (2007) 1221.

reservation.²³³ By applying this strict test the US aimed to prove that they were not violating their obligations under CAT when rendering individuals to countries that regularly practiced torture.²³⁴ However, this argument in itself is flawed because the US State Department released a report which confirmed the use of torture by some of the countries the US was rendering to.²³⁵ The existence of this report makes it difficult to conclude that it is not “more likely than not” that torture will occur.²³⁶

The US also argued that they requested diplomatic assurances from the countries where the individuals were being sent, and if they were tortured after assurances were received the US is immune from any wrongdoing.²³⁷ This argument cannot stand as an individual cannot be transferred to a country that violates CAT, even if assurances are obtained.²³⁸ The Special Rapporteur on torture also stated that assurances are impermissible because they are usually sought from countries that breach CAT.²³⁹ They are also not legally binding so the individuals have no form of recourse.²⁴⁰ He also noted that post-transfer monitoring is ineffective and will not effectively guard against torture.²⁴¹ As a defence to the questions posed by the Special Rapporteur in his report the US noted that they are exempt from

²³³ Sadat (2006) 321 -322, Sadat (2007) 1221. There was never a formal reservation made by the US, as mentioned in footnote 16 above.

²³⁴ Sadat (2007) 1220-1221.

²³⁵ Sadat (2007) 1220. All the countries named in the report were countries that the US extraordinarily rendered individuals to and included: Egypt, Syria, Saudi Arabia, Pakistan and Uzbekistan. Please refer to paragraph 3.3 for a more detailed discussion regarding the countries accused of participation in extraordinary rendition.

²³⁶ Sadat (2007) 1220.

²³⁷ A US official was quoted as saying: “They say they are not abusing them, and that satisfies the legal requirement, but we all know they do.” Cf. Priest D “CIA’s assurances on transferred suspects doubted” 17 March 2005 *The Washington Post* A1, Satterthwaite (2007) 1381.

²³⁸ The UN Committee against Torture and the UN HRC set out certain principles diplomatic assurance have to be in line with: The assurances had to be obtained by using clear and established procedures, the assurance must be subject to judicial review, and followed up by effective post-return monitoring of the treatment of the individual. Cf. Consideration of reports submitted by states parties under article 40 of the covenant: Concluding observations of the Human Rights Committee on United States of America (2006) *International Covenant on Civil and Political Rights Human Rights Committee* 87th session CCPR/C/USA/CO/3 available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/Od83f7fe89d83ed6c12571fb00411eb5/\\$FILE/G0644318.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/Od83f7fe89d83ed6c12571fb00411eb5/$FILE/G0644318.pdf) at par 16, Committee against Torture Report on US” (2006) at par 21, Satterthwaite (2007) 1381, 1385.

²³⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (30 August 2005) *UN General Assembly A/60/361* available at <http://www.refworld.org/docid/43f30fb40.html> at par 51. Cf. Satterthwaite (2007) 1386.

²⁴⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Summary (2005) par 48, 51.

²⁴¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Summary (2005) par 51.

responsibility because assurances are obtained from the countries where the individuals are to be transferred.²⁴² However, in *Alzery v Sweden*²⁴³ Sweden was found guilty for transferring the plaintiff to Egypt. The Human Rights Committee held that although Sweden sought diplomatic assurances before Mr Alzery was transferred they failed to conduct post-transfer monitoring.²⁴⁴

The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. The mechanics of the visits that did take place, moreover, failed to conform to key aspects of international good practice by not insisting on private access to the detainee and inclusion of appropriate medical and forensic expertise, even after substantial allegations of ill-treatment emerged. In light of these factors, the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant.²⁴⁵

In *Agiza v Sweden*²⁴⁶ Sweden obtained diplomatic assurances from Egypt that Mr Agiza would not be tortured after his transfer.²⁴⁷ He was placed on a CIA operated flight and taken to Egypt where he was tortured.²⁴⁸ Sweden was found guilty by the Committee against Torture as it did not act in accordance with its obligations under article 3 and 22 of CAT in granting Mr Agiza due opportunity to contest his expulsion.²⁴⁹

The ICCPR, which the US is a signatory to, also applies to extraordinary rendition and numerous provisions prohibit various phases of extraordinary rendition.²⁵⁰ The ICCPR, for example, prohibits torture and cruel, inhumane and degrading treatment

²⁴² Satterthwaite (2004) 1387. Assurances can be obtained if the individual fears that he may be tortured. After the Secretary of State has obtained assurances the individual may be surrendered subject to certain conditions (there is no indication what the 'conditions' would entail).

²⁴³ *Alzery v Sweden* (2006) Human Rights Committee CCPR/C/88/D/1416/2005.

²⁴⁴ Mr Agiza and Mr Alzery were on the same CIA plane. *Alzery* (2006) par 11.5, cf. Satterthwaite (2007) 1383-1384.

²⁴⁵ *Alzery* (2006) par 11.5.

²⁴⁶ *Agiza v Sweden* (2005) Committee against Torture CAT/C/34/D/233/2003.

²⁴⁷ *Agiza* (2005) par 4.12 (cf. Satterthwaite (2007) 1382).

²⁴⁸ *Agiza* (2005) par 4.12, 10.2 (cf. Satterthwaite (2007) 1382).

²⁴⁹ *Agiza* (2005) par 13.7 and 14 (cf. Satterthwaite (2007) 1382).

²⁵⁰ As explained in chapter 2, extraordinary rendition is not merely one wrongful act but rather an entire process with various intricate phases that all violate numerous international rules and regulations.

or punishment.²⁵¹ The UN Human Rights Committee (UN HRC) states that this is an absolute right and there can be no derogation from it in any circumstance.²⁵² The UN HRC also interpreted the torture prohibition in the ICCPR to include the non-refoulement rule,²⁵³ citing the *Soering* case as motivation.²⁵⁴

It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).²⁵⁵

Although all anti-torture norms apply to extraordinary rendition the non-refoulement rule is the most important as it prohibits the transfer of individuals to countries where they face torture.²⁵⁶ Since the US transfers individuals to foreign governments for

²⁵¹ Article 7 of the ICCPR. This article also states that no one shall be subjected to medical or scientific experimentation without his consent.

²⁵² "General comment no. 20: Replaces general comment 7 concerning prohibition on torture and cruel treatment or punishment (Art.7): 03/10/1992 CCPR general comment no. 20" (1992) *Office of the High Commissioner for Human Rights* available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5) at par 3 (hereafter referred to as "UN Human Rights Committee Comment 20") which states: "The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."

²⁵³ Paragraph 9 of the UN Human Rights Committee Comment 20 specifically calls upon states not to "expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end." The following conventions also support the non-refoulement rule: Article 33(1) of the RC which states "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, and article 3(1) of CAT. Cf. Sadat (2007) 1223, Sadat (2006) 322.

²⁵⁴ *Soering* (1989) ECHR, in which the European Convention of Human Rights was interpreted. Cf. Satterthwaite (2007) 1358.

²⁵⁵ *Soering* (1989) par 88.

²⁵⁶ Satterthwaite (2007) 1355.

interrogation²⁵⁷ in order to avoid accountability this rule is of specific importance.²⁵⁸ However, the US disagreed with this comment in its totality and argued that the only non-refoulement obligation they have to adhere to is the one contained in CAT.²⁵⁹

The reason for their objection is that article 3 of CAT only relates to torture whereas article 7 of the ICCPR includes cruel, inhumane and degrading treatment. The US therefore argues that the comment by the UN HRC unreasonably extended US responsibility under the ICCPR,²⁶⁰ by forcing it to apply the non-refoulement rule to cases of cruel, inhumane and degrading treatment too. In response the US maintained that all human-rights treaties they are signatory to (including CAT and the ICCPR) have no extraterritorial application and therefore the non-refoulement rule contained therein cannot apply to transfers originating outside of US territory in any circumstance.²⁶¹

However, the UN HRC has developed a doctrine of extraterritorial application in terms of article 2 of the ICCPR.²⁶² Article 2(1) of the ICCPR states:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...”

The UN HRC interprets “within its territory and subject to its jurisdiction” as “within its territory *or* subject to its jurisdiction”.²⁶³ Therefore the convention applies to any individual within US territory and any individual who is merely subject to its jurisdiction.²⁶⁴ The US, on the other hand, argues that “within its jurisdiction” was

²⁵⁷ Which interrogation can come down to torture or cruel, inhumane and degrading treatment? This is discussed in paragraph 3.5 below.

²⁵⁸ The US tries to avoid the application of the non-refoulement rule for transfers that originate outside US territory, but this is exploitive and not in line with the objects and purposes of human rights law. Cf. Satterthwaite (2007) 1378.

²⁵⁹ Satterthwaite (2007) 1357-3158.

²⁶⁰ Satterthwaite (2007) 1358.

²⁶¹ Satterthwaite (2007) 1352.

²⁶² Satterthwaite (2007) 1358.

²⁶³ Satterthwaite (2007) 1359.

²⁶⁴ Satterthwaite (2007) 1359. Cf. Meron T “Extraterritoriality of human rights treaties” 89 1995 *American Journal of International Law* 79 where the author says that “[t]he legislative history of Article 2(1) does not support a narrow territorial construction. The leading study by Professor Buergenthal, now a member of the United Nations Human Rights Committee, argues that Article 2(1) should be read so that each party would have assumed the obligation to respect and ensure the rights recognized in the Covenant both ‘to all individuals within its territory’ and ‘to all individuals subject to

added to the convention by the US when the convention was adopted in 1950 specifically to limit the scope of application so that a person needs to be within the state's territory and subject to its jurisdiction, therefore there is an explicit agreement that it has no extraterritorial application.²⁶⁵ The UN HRC does not share this view,²⁶⁶ and in 2006 it recommended that the US must recognise the application of the ICCPR on all individuals under its jurisdiction but outside of its territory.²⁶⁷ It concluded that article 2 cannot be used to avoid accountability for violations committed outside of its territory.²⁶⁸

The ICCPR also prohibits arbitrary detention²⁶⁹ and states that an arrested person has the right to challenge the validity of his detention.²⁷⁰

Unfortunately the ICCPR does not specifically condemn forced disappearances²⁷¹ but the UN HRC condemned it under article 7, 9 and 10(1) of the ICCPR.²⁷² Under the Rome Statute of the International Criminal Court it is also a crime against humanity.²⁷³

3.2 Secret facilities and arbitrary detention

After 9/11 the CIA was given the authority to transport individuals, who they suspected were terrorists, to foreign governments for interrogation without the prior approval of the US Department of Justice.²⁷⁴ Since 2006 reports have circulated that

its jurisdiction." This interpretation has almost never been questioned and has long ceased to be the preserve of scholars; it has obtained the imprimatur of the UN HRC and UN rapporteurs.

²⁶⁵ J Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency (2005) *US Department of Justice Office of the Legal Counsel Doc 20530* (hereafter referred to as "the John Rizzo Memo") 120 – 121. The CIA confirmed that torture does not take place in the US. Satterthwaite (2007) 1359-1361.

²⁶⁶ Satterthwaite (2007) 1359-1361.

²⁶⁷ Satterthwaite (2007) 1363.

²⁶⁸ Satterthwaite (2007) 1364. The International Court of justice agreed with this opinion.

²⁶⁹ Artic Satterthwaite (2007) 1352.

²⁷⁰ Article 9(4): "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

²⁷¹ The writer confirms that extraordinary rendition is not to be interpreted as an "enforced disappearance" or a "forced disappearance". Extraordinary rendition is a hybrid theory it needs to be defined and criminalised in its own right. Therefore, for purposes of this thesis a "forced disappearance" will only refer to the act of capturing an individual and detaining him against his will in order to affect his transfer to an unknown location.

²⁷² Sadat (2007) 1224.

²⁷³ Article 7(1) (i) of the ICC Statute.

²⁷⁴ Satterthwaite (2007) 1344.

detainees, captured in the GWOT, were being held at Guantanamo Bay, Abu Ghraib prison in Iraq, Bagram Air Force base in Afghanistan and that some were even being held at sea.²⁷⁵ It has also been reported that 70%-90% of the detainees at the Abu Ghraib facility in Iraq were arrested in error.²⁷⁶

In 2006 the UN Human Rights Committee issued a report in which the US was ordered to cease its practice of secret detentions.²⁷⁷ And in 2007 Rapporteur Dick Marty (appointed by the Commission on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe) concluded in his report that CIA secret detention facilities also existed in Europe and that unlawful transfers had taken place in Europe.²⁷⁸ Upon this discovery he reminded European countries that they had a responsibility not to host secret detention facilities within their territories, and not to allow individuals to be transferred to facilities where they could be subjected to torture.²⁷⁹ He cautioned further, in this regard, that secret detention of individuals enhanced their risk of subjection to ill treatment.²⁸⁰

779 detainees were held at Guantanamo Bay since 2002 under both the Bush and Obama administrations.²⁸¹ By February 2013 the military commission had only dealt

²⁷⁵ Sadat (2006) 309.

²⁷⁶ "Report of the International Committee of the Red Cross (ICRC) on the treatment by the coalition forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation" (8 February 2004) at 8 available at <http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf>, where the report states that "certain CF military intelligence officers told the ICRC that in their estimate between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake. The also attributed the brutality of some arrests to the lack of proper supervision of battle group units." Cf. Smith C "Algerian tells of dark term in US hands" (7 July 2006) *New York Times Online* available at http://www.nytimes.com/2006/07/07/world/africa/07algeria.html?pagewanted=all&_r=0. Mr Saidi was strapped with a diaper after capture, an object was inserted anally and he was tortured. It later emerged that he was captured because the CIA intercepted a phone call in which they thought he was talking about "planes", but it was later verified that he had in fact been talking about "tires", cf. Sadat (2007) 1245, Eppinger M "Reality check: Detention in the war on terror" 62 2013 *Catholic University Law Review* 325 at 355-356.

²⁷⁷ Sadat (2007) 1224.

²⁷⁸ Marty (2007) par 1 and 2. An interim report was also published in 2006 prior to the second report of 2007. Cf. Marty D "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states" (27 June 2006) *Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights* available at http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf, cf. Satterthwaite (2007) 1349.

²⁷⁹ Satterthwaite (2007) 1349.

²⁸⁰ ICRC Report (2007) 24.

²⁸¹ This number does not include the 3200 detainees still held in Afghanistan who have yet to face court or military commission proceedings. Cf. Eppinger (2013) 332. The US and its allies are still holding detainees at detention facilities in Parwan and other field detention sites. The population of

with 16 detainees at Guantanamo Bay. Of these 7 were convicted, 6 were charged and 3 were sentenced.²⁸² Orders for the release of 21 detainees were issued in December 2013, and the military commission has dealt with 49 detainees of the above-mentioned total population of 779.²⁸³ Periodic review boards have also come into being that assess the continued incarceration of detainees on putative grounds of national security and legality issues.²⁸⁴

The US practices three forms of detention as part of the GWOT: Criminal detention, preventive detention, and interrogative detention for national security purposes.²⁸⁵ Detainees who have already committed hostile acts of a criminal nature must stand trial for their actions and are accordingly subjected to criminal detention.²⁸⁶ The goal

field sites and the number of field sites and their locations are not publicly known. Cf. in general “Detained and denied in Afghanistan: How to make US detention comply with the law” (2011) *Human Rights First* available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf>. In March 2012 the US signed a Memorandum of Understanding with Afghanistan in which they agreed to transfer management of the detention facility in Parwan to Afghanistan. On 28 March 2012, in accordance with the MOU, Afghanistan appointed a Commander of Detention for Parwan. However, it was agreed that the US will retain responsibility for the detainees, under law, during the processing and transfer periods. (which may not last longer than six months). Afghanistan also agreed to consult with the US before a detainee is released and if the US argues that the detainee should not be released for National Security reasons Afghanistan has to favourably consider the recommendation by the US. There will be no formal trial or military commission proceedings for these detainees. There are two issues with the MOU between the US and Afghanistan: What happens to the detainees that were transferred to Parwan from third countries? The MOU specifically limits the contents of the agreement to Afghan nationals. Who has decision making authority? Afghanistan is compelled to favourably consider US recommendation on the release of detainees. Cf. “Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghan Soil of 2012” available at http://www.isaf.nato.int/images/20120408_01_memo.pdf, cf. Eppinger (2013) 334-335, 352.

²⁸²Eppinger (2013) 330. Cf. “By the numbers” (08-12-2013) *Miami Herald Online* available at <http://www.miamiherald.com/2013/08/12/v-fullstory/322461/by-the-numbers.html> which give a detailed account of the detainee status at Guantanamo Bay. It is regularly updated. According to this study 162 detainees from 23 countries remain at Guantanamo Bay. Detainees are aged between 27 (being the youngest detainee) to 66 (being the eldest detainee). There are currently 46 detainees that are now designated for indefinite detention. Cf. “The Guantanamo Docket” (5 December 2013) *The New York Times Online* available at <http://projects.nytimes.com/guantanamo> which is also a statistical account of the detainees at Guantanamo Bay which is also regularly updated.

²⁸³As of 20 December 2014, 132 of the 780 detainees at Guantanamo still remain. 639 were transferred, of which 220 were sent to Afghanistan. “The Guantanamo Docket” (20 December 2014) *The New York Times Online* available at <http://projects.nytimes.com/guantanamo>. The amount of detainees transferred to Afghanistan is troubling considering the hold the US has on the continuous detention of the detainees in accordance with the MOU of 2012 as discussed in footnote 87 above. “By the numbers” (8 December 2013) *Miami Herald Online* available at <http://www.miamiherald.com/2013/08/12/v-fullstory/322461/by-the-numbers.html>. The latter site updated regularly and recent updates (December 2014) show that the Military Commission has only convicted 8 detainees. cf. Eppinger (2013) 331, cf. “The Guantanamo Docket” (5 December 2013) *The New York Times Online* available at <http://projects.nytimes.com/guantanamo>.

²⁸⁴Eppinger (2013) 332.

²⁸⁵Eppinger (2013) 328.

²⁸⁶Eppinger (2013) 328.

of preventive detention is to treat the detainee as a prisoner of war, thus rendering him *hors de combat* in order to thwart further terrorist activities or hostile acts from that quarter.²⁸⁷ The US used interrogative detention as a tool to gain information from high-value detainees after the 9/11 attacks. Guantanamo Bay was designated an interrogation facility for high-value detainees and the military was informed not to send low-level detainees to Guantanamo Bay for interrogation.²⁸⁸

The executive branch of the US government denied federal jurisdiction for civilian and military detainees and denied that they could file a writ of *habeas corpus*. Grounds offered for this position were that military tribunals had been established for such purposes.²⁸⁹ However, in *Boumediene v Bush*²⁹⁰ the court held that the detainees at Guantanamo Bay had a constitutional and statutory right to file a writ of *habeas corpus*.²⁹¹ In *Rasul v Bush*²⁹² the court also held that federal courts had the jurisdiction to hear *habeas corpus* applications from detainees held at Guantanamo Bay.²⁹³ The Bush administration responded by creating the least law alternative.²⁹⁴

In 2007 the ICRC reported that it had finally been granted access to detainees. This was a concession the ICRC had been requesting since 2003. Fourteen high value detainees (HVDs) were arrested in 4 different countries by police or security forces employed by the countries concerned.²⁹⁵ They were kept in the countries where they had been arrested, for periods ranging from a few days to one month²⁹⁶ before being moved to facilities in other countries for the third and sometimes even more times. According to the ICRC Report some detainees claimed that they had been interrogated by US agents or agents employed by the countries where they were

²⁸⁷ Eppinger (2013) 348-349. Normally preventative detention is not meant to be indefinite and detainees are to be released as soon as hostilities end. However, the US argues that the GWOT can last indefinitely and therefore detention would also be indefinite.

²⁸⁸ Eppinger (2013) 353-354.

²⁸⁹ Eppinger (2013) 329-330. This was the reason the Bush administration chose Guantanamo Bay as detention facility. In justification it was argued that the *habeas corpus* and substantive constitutional rights did not apply to US non-citizens outside the US. Cf. Alexander (2013) 557-588.

²⁹⁰ *Boumediene v Bush* (2008) 553 US 723.

²⁹¹ *Boumediene* (2008) 771, 795 (cf. Alexander (2013) 568).

²⁹² *Rasul v Bush* (2004) 542 U.S. 466.

²⁹³ *Rasul* (2004) 466.

²⁹⁴ Refer to paragraph 3.1 above.

²⁹⁵ ICRC Report (2007) 6.

²⁹⁶ ICRC Report (2007) 6.

held, but regardless of where the facility was, it seemed to be under US control.²⁹⁷ During the transfer procedure the detainees were photographed naked and clothed by turns before and after transfer. Rectal examinations were performed and some detainees claimed that suppositories were inserted but they were not informed of the effect of the suppositories. They were blindfolded,²⁹⁸ shackled,²⁹⁹ and made to wear diapers.³⁰⁰

Some detainees said they were held in Guantanamo Bay between 2002-2003.³⁰¹ However the ICRC, which was in attendance at the time, maintained that the story it was fed that it had access to detainees was untrue.³⁰² Incarceration of the detainees at issue lasted from 16 months to four years in solitary confinement with no access to the outside world, or even to anyone except the guards,³⁰³ the interrogators and other detainees held for interrogation.³⁰⁴ They had no idea where they were.³⁰⁵ They had no access to legal representation or their families, and were even denied access to the ICRC.³⁰⁶

There is no clear procedure for arrest during extraordinary renditions and no opportunity is provided to contest the detention, therefore individuals subjected to it are often detained indefinitely.³⁰⁷ Most Guantanamo Bay prisoners are set to be held indefinitely, and some are to be tried for war crimes due to their involvement in the 9/11 attacks.³⁰⁸ The international human rights laws that apply to extraordinary

²⁹⁷ ICRC Report (2007) 6.

²⁹⁸ With black cloth and goggles. One of the detainees, Mr Zubaydah said that his blindfold was so tight it caused injuries to his ears and nose and that his transfer had taken 24-30 hours. The journey times of the fourteen detainees varied. Cf. ICRC Report (2007) 6.

²⁹⁹ Their feet and hands were shackled when they were taken to the airport. In some cases the detainees reported that their hands were shackled behind their backs and they were made to lie supine which caused severe pain and discomfort. Cf. ICRC Report (2007) 6.

³⁰⁰ They were not allowed to use the restrooms and had to urinate and defecate in the diaper. Cf. ICRC Report (2007) 6.

³⁰¹ ICRC Report (2007) 7.

³⁰² ICRC Report (2007) 7.

³⁰³ Even the guards were masked and communicated with them to the absolute minimum. Cf. ICRC Report (2007) 8.

³⁰⁴ Some detainees reported that they started receiving sports news and newspapers. Cf. ICRC Report (2007) 8.

³⁰⁵ ICRC Report (2007) 8.

³⁰⁶ ICRC Report (2007) 8.

³⁰⁷ Sadat (2007) 1226.

³⁰⁸ Jaffer J "Known unknowns" 48 2013 *Harvard Civil Rights-Civil Liberties Law Review* 457 at 457.

rendition include prohibition of arbitrary detention and denial of due process and the right to challenge putative grounds for the detention.³⁰⁹

3.3 Lack of accountability and transparency

In 2005 it became known that the CIA was operating prisons in so-called “black sites”³¹⁰ that had been erected to evade exercise of the rule of law by ensuring that captives were beyond the pale of any judicial system.³¹¹ Not even the ICRC, a neutral humanitarian aid group, had contact with the detainees,³¹² who were moved around constantly to keep them out of sight and thus thwart efforts to trace them and ensure that they received just treatment at the hands of their captors.

During 2005 prisoners were moved from CIA prisons in Europe before Condoleezza Rice arrived to inspect the conditions in the prisons on the same day.³¹³ The CIA also owns various shell corporations that have no employees and no other purpose than putative ownership registered as Aero Contractors Ltd of aircrafts used to ferry detainees to secret detention facilities.³¹⁴ The airplanes are owned by the front company Aero Contractors Ltd. These planes also transport CIA operatives overseas once HVDs have been captured and the presence of said operatives is urgently required. The planes typically depart from Johnston County and land at Dulles Airport outside Washington DC to pick up the operatives.³¹⁵

In their actions as part of the GWOT the US aimed to manipulate the legal system in order to create a law-free zone where no perpetrator can be held accountable for its actions.³¹⁶ The US has captured, detained and subjected persons to torture on vapid

³⁰⁹ Satterthwaite (2007) 1354.

³¹⁰ Priest (2 November 2005); see also Cassel “Washington’s ‘war against terrorism’ and human rights: The view from abroad” 33 2006 *Human Rights* 11-12.

³¹¹ Alexander (2013) 551, Sadat (2007) 1226.

³¹² Satterthwaite (2006-2007), cf. Sepper (2006) 1806.

³¹³ Ross B and Esposito R “Exclusive: Sources tell ABC News top Al Qaeda figures held in secret CIA prisons” (5 December 2005) *ABC News* <http://abcnews.go.com/WNT/Investigation/story?id=1375123>.

³¹⁴ Satterthwaite (2007) 1345-1346.

³¹⁵ Shane S “C.I.A. expanding terror battle under guise of charter flights” (31 May 2005) *The New York Times* A1.

³¹⁶ Sadat (2007) 1226. A CIA official also reportedly stated that ““We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.” Cf. Priest D Gellman B “U.S. decries abuse but defends interrogations” (26 December 2002) *The Washington Post* available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html>.

to non-existent evidence beyond bland claims that they were suspected of terrorist activity and had been detained as part of the GWOT.³¹⁷

Purported diplomatic assurances are without legal substance because the nefarious actions of extraordinary rendition are conducted in secrecy.³¹⁸ The individual's interests are disregarded because the sending and receiving states both have a vested interest in keeping the rendition secret.³¹⁹ The US wants to keep its illegal activities *vis-a-vis* putative suspected terrorists secret while the receiving state does not want its collusion with the US and its violation of its non-refoulement obligations to become public knowledge.³²⁰

The fact that black sites are commonly known to exist and that CIA front companies provide aircraft for the transfer of detainees is immaterial in itself unless the US government officially admits to these activities.³²¹

In 2003 Abu Omar was illegally captured in Italy and transferred to Egypt via Germany.³²² The Italian government brought charges against, amongst others, 25 CIA operatives for the illegal capturing and subsequent transfer of Abu Omar from Italian soil.³²³ In a public statement Human Rights Watch expressed deep concern and disappointment in the US government for not prosecuting officials for their involvement in extraordinary renditions.³²⁴ Andrea Prasow, a senior counterterrorism counsel for Human Rights Watch said that “the Obama administration should take the Italian ruling as a signal that other countries will not let US officials off the hook for torture and illegal rendition.”³²⁵ She went even further to state that “US officials should be deeply embarrassed that the Italian government had the courage to do what the Obama administration has not – hold people accountable for torture, Abu

³¹⁷ Sadat (2007) 1211.

³¹⁸ Satterthwaite (2004) 1393.

³¹⁹ Satterthwaite (2004) 1393.

³²⁰ Satterthwaite (2004) 1393.

³²¹ Jaffer (2013) 470.

³²² Pianigiani G “ Italy jails e-officials for rendition” (12 February 2013) *New York Times Online* available at <http://www.nytimes.com/2013/02/13/world/europe/former-italian-military-officials-sentenced-in-abduction-of-abu-omar.html>, “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012) *Human Rights Watch Online* found at <http://www.hrw.org/news/2012/09/20/italyus-ruling-cia-case-highlights-us-inaction>.

³²³ Pianigiani (12 February 2013).

³²⁴ “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012).

³²⁵ “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012).

Omar is just one of many victims of the CIA's rendition program, and there are many other cases that need to be investigated."³²⁶ According to Human Rights Watch the US Attorney General, Eric Holder, confirmed on 30 August 2012 that the one criminal investigation opened to investigate alleged abuses of detainees in CIA custody would be closed.³²⁷

Obama's memos detailing CIA interrogation methods under the Bush administration was a public admission in that regard.³²⁸ However the façade of secrecy at Guantanamo Bay is still upheld in order to avoid accountability.³²⁹ The US government is attempting to avoid the official acknowledgement doctrine (OAD),³³⁰ through which facts that are publicly known are distinguished from facts that the government has expressly confirmed.³³¹ The US uses the OAD to justify dismissal of suits and denial of public access to judicial records and hearings on grounds of the putative demands for state secrecy.³³²

The court is inclined to accept the OAD and regularly sides with the government in its failure to hold the US government accountable for the actions to which it resorts in its claimed pursuit of the GWOT, even when there are media accounts and witness

³²⁶ "Italy/US: Ruling on CIA case highlights US inaction" (20 September 2012). Also see recent updates from Human Rights Watch: "The CIA torturers should be prosecuted" (13 December 2014) available at <http://www.hrw.org/news/2014/12/13/cia-torturers-should-be-prosecuted>, "US: Senate report slams CIA torture, lies" (10 December 2014) available at <http://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies>, "US: Release torture report" (6 December 2014) <http://www.hrw.org/news/2014/12/06/us-release-torture-report>, "Torture still unaddressed" (17 December 2014) available at <http://www.hrw.org/news/2014/12/17/torture-still-unaddressed>.

³²⁷ "Italy/US: Ruling on CIA case highlights US inaction" (20 September 2012).

³²⁸ Jaffer (2013) 459.

³²⁹ The US government wants to avoid answering to courts and the public. Jaffer (2013) 459.

³³⁰ This doctrine was discussed in *Alfred A. Knopf Inc. et al v Colby et al* (1975) 509 F.2d 1362 at 1370 where the court held: "The District Judge properly held that classified information obtained by the CIA or the State Department was not in the public domain unless there had been official disclosure of it...Rumours and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so."

³³¹ Jaffer (2013).

³³² I.e. the American Civil Liberties Union requested access to transcripts of proceeding regarding prisoners held at black sites. The US government granted the transcripts but omitted the photographs detailing the treatment of the detainees. The US cannot afford to grant access to the photographs because that will confirm that the US did in fact use torture methods on the detainees. Cf. Jagger (2013) 462.

accounts from senior government officials which corroborate all the rumours.³³³ This was the case in *American Civil Liberties Union v Department of Justice*³³⁴ which dealt with the CIA's disclosure of the existence or non-existence of drones used for targeted killing. The court held that public knowledge cannot in itself be construed as a guarantee that confirmation by the CIA of such public knowledge would not harm the CIA as an institution.³³⁵ The court further held that disclosure of protected information by senior government officials does not amount to official disclosure of such information.³³⁶ The court stated in conclusion that "The CIA has met its burden of showing that the release of any acknowledgment of responsive records could damage national security; FOIA 'bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods.'"³³⁷

Courts in the US adopt the strictest possible approach to official acknowledgment, requiring the minutest match between public knowledge and the version of that knowledge held by government as classified information.³³⁸

During court proceedings the US invokes various national security privileges to protect information regarding the CIA's black sites and the details of prisoner interrogation.³³⁹

The US government's refusal to admit publicly to its activities around the handling of detainees held in virtue of the war on terror is attended by the intractable difficulty that it impairs transparency and gives government officials a basis for refusing to

³³³ *Mohamed v Jeppesen Dataplan Inc.* (2010) 614 F.3d 1070 at 2090 where the court quoted a judgment which stated that information disclosed by government officials can be prejudicial to government interests even if the information has already become public knowledge through the divulgence thereof by non-governmental sources, *Fitzgibbon v Central Intelligence Agency* (1990) 911 F.2d 755 at 766 where the court held that merely because information is in the public domain does not mean that the disclosure of further information would not harm intelligence sources. It went further to hold that merely because the CIA chose to disclose certain information does not mean they can be forced to disclose further information. Cf. Jaffer (2013) 467.

³³⁴ *American Civil Liberties Union v Department of Justice* (2011) 808, F.Supp.2d 280.

³³⁵ *American Civil Liberties Union* (2011) 300.

³³⁶ *American Civil Liberties Union* (2011) 300.

³³⁷ *American Civil Liberties Union* (2011) 300.

³³⁸ Jaffer (2013) 467.

³³⁹ Jaffer (2013) 460-461. Information about National Security surveillance activities, FBI infiltration of mosques and drone attacks is also kept classified.

answer certain question or to only give limited disclosure.³⁴⁰ This is proven by the military commission's court proceedings at Guantanamo Bay. Detainees at that centre are tried before a Military Commission at "Camp Justice"³⁴¹ instead of a normal criminal court.³⁴² Camp Justice has a floor-to-ceiling soundproof glass partition between the court proceedings and the public gallery.³⁴³ The public can hear the proceedings through an audio feed which is managed by a security official seated next to the judge, tasked with transmitting a white noise through the feed if the content of the proceedings are perceived to contain classified information.³⁴⁴ The audio feed can be delayed for up to 40 seconds.³⁴⁵ Therefore, no testimony regarding the treatment of detainees can be heard by the public.³⁴⁶ Some of these prisoners were held in black sites³⁴⁷ and subjected to torture, but observers could not listen to their testimony as a result of a court order that prevented it.³⁴⁸

³⁴⁰ Jaffer (2013) 4870.

³⁴¹ The facility where the detainees are tried is called "camp justice". Cf. Jaffer (2013) 458.

³⁴² Jaffer (2013) 457-459.

³⁴³ The official website of the US Military Commissions provides images of the courtroom at <http://www.mc.mil/FACILITIESSERVICES/Facilities/Courtrooms/CourtroomII.aspx>, Jaffer (2013) 457.

³⁴⁴ "United States of America v Khalid Shaikh Mohammad, Walio Muhammad Salih, Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, Mustafa Ahmed Adama Alhawsawi Protective Order 1: To protect against disclosure of National Security Information Military Commissions Trial Judiciary Guantanamo Bay, Cuba AE 013P" (hereafter referred to as "Military Commissions Protective Order") available at https://www.aclu.org/files/assets/gitmo_protective_order.pdf at par 3(c) – (d) where it is explained that the Court Security Officer (CSO) and the Assistant Court Security Officer (ACSO) are tasked with ensuring that all classified information is safeguarded during Commission proceedings, and that only personnel with the appropriate security clearance would appear before the Military Commissions.

³⁴⁵ A detailed description of court proceedings is provided on the official website of the US Military Commissions at <http://www.mc.mil/FACILITIESSERVICES/Facilities/Courtrooms/CourtroomII.aspx>, cf. Jaffer (2013) 458.

³⁴⁶ Rosenberg C "Strange censorship episode at Guantanamo enrages judge" (28 January 2013) *Miami Herald* available at <http://www.miamiherald.com/2013/01/28/3205391/strange-censorship-episode-at.html> in which the author describes a bizarre episode of censorship on the audio feed. After the judge expressed his repugnance at the incident, the defence team for the Pentagon confirmed that they knew who inadvertently censored the audio feed and stated that she could not indicate to the judge, in open court, who the originator of the order had been or why it had been censored. Some of the detainees on trial had been held in black sites and subjected to torture, but, clearly for that very reason, the audio feed was censored to prevent its location and the facts about the torture visited upon detainees held there from becoming known. Cf. Jaffer (2013) 458.

³⁴⁷ President Bush made the statement that these detainees were being transferred overseas from CIA prisons. This was the first time the US government publicly admitted to the existence of secret CIA detention facilities. Cf. Karl J "'High-value' detainees transferred to Guantanamo" (6 September 2006) *ABC News.Com Online* available at <http://abcnews.go.com/International/story?id=2400470>, Jaffer (2013) 458.

³⁴⁸ The protective order also stated that no member of the defence team or any of the defence witnesses would be allowed to access classified information without the consent of the US government. Cf. Military Commissions Protective Order par 5.

The US government constantly maintains a defensive shield around its actions to avoid accountability.³⁴⁹ When Canada launched an inquiry into the actions of Canadian officials in the matter of Maher Arar's detention the US refused to cooperate.³⁵⁰ It adopted the same position when investigations into CIA black sites in Poland were conducted.³⁵¹ Similarly, Hillary Clinton was requested to intervene when the UK wanted to publish reportage on CIA involvement in the torture of Binyam Mohammed.³⁵²

The European Parliament released a report in 2007³⁵³ in which it examined cases where European airspace was used to assist the CIA with extraordinary renditions. It confirmed that over 1200 CIA flights had flown through European airspace, or had stopped over at European airports, from 2001-2005.³⁵⁴ The said Parliament expressed regret that European countries were relinquishing control over their airspace and airports by turning a blind eye or allowing CIA extraordinary-rendition flights to land and/or take off from their airports,³⁵⁵ And it therefore called upon states to do more to investigate extraordinary rendition.³⁵⁶

³⁴⁹ Jaffer (2013) 471.

³⁵⁰ Report of the events relating to Maher Arar" (2006) *Commission of Inquiry into the actions of Canadian Officials in relation to Maher Arar* available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf. at 12, *vide* footnote that the US, Syria and Jordan declined to give evidence or to participate in the hearings. Cf. Jaffer (2013) 471.

³⁵¹ Berendt J "Polish ex-official charged with aiding C.I.A." (27 March 2012) *The New York Times Online* available at <http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html> where it states that President Obama declined calls for investigations into C.I.A. interrogations under the Bush administration. President Obama said that he wanted to "look forward, as opposed to looking backward." The Appellate Prosecutor in Warsaw writes in a published letter to the Helinski Foundation for Human Rights: "On 18 March 2009 Appellate Prosecutor Office in Warsaw submitted a legal assistance request to American judicial authorities regarding the investigation. On 7 October 2009 the American Department of Justice informed us that under art. 3(1) (c) of the Mutual Legal Assistance in Criminal Matters Agreement the request was case to be closed. The content of the request is covered by the investigation's secrecy." Cf. "Letter from Appellate Prosecutor Office in Warsaw to the Helinski Foundation of Human Rights" (2010) available at <http://www.interights.org/userfiles/Documents/20101215ProsecutorLettertoHFHRRReFOIEnglish.pdf>, cf. Jaffer (2013) 471.

³⁵² Norton-Taylor R "Clinton moved to halt disclosure of C.I.A. torture evidence, court hold" (29 July 2009) *The Guardian* available at <http://www.theguardian.com/world/2009/jul/29/binyam-mohamed-cia-torture>, cf. Jaffer (2013) 471.

