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Proving the Extraordinary

Issues of Evidence and Attribution in Cases of Extraordinary Rendition

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ABSTRACT

A number of cases before the UN Human Rights Committee, the UN Committee Against Torture, and the European Court of Human Rights have now confirmed that the practice of extraordinary rendition is in breach of international human rights law. The critical issues that remain following these cases are those of proving these extraordinary events, as a matter of fact of law. How can evidence be effectively adduced when the entire operation remains shrouded in secrecy? How can responsibility be effectively assigned amongst a network of sending, host and transit states? This paper will explore the issues of evidence and attribution that may arise in the process of litigating extraordinary rendition before these human rights tribunals.

Introduction

Khalid El-Masri, a German national, was stopped at the border whilst travelling to Former Yugoslav Republic of Macedonia (hereafter, 'Macedonia') on 31 December 2003. The guards had mistaken him for a man with an identical name who was a suspected Al-Qaeda operative. He was taken to Skopje and was detained incommunicado at a hotel where he was intensively interrogated by the authorities. After 20 days he was taken to Skopje airport, where he was stripped, shackled, blindfolded, drugged and beaten by hooded Central Intelligence Agency ('CIA') agents. El-Masri was flown under total sensory deprivation aboard a private chartered flight to Afghanistan. There, he was interrogated, beaten and kept in deplorable conditions at a secret CIA prison known as the 'Salt Pit.' He was never charged or given access to a lawyer. After 4 months El-Masri was flown to Albania, where he was released, in the woods, as an innocent man, with no explanation, and no redress in the law. It is now clear that El-Masri was a victim of the CIA programme of extraordinary rendition, a complex method of

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interrogating terror suspects in foreign jurisdictions. El-Masri's attempts to seek justice in domestic courts were repeatedly frustrated by jurisdictional issues or a lack of evidence. A criminal investigation in Macedonia found his claims were unfounded. A civil action in the United States was dismissed under the state secrets privilege.[1] A German prosecution faltered upon a failure to seek extradition of the CIA agents.[2] El-Masri's rights were eventually vindicated when the European Court of Human Rights ('ECtHR') found Macedonia responsible, largely on the basis of indirect evidence, for the conduct of its agents and the ill treatment he had suffered by the CIA in Macedonia and abroad.[3]

Cases invoking Swedish complicity in the extraordinary rendition programme have now been heard by the Human Rights Committee ('HRC') and the Committee Against Torture ('CAT').[4] Further cases against states that have hosted secret detention – Poland, Lithuania, and Romania – are pending before Strasbourg.[5] There is little doubt that extraordinary rendition is an anathema to the normative basis of human rights. The critical issues following these cases remain proving these extraordinary events occurred – as a matter of fact and law.

The central guiding question of this paper is thus: what are the essential difficulties, and most appropriate mechanisms for proving extraordinary rendition before human rights tribunals? Firstly, how can the facts giving rise to breach be proven convincingly? Do the rules of evidence and procedure amongst the tribunals differ and which is the most beneficial for the litigants? Do judicial approaches to evidence ease the evidential difficulties faced by litigants? Secondly, how can responsibility for extraordinary rendition be attributed to participatory states? Are the approaches focusing on the internal logic of the treaties consistent with the Articles of State Responsibility ('ARSIWA')?[6] Can a broader basis of liability be affirmed through the concept of aid and assistance?[7] This paper will examine the way in which human

[1] *El-Masri v U.S.*, 479 F.3rd 296 (4th Circuit, 2007).
[2] See 'Bundesregierung verhindert Auslieferungsantrag für CIA-Agenten, Der Spiegel Online, 22 September 2007 <http:// www. spiegel.de /spiegel/ vorab/a-507227.html> Accessed 4 June 2013.
[3] *El-Masri v the Former Yugoslav Republic of Macedonia*, App no. 39630/09 (ECtHR, 13 December 2012) ('*El-Masri*').
[4] *Alzery v Sweden* (2006) UN Doc CCPR/C/88/D/1416/2005 *('Alzery'); Agiza v Sweden* (2005) UN Doc CAT/C/34/D/233/2003 ('*Agiza*').
[5] *Abd Al Rahim Hussayn Muhammad Al Nashiri against Poland*, App no. 28761/11 lodged on 6 May 2011 (ECtHR, 4th Section) ('*Al-Nashiri against Poland*'); *Abd al Rahim Husseyn Al Nashiri against Romania*, App no. 33234/1 lodged on 1 June 2012 (ECtHR, 3rd Section); *Abu Zubaydah v Lithuania*, App no. 46454/11 lodged on 14 July 2011 (ECtHR); Interights, *Abu Zubaydah v the Republic of Poland*, Introductory Complaint, (11 February 2013) <http://www.interights. org/ document/256/index.html> Accessed 1 June 2013 ('Interights').
[6] Articles on the Responsibility of States for Intentionally Wrongful Acts, in Report of the International Law Commission to the General Assembly on Its Fifty-Third Session, 56 U.N. GAOR Supp. No. 10, at 1, 43, UN Doc. A/56/10 (2001) ('ARSIWA').
[7] ARSIWA Art. 16.

rights tribunals deal with issues of evidence and attribution in cases of extraordinary rendition in order to ascertain the most viable approach for holding participatory states responsible to the full extent of the law.

This paper will embrace conceptual, empirical, and normative approaches to legal research. The methodology will consist of an analysis of the primary materials of jurisprudence of the HRC, CAT, and the ECtHR, with a particular focus on the case examples that form the subject of the paper. These will be considered in light of the secondary materials of relevant literature and reports. For the sake of brevity, the focus will be afforded to the complicity of European states. The paper intends to address deficits in the literature: issues of evidence and attribution in this context are rarely explored, and deserve further elaboration in light of recent case law.

Chapter 1 will set the scene with a definitional exposition of the nature, policy, and legal problems of extraordinary rendition. Chapter II will discuss issues of evidence, commencing with a consideration of rules of procedure, including issues arising in the admission of evidence and mechanisms to secure the co-operation of the state (2.1.). This will be followed by an analysis of the rules of evidence, including techniques employed to lower the standard of proof and shift the burden to the state (2.2.). Chapter III will discuss issues of attribution for sending, transfer and host states. This will commence with a consideration of general principles of state responsibility (3.1.). This will be followed by an analysis of the position that has been or is likely to be adopted by the CAT (3.2,) HRC (3.3,) and the ECtHR (3.4,) in these cases. The chapter will conclude with an examination of complicity under the ARSIWA (3.5.)

Chapter I: What is so Extraordinary About Proving Rendition?

1.1. The Definition of Extraordinary Rendition

Extraordinary rendition is developing into a term of art in legal lexicon.[8] A useful working definition comprises of the following: 'the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.'[9] However, no universally shared conception has come to the fore. A number of critical semantic distinctions thus serve to demarcate the parameters of the undertaken inquiry. Firstly, extraordinary rendition is not deportation or extradition – the transfer of individuals between sovereign states within a relatively transparent legal regime.[10] Secondly, extraordinary rendition embodies elements of, but is distinct from kidnapping – the forcible abduction of an individual to be held without trial or consent.[11] Thirdly, extraordinary rendition is not 'rendition to justice' – the transfer of criminal suspect for prosecution, outside of extradition processes, but within a framework of judicial protection.[12] Rendition is conceived as a generic term that refers to processes for a state to take custody over a person on foreign territory, which may be lawful, unlawful, formal, or informal.[13] Indeed, what makes rendition extraordinary is the deliberate subversion of legal process through

[8] Some contend that the term is not defined under international law: K Parsad, 'Illegal Renditions and Improper Treatment: an Obligation to Provide Refugee Remedies Pursuant to the Convention Against Torture' (2008-2009) 37 DJILP 680, 682; See also M Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law' (2007) 75 GWLR 1333, 1335: 'any discussion of the phenomenon called "extraordinary rendition" may involve multiple implicit understandings of its content.'

[9] *Babar Ahmad and Others v the United Kingdom* App no. 24027/07, 11949/08 and 36742/08 (ECtHR, 6 July 2010) **[**113]; Note this definition has received support in some form of a number of scholars: see for example J van Aggelenm, 'The Consequences of Unlawful Pre-emption and the Legal Obligation to Protect the Human Rights Obligations of its Victims' (2009) 42 CWRJIL 21; S Egan, 'Extraordinary Rendition and the Quest for Accountability in Europe' (2012) (UCD Working Papers in Law No. 05/2012) 4 <http:// http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117365> accessed 1 May 2013, 4; M Satterthwhaite, 'The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism' (2010) Public Law and Legal Research Working Paper Series, 10/27, 5-8; < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157583> Accessed 1 June 2013.

[10] Egan (n 9) 2; See generally Satterthwhaite (n 9).

[11] See further C Bailliet, 'Towards Holistic Transnational Protection: an Overview of Public Law Approaches to Kidnapping' (2010) 38 DJILP 581.

[12] Note that courts have differed on the legality of 'ordinary rendition': see *Ker v Illinois* 119 US 436 (1886); *Öcalan v Turkey* (2005) 41 EHRR 985; See generally Egan (n 9) 2-3.

[13] An informal transfer is not pursuant to a treaty – thus it may be lawful, if otherwise 'prescribed by law' (or 'subjected to a legal process') See Satterthwaite (n 9) 9; M Hakimi, 'The Council of Europe Addresses the CIA Rendition and Detention Program' (2007) 101 AJIL 442, 446; See also *Prosecutor v Nikolic* (Judgment) ICTY-94-2 (June 5, 2003) [22] [29]; cited in Parsad (n 8) 682.

clandestine activities and state secrecy, and the raft of human rights violations that are ultimately suffered by the transferee.[14]

1.2. The Practice of Extraordinary Rendition by the United States

Extraordinary rendition has evolved from earlier forms of rendition over a number of decades. The 'rendition to justice' of criminal suspects to United States ('US') jurisdiction was eclipsed by the rendition of terrorism suspects to Egypt in the 1990s.[15] The phenomena increased exponentially during the 'War on Terror,' as the CIA was granted authorization to capture and detain Al-Qaeda suspects abroad.[16] A number of operatives were engaged in a 'special access program' to 'cross borders without visas (…) and interrogate terrorism suspects deemed too important for transfer to (…) Guantanamo.'[17] A general pattern has emerged in light of recent investigations. The suspects were apprehended with the participation of local authorities, and thereafter subjected to 'capture shock treatment' by CIA operatives.[18] The detainees are secretly transported through a series a 'rendition flights' to domestic prisons or 'black sites' – 'CIA prisons' operating in a number of states.[19] The detainees are then held in incommunicado detention and subjected to 'enhanced interrogation techniques.'[20] Some cases have involved 'torture by proxy,' that is, that conducted by the host state authorities.[21] A number of governmental[22] and non-governmental inquires have amassed

[14] Egan (n 9) 4.
[15] See generally A Clarke, 'Rendition to Torture: a Critical Legal History' (2009-2010) 62 RLR 1
[16] J Boys, 'What's so Extraordinary about Rendition? (2011) 15:4 IJHR 589, 594.
[17] Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions* (New York: ABCNY & NYU School of Law, 2004) 14 ('Torture by Proxy Report').
[18] On 'capture shock,' see 'Background Paper on CIA's Combined Use of Interrogation Techniques' <http://www.aclu.org/ files/torturefoia/released/082409/olcremand/2004olc97.pdf> (Accessed 1 June 2013).
[19] Note that there is a 'conceptual distinction between extraordinary rendition and secret detention, [but] there is little practical difference:' Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (Open Society Foundations, New York, 2013) 14-15.
[20] For a detailed analysis see The Constitution Project, *The Report of The Constitution Project's Task Force on Detainee Treatment* (The Constitution Project, Washington, 2013) 203-267.
[21] See 'Torture by Proxy Report' (n 17).
[22] There has been investigations by the national governments of France, Germany, Italy, Ireland, Portugal, Spain, Sweden, and the United Kingdom, but see especially: Council of Europe, Committee on Legal Affairs & Human Rights, 'Secret detentions and illegal transfers of detainees involving Council of Europe member States: 2nd Report, Doc. 11302 rev (11 June 2007); European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 'Report on the alleged use of European countries by the CIA for the transportation an illegal detention of prisoners' (2006/2200(INI)) (30 January 2007).

evidence implicating many European states in this practice. [23] A framework of liability thus unveils taxonomy of 'rendering,' 'host,' and 'transit' states.[24]

1.3. The Cases Under Examination

The following case examples of *Agiza, Alzery, Al-Nashiri* and *Abu-Zubaydah* will form the subjects of this paper. The fate of Khalid El-Masri has been mirrored to a great extent in these stories which inasmuch represent a microcosm of the nature of the programme.