³⁵³ Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (30 January 2007) *European Parliament Final Report A6-0020/2007* (hereafter referred to as "European Parliament Report of 2007").

³⁵⁴ European Parliament Report of 2007 par 42.

³⁵⁵ European Parliament Report of 2007 par 40 and 43.

³⁵⁶ See in general: European Parliament Report of 2007, Eppinger (2013) 355-356.

3.4 Violation of state sovereignty

The Declaration on the Rights and Duties of States³⁵⁷ speaks to state sovereignty and all it encompasses.³⁵⁸ State sovereignty is the inherent right of every state to organise and conduct its own affairs without interference from, or restrictions imposed on them by other states.³⁵⁹ This matter was addressed in *Government of the French Republic v Government of the Turkish Republic*³⁶⁰ (the *Lotus* case) where the court pronounced on the issue of inroads on states' sovereignty. It stated that international law governs the relations between states,³⁶¹ but that the rules of law which are binding on states result from a state's own free will to adhere to such rules of law, either by signing conventions to that effect, or through state practices that have achieved international customary law status.³⁶² It cannot therefore be presumed that states are subject to the imposition of restrictions on them.³⁶³

Each state also has the right to exercise all its legal powers freely, which includes the right to choose its own form of government³⁶⁴ and to exercise effective jurisdiction over its territory and all persons within its jurisdiction.³⁶⁵ States have a duty not to interfere in the affairs of other states or adjudicate in legal matters in such states.³⁶⁶ This principle follows in virtue of the sovereign equality of states,³⁶⁷ as

³⁵⁷ The Draft Declaration on the Rights and Duties of States of 1949 (hereafter referred to as "the Declaration on the Rights and Duties of States").

³⁵⁸ Shaw (2008) 211, article 1 – 14 of the Declaration on the Rights and Duties of States.

³⁵⁹ Article 1 of the Declaration on the Rights and Duties of States.

³⁶⁰ *The Government of the French Republic v The Government of the Turkish Republic: The Case of the S.S. Lotus* (hereafter referred to as "the *Lotus* case") (1927) Series A No 10 Permanent Court of International Justice 2. A French and a Turkish ship collided on the high seas. The collision caused the death of eight Turkish nationals. Upon docking on Turkish shores, the Turkish authorities took the captain of the French vessel into custody and brought criminal charges against him under Turkish law. France objected, stating that Turkey had no jurisdiction over the matter. The court held that Turkey had jurisdiction to bring criminal proceedings against the French captain because of the death of eight of its nationals and the physical presence of the French captain in its territory (cf. 10, 31-32).

³⁶¹ *Lotus* case (1927) 18.

³⁶² *Lotus* case (1927) 18. This view was shared by the court in *Nicaragua v United States of America* (1986) ICJ Reports 14 at 135, in token of which it held that there were no rules of international law that could limit the level of weaponry maintained by a sovereign state, unless such rules had gained acceptance by that state. The court asserted that this rule applied to all states "without exception".

³⁶³ *Lotus* case (1927) 18.

³⁶⁴ Article 1 of the Declaration on the Rights and Duties of States.

³⁶⁵ Subject to certain exclusions and immunities granted under international law (see article 2 of the Declaration on the Rights and Duties of States).

³⁶⁶ Article 3 of the Declaration on the Rights and Duties of States. Also see the *Corfu Channel Case* (9 April 1949) ICJ Reports 4 at 35 where the court confirmed that respect for territorial sovereignty between independent states is an "essential foundation of international relations."

³⁶⁷ Article 2(1) of the UN Charter confirms that the UN is based on the principle of the sovereign equality of states. Article 2(7) of the UN Charter also states that the UN cannot intervene in matters

confirmed in terms of the Declaration on International Law concerning Friendly Relations between States³⁶⁸ as follows:

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.³⁶⁹

It follows that political or economic dependence of one state on another has no effect on the dependent state's inherent sovereignty which can only be affected by coercion, such as armed intervention and occupation of one state by another.³⁷⁰

State sovereignty is protected by international law, which therefore also dictates the conditions, including the limits, which rule its existence.³⁷¹ The conditions and limits of state sovereignty are: A state has the right to exercise jurisdiction over its territory and its permanent population and the right to armed defence of its territorial integrity in certain circumstances. It does not have the right to interfere in the internal affairs of other states, however,³⁷² except when they violate basic human rights and fundamentals of human existence within the bounds of their territories, in which case other states do have the right to encroach upon their sovereignty.³⁷³ Likewise, if certain human-rights principles have been established in a treaty responsibility *erga omnes* may result for the affected states.³⁷⁴

that are within the domestic jurisdiction of states, and therefore the UN also needs to respect state sovereignty.

³⁶⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operations among States in accordance with the Charter of the United Nations of 1970 (hereafter referred to as "the Declaration on International Law concerning Friendly Relations between States").

³⁶⁹ Preamble to the Declaration on International Law concerning Friendly Relations between States. The preamble is yet another affirmation of the sovereign equality of states: "Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,".

³⁷⁰ Shaw (2008) 211, cf. *Lotus* case (1927) 18 where the court held a state "may not exercise its power in any form in the territory of another state."

³⁷¹ Shaw (2008) 212.

³⁷² Shaw (2008) 212.

³⁷³ Shaw (2008) 272. There are certain rights that cannot be violated by states, even in times of war. These rights have gained the sanction of international customary law and include the prohibition against torture, which is irrevocable [cf. Shaw (2008) 275].

³⁷⁴ Shaw (2008) 275.

It follows, therefore, that states cannot enforce adherence to their national laws within the territorial bounds of other states unless it be with the express consent (bar a treaty) of the states subjected to such visitation.³⁷⁵ It seems that cooperative arrangements may be considered tantamount to adequate consent, a case in point being *Öcalan v Turkey*³⁷⁶ where the applicant contended that his arrest by Turkish officials on Kenyan soil had been unlawful and that no cooperative arrangements could be cited to defend the Turkish action.³⁷⁷ The court held that no violation of state sovereignty had occurred since Kenyan officials had driven the applicant to the airport, thus signifying cooperation between Turkey and Kenya³⁷⁸ and by the same token there had been no abduction and therefore no violation of Kenyan sovereignty.³⁷⁹

In extraordinary rendition cases people are sometimes captured in a state other than the US and transferred to a third state.³⁸⁰ The state in which the individual is captured is either aware or unaware of the event (but perhaps they just do not publicly admit to such knowledge).³⁸¹

In 2003 Abu Omar was captured in Italy en route to a mosque.³⁸² He was taken to Aviano Military airport and flown to Egypt via a German airport. He alleged abuse and torture.³⁸³ The Italian government instituted court proceedings against twenty-six Americans of whom twenty-five were CIA and seven Italian Military Intelligence

³⁷⁵ Brownlie I *Principles of Public International Law* (2003) Oxford University Press 6th ed. 306.

³⁷⁶ *Öcalan v Turkey* (2003) ECHR Application 46221/99. Please note pronouncement of further judgment by the Grand Chamber in 2005: *Öcalan v Turkey* (2005) ECHR Grand Chamber Application 46221/99. The Grand Chamber asserted the same findings as the Chamber in its 2003 judgment.

³⁷⁷ Künzli A "Öcalan v Turkey: Some comments" 17 2004 *Leiden Journal of International Law* 141 at 143.

³⁷⁸ Künzli (2004) 145.

³⁷⁹ Künzli (2004) 145.

³⁸⁰ Sadat (2007) 1225.

³⁸¹ Sadat (2007) 1225.

³⁸² Sandberg B "Abu Omar case: Italian court delivers damning verdict on CIA renditions" (5 December 2009) *Spiegel Online International* available at <http://www.spiegel.de/international/europe/abu-omar-case-italian-court-delivers-damning-verdict-on-cia-renditions-a-659418.html>, "Italy: The Abu Omar case" *Amnesty International Media Briefing* (4 November 2009) found at <http://www.amnesty.org/en/library/asset/EUR30/012/2009/en/8580778b-6737-40dc-a3ce-0903398a0178/eur300122009en.pdf>.

³⁸³ "Italy/USA: Supreme Court order re-trial of former high-level intelligence officials and upholds all convictions in Abu Omar kidnapping case" *Amnesty International Public Statement* (21 September 2012) found at <http://www.amnesty.org/en/library/asset/EUR30/015/2012/en/d626ff4f-e559-4740-89c6-bad7382f5ca0/eur300152012en.pdf>.

Service agents.³⁸⁴ In 2009 twenty-three of the Americans were sentenced *in absentia* for their role in the illegal capture of Abu Omar on Italian soil.³⁸⁵ The court found that the remaining three Americans were protected by diplomatic immunity and that five of the seven Italians were protected by state secrecy laws.³⁸⁶ However, a 2012 ruling confirmed that the five Italians were not protected by the state secrecy laws and they were ordered to face a new trial.³⁸⁷ This is a striking example of infringement of state sovereignty caused by extraordinary rendition.

3.5 Torture and other forms of cruel, inhumane and degrading treatment or punishment

The prevalence of torture³⁸⁸ in cases of extraordinary rendition³⁸⁹ has earned it the alternative ominous labels of “outsourcing torture”³⁹⁰ and “torture by proxy.”³⁹¹ On 6 September 2006 President Bush admitted that “enemy combatants”³⁹² were being sent to secret detention facilities as part of the GWOT but specifically denied torture allegations by stating the US does not torture.³⁹³ However, witness accounts stated that detainees had been shackled, held captive, beaten, tortured, and sometimes even killed.³⁹⁴

³⁸⁴ “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012).

³⁸⁵ “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012).

³⁸⁶ Pianigiani (12 February 2013), “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012).

³⁸⁷ “Italy/US: Ruling on CIA case highlights US inaction” (20 September 2012).

³⁸⁸ The term “torture”, in this context, refers to ill-treatment of such severity that, in the writer’s opinion, it constitutes torture. However, there are various opinions as to what degree of severity of ill-treatment would actually constitute torture and what would merely constitute cruel, inhumane and degrading treatment and/or punishment. The case law will be discussed in this paragraph, and these issues will be addressed.

³⁸⁹ This will be proven by the content of this paragraph and the case studies in 3.5.1 below.

³⁹⁰ Mayer (14 February 2005) 106, Weissbrodt *et al* (2006) *Summer Virginia Journal of International Law* 593.

³⁹¹ Satterthwaite (2004) 15, Hasbargen (2012) 90,

³⁹² The special issue of “enemy combatants” and the reference to detainees in the GWOT as such will be discussed in detail in chapter 5.

³⁹³ ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody (2007) *International Committee of the Red Cross Regional Delegation for United States and Canada* available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>. During January 2003 the ICRC requested access to these detainees but access was only granted in October 2006. Sadat (2007) 1200. Also see “Fact sheet: Extraordinary rendition” (6 December 2005) *American Civil Liberties Union* found at <https://www.aclu.org/national-security/fact-sheet-extraordinary-rendition>, in which former CIA agent Robert Baer stated: “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear -- never to see them again -- you send them to Egypt.”

³⁹⁴ Sadat (2007) 1201.

It is important to note that the US does not refer to interrogation techniques practised by its operatives as torture, ill treatment or even cruel, inhumane or degrading treatment, but euphemistically as “enhanced interrogation techniques” (EIT).³⁹⁵ The US argued that EIT were in line with the US obligations under article 16 of CAT³⁹⁶ since the scope of application of article 16 is limited to territory under US jurisdiction.³⁹⁷

The Bush administration argued that interrogators’ actions would only constitute torture if the interrogator acted with “specific intent”. However, if the intent was merely to interrogate the detainee and ill-treatment eventuated as a corollary in the course of questioning, then such severe questioning would not constitute torture.³⁹⁸

Furthermore, it was contended that EITs are not unconstitutional because such measures are only applied in cases where detainees are deemed to be in possession of information of the most critical importance,³⁹⁹ in which case the methods of interrogation are designed to cause the least possible mental and physical suffering and the detainees are monitored by a medical team during the interrogation.⁴⁰⁰

A further contention is that EITs do not “shock the conscience” since the same techniques are applied to US troops in training;⁴⁰¹ Moreover certain conditions are prerequisites: For example as noted, detainees must be verifiably in possession of highly classified information as key members of Al Qaeda; the CIA must have

³⁹⁵ This is merely an attempted euphemism for what is in fact torture. Through the course of this chapter it will become apparent that EITs are nothing less than torture and/or cruel, inhumane and degrading treatment. Alexander (2013) 559, Jaffer (2013) 458.

³⁹⁶ Article 16(1) states “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”

³⁹⁷ John Rizzo Memo (2005) 1-2. The US insists that a foreign government will only be deemed a territory under US jurisdiction if it (the US) has at least *de facto* authority over that government.

³⁹⁸ Eppinger (2013) 345. This view was repudiated by the Obama administration. Cf Eppinger (2013) 346.

³⁹⁹ High value detainees (HVDs). John Rizzo Memo (2005) 3.

⁴⁰⁰ John Rizzo Memo (2005) 3.

⁴⁰¹ John Rizzo Memo (2005) 3. Cf. Garcia M “Interrogation of detainees: Requirements of the Detainee Treatment Act” (2009) *Congressional Research Report for Congress* 1-2.

verifiable intelligence that an attack emanating from that organisation is imminent; and approval for each case must be gained from CIA headquarters on the advice of the on-site team. An overriding condition must be met that there would be no physical or mental risk attached to the detainee's exposure to EITs.⁴⁰² This condition is sharply gainsaid, however, by the fact that the US makes use of waterboarding, albeit purportedly as an extreme exception, particularly if an attack is reliably known to be imminent and the HVD under interrogation is reliably deemed to possess information that could be used to delay or prevent the attack.⁴⁰³ The very fact of the admission to this practice tends to set at nought the caution purportedly exercised in using EITs, particularly since the US prosecuted Japanese interrogators for using this technique on US soldiers during the war between Japan and the US.⁴⁰⁴

During the initial interrogation of HVDs non-threatening techniques are used, but the detainee has to provide high-level information and if the on-site team feels he is withholding this information and only providing low-level information EITs can be used in an escalating fashion.⁴⁰⁵ However, the ICRC reported that the initial periods of detention (the first few days or months) were the harshest.⁴⁰⁶ The detainees were subjected to various forms of physical and mental ill treatment followed by a reward based programme entailing gradual improvement in conditions and treatment for the detainees, coupled with threats, however, that a reversion would occur to punish uncooperative behaviour.⁴⁰⁷

The US claims that Muslims believe that Allah permits them to provide information if the level of pain and suffering has become too high. This putative belief serves as a pretext and incentive employed by the US to use EITs to extract critical information from HVDs.⁴⁰⁸ However, there is no conclusive evidence that the results sought by

⁴⁰² John Rizzo Memo (2005) 5.

⁴⁰³ John Rizzo Memo (2005) 5-6. Waterboarding is the CIA's most invasive interrogation technique. According to the CIA waterboarding has only been used three times and never again since 2003. Cf. Singh (2013) 16.

⁴⁰⁴ Singh (2013) 16.

⁴⁰⁵ John Rizzo Memo (2005) 7. The approval for the use of EIT is usually granted for a period of thirty days although it is alleged that EITs were never employed for more than seven days in succession.

⁴⁰⁶ ICRC Report (2007) 8. No basic items were provided to the detainees. They received no toothbrush, toothpaste, soap, towels, blankets, clothes, toilet paper or underwear. Access to toilets and showers was also denied.

⁴⁰⁷ ICRC Report (2007) 8.

⁴⁰⁸ John Rizzo Memo (2005) 9.

resorting to EITs have been achieved, especially given the sporadic nature of their application,⁴⁰⁹ but the US has nevertheless claimed advances in information gained about Al Qaeda,⁴¹⁰ thus casting further doubt on its *bona fides*.

Interrogations are conducted in the presence of an on-site medical team⁴¹¹ who have to establish in advance whether detainees have the capacity to withstand the mental and physical rigours of EITs, and have to monitor the proceedings to determine at intervals whether detainees can withstand the treatment.⁴¹²

The ICRC reported the presence of an onsite medical service (OMS) at detention facilities⁴¹³ who were tasked to monitor ill treatment of detainees and at times participate in the practices, for example in the sense of ordering interrogation to continue, change or stop (e.g., in one instance a detainee reported that the OMS participated in waterboarding by measuring his oxygen saturation. Health checks were reportedly done before and after transfer, and likewise, injuries suffered in the course of interrogative procedures were treated.⁴¹⁴

The ICRC noted that international medical principles are based on three core values: First of all, the medical practitioner should act in the best interest of the patient. Critical elements falling under this rubric are that at the most basic level the practitioner's attentions should at least do no harm to the patient, which implies a further essential condition, namely that the practitioner's ministrations should do justice in all things to the patient's right to dignity.⁴¹⁵ Medical practitioners who work in detention facilities are critically burdened with the obligation to look after the detainee's best interests; in fact, the obligation can hardly be overemphasised since the detainee is in a particularly vulnerable position at the mercy of his captors whose reasons for inducing his predicament are not peaceful in the first place.⁴¹⁶ They

⁴⁰⁹ John Rizzo Memo (2005) 10.

⁴¹⁰ John Rizzo Memo (2005) 8.

⁴¹¹ John Rizzo Memo (2005) 8.

⁴¹² John Rizzo Memo (2005) 8.

⁴¹³ ICRC Report (2007) 21.

⁴¹⁴ ICRC Report (2007) 21.

⁴¹⁵ ICRC Report (2007) 22.

⁴¹⁶ ICRC Report (2007) 23. Medical practitioners are allowed to conduct initial health checks to assess any risks, they can be asked if there is any medical concern that precludes the detainee from being questioned and they can be called to give medical care that becomes necessary during questioning.

cannot rule on the permissibility of any form of physical or psychological ill treatment,⁴¹⁷ are specifically prohibited from using their medical skills in such a way. The fact is, however, that the conduct of the OMS violates international medical and ethical principles because their main purpose is patently to serve the best interests of the patient by upholding the principles enunciated above.⁴¹⁸

In the absence of medical contra-indications the interrogation team is permitted to use the following techniques on the detainee: walling, facial hold, facial slap, attention grasp, wall standing, stress positions, and sleep deprivation.⁴¹⁹ These techniques can be divided into three categories, namely conditioning, corrective and coercive techniques.⁴²⁰

The first group are devised to ensure that detainees' awareness of just how important their basic needs are to them are heightened dramatically, and to proceed from there to persuade them that in fact their basic needs are more important than the information they are protecting.⁴²¹

Conditioning techniques are not used to provide immediate results but rather to be used for an extended period of time in conjunction with other techniques to create a cumulative effect.⁴²² Forced nudity, dietary manipulation and sleep deprivation are the forms of conditioning techniques that are used.⁴²³

⁴¹⁷ ICRC Report (2007) 23.

⁴¹⁸ ICRC Report (2007) 23.

⁴¹⁹ John Rizzo Memo (2005) 7, Singh (2013) 16.

⁴²⁰ John Rizzo Memo (2005) 12-14.

⁴²¹ John Rizzo Memo (2005) 12.

⁴²² John Rizzo Memo (2005) 12.

⁴²³ John Rizzo Memo (2005) 12-13. Nudity is used to embarrass the detainee and, according to the memo, to create only mild physical discomfort. The detainee can also earn an immediate reward of clothes by being cooperative. The memo clearly stipulates there is no sexual abuse or threat of sexual abuse. There is also no health risk as room temperature is kept above 68 °F. Dietary manipulation is a diet formulated to provide the detainee with 1000 calories per day. The detainee can drink as much water as he wants. This regimen is considered harmless to the detainee's health as most weight loss programs in the US prescribe a 1000 calorie diet without even taking the person's body weight into account. The detainee cannot lose more than ten kilograms of his initial body weight. Sleep deprivation is used to break down the detainee's resistance. Prolonged periods of sleeplessness are allowed for 180 hours; however the report alleges that more than 96 hours of sleep deprivation are only used on three detainees. Detainees are shackled in a standing position with one hand shackled beneath the chin or above the head, a practice that reportedly cannot be kept up for more than two hours without causing extreme discomfort. The report further states that no lasting harm is suffered by the detainee except temporary cognitive impairment, hallucinations, nausea, blurred vision and impaired speech. In order to make sleep deprivation effective detainees have to remain in a standing

Corrective techniques persuade the detainee to listen to the interrogator's questions and do away with the idea that he will be exempt from invasive physical contact.⁴²⁴ Corrective techniques used are facial or insult slaps, abdominal slaps and facial holds.⁴²⁵

Coercive techniques heighten the physical and psychological stress imposed on the detainee by other means.⁴²⁶ Such techniques include: walling,⁴²⁷ water dousing,⁴²⁸ stress positions,⁴²⁹ wall standing, cramped confinement,⁴³⁰ and waterboarding.⁴³¹

The detainees said that the following interrogation methods were used: waterboarding, stress positions, walling, beating and kicking, small confinement, prolonged forced nudity, sleep deprivation, exposure to cold temperatures, prolonged shackling, threats of ill treatment, forced shaving, deprivation of solid food,

position for long periods of time and are therefore strapped with diapers that are changed daily, as well as regular monitoring of their skin condition.

⁴²⁴ John Rizzo Memo (2005) 14.

⁴²⁵ John Rizzo Memo (2005) 14.

⁴²⁶ John Rizzo (2005) Memo 14.

⁴²⁷ John Rizzo Memo (2005) 14. The detainee is shoved against a fake wall and harshly pulled back again. He wears a C-collar (collar around the neck with a rod at the back) to avoid whiplash. Walling is effective because the detainee is gripped by fear of what might be done to him next. Detainees are typically walled 20-30 times.

⁴²⁸ John Rizzo Memo (2005) 14-15. Potable water is poured over the detainee from a container or a hose without a nozzle. There are no significant health risks as the room temperature is kept above 64 degrees Fahrenheit and the water temperature is kept above 50 degrees Fahrenheit (although the interrogators are permitted to reduce the water temperature to 40 degrees Fahrenheit). Treatment is limited to two thirds of the probable length of time that can be expected to pass until the treatment results in hypothermia. However, the ICRC reported that two detainees were kept in an excessively cold cell for nine months in Afghanistan, and four detainees were subjected to water dousing while standing in stress positions (several detainees thought the dousing was intended to clean away the faeces running down their legs from prolonged stress standing. Two detainees were placed on a sheet with the edges held up while cold water was poured over them to create an immersion bath, cf. ICRC Report (2007) 15.

⁴²⁹ John Rizzo Memo (2005) 15. Used to cause muscle fatigue and discomfort. The ICRC reported that one detainee was shackled in a stress position for a period of one month and that he was allowed to defecate in a bucket. Cf ICRC Report (2007) 11.

⁴³⁰ John Rizzo Memo (2005) 15. Detainees are placed in a container of uncomfortably cramped proportions. They may remain in a larger container for up to 8 hours and up to 2 hours in a small container. However, the report states that the OMS advises against this technique, because it creates a safe haven that offers relief from the pressure of interrogation and is therefore not effective.

⁴³¹ John Rizzo Memo (2005) 15. This is the most traumatic interrogation technique. Detainees are placed on a gurney, face-up with the head downward. A cloth is placed over the face and water is poured over the cloth to create the sense of drowning. The face can be doused for periods of 40 seconds each. According to the report this technique may only be used for one continuous period of 30 days at the rate of two sessions per 24 hour period. The detainee may only be strapped to the gurney for two hours at a time. The report states that the health risks are "medically acceptable".

restricted access to the Koran, and long periods of deprivation of open air, exercise, hygiene facilities and basic items.⁴³²

The ICRC noted that the treatment the detainees were subjected to must not be seen as separate incidents but as part of a larger picture.⁴³³ And although the treatment of detainees improved as the captors became persuaded that the detainees were being cooperative, the cooperation should be seen against the background of the ill treatment they received before.⁴³⁴ Most received open-air privileges for the first time since their incarceration when they arrived at Guantanamo Bay.⁴³⁵

In defence of the CIA's interrogation practices the US argued that their practices did not "shock the conscience" because they were monitored by a medical team and there were safeguards in place to minimise physical and mental harm.⁴³⁶ However, any form of interrogation that requires medical monitoring must have inherent health risks.⁴³⁷

Discussion has accrued around the question of the level where ill treatment becomes classifiable as torture. The US argues that CAT and section 2340 and 2430A of the USC⁴³⁸ determine that an act inflicting severe pain or suffering must be of an extreme nature in order to constitute torture.⁴³⁹ Conviction on a charge of torture requires proof that the act forming the basis of the charge took place at a location beyond US jurisdiction, that the defendant was acting under the aegis of law and that the victim was in the defendant's custody or under his physical control; moreover

⁴³² ICRC Report (2007) 9.

⁴³³ ICRC Report (2007) 19.

⁴³⁴ ICRC Report (2007) 21.

⁴³⁵ ICRC Report (2007) 19.

⁴³⁶ John Rizzo Memo (2005) 25.

⁴³⁷ ICRC Report (2007) 23.

⁴³⁸ United States Code of 2000 Title 18.

⁴³⁹ "Memorandum for Alberto R. Gonzales Counsel to the President" (2002) *US Department of Justice Office of the Legal Counsel* Doc 20530 (hereafter referred to as "Gonzales Memo") 1. To constitute torture in terms of section 2340A of the USC the intensity of the pain should be equal to the intensity of pain suffered upon serious physical injury, for example as in the instance of organ failure, massive impairment of bodily function or death; and mental suffering should be significant suffering inflicted over a prolonged period of months or years. Examples considered typical causes of such trauma include threats of imminent death, threats of infliction of the type of pain that would constitute torture, and threats of subjection to the administration of drugs that severely disrupt the senses or fundamentally alter the personality.

that the defendant had the definite intent of inflicting severe physical or mental suffering, and that the act in question duly caused severe mental or physical suffering.⁴⁴⁰ In sum, therefore, proof is required that the person/accused acted with the specific intent to achieve a forbidden act.⁴⁴¹ The US also argued that article 16 of CAT distinguishes between torture and cruel, inhumane and degrading treatment.

It has become apparent from case law that acts considered in the realm of torture include severe beatings, death threats, threats of amputating extremities, inflicting burn wounds, administering electrical shocks to genitalia, or threatening such shocks, rape, sexual assault, and forcing detainees to watch the torture of others.⁴⁴²

In the case of *Mehinovic v Vuckovic*⁴⁴³ the plaintiffs sued Mr Vuckovic for subjecting them to torture and cruel, inhumane and degrading treatment. The applicants were beaten with blunt objects and subjected to booted kicks to or stamping on parts of the body Mr Vuckovic knew to be injured. They were hung against windows and beaten, they received beatings to their genitalia, they were made to run in a circle while men swung wooden planks at them, they were subjected to the game of “Russian roulette”. Other plaintiffs were beaten to the point of unconsciousness, they were forced to watch the torture of others, and their teeth were forcibly extracted. The court held that all the beatings constituted torture. The plaintiffs suffered severe mental and physical trauma. The mental harm inflicted upon them was of such duration and extent that it amounted to torture. The threatened infliction of severe physical pain or imminent death was always present.

The *Öcalan* case is one example where the courts have dealt with this question. Although this case relates to article 3 of the ECHR (which prohibits torture and cruel, inhumane and degrading treatment) it is still relevant to this discussion. *In casu* the court considered the components⁴⁴⁴ of the detainee’s arrest separately, and

⁴⁴⁰ Gonzales Memo (2002) 2-3.

⁴⁴¹ Gonzales Memo (2002) 3.

⁴⁴² Gonzales Memo (2002) 25.

⁴⁴³ *Mehinovic v Vuckovic* (2002) 198 F.Supp 2d 1322.

⁴⁴⁴ Including handcuffing, blindfolding and humiliation. .

concluded that individually not one of them constituted a violation of article 3 of the ECHR in itself.⁴⁴⁵

In *Selmouni v France*⁴⁴⁶ the court came to a different conclusion after considering the components of arrest collectively.⁴⁴⁷ These components included: countless blows inflicted upon Mr Selmouni, being dragged along by his hair, being forced to run down a corridor with police officers stationed on either side ready to trip him, being made to witness the exposure of a police officer's genitals, being urinated on, and being threatened with syringes and blowlamps.⁴⁴⁸ The court concluded that considered on the whole these actions constituted torture and would have been heinous and humiliating for any person.⁴⁴⁹

3.5.1 Case studies

Maher Arar

Maher Arar, a Syrian-born Canadian citizen, was travelling to Montreal via JFK Airport, where he was pulled aside by immigration officials. He was requested to agree to a voluntary deportation to Syria, which he refused.⁴⁵⁰ He was detained in New York for a week and then placed on an aircraft at a New Jersey airport.⁴⁵¹ The flight was bound for Jordan via Washington D.C. Once he arrived in Jordan he was blindfolded, loaded into a van and driven to Syria.⁴⁵² He reported abuse at the hands of his captors, including beatings with electric cables, subjection to long periods of solitary confinement and long periods of sustained interrogation.⁴⁵³

Before being sent to Syria he only met with his lawyer once. He was detained for ten months in Syria during which time he lost 19 kg as a result of malnutrition. He was

⁴⁴⁵ Künzli (2004) 148.

⁴⁴⁶ *Selmouni v France* (1999) Application 25803/94 ECHR.

⁴⁴⁷ *Selmouni* (1999) par 105.

⁴⁴⁸ *Selmouni* (1999) par 102 - 103.

⁴⁴⁹ *Selmouni* (1999) par 105: "Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention."

⁴⁵⁰ Wolf (2007)920, Satterthwaite (2007) 1338-1339.

⁴⁵¹ Satterthwaite (2007) 1338-1339.

⁴⁵² Satterthwaite (2007) 1338-1339.

⁴⁵³ Satterthwaite (2007) 1338-1339.

detained in a dark cell that he described as a “grave”.⁴⁵⁴ Rats could enter the cell through a hole in the ceiling and cats urinated on him. He was beaten with an electric cable with a diameter of 5 cm on palms, hips and lower back. His captors also beat him with their fists and threatened to place him in a “spine breaking chair” if he did not give them the information they were seeking.⁴⁵⁵ Maher Arar was held for ten months and finally released when Canada intervened and he was compensated for the ordeal.⁴⁵⁶

Osama Mustafa Hassan Nasr (aka Abu Omar)⁴⁵⁷

Abu Omar had asylum in Italy, but Italy was investigating him for involvement in activities related to terrorism. On his way to the mosque in 2004 he was stopped by Italian-speaking men claiming to be police officers. A substance was sprayed in his face and he was forced into a van. He was taken to a US air base in Italy where he was beaten, tortured and questioned about his connections to Al Qaeda and his involvement in the recruitment of four Iraqi men for Al Qaeda. From this air base he was transferred to a US air base in Germany, and then finally to Egypt. In Egypt he was blindfolded, subjected to electric shock to his genitals and hung upside down. He was eventually released in 2007 after a letter, in which he detailed his abuse, was leaked to the media.

Khalid El-Masri

In 2003 Khalid El-Masri, a Kuwaiti national turned German citizen,⁴⁵⁸ was arrested at the Serbian-Macedonian border. He claims he was detained and interrogated in a hotel room in Skopje for twenty-seven days. He was then transferred to the “Salt Pit” prison in Afghanistan after being strapped with a diaper, injected with a strong sedative and beaten. He was kept in the “Salt Pit” for four months where he was

⁴⁵⁴ Wolf (2007) 920.

⁴⁵⁵ Wolf (2007) 921.

⁴⁵⁶ Satterthwaite (2007) 1338-1339. Justice Dennis R. O'Connor, head of the Canadian government commission that exonerated Maher Arar, said: “am able to say categorically that there is no evidence to indicate that Mr Arar has committed any offense or that his activities constituted a threat to the security of Canada.” Austen I “Canadians fault US for its role in torture cases” (19 September 2006) available at http://www.nytimes.com/2006/09/19/world/americas/19canada.html?ex=1158897600&en=d7c6ae235663b150&ei=5087%0A&_r=0.

⁴⁵⁷ Satterthwaite (2007) 1340-1342.

⁴⁵⁸ “CIA nabs wrong man: Extraordinary rendition timeline: Part 2” available at http://www.pbs.org/frontlineworld/stories/rendition701/timeline/timeline_2.html, cf. Wolf (2007) 922.

repeatedly beaten and held in solitary confinement, and all requests for legal representation were denied. When he commenced a hunger strike he was force-fed by the prison guards. He was released after five months with no formal charges against him. El-Masri was left on a deserted Albanian road and ordered to walk in the opposite direction. He claimed that he feared for his life as he was convinced that the officials were going to execute him — instead they just abandoned him. He received no formal apology from the US government and his case was dismissed to avoid the risk of jeopardising the state-secrecy privilege. He is now held in a mental hospital after trying to set fire to a store.

Mr Abu Zubaydah⁴⁵⁹

He described being subjected to waterboarding and gave a detailed account of the experience, stating that the straps around his wrists caused severe pain to his wounds and that his breathing was severely constricted.⁴⁶⁰ He also intimated that he lost control of his bodily functions during the interrogations and helplessly still does so whenever he finds himself in a stressful situation.⁴⁶¹ Mr Zubaydah further stated that he was placed in a small container that was not even high enough to sit upright in. He was left in the container for long periods of time and existing wounds on his leg and stomach began to ache and open.⁴⁶² He was also subjected to sleep deprivation in that he was made to sit shackled in an upright position in a chair for two to three weeks without intermission. He was only allowed to get up when he had to use the toilet which consisted of a bucket. He developed blisters under his legs due to the long periods of sitting.⁴⁶³ He was told that no rules applied to his interrogation as he was one of the first detainees to whom this interrogation technique was applied.⁴⁶⁴

⁴⁵⁹ The entire account of Mr Zubaydah's treatment can be found in the ICRC Report (2007) 10.

⁴⁶⁰ Singh (2013) 16. Mr Mohammed said that he was doused with water for 20-40 seconds at a time.

⁴⁶¹ ICRC Report (2007) 10.

⁴⁶² ICRC Report (2007) 13.

⁴⁶³ ICRC Report (2007) 15.

⁴⁶⁴ ICRC Report (2007) 17.

Mr Bin Attash⁴⁶⁵

Mr Attash described being subjected to walling and said that the collar placed around his neck was also used to lead him through the corridors and bang him against the walls of the corridors.⁴⁶⁶ He also said that he was subjected to abdominal and facial slaps by an interrogator wearing surgical gloves. After this abuse he was approached by a second interrogator who pretended that he could save Mr Attash from the first interrogator.⁴⁶⁷ Mr Attash also averred that he had been subjected to a long period of stress standing on one leg (the other had been amputated for medical reasons), and the OMS constantly measured the leg he was standing on to detect swelling. Eventually the OMS said he was allowed to sit but that his hands should still remain shackled above his head.⁴⁶⁸

Mr Khaled Shaik Mohammed

Mr Mohammed said that he was placed against a wall and beaten on the head and in the face if it was perceived that he was not cooperating.⁴⁶⁹ He was told that “the green light had been given by Washington to give him a hard time and that although he would not die he would be brought to the verge of death and back again.”⁴⁷⁰

Using the above information and witness accounts as a guideline, the images on the following page, taken at the Abu Ghraib detention facility in Iraq should serve as conclusive evidence that EITs applied by the CIA amount to torture and leave no doubt about the mental and physical pain and suffering endured by the detainees.⁴⁷¹

⁴⁶⁵ The entire account of Mr Attash’s treatment can be found in the ICRC Report (2007) 11.

⁴⁶⁶ ICRC Report (2007) 11.

⁴⁶⁷ ICRC Report (2007) 13.

⁴⁶⁸ ICRC Report (2007) 22.

⁴⁶⁹ ICRC Report (2007) 13.

⁴⁷⁰ ICRC Report (2007) 17.

⁴⁷¹ These photos were published by various news sources including The Washington Post, ABC News, 60 Minutes, and The New Yorker. Cf. “Abu Ghraib abuse photos” (17 February 2006) *AntiWar.Com* found at <http://www.antiwar.com/news/?articleid=8560>, Gardham D Cruickshank P “Abu Ghraib abuse photos ‘show rape’” (27-05-2009) *The Telegraph* found at <http://www.telegraph.co.uk/news/worldnews/barackobama/5408038/Call-for-inquiry-into-Abu-Ghraib-rape-photographs.html>, Leung R “Abuse of Iraqi POWs by GIS probed” 27 April 2004 *60 Minutes* found at <http://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/3/>. In 2003 the American Civil Liberties Union (ACLU) filed a request for disclosure of further abuse photos, under the Freedom of Information Act. President Obama was set to release the photos of prisoner abuse, perpetrated under the Bush administration at prisons in Iraq and Afghanistan, to the ACLU on 23 April 2009. Cf. Taylor C “Obama administration to release detainee abuse photos; Former CIA official says former colleagues ‘don’t believe they have cover anymore’” 24 April 2009 *ABC News Online* found at <http://abcnews.go.com/blogs/politics/2009/04/obama-adminis-3/>. For more information cf. “ACLU

A description of each image is provided below the images.

Image 1



Image 2



Image 3



Image 4



Image 5



Image 6



releases first authentication of Abu Ghraib abuse images with one new photo" (11 April 2006) *ACLU Official Website* found at <https://www.aclu.org/national-security/aclu-releases-first-government-authentication-abu-ghraib-abuse-images-along-one-ne>, Zeleny J "Obama moves to bar release of detainee abuse photos" (13 May 2009) *The New York Times*, found at http://www.nytimes.com/2009/05/14/us/politics/14photos.html?_r=0.

Image 1

This image depicts a stress position which is a coercive interrogation technique. As can be seen from this image it can cause severe discomfort.⁴⁷²

Image 2

The writer believes this to be an example of walling which is another coercive interrogation technique. However, this detainee does not seem to be strapped with a C-collar, as the John Rizzo Memo indicates he is supposed to be, in order to prevent whiplash or serious injury.

Image 3

The writer believes this to be a result of severe beating. However, according to the John Rizzo Memo the only beatings the detainees are supposed to be subjected to are facial and abdominal insult slaps.

Image 4

The writer believes this to be a combination of forced nudity and stress standing. The detainee appears to be covered in mud or his own faeces as some detainee accounts have confirmed.⁴⁷³

Image 5

This picture constitutes proof, in the writer's opinion, that the detainees are in fact subjected to sexual abuse during periods of forced nudity.⁴⁷⁴

Image 6

This illustrates, in the writer's opinion, that detainees are placed in situations where they believe that death or serious injury is imminent. The fear and apprehension in this detainee's expression is clear.

⁴⁷² Refer to footnote 238 above.

⁴⁷³ Refer to footnote 277. The detainees thought they were being subjected to water dousing in order to clean off the faeces running down their bodies due to prolonged stress standing.

⁴⁷⁴ Refer to footnote 222. The John Rizzo Memo (2005) explicitly states that none of the detainees are subjected to any form of sexual assault or threat of sexual assault during periods of forced nudity.

3.6. Conclusion

In light of the above it is clear that the practice of extraordinary rendition creates various vexed questions that cry out for urgent attention. The US government clearly abuses the rule of law in its efforts to explain away the applicability of international laws where this procedure is concerned. In 2004, for example, President Bush stated that the US did not condone torture or cruel, inhumane or degrading treatment under its jurisdiction.⁴⁷⁵ The probity seemingly reflected by this statement is undermined by the question: What does the expression “under US jurisdiction” imply? Is torture or cruel, inhumane or degrading treatment that is not confined to US jurisdiction condoned for that reason alone, even if the abuse was perpetrated with the knowledge, and at the behest of, the US authorities? This was clearly said so the US did not have to prevent ill treatment meted out to detainees by US officials abroad⁴⁷⁶ and could therefore not be held accountable for such misdeeds under international laws.

Secret detention facilities are still operated across the globe, despite an order given by the UN Human Rights Committee in 2006 that enjoined the US to cease its practice of secret detentions.⁴⁷⁷ Most Guantanamo Bay prisoners are set to be held indefinitely and others are to be tried for war crimes due to their involvement in the 9/11 attacks.⁴⁷⁸

No further information has been released regarding the fate of the thousands of detainees remaining at Abu Ghraib, except that the US would have the final say on their release.

⁴⁷⁵ “Consideration of reports submitted by states parties under article 19 of the convention: Second periodic reports of states parties due in 1999” (29 June 2005) *UN Committee against Torture CAT/C/48/Add.3* available at <http://www.state.gov/documents/organization/62175.pdf> at paragraph 5 where President Bush was quoted: “... [T]he United States reaffirms its commitment to the worldwide elimination of torture To help fulfil this commitment, the United States has joined 135 other nations in ratifying the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction ...” Cf. Satterthwaite (2007) 1352.

⁴⁷⁶ Satterthwaite (2007) 1353.

⁴⁷⁷ Sadat (2007) 1224.

⁴⁷⁸ Jaffer (2013) 457.

Secret detention centres are referred to as “black sites”⁴⁷⁹ because their exact locations remain a closely guarded secret. The Obama administration declared that all secret detention facilities should be closed but refused to reveal particulars of their exact locations. Whether closure has duly ensued, therefore, and whether the detainees have been released or tried, or for that matter, whether extraordinary renditions have ceased, is a matter of speculation.

The perpetrators of extraordinary rendition are hard to identify as no country wants to openly declare its tolerance of and connivance at the practice, with the result that underhand deals are struck with cooperating countries. Charges against the victims are also not entered in the public record; in fact, even, or perhaps especially, the victims are not told what the nature of their presumptive offence has been or why they are being incarcerated, with the result that it is hard to pin the blame on a specific agency. Neither the person or persons, organisation or organisations, or the country or countries, that should be held responsible for the acts in question, nor even whether the acts constitute a demonstrable crime, can be found out with certainty; consequently there is equal uncertainty about the country or countries and international role players that have or should have jurisdiction over this parlous affair.

The ICRC stated that the secrecy of secret detention naturally enhances the risk that persons thus held could be subjected to ill-treatment,⁴⁸⁰ a conclusion that can hardly be gainsaid in view of paragraph 3.5 above and the accompanying images which illustrate detainee abuse.

It has been suggested that extraordinary rendition resembles the Nazi operation of “Night and Fog” (*Nacht und Nebel*) which also consisted in individuals being illegally transferred to secret facilities in order to instil fear and apprehension.⁴⁸¹ Although

⁴⁷⁹ Priest (2 November 2005); see also Cassel (2006) 11-12.

⁴⁸⁰ ICRC Report (2007) 24.

⁴⁸¹ Sadat (2007) 1237-1238. As a final footnote it should be acknowledged that extraordinary rendition and the attendant violations of human rights are almost insignificant compared to the atrocities committed by the Nazi regime in concentration camps (the notorious *Straflager*, also referred to as extermination or death camps) at various venues in Germany and Poland during the infamous Holocaust. However, they do bear an uncomfortable and ominous resemblance to the methods of especially Nazi tyranny which traded on the principle of denying the humanity of those whom they chose to victimise, for example by placing them in a broad ‘subhuman’ (*Untermensch*) class while reserving the classification of *Übermensch* for themselves as the ruling class. South American

extraordinary rendition cannot be equalled to the severity of suffering endured by the victims of the Holocaust it is still a disturbing notion that extraordinary rendition bears some resemblance to the Nazi conduct.

totalitarian regimes such as that of Augusto Pinochet in Chile, among others, should not be forgotten in this respect.

CHAPTER 4

LEGAL REGIMES APPLICABLE TO EXTRAORDINARY RENDITION

“The object of persecution is persecution. The object of torture is torture.

The object of power is power.” *George Orwell*¹

International scholars disagree with the view taken by the US that the GWOT falls in a legal vacuum and that the US is therefore free to take whatever actions it deems fit within its own discretion.² There are four schools of thought regarding the laws applicable to the GWOT:³ The first of these positions is that International Humanitarian Law⁴ may not apply to the GWOT but international human rights laws still apply. The second is that although the designation may not be exactly accurate it is appropriate enough to regard it as a non-international armed conflict⁵ and therefore subject to the rules relating to such conflict. A third position is that the GWOT (Global War on Terror) should be judged on a case-by-case basis to ascertain which laws would be applicable to each situation. Finally, it is held that the GWOT is in fact a new type of war to which new rules should apply.

The US points out certain gaps in international law, one of these being that there is a gap in the GCs because the war with Al Qaeda is an armed conflict but not as defined in common articles 2 or 3. Detainees captured in the course of the GWOT are “unlawful combatants” and not entitled to protection under the GCs as they are not combatants under article 4 of GC III, nor are they protected under GC IV because they are not civilians.⁶ Furthermore, IHL provides no protection in the

¹ George Orwell was a British author and journalist and published works such as “Animal Farm” and “Nineteen eighty-four”. The quote is from the latter work *Orwell G Animal Farm* (1949) Harcourt Brace and Company 22.

² Satterthwaite (2007) 1404.

³ Satterthwaite (2007) 1404.

⁴ See footnote 11.

⁵ There is a difference between an armed conflict and a war. An armed conflict does not need to be between two states or have domination of the other party as its goal. It is more readily definable as conflict involving organised groups using significant armed force. Cf. O’Connell M “The legal case against the global war on terror” 36 2004 *Case Western Reserve Journal of International Law* 349 at 354.

⁶ Milanovic Marko “Lessons for human rights and humanitarian law in the war on terror: Comparing Hamdan and the Israeli targeted killings case” 89 2007 *International Review of the Red Cross* 373 at 387.

GWOT, and IHRL does not apply under wartime conditions, nor does it have extraterritorial application as in Afghanistan and Guantanamo Bay.⁷

It is also argued that customary humanitarian law should not be seen as a gap-filler for the GCs. Although it adds to the content of humanitarian law its application is not broadened accordingly.⁸ Therefore, where the GWOT does not amount to armed conflict and the GCs and Additional Protocols (APs)⁹ are not applicable, customary humanitarian law adds nothing and should be seen to add nothing.¹⁰

Given the arguments as stated above it is difficult to decide which laws apply to the GWOT. However, this difficulty should not lead to the position adopted by the US, namely that the GWOT subsists in a legal vacuum that effectively allows that country to act entirely according to its own discretion.

4.1 International Humanitarian Law¹¹

IHL is governed by the four GCs and their Additional Protocols.¹² The GCs have been ratified by every country in the world and have therefore become rules of international customary law.¹³ The GCs explicitly prohibit certain acts and identify these as war crimes.¹⁴ The GCs call upon state parties to criminalise these acts and to search for and prosecute the perpetrators.¹⁵

⁷ Milanovic (2007) 387.

⁸ Rona G “Interesting times for international humanitarian law: Challenges from the ‘war on terror’” 27 2003 *Fletcher Forum of World Affairs* 55 at 69.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 (AP I), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (AP II).

¹⁰ Rona (2003) 69.

¹¹ International Humanitarian Law is also commonly referred to as “Geneva Law”, “Law of Armed Conflict”, “Laws of War” or “IHL”. For purposes of this thesis it will be referred to as “IHL”.

¹² Sassòli M “Use and abuse of the laws of war in the ‘war on terrorism’” 22 2004 *Law & Inequality: A Journal of Theory and Practice* 195 at 96; Cf. Sadat (2007) 1211; Cf. Sadat (2006) 310.

¹³ Sadat L “Shattering the Nuremberg consensus: US rendition policy and international criminal law” Winter 2008 *Yale Journal of International Affairs* 65 at 67.

¹⁴ The GCs have a grave breaches-regime, incorporated in article 130 of GC III, in terms of which certain provisions are considered *jus cogens* norms which are non-derogable. Cf. Sadat (2007) 1212. Acts constituting grave breaches are the following, according to article 130 of GC III: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war (POW) to serve in the forces of the hostile power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”

¹⁵ Derogations from the latter are punishable as international criminal acts perpetrated by individuals. Cf. Sadat (2007) 1211.

IHL applies only where violence reaches the level of armed conflict, whether international or non-international.¹⁶ The GWOT therefore falls outside this ambit as it is neither international nor non-international armed conflict (or so it is argued). The question arises: When is a situation violent enough to be classified as armed conflict?¹⁷ The US position in this regard goes beyond the circumscribed notion of regular, sustained conflict waged by organised forces.¹⁸ A single act or attempted act involving an armed attack that can be described as an act of war is enough.¹⁹ The US has consistently engaged with Al Qaeda on this basis throughout the GWOT, but as confirmed in *Prosecutor v Tadic*,²⁰ armed conflict has two important components. In this case the court defined armed conflict as occurring wherever there is a resort to armed force between states, or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.²¹

The US argues that the GCs, and therefore IHL, apply to nation states and not to relationships between nation states and private subnational groups or organisations,²² which explains why it countenanced the applicability of IHL for the purposes of dealing with the Iraq²³ conflict in that, as the occupying power in Iraq, it gave precedence to certain obligations towards the population inhabiting the territory under its administration,²⁴ yet denied such obligation in relation to Afghanistan,²⁵ on grounds that GC III (relating to POWs) and GC IV (relating to civilians) did not apply

¹⁶ ICRC Report (2007) 722.

¹⁷ Sassòli (2004) 200.

¹⁸ Sassòli (2004) 200.

¹⁹ Sassòli (2004) 200.

²⁰ *Prosecutor v Tadic* (15 July 1999) ICTY IT-94-1-A.

²¹ *Tadic* (15 July 1999) par 84, cf. O'Connell (2004) 353.

²² Dratel J Greenberg K *The torture papers: The Road to Abu Ghraib* (2005) Cambridge University Press 42.

²³ The war in Iraq was launched in two phases, the first being in 2003 when the US invaded Iraq on grounds of an allegation that Iraq held weapons of mass destruction. The second followed when an insurgency occurred that was aimed at dislodging the occupying force. The US officially withdrew all troops from Iraq in 2011, but continuing unrest and civilian attacks by the Islamic State of Iraq and Syria (ISIS), may lead to the US giving military assistance again. Cf. Morris L and Gearan A: "Kerry says US will help Iraq against Al Qaeda but won't send troops back in" (5 January 2014) *Washington Post* available at http://www.washingtonpost.com/world/kerry-says-us-will-help-iraq-against-al-qaeda-but-wont-send-troops-back-in/2014/01/05/8ebc7754-7642-11e3-b1c5-739e63e9c9a7_story.html .

²⁴ Sadat (2006) 312. Although the application of the GCs was accepted in the Iraq conflict the US acted contrary to the spirit of IHL by hiding detainees from the ICRC or removing individuals protected under GC IV from Iraq. Cf. Satterthwaite (2007) 1397-1398.

²⁵ The war in Afghanistan was launched by the US after the 9/11 attacks in 2001 in an effort to dismantle Al Qaeda and remove the Taliban government from power so as not to create a safe haven for Al Qaeda. Putative plans to withdraw US troops from Afghanistan in 2014 have not materialised.

to the detainees captured in the Afghanistan conflict²⁶ because the war with Al Qaeda is not a traditional war between states, nor is it a non-international civil war; being a conflict instead between a nation state and a non-governmental organisation.²⁷ The further rationale offered in this regard was that the GCs did not apply to the Taliban in the Afghanistan conflict because the Taliban was not a recognised government, nor was Afghanistan a functioning state at the time of the hostilities, which circumstances therefore ruled out the possibility of according POW status to detainees taken captive in the course of that conflict.²⁸ The President also had a right (according to the US authorities) to suspend all treaties with Afghanistan pending the restoration of a fully functioning state.²⁹ The Taliban's involvement with Al Qaeda in furthering its religious and political objectives placed it in the same legal position as Al Qaeda.³⁰

However, IHL applies to all hostilities directed against the forces representing another state or acting under the direction or control of that state.³¹ Therefore, in the case of the GWOT, IHL would indeed apply to the conflict between the US and the Taliban government in Afghanistan.³²

The US is a signatory to all four GCs, but not to their Additional Protocols. Nonetheless it recognises Additional Protocol II as existing law and many, but not all, provisions of Additional Protocol I are deemed to be customary international law.³³

4.1.1. International armed conflict

All four GCs and Additional Protocol I apply to international armed conflicts.³⁴ Common Article 2 of the GCs applies specifically to international armed conflicts:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict

²⁶ Satterthwaite (2007) 1395-1396.

²⁷ Dratel *et al* (2005) 49.

²⁸ Dratel *et al* (2005) 39.

²⁹ Dratel *et al* (2005) 39.

³⁰ Dratel *et al* (2005) 39.

³¹ Sassòli (2004) 199-200.

³² This argument has been the subject of much debate, with the US insisting that IHL does not apply to the Taliban. This is discussed later in this chapter.

³³ Sassòli (2004) 198-199.

³⁴ ICRC Report (2007) 726, Sassòli (2004) 199.

which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

The GWOT, in general, is not an international armed conflict because it is not a conflict between two or more states, besides which the territorial boundaries of the conflict are undefined and an end to the hostilities is unforeseeable.³⁵ The US has claimed since 2001, however, that the GWOT is a single global international armed conflict against Al Qaeda. If this were the case Al Qaeda members would be correctly classifiable as combatants in an armed conflict, and the US would therefore be justified in seeking out and killing such Al Qaeda members regardless of where they could be found.³⁶ However, the argument clearly breaks down in light of its practical considerations, such as the absurd prospect of seeking out and killing targeted individuals in peaceful and densely populated locations.³⁷ The ICRC disagrees with the US position that it is waging a global war, countering that the GWOT is no more a war than the “war on drugs”.³⁸ Wars (in the traditional sense of the word) are fought between states and not states and non-state actors. Not even all intrastate conflicts rise to the level of a war.³⁹

Scholars argue that the GWOT should be broken up into different components such as the initial hostilities in Iraq (which ended in 2011) and the prevailing situation in Afghanistan.⁴⁰ Unlike the position of the US as regards the GWOT in Iraq, the ICRC maintains that the 2001 conflict between the US and the Taliban regime in Afghanistan as part of the GWOT was effectively an international armed conflict

³⁵ Rona (2003) 64.

³⁶ O’Connell (2004) 355-356.

³⁷ O’Connell (2004) 355-362.

³⁸ Milanovic (2007) 376.

³⁹ Milanovic (2007) 376.

⁴⁰ Milanovic (2007) 376.

waged between states.⁴¹ IHL should apply to these two situations, but not to all conflicts fought in the GWOT across the board.⁴² There was consensus that the 2003-2011 military expedition in Iraq was classifiable as an international armed conflict because it was fought between forces of the US and the Afghan government,⁴³ but despite this recognition detainees were still transferred to alternative prisons outside of Iraq.⁴⁴ Article 49 of GC IV clearly states that:

Individual or mass forcible transfers, as well as deportations 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.

The ICRC noted that there could be no exceptions to this provision.⁴⁵ In 2006 a draft opinion was issued by the US Department of Justice Office of the Legal Council which stated that the deportations to jails outside Iraq were admissible on a temporary basis to facilitate interrogation.⁴⁶

Common Article 2 states that armed conflicts are fought between states. To this the US made a somewhat innovative argument stating that some armed conflicts are beyond the scope of, and therefore not regulated by the GCs.⁴⁷ They cited the Martens Clause in support of the claim that armed conflict is not covered by the GCs in all instances.⁴⁸ This use of the Martens Clause is cause for concern in that, whereas it has frequently served to fill a *lacuna* for distinctly humanitarian purposes in the absence of a clear customary rule or *opinion juris*,⁴⁹ this is the first instance on

⁴¹ ICRC Report (2007) 725.

⁴² Milanovic (2007) 376.

⁴³ In an international armed conflict detainees held by either of the belligerents are to be granted POW status and treated in accordance with the provisions of GC III. Civilians taking part in hostilities can also be detained but must be treated in accordance with laws of war. Cf. Eppinger (2013) 340.

⁴⁴ Sadat (2008) 70.

⁴⁵ Sadat (2008) 70.

⁴⁶ Sadat (2008) 70.

⁴⁷ Milanovic (2007) 376. In *Hamdan v Rumsfeld* (2006) 2796 the court held that “Common Article 2 provides that ‘the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.’...High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a non-signatory “power,” provided the non-signatory “accepts and applies” the said terms. Therefore, it can be argued that if an armed conflict does not fall within the GC the conventions simply do not apply; however nothing prevents the belligerents from applying the laws of war where a conflict does not fall under the convention.

⁴⁸ Milanovic (2007) 377.

⁴⁹ Milanovic (2007) 377.

record where it has been used to justify conduct for the opposite reason, that is, with malicious intent.⁵⁰

4.1.2. Non-international armed conflict

The laws governing international conflict are quite distinct compared to those governing non-international armed conflict,⁵¹ for example in that the latter do not specify the enemy in the form of a POW classification or in a consideration of territorial boundaries.⁵² It only provides that general judicial safeguards be followed in dealing with detainees.⁵³

The minimum standards applicable to non-international armed conflict are set out in Common Article 3 of the GCs of 1949:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture b) taking of hostages; c) outrages upon personal dignity, in particular, humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The main issue with Common Article 3 is whether it applies exclusively to intrastate armed conflicts or to all non-international armed conflicts.⁵⁴

⁵⁰ The US does not want the GCs to apply because it will interfere with their extraordinary renditions and enhanced-interrogation techniques. Cf. Milanovic (2007) 377.

⁵¹ Sassòli (2004) 196.

⁵² Sassòli (2004) 196.

⁵³ Sassòli (2004) 196.

⁵⁴ Satterthwaite (2007) 1407.

In 2006 the court held, in *Hamdan*,⁵⁵ that the war with Al Qaeda was a non-international armed conflict.⁵⁶ Scholars such as Derek Jinks agree. He argues that Common Article 3 applies to all armed conflicts beyond the ambit of Common Article 2, and that the rule of non-international armed conflict should therefore be the yardstick for the GWOT.⁵⁷

Assuming that the said yardstick is adopted, what rules would be applicable where the US captures a suspected Al Qaeda operative in a foreign country and transfers him to a third country?⁵⁸ Also, if the rules of non-international armed conflict apply to a captured individual suspected of Al Qaeda activity, would such individual be seen as “taking no active part in hostilities” as noted in Common Article 3, and once detained, would such individual enjoy all the protections vouchsafed under Common Article 3?⁵⁹

Non-international armed conflicts are regulated to be between a state and a non-state actor and are internal in that they occur within a single state.⁶⁰ This is where the court made an error in *Hamdan* as non-international armed conflicts are not synonymous with internal conflicts and cannot be transnational. As in the *Nicaragua* case, it should have applied Common Article 3 as customary law that rules all kinds of armed conflicts.⁶¹

⁵⁵ *Hamdan v Rumsfeld* 126 (2006) 548 U.S. 557, 126 S.Ct. 2749. See discussion below.

⁵⁶ There is no definitive clarity pertaining to interpretation of the *Hamdan* ruling, except that the court, in concert with the common view, held the conflict with Al Qaeda to be a non-international conflict, which the US accepted. The court drew a distinction between Common Articles 2 and 3, thus implying that it was interpreted as a non-international armed conflict. However, the court contradicted itself in footnote 61 of its judgement where it discussed the applicant’s POW status, which is precluded in instances of non-international conflict and only obtains for international armed conflict. Cf. Milanovic (2007) 378.

⁵⁷ Jinks D “September 11 and the laws of war” 28 2003 *Yale Journal of International Law* 1 at 41 where the author states “that Common Article 3 applies, as a formal matter, to all “armed conflicts” not covered by Common Article 2--the provision defining international armed conflict within the meaning of the GCs. Moreover, as a practical matter, the provision governs all “armed conflicts” in the sense that international armed conflicts trigger protections equal to, and in most areas greater than, those accorded by Common Article 3. Therefore, because armed conflicts are either international or “not of an international character the minimum humanitarian protections recognized in Common Article 3 extend to all armed conflicts.”

⁵⁸ Satterthwaite (2007) 1409.

⁵⁹ Satterthwaite (2007) 1410.

⁶⁰ Milanovic (2007) 379.

⁶¹ *Nicaragua v United States of America* (1986) ICJ Reports 14 at paras 218,219; Cf. Milanovic (2007) 379

The uncertainty about the international or non-international status of the Afghanistan conflict presents a problem.⁶² Rules relating to detention are well developed for international armed conflicts, but not for their non-international counterparts.⁶³ Soldiers therefore had clear rules to follow in Iraq, but not in Afghanistan.⁶⁴ Be this as it may, there is consensus that the conflict waged by the US and its NATO allies against Al Qaeda in Afghanistan was a non-international armed conflict.⁶⁵ However, there is no consensus on the type of conflict where the US is engaged in conflicts with Al Qaeda elsewhere,⁶⁶ failing which the US adopted the internationally contentious position that non-international armed conflicts can transcend borders.⁶⁷

Common Article 3 to the GCs set the first rules for non-international armed conflicts.⁶⁸ It protects persons who are not, or who are no longer taking part in hostilities. Its prohibitions include torture, mutilation, cruel treatment, the taking of hostages, and passing sentences without observing proper judicial proceedings. Common Article 3 is the minimum safety net that the parties to a non-international armed conflict are bound to observe, and it has become international customary law which reflects the elementary considerations of humanity.⁶⁹

Common Article 3 is non-derogable and applies to all persons in enemy hands regardless of their political or legal classification or in whose hands they may be held.⁷⁰ It provides the minimum standards for treatments of detainees but does not put all the procedural safeguards of internment in place.⁷¹

Every component of the GWOT needs to be judged separately as some components are international armed conflicts and others that do not constitute international armed

⁶² Eppinger (2013) 349.

⁶³ Eppinger (2013) 349.

⁶⁴ Eppinger (2013) 349.

⁶⁵ Eppinger (2013) 339.

⁶⁶ Eppinger (2013) 339.

⁶⁷ Eppinger (2013) 339.

⁶⁸ ICRC Report (2007) 741.

⁶⁹ ICRC Report (2007) 741.

⁷⁰ ICRC Report (2007) 741.

⁷¹ The ICRC argues that sources of law consistent with Common Article 3 should then be applied in these circumstances, and opines that certain issues relating to the law on the conflict of hostilities needs further examination. It remains difficult to determine, therefore, whether and when a situation has evolved into a non-international armed conflict. Cf. ICRC Report (20047) 742.

conflicts may be non-international armed conflicts.⁷² The question arises, however, whether every armed conflict that is not an international armed conflict would perforce be a non-international armed conflict.⁷³ Common Article 3 refers to “armed conflict not of international character”, and Additional Protocol II refers to “armed conflict not covered by article 1 of Additional Protocol I”. This creates the impression that every armed conflict not of international character is perforce a non-international armed conflict. However, Common Article 3 also refers to armed conflicts “occurring on the territory of one of the high contracting parties”, and Additional Protocol II refers to “taking place on the territory of a high contracting party”.⁷⁴ Does this imply that conflicts occurring between a high contracting party and an armed group that do not occur within the territory of the high contracting party, but in the territory of another state is not a non-international armed conflict, or does it merely imply that the rule of treaties only obtains within the territory of the state that is a high contracting party?⁷⁵

4.1.3. Special consideration of “unlawful combatants” in the Global War on Terror

The US sees Al Qaeda as a non-state actor and as an organisation made up of many actors across the globe.⁷⁶ Non-governmental organisations cannot be party to the GCs. Therefore Al Qaeda is not qualified to sign GCs, nor did it in any case. The US further states that Common Article 2 triggers the application of the GCs and refers to “two or more high contracting parties”.⁷⁷ Al Qaeda is not a high contracting party and therefore the application of the GCs is not triggered, with the result in turn that Al Qaeda members do not have POW status, hence they are fair game, that is, subject to capture without violating the GCs.⁷⁸

The US holds that although Al Qaeda is not a high contracting party to the GCs its operatives may nevertheless be protected or afforded some POW rights under GC III

⁷² Sassòli (2004) 200.

⁷³ Sassòli (2004) 200.

⁷⁴ Sassòli (2004) 200-201.

⁷⁵ Sassòli (2004) 200-201.

⁷⁶ Dratel *et al* (2005) 48.

⁷⁷ Dratel *et al* (2005) 48.

⁷⁸ Dratel *et al* (2005) 48.

article 4(A) (2)⁷⁹ and (3),⁸⁰ but it submits that this argument would be incorrect.⁸¹ Unless there is a conflict in terms of Common Article 2 or 3 IHL will not apply, and even so, detainees would be denied POW status because they would not meet the requirements spelled out in article 4(A) (2) of GC III,⁸² namely the following: Combatants must carry distinctive signs (insignia), must carry arms openly, must conduct their operations in accordance with the laws of war, and must serve under the command of persons who are specifically responsible for the actions of their subordinates.

The US asserted, however that the GCs did apply in the instance of the conflict with the Taliban in Afghanistan, but excluded Taliban detainees captured in the conflict because they were “unlawful combatants” and did not qualify for POW protection under article 4 of GC III.⁸³ The US adduced the argument⁸⁴ that the Taliban who had taken part in hostilities as operatives under the aegis of the *de facto* Afghanistan government were not entitled to POW status because they had not complied with the rules of war and had not distinguished themselves from civilians.⁸⁵ In such cases of non-compliance POW status is withheld from operatives under GC III, if they are acting as members of a resistance movement, other militias or a volunteer corps.⁸⁶ However, GC III does not explicitly exact the same compliance from members of

⁷⁹ “4A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: a) that of being commanded by a person responsible for his subordinates; b) that of having a fixed distinctive sign recognizable at a distance; c) that of carrying arms openly; d) that of conducting their operations in accordance with the laws and customs of war.”

⁸⁰ “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”

⁸¹ Dratel *et al* (2005) 49.

⁸² Dratel *et al* (2005) 49.

⁸³ Satterthwaite (2007) 1396. Article 4 A – C of GC III refers to various classes of persons to be afforded POW status.

⁸⁴ Only GC III needs to be dealt with since neither Afghanistan nor the US is a signatory to AP I. Cf. Sassòli (2004) 204.

⁸⁵ Rona (2003) 65. The argument is often proffered that members of the regular armed forces of a party to a conflict did not comply with the rules of war and are therefore not entitled to POW status, but the protective effect is vitiated if armed forces are invariably denied POW status on such putative grounds. Cf. Sassòli (2004) 204.

⁸⁶ Rona (2003) 65.

armed forces that are clearly acting in conflict situations with the Taliban in full view.⁸⁷

In fact, before the *Hamdan v Rumsfeld*⁸⁸ decision the US held that Common Article 3 of GC IV did not apply to Al Qaeda⁸⁹ or Taliban detainees because as “unlawful combatants” they were not afforded protection and fell outside the scope of the laws of war.⁹⁰

In *Hamdan* the applicant was captured in 2001 and turned over to the US who transferred him to Guantanamo Bay.⁹¹ Although captured in 2001 the Supreme Court only heard his case in 2006.⁹² The applicant was a confessed driver of Osama Bin Laden. In 2002 President Bush decided that he was eligible for trial by military commission for unspecified crimes, and in 2003 he was charged with conspiracy to commit offences triable by military council.⁹³ He challenged the validity of the military commission to try him.⁹⁴ The court held that the military commission violated Common Article 3 of the GCs underwritten by the US and incorporated in its statutes.⁹⁵ The court held further that the military commission did not provide minimal judicial guarantees to detainees as is expected by civilised peoples.⁹⁶ The majority of the court found that conspiracy to commit a crime is not an offence under the laws of war.⁹⁷

⁸⁷ Sassòli (2004) 204.

⁸⁸ *Hamdan* (2006) 2749.

⁸⁹ Al Qaeda members captured in Afghanistan could be denied POW status as they did not form part of the armed forces of a party to the conflict. GC III removes all doubt whether POW status should be granted or denied by determining that detainees should be treated as POWs until a competent tribunal can rule on their status. However, the US maintains that detainees held at Guantanamo Bay are “unlawful combatants” and therefore not entitled to POW status. If this provision only applied in doubtful cases POW status would be precluded without exception. Cf. Sassòli (2004) 205.

⁹⁰ Satterthwaite (2007) 1397.

⁹¹ Milanovic (2007) 374.

⁹² Milanovic (2007) 374.

⁹³ Milanovic (2007) 374.

⁹⁴ Milanovic (2007) 374.

⁹⁵ Common Article 3(d) states that it is prohibited to pass sentences and carry out executions without a previous judgment being pronounced by a “regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilized peoples”. Cf. Milanovic (2007) 374.

⁹⁶ Milanovic (2007) 374.

⁹⁷ Milanovic (2007) 374.

IHL accepts the use of force by privileged combatants and limits the use of force in relation to protected persons, including civilians and POWs.⁹⁸ According to the ICRC all armed conflict detainees are entitled to “protected person” status.⁹⁹ Under IHL there are two categories of protected persons in international armed conflicts: combatants or POWs¹⁰⁰ in terms of GC III and civilians in terms of GC IV.¹⁰¹ Persons who are not compliant with the nationality principle¹⁰² and are therefore unprotected receive no more than fundamental guarantees of humane treatment.¹⁰³ The US position is that terrorists cannot be “protected persons”, but it forgets that some of the detainees form part of the regular armed forces of the Taliban and should be given POW status until a competent tribunal makes a decision regarding their status.¹⁰⁴ Others are civilians that may or may not have committed criminal acts.¹⁰⁵ Detaining or interrogating them, if it proves imperative, would not be influenced detrimentally if they are granted protected status.¹⁰⁶

Combatants are part of the armed forces of a party to a conflict and cannot be prosecuted for taking part in hostilities.¹⁰⁷ They may be attacked until they surrender or are rendered *hors de combat*.¹⁰⁸ The requirements they need to meet in order to be afforded combatant status depends on whether GC III only applies or whether GC

⁹⁸ Satterthwaite (2007) 1398.

⁹⁹ Rona (2003) 66.

¹⁰⁰ Articles 13 and 15 of GC III set the basic treatment-standard for POWs. Article 13: “Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.” Article 15: “The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.”

¹⁰¹ Sassòli (2004) 203.

¹⁰² Article 4 of GC IV states that “... Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are...”

¹⁰³ Sassòli (2004) 203.

¹⁰⁴ Rona (2003) 66.

¹⁰⁵ Rona (2003) 66.

¹⁰⁶ Rona (2003) 66.

¹⁰⁷ Sassòli (2004) 204.

¹⁰⁸ Sassòli (2004) 204.

III and Additional Protocol I also apply;¹⁰⁹ also whether they are members of the regular armed forces or of a resistance movement.

Detainees captured in an international conflict are subject to all four GCs,¹¹⁰ while those captured in a non-international conflict are only subject to Common Article 3 of the GCs, read in conjunction with other applicable treaties (e.g. AP II), international customary law and international human rights law, all of which regulate deprivation of liberty.¹¹¹ Other bodies of law apply where persons are detained in a context that does not involve armed conflict.¹¹²

Combatants in international armed conflicts are granted POW status under IHL; however, combatants in non-international armed conflicts are precluded from such status since they are subject to a different legal dispensation¹¹³ whereby POW or combatant status is non-existent.¹¹⁴

When a combatant falls into enemy hands he/she must be treated humanely and held pending the end of hostilities, whereupon he/she must be released since he/she cannot be held on grounds of breaking a law for which infraction his/her captors would be entitled to incarcerate him/her; after all, the purpose of his/her detention was merely to prevent his/her further participation in armed hostilities.¹¹⁵

Regular combatants are allowed to be actively involved in hostilities aimed at achieving military objectives in line with the rule of IHL.¹¹⁶ If they are captured in the course of such pursuits they are held as prisoners of war until the cessation of hostilities.¹¹⁷ However, their combatant status cannot be used as grounds to detain them after cessation of the hostilities concerned, unless they are suspected of committing war crimes or other criminal acts.¹¹⁸ Even so, they may only be

¹⁰⁹ Sassòli (2004) 204.

¹¹⁰ ICRC Report (2007) 726.

¹¹¹ ICRC Report (2007) 726.

¹¹² ICRC Report (2007) 726.

¹¹³ ICRC Report (2007) 726.

¹¹⁴ ICRC Report (2007) 728.

¹¹⁵ Sassòli (2004) 205.

¹¹⁶ ICRC Report (2007) 726.

¹¹⁷ ICRC Report (2007) 726.

¹¹⁸ ICRC Report (2007) 726.

prosecuted if it is done by the same courts and through the same procedure followed for members of the armed forces of the detaining power.¹¹⁹ If a person fulfils the requirements for protected person status no person can fall in between GC III and IV and therefore be protected by neither. Article 4 and 4(4) of GC IV clearly states that if a person is not protected under GC III he is still protected under GC IV.¹²⁰

If terrorists are granted civilian status they can still be prosecuted for taking part in an armed conflict.¹²¹ Likewise, even if civilian status is granted to “unlawful combatants” they may nevertheless be interned for reasons imperative to security, provided that incarceration cannot continue beyond a reasonable timeframe that must be set for a prospective trial.¹²²

IHL does not explicitly refer to the term “unlawful combatants”.¹²³ What is meant by this term is that POW status is not extended to civilians (protected persons) who are directly involved as combatants in an armed conflict without qualifying as regular combatants, and who then fall into enemy hands in consequence and in the process of such involvement. Such detainees may then be prosecuted and convicted for the mere act of taking part in hostilities and are commonly referred to as “unlawful belligerents” or even “unlawful combatants”.¹²⁴ Under IHL civilians cannot be attacked unless they take up arms and take a direct part in hostilities.¹²⁵

There are two schools of thought regarding civilians who engage in active hostilities:¹²⁶ First, that they are “unlawful combatants” who are only covered by Common Article 3 of the GCs, and possibly by article 75 of Additional Protocol I as treaty law or international customary law. Secondly, they are deemed to be “unlawful combatants” who are entitled to protected status because they fulfil the nationality principle (in terms of article 4 of GC III), and regardless of not fulfilling that principle

¹¹⁹ ICRC Report (2007) 726.

¹²⁰ Sassòli (2004) 207.

¹²¹ Sassòli (2004) 208-209.

¹²² Sassòli (2004) 210.

¹²³ ICRC Report (2007) 727.

¹²⁴ ICRC Report (2007) 727.

¹²⁵ ICRC Report (2007) 727.

¹²⁶ ICRC Report (2007) 727.

are nevertheless at least protected under Common Article 3 of the GCs, as well as article 75 of Additional Protocol I.

Therefore, there is no category of persons involved or affected by an armed conflict that does not fall under IHL, so there is no gap between GC III and IV as suggested by the US.¹²⁷

The obvious difficulty seems to be the unresolved and elusive matter of deciding what is meant by “direct” engagement in hostilities.¹²⁸

The only measures that can be taken against a civilian combatant are deprivation of the immune status of a civilian that would otherwise protect him/her against armed attack in the course of hostilities, internment¹²⁹ warranted by security reasons, possible forfeiture of certain rights and privileges during detention, and liability to criminal charges.¹³⁰ To go beyond these measures would expose the individual to serious violations of his right to life, physical integrity and personal dignity; that is to say, it would entail relaxation of the absolute prohibition that would protect the person against torture in the form of exposure and subjection to enhanced interrogation techniques.¹³¹

Civilians who participate directly in hostilities during a non-international armed conflict are entitled to fewer of the protections that are usually extended to combatants in an international armed conflict.¹³² For example, they are not granted POW status and can be prosecuted and convicted for all acts of violence, including

¹²⁷ ICRC Report (2007) 727.

¹²⁸ ICRC Report (2007) 727.

¹²⁹ Internment is a form of deprivation of liberty without criminal charges. In accordance with articles 42 and 78 of GC IV internment can only be imposed if it is deemed imperative for purposes of protecting the national integrity and security of the detaining power. “If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.” “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.” Internment must end with cessation of reasons for internment or of the hostilities concerned. Cf. ICRC Report (2007) 729.

¹³⁰ ICRC Report (2007) 728.

¹³¹ ICRC Report (2007) 728.