1.3.1. Agiza and Alzery[25]

Agiza and Alzery were refused asylum applications by the Swedish Migration Board on 18 December 2001 on grounds of national security. On the same day they were transferred to Bromma Airport by Swedish Security Forces, where they were handed over foreign agents in hoods, stripped and redressed, handcuffed, blindfolded, and drugged per rectum. They were transferred via a private registered aircraft to Egypt and detained at Tora Prison. Sweden obtained diplomatic assurances from Egypt that the men would not be tortured whilst in custody. These proved unfounded. Both men were allegedly subjected to multiple electrical charges. A doctor rubbed ointment into their wounds to conceal any signs of ill treatment. Agiza was arbitrarily detained as a suspected terrorist and released in 2003 without charges. Alzery was convicted by a military tribunal for being a member of a banned terrorist organisation and sentenced to 25 years imprisonment. He was released in 2011. Both men now live in Sweden.

[23] See for example, Open Society Justice Initiative (n 19); The Constitution Project (n 20); Amnesty International, *Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention* (Amnesty International Publications, London, 2010).
[24] Egan (n 9) 4.
[25] These facts are derived from *Alzery* (n 4); *Agiza* (n 4); The Constitution Project (n 20) 165, 175.

1.3.2. Al-Nashiri and Abu-Zubaydah[26]

Al-Nashiri was captured in Dubai in 2002 as a suspect in the USS Cole bombing. He was taken to secret detention facilities in Afghanistan and Thailand. He was thereafter transferred to the secret detention centre in Poland, where he was allegedly subjected to mock executions with a drill and a handgun, standing stress positions, and threats of sexual assault against his mother. In 2003 he was transferred to the 'Bright Light' facility in Romania where he was allegedly subjected physical abuse and sleep deprivation. Abu Zubaydah was captured in Pakistan in March 2002 on suspicion of being a high-ranking Al-Qaeda suspect. He was rendered to Afghanistan and later transferred to secret detention facilities in Poland and Lithuania. Abu-Zubaydah was allegedly the 'guinea pig' of the 'enhanced interrogation techniques,' including sensory deprivation and a course of waterboarding 82 times in one month. In all cases of detention the Al-Nashiri and Abu-Zubaydah have been held incommunicado and in solitary confinement, with no knowledge their present whereabouts. Both men currently remain imprisoned at Guantanamo Bay as 'high value detainees.'

1.4. The Problem to be Addressed

1.4.1. The Exhaustion of Legal Remedies against the United States

It is apparent that seeking recourse against the United States is highly problematic. Agiza and El-Masri brought separate actions in the US that were dismissed after the government invoked the state secrets privilege.[27] Al-Nashiri and Abu-Zubaydah have yet been able to challenge the legality of their detention.[28] The US has thoroughly resisted extradition requests in other cases.[29] These victims of rendition must clearly seek to vindicate their rights through alternatives avenues of redress.[30]

[26] These facts were derived from the references cited at (n 5) and the Constitution Project (n 20) 181-185.
[27] *Mohamed et al v Jeppesen Dataplan Inc.*, No. 08-15693, D.C. No. 5:07 (9th Circuit, 2010).
[28] Al-Nashiri has filed a writ of habeas corpus which remains pending: see *Al-Nashiri et. al v Bush et al.* District Court of Columbia, Habeas Corpus (General) Office, Filed July 15, 2008.
[29] See the references cited at (n 2) in relation to *El-Masri's* case Cf. *Conflitto di attribuzione tra poteri dello Stato (processo Abu Omar esegreto di stato*), n. 106/2009, Gazz. Uff. 1 Serie Sp., Published on 8/04/2009 (decided 11/03/2009) (here, trials in absentia were permitted).
[30] Cf. *Bisher Al Rawi & others v UK* [2010] EWCA Civ 482 (here, the state secrets privilege was ruled out but the UK government allegedly conceded the case under pressure from the US) Clarke (n 15) 27.

1.4.2. The Breach of Human Rights

There is little doubt that extraordinary rendition involves a raft of human rights abuses. These include violations of the right to liberty, freedom from torture and inhuman and degrading treatment, and concomitant duties of non-refoulement and effective investigation and remedies.[31] This opinion is shared by inquiries undertaken by the Venice Commission of the Council of Europe,[32] the United Nations Human Rights Council,[33] and a number of scholars.[34] Indeed, this opinion has been validated as the CAT and the HRC found Sweden responsible for the mistreatment of Alzery and Agiza respectively.[35] The ECtHR found Macedonia responsible for the violations suffered by El-Masri.[36] Al-Nashiri and Abu-Zubaydah's cases are yet to be determined.[37]

1.4.3. The Problem of Evidence

The fundamental difficulty encountered by the victims is that the entire operation remains shrouded in secrecy.[38] The problem of adducing evidence in these cases arises from three interrelated factors.[39] Firstly, extraordinary rendition is a clandestine operation, and the US has redacted information and undertaken measures to conceal and eradicate any related

[31] Arising under the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('UNCAT'); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('ECHR').

[32] See for example Venice Commission, 'Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners' (17 March 2006) Opinion 363/2005, CDL-AD(2006)009 ('Venice Commission Report').

[33] UN Human Rights Council, 'Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinen; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfed Nowak; the Working Group on Arbitrary Detention represented by its vice-chair Shaheen Sadard, and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin,' (26 January 2010) UN Doc. A/HRC/13/42 ('UNHRC Report').

[34] See for example D Aronofsky and M Coper, 'The War on Terror and International Human Rights Law: Does Europe Get it Right?' (2008) 37 DJILP 567; D Weissbrodt and A Burgquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 HHJ 123; K Hawkins, 'The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition' (2005-2006) 20 GILJ. 213; D Weissbrodt and A Burgquist, 'Extraordinary Rendition and the Torture Convention' (2006) 46 VJIL 585.

[35] *Alzery* (n 4); *Agiza* (n 4).

[36] *El-Masri* (n 3).

[37] See the references cited at (n 5).

[38] It is apparent that the US has put extraordinary pressure on participatory states: see Clarke (n 15) 27, 64-65; See also L Fisher, 'Extraordinary Rendition and the Price of Secrecy' (2007-2008) 57 AULR 1405, 1430-1431.

[39] See the summation of these issues in Interights (n 5) at [23].

evidence. Secondly, the participatory states have denied involvement or failed to conduct effective investigations into their cases, which restricts access to information. Thirdly, significant barriers prevent the victims from communicating with legal representation. These issues must be considered in light of the interest of producing a decision based on sound reasoning and verifiable evidence.

1.4.4. The Problem of Attribution

If the facts can be proven to the requisite degree before the relevant tribunal, it will be necessary to establish that participatory states are responsible as a matter of law. There remains little doubt amongst scholars that the conduct of CIA operatives can be attributed to the United States.[40] More problematic is the question of attributing liability to 'host,' 'rendering,' and 'transit' states. Extraordinary rendition is a multi-faceted human rights violation that employs a raft of jurisdictional obfuscations: a network of illegal transfers and disappearances likened to a 'spider's web.'[41] How can this web be untangled in order to attribute wrongful acts to participatory states?

[40] See 'Torture by Proxy Report' (n 17) 96-100; J Button, 'Spirited Away into a Legal Black Hole: The Challenge of Invoking State Responsibility for Extraordinary Rendition' (2007) 19 FJIL 531, 544.
[41] Council of Europe, Committee on Legal Affairs & Human Rights, 'Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe member States,' Doc 10957 (12 June 2006) 9.

Chapter II: Evidence

This chapter will discuss the evidential problems of proving extraordinary rendition. It will commence with a thematic analysis of the rules of procedure of the HRC, CAT and ECtHR in order to identify the issues arising in the admission of evidence and mechanisms that seek to engage the co-operation of the state. It will thereafter undertake a comparative analysis of the techniques adopted for lowering the burden and standard of proof in order to ascertain the most beneficial approach for litigants.

2.1. Rules of Procedure

2.1.1. Initiating a Case in the HRC, CAT and ECtHR

The three human rights tribunals allow for individual complaints against a state party if the complainant has suffered a violation of one of the rights that is protected under the respective treaty.[42] The HRC may hear individual complaints if a state party has ratified the First Optional Protocol to the International Covenant of Civil and Political Rights ('ICCPR.')[43] The CAT may consider a complaint if a state party has made the declaration to accept jurisdiction that is required under the treaty.[44] Conversely, acceptance of the jurisdiction of the ECtHR is integral to a state's membership of Council of Europe.[45] Individual complaints will thus be permissible under the respective treaties if a state is party to that particular treaty and has accepted the competence of the tribunal to hear individual complaints.

2.1.2. Courts and Committees: Rules of Procedure and Approaches to the Facts

The rules of procedure of the tribunals are in some respects quite specific, but ultimately leave many important issues unsettled.[46] The ECtHR is a judicial body and its judgments are legally binding.[47] In contrast, the HRC has flexible procedure and its 'views' are non-binding.[48] The

[42] The term 'tribunal' will be employed for the sake of practicality, notwithstanding conceptual issues.
[43] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302 ('First Optional Protocol').
[44] UNCAT Art. 22.
[45] The Council of Europe member states includes all those under examination; ECHR Art. 34.
[46] J Fitzpatrick, 'Human rights fact-finding' in A Bayefsky (ed.) *The UN Human Rights Treaty System in the 21st Century* (The Hague, Klewer Law International, 2000) 65.
[47] See ECHR Arts. 44, 46(1).

CAT similarly stresses that it is not 'a quasi-judicial' but rather a 'a monitoring body' with 'declaratory powers only.'[49] The Committees have nevertheless adopted judicial methods in light of the seriousness of a finding of a violation.[50] The tribunals rely on the facts unveiled by advocates, public inquiries and domestic courts. However, lacunae of evidence may remain and the veracity of allegations must be tested. The CAT and the ECtHR were empowered to undertake fact-finding missions, although this practice has been curtailed by constraints on budget.[51] The tribunals thus must adopt a particular methodology in light of 'the availability of evidence, the consequences of an adverse finding, and the degree of co-operation of the [state].'[52]

2.1.3. Conduct of Hearing on the Merits

Each case has presented unique issues of presentation of evidence arising from the suppression of information, lack of access to legal counsel, and the failure of the defendant state to conduct an effective investigation into the applicant's claims. These may be countered by the willingness of the tribunal to relax procedural rules in favour of the applicant, but it remains necessary to ensure the co-operation of the state. Moreover, there is a legitimate interest in formulating a decision on the basis of verifiable evidence, as a sound decision is ultimately more likely to be accepted.

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[48] See HRC, 'General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights,' UN Doc CCPR/C/GC/33 (2008) [13-15].
[49] See CAT, 'General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications,)' UN Doc A/53/44 (1997) [9].
[50] F Viljoen, 'Fact Finding by United Nations Treaty Bodies' (2004) 8 MPYBUNL 65, 81.
[51] See UNCAT Art. 20; Rules of the European Court of Human Rights < http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> Annex, Accessed 1 June 2013; See generally A Dzemczczewski, 'Fact Finding as Part of Effective Implementation, the Strasbourg Experience' in A Bayefsky (ed.) *The UN Human Rights Treaty System in the 21st Century* (The Hague, Kluwer Law International, 2000) 155; E Evatt, 'Ensuring Effective Supervisory Procedures: the Need for Resources' in P Alston and J Crawford (ed.) *The Future of Human Rights Treaty Monitoring* (Cambridge, CUP, 2000) 461.
[52] Fitzpatrick (n 46) 65, 67.

2.1.3.A. *Written Statements*

The HRC examines a case in light of 'all written material' submitted by the parties.[53] The CAT essentially relies on written evidence only.[54] In contrast, the ECtHR may examine any form of evidence.[55] It is nevertheless apparent that these procedures allow for a wide variety of evidence to be admitted. This is significant as the type of evidence that has been admitted to prove the facts of extraordinary rendition in these cases has been essentially diffuse; including flight logs, scientific analysis, and reports from non-governmental organisations and public inquiries.[56] However, there is no requirement for the evidence to be sworn or otherwise validated. The basis of decision is thus essentially restricted to the party's untested submissions.[57]

2.1.3.B. *Oral Statements*

The HRC has thus far adopted closed meetings for individual communications, and the CAT has not made use of its ability to 'invite' parties to 'provide further clarifications.'[58] In contrast, the ECtHR can hear oral testimony from an 'expert, witness, or any other individual.'[59] It is thus apparent that the ECtHR adopts a more encompassing procedure, and there have been calls for the HRC and the CAT to introduce oral hearings.[60] Oral hearings may allow for the veracity of allegations to be substantiated by means of cross-examination. Uncorroborated material is often excluded in domestic proceedings if there is no opportunity to test its reliability.[61] However, certain factors suggest that oral testimony is not always necessary in these cases. The ex-minister's admission of El-Masri's treatment in his case indicates that crucial evidence from the state can be submitted through affidavits.[62] Furthermore, the victims have been generally unavailable to give evidence, and special considerations may have to be afforded if they are reluctant to recount the abuses they

[53] First Optional Protocol Art. 5(1); CAT, 'Rules of Procedure,' CAT/C/3/Rev.4 (2002) Rule 100(1); Y Tyagi, *The UN Human Rights Committee: Practice and Procedure* (CUP, Cambridge, 2011) 529.
[54] UNCAT Art. 22(4).
[55] Rules of the European Court of Human Rights (n 51) Rule 42.
[56] This particular pattern has arisen in *El-Masri* (n 3) *Abu-Zubaydah* and *Al-Nashiri's* cases (n 5).
[57] Viljoen (n 50) 84, 88.
[58] CAT, 'Rules of Procedure (n 58) Rule 111(4) (comprising a mutual invitation).
[59] Rules of the European Court of Human Rights (n 51) Rule 42.
[60] See for example Viljoen (n 50) 94; Tyagi (n 53) 536-537.
[61] R Patterden, 'Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by the United Nations Convention Against Torture' (2006) IJEP, 1, 38.
[62] See *El-Masri* (n 3) [74].

suffered.[63] Moreover, the tribunals generally restrict oral testimony in the interest of expedition.[64] Nevertheless, securing greater probative value would help to legitimate the decision.