¹³² ICRC Report (2007) 728. However, the difficult issue of direct participation by civilians and rules of engagement fall outside the scope of this study.

war crimes.¹³³ Their rights and treatment during detention are governed by domestic law, IHRL and IHL.¹³⁴ However, it must be stressed that no one can subject detainees to acts prohibited by IHL, including murder, torture, and cruel, inhuman and degrading treatment.¹³⁵ An “unlawful combatant” is similarly protected, hence it is incorrect to argue that they have minimal rights. The ICRC observes (correctly) in this regard:

“It is inconceivable that calling someone an ‘unlawful combatant’ (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law.”¹³⁶

It is difficult to determine whether a group resorting to violence can be described as a “party to the conflict”. Considerations are the level of violence and the level of organisation of the group. Uncertainty arises when the structure of the group is loose and it lacks a definite chain of command.¹³⁷

If the Geneva Conventions apply to the conflict in Afghanistan the Taliban fighters need to be granted POW status and should be repatriated after hostilities end;¹³⁸ however, the difficulty here is that acts of terror have not ceased in Iraq and the US still has a presence in Afghanistan.¹³⁹

Even if the US never recognised the Taliban as the legitimate government of Afghanistan its members would still have fallen under the protection of the GCs.¹⁴⁰ However, Al Qaeda is an independent terrorist group and not a state party to the GCs and therefore does not fall under the protection of the GCs.¹⁴¹ The US attempt to limit the application of GC III in the manner indicated is incorrect¹⁴² since the presence or absence of GC III as protective cover does not change the fact that detainees at Guantanamo Bay would be protected by general humanitarian

¹³³ ICRC Report (2007) 728.

¹³⁴ ICRC Report (2007) 728.

¹³⁵ ICRC Report (2007) 728.

¹³⁶ ICRC Report (2007) 729.

¹³⁷ ICRC Report (2007) 742-743.

¹³⁸ Sassòli (2004) 203.

¹³⁹ Sassòli (2004) 199.

¹⁴⁰ McDonald N Sullivan S “Rational interpretation in irrational times: The third Geneva Convention and the ‘war on terror’” 44 2003 *Harvard International Law Journal* 301 at 302.

¹⁴¹ McDonald *et al* (2003) 302.

¹⁴² McDonald *et al* (2003) 304.

principles as enunciated in the Martens Clause of 1899 (incorporated in various human rights instruments) and in Common Article 3 of the GCs.¹⁴³

The US is reluctant to acknowledge POW status because of the potential hindrance it might pose to interrogations. Again, it is concerned about the potential impact on the GWOT as a whole of acknowledging the protection of GC III.¹⁴⁴

GC III and Additional Protocol I regulate POW status, which is precluded in some instances.¹⁴⁵ Article 4 of GC III states the conditions that have to be met to qualify for POW status. Terrorists act in violation of the requirements for irregular troops according to article 4 of GC III because they carry concealed weapons and disguise themselves as civilians.¹⁴⁶ Article 5 of GC III states that if there is any doubt, detainees must be treated as POWs, pending determination by a competent tribunal.¹⁴⁷ US army regulations confirm this position.¹⁴⁸

Combatants should wear distinctive insignia to distinguish them from civilians.¹⁴⁹ Article 44(3) of Additional Protocol I determines that where insignia are precluded by the nature of hostilities, POW status is still applicable if arms are carried openly.¹⁵⁰

The effect of article 44 is that combatants entitled to POW status fall in three categories: Members of the regular armed forces and supporting personnel; combatants who are not in uniform but wear insignia and carry arms openly; and combatants who carry arms openly but are prevented by special circumstances from wearing insignia or distinctive clothing.¹⁵¹

Since regular armed forces wear uniforms to signal their status it follows that regular soldiers would be classifiable as unlawful combatants if they commit belligerent acts

¹⁴³ McDonald *et al.* (2003) 304.

¹⁴⁴ McDonald *et al.* (2003) 307.

¹⁴⁵ Mofidi M “‘Unlawful combatants’ or ‘prisoners of war’: The law and politics of labels” 36 2003 *Cornell International Law Journal* 59 at 66.

¹⁴⁶ Mofidi (2003) 74.

¹⁴⁷ Rona (2003) 65; Mofidi (2003) 67.

¹⁴⁸ Rona (2003) 65.

¹⁴⁹ Mofidi (2003) 68.

¹⁵⁰ Mofidi (2003) 68.

¹⁵¹ Mofidi (2003) 68.

while dressed in civilian apparel.¹⁵² “Unlawful combatants” can be members of the regular armed forces or members of resistance or guerrilla movements who do not fulfil the conditions of lawful combatants.¹⁵³

The US also disavows the applicability to detainees in its custody of GC IV, which regulates the treatment of civilian participants in armed conflict, but the law recognises the humanity, and therefore the inalienable human rights, of the persons concerned as a fundamental, non-derogable principle pertaining to human rights across the board.¹⁵⁴ Not applying GC III or IV leaves the detainees in a legal vacuum.¹⁵⁵

Terrorists cannot be engaged in a legal act of war since they are not constituted as states, therefore it follows that terrorist acts committed by private individuals cannot be classified as acts of war.¹⁵⁶ Additional Protocol I provides a definition for “armed forces” and lays down the condition that terrorists are unprotected in that capacity, and that soldiers may not conduct military operations disguised as civilians.¹⁵⁷

4.1.4. Special debate on detention in IHL and IHRL

Since detention is one of the main components of extraordinary rendition it is necessary to include a short discussion on the current debate regarding the applicability of IHL and IHRL to detention in international.

In *Hassan v The United Kingdom*¹⁵⁸ the court had to consider the applicability of IHL, IHRL and the ECHR to the detention of Tarek Hassan at Camp Bucca. In examining this question of law the court stressed that the protection offered by human rights conventions and that offered by IHL co-exist in situations of armed conflict.¹⁵⁹ It further referred to the opinion of the international court of justice which explained that there are three possibilities in the relationship between IHL and IHRL: some rights

¹⁵² Rona (2003) 65; Mofidi (2003) 69.

¹⁵³ Mofidi (2003) 69.

¹⁵⁴ Rona (2003) 66.

¹⁵⁵ Rona (2003) 66.

¹⁵⁶ Mofidi (2003) 74.

¹⁵⁷ Mofidi (2003) 69.

¹⁵⁸ *Hassan v The United Kingdom* (2014) ECHR Application 29750/09.

¹⁵⁹ *Hassan* (2014) par 102.

are exclusively matters of IHL, some exclusively of IHRL, but other rights may concern both IHL and IHRL.¹⁶⁰ In conclusion the court held that the rights afforded to deprivation of liberty in the ECHR run concurrent with the safeguards provided in IHL, and therefore IHL and IHRL applied to this situation.¹⁶¹

4.2 International Human Rights Law

Extraordinary rendition is a complex human rights violation.¹⁶² It is easy to see the violations brought about by extraordinary rendition as separate violations of human rights, but it is the cumulative effect of violations that calls for urgent attention.¹⁶³

Although international human rights are universal,¹⁶⁴ there are no territorial boundaries in the GWOT as the war moves to any location where Al Qaeda can be found.¹⁶⁵ It has also been dubbed “the long war” since it will only end once terrorism aimed at the US has been decisively stamped out.¹⁶⁶

The ICRC states that IHL only applies to the GWOT in situations where violence has escalated to an armed conflict of either international or non-international character.¹⁶⁷ However, international organisations¹⁶⁸ stress that US actions beyond

¹⁶⁰ *Hassan* (2014) par 102.

¹⁶¹ *Hassan* (2014) par 104 where the court held: “By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention [ECHR] in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions...” Cf. Hill-Cawthorne L Akande D “Does IHL provide a legal basis for detention in non-international armed conflicts?” 7 May 2014 *European Journal of International Law: Talk!* available online at <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>, Heller K “What exactly is the ICRC’s position on detention in NIAC?” 6 February 2015 *Opinio Juris Online* available at <http://opiniojuris.org/2015/02/06/exactly-icrcs-position-detention-niac/>, Goodman R “The detention of civilians in armed conflict” 103 2009 *The American Journal of International Law* 48. See also Borelli S “Casting light on the legal black hole: international law and detentions abroad in the ‘war on terror’” 87 2005 *International Review of the Red Cross* 39; De Zayas A “Human rights and indefinite detention” 87 2005 *International Review of the Red Cross* 15.

¹⁶² Saul B Borelli S *Research Handbook on International Law and Terrorism* (2014) Edward Elgar Publishing Limited 7.

¹⁶³ Saul *et al* (2014) 7.

¹⁶⁴ Fitzpatrick J “Speaking law to power: The war against terrorism and human rights” 14 2003 *European Journal of International Law* 241 at 252.

¹⁶⁵ Satterthwaite (2007) 1405.

¹⁶⁶ Satterthwaite (2007) 1405.

¹⁶⁷ Such as the 2001 Afghanistan invasion, and the first phase of the Iraq invasion in 2003.

¹⁶⁸ Such as Amnesty International, Human Rights First, and the International Commission of Jurists. Cf. Satterthwaite (2007) 1406.

the confines of the battlefield are ruled by domestic and international human rights law (IHRL)¹⁶⁹ that set limits to the capturing of Al Qaeda operatives by the US.¹⁷⁰

Extraordinary rendition violates various IHRL rules including: the right to liberty and security of persons, the right to be free from torture and other ill-treatment, the right to a fair trial, the right to life (in some instances), the right to be free from abduction, the right not to be held incommunicado detention and the right to be shown due respect for private and family life.¹⁷¹ The right to liberty and security of the person is violated in all cases of extraordinary rendition through the extrajudicial capturing, transfer and arbitrary detention of the detainees.¹⁷² The right to be free from torture and other ill-treatment can be inherently violated through the transfer process alone.¹⁷³ In *El-Masri v Macedonia*,¹⁷⁴ for example, the applicant was extraordinarily rendered from Skopje airport to the Salt Pit prison in Afghanistan. In this instance the court held that:

... any recourse to physical force, which has not been made strictly necessary by the applicant's own conduct, diminishes human dignity and is in principle an infringement of the right set forth in art 3 of the [ECHR]. Accordingly, the physical force used against the applicant at the airport was excessive and unjustified in the circumstances.¹⁷⁵ (own emphasis).

The court further held that the Republic of Macedonia had breached the applicant's right to private and family life in terms of article 8 of the ECHR,¹⁷⁶ and his rights under article 5 because the Republic of Macedonia could have been reasonably expected to know that handing him over to the CIA would lead to arbitrary, in commando and indefinite detention.¹⁷⁷

¹⁶⁹ Satterthwaite (2007) 1405.

¹⁷⁰ Satterthwaite (2007) 1405.

¹⁷¹ Saul *et al* (2014) 4.

¹⁷² Saul *et al* (2014) 4-5.

¹⁷³ Refer to the discussion of the "twenty-minute take out" discussed in chapter 2.

¹⁷⁴ *El-masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25.

¹⁷⁵ *El-Masri* (2013) par 207.

¹⁷⁶ *El-Masri* (2013) par 148-250.

¹⁷⁷ *El-Masri* (2013) par 238-239.

Likewise, in *Alzery v Sweden* the court held that the treatment of the applicant by foreign officials at the airport amounted to excessive use of force which amounted to a breach of article 7 of the ICCPR.¹⁷⁸

IHL applies very specific guidelines for violations in times of armed conflict, while IHRL provides a broader (i.e. more generalised) protective cover that does not relate specifically to armed conflict.¹⁷⁹ Except in the most essential matters, human-rights norms can usually be abrogated, provided IHL is observed. IHRL sees the right to life as non-derogable, although in some instruments there is an explicit or implicit exception for lawful acts of war.¹⁸⁰ In armed conflicts both IHL and unsuspended provisions of IHRL are applied. Where IHL is the *lex specialis* dealing explicitly with the laws of war, IHRL is more of a general rule.¹⁸¹

Extraterritorial conduct of a military or law enforcement nature against a terrorist of one state on the territory of another state can be a violation of human rights norms and international customary law. In *López v Burgos*,¹⁸² for example, the court held that states have a duty to protect and uphold the right with respect to all persons in their territory or subject to their jurisdiction. However, this does not mean, the court held, that a state is free of this duty and cannot be held accountable for a violation committed within the territory of another state, whether with that state's consent or not. The court concluded that it would be unreasonable for a state to violate the principles it is bound to uphold within the territorial bounds of another state while being legally prevented from doing so within its own borders.¹⁸³

Some scholars are of the opinion that IHL governs in times of armed conflict by regulating relations between the state and citizens of the adversary, while IHRL primarily regulates the relationship between a state and its own citizens during

¹⁷⁸ *Alzery* (2006) par 11.6. "Insofar as the State party accepts the finding of its Parliamentary Ombudsman that the treatment suffered was disproportionate to any legitimate law enforcement purpose, it is evident that the use of force was excessive and amounted to a breach of article 7 of the Covenant. It follows that the State party violated article 7 of the Covenant as a result of the treatment suffered by the author at Bromma airport."

¹⁷⁹ Sassòli (2004) 214.

¹⁸⁰ Sassòli (2004) 215

¹⁸¹ Sassòli (2004) 215-216.

¹⁸² *López Burgos v. Uruguay*, (1981) 36 UN GAOR Supp. No. 40 UN Doc. A/36/40 at 182 par 12.3.

¹⁸³ Fitzpatrick (2003) 253.

peacetime.¹⁸⁴ Delahunty and Yoo further argue that IHRL originated as early as 1948 in the UDHR which created a common, comprehensive international standard, but as time passed since then it became increasingly apparent that delegates intended it to apply in peacetime only.¹⁸⁵ According to Delahunty and Yoo the ICCPR does not apply to the GWOT as the UN Human Rights Committee suggests.¹⁸⁶ They argue that the ICCPR regulates the relationship between a state and its nationals and others subject to its jurisdiction, such as aliens in its territory.¹⁸⁷ It is not meant to regulate the relationship between a state party and the nationals of the state with which it is engaged in armed conflict.¹⁸⁸ They further state that IHRL may be derogable in some instances if it suits the interests of the relevant state's nationals. However, IHL is non-derogable even in a state of grave emergency because derogation would not be in the interests of non-nationals.¹⁸⁹ It follows, therefore (according to Delahunty and Yoo) that unlike IHL, the foremost concern of IHRL is protection of the state's subjects, or the power to detain non-nationals who owe allegiance to that state.¹⁹⁰

Delahunty and Yoo assert that the ICCPR does not regulate armed conflicts falling under IHL.¹⁹¹ The plain language of article 2 of the ICCPR reads "within its territory and subject to its jurisdiction".¹⁹² The fact that both the word "territory" and "jurisdiction" are included implies that it has no extraterritorial effect and therefore does not regulate the state's dealings with the nationals of the other power with whom they are in conflict (unless they happen to be in its territory).¹⁹³ The words "within the jurisdiction" were specifically included in article 2(1) of the ICCPR to preclude the emanation of obligations for the state from the right enshrined in the ICCPR with respect to territories under military occupation.¹⁹⁴

¹⁸⁴ ICRC's Jean Pictet and British scholar Christopher Greenwood are quoted in Delahunty D Yoo J "What is the role of international human rights in the war on terror" 59 2010 *DePaul Law Review* 301 at 310.

¹⁸⁵ Delahunty *et al* (2010) 314.

¹⁸⁶ Delahunty *et al* (2010) 317.

¹⁸⁷ Delahunty *et al* (2010) 319.

¹⁸⁸ Delahunty *et al* (2010) 319.

¹⁸⁹ Delahunty *et al* (2010) 320.

¹⁹⁰ Delahunty *et al* (2010) 321.

¹⁹¹ Delahunty *et al* (2010) 323.

¹⁹² Delahunty *et al* (2010) 323.

¹⁹³ Delahunty *et al* (2010) 323.

¹⁹⁴ Delahunty *et al* (2010) 324.

In *Turkey v Cyprus*¹⁹⁵ the court considered article 1 of the ECHR. Turkey argued that its invasion of Cyprus did not amount to an annexation, or to an installation of a civil or military government there, and that it could only be held liable for violations of the ECHR within its own territory. The Committee rejected the argument and interpreted “jurisdiction” to include persons under Turkey’s “actual authority and responsibility whether its authority is exercised within its own territory or abroad”.¹⁹⁶

4.2.1. Customary International Law

Customary international law evolves from three usages or practices: diplomatic relations between states; practice of international organisations; state laws and court decisions; and administrative practices.¹⁹⁷

The UDHR is a strong customary international law instrument, and many of its provisions have been given that status.¹⁹⁸ The rights upheld in the UDHR are of such fundamental value that no state or individual would consider overriding or circumventing them as they are the pillars supporting the rule of law and human rights in any self-respecting state functioning within the context of international society.¹⁹⁹ The UDHR is an expression of, and an exhortation to all nations and peoples to uphold the rights enshrined in the United Nations Charter.²⁰⁰

¹⁹⁵ *Turkey v Cyprus* (1975) ECHR Applications 6780/74 and 6950/75.

¹⁹⁶ *Turkey* (1975) 136 par 8 where the court held that “...the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone ‘within their jurisdiction’ ... The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad ...”

¹⁹⁷ Wilske *et al* (1998) 212-213.

¹⁹⁸ Preliminary report by the Special Representative of the Commission, Mr Andrés Aguilar, appointed pursuant to resolution 1984/54, on the human rights situation in the Islamic Republic of Iran (1 February 1985) *United Nations Economic and Social Council E/CN.4/1985/20* at 8 available at http://iranhrdc.org/files/pdf_en/UN_Reports/Andres%20Aguilar/E.CN.4.1885.20--Aguilar's%20Report%201985.pdf; See also Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 130.

¹⁹⁹ Preliminary report by the Special Representative of the Commission, Mr Andrés Aguilar, appointed pursuant to resolution 1984/54, on the human rights situation in the Islamic Republic of Iran (1985) 8; See also Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 130.

²⁰⁰ Preliminary report by the Special Representative of the Commission, Mr Andrés Aguilar, appointed pursuant to resolution 1984/54, on the human rights situation in the Islamic Republic of Iran (1985) at 8.

The UDHR strict adjuration to uphold said human rights is clearly violated in some instances by the use of extraordinary rendition, and it affirms, in fact, that disregard for human rights has been the cause of barbaric actions that “shock the conscience of mankind”; moreover that basic human rights should be protected by the rule of law.²⁰¹ The preamble further states that the Declaration was drawn up to reaffirm mankind’s trust and faith in humanity, and the respect that all persons should pay to the enforcement of and adherence to these human rights.²⁰²

Article 3 of the UDHR, which accords to all and sundry without regard to persons the right to security of person, life and liberty is violated at every stage of the process of extraordinary rendition, which involves the kidnapping and rendering of a person to a foreign legal system where torture is used as an interrogation method. More specifically, the right to security of the person is violated from the moment the victim is kidnapped. This is followed by torture which is a violation of the right to life, especially given the harsh and cruel methods employed,²⁰³ leaving many victims physically and mentally severely abused and traumatised, perhaps even costing them their lives in the end.

Article 5 expressly prohibits torture and any form of cruel, inhuman or degrading treatment. This article is relevant to extraordinary rendition and can be read with the preamble, which exhorts all nations throughout the world to promote respect for and deference to the Declaration.²⁰⁴ Victims of extraordinary rendition are subjected to torture because they are rendered to countries where such conduct is readily

²⁰¹ Preamble to the UDHR: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

²⁰² Preamble to the UDHR “ ... peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person ... Whereas member states have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms ... common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive ... to promote respect for these rights and freedoms ... ”

²⁰³ Maher Arar’s story at <http://www.maherarar.ca/mahers%20story.php>; See also Arar “They put a bag over my head and flew me to Syria for torture and interrogation: This is what they did to me” (November 6 2003) available at <http://www.counterpunch.org/arar11062003.html>; See also “CIA nabs wrong man: Extraordinary rendition timeline: Part 2.”

²⁰⁴ Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 130.

tolerated, such rendition being perpetrated deliberately by the US in the full knowledge that such tolerance exists in the countries concerned.²⁰⁵ A prime example of such rendition with premeditated consequences is the case of Talaat Fouad Qassem, who was apprehended by the CIA in 1995 and then delivered to Egypt where he had been sentenced to death *in absentia*,²⁰⁶ this after the US had in fact accepted a report detailing the use of torture in Egypt.²⁰⁷ The report revealed that Egyptian security officers had tortured and arbitrarily detained prisoners while local police had taken to torturing criminal suspects and other people. The report further contained mention of the fact that the Egyptian Organisation for Human Rights had published a further report in which 41 cases of torture were recorded that had resulted in 15 deaths. Yet despite these alarming revelations, the CIA chose to transfer Qassem to the Egyptian government after arbitrarily detaining him on a ship in the Adriatic Sea.²⁰⁸ Thus in this instance the US had not only violated the prisoner's right to be safeguarded against torture, but also failed to meet its obligation as a state party to the UDHR to uphold and protect the rights enshrined therein.

Apart from the torture to which victims of extraordinary rendition are subjected, the sheer brutality of the process whereby victims are rendered is itself cause for grave concern. The "twenty-minute takeout" involves drugging the victim with an unknown substance, strapping him with a diaper, as he will be unable to control his bodily functions, and blindfolding him for the entire journey.²⁰⁹ The mere act of rendering a person incapable of controlling his bodily functions is in itself inhuman and degrading in the worst degree. Kidnapping and rendering a person unconscious, followed by subjecting the person to paralysing fear of unnameable horror, is cruel to say the least. These victims are not told why they are being apprehended, or where they are going, or what crime they are being accused of.

²⁰⁵ US Department of State Human Rights Reports, in which the US Department of State reports investigations into human-rights violations in countries around the world, and then compiles the findings in a detailed yearly report. Available at <http://www.state.gov/j/drl/rls/hrrpt/index.htm#>.

²⁰⁶ Mayer (14 February 2005) 106, 109.

²⁰⁷ US Department of State Human Rights Report: Egypt (2004) available at <http://www.state.gov/j/drl/rls/hrrpt/2004/41720.htm>.

²⁰⁸ Mayer (14 February 2005) 109.

²⁰⁹ Marty (2006) 21 par 84 in which the "twenty-minute take-out" is explained as the "security check" used by CIA agents. It is said that a detainee can be fully prepared for transportation within twenty minutes by rendering him immobile and incoherent and by dressing him in a diaper.

Furthermore, article 6 states that each person has the right to recognition as a person before the law, regardless of where that person happens for the time to be. These victims are sent to prisons, which in many cases have unknown coordinates, where they are kept without affording them any contact with the outside world. Not even humanitarian aid groups have access to these prisons; therefore the welfare of the victims cannot be communicated to loved ones and family members.²¹⁰ No law governs within the boundaries of these prisons, and the prisoners are not granted any form of legal representation, neither are they offered an explanation as to why they are being held against their will. Basically, these prisoners are treated like animals as their rights as members of the human race are abrogated; they are kept in degrading surroundings and subjected to the severest torture. The right to recognition as a person before the law is trampled into the dust during extraordinary rendition; in fact, the victim's human status is effectively obliterated from the moment he is kidnapped.

According to article 8 every person has the right to approach a competent tribunal for a remedy in instances where the person's fundamental rights have been infringed. Article 10 enforces this determination by declaring that everyone has the right to a fair and public hearing by an impartial body, in order to determine his rights and the nature of the crimes he is being accused of. Victims of extraordinary rendition are denied access to legal representation. In most cases the states guilty of this practice do not have enough evidence against the victim to bring the matter before a competent court, hence the use of extraordinary rendition. Not to be forgotten in this regard is the fact that, because he is not informed of his crime, not granted the right to legal representation, and not granted the opportunity to approach a court or tribunal during his captivity, his remedies after release are bleak as well. Victims have attempted instituting court proceedings to seek justice for the horrifying atrocities committed against them, but in most of these cases the state invoked the state secrecy defence in order to get the case dismissed and avoid any further probing into the nature of what really happened.²¹¹ Although these victims are paid

²¹⁰ Satterthwaite (2006-2007) 71; see also Sepper (2006) 1806.

²¹¹ See in general *Khaled El-Masri v George Tenet et al* (7 July 2006) US Court of Appeals, 4th Ct. No. 06-1667, "El-masri v Tenet" (13 January 2015) *American Civil Liberties Union* available at

handsome amounts of money, this is merely a consolation prize. They never get to see justice prevail and the guilty culprits caught and tried in a court of law.

Article 9 states that no person may be subjected to arbitrary arrest, detention or exile. In short, it cannot be gainsaid that extraordinary rendition violates article 9 in its entirety. Victims are not even arrested but are kidnapped. No explanation is given, either for their detention, or of the nature of their crime. They are conveyed to prisons in foreign countries and are detained indefinitely without rhyme or reason.

Article 12 asserts the right to be presumed innocent until proven guilty. Extraordinary rendition rides roughshod over this right by kidnapping targeted individuals on the purely presumptive grounds of having committed a crime so heinous that it justifies deprivation of the person's basic human rights. Such persons are rendered secretly for lack of evidence that can lead to a conviction, and the veil of secrecy serves as cover for the torture and detention of scores of innocent people.

Extraordinary rendition violates the provisions of article 12 which safeguards, without respect to persons, the right to protection from arbitrary interference with privacy, private dwellings, families, honour, reputation and private correspondence in that it interferes with the victim's home, as well as his family who are not informed of the event of his captivity or of where he is being detained. Most families are left to believe that the victim is dead or, in some instances, that they have simply been abandoned by the head of their household.²¹²

The right to protection from arbitrary interference with personal correspondence, or with the right to conduct such correspondence, is violated by refusing to allow humanitarian aid groups to gain access to prisons. Information about the identity of inmates kept in prisons cannot be obtained as a result of such lack of access; moreover, the said agencies are prevented from informing victims' families about their whereabouts and state of well-being.

<https://www.aclu.org/national-security/el-masri-v-tenet>, *Tash Hepting et al v At&T Corp et al* (16 March 2007) US Court of Appeals, 9th Ct. at 10, 12, *Arar v Ashcroft* 414 F.Supp 2d 250 at 287.

²¹² This was the case with Khaled El-Masri.

Extraordinary rendition violates the provisions of articles 13 and 14, which assert the universal right to freedom of movement, including the right to seek and enjoy asylum from persecution in any country, in that it subsists in the kidnapping and arbitrary detention of persons: the right to asylum from persecution is violated in that kidnapping the person undeniably asserts the presumptive position that the person is presumed guilty. Moreover, the arbitrary nature of the act of detention involved in extraordinary rendition certainly puts in doubt the possibility that the process of adducing proof of innocence will be countenanced.

4.2.2. International Human Rights Treaties

The US presented the argument to the Committee against Torture that CAT did not apply to the GWOT.²¹³ The Committee's response was that the principles of CAT apply at all times in any territory under a state party's jurisdiction, whether in peace or war.²¹⁴

Furthermore, the ICC Statute determines that enforced disappearances and deprivation of liberty are crimes against humanity.²¹⁵ The fact that the US signed but did not ratify²¹⁶ ICC Statute surely cannot render that country impervious to the fact that its actions are violating cardinal principles upheld by the international community.²¹⁷

Far from taking heed of the principles enunciated and underwritten by the international community, however, the US adopted the position concerning Afghanistan that no international or domestic laws applied to members of Al Qaeda or the Taliban because they were terrorists and therefore unlawful combatants,²¹⁸ which therefore effectively stripped them of the normal protection afforded by human-rights conventions against enforced disappearances and deprivation of

²¹³ Sadat (2008) 68.

²¹⁴ Sadat (2008) 68.

²¹⁵ Article 7(1)(e) and (i) state: "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (i) Enforced disappearance of persons."

²¹⁶ Refer to paragraph 6.5 in chapter 6 and chapter 6 in general.

²¹⁷ Sadat (2008) 69.

²¹⁸ Sadat (2008) 69.

liberty because such acts can only be classified as crimes against humanity when perpetrated against civilians; and by the same token members of the said movements are stripped of protection that would normally be afforded in situations involving armed conflict because they are deemed to be unlawful combatants according to the rationale adopted by the US as indicated above.²¹⁹

CAT prohibits torture and cruel, inhuman and degrading treatment (cf. detailed discussion in ch 3). CAT further provides that interrogation personnel need to be trained to act in accordance with CAT, and must therefore be educated and duly informed with regard to the universal prohibition of torture and the injunction imposed by international conventions to ensure that interrogation practices and guidelines are subjected to regular review.²²⁰ The Bush administration violated this rule as enunciated by CAT when the decision was taken to use extraordinary rendition in the GWOT and to subject detainees to enhanced interrogation techniques.

The ICCPR, concluded on 23 March 1976, comprises 53 articles detailing the rights afforded to all who are resident within a state party's territory or subject to such party's jurisdiction. The ICCPR was drafted in accordance with the basic principles of the United Nations Charter, which recognises the "inherent dignity" and equal rights of all persons and is the cornerstone of a society based on freedom, justice and peace. The ICCPR exhorts states, as well as their citizens, to protect these rights. Article 2(3) enunciates the principle that each state party to the ICCPR shall be considered to be obligated to uphold these rights without respect to persons in its treatment of all who live within its territorial domain.²²¹

As extraordinary rendition involves transfers to unknown international destinations beyond the territorial domain of the rendering party the question arises whether it would be appropriate to regard the location of the victims thus transported to be still effectively within the territorial domain, and thus subject to the jurisdiction, of the rendering state. According to the Human Rights Committee's General Comment

²¹⁹ Sadat (2008) 69.

²²⁰ Article 10 and 11.

²²¹ It can be argued that state parties only have an obligation to observe and protect these rights if the person is in fact within its territory and subject to its jurisdiction. Article 2(1) of ICCPR; Cf. Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 133.

31²²² “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” Moreover:

The enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.

The purport of this statement is that all victims of extraordinary rendition are deemed to be within the territorial bounds and subject to the jurisdiction of the rendering state, and that it therefore follows that regardless of the empowering agency under whose authority unlawful acts of disappearance (e.g. extraordinary rendition) occurred, the state parties concerned remain strictly accountable for such acts when perpetrated within their territorial bounds. Thus, even if extraordinary rendition is carried out by a state party’s agents beyond the territorial domain of that state party and at a location beyond the reach of national and international law, the victim of extraordinary rendition will still be afforded all rights embodied in the ICCPR.

Article 2 is endorsed by paragraph 12 of General Comment 31²²³ to the effect that a state’s obligation to uphold and protect the rights embodied in the ICCPR extends to ensuring that individuals are not arbitrarily extradited, deported, expelled or removed by any other means from their territory, particularly if there are substantial grounds to believe that persons thus removed may suffer irreparable harm in the country to which removal is being effected or at the location of any subsequent destination. Extraordinary rendition essentially subsists in the forcible removal of a person from a

²²² General comment No. 31 Nature of the general legal obligation imposed on state parties to the Covenant (26 May 2004) *UN CCPR Human Rights Committee* CCPR/C/21/Rev.1/Add.13 par 10 available at <http://www.equalrightstrust.org/ertdocumentbank/United%20Nations%20Human%20Rights%20Website%20-%20Treaty%20Bodies%20Database.pdf>; See also Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 132.

²²³ General comment No. 31 Nature of the general legal obligation imposed on state parties to the covenant” (26 May 2004) par 12; See also Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 134.

state party's territory, or secondary territory, to countries where illegal methods of interrogation are the order of the day.²²⁴

In the *Jeebhai*-case,²²⁵ for example, Khalid Mehmood Rashid was arrested at his home in Kwazulu-Natal, South Africa, on charges of being an illegal alien, whereupon he was handed over to putative Pakistani officials.²²⁶ The South African government did not obtain assurances of compliance with international human-rights conventions with regard to his possible treatment in captivity in the receiving country, and as Pakistan is a country known to be amenable and inclined to the practice of torturing persons in captivity (including children),²²⁷ assurances should have been secured. Pakistan is included among the "torture countries" identified by *Human Rights Watch*.²²⁸

The aim of extraordinary rendition is to spirit targeted persons away by nefarious means (i.e. kidnap them) to areas where they can be held captive under the jurisdiction of foreign (yet amenable to cooperation with US extraordinary-rendition practices) judicial systems where they can be effectively rendered invisible and untraceable. Therefore, the core element of this practice infringes upon the substance of article 2 of the ICCPR. The UN Human Rights Committee confirmed that rendering a person to a country when there are substantial grounds to believe he will be tortured and placed beyond reach of parties who could aid and abet him at that location militates directly against the essential purpose of the ICCPR.²²⁹

²²⁴ cf. discussion in chapter 3 paragraph 3.5.

²²⁵ *Jeebhai* (2007) 774 (T).

²²⁶ Murphy K "A story of extraordinary rendition from South Africa. Where is Khalid Rashid?" (14 March 2006) *Indymedia Ireland* available at <http://www.indymedia.ie/article/74841>; See also Strumpf & Dawes "Khaled Rashid: Govt's cover is blown" (9 June 2006) *Mail and Guardian* <http://www.mg.co.za/article/2006-06-09-Khaled-rashid-govts-cover-is-blown>.

²²⁷ Pakistani police officials are known for abducting individuals and resorting to torture to extract information, for example to secure a confession in criminal investigations, but certainly also as a routine measure to gain military intelligence. Children have been tortured in order to obtain confessions or information from their parents. During 2003 hundreds of children were detained in torture cells where they were stripped and whipped in order to coerce information. See also Hasan (2004) 28; Javed Anjum was also one of many Christians tortured by Islamic extremists in Pakistan due to his religious beliefs, cf. "Pakistani Christian dies of torture at hands of Islamists" (5 May 2004). Although Pakistan has signed CAT, ICCPR and ICESCR, no provision has been made for protection against torture in their domestic laws (cf. footnote 141 chapter 1).

²²⁸ "Torture worldwide" <http://www.hrw.org/english/docs/2005/04/27/china10549.htm#PAKISTAN>. This site is constantly updated with new information on various countries.

²²⁹ Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 134.

Article 2(3) also states that each state party to the ICCPR shall be obligated to ensure that any person whose rights (cf. ICCPR) have been infringed will have recourse to a proper remedy, regardless of whether the violation was committed by someone in official capacity or not. It further stipulates that each state party shall be obligated to ensure that the right of the said injured party to have recourse to a proper remedy, which remedy shall be decided and pronounced by a competent court or tribunal, and that such competent tribunal shall enforce the remedy decided upon. Furthermore, appropriate administrative measures are to be implemented by state parties to ensure full realisation and protection of the rights contained in the ICCPR within the national and domestic jurisdiction of the state party concerned.²³⁰

Although these determinations are obeyed as a rule there is significant room for improvement in this regard, mainly because states that practice extraordinary rendition do not arrest, detain or torture victims within their domestic jurisdictions. The whole point of the practice is to get the individual into a territory where he is beyond the pale of the law, once again infringing the rights articulated in the ICCPR.

Article 5 of the ICCPR states that nothing in the act may be interpreted to the effect that a state may arrogate the right to itself to take action that could detract from or undermine the rights enunciated in this act, or that could impose further limits on rights thus enunciated than those already imposed in terms of the Covenant. The mere fact of extraordinary rendition perpetrated by states that indulge in the practice, amounts to a violation of the provisions of this article.

Article 7 in Part 3 of the ICCPR lays down the anti-torture rule, and the right of each person not to be treated in any cruel, inhuman or degrading way. The UN Human Rights Committee broadened the scope of application for this article. It determined that in order to protect an individual from torture, the state should not only refrain from using torture methods, but should also apply due diligence to ensure that the individual is safe from any threats of torture by a third party.²³¹ Extraordinary rendition is commonly, indeed prominently (numerous reported cases) associated

²³⁰ General comment No. 31 Nature of the general legal obligation imposed on states parties to the covenant (26 May 2005) par 15.

²³¹ Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 13.

with torture.²³² The Special Rapporteur confirmed that condoning torture is a violation of the international convention that protects the universal human right to be protected against the possibility of being subjected to torture; further that no domestic laws may be written to the effect that they can be regarded as a condonation of torture in any form whatsoever, nor may any such domestic law be wilfully interpreted to the effect that it amounts to such condonation.²³³ Therefore condonation or active participation in torture by anyone acting under the aegis of a state party is deemed to be a violation of the prohibition that protects the right of persons to be free from the possibility of subjection to torture.

According to article 9 the right to security and liberty of persons is enshrined in the rule that no-one shall be subjected to arbitrary arrest or detention;²³⁴ further that detainees must be duly informed of the reason for their arrest and must be promptly informed of the charges against them.²³⁵ The article further determines that persons against whom criminal charges are laid must be brought before a competent judicial body for a duly considered legal decision in the matter, and by the same token the matter shall be brought to trial expeditiously without undue delay.²³⁶ Again, anyone who has been arbitrarily detained shall be entitled to approach a competent court in order to petition the presiding judge to hand down a pronouncement articulating the nature of the crime indicated in the accused person's charge sheet, and/or to disclose elucidatory particulars relating to the arrest of the accused; moreover to be released in the event of a verdict to that effect.²³⁷

One of the purposes of extraordinary rendition is to render the victim to a place which places him outside the law and judicial system, thereby violating article 9 rights. Article 10 endorses the rule promoting the dignity of all persons by stating that "all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person."

²³² Refer to the "Torture" section in chapter 3.

²³³ Report of the Special Rapporteur on torture and any other cruel, inhumane or degrading treatment (1 September 2004) *UN General Assembly* 59th session UN Doc. A/59/324 at par 15; See also Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 135.

²³⁴ Article 9(1) of ICCPR.

²³⁵ Article 9(2) of ICCPR.

²³⁶ Article 9(3) of ICCPR.

²³⁷ Article 9(4) of ICCPR.

According to article 12 any person whose presence within the territory of a state is lawful shall have the right to freedom of movement, to liberty, and to choose a residence.²³⁸ Further, any person shall be allowed to leave any country, including his own, should he wish to do so.²³⁹ No limitation can be placed on these rights, except where such limitation is a legal necessity; that is to say, where legal limitations are “necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.”²⁴⁰ Lastly, article 12 states that no person may be arbitrarily denied access to his own country.²⁴¹ Most victims of extraordinary rendition don’t even know where they are being held or why, or even whether they have been deported without their consent.

Extraordinary rendition clearly violates the substance of article 13 as a whole, which provides that an alien who is lawfully present in the territory of a state party to the ICCPR can only be legitimately expelled from such country if the proper procedures are followed in accordance with the law, and if the alien is granted the opportunity to submit reasons why he should not be expelled.²⁴²

Extraordinary rendition overrules the entire purport of article 14, which states that all persons charged with offences have the right to be presumed innocent until proven guilty, implying therefore that all such persons are deemed to be equal before the court, and are entitled to a fair and public hearing by a competent, independent and impartial tribunal duly established by law; moreover any such person has the right to be “informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;²⁴³ to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;²⁴⁴ to be tried without undue delay;²⁴⁵ to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does

²³⁸ Article 12(1) of ICCPR.