2.1.3.C. *Closed proceedings and Confidential Information: Securing Co-operation of the State*

States may be unwilling to participate in extraordinary rendition litigation because they are unwilling to divulge evidence related to national security.[65] Procedures that allow for the submission of evidence in confidence – either through the suppression of documentation or a restriction on the parties that can access the information – may thus help to ensure the co-operation of the state. The CAT and the HRC conduct closed proceedings, although information prejudicial to the state may be released on publication of the decision. In contrast, the ECtHR conducts public hearings, but can make allowances to receive evidence submitted by the parties on a confidential basis at request or own its own motion.[66] In the *Abu-Zubaydah* and *Al-Nashiri* cases the Court has offered to receive information on a confidential basis, although it is apparent that these procedures have proven insufficient to secure the co-operation of the state.[67] Amnesty International has recently detailed the 'exceptional measures' that have been taken in *Al-Nashiri v Poland* that mimic the 'state secrecy' dilemma.[68] Poland requested for the proceedings to be held *ex-parte* before selected judges *of its choosing.* As this request apparently faltered, the Court lifted confidentiality measures and Poland expressed that it would 're-consider its co-operation with the Court.' An alternative approach could arise through 'closed material procedures,' where evidence is submitted in confidence of the applicant and litigants are represented by 'special advocates.'[69] The UK Court of Appeal has rejected the use of this procedure in civil cases as '[contrary to] a

[63] D Weissbrodt 'International Fact-Finding in Regard to Torture' (1988) 57 NJIL 151, 157-158.
[64] D Shelton, 'Human Rights: Individual Communications/Complaints' in *The Max Planck Encyclopaedia of Public International Law*, <http://www.mpepil.com.proxy.uba.uva.nl:2048/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e815&recno=110&subject=Human%20rights> accessed 1 May 2013 [46].
[65] This same concern has impeded the full prosecution of public inquiries into the extraordinary rendition programme: See Egan (n 9) 36.
[66] Rules of the European Court of Human Rights (n 51) Rule 33, 63 (Cf. Rule 22: secret deliberations)
[67] See the first question of each of the communicated cases cited at (n 5).
[68] Amnesty International, *Unlock The Truth: Poland's Involvement in CIA Secret Detention* (Amnesty International Limited, London, 12 June 2013) 28-29; in reference to *Al-Nashiri against Poland* (n 5).
[69] See T Synhaeve, 'Taking the War on Terror to the Court. A Legal Analysis on the Right to Reparation for Victims of Extraordinary Rendition' (2011) 5 VJICL 439, 473-474.

litigant's right to know the case against him,'[70] although the ECtHR has not excluded this possibility in its own proceedings.'[71] Closed proceedings should be limited as they reduce the cathartic effect of human rights litigation, whereby state participation in practices that are said to give rise to a violation become a matter of public record, and may thus ultimately diminish the extent to which states can be held accountable in future proceedings. It is nonetheless apparent that co-operation of the state is better secured through more substantiative measures.

2.1.3.D. *The Obligation of Co-operation*

The HRC has affirmed the obligation of states to investigate any violation of the Convention furnish to all available information.[72] It will give the author's allegations full weight upon a failure to fulfil this duty.[73] The ECtHR has propounded a similar obligation whereby a state may be found independently liable for failing to cooperate with the Court.[74] In *Agiza* the CAT found Sweden to have concealed information concerning its awareness of the allegations of ill treatment in Egypt on the grounds of national security. The CAT thus held Sweden responsible for a violation of the obligation to co-operate that is embodied in the UNCAT.[75] These obligations allowed the tribunals to hold states liable for breach in the absence of evidence. The CAT and the ECtHR appear to take a stronger stance than that adopted by the HRC, but it is uncertain if these obligations that encourage a state to co-operate with the relevant tribunal are likely to compel production of evidence when proceedings have already commenced. This issue is particularly pertinent to cases of extraordinary rendition, and inasmuch represents a 'sleeper issue' in international adjudication: states will be unwilling to

[70] *Bisher Al Rawi and others v UK* **[**2010] EWCA Civ 482 [30]; cited in Synhaeve (n 69) 474.
[71] *Tinnelly & Sons Ltd and Others and McElduff and Others v United Kingdom* (1998) 27 EHRR 249; See also *A v United Kingdom* (2009) 49 EHRR 29 [220]; Egan (n 9) 45-46; For a discussion of these procedures in light of the right to truth as recognised in *El-Masri*, see Amnesty International and International Commission of Jurists, *Written supplementary submissions pursuant to the Chamber's decision to invite interveners to submit supplementary comments in the light of the judgment of the Court's Grand Chamber in the case of El-Masri v the former Yugoslav Republic of Macedonia (no. 39630/90)* 15 February 2013, EUR 65/001/2012 <http://www.amnesty.org/en/library/info/EUR37/003/2013/en> (accessed 2 July 2013) [29-31] (cited in Amnesty International (n 68).
[72] See *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v Uruguay*, UN Doc. CCPR/C/OP/1 (1982) [13.3] (*'Irene Bleier')*; First Optional Protocol Art. 4(2).
[73] First Optional Protocol Art. 4(2).
[74] ECHR Art. 38(1); See *Baysayeva v Russia* App no. 74237/01 (ECtHR, 10 May 2007).
[75] *Agiza* (n 4) [12.11-12.16] [12.34]; On the basis of UNCAT Art. 22 (and for the first time): See S Joseph, 'Rendering Terrorists and the Convention Against Torture' (2005) 5 HRLR 339, 345.

unveil state secrets to tribunal that they ultimately cannot control. *Agiza* was unique in the sense that Sweden was actually discovered to be doing so.[76]

2.1.3.E. *The Right to Truth*

The procedural obligation of co-operation may be significantly bolstered if linked to the emergent norm/of the right to truth – a right of victims of human rights abuses to know the 'cause and circumstances of violations.'[77] The right to truth has been recognised by UN agencies,[78] NGO's[79] and regional human rights tribunals.[80] However, some scholars have questioned whether it holds an autonomous legal basis, as it remains closely linked to the rights of effective remedy and investigation.[81]

The CAT has not expressly recognised a right to the truth, although it has stated that a state's failure investigate allegations of torture could amount to a 'de facto denial' of obligation of redress.[82] This may imply a positive obligation to collect and secure evidence and to punish perpetrators. This reflects the CAT's recognition that Agiza's swift deportation deprived him of a remedy.[83] The scope for the articulation of a norm embodying a right to the truth is evident. However, it is uncertain if this would impose broader duties than those already contained in the obligation of co-operation.

In *El-Masri* the built upon its established jurisprudence concerning investigative obligations[84] to hold that El-Masri was explicitly denied a 'right to the truth' embodied in article 3 and

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[76] Joseph (n 75) 346.
[77] UN Commission on Human Rights ('UNCHR') 'Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights,' E/CN.4/2006/91 (2006) 4.
[78] See for example UNCHR, 'Resolution: Right to Truth,' UN Doc A/HRC/21/L.16 (2008).
[79] See for example ICRC, *Customary International Humanitarian Law*, (Cambridge University Press, 2005) 421; cited in Open Society Foundations, *Application to the European Court of Human Rights in Al-Nashiri v Romania* <http://www.opensocietyfoundations.org/sites/default/files/echr-nashiri-romania-20120802.pdf> Accessed 1 May 2013 ('*Al-Nashiri v Romania'*) [88].
[80] See for example Inter-American Court of Human Rights, *Velasquez Rodriguez v Honduras* (Ser. C) No. 4 (1988) [81]; cited in *Al-Nashiri v Romania* (n 79) 89.
[81] See generally R Sunga, 'On Locating The Rights of the Lost' (2012) 45 JMLR 1051, 1054; J Naqvi, The Right to the Truth in International Law: Fact or Fiction? (2006) 88 IRCRC 245, 246.
[82] CAT, 'Conclusions and Recommendations: United States of America,' (36th Sess 2006), UN Doc. CAT/C/USA/CO/2, [18] cited in Sunga (n 81) 1080; See further CAT, 'General Comment No 3: Implementation of article 14 by State parties,' UN Doc. CAT/C/GC/3 (2011) [16-17].
[83] *Agiza* (n 4) [13.8].
[84] See for example *Assenov and Others v Bulgaria*, ECHRVIII 1998 [191] *Cyprus v Turkey* App no. 25781/9 Judgments of 18 December 1996; *Aksoy v Turkey*, App no. 21987/93 1996-VI, no. 26; *Kurt v Turkey* ECHR II11998 [125].

article 5.[85] Four of the judges thought the right was also articulated in article 13, 'which includes a right of access to relevant information about alleged violations, both for the persons concerned and for the general public.'[86] This line is being pursued in the Al-Nashiri and Abu-Zubaydah cases, and if accepted would seemingly give a broader right of access to material held by the state throughout an investigation and after the occurrence of an investigation than that currently available on the basis of the principles espoused by the Court.[87] Moreover, it may restrict permissible derogations, as information protected as a 'state secret' cannot be protected under this provision.[88] The unquantifiable scope of this 'right to the truth' as articulated led some judges in *El-Masri* to insist that the bearer of the right to truth should remain 'the victim, and not the general public.'[89] It nonetheless remains difficult to see how the right to the truth could compel the production of evidence if it remains parasitic on a violation of the right to liberty or freedom of torture and not freestanding: that is, a 'procedural right (…) that arises after the violation of another human right has taken place.[90] It has thus been contended that right to the truth 'also constitutes (...) an integral aspect of the right to reparation in international law.'[91] The right to truth is yet to entail a right to effective reparation in the ECtHR because of the Court's demonstrated refusal to order a new investigation under Article 41 of the Convention.[92] This stands in contrast with the position adopted in other tribunals (such as the Inter-American Court of Human Rights) where it functions as a 'direct remedy:' that is, one that is based on the obligation of a state

[85] *El-Masri* (n 3) [191-192].
[86] *El-Masri* (n 3) joint concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller.
[87] Amnesty International and the International Commission of Jurists, *Written Submissions on Behalf of Amnesty International and the International Commission of Jurists in the case of Abu Zubaydah v Lithuania* <http://www.amnesty.org/fr/library/info/EUR53/002/2013/en> Accessed 1 June 2013 [41]; Interights, *Application to the European Court of Human Rights in Abu Zubaydah v Poland* <http://www.interights.org/document/269/index.html> Accessed 1 May 2013 ('*Abu-Zubaydah v Poland*') [326-330]; Open Society Foundations, *Application to the European Court of Human Rights in Al-Nashiri v Poland,* <http://www.opensocietyfoundations.org/sites/default/files/echr-al-nashiri-application-20110506.pdf> Accessed 1 May 2013 [263] ('*Al-Nashiri v Poland*'); Cf. *Tibi v Ecuador,* judgment of 7 September 2004 Series C No. 114 (Inter-American Court of Human Rights) [258]: 'The victim must have full access and be able to act in all stages and levels of investigation;' cited in *Al- Nashiri v Poland* (n 87) [327].
[88] *Artico v Italy*, App no. 6694/74 1980 ECHR A037 [33]; *Abu-Zubaydah v Poland* (n 87) [431].
[89] *El-Masri* (n 3) the joint concurring opinion of Judges Casadevall and López Guerra.
[90] See Linton in Sunga (n 81) 1082 (the right is 'wishful thinking') and 1088, and Naqvi (n 81) 249.
[91] See the references cited at (n 87) and specifically *Abu-Zubaydah v Poland* (n 87) [326].
[92] See 'Can a Right to Truth be Uncovered in the European Court of Human Rights Case Law?' Patricia Naftali <http://www.academia.edu/1725096/Can_a_Right_to _Truth_be_Uncovered_from _the_European_Court_of_Human_Rights_Caselaw> Accessed 1 June 2013.

party to guarantee the full and free exercise of the rights recognized by the Convention' [Article 9(1) of the Inter-American Convention].[93]

The HRC has specifically recognised the remedial aspects of right to truth. A collective right of truth arises for the families of victims of enforced disappearance.[94] A similar right arises in the guise of an effective remedy, which may include information about the location or violation suffered by a victim.[95] This imposes broad duties to the extent the state may be held in violation of an obligation if an applicant sought to discover the truth through a meaningful civil or criminal process and that right was effectively denied by the state. This did not arise in *Alzery* although Sweden was liable for failing to conduct an effective investigation on similar grounds.[96]

The right to truth as a remedy may ultimately impose the most burdensome procedural obligation on the state. However, as an emergent norm, the scope of the right to truth remains uncertain. It is important to note that the victim requirement necessitates that there is no public right of access to information, and the tribunals hold no general power of compulsion. The scope for the production of evidence in the instant case is thus yet to be determined.