²³⁹ Article 12(2) of ICCPR.

²⁴⁰ Article 12(3) of ICCPR.

²⁴¹ Article 12(4) of ICCPR.

²⁴² Weissbrodt *et al* (2006) *Harvard Human Rights Journal* 136.

²⁴³ Article 14(3) (a) of ICCPR.

²⁴⁴ Article 14(3) (b) of ICCPR.

²⁴⁵ Article 14(3) (c) of ICCPR.

not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;²⁴⁶ to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;²⁴⁷ to have the free assistance of an interpreter if he cannot understand or speak the language used in court; and not be compelled to testify against himself or to confess guilt.”²⁴⁸ Lastly article 14 (5) determines that every person convicted of a crime shall have the right to have his conviction reviewed by a higher tribunal in accordance with the law.

As discussed above in regard to the UN Declaration of Human Rights, extraordinary rendition overrules the declaration by the ICCPR of the right of all persons to be recognised as persons before the law,²⁴⁹ to be safeguarded against subjection to arbitrary interference with their privacy, families, homes or correspondence;²⁵⁰ the universal right of persons to be safeguarded against unlawful attacks on their honour or reputation²⁵¹ and in virtue of the principle of equality before the law, and to be guaranteed the protection of the law against such interferences.²⁵²

4.2.3. Convention on Enforced Disappearances²⁵³

Although international bodies have attempted to outlaw the use of extraordinary rendition by using existing international human-rights norms, for example as embodied in the Convention on Enforced Disappearances, it seems unlikely that such measures will culminate in the complete criminalisation of this practice. Extraordinary rendition is, as Weissbrodt²⁵⁴ rightly says, an absolute hybrid theory to enforced disappearances. It involves so much more than mere disappearance. The

²⁴⁶ Article 14(3) (d) of ICCPR.

²⁴⁷ Article 14(3) (f) of ICCPR.

²⁴⁸ Article 14(3) (g) of ICCPR.

²⁴⁹ Article 16 of ICCPR.

²⁵⁰ Article 17(1) of ICCPR.

²⁵¹ Article 17(1) of ICCPR.

²⁵² Article 17(2) of ICCPR.

²⁵³ Declaration on the Protection of All Persons from Enforced Disappearance of 1992, Resolution 47/133 (hereafter “Convention on Enforced Disappearances).

²⁵⁴ Weissbrodt *et al* (2007) 586; Ross (2007) 574.

Convention on Enforced Disappearances defines an “enforced disappearance” as follows:

For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.²⁵⁵

This broad description falls rather short of expressing all the elements of the process of extraordinary rendition, which (cf. Ch 2, 1.1) entails a progression through various stages, each of which involves an element of express criminality. For example, the above definition does not include the fact that the forcible apprehension of an individual is associated with forced administering of a “pacifying” drug, thus effectively stunning the victim into a fit state of submissiveness. Nor does it recognise the all-important fact (i.e. a cardinal feature of extraordinary rendition) that all victims of that practice are alleged to be suspected terrorists, thus indicating that the practice is aimed at targeted individuals rather than a general population.

It seems that by enacting the Convention on Enforced Disappearances the international community attempted to define something close to extraordinary rendition, but without explicitly stating the subject matter and elements of it, thus raising the question whether it was indeed the real purpose of the convention to outlaw and criminalise extraordinary rendition, given that the act was not explicitly mentioned; rather, an act almost like it was described (somewhat unnecessarily) instead of directly confronting the naked truth of it. This matter has been discussed by many academics; indeed many politicians have commented critically and there has been a global outcry against it, to the extent that it has become known as “the known unknown” as a result of the wide publicity it has attracted without shedding any real light on its nature and mechanisms, which are still largely wrapped in obscurity. The question remains: Why is nobody addressing the issue as it stands?

²⁵⁵ Article 2 of the Convention on Enforced Disappearances.

4.4 Conclusion

The ICCPR, CAT²⁵⁶ and the GCs require states to criminalise and investigate acts of torture committed by their officials, or by persons acting at the instance of such officials.²⁵⁷ However, the Obama administration's compliance in this regard has been rather lacklustre, thus far merely comprising a flawed investigation into alleged acts of torture and cruel, inhuman and degrading treatment committed under the Bush administration with no prosecutions at the end of it. In the meantime the administration has been accused of torturing a detainee aboard a seagoing vessel of uncertain identity. Article 5 of CAT provides that states should take the necessary measures to establish jurisdiction over article 4 offences, including instances when the offence has been committed aboard a seagoing vessel. Article 6 further provides that a failure to investigate and take into custody an individual for alleged acts of torture is a violation of CAT.

Renditions have not been outlawed by President Obama and still continue.²⁵⁸ While some detainees captured as part of the GWOT have been released under the Obama administration, many remain in detention at Guantanamo Bay and overseas facilities, some having been charged, and others not.

It is important to qualify the GWOT because IHL will only apply if violence escalates to critical threshold levels in armed conflicts; failing which other bodies of law will apply.²⁵⁹ The ICRC argued that the GWOT is not a global war of non-international character and should rather be judged on a case-by-case basis.²⁶⁰ This is sound advice that should be followed without fail since it is dangerous to apply IHL rules to

²⁵⁶ Article 4 of CAT provides that "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

²⁵⁷ Huckerby *et al* (2005) 10.

²⁵⁸ Saul *et al* (2013) 2-3, cf. Whitlock C "Renditions continue under Obama, despite due process concerns" (1 January 2013) *Washington Post* available at http://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html.

²⁵⁹ ICRC Report (2007) 724.

²⁶⁰ ICRC Report (2007) 724.

situations that do not amount to an armed conflict.²⁶¹ The US, for example, concluded that it was quite justifiable for its agents to kill without warning.²⁶²

Sassòli argues that the GWOT should be judged on a case-by-case basis in order to decide whether a case would be best suited by applying IHRL rules, rules regulating non-international armed conflict, or rules regulating international armed conflict.²⁶³ He further argues that to create a third type of armed conflict would only add to already confusing arguments relating to the existing types of armed conflict.²⁶⁴

However, if each subcategory of the GWOT has to be decided on a case-by-case basis arguments are bound to ensue whenever a set of rules that would be appropriate to meet a specific case have to be decided.

The GWOT seems normless, and the duration of the hostilities marking its “progress” (i.e. merely the fact that it is continuing) is measured by the highly subjective and incalculable yardstick of an absence of fear of another imminent terrorist attack. The radical uncertainty characterising the GWOT is evident from the fact, for example, that the length of intervals between attacks cannot be considered significant²⁶⁵ as the enemy is known to operate “sleeper cells”.²⁶⁶

The policy *inter arma silent leges* (in times of war the law is silent) is unacceptable at the present juncture,²⁶⁷ and it is unacceptable as a pretext for the use of extraordinary rendition and other illegal measures applied in waging the GWOT.

Robert Gates, US Defence Secretary under the Obama administration, has noted that both Presidents Bush and Obama have stated categorically that they would “go after” Al Qaeda, and Obama has declared it to be a firm policy that would be prosecuted without fail under his administration.²⁶⁸ But to what end? When will

²⁶¹ ICRC Report (2007) 726.

²⁶² O’Connell (2004) 352.

²⁶³ Sassòli (2004) 219-220.

²⁶⁴ Sassòli (2004) 220.

²⁶⁵ Fitzpatrick (2003) 251-252.

²⁶⁶ Fitzpatrick (2003) 251-252.

²⁶⁷ Murray M “Extraordinary rendition and US counterterrorism policy” 4 2011 *Journal of Strategic Security* 15 at 18.

²⁶⁸ Delahunty *et al* (2010) 307.

hostilities cease, and what laws will be applied to govern the conflict between the US and this so-called global non-state actor?

The fact that conflict situations occurring in the course of the GWOT are not invariably classifiable as either international or non-international and that therefore IHL is not always applicable in such situations does not mean that the GWOT is not subject to any laws at all. However, if this “long war” goes much further conflict situations will have to be judged on a case-by-case basis and domestic and international human rights law will have to be applied if IHL classification cannot be achieved.

CHAPTER 5

IS THE GLOBAL WAR ON TERROR A NEW TYPE OF WAR?

“This will be a war like none other our nation has faced ... Even the vocabulary of this war is different ... But if this is a different kind of war one thing remains unchanged: America is indomitable.” *Donald H Rumsfeld*¹

5.1. Introduction

There is no exact definition for the GWOT (Global War on Terror); in fact the ambiguity and uncertainty surrounding it suits the parties involved, particularly those engaged in taking the conflict to the self-declared perpetrators of acts of terror, because it enables them to sidestep the obligations imposed on them by regulatory frameworks pertaining to such matters (cf. discussion above).²

The term “war” is also not defined in IHL or IHRL. The GCs refer to “armed conflicts” of either national or non-international character, but the GWOT contains the reference to “war” in the title, and historically the global community has also on various occasions referred to other “armed conflicts” as “wars” (e.g. World War I and World War II, the Vietnam War, and the Gulf War). The difficulty in this context is that although the US grudgingly accepts the applicability of IHL for the conflict in Afghanistan, but still does not recognise the GWOT as an armed conflict, it nevertheless refers to it as a “war”. With this in mind, and in view of the perceived hiatus in IHL, among other similar issues, the exact ambit of the terms “war” and “armed conflict” has to be cleared up definitively.

War has been defined as “collective killing for some collective purpose”,³ and as:

A state of hostilities that exists between or among nations, characterized [sic] by the use of military force. The essence of war is a violent clash between two hostile, independent, and irreconcilable wills, each trying to impose itself on the other.⁴

¹ These quotes are from an article written by then US Secretary of Defence, Donald H Rumsfeld, as published in the New York Times. Rumsfeld D “New kind of war” (27 September 2001) *New York Times Online* available at <http://www.nytimes.com/2001/09/27/opinion/27RUMS.html>.

² Fitzpatrick (2003) 249.

³ This was said by British war historian John Keegan in his book: Keegan J *War and our world* (2001) Vintage Books 72 as referenced in Runzo J “The importance of defining war: Terrorism, torture, humanitarian intervention and private military companies” 13 2006-2007 *International Law Students Association Journal on International and Comparative Law* 139 at 140.

Besides the above, “war” refers to places where intense and prolonged fighting occurs between organised groups, and not to mere places where a terrorist presence is suspected.⁵ War status also depends on the persistence of armed exchanges between belligerents at a mutually agreed level of intensity, and for a prolonged period of time.⁶

On the other hand, as noted above, “armed conflict” as referred to in the GCs is classifiable as either international armed conflict (IAC)⁷ or non-international armed conflict (NIAC).⁸

In order to qualify as an armed conflict under IHL, two or more armed groups must be engaged in prolonged and intense armed hostilities.⁹ *Prosecutor v Tadić*¹⁰ explained when a state of violence will be an armed conflict:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

Prosecutor v Mrksic,¹¹ referring to *Tadić*, also commented on the test for the existence of an armed conflict:

Two criteria are to be assessed under this test: (i) the intensity of the conflict and (ii) the organisation of the parties. Both are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.¹⁵⁹¹ Relevant for establishing the intensity of a conflict are, *inter alia*, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation

⁴ The definition is from General Gray's *Marine Corps Strategies* as quoted and referred to by Runzo (2006-2007) 142. The *Cambridge Dictionary* (2003) defines war as “armed fighting between two or more countries or groups”.

⁵ In any case, if terrorists are deemed to be civilians (as discussed below under 5.3) there can be no mention of a “war” with Al Qaeda, because then the terrorists would merely be criminals. Cf. O’Connell M “When is a war not a war? The myth of the global war on terror” 12 2005-2006 *International Law Student Association Journal on International and Comparative Law* 535 at 538-539.

⁶ The term “war” should be used sparingly for situations of such intensity that normal peacetime rules cannot apply. Cf. O’Connell (2005-2006) 538. It should also refer to a state of society or type that is markedly different from other realms of human existence. Cf. Runzo (2006-2007) 144.

⁷ Common article 2 to the GCs

⁸ Common article 3 to the GCs.

⁹ O’Connell (2005-2006) 537.

¹⁰ *Prosecutor v Tadić* (2 October 1995) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1 par 70.

¹¹ *Prosecutor v Mrksic* (27 September 2007) Trial Chamber Judgment of ICTY IT-95-13/1-T par 407.

and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and if so whether any resolutions on the matter have been passed.¹²

An international armed conflict (IAC) refers to a conflict between two or more states. A non-international armed conflict (NIAC) can become an IAC if it breaks out in the territory of a state and another state participates, or if the participants act on behalf of that other state.¹³ Therefore, in a conflict between two states, when one is partially occupied the conflict is an IAC regardless of whether the occupation is resisted militarily.¹⁴ According to common article 2 of the GCs¹⁵ IHL applies to all IAC situations.

NIAC, on the other hand, is internal and takes place within a state, and the hostilities are between that state's government and an organised armed group, or it arises from such hostilities.¹⁶

Therefore (and for purposes of the discussions in this thesis), “war” and “armed conflict” will be used synonymously and interchangeably. I submit that both “war” and “armed conflict” refer to intense, violent fighting between two groups, countries, or a group and a country, except where the conflict occurs in a IHL context, in which case “armed conflict” should qualify as either an IAC or a NIAC. Beyond the IHL context (e.g. “armed conflict” should meet all the requirements of IAC and NIAC), “war” and “armed conflict” refer to the same thing. “War” in the sense of the GWOT is

¹² AP II also calls for a certain level of intensity and organisation in the nature and scope of the conflict to qualify as an armed conflict. Article 1 (1) of AP I refers to organised armed forces and article 1(2) states that the protocol will not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Cf. O’Connell (2005-2006) 537. Cf. Cline D “An analysis of the legal status of CIA officers involved in drone strikes” 15 2013 *San Diego International Law Journal* 51 at 59-60.

¹³ *Tadić* (1999) par 84.

¹⁴ Cline (2013) 60.

¹⁵ “...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them...” [own emphasis].

¹⁶ Cline (2013) 62. AP II and common article 3 apply to NIAC. While common article 3 presents a wider scope of application its content is narrower, and it sets the minimum standards applicable to a conflict, and it applies to any NIAC within a state that has ratified the GCs. AP II on the other hand has more detailed content but a more limited range of application, and it only applies to the state's armed forces and dissident forces, as well as non-state organised groups engaged in protracted military operations (cf. Cline 2013, 63-64. In the language of article 1(2) of AP II: “it will not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

essentially a fight against terrorism which involves non-state actors and which transcends state borders.

5.2. New type of war?

In the early stages of the GWOT President Bush held that the Geneva Conventions (GCs) did not apply to the Taliban and Al Qaeda because it was a new kind of war.¹⁷ The US argued that although IHL applied under the conditions of conventional warfare waged in Iraq, the treatment of detainees captured in the course of operations conducted in pursuing the GWOT post-9/11 in Afghanistan did not fall within the ambit of IHL because the type of military exercises involved in that instance amounted to waging a new kind of war requiring new regulation.¹⁸

The US explained its position *vis-à-vis* Afghanistan by observing that the adversary in that instance was Al Qaeda (a non-state actor), thus broadening the theatre of operations to a globalised context (i.e. everywhere and anywhere) in which hostilities were conducted by unlawful combatants who could therefore be captured and detained without notice as and when convenient.¹⁹ The conflict in Afghanistan was therefore (according to the US) neither an international, nor a non-international armed conflict²⁰ and, in fact, the methods adopted by the combatants ranged against the US were classifiable as unlawful, the US could ignore the rules of IHL and in its own right adopt irregular methods too, including extraordinary rendition, without thereby neglecting their obligations under international law.²¹

It seemed that President Bush unilaterally asserted authority as commander-in-chief after the 9/11 “act of war”, stating that the enemy was cruel and barbaric and therefore not entitled to the consideration of domestic rules and rules conventionally observed in armed conflicts.²²

¹⁷ Sadat (2008) 67, Alexander (2013) 551, Satterthwaite (2007) 1350-1353.

¹⁸ The Bush Administration accepted this argument and effectively disavowed any obligation to apply IHL to Al Qaeda and Taliban detainees in US custody. Cf. Sadat (2006) 311, Sadat (2007) 1213.

¹⁹ Satterthwaite (2007) 1398-1399.

²⁰ Please note that this is the US argument. However, as discussed above in chapter 4, the court held in *Hamdan* (2006) 2757, 2795 that it was a NIAC. Cf. Satterthwaite (2007) 1399.

²¹ Satterthwaite (2007) 1399.

²² Alexander (2013) 556.

Condoleeza Rice has been quoted as saying that the GWOT is a new kind of war to be fought on different battlefields.²³ The Bush administration declared three privileges or advantages accruing from the GWOT: First, persons suspected of terrorism could be declared “enemy combatants”. Secondly, such persons could be targeted and killed regardless of location. Thirdly, ships could be searched and cargoes seized if the vessels concerned were suspected of carrying weapons for terrorists.²⁴

The US arguments (above) create unnecessary uncertainty and discord in the global community when dealing with the application of rules pertaining to an armed conflict. This chapter explores the issues raised by the US standpoint.

5.3. Is there a gap in IHL?

Early on in the US fight against terrorism arguments were adduced to the effect that IHL did not apply to the GWOT because it contained *lacunae* (especially regarding the status of combatants); however, this position is effectively defeated by well-founded counterarguments.²⁵ For example, regarding the issue of combatant status, if GC III is read with due cognisance of its purpose the undeniable truth is that it was written with no restrictions of application in mind, and not at all to render war obsolete,²⁶ but rather to establish well-founded rules of engagement to apply in times of war and to elicit the broadest possible interpretation of the GCs.²⁷ The conclusion that must be reached on reading GC III in conjunction with GC IV is that an individual is inescapably either a combatant or a civilian, hence no-one can fall into a “gap” or a kind of legal no-man’s land under HL – consequently minimal protections (either under GC III or GC IV) do apply.²⁸

²³ O’Connell (2004) 350.

²⁴ O’Connell (2004) 351.

²⁵ Falk B “The global war on terror and the detention debate: The applicability of Geneva Convention III” 3 2007 *Journal on International Law and International Relations* 31 at 34.

²⁶ Falk (2007) 47.

²⁷ The fact that GC III requires belligerents to wear a uniform does not necessarily amount to an injunction that they need distinctive insignia to qualify as combatants, but rather that members of a fighting force should be able to recognise each other during the conflict and not mistake each other, or generally be mistaken for, civilians. Furthermore, the information on which the US argument is premised, namely that the Taliban are not POWs, has never been made public, and a competent tribunal has never ruled on this assertion. Falk (2007) 47.

²⁸ Falk (2007) 47.

If international customary law is read together with the GCs and the Additional Protocols, it is clear that IHL applies to all conflicts regardless of the type, location, and status of belligerents.²⁹ The norm is to grant POW status in all circumstances where the status of the combatant is unclear until a competent tribunal has ruled on it.³⁰ Adherence to the criteria³¹ for combatant status in accordance with GC III was never a precondition to granting POW status,³² even though accusations were made that certain parties to a conflict were not acting in accordance with the law of war. Only in the case of the GWOT did the US use non-compliance with the criteria for combatant status as a reason to deny POW status.³³

Some scholars (e.g. Sassòli) argue that terrorists should be given civilian status³⁴ on grounds that they will lose their status as protected persons under the GCs if they participate directly in hostilities and thus be vulnerable to capture, detainment and prosecution. The clear implication, once more, is that IHL is seamless in this regard (i.e. there is no shadowy region where untoward actions can be harboured with impunity). The individual is either combatant or civilian, and minimum protections apply either way.³⁵

²⁹ Falk (2007) 49.

³⁰ As the US did in the Vietnam War when it recognised the Viet Cong as POWs. Falk (2007) 49.

³¹ According to article 4(2)(a)-(d) of GC III the criteria are the following: acting under the command of a person who assumes responsibility for them and their actions, wearing fixed, distinctive insignia, carrying arms openly and conducting operations informed by the purpose of armed aggression in accordance with the law of war.

³² I.e. the US treatment of the German *Wehrmacht*. Taking into account that POW status can only exist during an IAC.

³³ Falk (2007) 49-50.

³⁴ Sassòli (2004) 208-209.

³⁵ On the subject of civilians, Article 4 of GC IV provides: Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals..." Furthermore the purport of Article 5 is that even if they take part in hostilities, "such persons shall nevertheless be treated with humanity, and in case of trial, and shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be." Article 5 of GC III dealing with POWs also clearly state: "Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

5.4. Expanding the traditional parameters of warfare

Transnational warfare refers to an armed conflict between state military forces and foreign non-state actors that is waged beyond state borders.³⁶ This causes difficulty in the classification of an armed conflict as the issue of applying “old” law to new facts or a new theatre of warfare is gaining in prominence.³⁷ The parameters of traditional warfare are becoming unstable. With new technology and new methods of warfare it is becoming increasingly difficult to define an armed conflict as an IAC, NIAC, or more specifically, a NIAC in terms of AP II.³⁸ Consider that during WW I and WW II the common goal of all parties to the conflict was to force their will as separate entities on other belligerents by engaging in acts of war on a battlefield where enemy combatants could be seen and targeted. It was commonly “understood” (i.e. taken for granted) that belligerents were at liberty by virtue of the circumstances to exchange acts of aggression in kind and in equal measure.

Nowadays, however, the parameters of warfare have shifted and the criteria applied to judge the nature and extent of violence, including the manner of inflicting it, have become less clear-cut, except that warfare is characterised by greater intensity as well as passive aggression (e.g. civilian deaths caused by suicide bombings and “collateral” deaths caused by drone strikes). There is no foreseeable timeframe within which hostilities take their course and come to an end, and more advanced weapons and methods of warfare are making it increasingly difficult to reconcile the modern actions of warfare with the old rules of war.

5.4.1. Asymmetrical warfare

Asymmetrical warfare can be defined as:

Acting, organising, and thinking differently than opponents in order to maximise one’s own advantages, exploit an opponent’s weakness, attain the initiative, or gain greater freedom of action. It can be political-strategic, military strategic, or a combination of these. It can entail different methods, technologies, values, organisations, time perspectives, or some combination of these. It can be short-term or long-term. It can

³⁶ Barnidge R “A qualified defence on American drone attacks in North West Pakistan under international humanitarian law” 30 2012 *Boston University International Law Journal* 409 at 429.

³⁷ Barnidge (2012) 429.

³⁸ Barnidge (2012) 429.

be deliberate or by default. It can be discreet or pursued in combination with symmetric approaches. It can have both psychological and physical dimensions.³⁹

Asymmetry in war has many dimensions, including physical and psychological dimensions and political strategies, a hypothetical case in point being combatants who gain a relative advantage by wearing lightweight body armour, unlike an opponent who lacks such protection.⁴⁰ Similar asymmetrical situations can come about when belligerent groups form strategic and political alliances, or bend the rules of IHL to suit their objectives, or gain a military advantage from deliberately sought information.⁴¹ Such asymmetry severely tests the opponent's willingness to remain within the bounds of IHL.⁴²

Asymmetry can also take the form of relative technological advantage in the sense of modern sophistication.⁴³ The US currently occupies this position as its military technology is more advanced than any other and is likely to remain so for the foreseeable future.⁴⁴ This competitive edge is countered, in contravention of IHL, by resorting to cheaper chemical and biological weapons that are relatively easy to obtain by nefarious means and whose origins are difficult to trace.⁴⁵ Asymmetry also applies to methods of warfare,⁴⁶ such as US targeted drone attacks.⁴⁷

Asymmetrical warfare invariably has major implications for IHL. For example, US treatment of detainees will have asymmetrical implications, and as part of the GWOT violates the rules of warfare, and as a result encourages opposing to follow suit on putative grounds of "levelling the playing field".

³⁹ The definition by Metz and Johnson as quoted and referred to by Schmitt (2008) 3.

⁴⁰ Schmitt M "Asymmetrical warfare and international humanitarian law" 62 2008 *Air Force Law Review* 1 at 4-5.

⁴¹ Schmitt (2008) 5.

⁴² Mégret F "The humanitarian problem with drones" 2013 *Utah Law Review* 1283 at 1311.

⁴³ Schmitt (2008) 5.

⁴⁴ An example of this would be the high tech drones the US has to its disposal with which they are conducting drone strikes across Pakistan, Yemen and Somalia. This is discussed under paragraph 5.4 below.

⁴⁵ Schmitt (2008) 27.

⁴⁶ Schmitt (2008) 5.

⁴⁷ As discussed in chapter 3.

In all situations of asymmetrical warfare the disadvantaged party responds by violating the IHL norms of distinction, or does something to weaken these norms, or dispenses with them altogether by attacking civilians and civilian objects⁴⁸ as this is the only retaliatory measure of comparable intensity that they can muster in response to the stronger party's attacks. The weaker party either appeals for protected status or stays physically close to protected persons to either deter⁴⁹ or entice attacks by using civilians and civilian objects as shields.⁵⁰ Another striking example of the influence of asymmetrical warfare is IEDs and suicide bombings⁵¹, executed more often than not to counter the military advantage of the adversary rather than to express religious or other sentiment⁵².

Asymmetrical warfare creates a vicious circle of possible IHL violations as the parties retaliate in turn.⁵³ However, since IHL largely operates on the principle of reciprocity,⁵⁴ it is in the interest of both sides to obey the law.⁵⁵

(a) Extraordinary rendition as consequence of asymmetrical warfare

Under the Obama administration Guantanamo Bay remains open despite promises to close it down. Moreover, the US has yet to renew its status as signatory of the Rome Statute of the International Criminal Court, and although the language of the Obama administration is different to that of the Bush administration, policies regarding the fight against terrorism remain in place.⁵⁶ Furthermore, President Obama has stated that extraordinary rendition will continue, but those captured will be treated humanely.⁵⁷ However, no inviolable guarantees are offered to that effect.

⁴⁸ Schmitt (2008) 25.

⁴⁹ Schmitt (2008) 15.

⁵⁰ Schmitt (2008) 18.

⁵¹ Suicide bombings are not illegal in themselves if executed against enemy combatants and the party responsible for the bombing fulfils the requirements of distinction under IHL (case in point: Japanese "divine wind", i.e. Kamikaze bombing campaign against US warships during WW II). Cf. Schmitt (2008) 24.

⁵² Schmitt (2008) 24.

⁵³ Schmitt (2008) 41-42.

⁵⁴ Schmitt (2008) 42.

⁵⁵ Schmitt (2008) 42.

⁵⁶ Barnidge (2012) 411.

⁵⁷ Orpizewska M "El Masri v Former Yugoslav Republic of Macedonia: Implications for the CIA extraordinary rendition program" 39 2014 *North Carolina Journal of International Law and Commercial Regulation* 1165 at 1168.

Assuming there is an armed conflict (either IAC or NIAC) the key instruments that apply to extraordinary rendition are GC III and IV, AP II, the Convention relating to the Status of Refugees, the ICCPR and CAT.⁵⁸ These instruments and international customary law impose various obligations on states, including: a prohibition on varying degrees of torture and cruel, inhuman and degrading treatment; application of the non-refoulement rule; the obligation to investigate, criminalise, prevent and punish acts of torture and the aiding and abetting of torture; and lastly, the right not to be arbitrarily detained.⁵⁹

However, the US claims that providing legal counsel to extraordinary rendition detainees will obstruct interrogations.⁶⁰ In fact, the US government has subjected numerous detainees to enhanced interrogation techniques and has transported them to detention facilities that violate the non-refoulement rule. All of this is achieved by the US through secret political alliances and assistance from foreign governments in various degrees, whether it be access to their airspace, assistance with the actual capture and transport of the suspect, or provision of detention facilities. Little is known about methods of obtaining information deemed indicative of terrorist activity and, by extension therefore, grounds to take captives by way of extraordinary rendition. In fact, such information is mostly classified.

The asymmetrical consequences of this situation is clear from the superiority of the US position as a world power, for example in light of its superior access to technology, information, political strategies and alliances, compared to the average working class individuals who are representative of persons subjected to extraordinary rendition. Even if the captive turns out to be the suspected terrorist, and not merely a victim of mistaken identity, the non-state opponents (e.g. Al Qaeda) of the US are still at an enormous disadvantage compared to the overwhelming might of their adversary.

The fact that the US can basically capture anyone, anywhere, without the slightest warning, thus causing the inexplicable disappearance of a person, must be quite

⁵⁸ Huckerby *et al* (2045) 8.

⁵⁹ Huckerby *et al* (2005) 8.

⁶⁰ Orpizewska (2014) 1167.

unnerving to the population at the receiving end, displaying the disadvantaged population's awareness of disproportion in the forces brought to bear by an aggressor (e.g. methods employed against Al Qaeda). In response to extraordinary rendition the disadvantaged party retaliates with suicide bombings, using civilians as human shields to ward off attacks, or directly attacking civilians, or placing IEDs where the American convoys are passing by. Such retaliatory measures show that by disregarding the rules of war the advantaged party exerts increasing pressure on the disadvantaged party (Al Qaeda or non-state actor) to resort to irregular methods that also violate the rules of war.

(b) Targeted killing as method of asymmetrical warfare

Targeted killing refers to “premeditated acts of lethal force employed by states to kill specific individuals who are not in custody, and often, difficult to get into custody. Drone-based targeting killing, which is a common way to conduct these operations, refers to the use of ‘drones,’ or unmanned aerial vehicles that are remotely piloted or run autonomously, to remotely launch missile strikes for targeted killing.”⁶¹ It occurs in times of war and in times of peace in various ways (e.g. sniper fire, drone strikes, missiles, poison or bombs).⁶² However, the specific issue in the present instance is that of drone strikes launched by the US as a form of targeted killing.

The purpose of targeted killing is to use lethal force to eliminate an unsuspecting target with the aid of unmanned drones operated from a distance of thousands of miles,⁶³ unlike normal battlefield practices where enemies are within relatively immediate or even point-blank range and fully aware of being targeted.⁶⁴ Thus the

⁶¹ Bower D “(Start to) look out below!: Creating a court to review targeted attacks on United States citizens” 14 2014 *Chicago-Kent Journal of International and Comparative Law* 69 at 72. It has also been defined as a “state sanctioned targeting and killing of a specific individual, usually a civilian or unlawful combatant.” Cf. Cline (2013) 93. See also the definition of “targeted” given by Nils Mezler as quoted and referred to in Rylatt J “An evaluation of the US policy of ‘targeted killing’ under international law: The case of Anwar Al-Aulaqi (Part 1)” 4 2013 *California Western International Law Journal* 39 at 40-41. “Targeted killing denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.”

⁶² Cline (2013) 94.

⁶³ Cline (2013) 95.

⁶⁴ Cline (2013) 95.

expression “within striking distance” has undergone significant change in recent times with the advent of drones.

A person who is considered dangerous is placed on a kill list according to classified information⁶⁵ that is extensively processed before the listing is affected.⁶⁶ Anwar Al-Aulaqi, a US citizen yet implacably hostile to that country, was listed and killed by a drone-launched missile in 2011.⁶⁷ After an attempt on his life in August 2010⁶⁸ his father brought a court action to have his targeting set aside; however the application failed for lack of jurisdiction.⁶⁹ The chain of events leading to the missile launch that killed him remained undisclosed, except that in view of his US citizenship a protracted investigative process was undertaken to justify placing him on the kill list.⁷⁰

Drone-related killings are controversial because no-one can surrender to a drone. That is to say, such killings amount to summary execution without any option of recourse to remedies that could preserve the life of the individual(s) concerned.⁷¹ By default the finality of drone-related action endows drone operators with godlike powers of life and death, while those at the receiving end of drone strikes lack the means to retaliate on a comparable level and therefore often have no option but to

⁶⁵ Cline (2013) 93.

⁶⁶ The US argues that it is lawful to eliminate an individual on the kill list, given the exhaustive information gathered beforehand to justify the listing. However, the ICRC argues that there must also be definite clarity regarding the person’s function in the organised armed group before a strike is executed. McNeal G “Targeted killing and accountability” 102 2014 *Georgetown Law Journal* 681at 700-701, 707.

⁶⁷ Gonzales A “Drones: The power to kill” 82 2013 *George Washington Law Review* 1 at 3.

⁶⁸ Gonzales (2013) 15-16.

⁶⁹ Gonzales (2013) 3.

⁷⁰ Gonzales (2013) 16-17. There is little information on the investigative methods and evidentiary standards by which the information was gained in order to place him on the kill list, and attempts to obtain more information were opposed by the Obama administration and denied by the courts. Cf. Gonzales (2013) 7. The New York Times sued the US government for details on the drone programme, including the killing of US citizen Anwar Al-Aulaqi and his sixteen year old son in 2011. The court dismissed the suit and held that although disclosure could help the public understand the “vast and seemingly ever-growing exercise in which we have been engaged for well over a decade, at great cost in lives, treasure, and (at least in the minds of some) personal liberty” the government was not obliged to disclose? materials as requested by the New York Times even if the government was in possession of such materials. Cf. Saba J Stempel J “New York Times loses lawsuit to uncover drone strikes information” (1 February 2013) *Huffington Post Online* available at http://www.huffingtonpost.com/2013/01/02/new-york-times-drone-strikes_n_2398393.html.

⁷¹ O’Connell (2003) 327. How can an individual surrender to a 155mm shell being fired from 40 kilometres away?

go into deeper and more or less permanent hiding,⁷² as well as retaliation with IEDs and suicide bombs.

On 3 November 2002 the US launched a Hellfire missile in Yemen even though a state of armed conflict had not been recognised within the bounds of its territory at that point,⁷³ thus giving credence to its assertion that the GWOT was a new kind of war in which it could kill anyone, anywhere in pursuing the GWOT.⁷⁴

The use of attack drones under the Bush administration has increased significantly under the Obama administration,⁷⁵ particularly to target members of Al Qaeda, the Taliban and those who support them in Yemen, Pakistan and Somalia.⁷⁶ The US government also proclaims that these drone strikes are effective and will continue⁷⁷ on grounds that the US is engaged in an armed conflict with Al Qaeda and its affiliates; in fact,⁷⁸ by President Obama's third year in office he had approved twice as many targeted killings as there were prisoners in Guantanamo Bay.⁷⁹ In Pakistan alone drones killed more than 1500 people between 2009 and 2011.⁸⁰ By 2011 the drones logged approximately 2.7 million hours of flight time and completed over 80 000 missions.⁸¹ After the heavy increase⁸² in drone strikes and the death of Osama Bin Laden the CIA was urged to be more circumspect in selecting target for drone attacks.⁸³ By 3 January 2014 drone attacks under the Obama administration came to 327.⁸⁴

⁷² Mégret (2013) 1310.

⁷³ O'Connell (2005-2006) 536.

⁷⁴ O'Connell (2005-2006) 536.

⁷⁵ From January 2008 to January 2009 (under the Bush administration) twenty-five attacks were carried out in Pakistan which killed just under two hundred people, but from late January 2009 when Obama became President until June 2010 attacks in Pakistan escalated to almost ninety, which brought the death toll under the Obama regime to more than seven hundred people. Cf. Barnidge (2012) 421.

⁷⁶ Cline (2013) 93.

⁷⁷ Cline (2013) 93.

⁷⁸ Barnidge (2012) 434.

⁷⁹ McNeal (2014) 685.

⁸⁰ Benson (2014) par II.

⁸¹ Benson K "'Kill 'em and sort it out later:' Signature drone strikes and international humanitarian law" 27 2014 *Pacific McGeorge Global Business & Development Law Journal* 17 at par II.

⁸² Residents from the North West tribal region of Pakistan reported hearing drones fly 24 hours a day, seven days a week and that they live in constant fear of being targeted. Cf. Benson (2014) Par III B.

⁸³ The US changed the drone programme by determining that the State Department would participate more heavily on strike decisions and that Pakistan would be given more advance notice of the strikes on a more regular basis. Cf. Benson (2014) par II.

⁸⁴ Gonzales (2013) 5.

The US practice of targeted killing, much like extraordinary rendition, is shrouded in secrecy and mostly inaccessible to scholarly research, being unassailably hidden from public view despite frequent attempts by NGOs and journalists to gain access to such information.⁸⁵

Respect for state sovereignty,⁸⁶ IHL and IHRL are the legal regimes that govern drone attacks.⁸⁷ If there is no armed conflict IHRL will take precedence in the event of targeted killings, in which case it would be a violation of the IHRL prohibition of arbitrary deprivation of life to execute a targeted killing simply because the person(s) thus targeted are suspected of associating with a certain group. It would therefore be incumbent on the party harbouring suspicions about the intentions of the group concerned towards itself (i.e. the US in this instance) to take the suspects into custody⁸⁸ rather than kill them outright,⁸⁹ first of all,⁹⁰ and then call for the

⁸⁵ McNeal (2014) 687. Information about drone strikes is largely classified, but it is nevertheless rumoured, apparently not without foundation, that President Obama has 7000 drones at his disposal. Cf. Gonzales (2013) 5 and Barnidge (2012) 445.

⁸⁶ In relation to crossing the frontier of a sovereign state unbidden to conduct drone strikes. Cf. Schmitt M "Narrowing the international law divide: The drone debate matures" 39 2014 *Yale Journal of International Law Online* 1 at 3.

⁸⁷ Schmitt (2014) 3. US domestic legal authority and international legal authority both need to be consulted in considering the legality of targeted killing. In the former case consideration must be given to the President's constitutional authority as commander-in-chief, with particular reference to the Authorisation to Use Military Force (AUMF), passed after the 9/11 attacks, as well as the National Security Act of 1947. On the other hand, in the latter case it would be incumbent on the party conducting the investigation to give due consideration to *jus ad bellum* and the principles of self-defence with the consent of the host state or, failing which, the unwillingness or inability of the host state to keep non-state actors in its territory under control. The AUMF authorises the President to take all possible measures or exert force to the full extent required to visit condign punitive measures upon those responsible for 9/11, an authorisation that basically amounts to a declaration of war. The most expansive authority, however, is granted to the President in terms of the Al Qaeda Network Executive Order of 2003 whereby the Joint Special Operations Command (JSCO) of the military was given the authority to undertake global campaigns against Al Qaeda across borders in various circumstances without the prior approval of the Secretary of Defence or the President to adopt a variety of measures ranging from information gathering to killing. In accordance with *jus ad bellum* the sovereignty of a state can only be undermined by an incursion into its territory if the state intending the incursion receives permission to that effect from the security council, or if the cross-border violation of the sovereignty of the state targeted for such incursion on whatever grounds is acting in accordance with its right to self-defence, or if the host state gives permission. In the absence of permission the drone attacks carried out on the host state's territory can be considered an act of war (cf. McNeal (2014) 689, 690-692, 695, 697. Also refer to the Convention on International Civil Aviation of 7 December 1944 (Chicago Convention) which was adopted to ensure the safe development of international civil aviation and to ensure that international air transport services are operated soundly. Article 3(c) of the Chicago convention specifically states that: "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof ..." Therefore, targeted drone strikes in the territory of another state may be against the Chicago Convention.