2.2. Rules of Evidence

The general principle of international law is that international tribunals are not bound by strict judicial rules of evidence.[97] However, tribunals have found it necessary to formulate standards as they have been presented with complex factual disputes.[98] The rules of evidence are premised on the notion of equality of the parties and the desire for legal certainty.[99] The

[93] Naqvi (n 81) 257 citing Inter-American Commission, Report No. 136/99, of 22 December 1999, *Case of Ignacio Ellacrı´a et al. v El Salvador* [221]; Naftali (n 92).
[94] See for example *Quinteros v Uruguay*, UN Doc. CCPR/C/19/D/107/1981 (1983) [9.5].
[95] See for example *Khalilov v Tajikistan*, UN Doc. CCPR/C/83/D/973/2001 (2005).
[96] Finding a violation under ICCPR Arts. 2 and 7: *Alzery* (n 4) [11.7].
[97] See for example D Sandifer, *Evidence before International Tribunals* (1975) cited in C Brown, ' Book Review' in (2011) *The Law and Practice of International Courts and Tribunals* 10 (2011) 205; See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits, Judgment* [1986] ICJ Rep 1986 [60]; This stands in contrast to the position of international criminal courts: see R Wolfrum, 'International Courts and Tribunals, Evidence' in The *Max Planck Encyclopaedia of Public International Law* <http://www.mpepil.com.proxy.uba.uva.nl:2048/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e26&recno=26&subject=International%20courts%20and%20tribunals> accessed 1 May 2013 [1-3].
[98] Brown (n 97) 205.
[99] See generally C Foster, 'Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals' (2010) 29 AYBIL 27.

standards adopted are significantly affected by the delimitation of competences, the interpretation of substantive of obligations, and the evidence available to the parties.[100] This section will undertake a comparative analysis of the techniques adopted in the tribunals that are under examination in this paper for lowering the standard of proof and shifting the burden of proof to the state.

2.2.1. The European Court of Human Rights

The ECtHR holds not strict rules for admissibility of evidence, and generally accepts all forms of evidence.[101] The Court holds a power to request other forms of evidence on its own motion, from either the state party or any other source.[102] This is highly significant in cases where the state is unwilling in giving evidence to the tribunal, and may also help to fill a lacuna in the evidence or assess the veracity of allegations. [103] However, in practice the Court is likely to rely on evidence submitted by the parties. Moreover, the power is limited to requesting evidence, and the Court cannot order a party to produce evidence. The Court considers admitted evidence under a general principle of 'free evaluation.'[104] This inherent flexibility embodied in this principle is beneficial in cases involving a high degree of indirect evidence. Nevertheless, the desirability of producing a probative decision necessitates that facts are established to a requisite standard. The principle of 'free evaluation' is thus subject to modification through rules pertaining to the burden and standard of proof in proceedings before the Court.

2.2.1.A. *The Standard of Proof*

The ECtHR imposes a standard of 'beyond reasonable doubt,' applied in accordance with the specificity of the facts, nature of the allegation, and the right in question. This is not the same

[100] J Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (The Hague, Kluwer Law International, 1998) 1, 146.
[101] 'There are no procedural barriers to the admissibility of evidence:' See *Nachova v Bulgaria*, 43577/98 and 43579/98, 6.7.05 ECHR 2005-VII [104] cited in P Leach et al. 'International Human Rights Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights,' Report, Human Rights & Social Justice Research Institute, London Metropolitan University February 2009, 11 < http://www.academia.edu/1315823/INTERNATIONAL_HUMAN_RIGHTS_and_FACT-FINDING> Accessed 1 May 2013.
[102] Rules of the European Court of Human Rights (n 51) Rule 42.
[103] See for example *Khochklich v Ukraine* App no. 41707/98 (ECHR, 29 April 2003) (medical examination).
[104] See for example. *Nachova and Others v Bulgaria* App no. 43577/98, 43579/98 (ECHR, 6 July 2005) 147.

as the criminal standard, but is apparently higher than that adopted by all other human rights tribunals. [105] However, the Court adopts a number of techniques for lowering the standard of proof in certain cases. Firstly, the Court finds proof in 'sufficiently strong, clear and concordant inferences' and 'unrebutted presumptions of fact.' [106] For example, the Court will accept 'circumstantial evidence based on concrete elements.'[107] Each of the applicants to the ECtHR have requested the Court to draw inferences from public source evidence arising from a number of influential inquiries, which are given strong weight as they are official documents.[108]

The inferential approach to evidence is significant as the victims of the programme are deprived of knowledge of their circumstances and are thus unable to give reliable testimony. El-Masri was only able to ascertain that he was detained in Afghanistan after investigations into his ordeal had taken place. The ECtHR drew inferences from various sources to establish these facts to the requisite standard, including flight logs, scientific testing of his hair follicles confirming that he had spent time in South Asia, geological records confirming that he experienced a minor earthquake, and sketches he made of the prison that were recognised by other detainees.[109] Al-Nashiri and Abu-Zubaydah have similarly been able to recount their torture but cannot state when or where it occurred.[110] The Court has thus been asked to draw an inference from statements confirming they were tortured at some stage whilst in US custody and documents granting the CIA specific authorisation to undertake 'enhanced interrogation techniques.'[111] Flight logs and evidence from inquiries confirming the existence of the prisons further support this.[112] This assessment will be crucial due to the clandestine nature of the programme and the apparent inability of the applicants to present any direct evidence in their cases.

[105] *Khudoyorov v Russia* App no. 6847/02 (ECtHR, 8 November 2005) [113]; Leach (n 101) 18.
[106] *Ireland v United Kingdom* (1978) Series A No 25 [161]; Leach (n 101) 19.
[107] *Cakici v Turkey* ECHR 1999-IV [85].
[108] *El-Masri* (n 3) [37-53]; *Al-Nashiri v Poland* (n 87) [21-30]; *Al-Nashiri v Romania* (n 79) [26-38]; *Abu-Zubaydah v Poland* (n 87) [36-39]; See for example *Timurtas v Turkey* ECHR 2000-VI [66]
[109] *El-Masri* (n 3) [103].
[110] See for example Interights, *Application to the European Court of Human Rights in the case of Abu Zubaydah v Lithuania* <http://www.interights.org/document/181/index.html> Accessed 1 May 2013 ('*Abu-Zubaydah v Lithuania*') [61]; *Al-Nashiri v Poland* (n 87) [50-60].
[111] See for example *Abu-Zubaydah v Poland* (n 87) [18]; *Al-Nashiri v Romania* (n 79) [71].
[112] See for example *Abu-Zubaydah v Lithuania* (n 110) [34-35, 55-47]; *Al-Nashiri v Poland* (n 87) [34-35, 41-47, 56].

The ECtHR may adopt a lower standard of proof by finding a violation of a procedural obligation upon a failure of the state to conduct an effective investigation.[113] The finding of a procedural violation will require proof of similar facts as those required to make out a substantiative violation and is often found in instances where there may not be the requisite degree of certainty to satisfy the substantiative criteria.[114] This is highly significant in cases of extraordinary rendition in light of the deliberate attempt of states to conceal their involvement in the programme by ensuring the details are not unveiled in the course of proceedings undertaken by the victim in the domestic legal system. In *El-Masri* the Court found Macedonia responsible for procedural violations of Articles 3 and 5 in addition to violations of the substantive obligations that are contained in those provisions.[115] This approach is beneficial to the extent that it allows the Court to establish a wider basis of liability. However, procedural violations are considered less serious as they do not directly implicate a state in the conduct giving rise to breach of the provision. In this context it is relevant to note that the standard of proof adopted by the Court has been criticised as unduly high for human rights protection. A number of dissenting Judges in the *Labita* decision adopted this apposite criticism:[116]

> '[T]he standard used for assessing the evidence in this case is inadequate, possibly illogical and even unworkable since, in the absence of an effective investigation, the applicant was prevented from obtaining evidence and the authorities even failed to identify the warders allegedly responsible for the ill-treatment complained of. If States may henceforth count on the Court's refraining in cases such as the instant one from examining the allegations of ill treatment for want of sufficient evidence, they will have an interest in not investigating such allegations, thus depriving the applicant of proof "beyond reasonable doubt". Even though we consider that in some cases a procedural approach may prove both useful and necessary, in the type of situation under consideration it could permit a State to limit its responsibility to a finding of a

[113] Note that is doubt over whether the finding of a procedural violation should properly be considered a technique for lowering the standard of proof. For example, Claude refers to this as a measure by which the Court may 'compensate for the rigidity of the [beyond reasonable doubt] standard: O Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence (2010) 5 IHRL 408, 425.

[114] Moreover, members of the Court have expressed that [in the context of Article 2 cases]: 'rather than holding fact-finding missions, [the Court has] a tendency to find procedural violations, in order to save time and costs, when there was insufficient evidence to find a substantive violation, or where the evidence was held by the state:' see Leach et. al (n 101) 41.

[115] *El-Masri* (n 3) [194] [243].

[116] *Labita v Italy* ECHR 2000-IV (Joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič).

violation of the procedural obligation only, which is obviously less serious than a violation for ill-treatment.'

This reasoning resonates with the cases in issue and if adopted could allow the standard to be lowered to support a substantive violation upon a failure to conduct an effective investigation, although a majority of the Court has not accepted this.[117] Further elaboration of the inferential and procedural approaches would benefit the victims of extraordinary rendition.

2.2.1.B. *The Burden of Proof*

The operation of the standard of proof is essentially tied to burden of proof. The ECtHR places the initial onus of proof on the applicant to substantiate a prima facie case.[118] The state will be required to furnish responses, although no burden arises at this stage. The applicant retains the primary onus of proving facts amounting to a violation.[119] In certain instances the Court will shift the onus to the state to disprove an allegation in response to a compelling demand to achieve a more equitable resolution.[120] However, it has been argued that the Court will only shift the burden in 'exceptional cases' as it otherwise imposes a high standard of proof.[121] A relaxation would be beneficial in cases of extraordinary rendition as the state is generally in a dominant position to 'collect, present, conceal and destroy evidence.'[122]

2.2.1.B. (i) Reversal of the burden of proof in the case when evidence lies exclusively in the hands of the state

The ECtHR has consistently reiterated that when evidence is exclusively in the hands of the state it will bear the onus of explaining inexplicable circumstances, and a negative inference will be drawn if it fails to disclose relevant documents.[123] The Court's construal of the

[117] This approach has been specifically advocated in *Abu-Zubaydah v Lithuania* (n 110) [157-158].
[118] ECHR Art. 34, 35.
[119] ECHR Art. 34, 35; Rules of the European Court of Human Rights (n 51) Rule 59(a).
[120] See for example Judge Zekia's dissenting opinion: '[W]hat is material is… by whom and how … (the) onus should be discharged:' *Ireland v United Kingdom* ECtHR Series A No 25 (1978); cited in Leach (n 101) 17.
[121] Kokott (n 100) 189.
[122] M Vermeulen, 'Living Beyond Death: Torture or Other Ill-Treatment Claims in Enforced Disappearance Cases' (2008) 1 IAEHRJ 159, 165.
[123] *Cakici v Turkey* ECHR 1999-IV; *Salman v Turkey* ECHR 2000-VII [100]; and *Rupa v Romania (no. 1)* App no. 58478/00 (ECHR, 16 December 2008) [97].

Minister's admission in *El-Masri* provides an effective insight into the role of this presumption, particularly as it was 'the only direct evidence' submitted in support of the allegations.[124] The Court stated government statements should be treated with caution, particularly where no court has had the opportunity to test the veracity of the allegations, but it could lend high probative value to the instant case, as it tended to constitute an admission.[125] This was but one of the many factors that justified the decision to shift the burden of proof to the state.[126] The absence of such an admission in Abu-Zubaydah and Al-Nashiri's cases may ultimately adversely affect their prospects of success against each of the states.