⁸⁸ This is exactly where the problem materialises. No individual is taken into custody during targeted killing he is merely put on a kill list, targeted and eliminated. During extraordinary rendition the individual is illegally captured, tortured and held without due process being followed.

proportionality test to determine the extent to which the use of force would be justified by the circumstances.⁹¹

Proportionate harm to civilians during a drone strike must be considered on a case-by-case basis.⁹² A drone strike that meets the proportionality test is condoned in terms of the provisions of IHL (if it is an armed conflict), but not if it fails that test.⁹³ Barnidge and O’Connell represent a good example of dissension regarding the proportionality test in the case of the Hellfire missiles that killed Baitullah Mehsud, his bodyguards, wife, mother and father-in-law.⁹⁴ According to O’Connell the strike was unlawful as Mehsud was receiving a blood transfusion and therefore⁹⁵ *hors de combat* at the time of the strike, which made him a protected person in terms of article 41(2)(c) of AP I.⁹⁶ However, Barnidge argues that as a person who staged terrorist attacks, and who had survived a previous drone strike, it is highly unlikely that he was unarmed at the time and unprepared for possible strikes; and moreover that the house was closely guarded and on high alert: therefore the condition of *hors de combat* made no material difference to the overall state of combat readiness signalling engagement in hostilities that rendered targeting of the house and its occupants justifiable.⁹⁷

Both these arguments are based on AP I, which indicates that both writers proceed from the assumption that the drone strike was conducted during an armed conflict since AP I would only apply during an IAC. However, it should be noted that the US was not involved in an IAC with Pakistan in 2013, when the strike took place. So these arguments, unless meant hypothetically, would be of no consequence and the focus should be on IHRL.

⁸⁹ O’Connell (2003) 330; Schmitt (2014) 7.

⁹⁰ Article 6(1) of the ICCPR: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 3 of UDHR: “Everyone has the right to life, liberty and security of person.” Cf. Schmitt (2014) 7.

⁹¹ Schmitt (2014) 7.

⁹² Mégret (2013)1297.

⁹³ Barnidge (2012) 440.

⁹⁴ Therefore, there was no distinction made between the actual culprit and innocents.

⁹⁵ Barnidge (2012) 441-442.

⁹⁶ “A person is *hors de combat* if (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself”.

⁹⁷ Article 41 of AP I continues: “...provided that in any of these cases he abstains from any hostile act and does not attempt to escape.”

Assuming IHL applies, on the other hand, a drone attack is only legal if valid consent was sought from and given by the host state and the action taken was reconcilable with the scope of the consent obtained⁹⁸ under the hand of a duly authorised official,⁹⁹ failing which it has to fall within the ambit of self-defence to meet the demands of legality.¹⁰⁰

Targeted killing by drone strike is only legal under IHL if the strike is executed in the theatre of an armed conflict,¹⁰¹ failing which it falls under IHRL which provides that targeted killing is only justifiable if the person(s) concerned pose(s) a real and serious threat to others,¹⁰² or if the state deems it necessary to exercise its legitimate right to defend itself against presumed imminent or active hostilities on the part of the relevant person(s).¹⁰³

Finally, the use of force (*ius ad bellum*) must be analysed. The subject of drone strikes executed in anticipatory self-defence, that is, to ward off presumed imminent attacks, is controversial.¹⁰⁴ The traditional approach is to apply the *Caroline test* which determines that the state must possess prior verifiable intelligence that an attack is imminent before a drone strike can be justifiably launched.¹⁰⁵

The US is a signatory to the UN Charter, which lays down conditions under which force is permissible.¹⁰⁶ Article 51 of the UN Charter states that no member shall be precluded from exercising its inherent right to individual or collective self-defence in the event of an armed attack launched against it.¹⁰⁷

⁹⁸ Schmitt (2014) 4. The main objective of IHL is to regulate the relationship between a state and the citizens of the enemy and to regulate the use of force. Cf. Cline (2013) 56-57.

⁹⁹ Schmitt (2014) 4.

¹⁰⁰ The US argument is that drone strikes are legal in places where the state is unwilling or unable to deal with violent non-state actors in its territory. Schmitt (2014) 4, 7, Cline (2013) 58.

¹⁰¹ Cline (2013) 95.

¹⁰² Cline (2013) 95.

¹⁰³ Cline (2013) 95.

¹⁰⁴ Schmitt (2014) 9.

¹⁰⁵ This approach is losing support in modern-day warfare with weapons of mass destruction, elevated terrorist attacks etc. Therefore more support is being garnered for anticipatory self-defence on grounds that a state should be able to execute a drone strike if the "window of opportunity" to defend itself is closing. Cf. Schmitt (2014) 9.

¹⁰⁶ Cline (2013) 58.

¹⁰⁷ Article 51 determines: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported

The timeline between the armed attack and invoking the inherent right to self-defence is very important. For example, in *Nicaragua* the court held that the three years' time lapse between the attack which occurred in 1981 and El Salvador's request for US assistance in 1983 was too long to serve as a legitimate basis for El Salvador's claim that it was exercising its legitimate right to defend itself.¹⁰⁸ Only the gravest instances of a use of force will be deemed to be an armed attack.¹⁰⁹

In response to speculation whether self-defence could be invoked against a non-state actor the ICJ held that self-defence could only be invoked against another state.¹¹⁰

The argument for pre-emptive self-defence has failed for lack of a provocative armed attack in a number of prominent instances of international incidents in various theatres, including the 1956 Suez crisis, the 1967 Six-Day Israeli-Egypt war and the 1981 Israeli strike on Osirak.¹¹¹ However, the US insists that the drone strikes on Al Qaeda members outside of Afghanistan are lawful since it is engaged in a war with Al Qaeda and can therefore strike wherever the members are found.¹¹²

to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

¹⁰⁸ *Nicaragua* (1986) par 236 where the court held: "Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack and the date of its official request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The States concerned did not behave as though there was an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador."

¹⁰⁹ Cline (2013) 98.

¹¹⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2014) *Advisory Opinion of the ICJ* at par 136 where the court held: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State... Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." [own emphasis]

¹¹¹ Cline (2013) 101.

¹¹² Cline (2013) 107.

In terms of IHL, and more specifically article 51(4) of AP I,¹¹³ the general norms to justify targeted killing come down to distinction, precaution, and proportionality.¹¹⁴ First, by distinction is meant that the targeted person must be duly identified as a legitimate military target¹¹⁵ before a strike is launched, thus implying the need to place the person(s) on the kill list pre-emptively.¹¹⁶ Secondly, by precaution is meant that the targeting of the person(s) considered suspect must be followed by an assessment of the risk of a strike as a potential hazard to civilians, as well as an assessment of possible measures to minimise such risk.¹¹⁷ Thirdly a proportionality assessment needs to be done in accordance with articles 51 and 57 of AP I.¹¹⁸

There are also concerns regarding the participation of CIA agents in drone attacks.¹¹⁹ On 20 September 2011 a drone strike initiated by the US CIA killed a US citizen in Yemen.¹²⁰ Over the past ten years the CIA has become increasingly involved in the GWOT.¹²¹ The forty-six drone strikes reported between 2004 and 2008 rose to at least sixty-nine in 2009 and nearly double that number in 2010.¹²² There is still a CIA presence in Afghanistan and despite the removal of most troops drone strikes will continue to eliminate Al Qaeda's operatives.¹²³

¹¹³ "4. Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) Those which are not directed at a specific military objective; (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

¹¹⁴ McNeal (2014) 733.

¹¹⁵ This is also in line with article 48 of AP I which determines that "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

¹¹⁶ McNeal (2014) 733.

¹¹⁷ This is in line with article 57 (1) of AP I which determines that "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects;" also with article 57(2) which elaborates the necessary precautions. Cf. McNeal (2014) 745.

¹¹⁸ McNeal (2014) 750.

¹¹⁹ O'Connell (2003) 327.

¹²⁰ Cline (2013) 52.

¹²¹ Cline (2013) 52.

¹²² Cline (2013) 52.

¹²³ Cline (2013) 52. It was reported that the director of the CIA told military officials that although its operatives would be withdrawing towards Kabul their function of intelligence gathering and targeting of militants would continue. Cf. Rosen A "Here's what the US presence in Afghanistan might look like after 2014" (28 May 2014) *Business Insider Online* available at <http://www.businessinsider.com/us-presence-in-afghanistan-after-2014-2014-5>.

Since the CIA is not part of the armed forces and a civilian agency the legality of drone strikes originating from that quarter has become a matter for concerned debate, especially in areas where armed conflict is not a recognised phenomenon, such as Yemen, Somalia and Pakistan.¹²⁴

The possible range of categories in which the CIA could be placed (assuming there is an armed conflict) in view of its drone-related activities includes the following: combatants, non-combatants, POWs, civilians, mercenaries, organised armed groups, or civilian contractors.¹²⁵ Article 47(2)(d) of AP I states that since mercenaries are neither national in the sense of being a party to a conflict, nor are they residents of a territory controlled by a party to a conflict, therefore the CIA operatives cannot be mercenaries.¹²⁶ Furthermore, they cannot be civilian contractors as they are employed by the US government. Again, they are not POWs because they have not been captured by an enemy.¹²⁷ Nor are they combatants as they do not meet the criteria set forth in article 4 of GC III and are not part of the armed forces.¹²⁸ Lastly the agency cannot be an organised armed group that is conducting hostilities in a NIAC on behalf of a non-state actor since it is an agency of the US government. It follows that the CIA is a civilian operation that participates directly in hostilities in that capacity and therefore cannot claim the status of protected persons while engaged in such hostilities,¹²⁹ the implication being, therefore, that its operatives can be targeted while thus engaged.¹³⁰

A drone strike during an IAC and a NIAC must be aimed at a combatant or a civilian taking a direct part in hostilities; therefore the status of the fighter and the conflict is critical in determining the legitimacy of the strike.¹³¹ Targeted killing must also be proportionate to protect civilians against harm that could be sustained during the attack.¹³²

¹²⁴ Cline (2013) 52.

¹²⁵ Cline (2013) 109-110.

¹²⁶ Cline (2013) 109-110.

¹²⁷ Cline (2013) 109-110.

¹²⁸ Cline (2013) 109-110.

¹²⁹ Cline (2013) 110.

¹³⁰ Barnidge (2012) 443.

¹³¹ Cline (2013) 96.

¹³² Cline (2013) 96.

Terrorists can only be combatants if they fulfil the requirements of article 4 of GC III, but they do not fulfil the criteria as they neither carry arms openly nor wear distinctive insignia.¹³³ Therefore they are civilians and cannot be targeted during drone strikes unless they are actively engaged taking an active part in hostilities at the moment when the drone strike is launched.¹³⁴

Drone strikes also cause territorial difficulties when they are perpetrated unbidden within the territorial bounds of another state, thereby violating that country's sovereignty, unless the strike is undertaken with the consent of the relevant territorial authority, or the originating authority is exercising its legitimate and justifiable right to defend itself.¹³⁵ However, the consenting state (if such be the case) has a duty to act in accordance with the rules of IHL and IHRL and should seek prosecution of those responsible if it transpires that the strike was illegal.¹³⁶ On the other hand the US holds the conviction that drone attacks are lawful if they are executed at the invitation of a host state within the territorial bounds of that state and within the theatre of a NIAC if the host state considers itself engaged in such NIAC.¹³⁷

The last important criticism (if it is assumed that there is no armed conflict) against targeted killing is that the victim is not only unaware of "being in the cross-hairs", so to speak, but is even deprived of the formality of a hearing and the possibility of appeal, being summarily dispatched ("taken out" as the colloquial expression goes) as would be the victim of a hired assassin.¹³⁸

The US justifies its use of drones by adducing the following three arguments:¹³⁹ a) An informed, high-level US government official must determine that the targeted individual poses an imminent threat in the form of a violent attack against the US; b) the US will continue to monitor whether and when the capture of said individual

¹³³ Article 4(2) (a)-(d) of GC III, also see Cline (2013) 80.

¹³⁴ Article 5 of GC IV states: "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State." Cf. Cline (2013) 80.

¹³⁵ Cline (2013) 97.

¹³⁶ Cline (2013) 97.

¹³⁷ McNeal (2014) 690.

¹³⁸ Cline (2013) 95.

¹³⁹ Rylatt (2013) 48.

becomes feasible if feasibility is in doubt; c) strikes are always executed in accordance with IHL.¹⁴⁰

In sum, targeted killing is only legal during an armed conflict if the targeted person is either a combatant or a civilian who is directly involved in hostilities, or if the strike is carried out in a context other than that of an armed conflict and the targeted person poses a real and serious threat to others, or if the motive is self-defence in response to an attack.¹⁴¹

Although drones add to the asymmetry in asymmetrical warfare as they have mostly been used in situations where only one side has access to high-tech drones,¹⁴² it is not necessarily illegal. Where states have different means but somewhat similar broad organisational and industrial capabilities, non-state actors are at a disadvantage since they cannot field matching technology and martial and organisational sophistication.¹⁴³

Drones have a definite influence on the concept of a “level playing field” and war as an open contest where the opponents share the risk inherent in striving to inflict equal harm on each other’s combatants. This mutual, balancing risk has been removed by drones¹⁴⁴ since only one side normally (in the vast majority of cases) has access to drones, with the result that a situation develops where one side pays with life and limb and the other pays economically.¹⁴⁵

¹⁴⁰ Once again the referral to IHL is made, but regardless of a US admission of involvement in an armed conflict, the fact remains that there is no current armed conflict between the US and another state. Therefore IHL does not feature in this argument.

¹⁴¹ Cline (2013) 96-97.

¹⁴² Mégret (2013) 1309-1310.

¹⁴³ Mégret (2013) 1310.

¹⁴⁴ Mégret (2013) 1310. Although he focuses more on lethal autonomous robotics, Special Rapporteur Christof Heyns makes some interesting points regarding asymmetrical warfare and unmanned aerial vehicles. According to the Special Rapporteur unmanned systems can enlarge the battlefield, penetrate enemy lines more easily and save human and final resources. It can also stay on enemy lines much longer than soldiers can. If one of the parties to the conflict has this advantage at his disposal it places the other at a severe disadvantage.

Cf. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (9 April 2013) *UN General Assembly A/HRC/23/47* at par 51 available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf.

¹⁴⁵ Mégret (2013) 1311.

5.5. Conclusion

In view of post-9/11 events the following descriptions seem to offer possible rationales for classification of the GWOT:

- a) It is an undeclared armed conflict in which the US and its allies are engaged in seeking out perpetrators in Afghanistan who engage in acts of terror, and in mounting retaliatory exercises calculated to neutralise said perpetrators according to military intelligence.
- b) It is an undeclared armed conflict in which the US and its allies engage in military operations against the former Taliban regime.
- c) It is a non-international armed conflict, originally waged in Afghanistan between the Taliban and its domestic rivals, but was internationalised in due course by a combined intervention mounted by the US and its allies in 2001.
- d) It is an undeclared international armed conflict in which the US and its allies conduct military operations against Al Qaeda, a non-state entity, aiding the Taliban.
- e) It is an undeclared international armed conflict in which the US and its allies conduct military operations against a range of non-state entities and individuals targeted as terrorist groups or individuals in accordance with military intelligence.
- f) it subsists in continual crime control activities conducted against international terrorists with metaphorical use of “war” rhetoric.¹⁴⁶

Scholars supporting the position that the GWOT is neither an international nor a non-international armed conflict¹⁴⁷ disagree with the general view that the GWOT by its nature cannot be subject to rules of any kind.¹⁴⁸ In contrast the Bush administration held that extraordinary rendition could not be unlawful since it took place outside the US¹⁴⁹ and was implemented by governments that gave assurances that detainees held within their precincts would be treated humanely. The US under Bush steadfastly held immovably that the GWOT was a new kind of war entailing actions that were not readily classifiable according to received views concerning warfare.¹⁵⁰

¹⁴⁶ Fitzpatrick (2003) 249.

¹⁴⁷ Satterthwaite (2007) 1412.

¹⁴⁸ Satterthwaite (2007) 1412.

¹⁴⁹ Satterthwaite (2007) 1419-1420.

¹⁵⁰ Waldron J *Torture, terror, and trade-offs: Philosophy for the White House* (2010) Oxford University Press, Satterthwaite (2007) 1419-1420.

In other words, the US position under Bush can be summed up as a thinly veiled demand for a licence to engage in lawlessness, or put differently, to be a law unto itself. Some scholars argue that it is important not to define the GWOT as war and treat Al Qaeda operatives as combatants because this elevates them to be more than mere criminals, thereby securing elevated protections within the framework of IHL.¹⁵¹

The crux of the whole matter, finally, is that even if the GWOT is a new type of war and the traditional dimensions of warfare have evolved or expanded, it is still a war. Whether it is an undeclared new type of war or an armed conflict under IHL, some basic legal principles remain in force, regardless of them being subsumed under IHL or IHRL. The advocacy of what effectively amounts to a state of licence is therefore baseless.

¹⁵¹ O'Connell (2005-2006) 538.

CHAPTER 6

CRIMINALISING EXTRAORDINARY RENDITION

“I did not bring this lawsuit to harm America. I brought the lawsuit because I want to know why America harmed me. I don't understand why the strongest nation on Earth believes that acknowledging a mistake will threaten its security. It seems that the only place in the world where my case cannot be discussed is in a US courtroom.” *Khalid El-Masri*¹

6.1. Introduction

The establishment of the International Criminal Tribunal for the former Yugoslavia² (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)³ in the early 1990s cemented international criminal law (ICL) as a somewhat codified body of law,⁴ although the Nuremberg and Tokyo International Military Tribunals (IMTs) introduced the concept of international criminal responsibility and prosecution. Since ICL as a formal body of law is a very recent development it is still evolving.⁵

International criminal law now derives from international law, national criminal law, comparative criminal law and procedures, and international and regional human rights law.⁶ The penal aspects of international criminal law are derived from conventions, customs and general principles of law.⁷ Sources of international law are not always distinct from each other and sometimes overlap, but they do tend to complement each other.⁸

It is an established ICL principle that when a crime is committed in a state's territory that state can prosecute or extradite the individual to another jurisdiction or state.⁹

¹ Khaled El-Masri was a German citizen born in Lebanon. He was a car salesman before he was wrongfully detained in 2003. Cf. El-Masri K “I am not a state secret” (3 March 2007) *LA Times Online* available at <http://www.latimes.com/news/la-oe-elmasri3mar03-story.html>

² The ICTY is a court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990's, and was established by the United Nations in 1993.

³ The ICTR was established by the United Nations in 1995 to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994.”

⁴ Cryer R Friman H Robinson D Wilshurst E *An Introduction to International criminal law and procedure* (2007) Cambridge University Press 1st ed. at 1.

⁵ Cryer *et al* (2007) 1.

⁶ Bassiouni M *Introduction to international criminal law* (2003) Transnational Publishers 1.

⁷ Bassiouni (2003) 2.

⁸ Bassiouni (2003) 6.

⁹ Bassiouni (2003) 504.

The territoriality principle of jurisdiction necessarily implicates state sovereignty because it is a natural consequence of its sovereignty that it can regulate activities within its territory and administer justice.¹⁰ Most criminal prosecutions take place in the territory where the offences concerned were committed.¹¹ Therefore all crimes committed in a state's territory can be prosecuted in the municipal courts, and if the accused is convicted he/she can be sentenced even if he/she is a foreign citizen.¹²

Therefore, the court of one country has no jurisdiction over an event that originated in another state.¹³ Here the *Lotus* case¹⁴ can be of some consequence. In this case a French ship collided with a Turkish vessel on the high seas, with the result that Turkish lives were lost. Upon docking in Turkey the Turkish authorities arrested the French captain and tried him for manslaughter. France objected and the matter was referred to the ICJ. The court held that Turkey had the right to prosecute as nothing deters a state from prosecuting an individual for acts perpetrated by such individual at a location beyond the territorial borders of that state, thereby harming a citizen of that state, while the individual in question is present within the state's territorial borders.¹⁵

National states and intergovernmental organisations are subject to international law.¹⁶ Individuals only become subjects of international law through establishment of their criminal responsibility.¹⁷ Therefore, it cannot be generally accepted that all individuals are automatically subjects of international law; it is only in certain circumstances that this is achieved.¹⁸

ICL attaches individual criminal responsibility under international law for the violations of *jus cogens* norms.¹⁹ Not only does ICL recognise individual criminal responsibility but the following defences also could hold no ground in terms of ICL:

¹⁰ Shaw (2008) 653.

¹¹ Shaw (2008) 654.

¹² Shaw (2008) 653.

¹³ Shaw (2008) 653.

¹⁴ *Lotus* case (1927) 9, 26 and refer to footnote 167 in Chapter 3.

¹⁵ Shaw (2008) 656-657.

¹⁶ Bassiouni (2003) 57.

¹⁷ Bassiouni (2003) 57.

¹⁸ Bassiouni (2003) 58.

¹⁹ Bassiouni (2003) 58.

- a) Immunity of heads of state;²⁰
- b) Obedience to superior orders;
- c) Command responsibility for military or civilian leaders;
- d) Statutes of limitations for certain crimes are not applicable;
- e) Certain obligations deriving from *aut dedere aut judicare*.²¹

The aim of this thesis is to investigate if extraordinary rendition can be criminalised, and to what end international criminal law should be explored with a view to discovering whether criminal acts so designated can indeed be investigated and prosecuted under said law.

6.2. The International Criminal Court

The International Criminal Court (ICC) is a permanent institution established by treaty to investigate and prosecute persons who have committed the gravest offences, such as genocide, crimes against humanity, war crimes and aggression.²² Given its treaty-based nature, it is only binding on state parties²³ and is burdened with more limitations than other international tribunals such as the ICTY and the ICTR.²⁴ The ICC does not infringe upon state sovereignty or override national legal systems capable of carrying out international obligations.²⁵ Further, rather than a substitute for, it is meant to be complementary to, the national criminal justice system.²⁶

²⁰ Although an in depth discussion on Immunity of heads of state is relevant for purposes of this thesis, it should be noted that it is a very contentious issue, cf. Tladi D “The ICC decisions on Chad and Malawi: On cooperation, immunities and article 98” 2013 *Journal of International and Criminal Justice* 199, Tladi D “The immunity provision in AU amendment and the entrenchment of the hero-villain trend” 2015 *Journal of International Criminal Justice* forthcoming, Akande D “The legal nature of the Security Council referrals to the ICC and its impact on Al Bashir’s immunities” 2009 *Journal of Criminal Justice* 333.

²¹ Bassiouni (2003) 58.

²² Again it must be noted that article 5 of the ICC Statute invests that body with jurisdiction over the crime of aggression, but only once it has been defined, whereupon a lapse of nine years ensues before it is applied in the ICC. Article 5(2) of the ICC Statute reads: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

²³ Bassiouni (2003) 499.

²⁴ Given the treaty-based nature of the ICC, compromise had to assume much more prominence than had been the case with the establishment of the ICTY and the ICTR. Cf. Bantekas *et al.* (2003) 163-164. It is also important to note that both the ICTY and ICTR were creatures of the UN.

²⁵ Bassiouni (2003) 500.

²⁶ Bassiouni (2003) 500.

Article 21 of the ICC Statute requires the application of international law through the following sources: the ICC Statute, international treaties and general principles and rules of international law, or failing the latter, general principles of national legal systems, provided these are consistent with the ICC Statute.²⁷

6.2.1. Jurisdiction of the ICC

International criminal jurisdiction refers to international tribunals that are not affected by national or municipal judicial and enforcement limitations.²⁸ ICC jurisdiction has two legs: *ratione personae* and *ratione materiae*. In terms of the former the ICC jurisdiction is confined to natural persons over the age of 18²⁹ and does not extend to states or legal entities in the event of crimes committed within the domain of such states or entities.³⁰ Where subject matter (*ratione materiae*) is concerned ICC jurisdiction covers only the gravest international crimes, such as genocide, crimes against humanity, war crimes and the crime of aggression.³¹ There are 28 categories of international crimes, some of which arise from state action or inaction, or lack of enforcement.³² The ICC has jurisdiction over four of these, namely genocide, war crimes, crimes against humanity and aggression.³³ All the core crimes of international law are *jus cogens* norms.³⁴

²⁷ These sources are largely conversant with the article 38 sources informing the Statute of the International Court of Justice (ICJ Statute) subsumed under the UN Charter. Article 38(1)(a)-(d) of the ICJ Statute provides as follows: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

²⁸ Bantekas I Nash S *International Criminal Law* (2003) Cavendish Publishing Limited 2nd ed at 162-163.

²⁹ Article 26 of ICC Statute. Cf. Engle E “The international criminal court, the United States, and the domestic armed conflict in Syria” 14 2013 *Chicago-Kent Journal of International and Comparative Law* 146 at 148, Bassiouni (2003) 506, Bantekas *et al* (2003) 378, Broomhall B *International justice and the international criminal court: Between sovereignty and the rule of law* (2003) Oxford University Press 1st ed. at 78.

³⁰ Bassiouni (2003) 506.

³¹ Articles 5-9 of the ICC Statute, Broomhall (2003) 76. Until recently there was no definition for the crime of aggression. However, during the 2010 Kampala Review Conference of the Rome Statute a definition was adopted and the necessary amendments to the Rome Statute were agreed upon. Article 8 of the Rome Statute was amended by the insertion of the definition of the crime of aggression. Article 5(2) was deleted and the necessary amendments to article 15 were adopted in order to give proper effect to the exercise of jurisdiction over the crime. Cf. “Draft resolution submitted by the President of the Review Conference: The crime of aggression” (11 June 2010) *International Criminal Court Review Conference of the Rome Statute, Kampala RC/10* (Kampala Review).

³² Bassiouni (2003) 85.

³³ Terrorism is not a core crime under international law. Cf. Broomhall (2003) 39, Bantekas *et al* (2003) 377.

³⁴ Broomhall (2003) 49.

ICC jurisdiction does not extend to crimes committed before the coming into force of the treaty on 1 July 2002,³⁵ or to states that did not accede to the treaty after its adoption.³⁶ When a state becomes a state party to the ICC Statute it automatically accepts the court's jurisdiction with respect to the said core crimes.³⁷ However, although state parties are automatically subject to ICC jurisdiction, that tribunal will not exercise jurisdiction without consent of a state, or in the case of state parties, proof that the principal of complementarity has been complied with.³⁸

(a) ICC jurisdiction over non-state parties

Non-state parties are not subject to ICC jurisdiction unless they make an explicit declaration to that effect.³⁹ A national of a non-state party can be subjected to ICC jurisdiction if the person commits a crime within the jurisdiction of the ICC and within the territorial borders of a state party. The SC can refer the matter if the person's home state is a non-state party but it accepts the ICC's jurisdiction. The SC will also refer the matter if a crime is committed within the territorial borders of a non-state party and the matter is referred to the ICC.⁴⁰

If the court exercises jurisdiction through a Security Council referral its jurisdiction will remain intact even if the offence was committed within the territorial borders of a non-state party or by a national of a non-state party, and even without the consent of the state within whose borders the offence was committed⁴¹. The only condition that is imperative under these circumstances is that the offence at issue must be a serious threat to the peace and security of mankind.⁴² The Security Council may also delay the investigation or prosecution for a period of twelve months in certain circumstances.⁴³

³⁵ Bassiouni (2003) 505, Broomhall (2003) 78.

³⁶ Bassiouni (2003) 505, Broomhall (2003) 78.

³⁷ Bantekas *et al* (2003) 164.

³⁸ Broomhall (2003) 80, cf. article 17 of the ICC Statute.

³⁹ Bantekas *et al* (2003) 378.

⁴⁰ Article 53(3) of the ICC Statute, cf. Engle (2013) 148.

⁴¹ Bantekas *et al* (2003) 164.

⁴² Bassiouni (2003) 515.

⁴³ Bassiouni (2003) 515.

(b) Criminal jurisdiction of the ICC

The ICC will exercise jurisdiction over a criminal matter where an offence has been committed within the jurisdiction of the ICC if:

- (i) a state party refers the matter to the prosecutor of the ICC;⁴⁴
- (ii) if the matter is referred by the Security Council in virtue of Chapter VII of the UN Charter;⁴⁵
- (iii) if it is referred by non-state parties in terms of article 12(3) of the ICC Statute;⁴⁶ or
- (iv) if the prosecutor initiates the investigation *proprio moto* after obtaining permission from the pre-trial chamber.⁴⁷

(c) Referrals by the SC

If the prosecutor refers a situation⁴⁸ to the ICC he/she may do so on the basis of information from any source, but this right is not unlimited.⁴⁹ According to article 15 the prosecutor needs permission from the Pre-Trial Chamber⁵⁰, and according to article 18 he/she has a duty to inform the government of the state being investigated, that an investigation is being conducted.⁵¹ If investigations are to be done in the territory of a non-state party the prosecutor may conclude *ad hoc* agreements with

⁴⁴ Article 13(a) of the ICC Statute. However, the crime would have to be committed within the state party's territory or by one of its nationals. Cf. Article 12(2) of the ICC Statute: "...the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State or the territory where the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State or registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national." (Own emphasis). Cf. Bassiouni (2003) 504.

⁴⁴ Article 12(3) of the ICC Statute: "If the acceptance of a State which is not a Party to this Statute is required..., that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception..." (own emphasis). Cf. Bassiouni (2003) 504, Bantekas *et al* (2003) 164.

⁴⁵ Dealing with the Security Council's powers to take action in respect to threats to the peace, breaches of the peace and acts of aggression.

⁴⁶ Article 13(b) and 12(3) of the ICC Statute. Article 12(3) of the ICC Statute: "If the acceptance of a State which is not a Party to this Statute is required..., that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception..." (own emphasis). Cf. Bassiouni (2003) 504, Bantekas *et al* (2003) 164, 377.

⁴⁷ Article 13(c) of the ICC Statute. Cf. Broomhall (2003) 78, Engle (2013) 148.

⁴⁸ A "situation" refers to the "overall factual context in which it is believed that a crime within the jurisdiction of the court has been committed." The term "situation" cannot be interpreted too narrowly and requires case-by-case consideration. Cf. Bassiouni (2003) 515.

⁴⁹ Broomhall (2003) 79.

⁵⁰ Article 61 of the ICC Statute. Cf. Bassiouni (2003) 517.

⁵¹ Broomhall (2003) 79.

the relevant state to facilitate such investigations.⁵² The prosecutor may continue with an investigation if he/she believes that there are 'reasonable grounds' to proceed,⁵³ in which case the prosecutor will judge the reasonableness of such grounds in light of evidence adduced to the effect that a crime has been committed within the jurisdiction of the ICC; further, whether the case is admissible under article 17. Finally the prosecutor would consider the gravity of the offence and the interest of the victims. If gravity proves to be an inadequate factor in the matter at issue the pre-trial chamber shall be informed accordingly.

Furthermore, the prosecutor may at any time review a decision to refrain from investigation and prosecution because reasonable grounds for doing so are considered inadequate and if he/she believes that:⁵⁴

- (i) The legal or factual basis in terms of article 58 is inadequate.
- (ii) The case is inadmissible under article 17.
- (iii) The prosecution is not in the interest of justice (taking various factors into account).⁵⁵

The decision to prosecute or investigate is reviewable by the Pre-Trial Chamber.

(d) Admissibility

The ICC will declare a case inadmissible if:

- (i) It is being investigated or prosecuted by a state with jurisdiction; provided that the state concerned is not unwilling or genuinely unable to investigate or prosecute;⁵⁶
- (ii) a state with jurisdiction has not investigated the situation and decided not to prosecute, unless this decision resulted from the unwillingness to prosecute;⁵⁷
- (iii) the accused has not been tried for the conduct which is the subject of the complaint⁵⁸;

⁵² Article 54(1) of the ICC Statute. Cf. Bassiouni (2003) 521.

⁵³ Bantekas *et al* (2003) 378.

⁵⁴ Article 53 of ICC Statute.

⁵⁵ Article 53(2)(c): "A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion."

⁵⁶ Article 17(1) (a) of the ICC Statute. Cf. Bassiouni (2003) 518.

⁵⁷ Article 17(1) (b) of the ICC Statute.

- (iv) trial by the ICC is not permitted in terms of article 20(3);⁵⁹ or
- (v) the case is rendered inadmissible for lack of gravity.⁶⁰

The ICC will decide that a state is genuinely unwilling or unable to investigate or prosecute if it undertakes a proceeding in order to hide the person from the court who is the subject of the complaint in question,⁶¹ or if the proceedings are unjustifiably delayed in a manner that is inconsistent with the intent to bring the person to justice⁶²; and if, to boot, the proceedings have not been conducted independently or impartially.⁶³

The Obama administration flouted the rule of law by refusing to investigate and prosecute parties who, during the Bush-Cheney era, had been prominently involved in extraordinary rendition. If the US was, hypothetically, a state party and extraordinary rendition was a crime within the jurisdiction of the ICC, the ICC's jurisdiction over US nationals would have been strengthened.⁶⁴ Furthermore, if US citizens then committed crimes against humanity or war crimes in the territory of state parties during the Bush/Cheney era they could then have been investigated and prosecuted by the ICC because the Obama administration is clearly unwilling or unable to do so,⁶⁵ given that President Obama stopped all criminal investigations.⁶⁶ It

⁵⁸ Article 17(1) (c) of the ICC Statute.

⁵⁹ Article 20(3) of the ICC Statute: "No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

⁶⁰ Article 17(1) (d) of the ICC Statute.

⁶¹ Article 17(2) (a) of the ICC Statute.

⁶² Article 17(2) (b) of the ICC Statute.

⁶³ Article 17(2) (c) of the ICC Statute.

⁶⁴ Paust J "The US and the ICC: No more excuses" 12 2013 *Washington University Global Studies Law Review* 563 at 572. Article 17(1)(a) of the ICC Statute gives the Court the right to prosecute should a state be unwilling to do so.

⁶⁵ Paust (2013) 574.

⁶⁶ Paust (2013) 574. The Appeals Chamber of the ICC ruled that inaction from a state with jurisdiction renders it admissible for examination by the ICC. Cf. *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (25 September 2009) Appeals Chamber of the International Criminal Court ICC-01/04-01/07 OA at par 78 where the court held: "Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the statute, the initial questions to ask are (1) whether there are on-going investigations or prosecutions, or (2) whether there have been investigations in the Past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-

seems justifiable therefore to conclude that the absence over decades of prosecutions for war crimes in US federal courts is indicative of unwillingness to entertain such matters,⁶⁷ despite Human Rights Watch and Amnesty International having pleaded with the Obama administration to investigate and prosecute those guilty of torture during the Bush administration.⁶⁸

(e) *Ne bis idem* principle

In terms of the *ne bis idem* principle a person cannot be tried for conduct that has already resulted in his/her conviction or acquittal. A state therefore cannot try a person on charges that have already been answered in court and on which he/she has been convicted or acquitted⁶⁹, or the other way round.⁷⁰ However, it is important to note that ICC jurisdiction is unaffected by a conviction or acquittal by a national court if it can be shown that the proceedings in question were held to shield the person from ICC jurisdiction⁷¹, or that the proceedings leading to conviction or acquittal were not independent and impartial.⁷²

(f) *Nullum crimen sine lege* principle

The nullum crimen sine lege principle included in article 22 of the ICC Statute determines that the court can only judge on the law that falls within its legal brief and nothing more.⁷³

Therefore, in order for the court to have jurisdiction the individuals responsible for extraordinary rendition must have committed a crime within its jurisdiction. Seeing as

paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. This interpretation of article 17 (1) (a) and (b) of the Statute also finds broad support from academic writers who have commented on the provision and on the principle of complementarity.”

⁶⁷ Paust (2013) 578.

⁶⁸ Bejesky R “Sensibly construing the ‘more likely than not’ threshold for extraordinary rendition” 23 2013-2014 *Kansas Journal of Law & Public Policy* 221 at 222. Importantly, Obama signed an executive order that did not proscribe extraordinary rendition but its implementation seems to be an open question. Cf. Bejesky (2013-2014) 222.

⁶⁹ Article 20(2) of the ICC Statute.

⁷⁰ Article 20(3) of the ICC Statute. Cf. Bassiouni (2003) 519.

⁷¹ Article 20(3) (a) of the ICC Statute.

⁷² Article 20(3) (b) of the ICC Statute. Cf. Bassiouni (2003) 519.

⁷³ Broomhall (2003) 26.

extraordinary rendition is not yet criminalised, and no legal definition exists, it cannot be said to fall within the core crimes of the ICC Statute.

(g) State secrecy privilege

States may protect information in their possession, or in the possession of third parties, that pertains to their national security.⁷⁴ Only the states can intervene in the proceedings to prevent the national security information from being disclosed.⁷⁵ If the state intervenes in proceedings for purposes of protecting national security information it is obliged to take reasonable steps to assist in the proceedings by considering other means of soliciting or gaining testimony or evidence.⁷⁶

6.2.2. Immunity to criminal liability before the ICC

(a) Diplomatic immunities

Criminal liability under international law hinges on the fulfilment of numerous requirements. For example: Jurisdiction needs to be considered, the elements of the crime need to be present, and the forum for prosecution needs to be determined.