2.2.1.B. (ii) Reversal of the burden of proof in the case of enforced disappearance

The presumption arising when evidence lies exclusively in the hands of the state may be stronger if extraordinary rendition is characterised as an instance of enforced disappearance. This is an apposite comparison, as the phenomena possess a degree of factual similarities.[127] The ECtHR will shift the burden of proof on to the state if it has assumed control of an individual and fails to provide an adequate explanation for their disappearance.[128] However, it generally treats this notion as an 'aggravated violation of the right to liberty.'[129] The Court has yet to accept that it constitutes a violation of the prohibition of torture per se, and will thus generally reject allegations of torture in the absence of direct evidence. This has led to charges of a failure to 'condition' its approach.[130] However, it has adopted a number of techniques that impart a degree of flexibility. Firstly, the Court may find a violation of a procedural obligation to conduct an effective investigation if the substantive obligation cannot be proved to the requisite degree.[131] This may be unsatisfactory if the violation is conceived as less

[124] *El-Masri* (n 3) [161].
[125] *El-Masri* (n 3) [165-165] See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits, Judgment* [1986] ICJ Rep 1986 [64].
[126] Significantly, the last mentioned: *El-Masri* (n 3) [168].
[127] See for example Weissbrodt and Burgquist (n 34) 160.
[128] See for example *Öcalan v Turkey* (2005) 41 EHRR 985; *Cyprus v Turkey*, ECHR 2001-IV.
[129] Vermeulen (n 122) 168.
[130] Vermeulen (n 122) 197.
[131] Claude (n 113) 425; See for example *Kurt v Turkey* ECHR II11998.

serious.[132] Secondly, the Court may draw inferences from circumstantial evidence. However, this process ultimately remains subject to judicial discretion.[133]

Commentators have suggested a number of solutions to this problem. Firstly, the Court could undertake a 'multiple rights approach', which considers a violation cumulatively under a definition of 'disappearances.'[134] However, this analysis is difficult to reconcile with the Court's methodology of construing each violation independently. Secondly, the Court could establish prima facie evidence through an 'administrative practice,' although this concept is highly political and does not bode well with a pattern of isolated incidents.[135] Thirdly, the Court could accept that enforced disappearance amounts to torture.[136] This position achieves legal coherency and is pertinent to cases of rendition where victims have 'reappeared.'[137] The ECtHR has yet to embrace this position but will consider it in Abu-Zubaydah's cases.[138] In *El-Masri* the Court was willing to accept that extraordinary rendition amounts to an enforced disappearance thus sufficient to find a violation of the right to liberty.[139] It is likely that this will be beneficial to Abu-Zubaydah and Al-Nashiri as their cases are archetypical disappearances. However, a broader basis could allow the Court to hold a state liable for a breach of Article 3 than that which might otherwise be available on the facts that have been established. This scenario is more than theoretical as it could likely arise in the circumstances of secret detention. For instance, in the absence of refoulement – where a host state has not been found responsible for assisting in transfer of the victim beyond the state. This scenario could also arise if the host state has not directly participated in acts of torture or other prohibited ill treatment.

[132] *Labita v Italy* ECHR 2000-IV (6 April 2000) (Joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič).
[133] See for example Claude (n 113) 426; S Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer-Verlag, Berlin-Heidelberg, 2009) 125.
[134] Claude (n 113) 461-462.
[135] Recent Developments, 'Chechnya's Last Hope? Enforced Disappearance and the European Convention of Human Rights' (2009) 22 HHRJ 133, 142.
[136] Vermeulen (n 122) 197.
[137] See for example Ibid; *El-Masri* (n 3); Inter-American Court of Human Rights, *Velásquez-Rodríguez v Honduras*, Merits, 29 July 1988, Series C. No. 4, [187]; CAT, Summary Record of the First Part (Public) of the 870th Meeting, 42nd Sess, 2009 UN Doc. CAT/C/SR.870, 8,1 49 (May 4, 2009), cited in Sunga (n 81) 1080.
[138] *Abu Zubaydah v Poland* (n 86) [204-208]; *Abu Zubaydah v Lithuania* (n 110) [174-176]; (in reliance of *Beksultanova v Russia* App no. 31564/07 (ECHR 27 September 2011) [105-107]; See also *Al-Nashiri v Romania* (n 79) [185].
[139] *El Masri* (n 3) [199].

2.2.2. The Human Rights Committee

The HRC holds no strict rules as to admissibility of evidence, and has not declared any evidence inadmissible.[140] The instruction of the HRC to consider of 'all information' 'before it' 'on the merits' clearly embodies a similar criterion to that of 'free evaluation.'[141]

2.2.2.A. *The Standard of Proof*

The standard employed by the HRC has been equated with a 'balance of probabilities' test that may vary in accordance with the gravity of the case.[142] This is apparently lower than the standard adopted by the ECtHR, although this cannot be assessed in the abstract, as the standards are deployed on a case-by-case basis. The HRC adopts a number of techniques by which it may lower the standard of proof. Firstly, the HRC may draw an inference that a state considers an allegation irrefutable if the state fails to respond to a question that is in essence of the nature of the claim that has been issued by the Committee to the state.[143] This is significant in cases of extraordinary rendition to the extent that the state manifestly denies involvement in the programme. The HRC can draw inferences from public source and circumstantial evidence in the absence of direct evidence supporting a claim. In *Alzery* the HRC took notice of the lack of effective medical examinations and the general human rights situation in the state in establishing the risk of torture in Egypt.[144] Secondly, the HRC can find a violation of a procedural obligation upon a failure of the state to conduct an effective investigation. In *Alzery* Sweden was found to have violated the procedural aspect of Article 7 as an additional based for finding Sweden was directly liable for the mistreatment he suffered at Bromma Airport.[145] In each of these instances the HRC effectively lowered the standard of proof to allow for a wider basis for liability.

[140] Tyagi (n 53) 529.
[141] First Optional Protocol Art. 5(1).
[142] Tyagi (n 53) 543; See also Viljoen (n 50) 85.
[143] See for example *Francis Hopu and Tepoaitu Bessert v France*, UN Doc. CCPR/C/60/D/549/1993/Rev.1. (1997) [7.1]; Tyagi (n 53) 542.
[144] *Alzery* (n 4) [11.3] [11.5].
[145] *Alzery* (n 4) [11.7].

2.2.2.B. *The Burden of Proof*

The HRC employs a similar burden of proof to the ECtHR: the onus is placed on the applicant, and the state is merely required to respond to the allegations.[146] The HRC tends to afford ample opportunities to the state through an 'equality of arms' principle embodying the adversarial notion that 'each party has a right to present its case fully.'[147] However, the applicant may benefit of the HRC's demonstrated willingness to shift the burden to the state to secure justice in each individual case.

2.2.2.B. (i) Reversal of the burden of proof in the case when evidence lies exclusively in the hands of the state

The HRC will reverse the burden of proof when the author's allegations are supported by testimony and clarification of that testimony depends on information that lies within exclusive control of the state. The onus will be discharged if the state fails to provide a convincing explanation.[148] The HRC appears to adopt this as a freestanding principle that is not dependent on any particular rights violation. However, it has not been entirely consistent in its application, and it is difficult to predict when it will deploy this presumption.[149] The benefit of this approach is nevertheless apparent as this precise factual pattern is reflected in cases involving transfer and secret detention.

2.2.2.B. (ii) Reversal of the burden of proof in the case of enforced disappearance

This presumption may be stronger if the case is considered an instance of enforced disappearance. The HRC conceives every act of enforced disappearance as amounting to torture.[150] In most cases of enforced disappearance there is no direct evidence to support the

[146] Tyagi (n 53) 529; First Optional Protocol Art. 4(2).
[147] See for example *Eduardo Bleier v Uruguay* UN Doc. Supp. No. 40 (A/37/40) (1982) [130]; A Byrnes, 'An Effective Individual Complaints Mechanism' in A Bayefsky (ed) *The UN Human Rights Treaty System in the 21st Century* (The Hague, Kluwer Law International, 2000) 139, 148.
[148] See *Irene Bleier* (n 72) [13.3].
[149] J Moller and A de Zayas, *UN Human Rights Committee Case Law 1977-2008: a Handbook* (NP Engel, Geneva, 2009) 37.
[150] See for example *Mojica v Dominican Republic*, UN Doc. CCPR/C/51/D/449/1991 (1994) [5.7]; *Celis Laureano v Peru*, UN Doc. CCPR/C/56/D/540/1993 (1996) [8.5].

notion that an individual has been tortured, as the person has in fact 'disappeared.'[151] The HRC thus holds that 'due weight must be given to the author's allegations' if the state fails to provide an explanation.[152] The presumption can only be rebutted if the state establishes a contrary conclusion.[153] The issue was not raised in the *Alzery* case, but would be of direct relevance to instances constituting a disappearance, such as *El-Masri*, *Al-Nashiri*, and *Abu-Zubaydah's* cases.

2.2.3. The Committee Against Torture

The CAT holds no strict rules to admissibility of evidence, and thus can rely on a wide range of materials. It is guided by a principle of 'free assessment of the facts' in each case.[154]

2.2.3.A. *The Standard of Proof*

The CAT generally employs a high standard of proof to a finding of torture. This stems from the nature of the treaty provisions. The consideration of a claim of extraordinary rendition under the United Nations Convention Against Torture ('UNCAT') tends to gravitate around the prohibition of non-refoulement, as the treaty is limited in scope, with no explicit protection of general liberties. The UNCAT provides that '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.'[155] This obligation requires *prima facie* evidence indicating 'substantial grounds for believing that he would be in danger of being subjected to torture' if expelled by a state.[156]

The strictness of this criterion was demonstrated in a previous case when Agiza's wife was unable to prove the risk that she may be subjected to torture in Egypt.[157] This occurred in spite of the fact that the CAT had specifically adopted conclusions with that had criticised

[151] Vermeulen (n 122) 174.
[152] Most recently affirmed in *Benali v Libya*, UN Doc. CCPR/C/105/D/1805/2008 (2013)
[153] Claude (n 113) 417.
[154] UNCAT Art. 22 (4); CAT, 'General Comment No. 1,' (n 49) [9].
[155] UNCAT Art. 3.
[156] UNCAT Art. 3; See M Nowak and E McArthur, *The United Nations Convention Against Torture: a Commentary* (Oxford, OUP, 2008) 219-224 (for substantiative jurisprudence).
[157] See *Hanan Ahmed Fouad Abd El Khalek Attia v Sweden*, UN Doc. CAT/C/31/D/199/2002, (2003) cited in Joseph (n 75) 343.

widespread use of such practices in Egypt.[158] However, the CAT later came to conclude in *Agiza's* case that its previous decision was based on incomplete evidence.[159] The CAT found a violation of Article 3 based on the 'consistent and widespread usage of torture against detainees,' enlivened by a 'particularly high risk' for 'detainees held for political and security reasons.'[160]

This case demonstrates the flexibility of the 'free evaluation' approach as the CAT effectively lowered the standard of proof through two approaches to the evidence. Firstly, the CAT found a violation of the procedural obligation to conduct an effective investigation.[161] This was significant as the CAT suggested that the decision to expel could not be made on the evidence available. Secondly, the CAT drew inferences from circumstantial and public source evidence. The CAT was thus able to rely on witness statements supporting his allegations of torture in the absence of direct medical evidence. [162] Moreover, the CAT appears to have taken cognisance of the elevated risk of torture due to the interest taken in him by 'intelligence services of two other states.' [163] This implicit recognition of the practice of rendition is significant, as the CAT was not directly called upon to consider evidence detailing the nature of the programme.

2.2.3.B. *The Burden of Proof*

The standard of proof is essentially tied to the burden of proof in CAT proceedings. The CAT places the initial onus on the applicant to establish a prima facie case.[164] The state will be required to furnish responses, but the applicant retains the primary onus of proving the allegations.[165] However, the CAT has followed the other tribunals in shifting the burden in order to alleviate an inequitable balance in each case.

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[158] See CAT, 'Conclusions and Recommendations of the Committee Against Torture: Egypt, 23 December 2002,' UN Doc CAT/C/CR/29/4 cited in Joseph (n 75) 341.
[159] *Agiza* (n 4) [13.5]; See also Joseph (n 75) 343.
[160] *Agiza* (n 4) [13.4].
[161] *Agiza* (n 4) [13.7].
[162] *Agiza* (n 4) [3.4-3.7] [13.4].
[163] *Agiza* (n 4) [13.4]; Joseph (n 75) 344.
[164] CAT, 'General Comment No. 1,' (n 49) [5-6].
[165] UNCAT Art. 22 (3).

2.2.3.B (i) In the case of non-refoulement

The CAT employs a strong shift in the burden of proof in cases of non-refoulement: if an applicant establishes a prima facie case the state must substantiate that expulsion would not involve a risk of torture.[166] A factual dispute over the risk of torture became central to the *Agiza* decision.[167] The CAT took cognizance of the elevated risk of torture in context of extraordinary rendition, and enunciated a test that construes the information that the state 'had, or should have in their possession at the time of expulsion.'[168] This imposes a positive obligation on the state to investigate the risk of ill treatment,[169] and it is apparent that the production of diplomatic assurances will not discharge the onus unless they meet strict criteria.[170] It has thus been stressed that 'the more serious the general human rights situation in the country concerned appears, the more the burden shifts to the state.'[171] If the onward destination is unknown to authorities (such as *El-Masri's* case) satisfaction of this test may depend on whether subjective knowledge of the risk of torture can be imputed to the state. The benefit of this approach for litigants cannot be underestimated, as it imposes a high burden on the state that would be difficult to rebut as extraordinary rendition is specifically constructed to send individuals to states where it is more likely that such clandestine activity is can ultimately operate undetected. However, the CAT has thus far proven reluctant to shift the burden of proof beyond this circumstance, such as in the case of enforced disappearance.[172] The potential for further development is restricted by the limited and specific scope of the UNCAT.[173]

[166] *A.S. v Sweden*, UN Doc CAT/C/25/D/149/1999 (2001).
[167] *Agiza* (n 4) [4.21-4.24] [9.2] [13.5].
[168] *Agiza* (n 4) [13.2]; this was later affirmed in *Adel Tebourski v France*, UN Doc. CAT/C/38/D/300/2006 (2007) [13.2].
[169] See CAT, *A.S. v Sweden*, UN Doc CAT/C/25/D/149/1999 (15 February 2001).
[170] *Agiza* (n 4) [13.4]; The legal qualities of diplomatic assurances have been widely discussed: See for example L Skoglund, 'Diplomatic Assurances Against Torture: an Effective Strategy?' (2008) 77(4) NJIL 319; C Michaelsen, 'The Renaissance of Non-Refoulement: the Othman (Abu Qatada) Decision of the European Court of Human Rights' (2012) 61(3) ICLQ 750.
[171] See Nowak and McArthur (n 156) 224.
[172] C Inglese, *United Nations Committee Against Torture: an Assessment* (Kluwer Law International, The Hague, 2001) 287.
[173] It has also existed for a shorter duration and fewer states have accepted the competence of the tribunal.

2.3. Preliminary Conclusion

It is apparent that the cross-fertilisation of jurisprudence within the respective tribunals has fostered broadly similar approaches to the evidence. However, the analysis has indicated that choice of forum is an important issue in these cases.[174]

Agiza demonstrates that the CAT is a beneficial forum for litigants seeking to adduce evidence against a sending state. The CAT demonstrated a willingness to lower its otherwise high standard of proof by drawing inferences from public source and circumstantial evidence, and adopted a strong evidential presumption that shifted the burden of proof to the state. The state was thereafter held liable under an independent procedural obligation for failing to co-operate with the CAT. However, the evidential devices employed are restricted by the limited scope of the UNCAT.

A similar outcome arose in *El-Masri* although the focus was afforded to procedural obligations arising from the failure to investigate. The ECtHR employs the highest standard of proof but this is offset by the free evaluation approach to evidence. The drawing of inferences is crucial, as the cases have revolved around a high degree of public sources and circumstantial evidence. The specific circumstances are nonetheless decisive, and Abu-Zubaydah and Al-Nashiri may have more difficulty in their cases due to the absence of direct evidence from the victim or the state. However, as they have established a prima facie case it is likely that the Court will shift the burden as evidence remains exclusively in the hands of the state. The recognition of enforced disappearance and the right to truth in *El-Masri* will benefit each case. Nevertheless, there remains scope for the Court to further develop its jurisprudence on a number of issues to support a wider basis of liability in each case.

The HRC appears to adopt approaches to the evidence most beneficial to litigants. *Alzery's* case demonstrates that the HRC adopts a relatively low standard of proof and is willing to draw inferences and find a procedural violation in the absence of an investigation. Further analysis of its jurisprudence has indicated that the HRC it is willing to shift the burden of proof under a wider conception of enforced disappearance and when evidence lays exclusively in the hands of the state. Moreover, the HRC has affirmed the remedial aspects of the right to the truth.

[174] See also W Kaleck & A Schuller, 'Litigating Extraordinary Rendition' (2010) 16(1) IB 34, 35.

The uncertain content of the right to truth nevertheless reveals a number of fissures in these cases. The concept of the 'right to truth as a remedy' may be suggestive of notions of full disclosure. However, the state will be unwilling to concede state secrets if it were to unveil a wider basis of liability, and the tribunals hold no general power of compulsion. A state may thus withhold evidence and be found in violation for a failure to co-operate or an essentially lesser procedural obligation. Two important caveats are of note. Firstly, the revelation of clandestine activity in tribunal proceedings and the pull on participatory states to effectuate the right to an effective remedy that arises from provisions of the respective treaties may be of assistance to further victims. Secondly, the inferences drawn from a procedural allegation may support a substantive violation. But the experience of *El-Masri* shows that states hold an interest in denying the *instant* case. This is an important lesson about litigating extraordinary rendition: the opprobrium attached to broader complicity may be more damaging than conceding an individual decision.

This analysis affirms the importance of securing the co-operation of the state. Rules of evidence and procedure are premised on a notion of equality between the parties, and it is important to maintain a modicum of balance in each case. It is apparent that the tribunals could take further measures to assess the veracity of allegations. This is significant as decision based on sound reasoning and verifiable evidence is more likely to be respected by the states. The benefit of proving extraordinary rendition as a matter of evidence clearly extends beyond the individual case.

Chapter III: Attribution

If the facts of can be proven as a matter of evidence, it will be necessary to satisfy the tribunal that the conduct of organs or foreign agents can be attributed to the state. The Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA') contain a set of detailed rules for the attribution of wrongful acts.[175] In the usual course of cases coming before the tribunals, the tribunals allocate independent responsibility to the state for the acts of state officials acting within territorial jurisdiction of the state that is respondent to the claim through positive and negative obligations contained in the treaty. However, extraordinary rendition presents unique issues as foreign agents have committed wrongful acts with respect

[175] See the reference cited at (n 6).

to the victims on home state territory and abroad. This chapter will discuss the problem of attributing responsibility to sending, host and transit states.

3.1. General Principles of State Responsibility

The Articles on State Responsibility codify the majority, but not all of the customary international law on the subject matter, and otherwise expresses principles subject to progressive legal development.[176] *Lex specialis* may be embodied in a particular treaty regime, such as the ECHR, ICCPR, and the UNCAT.

3.1.1. The Framework of the Law of State Responsibility under ARSIWA

The ARSIWA covers situations where responsibility is owed by one state or a multitude of states, and contains secondary rules that attach to a violation of a primary norm.[177] Under the framework 'every international wrongful act entails the international responsibility of that State;'[178] that is, an act that is 'is attributable to the state under international law' and 'constitutes a breach of an international obligation of that state.'[179] This latter requirement presents little difficulty as extraordinary rendition amounts to a hybrid human rights violation.[180] It is further apparent that such conduct is unlikely to be vitiated by any 'circumstance precluding wrongfulness.'[181]

The Articles define a number of instances where the logical connection between conduct and breach can be forged. Firstly, the acts of 'organs of a state' or 'persons exercising governmental authority' are attributable to the state, irrespective of ultra-vires conduct.[182] This is premised on the notion of individual responsibility of states that permeates the law of

[176] International Law Commission, 'Commentaries to the draft articles on Responsibility of States for internationally wrongful acts' Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2) 59 ('ILC Commentaries') [77(1)]; ARSIWA Art. 56.
[177] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874; ILC Commentaries (n 176) [77(4)].
[178] ARSIWA Art. 1.
[179] ARSIWA Art. 2; An act in this part is taken to include an omission: ILC Commentaries (n 176) 68
[180] See J Button, 'Spirited Away into a Legal Black Hole: The Challenge of Invoking State Responsibility for Extraordinary Rendition' (2007) 19 FJIL 531; 'Torture by Proxy Report' (n 16) 93-94 (finding the US in breach).
[181] For the sake of brevity these cannot be considered in any detail: See Button (n 180) 545-551.
[182] ARSIWA Arts. 4, 5, 7.

state responsibility. Instances of dual attribution are rare in international law.[183] However, the ARSIWA anticipates that responsibility can be attributed to more than one state in certain cases.[184] The situation of most relevance to extraordinary rendition arises where one state provides aids and assistance to another in the 'commission of an internationally wrongful act.'[185] The acts of the primary state are not attributed to the complicit state but the complicit state is responsible for aiding and abetting the primary state to commit the primary act – that is, for the aiding and abetting itself. Article 16 thus bears the character of a primary rather than secondary rule.[186] It may allow for a wider basis of liability in this respect. However, the provision holds a number of pre-requisites that impose practical and theoretical difficulties for proving extraordinary rendition. Firstly, the aiding or abetting state must hold 'knowledge of the circumstances of the internationally wrongful act.'[187] This has been read as requiring that the state is at least aware of the specific intent of the main perpetrator, although some scholars have questioned this analysis.[188] Secondly, the act must be 'internationally wrongful if committed by the state.'[189] This requirement poses no difficulty as each of the states under examination is bound by the ICCPR and the UNCAT.[190] Of course, the US cannot be responsible for violating the ECHR but the obligations contained in the treaties are broadly similar in any case.

3.1.2. State Responsibility as Defined by the International Tribunals

The ARSIWA will not apply if the same matter is governed by a special rule of international law.[191] The ICCPR, CAT, and ECHR are generally silent on secondary rules of responsibility.[192] It is debatable that they are 'self-contained regimes.'[193] One could thus

[183] See A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: a Conceptual Framework' (2013) 34 MJIL 359, 374.
[184] See for example ARSIWA Arts. 8, 16 and 17; see also H Duffy, 'Extraordinary Rendition Under International Law' (2010) 16(1) *IB* 4, 6 (arguing these are not relevant in this instance).
[185] ARSIWA Art. 16; This reflects customary international law: see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, judgment of 26 February 2007 [420] ('*Genocide Convention* case').
[186] Nollkaemper and Jacobs (n 183) 385.
[187] ARSIWA Art. 16 (a).
[188] *Genocide Convention* case (n 185) [432]; B Graefarth, 'Complicity in the Law of International State Responsibility' (1996) 29 RBDI 370, 375.
[189] ARSIWA Art. 16 (b); Accordingly, this criteria will not be considered as it is satisfied.
[190] Note also the jus cogens nature of the prohibition of torture (and arguably non-refoulement): see R Bruin and K Wouters, 'Terrorism and the Non-derogability of Non- refoulement' (2003) 15 IJRL 5.
[191] ARSIWA Art. 55; ILC Commentaries, (n 176) 357.
[192] Cf. ECHR rules of reparation and compensation: ARSIWA Art. 55; ILC Commentaries (n 176) 357

expect the tribunals to be guided by the law of state responsibility. However, this is usually unnecessary as they draw on the expansive scope of their internal law. In clear-cut cases the tribunals will attribute responsibility to state organs for a violation of a negative obligation. This is consistent with the ARSIWA as an incident of attribution of conduct to state officials exercising jurisdiction.[194] In other instances the tribunals have attributed responsibility for a violation of a positive obligation.[195] These impose a duty to act, including duties of investigation and the prevention of harm by private parties.[196] Here, the state is responsible for an omission rather than an act – that is, the state is responsible for not showing diligent conduct in the discharge of the obligation. This could foster a path for attribution that may otherwise be unavailable under the ARSIWA.[197] In the construction of attribution for non-refoulement the tribunals have tended to allocate responsibility for the act of handing over the victim, rather than the consequent wrong suffered as a result.[198] In exceptional cases the tribunals have been asked to consider the complicity of states in wrongful acts through notions of acquiescence and connivance. As will become clear in the exposition that follows, *El-Masri* may further indicate a new path for attribution of a wrongful act committed by another state in a failure to prevent the conduct of foreign agents that occurs in a foreign state. However, these approaches may be inconsistent with ARSIWA if they lower the test for attribution.[199] Alternatively, it may be unjustified for the tribunals to rely on the notion of aid and assistance that is embodied in the ARSIWA – and face the consequent risk that the avenues to responsibility will be diminished by the limited scope of that provision – if the participatory state can be found responsible for wrongful acts to the fullest extent of the law through the through positive and negative primary obligations imposed on state parties by the respective Conventions.[200] It is thus relevant to inquire if the tribunals have adopted approaches for attributing responsibility that could be extended to participatory states in a manner that is cohesive and legally logical.