Representatives of foreign states are safeguarded by diplomatic immunity against legal processes, whether civil or criminal, prosecuted by other states against them in consequence of their fulfilment of acts of state (*jure imperii*), but not in fulfilment of ministerial acts (*jure gestionis*).⁷⁷ Immunity against criminal prosecution simply means that the person concerned is not subject to the jurisdiction of the ICC, but not that he/she is completely exempt from all criminal liability.⁷⁸ There are two reasons why a foreign national would be granted immunity: One of these can be his personal status (eg. membership of a limited group of people such as heads of state or heads

⁷⁴ Article 72 to 73 of the ICC Statute.

⁷⁵ Article 72(4) of ICC Statute. Cf. Bassiouni (2003) 523

⁷⁶ Article 72(5)(a) to (d) suggest: "(a) Modification or clarification of the request; (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence."

⁷⁷ Bassiouni (2003) 71-72.

⁷⁸ Article 27 and 98 of the ICC Statute, cf. Tladi (2015), Tladi (2013) in general, Bantekas *et al* (2003) 168.

of diplomatic missions) or subject matter jurisdiction (e.g. immunity from civil and criminal prosecution initiated by foreign states in official (ie. governmental) matters.⁷⁹

The purpose of this immunity is to enable officials to perform their duty without hindrance, but when the officials concerned vacate (ie. no longer have the protection) of their position they may be prosecuted for crimes committed in the past.⁸⁰

(b) Command responsibility and superior orders

It is the nature of the military that subordinates comply with orders given by superiors.⁸¹ What may seem simple for civilians to refuse cannot always be as simple for soldiers in a war zone when faced with the choice of committing a crime or facing the wrath of their superiors.⁸² Therefore the 'moral choice doctrine' is applied. In terms of this doctrine, if a soldier has exceeded the terms of reference of an order issued to him/her he would be found guilty.⁸³ Article 33(1) (a) to (c) provides the defences to superior orders. In accordance with this article the individual would only be able to enter a defence of superior orders if he was under a legal obligation to obey superior orders, if he did not know that the order was unlawful, and if it was not manifestly unlawful. Article 28(a) (i) also states that superiors or subordinates must have had actual knowledge of the act or should have reasonably known that their forces were committing crimes.

A military officer in a position of command cannot escape responsibility for an act perpetrated under his command if the fact of the conduct was or could reasonably have been assumed to be known to him/her. He also cannot escape responsibility if he failed to prevent the relevant act, again provided, of course, that he was or could reasonably have been assumed to be aware of the conduct in question.⁸⁴ Responsibility as detailed here covers wrongful acts committed by subordinates where the superior was aware of or consciously disregarded, or effectively controlled

⁷⁹ Bantekas *et al* (2003) 169.

⁸⁰ Bantekas *et al* (2003) 169.

⁸¹ Bantekas *et al* (2003) 13.

⁸² Bantekas *et al* (2003) 131.

⁸³ Bantekas *et al* (2003) 131.

⁸⁴ Article 28(a) of the ICC Statute. Cf. Bassiouni (2003) 514.

the relevant actions, or where the superior failed to take preventive or repressive measures to the extent required.⁸⁵

(c) Self defence exception

There is also the issue of self-defence. The *Kordic* case defines self-defence “as providing a defence to a person who acts to defend or protect himself or his property (or the person or property of someone else) against attack, provided that the defensive acts constitute a reasonable, necessary and proportionate reaction to the attack.”⁸⁶

6.3. The right of the victim to redress

For purposes of a victim’s right to redress under international law a “victim” is defined as:

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that is in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power...The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”⁸⁷(own emphasis).

This definition presupposes four types of victims of crime: those who suffered harm directly; those who are dependents or family members of victims; those who intervened to prevent or prohibit violations and suffered harm in the process; and collective victims such as legal entities and organisations.⁸⁸ The ICC Rules of

⁸⁵ Article 28(b) of the ICC Statute. Cf. Bassiouni (2003) 514.

⁸⁶ *Prosecutor v Dario Kordic & Mario Cerkez* (26 February 2001) ICTY IT-95-14/2-T par 449.

⁸⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power United Nations General Assembly Resolution 40/34 of 9 December 1994, principle 1.

⁸⁸ Bassiouni (2003) 96.

Procedure and Evidence also define the term “victim”.⁸⁹ The ICC has the power to order the offender to pay reparations to victims.⁹⁰

In accordance with article 77 of the ICC Statute the ICC can impose penalties on a person convicted of a crime. It may impose a penalty of imprisonment for a period no longer than thirty years,⁹¹ unless the gravity of the crime warrants life imprisonment.⁹² In addition to imprisonment the ICC may impose a fine or the forfeiture of property or assets.⁹³ ICC can offer reparation to victims of crimes including restitution, compensation and rehabilitation.⁹⁴ The ICC will not impose the death sentence but states that allow that under their own legal systems will not be precluded from doing so.⁹⁵

Victims of IHL and IHRL abuses have a right to reparation and a right of access to a fair and impartial mechanism of justice to enable the redress requested.⁹⁶ Therefore, the ICC can also order the payment of reparation to victims in accordance with article 75 of the ICC Statute, but the ICC is not authorised to order states to pay reparation instead it can only order reparation in the case of individual persons, except where said individuals acted on behalf of the state or under state authority.⁹⁷ However, the victim can still pursue the claim in other forums.⁹⁸

Upon request, and in limited times by own motion, the ICC can also determine the scope and extent of the injury or damage suffered and can then make a reparation order directly against the offender.⁹⁹ The court can also order payment of reparations

⁸⁹ ICC Rules of Procedure and Evidence of 2002, Principle 85 defines “victim” as follows: “(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

⁹⁰ Bassiouni (2003) 102.

⁹¹ Article 77(1) (a) of the ICC Statute.

⁹² Article 77(1) (b) of the ICC Statute.

⁹³ Articles 77(2) (a) and (b) of the ICC Statute.

⁹⁴ Bantekas *et al* (2003) 3953.

⁹⁵ Article 80 of the ICC Statute. Cf. Bassiouni (2003) 526.

⁹⁶ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1994) states in principle 4 that “victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”

⁹⁷ Bassiouni (2003) 528.

⁹⁸ Bassiouni (2003) 528.

⁹⁹ Bassiouni (2003) 102.

from the international trust fund to which states contribute in terms of section 78 of the ICC Statute.¹⁰⁰

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also gives victims a right to redress¹⁰¹ and further states that, especially if the offence is serious, the state should compensate the victim if the offender lacks the means to do so.¹⁰² It is suggested that a fund be maintained to meet the need where state compensation is required, or that states contribute to an international fund to provide for such cases according to the provisions contained in article 78 of the ICC Statute.¹⁰³

Therefore, states should have some kind of reparation mechanism in place which can be national, regional or international.¹⁰⁴ According to the US Alien Tort Claims Act of 1789 a non-national can pursue an action for a tort violating the law of nations, and the tort need not be committed in the US,¹⁰⁵ but jurisdiction over the person of the offender is still essential.¹⁰⁶ This method has proved successful in cases where claims were brought against war criminals and dictators. However, the victim's right of redress is contingent upon his/her possession of assets in the US, or on the willingness of another state to execute the judgment.¹⁰⁷

Victims have limited standing in international law and the claim has to be brought by the state of nationality, or by a state with a genuine link to the victim.¹⁰⁸ The *Barcelona Traction* case confirmed that victims only have a standing for the violations of *erga omnes* obligations.¹⁰⁹

¹⁰⁰ Article 78 of the ICC Statute of 1998 states: "(1) A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. (2) The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund. (3) The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties."

¹⁰¹ The Declaration gives victims a right to restitution (principles 8 to 11) and compensation (principles 12 to 13).

¹⁰² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1994) Principle 12.

¹⁰³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1994) Principle 13.

¹⁰⁴ However, the most traditional methods of seeking redress are through national courts. Cf. Bassiouni (2003) 99.

¹⁰⁵ Bassiouni (2003) 100.

¹⁰⁶ Bassiouni (2003) 100.

¹⁰⁷ Bassiouni (2003) 100.

¹⁰⁸ Bassiouni (2003) 101.

¹⁰⁹ Bassiouni (2003) 101.

The *Corfu Channel case*¹¹⁰ entailed reparations occasioned by unlawful killings perpetrated by Albania by laying mines in peacetime without giving due notice to that effect. The court held that the Albanian authorities were liable for the harmful consequences of laying mines as indicated, and therefore ordered compensation to be paid to the UK for the loss of their nationals' lives.¹¹¹

It seems that under international law however states are reluctant to award punitive damages. In the *Velásques Rodríguez case*¹¹² the Inter-American Court of Human Rights did not award punitive damages against Honduras on grounds that international law made no provision for such damages. It noted further that the Statute of the Court merely referred to "fair compensation" and therefore concluded that damages in international law were only meant to be compensatory.¹¹³

6.4. The special issue of criminal responsibility incurred by states

State criminal responsibility emerged as a result of the imposition of Security Council sanctions, but since the consequences of imposing sanctions were harmful to innocent citizens who had no part in the conduct leading to the sanctions little progress has been made in exacting this kind of retribution.¹¹⁴ The collateral harm affecting innocent persons has thus been a deterrent to applying criminal sanctions to states.¹¹⁵

Besides provisions in law for individual criminal responsibility there is no convention in place to deal systematically with state criminal responsibility.¹¹⁶ Therefore, mechanisms to deal with state responsibility need to come from other sources, such

¹¹⁰ *Corfu Channel case* (1949). See chapter 3 footnote 173.

¹¹¹ *Corfu Channel case* (1949) at 23 where the court held: "The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom." It must be noted that this case deals with the responsibility of one state to another in international law, and not with the duty of a state to a national from another state.

¹¹² *Velásques Rodríguez case* (21 July 1989) ILR 233.

¹¹³ *Velásques Rodríguez* (1989) par 29 to 31.

¹¹⁴ Bassiouni (2003) 108. Criminality refers to a liability of criminal nature. Cf. Bantekas *et al* (2003) 12.

¹¹⁵ Bassiouni (2003) 86.

¹¹⁶ Bassiouni (2003) 86.

as international customary law which provides a good basis for state responsibility but not for state criminal responsibility.¹¹⁷

As can be seen from its gradual development international law is primarily concerned with states, to the extent that it can be described as essentially state-centred.¹¹⁸ However, most international offences are committed by individuals acting on behalf of or under the authority of the state (ie. the state's subjects),¹¹⁹ and since the perpetrators must of necessity be natural persons it follows that individuals are liable for criminal offences.¹²⁰

Criminal responsibility is the subject of two types of treaties in international law. The first places a duty on states to prosecute or extradite perpetrators of criminal acts, while the second classifies the criminal acts as offences in international law.¹²¹

Assigning criminal responsibility to a state is intended to serve as a means of compensating the victim and deterring future violations,¹²² but states are reluctant to assume responsibility and want to avoid economic consequences.¹²³ It is feared that penalties imposed on states in virtue of their criminal liability under international law may harm citizens of the penalised state who had no knowledge of the criminal act at issue and therefore had no role in the conduct leading to the consequences of the relevant legal action.¹²⁴

Therefore, an important question awaiting ICL's attention is when these limits can be demarcated beyond a group or organisation that has been found guilty of criminal conduct to rather be demarcated to the state as a whole.¹²⁵ This question is particularly significant in light of the consideration that citizens who had nothing to do with, or at least expressed disapproval of, the conduct leading to a guilty verdict

¹¹⁷ Bassiouni (2003) 86.

¹¹⁸ Bassiouni (2003) 90.

¹¹⁹ Bantekas *et al* (2003) 12.

¹²⁰ Bantekas *et al* (2003) 12.

¹²¹ Bantekas *et al* (2003) 5.

¹²² Bassiouni (2003) 86.

¹²³ Bassiouni (2003) 104.

¹²⁴ Bassiouni (2003) 62-63.

¹²⁵ Bassiouni (2003) 85.

would be harmed, depending on where the line demarcating representivity is drawn.¹²⁶

Notably, however, the award of damages is not dependent on a verdict of state liability for criminal conduct.¹²⁷ The law of state responsibility already provides for compensatory and punitive damages, and the likelihood that a suit hinging on civil liability will succeed is significantly greater than that attending a verdict of criminal responsibility.¹²⁸

The 1996 International Law Commission's Draft Articles on State Responsibility made states liable for criminal acts.¹²⁹ It stated that:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

The article was abandoned, however, in consequence of the weight of numerous arguments against state criminal responsibility.¹³⁰ This concept was not entertained

¹²⁶ Bassiouni (2003) 85.

¹²⁷ Bassiouni (2003) 86.

¹²⁸ Bassiouni (2003) 86.

¹²⁹ Broomhall (2003) 14, Bassiouni (2003) 61.

in the Rome Statute of the ICC.¹³¹ All references to “crimes” were also dropped, and instead reference was made to “serious breaches of obligations under peremptory norms of general international law”.¹³² It was replaced in the final ILC document of 2001,¹³³ which stipulates that states perpetrating wrongful acts can be subjected to sanctions and ordered to pay compensatory damages.¹³⁴

The article above also distinguished between international crimes and international delicts. Anything below the threshold provided in article 19(2) would be considered an international delict.¹³⁵ However, in its final draft of 2001 article 19 was abandoned together with all references to “crime”,¹³⁶ as well as the distinction between crime and delict - consequently the state’s wrongful acts are now relegated to a single category.¹³⁷

Crimes falling under international delicts include threatened or actual use of force against internationally protected persons, and taking civilian hostages.¹³⁸

As noted earlier, criminal responsibility emanates from the individuals who perpetrate crimes while acting on behalf of the state or under its authority.¹³⁹ In a dictatorship determining individual criminal responsibility would be simple because in that dispensation the dictator would be responsible for all decisions.¹⁴⁰ Not so, however, in a democratic state where various officials and cabinet members act on behalf of the state.¹⁴¹

States arguing against state criminal responsibility unfortunately overlooked the fact that since the repeal of article 19 there has been no provision to cover, recognise and deal with international crimes committed under the aegis of, or with the aid of

¹³⁰ Bassiouni (2003) 87.

¹³¹ Bassiouni (2003) 90.

¹³² Broomhall (2003) 15.

¹³³ Draft Articles on the Responsibility of states for International Wrongful Acts of 2001.

¹³⁴ Bassiouni (2003) 61.

¹³⁵ Bantekas *et al* (2003) 12.

¹³⁶ Bantekas *et al* (2003) 13.

¹³⁷ Bantekas *et al* (2003) 13.

¹³⁸ Bassiouni (2003) 123.

¹³⁹ Bassiouni (2003) 62.

¹⁴⁰ Bassiouni (2003) 85.

¹⁴¹ Bassiouni (2003) 85.

resources belonging to the state.¹⁴² Defining conduct as an international crime renders states responsible for wrongful conduct and imposes limits and duties on them.¹⁴³

State responsibility is currently confined to responsibility for international wrongful acts, and the state can commit a breach through an act or an omission¹⁴⁴ in terms of international standards. International law is therefore consulted to determine whether an act emanating from the state should be considered lawful or not.¹⁴⁵ States are not responsible to other states for the international wrongful acts committed by their citizens unless such acts were committed wilfully and maliciously or with culpable negligence.¹⁴⁶

Injured states have the right to lodge a claim for compensation in an international tribunal if another state inflicted harm on any one (or more) of its citizens, in which case the injured state will act on behalf of its subject(s).¹⁴⁷

Articles 25 to 30 of the ICC Statute deal with the elements of individual criminal responsibility, while articles 31 to 33 deal with the conditions for exemption from such responsibility.¹⁴⁸ Article 25 provides that individual criminal responsibility will vest for any act that constitutes a crime under the ICC's jurisdiction, regardless of whether the perpetrator acted alone or in concert with others, and regardless, too, of whether he/she ordered or facilitated the criminal act concerned.¹⁴⁹ The accused in the matter may also be found guilty if it transpires that he/she contributed to the crime as a member of a group with a common purpose; on condition that the intentionality on which the charge hinges is proved in court.¹⁵⁰

¹⁴² Bassiouni (2003) 61.

¹⁴³ Bassiouni (2003) 121.

¹⁴⁴ Shearer (1994) 264.

¹⁴⁵ Shearer (1994) 264.

¹⁴⁶ Shearer (1994) 282.

¹⁴⁷ Shearer (1994) 284.

¹⁴⁸ Bassiouni (2003) 513.

¹⁴⁹ Bassiouni (2003) 513.

¹⁵⁰ Article 25(d) of the ICC Statute. Cf. Bassiouni (2003) 513.

Failing the mental element, neither official capacity,¹⁵¹ nor a statute of limitations,¹⁵² nor a mistake of fact or law can be advanced as grounds for exemption from the charge of individual criminal responsibility.¹⁵³ This last condition cannot be claimed by the US because the perpetrators knew they were committing a wrongful act, thus ruling out the possibility of an error in law, and besides, if they really were unaware of the criminal significance attaching to their actions, why did they assiduously endeavour to conceal the facts of the matter and seek repeatedly to redirect international law? Exemption in this instance can only hinge on mental deficiency.¹⁵⁴

Exemption from individual criminal responsibility is possible if the individual charged with the relevant offence suffers from a mental disability or some other incapacitating condition that diminishes his/her accountability, or if he/she can be shown to have acted in self-defence or under duress.¹⁵⁵

The initiative must come from the state if a crime attributed to it is to be condoned. The difference between state criminal responsibility and individual criminal responsibility is the seriousness or gravity of the act concerned in light of the scale on which it is perpetrated in execution of a state policy or of course of action undertaken by bureaucratic state institutions.¹⁵⁶

International law does not pronounce unequivocally on the consequences of state criminal responsibility as opposed to those attending a wrongful act committed by a state.¹⁵⁷

¹⁵¹ Article 27(1) and (2) of the ICC Statute: "(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

¹⁵² Article 29 of the ICC Statute.

¹⁵³ Article 32(1) and (2) of the ICC Statute. Cf. Bassiouni (2003) 514.

¹⁵⁴ Bantekas *et al* (2003) 391.

¹⁵⁵ Bassiouni (2003) 514.

¹⁵⁶ Jørgensen N *The responsibility of states for international crimes* (2000) Oxford University Press at 112.

¹⁵⁷ Jørgensen (2000) 203.

6.5. US concerns regarding the Rome Statute of the International Criminal Court

The US raised concerns about the ICC vesting jurisdiction over their nationals and therefore signed, but did not ratify the Statute cementing their status as a non-state party to the Statute.¹⁵⁸ In token of its campaign against support for the ICC the US then signed a number of article 98(2) treaties with states to prohibit the transfer of US nationals to the jurisdiction of the ICC;¹⁵⁹ however in the eager pursuit of its aim the US did not consider that this particular article of the ICC Statute was meant to apply only to status of forces agreements.¹⁶⁰

The stratagem of signing treaties therefore militates against the object and purpose of the ICC and is in breach of its obligations to the ICC as a signatory to the Statute and of the state parties' obligations to cooperate with the ICC under article 86¹⁶¹ of the ICC Statute in investigating and prosecuting offenders.¹⁶² However, the states that entered into the agreements with the US argue that the contractual obligation thus incurred is not in conflict with their obligations to the ICC since specific provision is made for such contingencies in terms of article 98(2) of the ICC Statute, which determines that their treaty obligations are inviolate. This argument is fallacious as

¹⁵⁸ Bassiouni (2003) 533. The US position is that its foreign relations will be harmed if the state where the national is located at the time is a state party or consents to the jurisdiction of the court. Cf. Broomhall (2003) 166.

¹⁵⁹ The US imposed economic sanctions on nations that resisted its efforts to persuade them to enter into the treaties that they proposed. Cf. Paust (2013) 569. Article 98(2) of the ICC Statute: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Cf. Bassiouni (2003) 533. Some of these countries include Romania, Tajikistan and Israel. Cf. International criminal court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes (August 2002) *Amnesty International* IOR 40/025/2002 Amnesty International in which Amnesty International expressed grave concern over these agreements: "Amnesty International is deeply concerned by the current worldwide campaign by one state, the United States of America (USA), to persuade states to enter into impunity agreements which seek to prevent US nationals accused of genocide, crimes against humanity or war crimes from being surrendered to the International Criminal Court. These impunity agreements do not require the USA or the other state concerned to investigate and, if there is sufficient admissible evidence, to prosecute the US national accused by the International Criminal Court of such horrendous crimes. The organization is dismayed that two states parties, Romania and Tajikistan, have signed such an agreement with the USA. Both states parties will violate their obligations under Article 86 of the Rome Statute to arrest and surrender persons accused of such crimes to the International Criminal Court if their parliaments ratify these agreements."

¹⁶⁰ Bassiouni (2003) 535.

¹⁶¹ In terms of article 86 there is an obligation on state parties to co-operate with the ICC and not so for non-state parties unless they consent to it by way of *ad hoc* declaration. Cf. Bantekas *et al* (2003) 392.

¹⁶² Bantekas *et al* (2003) 378.

article 98 only applies to status of forces agreements.¹⁶³ Furthermore, in contracting with the US the states concerned are acting in bad faith in that such action is clearly in breach of their obligations under the ICC Statute to which they have a prior, indissoluble commitment.

The fact that the US signed the ICC Statute but did not ratify it does not, in conscience, relieve it of a duty not to frustrate the purpose of the treaty; consequently the obligations to which the US putatively committed by concluding treaties with acceding states are not domestically effective as enforceable law.¹⁶⁴

Despite the obvious limitations of the ICC Statute as regards the ambit of its jurisdiction the US insists that the ICC might engage in ‘unfounded charges’ against US officials.¹⁶⁵ The Bush administration argued that the ICC jurisdiction provisions leave the US officials “subject to an unaccountable judge” and “unchecked judicial power”;¹⁶⁶ furthermore it was held that the ICC might permit politicised prosecutions of US officials.¹⁶⁷ Paust however contends that the essential consideration fuelling US rejection of ICC jurisdiction is a desire for immunity from prosecution,¹⁶⁸ not only by the ICC, which is its immediate problem, but by all foreign courts.¹⁶⁹

The ICC can, however, vest jurisdiction if the state in whose territory the crime occurred is a state party. Afghanistan is a state party and can therefore defer to the ICC or any of the other 121 state parties on whose soil accused are located.¹⁷⁰ So US fear of prosecution as a reason for not ratifying is unfounded.¹⁷¹

In 2002 President George W. Bush signed the American Service Members Protection Act in terms of which US cooperation with the ICC is not allowed, restrictions are placed on US participation in peacekeeping operations, US military

¹⁶³ Bantekas *et al* (2003) 378-379.

¹⁶⁴ Engle (2013) 148.

¹⁶⁵ Paust (2013) 563.

¹⁶⁶ Paust (2013) 564. If a US official is found guilty of such crimes and he is in foreign country that country will have universal and territorial jurisdiction in any way and can prosecute and who's to say that will be as fair process as ICC. Cf. Paust (2013) 570.

¹⁶⁷ Paust (2013) 565.

¹⁶⁸ Paust (2013) 569.

¹⁶⁹ Paust (2013) 572.

¹⁷⁰ Paust (2013) 572-573

¹⁷¹ Paust (2013) 572-573.

assistance to parties to the ICC is prohibited, and authority is granted to free any US citizen detained or imprisoned in virtue of a determination made by the ICC.¹⁷²

The US also took a position against the principle that non-state parties can make a declaration giving the ICC jurisdiction, arguing that treaties are only meant to be binding on contracting parties.¹⁷³ Even if the court exercises jurisdiction over the non-state party its jurisdiction will only extend to the individual and not to the non-state party, and it will not be obligated to comply with the ICC.¹⁷⁴ But even this argument was rejected by the US.¹⁷⁵

The success of the ICC depends on the states' support because it will have no policing powers and will have limited resources at its command for investigations and prosecutions, therefore the states have a duty to cooperate with the ICC.¹⁷⁶ Inadequate US support for the ICC Statute inhibited enhancement and fulfilment of its purpose.¹⁷⁷ The cooperation of the states is necessary for financial reasons (reduction of the burden on underdeveloped states) as well as political reasons.¹⁷⁸

In a further attempt to appease the US regarding the application of the ICC Statute the Security Council signed resolution 1244 of 2 July 2002 in which it provides that troops stationed in US peacekeeping missions would be exempt from prosecution for a period of twelve months. This attempt at cementing ties was occasioned by the US threat to pull troops out of Bosnia-Herzegovina to avoid the risk that said troops might be prosecuted by the ICC under article 12(2).¹⁷⁹

The concern of the US that its nationals could be prosecuted by the ICC for war crimes against humanity is mistaken or at least out of proportion because such prosecution can only take place if there is a reasonable basis to believe that US

¹⁷² Bassiouni (2003) 534.

¹⁷³ Bantekas *et al* (2003) 378.

¹⁷⁴ Broomhall (2003) 81.

¹⁷⁵ Broomhall (2003) 81.

¹⁷⁶ Broomhall (2003) 151, 155.

¹⁷⁷ Broomhall (2003) 163.

¹⁷⁸ Broomhall (2003) 163.

¹⁷⁹ Bantekas *et al* (2003) 379.

nationals committed the wrongful actions at issue.¹⁸⁰ But this also did not appease the US.

The US played a huge part in advocating and setting up the ICC, which is why over 100 countries signed the Statute. However, the US has still not ratified the treaty,¹⁸¹ but its excuses for its seemingly interminable delay tactics have in fact lost all substance.¹⁸²

6.6. International crimes in terms of the ICC Statute

International crime is characterised by “those criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind, or is contrary to fundamental humanitarian values, or is the product of state-action or state-favouring policy”.¹⁸³

Establishing international crimes is a direct product of state consensus,¹⁸⁴ which is why not only international tribunals, but national courts are equally competent to prosecute international crimes, in which case they become international tribunals for the purpose of such prosecution.¹⁸⁵

6.6.1. *Jus cogens* norms and *erga omnes* obligations

Genocide, crimes against humanity, war crimes and military or armed aggression are the most heinous international crimes in view of their potential impact on humanity.¹⁸⁶ These international crimes are *jus cogens*¹⁸⁷ norms and are therefore non-derogable. Bassiouni states that *jus cogens* implications are those of duty and not of optional rights, otherwise they would not constitute pre-emptory norms in international law.¹⁸⁸ *Jus cogens* norms impose obligations *erga omnes* on states to

¹⁸⁰ Broomhall (2003) 164.

¹⁸¹ Engle (2013) 148.

¹⁸² Engle (2013) 148.

¹⁸³ Seen in this light the defining characteristics of international crime are that it tends to disrupt peace and security, erodes humanitarian values, and results from a state-action or state-favouring policy. Cf. Bassiouni (2003) 121-122.

¹⁸⁴ Bantekas *et al* (2003) 5.

¹⁸⁵ Bantekas *et al* (2003) 9.

¹⁸⁶ Bassiouni (2003) 137.

¹⁸⁷ Bassiouni (2003) 173.

¹⁸⁸ Bassiouni (2003) 168.

grant impunity to perpetrators of such crimes.¹⁸⁹ *Jus cogens* can be translated directly (ie. transliterated) as “compelling law” and is therefore uppermost in the hierarchy of norms and principles, hence it is pre-emptory and non-derogable.¹⁹⁰ *Erga omnes* can be translated directly as “flowing to all”, therefore obligations deriving from *jus cogens* are *erga omnes*. Logic supports that compelling law of necessity engenders an obligation flowing to all.¹⁹¹

6.6.2. Categories of international crimes in terms of the ICC Statute

The ICC Statute grants jurisdiction over four core crimes to the ICC: Genocide, crimes against humanity, war crimes and aggression.

(a) War crimes

War crimes are serious violations in terms of article 8(2)(b) of the ICC Statute and any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.¹⁹²

In international law the gravity of war crimes outranks all others in terms of potential harm to civilians, POWs, the war-wounded and the shipwrecked. It necessarily excites universal humanitarian concern.¹⁹³ War crimes also have the most efficient

¹⁸⁹ Bassiouni (2003) 169.

¹⁹⁰ Bassiouni (2003) 171.

¹⁹¹ Bassiouni (2003) 176.

¹⁹² Article 8(2)(a)(i)-(viii).

¹⁹³ Bassiouni (2003) 124-125.

and reliable record of prosecution and punishment.¹⁹⁴ Moreover, war crimes have the largest number of specifications of all international crimes and violations require prosecution and punishment and it has penal obligations.¹⁹⁵

(b) Genocide

Genocide and crimes against humanity are crimes of conduct and can be committed both during war time and during peace.¹⁹⁶ One convention on genocide exists, namely the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948). Other relevant instruments are the statutes of the ICTY and ICTR.¹⁹⁷ The genocide convention has never been supplemented or amended although it has clear weaknesses that require urgent attention. For instance, protected groups do not include social or political groups, and the nationality of the protected group is not to be understood as the totality of the group in a universal sense but rather in a relative contextual sense, and the specific-intent requirement is too stringent for certain categories of offenders.¹⁹⁸

Genocide is the denial of the right to exist to an entire human group, it shocks the conscience of mankind and violates, and is contrary, to moral law.¹⁹⁹ In terms of the ICC Statute it means the commission of any of the following acts with the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting conditions of life on the group that are calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.²⁰⁰

¹⁹⁴ Bassiouni (2003) 141.

¹⁹⁵ Bassiouni (2003) 141.

¹⁹⁶ Bassiouni (2003) 127.

¹⁹⁷ Other instruments referring to genocide include the ICC Statute and the UN Draft Code of Crimes against the Peace and Security of Mankind of 1996. Cf. Bassiouni (2003) 138.

¹⁹⁸ Bassiouni (2003) 138-139.

¹⁹⁹ Jørgensen (2000) 119.

²⁰⁰ Article 6 of the ICC Statute.

(c) Aggression

Article 5 of the ICC Statute places aggression under the jurisdiction of the ICC, but until recently there was no consensus on the definition. During the 2010 Kampala Review however, a definition was agreed upon and the necessary amendments to the ICC Statute were adopted.²⁰¹

(d) Crimes against humanity

Crimes against humanity are “cruelty directed against human existence, the degradation of human dignity and the destruction of human culture.”²⁰² According to the ICC Statute these crimes include the following acts as part of a widespread or systematic attack directed against a civilian population who are aware of the attack:

- (i) Murder;
- (ii) Extermination;
- (iii) Enslavement;
- (iv) Deportation or forcible transfer of population;
- (v) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (vi) Torture;
- (vii) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
- (viii) Collective persecution of an identifiable group on political, racial, national, ethnic, cultural, religious and gender grounds as defined in paragraph 3, or on other grounds that are universally recognised as violations under international law., in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (ix) Enforced disappearance of persons;
- (x) The crime of apartheid;
- (xi) Other inhumane acts of a similar character that are intended to inflict great suffering or serious injury in the form of mental or bodily harm.

²⁰¹ Kampala Review (2010) Annex 1. Article 8 of the ICC Statute was amended to include the definition of the crime of aggression. Article 5(2) was deleted and article 15 amended to grant the court jurisdiction over this crime.

²⁰² Jørgensen (2000) 119.

A defining criterion of crimes against humanity is that they must be perpetrated as specific crimes in virtue of state policy or a policy of a non-state actor, and the crime must be widespread and systematic.²⁰³ Such crimes may also take the form of either an omission or failure to act, or of direct participation in the conduct, but in both instances the conduct must be public knowledge.²⁰⁴ Crimes against humanity can be committed either by state entities and their agents, or by non-state entities.²⁰⁵

A *nexus* to an armed conflict is not required for conduct to qualify as a crime against humanity under the ICC Statute.²⁰⁶ Crimes against humanity create a duty to prosecute that rests not only on the state in question but on the international community at large.²⁰⁷

The meaning attributed to the concept of a crime against humanity as reflected in the ICTY and ICTR is slightly different from that attached to the concept in the ICC Statute in that in the latter the qualification is added that not every inhumane act should be considered a crime against humanity.²⁰⁸ Another difference is that ICTY and ICTR, the word “attack” is further defined and broken down in article 7(2) (a).²⁰⁹ The mental element is essential in deciding what the term “attack” means.²¹⁰

Article 7(2) (I) of the ICC Statute also makes enforced disappearance a crime against humanity and reads:

Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

²⁰³ Refer to paragraph 6.9 of this thesis and chapter 7, page 214 for a discussion on extraordinary rendition as a crime against humanity, especially regarding the “widespread and systematic”-requirement. Cf. Article 7(1) and (2) of the ICC Statute. Cf. Bassiouni (2003) 511.

²⁰⁴ Bassiouni (2003) 511.

²⁰⁵ Bantekas *et al* (2003) 385.

²⁰⁶ Broomhall (2003) 49.

²⁰⁷ Broomhall (2003) 56.

²⁰⁸ Bantekas *et al* (2003) 378.

²⁰⁹ “‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack ...” (Own emphasis).

²¹⁰ Bantekas *et al* (2003) 384.

6.7. Alternative international tribunals

6.7.1. Inter-American Court of Human Rights

The US is a member state of the Inter-American Commission of Human Rights and the subsequent American Convention on Human Rights (*Pact of San Jose*).²¹¹ The purpose of this convention is to protect the right to life,²¹² the right to humane treatment,²¹³ the right to personal liberty, and the right to a fair trial²¹⁴, amongst others. The text of the convention also states that every person has the right to be compensated for a miscarriage of justice.²¹⁵ Only state parties and the commission, which can act on behalf of an individual, will have the right to submit a case to the court.²¹⁶

In the Inter-American system the victim should initiate his/her complaint procedure and petition for damages by laying the matter before the Inter-American Commission on Human Rights which will investigate the claim and attempt to facilitate settlement with the offender. The jurisdiction of the court extends to no more than member states, interpreting treaties,²¹⁷ handing down rulings regarding the violation of human rights, interpreting function, and determining a fair amount of compensation for the wrong done.²¹⁸

It should be evident from the above that the court can go no further than adjudicate matters that relate to the *Pact of San Jose*. The court's jurisdiction is also expressly limited to member states, in token whereof it has no power to criminally convict an individual acting on behalf of the state and then sentence him/her accordingly.

Furthermore, only states in the Americas are party to the *San Jose* convention, and from the information available²¹⁹ it would seem that none of these states have come to harm in consequence of extraordinary rendition, nor have they supported the US

²¹¹ American Convention on Human Rights, referred to as "Pact of San Jose, Costa Rica" of 1969.

²¹² Article 4 of the Pact of San Jose.

²¹³ Article 5 of the Pact of San Jose.

²¹⁴ Article 8 of the Pact of San Jose.

²¹⁵ Article 10 of the Pact of San Jose.

²¹⁶ Article 61 of the Pact of San Jose.

²¹⁷ Article 64(1) of the Pact of San Jose.

²¹⁸ Article 63 of the Pact of San Jose.

²¹⁹ See in general Singh (2013) in general.

in the execution of extraordinary rendition.²²⁰ These rather limited terms of reference could be attributable to the fact that the US is bound by the Pact of San Jose which expressly protects a number of fundamental rights violated by the extraordinary rendition programme. The court will have definite jurisdiction to hold the US responsible for these violations should a case be referred to it.

Therefore, in light of the above this international tribunal cannot be an alternative to the ICC in vesting criminal jurisdiction over those responsible for extraordinary rendition.

6.7.2. International Court of Justice

The permanent International Court of Justice (ICJ) is an organ of the United Nations, and all state parties to the UN are automatically parties to the Statute of the ICJ.²²¹ All state parties have a duty to comply with any decision made by the court in any case in which it is a party.²²² However, state parties may refer disputes to other international tribunals in accordance with signed treaties, extant or due to come into effect at a future date.²²³ The General Assembly, the Security Council, other organs of the UNB, and specialised agencies may also request advisory opinions from the ICJ.²²⁴

One of the most important elements of this court is that besides state parties, no natural persons may be parties to cases before the ICJ.²²⁵ Besides treaties and conventions in force the court's jurisdiction comprises all cases that the parties may refer to it, as well as all matters specially provided for in the UN Charter.²²⁶

²²⁰ Due to the secret nature of extraordinary renditions this cannot be said with absolute certainty, but from the evidence that is currently available it would seem that they did not form part of this conspiracy.

²²¹ Chapter XIV, article 93(1) of the UN Charter.

²²² Article 94(1) of the UN Charter.

²²³ Article 95 of the UN Charter.

²²⁴ Other organs and specialised organisations need authorisation from the General Assembly before requesting an advisory opinion. Article 96(1) and (2) of the UN Charter.

²²⁵ Article 34 of the Statute of the International Court of Justice of 1945.

²²⁶ Article 36(1) of the ICJ Statute.

Article 38(1) of the Statute of the ICJ provides for primary and secondary sources of international law,²²⁷ the former comprising international treaties and custom, as well as the general principles of law, while the latter comprise the writings of renowned publicists (ie. respected academic authorities?) and the decisions of international courts.²²⁸

If a state party declares to that effect the court will have jurisdiction over cases concerning the interpretation of a treaty, any question of international law, the existence of a fact that could breach international obligations, and the nature and extent of the reparation to be made in the event of a breach of international law.²²⁹

It seems from the above that the court's function is predominantly interpretive and that it effectively lacks the capacity to impose criminal responsibility on those involved in perpetrating extraordinary rendition.

The above courts were briefly discussed to merely consider alternative possibilities that may afford jurisdiction, if no jurisdiction under the ICC can be vested. However, as indicated from the discussions above, none of these alternative courts or tribunals have criminal jurisdiction and therefore it will not be a viable alternative to the ICC.

6.8. Foreign government responsibility for extraordinary rendition

The responsibilities of foreign states under international law with regard to extraordinary rendition include:

- (i) Taking care not to assist a process of extraordinary rendition knowingly or otherwise. Since assistance will be traceable by following the cause-effect linkage to the offence in question the association thus arising will result in acts that seem innocuous become punishable. For example: refuelling a plane is normally quite unremarkable, but the act, or rather those enabling or conniving at it, will attract criminal liability charges if it transpires that the state concerned knew or should have known in all conscience that the plane was carrying

²²⁷ Bantekas *et al* (2003) 2.

²²⁸ Bantekas *et al* (2003) 2.