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[193] ILC Commentaries (n 176) 358-359; Crawford (n 177) 879-880.
[194] J Cerone, 'Re-Examining International Responsibility: 'Complicity' in the Context of Human Rights Violations' (2007) 14 ILSAJICL 525, 528-529.
[195] Cerone (n 194) 532-533.
[196] Duffy (n 184) 5.
[197] Cerone (n 194) 532-533.
[198] 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' André Nollkaemper, <http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/> (9 March 2012).
[199] See generally Cerone (n 194).
[200] M den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' SHARES Research Paper 06 (2012), ACIL 2012-04, 47 available at www.sharesproject.nl.

3.2. Attribution in the Committee Against Torture

The UNCAT imposes positive obligations to prevent acts of torture in any territory under its jurisdiction, extending to all persons under *de jure* or *de facto* control. [201] Torture includes any pain or suffering instigated with the acquiescence of a public official. [202] A broader conception of complicity extends from the treaty provisions.

3.2.1. Attribution to the Sending State

In *Agiza* the CAT did not consider the ARSIWA, but instead decided the case through the internal logic of the Convention. The CAT ultimately found Sweden responsible for a violation of the obligation of non-refoulement. [203] In this instance, 'the mistreatment of the complainant by foreign intelligence agents on the territory of the State party and acquiesced in by the State party's police' appears to have have elevated the CAT's assessment of the risk of torture upon expulsion. [204] That is, the 'risk was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police.' [205] Two instances of responsibility can thus be derived from this decision. Firstly, the CAT adopted the traditional approach to cases of non-refoulement: the state is responsible for handing over the victim rather than the consequent wrong that resulted. This is consistent with ARSIWA as an incident of attribution of conduct to state officials. [206] Secondly, the CAT implicitly suggested that Sweden acquiesced in conduct that amounted to cruel, inhuman or degrading treatment. In this respect, it has been noted that '[a]lthough the impugned acts were perpetrated by US agents, Sweden was responsible as its authorities, apparently, willingly, let the treatment occur.' [207] This finding is consistent with ARSIWA, as Sweden was held responsible for the treatment as an omission – that is, it failed to prevent or willingly allowed the treatment to occur. [208] The CAT thus made a finding of breach through

[201] UNCAT Art. 2(1); See generally CAT, 'General Comment 2: Implementation of Article 2 by State Parties,' UN Doc. CAT/C/GC2 (2008).
[202] UNCAT Art. 1(1).
[203] UNCAT Art. 3.
[204] *Agiza* (n 4) [13.5].
[205] *Agiza* (n 4) [13.4].
[206] ARSIWA Art. 4; Nollkaemper (n 198).
[207] *Agiza* (n 4) [13.4]; Joseph (n 75) 344 (noting the US is 'presumably in breach of Article 16').
[208] ILC Commentaries (n 176) 70 [4]: referring to the notion that 'conduct attributable to the state can consist of acts or omissions' [in context of the discussion on Article 2].

the obligation of non-refoulement and a positive duty of prevention, but stopped short of attributing the conduct of the American or Egyptian authorities to Sweden itself.

3.2.2. Attribution to the Host State

Host state liability has arisen in relation in Abu-Zubaydah and Al-Nashiri's cases in relation to the secret detention facilities in Poland, Romania and Lithuania. The CAT has not yet had to opportunity to consider attribution to a host state. However, it has condemned the US practice of secret detention as a violation of the prohibition of torture per se.[209] The UN Secret Detention report concurred that secret detention involves a violation of the prohibition of 'complicity in acts of torture.'[210] Complicity under the UNCAT extends to 'instigation, incitement, superior order and instruction, consent, acquiescence and concealment.'[211] Under this formulation a state may be held responsible if it had actual or constructive knowledge of the risk of torture, and is 'inherently associated with the establishment or operation of such a facility, and did not take reasonable steps to prevent it.'[212] Abu-Zubaydah and Al-Nashiri's cases follow broadly similar factual patterns. High ranking government officials allegedly entered into an agreement to give effect to the operation, fostered the preparation of facilities for detention, and state military forces was deployed to establish a 'buffer zone' for the service.[213] It may be difficult to establish actual knowledge of the risk of torture, as each instance occurred relatively early in the programme (2002-2003) and it has been conceded that there is no evidence that local authorities actually took part in the interrogations.[214] However, it could reasonably be argued that constructive knowledge could be imputed due to the clandestine nature of the arrangements and the national security interests of the US. The CAT seems to have accepted a similar argument in *Agiza's* case.[215] This could be further supported by evidence of intelligence sharing, although this has not emerged as yet. Moreover, the states could also be held responsible for the circumstances of detention under a

[209] CAT, 'Conclusions and Recommendations, United States of America,' (n 82).
[210] UNHRC Report (n 33) [39].
[211] CAT, 'General Comment No. 2' (n 200) [17]; UNHRC Report (n 32) [39].
[212] UNHRC Report (n 33) [40].
[213] *Al-Nashiri v Poland* (n 87) [154]; *Al-Nashiri v Romania* (n 79) [172]; *Abu-Zubaydah v Poland* (n 87) [38-48, 242]; *Abu-Zubaydah v Lithuania* (n 110) [37] [40] [47].
[214] *Abu-Zubaydah v Poland* (n 87) [241]; See also W Czaplinski, 'Transcript of the Debate: State Responsibility for the CIA's Secret Prisons in Third States ' (2008) 30 PYBIL 277, 297.
[215] *Agiza* (n 4) [13.4-13.5].

positive obligation to prevent cruel, inhuman and degrading treatment.[216] It is thus apparent that the CAT could establish a wide basis of liability through the internal logic of its Convention without reliance on the notions of aid and assistance that are contained in ARSIWA.

3.2.3. Attribution to the Transit State

Allegations of 'indirect participation' extend to circumstances where states have allowed their territory to be used as air space, 'staging post[s]' and 'stop-over' points for rendition flights.[217] A large number of European states have been implicated in this practice, but the greatest controversy has in relation to allegations concerning the use of airports in Britain and Ireland for rendition purposes.[218] The CAT has not been called on to consider the position of a transit state, but the treaty grants wide scope for liability in this practice. The obligation of non-refoulement could be relevant if it could be proved that there were 'substantial grounds for believing' that an individual would be tortured.[219] However, it is difficult to secure direct evidence indicating a flight was involved in rendition if the relevant domestic authorities have not searched the aircraft in order to ascertain if the aircraft was used for that purpose.[220] Information indicating intelligence sharing would be closely guarded as a state secret. Britain and Ireland have obtained diplomatic assurances from the US purporting to guarantee that their airports were not used for rendition flights, and have denied they were aware of the circumstances.[221] These evidential difficulties suggest liability is better secured through the positive obligation to take persons suspected of committing or being complicit in acts of torture into custody for the purposes of prosecution or extradition whilst they are within the

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[216] UNCAT Art. 4(2), 16; circumstances of detention are considered primarily under article 16: Nowak (n 156) 550; See for example *Hajrizi Dzemajl et al. v Yugoslavia*, UN Doc. CAT/C/29/D/161/2000 (2002).
[217] Egan (n 9) 21-22.
[218] See Constitution Project (n 20) 199-200.
[219] UNCAT Art. 3.
[220] For the sake of brevity, obligations arising under aviation law cannot be considered: See M Milde, 'Rendition Flights and International Air Law' < 'http://www.redress.org/downloads/publications/ Prof_Dr_Michael_Milde_for_REDRESS_June_2008_2_.pdf >; Venice Commission Report (n 32) [91]; See also Irish Human Rights Commission, *Extraordinary Rendition: A Review of Ireland's Human Rights Obligations* (2007, Dublin; IHRC) [16] noting that 'it is extremely difficult
for private citizens to obtain concrete evidence of aircraft involved in 'extraordinary
rendition' activities without having the authority or power to inspect the aircraft in
question.' [and later proposing for a system of inspection (at 40)].
[221] Ibid, 40; Joint Committee on Human Rights, 'The UN Convention Against Torture (UNCAT)' Nineteenth Report of Session 2005–06 Volume I – Report and formal minutes HL Paper 185-I HC 701-I Published on 26 May 2006 House of Lords and the House of Commons, London: TSOL 22 [159].

jurisdiction of the state. [222] It has been contended that this could extend to an obligation to investigate and to prevent an aircraft from leaving.[223] The CAT would thus ultimately be able to affirm a wide basis for attributing liability to the transit states of Britain and Ireland through expansive scope of the UNCAT.

3.3. Attribution in the Human Rights Committee

The ICCPR is applies to 'all individuals within [state] territory and subject to its jurisdiction.'[224] Article 2(1) has been read to impose a positive obligation on states to ensure all individuals within their jurisdiction the rights protected by the Convention.[225]

3.3.1. Attribution to the Sending State

The HRC considered attribution to a sending state in *Alzery's* case. The HRC held that Sweden had violated the obligation of non-refoulement for exposing to Alzery to the risk of torture or ill treatment in Egypt.[226] This decision reflects traditional doctrine: Sweden was responsible for its own wrongful conduct in handing over Alzery and not for the consequent torture itself. However, the HRC went further and found Sweden liable for the treatment he suffered at the airport.[227] These 'acts…were [deemed] properly imputable' as they occurred on state territory, in the course of official functions, and with the 'consent or acquiescence of the state party.'[228] The HRC appears to have taken a broader stance against rendition, as this aspect of the judgment was not necessary for the decision.[229] The HRC stated that it had reached this conclusion in accordance with the terms of the treaty and accepted principles of state responsibility, although the complainant did not avert to the ARSIWA and it is difficult to infer the approach. The HRC may have enlivened by the notion of a wrongful act arising

[222] UNCAT Arts. 6, 7.
[223] Joint Committee on Human Rights (n 221) [157].
[224] ICCPR Art. 2(1).
[225] M Nowak, *United Nations Covenant on Civil and Political Rights. CCPR Commentary* (2nd ed. NP Engel, Kuhn, 2005) 43-44; HRC, 'General Comment 31,' UN Doc. CCPR/C/21/Rev.1/Add.13, [10].
[226] *Alzery* (n 4) [11.3-11.5].
[227] *Alzery* (n 4) [11.6].
[228] *Alzery* (n 4) [11.6]; In doing so it referred to the definition of torture in UNCAT Art. 1.
[229] The HRC may have been enlivened by the gravity of the situation: *Alzery* (n 4) 4.2; See also Joseph (n 75) 344.

from an omission.[230] However, the broader notion of acquiescence suggests it was grounded in a positive obligation of prevention and a failure of due diligence – conceived in terms of the spatial application of the ICCPR.

3.3.2. Attribution to the Host State

The HRC has denounced the US programme of secret detention as contrary to articles 7 and 9 of the ICCPR.[231] This reflects the Committee's substantive jurisprudence holding that incommunicado detention (by definition secret) as in violation of articles 7 and 10.[232] However, it has been demonstrated that it may be difficult to establish knowledge of the risk of torture. Nevertheless, the facts of Abu Zubaydah and Al-Nashiri's cases against Poland and Lithuania indicate that the states were aware of the circumstances of detention.[233] Article 10 can be read as imposing a positive obligation of prevention through a logical analogy of instances where the state has contracted out detention facilities to be operated by private parties.[234] Most crucially, the UN Working Group on Arbitrary Detention has heard a complaint against the US and Afghanistan by a man subject to extraordinary rendition and thereafter detained at Baghram air base with the consent of the Afghan government. The Working Group opined that the US was responsible as the direct perpetrator of arbitrary detention, but Afghanistan 'shared responsibility' for a violation of Article 9 on the basis of the positive obligation embodied in Article 2(1).[235] The *Alzery* formula would be relevant in each case as the acts occurred on state territory with consent and in the course of official functions. These principles can be deductively applied to affirm a wide basis of liability for the states that have hosted secret detention in these cases.

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[230] ARSIWA Art. 2; An act in this part is taken to include an omission, ILC Commentaries (n 176) 68

[231] Concluding Observations of the HRC on the Second and Third U.S. Reports to the Committee, UN Doc. CCPR/C/USA/3 (2006) [12-13].

[232] See for example *Miguel Angel Estrella v Uruguay,* UN Doc. CCPR/C/OP/2 (1980).

[233] See (3.4); Article 10 is often relied upon when knowledge of torture cannot be imputed to the state: See Moller and De Zayas (n 149) 205, 217; See for example *Karina Arutyunyan v Uzbekistan,* UN Doc. CCPR/C/80/D/917/2000 (2004) [6.2].

[234] The HRC has expressed that the Convention will continue to apply in such circumstances: See A Kontos, '"Private" Security Guards: Privatized Force and State Responsibility Under International Human Rights Law (2004) 4 NSAIL 199, 207-208, 216.

[235] See *Amine Mohammad Al-Bakry v Afghanistan and United States of America,* Working Group on Arbitrary Detention, Opinion No. 11/2007, UN Doc. A/HRC/7/4/Add.1 (2007) [85].