²²⁹ Article 36(1) and (2) of the ICJ Statute.

extraordinary rendition victims and would have been unable to make it to its final destination if it did not refuel at the assisting state's airport.²³⁰

- (ii) To assert jurisdiction over instances of torture if the charge and its pursuit is pursuable within the legitimate area of the court's jurisdiction.²³¹
- (iii) To take into custody, investigate and then extradite or prosecute a person who is alleged to have committed acts of torture or was complicit in or participated in such acts.²³²

As many as 54 governments²³³ have been involved in extraordinary rendition in various ways:

- a) Hosting CIA prisons within the bounds of their territory;
- b) Detaining, interrogating, torturing and abusing victims;
- c) Rendering assistance in dealing with the transport and capture of victims;
- d) Permitting the use of domestic airspace and airports for secret flights transporting victims of extraordinary rendition;
- e) Providing intelligence leading to the extraordinary rendition of victims;
- f) Interrogating individuals secretly held in the custody of other governments;
- g) Failure to protect individual persons from extraordinary rendition within the bounds of their territory; and
- h) Failure to conduct effective investigations critically aimed at the conduct of officials and agencies who have participated in extraordinary renditions.²³⁴

Human rights organisations have tried to create a diligent list of persons who have disappeared as a result of extraordinary rendition, but the numbers are a mystery.²³⁵

These numbers remain undocumented because victims are forced into silence by

²³⁰ Briefing: Torture by proxy: International law applicable to 'extraordinary renditions' (December 2005) *All Parliamentary Group on Extraordinary Rendition* at 13.

²³¹ Briefing: Torture by proxy: International law applicable to 'extraordinary renditions' (December 2005) 13.

²³² Briefing: Torture by proxy: International law applicable to 'extraordinary renditions' (December 2005) 13.

²³³ Foreign governments include: Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Iceland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, UK, Uzbekistan, Yemen and Zimbabwe. Cf. Singh (2013) 6.

²³⁴ Singh (2013) 6.

²³⁵ Hasbargen (2012) 81.

threats, brutality, torture, and fear for their own and their families' safety.²³⁶ Many have been silenced by death at the hands of their captors.²³⁷ Many refrain from legal action against the US for party-political reasons or because the national secrets defence might be invoked as a pretext to dismiss the case.²³⁸

Some countries believe that the CIA and top Bush-administration officials should have been brought to justice for their roles in extraordinary rendition.²³⁹ Sweden, for, example, conducted an investigation into extraordinary rendition and found that the European security services colluded with the US to execute extraordinary renditions and gave the US full discretion to act at will within the bounds of European territory despite total prohibition by the Council of Europe of the activities perpetrated there with the full knowledge of the said services.²⁴⁰

Shortly after the above Germany launched an investigation into extraordinary renditions and requested the extradition of thirteen CIA officials, but pressure from the US ended the inquiry.²⁴¹

As noted in Chapter 3 above, Italy convicted 21 CIA officials and imposed five-year sentences for the extraordinary rendition of Abu Omar. Charges against three others were dropped due to their diplomatic immunity. On being convicted these individuals fled the country and are fugitives from Italian law.²⁴² This is the only known example of a conviction of officials by a state for their involvement in extraordinary rendition. It should be noted too in this regard that Canada is the only country to issue a public apology to a victim of extraordinary rendition, namely Maher Arar.²⁴³

²³⁶ Hasbargen (2012) 82.

²³⁷ Hasbargen (2012) 82.

²³⁸ Hasbargen (2012) 82.

²³⁹ Bejesky (2013-2014) 253.

²⁴⁰ Bejesky (2013-2014) 256-257.

²⁴¹ Bejesky (2013-2014) 257.

²⁴² Fisher I Povoledo E "Italy seeks indictments of CIA operatives in Egyptian's abduction" (5 December 2006) *The New York Times* Rome available at http://www.nytimes.com/2006/12/06/world/europe/06italy.html?_r=0, Sabrina de Sousa who was one of the CIA operatives convicted *in absentia* stated the following: "Clearly we broke the law, and we're paying for the mistakes right now of whoever authorised and approved this...I was a representative of this government, and I should have been protected." Cf. Bejesky (2013-2014) 258.

²⁴³ Singh (2013) 6.

Australia, Canada and the UK have all settled claims with former Guantánamo Bay detainees rather than risk divulging state secrets of their own, or of the US.²⁴⁴ It should be borne in mind here that an element of coercion helped to persuade the UK authorities to join the US in settling claims. The coercive measure, emanating from the US, was its threat to reduce intelligence sharing with the UK if courts in that country were to ‘spill the beans’ by revealing US state secrets in any way.²⁴⁵

In *US v Khadr*²⁴⁶ a Canadian court refused to extradite a suspected terrorist to the US due to the treatment he suffered at the hands of the US in Pakistan. The court held the following:

In civilized democracies, the rule of law must prevail over intelligence objectives. In this case, the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable. Although Khadr may have possessed information of intelligence value, he is still entitled to the safeguards and benefit of the law, and not to arbitrary and illegal detention in a secret detention centre where he was subjected to physical abuse. The United States was the driving force behind Khadr's fourteen month detention in Pakistan, paying a \$500,000 bounty for his apprehension...The United States, contrary to Canada's wishes, pressured the ISI to delay Khadr's repatriation because of its dissatisfaction with Khadr being released without charge, even though there was no admissible evidence upon which to base charges at that time. In my view, given this gross misconduct, there cannot be a clearer case that warrants a stay.²⁴⁷

In 2012 the European Court of Human Rights handed down a landmark judgment concerning the extraordinary rendition of Khalid El-Masri.²⁴⁸ The court found that El-Masri established his version of events beyond reasonable doubt²⁴⁹ and further found the government of Macedonia guilty of several violations of the European Convention on Human Rights. The court held that the Macedonian government was responsible for his abduction and transfer to the CIA when there was good cause to

²⁴⁴ Australia and the UK in the context of confidential settlements. Cf. Singh (2013) 62, Roach K “Substitute justice? Challenges to American counterterrorism activities in non-American courts” 82 2013 *Mississippi Law Journal* 907 at 910.

²⁴⁵ Roach (2013) 910.

²⁴⁶ *US v Khadr* (2011) ONCA 358.

²⁴⁷ *Khadr* (2011) par 24.

²⁴⁸ *El-Masri v The Former Yugoslav Republic of Macedonia* (13 December 2012) ECHR Application no 39630/09.

²⁴⁹ *El-Masri case* (2012) par 167.

believe he would be tortured.²⁵⁰ The court also held that El-Masri's treatment at the Skopje hotel was a violation of article 30 of the ECHR. The treatment of El-Masri when he was handed over to the CIA was a violation of article 7. The treatment was imputable to Macedonia as it was carried out in the presence of its representatives who failed to prevent the action and was therefore held responsible in the matter.²⁵¹

This is an important ruling, because it is the first international ruling to the effect that extraordinary rendition amounts to torture.²⁵² The further fact that the court held Macedonia responsible for the ill treatment of El-Masri at the hands of the CIA has definite implications for other governments that connive at or aid and abet extraordinary rendition.²⁵³

The US plan to fight terrorism hinges on the tactic of evading US courts by dint of indefinite and indiscriminate detention of suspects.²⁵⁴ In *Lebron v Rumsfeld*²⁵⁵ the US Supreme Court denied a civil claim lodged by US citizen Jose Padilla in consequence of his detention and mistreatment by the US. The court held that the constitution delegate's authority of military affairs to congress and the President and that judicial review of military decision would therefore stray from "the traditional subjects of judicial competence."²⁵⁶

²⁵⁰ The court found that the applicant had been tortured and ill-treated and that the burden of responsibility would therefore have to be borne by the respondent state for having transferred him deliberately to the custody of the CIA despite substantial reasons to believe that he might be subjected to treatment contrary to Article 3 of the Convention. It also found that the applicant was detained arbitrarily, contrary to Article 5. The respondent State also failed to carry out an effective investigation as required under Articles 3 and 5 of the Convention. In addition, the Court found that the applicant's rights under Article 8 had been violated. Lastly, it found that responsibility devolved on the respondent state for having failed to provide an effective remedy within the meaning of Article 13 of the Convention for the applicant's grievances on grounds submitted in terms of Articles 3, 5 and 8, in consideration whereof the Court found that the applicant had suffered non-pecuniary damage that could not be made good on grounds of a violation alone.. Cf. *El-Masri* (2012) par 269.

²⁵¹ "The respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring." Cf. *El-Masri* (2012) par 211.

²⁵² Orpizewska (2014) 1167.

²⁵³ Orpizewska (2014) 1167.

²⁵⁴ The National Defence Authorisation Act of 2012 authorises indeterminate detention and military trials for non-citizens thought to be linked to Al Qaeda. Cf. Roach (2013) 917.

²⁵⁵ *Lebron v Rumsfeld* (2012) 670 F.3d 540 4th Ct.

²⁵⁶ *Lebron* (2012) at 548: "Special factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention. First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional

US courts also held that Khalid El-Masri's civil claim could not be entertained because doing so would jeopardise state secrecy.²⁵⁷ The national security defence evoked by the US effectively deprives foreign nationals of any recourse to counter extraordinary rendition.²⁵⁸ For example, the Bush administration declined Maher Arar's civil suit on grounds that US security would be undermined if that country's courts claimed jurisdiction over his case.²⁵⁹

Under common law state-secrecy privilege authorises governments to block evidence in proceedings, or even to persuade courts to dismiss proceedings if they are deemed to be a threat to national security.²⁶⁰ Thus victims of extraordinary rendition face a tough battle to extricate themselves from the toils of US antiterrorism measures as they deal with personal jurisdiction, subject matter jurisdiction, venue, and impunity defences.²⁶¹

Binyam Mohammed, Abou Elkassim Britel and Ahmed Agiza tried a different angle and sued the American company Jeppesen Dataplan Inc. for its role in the disappearance of detainees, which consisted in providing air transport to assist the extraordinary rendition programme, grounds for the suit being that the company could hardly be unaware of the kind of passenger transport it was catering for.²⁶² However, the CIA director at the time intervened and again, the case was dismissed in virtue of state-secrecy privilege.²⁶³

The purpose of perpetrating extraordinary rendition under an impenetrable veil of secrecy outside the US would be defeated without aid from foreign governments²⁶⁴, which therefore need to be held accountable in international tribunals. Evidence to that end is not available, however, because of the secrecy surrounding activities in this regard. The US has consistently declined disclosure of the location of secret

assignments of responsibility to the coordinate branches of our government. Together, the grant of affirmative powers to Congress and the Executive in the first two Articles of our founding document suggest some measure of caution on the part of the Third Branch."

²⁵⁷ Bejesky (2013-2014) 247.

²⁵⁸ Bejesky (2013-2014) 247.

²⁵⁹ Bejesky (2013-2014) 247-248.

²⁶⁰ Bejesky (2013-2014) 248-249.

²⁶¹ Hasbargen (2012) 82.

²⁶² Bejesky (2013-2014) 250-251.

²⁶³ Bejesky (2013-2014) 250-251.

²⁶⁴ Singh (2013) 6.

detention facilities, and foreign governments are understandably reluctant to provide particulars of their involvement.²⁶⁵

It is worrying that the US concern to avoid foreign investigation and prosecution can dissuade foreign governments from conducting investigations into extraordinary renditions.²⁶⁶

The scope of this thesis does not allow a comprehensive account of foreign governments' involvement in extraordinary rendition, hence the account presented here will be confined to a select few.

Afghanistan

It has hosted at least three CIA prisons where detainees have been held, tortured and abused. Two of these prisons had acquired notoriety as the Dark Prison and the Salt Pit, respectively.²⁶⁷ Gul Rahman, a young Afghan detainee, froze to death after the CIA allegedly ordered officers to strip him naked and chain him to the concrete floor and leave him there.²⁶⁸ Afghanistan also provided airspace and airports for the transfer of detainees to and from Kabul.²⁶⁹ Bagram Air Base was the US main detention facility in Afghanistan where detainees were held in metal shipping containers deep inside the air base.²⁷⁰ Bagram detainees included Hussein Salem, Muhammed Almerfedi, Jamil el-Banna and Ramzi bin al-Shibh.²⁷¹

Detainees were forced to stand or kneel in stress positions for prolonged periods of time without food or water. In the Dark Prison they were chained to the walls and held without food and drinking water in total darkness with loud rap or heavy metal music playing.²⁷²

²⁶⁵ Singh (2013) 61.

²⁶⁶ Roach (2013) 911.

²⁶⁷ Salt Pit detainees include Khalid El-Masri and Laid Saidi. Cf. Singh (2013) 62.

²⁶⁸ Singh (2013) 63.

²⁶⁹ Singh (2013) 62.

²⁷⁰ Singh (2013) 62.

²⁷¹ Singh (2013) 62.

²⁷² Singh (2013) 62.

Albania

Permitted the use of their airspace and airports for the CIA to transfer Khalid El-Masri from Afghanistan to Albania. Albania did no official investigation into Afghan involvement despite having stamped El-Masri's passport.²⁷³

Australia

Implicated in the extraordinary rendition of Australian citizen Mamdouh Habib, who was allegedly interrogated by US officials after being captured in Pakistan. Australia therefore failed to prevent his mistreatment and extraordinary rendition to Egypt. It was also alleged that Habib's mistreatment was witnessed by Australian officials who did not intervene.²⁷⁴

Canada

Permitted the use of that country's airspace and airport and the intelligence that led to the capture of a Canadian citizen.²⁷⁵

Cyprus

Permitted the use of Canadian airspace and airports; and a 2007 European Parliament report expressed concern over the 57 stopovers made by CIA operated aircraft that were inbound from or outbound to countries associated with extraordinary rendition.²⁷⁶

Egypt

Permitted the use of that country's airspace and airports, and detained, interrogated and tortured detainees. Egypt has been described as the receiving depot for the greatest number of victims of extraordinary rendition. In 2001 the Egyptian Prime Minister admitted that the US had by then transferred 60-70 individuals there in the course of the GWOT.²⁷⁷

²⁷³ Singh (2013) 64.

²⁷⁴ Singh (2013) 66.

²⁷⁵ The Royal Canadian Mountain Police provided information that led to the capture of Maher Arar. Cf. Singh (2013) 70.

²⁷⁶ Singh (2013) 71.

²⁷⁷ Singh (2013) 74.

Germany

Participated in the interrogation of at least one victim and permitted the use of German airspace and airports. Admitted that a German citizen was being held in a US detention facility. According to a 2010 UN report a German official participated in the interrogation of Muhammed Zammar when he was held in Syria as a victim of extraordinary rendition.²⁷⁸

Hong Kong

Captured, detained, interrogated and transferred an individual who was subsequently transferred to Egypt as a victim of extraordinary rendition. Captured Sami al-Saadi in 2004 and held him and his family for two weeks, then assisted their transfer to Libya.²⁷⁹

Iran

Captured and transferred individuals and gave them up to extraordinary rendition. Transferred 15 individuals to Afghanistan of whom 10 were transferred to the US extraordinary rendition programme.²⁸⁰

Jordan

The CIA sent several individuals to Jordan where they were detained and tortured. Jordan also permitted the use of its airspace and airports. A 2010 UN report states that they held at least 15 detainees.²⁸¹

Saudi Arabia

Detained victims before and after they were subjected to extraordinary rendition. They reportedly held Ali Abd al-Rahman al-Faqasi al-Ghamdi in 2003 before he was held in CIA custody and then disappeared.²⁸²

²⁷⁸ Singh (2013) 78.

²⁷⁹ Singh (2013) 81-82.

²⁸⁰ Singh (2013) 82-86.

²⁸¹ Singh (2013) 87.

²⁸² Singh (2013) 106.

6.9. Conclusion

As can be seen from the discussions above, the question of criminalising extraordinary rendition remains open as there has to be a specific person who commits the crime, whether under the authority, or on behalf of a state. If criminal responsibility is positively assigned, then, it would have to be assigned specifically to the individuals responsible for the various phases of extraordinary rendition. As explained in chapter 3 above, extraordinary rendition is not a single wrongful act but rather various interlinked phases of wrongful acts. The question is how to prosecute a crime with various phases that is committed over an extended period of time? How does this affect the *nexus* and how is the *actus reus* determined?

Furthermore, the veil of secrecy in which the proceedings of extraordinary rendition are wrapped, and the state-secrecy privilege that effectively protects the secrecy of such measures, defeats the object of attaching criminal responsibility to individuals.

Thus, if the identity of culprits is obscure there can be no foundation for a criminal case which, as explained, must hinge on the hard evidence of specific identities.

The next issue would be the jurisdiction of the ICC. The US is not a state party to the statute and is therefore not subject to its jurisdiction. Unless a state party to the ICC refers a case to the ICC with US individuals, for crimes committed within its territory, as the accused there can be no case. Given the political pressure exerted by the US on foreign states, and the illegal activities of extraordinary rendition perpetrated by the US, there seems little likelihood that any state will denounce the US to the ICC with a view to occasioning investigation and prosecution of that country.

Even if individual identities could be ascertained and the ICC could bring its jurisdiction to bear, there is still the matter of determining whether there is a reasonable basis to believe that the case can proceed. How will a reasonable basis be established without evidence? How will the illegal transfers, torture, detentions and other phases of extraordinary rendition be proved if the entire focus of the programme is secrecy? There will be no reasonable evidence from which to proceed.

If the matter is taken a step further to the point where a reasonable basis can be demonstrated, how far will the case go? In all probability the US will simply take refuge behind the state-secrecy privilege.

There is also the issue of the ICC being willing to vest jurisdiction. The US has exerted considerable pressure on parties who drafted the ICC Statute in order to advance its particular interest in the content of that document. In fact, political, financial and strategic threats to the international community have issued from US ranks in this regard. Will the ICC not be moved to consider all the support they would stand to lose in the international community if they were to incur the wrath of the US?

The last issue concerns the actual criminalisation of extraordinary rendition. If in a perfect world extraordinary rendition were criminalised and subject to ICC jurisdiction either as a new core crime, or as part of crimes against humanity, the matter would still remain unresolved because of the difficulty indicated above, namely assigning criminal responsibility to specific individuals. Defining extraordinary rendition is not the problem since a definition can easily be drafted. The problem rather is even if it is defined how will it possibly be criminalised, and even if it can be criminalised how will the crime be brought into being? A custom treaty can be drafted but that would only create certain key responsibilities and prosecution would still be necessary. On the other hand, it can also be proposed that a convention be drafted to define extraordinary rendition with the view to criminalise it, but taking into consideration the lengthy process of agreeing upon and implementing a definition for aggression this does not seem to be a valid option.²⁸³

Should an entirely new crime be created the issue would immediately be: how will it be prosecuted? It can also be placed under the existing crimes in terms of the ICC

²⁸³ Although the definition for aggression was agreed upon in 2010 it must be noted that this was a lengthy and complicated process. The crime of aggression was already included in the ICC statute as a core crime in 1998, even though there was no agreed upon definition at that time. It was only in 2010, that the crime was duly defined and the ICC statute amended accordingly to provide for the definition. Therefore, it took twelve years just to agree on a definition for a core crime. Furthermore, even though the definition has been agreed upon and the ICC statute amended, the amendments will only come in to operation once a certain number of state parties have ratified it. It is expected that this might only happen in 2017. Therefore, if it took this long just to agree upon a definition for a core crime, how long will it take to provide for a new crime in the ICC statute, agree on a definition, and have it come into force? Cf. footnote 201 and page 192 of this thesis.

Statute but even if it were considered how would it be proved that it is a crime against humanity or a war crime? It cannot be proven to be “widespread” and “systematic”, it takes place in various phases over an extended period of time. It also does not take place routinely but rather from time to time as various suspected terrorists are identified and captured. Furthermore, it cannot be included under “deportation or forcible transfer of a population”²⁸⁴ since extraordinary rendition is not deportation²⁸⁵ nor does it involve the transfer of an entire population. It only involves the transfer of specific targeted individuals.

The final option is to prosecute extraordinary rendition as various individual crimes (e.g. abduction, arbitrary detention, torture etc). However, to prosecute all these interlinking crimes separately would put undue strain on international tribunals and due process and there would still need to be sufficient evidence for each of these crimes. How will this be possible without an accused, lack of evidence, no crime scene and the state secret defence?

²⁸⁴ Article 7(1)(d) of the ICC Statute. Cf. *Prosecutor v Popović et al* (10 June 2010) ICTYIT-05-88-T par 887-962 for jurisprudence on “deportation and forcible transfer of population” as a crime against humanity.

²⁸⁵ Refer to the discussion in chapter 2.

CHAPTER 7

CONCLUDING REMARKS: CRIMINALISING THE INDEFINABLE?

“Experience hath shown, that even under the best forms of government those entrusted with power have, in time, and by slow operations, perverted it into tyranny.” *Thomas Jefferson*¹

Conceptualising this thesis proceeded from the somewhat idealistic notion of properly defining extraordinary rendition and explaining the process of criminalisation. After further investigation and contending with the subject matter I feel constrained to conclude that criminalisation in this instance would be an elusive target, given the considerations at issue, which can be summarised as the essential problem of conclusive definability. From the start it was clear that this is a complicated issue with various considerations to take into account.² However, even with this thought in mind it proved nearly impossible to fully account for the diverse issues created when trying to criminalise the indefinable.³

The research began with an investigation of the traditional and legal forms of expulsion and rendition under international law.⁴ There are codified legal processes in place to secure the expulsion or rendition of an individual. The various processes available, all with various requirements under international law, were discussed in chapter one and included: extradition, deportation, military rendition and a special referral to asylum. This set the background for the discussion on the illegality of extraordinary rendition.

To further demonstrate the hybrid nature of extraordinary rendition, comparisons with other forms of illegal expulsion were covered in chapter two, a discussion that was considered necessary given the ambiguous nature of extraordinary rendition, which precluded its being subsumed under existing illegal methods employed in this

¹ Thomas Jefferson was the third US President and one of the Founding Fathers who established the United States of America. As Founding Father he also signed the US Declaration of Independence of 1776.

² Cf. chapter 2 at paragraphs 2.1 and 2.2, and chapters three and four in general.

³ Cf. chapters 5 and 6 in general.

⁴ Cf. chapter 1 in general.

regard. Chapter two specifically dealt with disguised extradition and abduction which could most narrowly be compared to extraordinary rendition.

At this point it is important to consider that there is no official legal definition for extraordinary rendition in international law.⁵ In my opinion extraordinary rendition is best described as a three-phased illegal process with distinctive elements exemplifying each phase.

Phase one: The capture

- (a) Wilful apprehending of suspected terrorists through illegal means such as abduction.
- (b) Forcible detention and transportation under the induced influence of drugs,⁶ to facilities that are well-nigh untraceable at clandestine destinations.⁷
- (c) Torture administered as an interrogation technique.⁸
- (d) No transparency and no assurances required from the receiving state.⁹
- (e) The suspected terrorists are captured by state agents from various involved governments.¹⁰
- (f) No due legal process.¹¹

Phase 2: The detention

- (a) After transfer the suspects are detained indefinitely without trial.
- (b) Governments involved deny their involvement and any knowledge of detainees' condition.¹²

⁵ Cf. footnote 15 in chapter 2.

⁶ The word "suspected" is definitely apposite here, given the meagre shreds of evidence that would certainly not persuade a court to prosecute. Many suspects have such tenuous links to terrorism that legal processes could not provide grounds for arrest, let alone detention, which is why torture is used as an aid to interrogation.

⁷ Numerous articles refer to the existence of "black sites" which are secret facilities maintained for the purposes of torture, illegal detention and the like. The existence of these facilities and the disappearance of detainees from them has led to the detainees being dubbed "ghost prisoners." See Grey (2007); Sepper (2006) 1807; Sadat (2007) 1215; Weissbrodt *et al* (2006) 588; Sadat (2006) 315; Priest (2 November 2005) A01.

⁸ Extraordinary rendition is also referred to as "torture by proxy" because torture seems to go hand in hand with extraordinary rendition. See in general Satterthwaite *et al* (2004); Hasbargen (2012) 89-90.

⁹ Marty (2007) 22-23, 47.

¹⁰ Johnston (2007) 357-359; Singh (2013) 6.

¹¹ Wolf (2007) 917.

¹² These detainees are naked when they are placed in cells that are temperature controlled to produce temperature extremes from freezing to extreme humidity and heat. They are also likely to go through a "four month isolation regime" during which they will be denied contact with human beings and their cells will be under constant surveillance; see Johnston (2007) 358-362; Ross (2007) 562.

(c) No access to humanitarian aid groups or legal representation is allowed throughout and after such detention.¹³

Phase 3: Victim redress

Lack of justice for released victims as states that are sued take refuge behind the defence of state secrecy.¹⁴

In light of the above extraordinary rendition is clearly not conformable to a unitary concept of a clear-cut, indivisible illegal act; rather it comprises a concatenation of interlocking phases that individually and collectively contribute to the illegal nature of extraordinary rendition as a whole; that is to say, each phase is fraught with illegality in its own right and confirms and compounds the illegality of the whole.¹⁵ It cannot be reduced to a single act but is a process, comprising a multi-stranded, multi-phased fabric of illegality.

Keep the above in mind: Disguised extradition is based on the misuse of municipal laws in order to secure the deportation of a person to the country where he is accused of a crime.¹⁶ The final goal of disguised extradition is to ensure that the accused is brought by clandestine means to the country where he is charged with an offence and will duly stand trial.¹⁷

By contrast, the sole purpose of extraordinary rendition is to capture the individual and make him “disappear” in order to extract information from him.

¹³ Sepper (2006) 1807; Satterthwaite (2006-2007) 72.

¹⁴ A good example is the case of Khaled El-Masri. It was proved that the CIA participated in the abduction and transfer of El-Masri from Skopje to a secret detention facility in Kabul, Afghanistan. He was held for a period of four months before the CIA realised that the agency could not bring charges against him. He was subjected to solitary confinement for several weeks. He was eventually blindfolded and flown to Europe, where the captors drove around with him for several hours in order to confuse his sense of location. When the vehicle was stopped eventually he was told to exit the vehicle and walk down an unpaved road in the dark in mountainous terrain. He was also instructed not to look back. He feared for his life and thought he would be shot in the back, but the captors merely drove off and left him there. Three years after his ordeal his case was still being investigated extensively (cf. Marty (2007) 51). El-Masri's civil suit against the US was eventually rejected on grounds of state secrecy, with the result that he cannot hold anyone accountable for the ordeal he suffered (cf. Marty (2007) 54). The writer agrees with Rapporteur Marty's statement that persistently invoking state secrecy doctrine years after the event is unacceptable in a democratic society (implies an adversarial relationship between the state and its subjects). He also argues that state secrecy cannot be lawfully used as a mantle behind which to cover up criminal acts or acts of gross human rights violations (cf. Marty (2007) 55).

¹⁵ Cf. chapter 2 in general.

¹⁶ Refer to footnote 70 in chapter 2.

¹⁷ Cf. paragraph 2.3.1 in chapter 2.

Abduction on the other hand is the forcible seizure of an individual by officials from a state other than that where the individual finds himself, without the knowledge of the state from which he is being abducted.¹⁸

Since extraordinary rendition largely depends on connivance between the states concerned, it follows that the act cannot be classified as an abduction because the element of connivance implies that, at the very least, the state from which the individual has been abducted would be very likely to feign ignorance of the abduction in order to protect itself from public scrutiny.¹⁹ Even if the illegal detention does conform to the requirements relating to abduction,²⁰ however, or even if it were classifiable as unlawful seizure or informal rendition,²¹ it would still only be one of a series of illegalities occurring in the course of the different phases and elements of rendition. Therefore, the usefulness of dealing with one element in a series, particularly given the elements of illegality arising from that one element, seems contentious to say the least.

Extraordinary rendition cannot be boxed into any of the above illegal methods of expulsion. The illegalities and issues arising from extraordinary rendition have to be considered explicitly with a view to giving a definitive description of the phenomenon as an unbroken chain of illegalities proceeding from each other:

- (a) Disrespect for the rule of law.²²
- (b) Secret detention facilities and arbitrary detention.²³
- (c) Lack of accountability and transparency.²⁴
- (d) Infringement of state sovereignty.²⁵
- (e) Torture and other forms of cruel, inhuman and degrading treatment or punishment.²⁶

¹⁸ Loan (2005) 255, Dugard (2011) 233, Bassiouni (1996) 217.

¹⁹ Singh (2013) in general, where 54 governments are named as co-conspirators in extraordinary renditions although few have officially admitted their part in it.

²⁰ Refer to chapter 2 under paragraph 2.3.2.

²¹ Refer to the discussion concerning the difference between abduction, unlawful seizure and informal rendition under paragraph 2.3.2 in Chapter 2.

²² For a full discussion refer to paragraph 3.1 in chapter 3.

²³ For a full discussion refer to paragraph 3.2 in chapter 3.

²⁴ For a full discussion refer to paragraph 3.3 in chapter 3.

²⁵ For a full discussion refer to paragraph 3.4 in chapter 3.

Apart from these listed considerations there is the issue of applicable legal regimes. Which legal regime should be taken as definitive in formulating a description of and criminalising extraordinary rendition?²⁷ At this stage it is common cause that the actions and procedures constituting extraordinary rendition infringe various international laws and principles, but that the complex nature of the phenomenon and the various intricate legal arguments adduced by the US on the applicability of legal regimes cast a cloud of uncertainty over the issue and thus leave it unresolved. As discussed in chapter 4, there are arguments for and against the applicability of IHL, which in turn is undecided on its own account as to whether extraordinary rendition should be treated as an international violation committed within the context of a non-armed conflict, or whether it should be considered integral to an international armed conflict. Some believe that IHL is completely irrelevant in this matter since armed conflict is by no means a necessary adjunct to extraordinary rendition. However, certain core IHRL rules should nevertheless be observed.

The gist of the latest argument regarding legal regimes is that the GWOT is a new kind of war requiring new rules and conformity to new parameters of warfare, thus voiding at once whatever legal regimes were hitherto applicable.

In light of the above the million-dollar question is: Can it (i.e. extraordinary rendition) be criminalised? A series of vexing problems need to be addressed to deal effectively with this matter.

First of all, an act has to be duly defined to be criminalised, and as noted, extraordinary rendition cannot be duly defined because it entails a series of related actions that are linked in a chain of sequential causality eventuating over an extended period and that are individually and collectively illegal. The nature of the illegality perpetrated in this way itself constitutes a significant obstacle to formulating the required succinct definition from which the elements of the crime are clearly evident. Defining a crime as a series of phases makes it almost impossible to even start considering prosecution. Apart from these elemental issues the more pressing

²⁶ For a full discussion refer to paragraph 3.5 in chapter 3.

²⁷ Cf. chapter 4 in general.

issue is agreeing on a definition. Judging from the interminable wrangling over a definition of the crime of aggression, it seems likely that “the law’s delay” (will assert itself once more in an indefinite time lapse if the same exercise had to be repeated for a new crime. It took twelve years to agree on a definition for aggression, which was already a core crime initially agreed to by all state parties in 1998. Even though the definition has been included in the ICC statute, the amendments have yet to come into force subsequent to ratification of state parties. This begs the question: If it took this long to merely define a core crime, how complicated and lengthy would the process be to agree upon, define and enforce a totally new crime?

Second, presupposing that the obstacles of formulating a consensual definition were overcome, would the crime thus formulated and agreed upon be a new crime, or would it be categorised under one of the existing ICC crimes? If a new crime is declared the process of formulating and agreeing on a definition would be revived, in which case the prospects of performing the exercise successfully would seem rather limited. That leaves the option of subsuming it under one of the existing categories of international crimes within ICC jurisdiction: War crimes, crimes against humanity, genocide and aggression. There is no agreement on the definition for aggression, and extraordinary rendition does not fit into the definition of genocide, so these two are already eliminated. That leaves war crimes and crimes against humanity.

To be classified as a crime against humanity it would have to be “widespread” and “systematic”. The *Cambridge Advanced Learner’s Dictionary*²⁸ defines “widespread” as “existing or happening in many places and/or among many people”, and “systematic” as “using a fixed and organised plan”. While the incidence of extraordinary rendition is wide-ranging the numbers of those who fall prey to it are low. As noted in chapters three and four, victims can be captured from various countries and transported to various other countries, but the targeted individuals are always members of an elite group whose names appear on secret lists of suspected terrorists. Therefore, it cannot really be said to be widespread and systematic.²⁹

²⁸ *Cambridge Dictionary* (2004).

²⁹ Refer also to chapter 6, paragraph 6.9 for a further discussion on defining extraordinary rendition as a forcible transfer or deportation in terms of article 7(1)(d) of the ICC Statute.

However, even if we assume that it is so, under which of the acts listed in article 7(1) of the ICC Statute would extraordinary rendition be classified? It can hardly be a deportation or forcible transfer of population since not populations but individual persons are transported by extraordinary rendition. Enforced disappearance seems a possible candidate but the writer is reluctant to recommend such a classification which might serve as a convenient pretext to 'hide a multitude of sins' in the sense that it could be used to minimise the gravity of the cumulative effect of the series of illegalities perpetrated in the process. As stated in chapter 4, the complexity of the phased perpetration of illegalities involved in extraordinary rendition rules out the simplistic charge of mere "arrest, detention and abduction" involved in enforced disappearance. It is truly a mixed bag of elements woven together over a series of phases, each of which is with illegalities.

Extraordinary rendition would at best qualify as a war crime as defined in section 8 of the ICC Statute since some of the various illegalities specific to it are denoted in this section: torture, cruel and inhuman treatment, wilfully causing great suffering or serious injury to body or health, deprivation of a fair trial, unlawful confinement and transfer, and taking hostages.

Third, if it were a viable assumption that extraordinary rendition could be classified as a war crime under the ICC Statute, how would jurisdiction for its prosecution be vested? The ICC has no jurisdiction over the US because it is not a signatory to the Rome Statute. A state party may refer a matter to the ICC if it involves a crime committed by a US national on its territory; however, this is a remote to vestigial possibility due to political liaisons and various section 98 agreements signed between the US and various countries.

Fourth, if extraordinary rendition were properly defined as a war crime and the US became a signatory to the Rome Statute, how would the ICC prosecute the crime? Since it does not prosecute retrospectively there would be no prosecutions of acts occurring before the signing of the Rome Statute. Furthermore, there is no accused and no line of evidence due to the smokescreen behind which this crime is committed. How will it pass the gravity test of the ICC if there is no evidence to present?

Lastly, there is the multiphase and multi-stranded nature of the illegalities comprising extraordinary rendition. Would the various elements of criminality be prosecuted as separate crimes? Would this procedure unduly strain the legal process? Even so, how would the *nexus* and the *actus reus* be determined for a crime that consists of various crimes and that is committed over an extended period of time? There is no causal link, no crime scene, no evidence. And apart from everything else, yet another obstacle would be that the victim looking for redress would have to contend with the state secrecy defence.

In light of all the above and counting the many variables and uncertainties involved, it would clearly be a formidable task to seek and obtain legal redress for extraordinary rendition; in fact, with all the political, jurisdictional and applicability issues added it becomes well-nigh impossible.

So the question arises again: Can the indefinable be criminalised? In the final analysis an act can be defined even if it requires a lengthy explanation. However, arriving at a consensual definition could be fraught with difficulty, although it does remain in the realm of possibility. Most intractable, though, is the problem of criminalising the act, especially in the case of extraordinary rendition as indicated above and throughout this thesis. In fact, as noted in the preceding paragraph, criminalising extraordinary rendition to the extent that it becomes an offence that can be prosecuted successfully may prove well-nigh impossible, given the obstacles ranged against it. The US cannot be forced to sign the ICC Statute, states cannot be forced to deliver US nationals to the ICC, evidence cannot be fabricated, and political relationships cannot be upended - there is simply too much at stake for the culprits. Therefore, the possibility of criminalising this act lies solely in the hands of the guilty! A truly ironic game of cat and mouse!

Therefore, it is difficult to draw a road map to a possible solution since there is no foundation to use as a starting point. Just like a house cannot be built without first laying the foundations, extraordinary rendition cannot be criminalised without evidence and a viable definition.

It can be recommended that this issue be considered by dignitaries and scholarly experts from around the world but this will probably only lead to hosting of various discussion forums and colloquiums on the matter that will make no real and lasting impact. States need to take responsibility for the part they played and in some ways continue to play in this practice: they need to show active respect and support for the international legal system and the jurisdiction of the ICC. Signs that they are remiss in assuming such responsibility can be read in the natural questions awakened by their conduct, namely: If US nationals were guiltless, why would they step so warily around the issue of accepting ICC jurisdiction and entertaining trials brought by victims? If they have nothing to hide, why all the squawking and hedging, throwing up a dense barrier of counterarguments?

The above adjuration addressed to states is actually an exhortation, built on fairly idealistic sentiment, to the effect that the problem can and should be resolved satisfactorily. After all, no government can be forced to take responsibility, but as Eli Wiesel rightly states: “There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest.”³⁰

In token of Eli Wiesel’s exhortation this writer adds at least one more voice of protest, and furthermore, in concert with Eli Wiesel, takes up the cry: Human rights organisations across the world, lift your voices in protest! And victims of extraordinary rendition, do likewise! Note that even governments whose own nationals have been found guilty of extraordinary rendition have protested! The writer keenly adjures all concerned to follow the worthy example of Italy and Sweden in this regard, to which end note that academics, scholars and high office bearers can all make a significant contribution.

The harsh reality is that at the moment this is where the argument ends. This is where the vicious cycle comes full circle. Extraordinary rendition has been explained in this thesis, the elements provided and the arguments unpacked. Where do we go

³⁰ Eliezer Wiesel is a political activist, author, and professor. He was a prisoner in Auschwitz, Buna and Buchenwald concentration camps during WW II. This quote is from the Nobel Lecture he gave on 11 December 1986, his lecture was titled “Hope, Despair and Memory.”

from here? What is the next step? It seems around every turn and at the end of every argument there is a giant red “Stop” sign?

Therefore, in conclusion I echo the words of Martin Luther:

“Here I stand, I can do no other, so help me God.”³¹

³¹ Martin Luther (1483 – 1546) was a German key figure in the 16th century Protestant Reformation. These are the words spoken by Martin Luther when he was standing in front of the Emperor Charles V at the Diet of Worms in 1521 and was asked to renounce his views on the Catholic Church and its practices.

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