3.3.3. Attribution to the Transit State

A state will be responsible under the ICCPR for persons within its jurisdiction. Jurisdiction will thus attach when victim is on-board an aircraft and the plane 'stops-over' but critical issues may this arise if the victim is not actually aboard the aircraft. The HRC has interpreted the ICCPR as holding extra-territorial application, but has thus far avoided the question of whether state can be held responsible for acts or omissions which facilitate the violation of rights by another state outside that state's territory.[236] If these difficulties can be surmounted it would be necessary to establish breach of a treaty provision. The HRC has interpreted Article 7 as imposing a requirement of 'due diligence to avoid a threat to an individual of torture from third parties,' although it has not demarcated its precise scope.[237] The obligation of non-refoulement is also relevant in this case. It has been argued that the duty requires a state itself to actually refouler an individual, rather merely facilitating transportation.[238] However, the HRC has suggested that a state would be responsible for failing to take action in this case.[239] Nevertheless, it has previously been demonstrated that may ultimately be difficult to impute knowledge of the risk of torture to the transit state.[240]

3.4. Attribution in the European Court of Human Rights

The ECHR provides that state parties 'must secure to everyone within their jurisdiction the rights and freedoms' that are protected under Convention.[241] The Court reiterates these rights must be 'real and effective, not theoretical or illusionary,' and has thus developed wide jurisprudence on positive and negative obligations. [242]

3.4.1. Attribution to the Sending State

The ECtHR considered attribution to a sending state in *El-Masri's* case. The Court ultimately found Macedonia responsible for a number of separate violations. Firstly, the Court found that

[236] Egan (n 9) at 24 noting that it has nevertheless used language to this effect: See *Munaf v Romania*, UN Doc. CCPR/C/96/D/1539/2006 (2006) [14.2].
[237] See *Ahani v Canada*, UN Doc. CCPR/C/80/D/1051/2002 (2002); Egan (n 9) 26.
[238] See Irish Human Rights Commission (n 220) 23, 86; See also Egan (n 9) 26.
[239] *Kindler v Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993) [6.2] 168; See Egan (n 9) 27.
[240] See section 3.2.3. of this paper.
[241] ECHR Art. 1.
[242] See *Airey v Ireland* 32 Eur Ct HR Ser A (1979).

Macedonia was responsible for his arbitrary deprivation of liberty at the hotel in Skopje.[243] This is an ordinary incident of direct attribution for the conduct of state officials operating on state territory. Secondly, Macedonia was held liable under the obligation of non-refoulement enshrined in Article 3; that is, responsible for its own wrongful conduct in exposing El-Masri to the risk of torture.[244] Thirdly, Macedonia was responsible for the ill treatment meted out by the CIA at Skopje airport.[245] In this respect the Court followed *Alzery* in holding that a state is responsible for 'acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.[246] However, it appears to have adopted a broader analysis by equating this with an obligation to prevent private parties acting within state jurisdiction from infringing the rights protected under the Convention.[247] André Nollkaemper provides a convincing analysis of this reasoning:

> 'The justification of the construction then lies in the combination of the (positive) obligations of states party under the Convention, and the fact that the conduct in question took place on its territory with its acquiescence or connivance, which in turn was incompatible with the positive obligations.'[248]

This logic appears to have influenced the Courts fourth substantive finding: that Macedonia was responsible for El-Masri's arbitrary deprivation of liberty in Afghanistan.[249] The Court appears to have imputed the deprivation of liberty itself (at the behest of the CIA) to the state; that is, Macedonia was responsible for the conduct.[250] The Court attached this finding to a positive obligation of prevention.[251]

Nollkaemper contends that this legal basis allowed the Court to espouse a 'fresh approach' to the law of state responsibility by finding Macedonia liable for the conduct of foreign agents.[252] In contrast, Assier Garrido regards the Court's reasoning on Article 5 as merely embraces a new category of non-refoulement. This leads him to conclude that it did not carve

[243] *El-Masri* (n 3) [237].
[244] *El-Masri* (n 3) [223].
[245] *El-Masri* (n 3) [211].
[246] *El-Masri* (n 3) [206]; See also *Ilaşcu and Others v Moldova and Russia* [GC], App no. 48787/99 [318]. ECHR 2004-VII ('*Ilaşcu').*
[247] *El-Masri* (n 3) [211].
[248] Nollkaemper (n 198).
[249] *El-Masri* (n 3) [241].
[250] *El-Masri* (n 3) [235] [240].
[251] *El-Masri* (n 3) [239].
[252] *El-Masri* (n 3) [235] [240].

out any new approach to responsibility.[253] These divergences ultimately emerge from the large gaps in the Court's reasoning. However, Nollkaemper's analysis is intuitively more compelling. He notes that the 'primary rules thus in a way incorporate questions that in the ILC texts are considered as freestanding secondary rules.'[254] The decision is consistent with the internal logic of the Convention: once jurisdiction is engaged, the obligation to secure the rights protected should extend without distinction as to the identity of the party that violates them.[255] The Court was called upon to consider Articles 7, 14, 15 and 16 of the ARSIWA in reaching this decision. [256] However, it was clearly able to foster a wide basis for attribution of responsibility and conduct in its own distinctive legal order.

3.4.2. Attribution to the Host State

Abu-Zubaydah and Al-Nashiri's cases against Poland, Romania and Lithuania currently remain pending. The Venice Commission has expressed that secret detention gives rise to issues under, inter-alia, Articles 3, 5 and 6 of the ECHR, and that responsibility will be engaged if a state 'is informed or has reasonable grounds to suspect that persons are held incommunicado… on its territory.'[257] A state may also be held responsible for a failure to take preventive measures in the absence of knowledge.[258] It is likely that the Court will carve a similar path in their cases. The submissions in each case are substantially similar and the argument proceeds on the following basis. The state is responsible for 'knowingly, intentionally, and actively collaborating' in secret detention on the basis of a positive obligation to secure the protected rights and the 'acquiescence or connivance' of state authorities.[259] The obligation to prevent infringing conduct of private parties is more persuasive when the acts occur within the state, and extends to situations where the state 'lacks effective control over the territory.'[260] The agreements fostering the scheme could thus be read as manifesting an intention to arbitrarily deprive individuals of their liberty and a fair

[253] *El-Masri* (n 3) See Assier Garrido's response on the *EJIL Talk* Blog in Nollkaemper (n 198).
[254] Garrido contends that the majority of the Court's reasoning is at *El-Masri* (n 3) [239].
[255] Nollkaemper (n 198).
[256] *El-Masri* (n 3) [97].
[257] Venice Commission Report (n 32) [123-127].
[258] Venice Commission Report (n 32) [127-130].
[259] ECHR Art. 1; *Al-Nashiri v Poland* (n 87) [151-152]; *Al-Nashiri v Romania* (n 79) [169]; *Abu-Zubaydah v Poland* (n 87) [239-241]; all citing *Ilaşcu* (n 245) [313, 318].
[260] *Al-Nashiri v Poland* (n 87) [152]; *Al-Nashiri v Romania* (n 79) [170]; *Abu-Zubaydah v Lithuania* (n 109) [173]; each case is relying on *Ilaşcu* (n 246) [331, 339] (in that case a region of Moldova had proclaimed independence); See also Nolte noting that 'stationing agreements' would not affect the application of the Convention: Czaplinski (n 216) 277, 283.

trial in contravention of the Articles 5 and 6 of the ECHR. The Polish agreement expresses the purpose of the centre to 'detain and interrogate CIA suspects,' and similar engagements have been undertaken by the other states.[261] This evidence of collusion is supported by the high degree of 'logistical support and servicing.'[262] It is apparent that the Court's recognition of secret detention as an element of extraordinary rendition in *El-Masri* will support the finding of a violation.[263] However, it may be difficult to hold that the states held actual or constructive knowledge of the risk of torture. This would involve a similar assessment likely to be taken by the CAT in consideration of host state liability. Nevertheless, this remains another instance where liability is effectively secured through positive obligations.

3.4.3. Attribution to the Transit State

The ECtHR has not yet been called upon to consider the liability of transit states. The Venice Commission adopted an expansive interpretation of jurisdiction extending to airspace, and asserted that the obligation to secure the Convention rights includes a positive obligation to prevent aircraft suspected of transiting these suspects.[264] This could seemingly extend to situations where a suspect is actually on the plane. However, in the 'the empty plane scenario' the person is not on board when it comes within state territory.[265] It is apparent that such a person is not within the framework of jurisdiction conceived by the ECtHR: territorial, incidental, or under 'effective control and authority.'[266] Egan has contended that a jurisdictional linkage could possibly be affirmed through an 'object and purpose' approach that looks to the Convention 'as an instrument of European public order.'[267] In this case, a jurisdictional connection could be affirmed as the complicit conduct that is said to give rise to breach occurs within the territorial jurisdiction of the participatory state – even though the victim is not. However, Egan warns that the Court has been wary of a 'floodgate' of liability in this area.[268] An alternative approach could arise through the 'functional' theory:

[261] See for example *Abu-Zubaydah v Poland* (n 87) [41].
[262] See for example *Abu-Zubaydah v Poland* (n 87) [41]; *Al-Nashiri v Poland* (n 87) [154]; *Al-Nashiri v Romania* (n 79) [172]; *Abu-Zubaydah v Poland* (n 87) [38-38; 242]; *Abu-Zubaydah v Lithuania* (n 110) [37, 40, 90].
[263] *El-Masri* (n 3) [202-203].
[264] Venice Commission Report (n 32) [143-146].
[265] Egan (n 9) 22-24.
[266] See respectively ECHR Art 1; *Banković and Others v Belgium and 16 Other Contracting States* (2001) 11 BHRC; *Stocké v Germany* [1991] ECHR 25 [43] cited in F de Londras, 'Shannon, Saadi and Ireland's Reliance on Diplomatic Assurances under Article 3 of the ECHR' (2007) IYBIL 1, 6.
[267] Egan (n 9) 23.
[268] Egan (n 9) 23.

jurisdiction is engaged if the state had '"authority" and "control" over whether a breach of human rights is, or is not, committed.'[269] This could extend to a positive obligation to investigate whether a flight has been engaged in extraordinary rendition. However, a majority of the Court is yet to accept this line of reasoning. [270] If a jurisdictional linkage can be affirmed it will be necessary to find a violation of the Convention. The obligations contained in Article 3 could be relevant if the positive obligation to prevent acts of torture by third parties and the obligation of non-refoulement were combined into a single test: 'that Contracting states are responsible for *failing to take action on their territory* which as a direct consequence gives rise to a substantial risk that a person will face ill-treatment in another jurisdiction.'[271] This approach is consistent with that adopted by the Venice Commission and the *El-Masri* conception of positive obligations. However, it may be difficult to satisfy the Court that there were substantial grounds for believing that an individual would be tortured, as the applicant must demonstrate that they are 'personally at risk' of being tortured in the destination state.[272] This was reflected in the *Babar Ahmad* case, where a number of terrorist suspects contended they would be rendered to Egypt if extradited to the US.[273] The Court relied on diplomatic assurances to dismiss the risk of torture in spite of evidence indicating a co-conspirator had been subject to extraordinary rendition.[274] The Court appears to have taken broader cognizance of the practice in *El-Masri's* case. However, *Babar Ahmed* suggests that these decisions are highly factually dependent. This analysis may ultimately suggest a broader role for the ARSIWA in the case of a transit state.

3.5. Attribution under ARSIWA

Each instance of state responsibility arising in the cases under examination has involved conduct that is directly attributable to the state, such as wrongful acts giving rise to the arbitrary detention or refoulement of individuals subject to rendition. However, in other instances the states have been responsible for conduct which is plainly not their own.[275] The logical tensions inherent in this process could possibly be avoided if the state's wrongfulness

[269] *Al-Skeini and Others v United Kingdom*, App. No. 55721/07, 53 (ECHR, 7 July 2007) (Judge Bonello, concurring).
[270] Egan (n 9) 24.
[271] Ibid, 27.
[272] Ibid, 29; See *Vilvarajah and Others v United Kingdom* 14 EHRR 248 (1992).
[273] *Babar Ahmad and Others v United Kingdom* (n 9); cited in Egan (n 9) 29.
[274] *Babar Ahmad and Others v United Kingdom* (n 9) [112]; cited in Egan (n 9) 29.
[275] Nollkaemper (n 198).

is isolated in accordance with Article 16 of the ARSIWA. Moreover, the primary rule may suggest a broader basis for liability.

3.5.1. Attribution to the Sending State

The conduct of state officials amounting to a violation of the prohibition of non-refoulement would normally be attributable to the sending state directly.[276] However, it may be possible to establish that a state is independently responsible for aiding and assisting the conduct that it acquiesced in or failed to prevent. [277] It would necessary to establish that the states had 'knowledge of the circumstances' and undertook actions 'with a view to facilitating the commission of that act.[278] A relevant example is where one state 'knowingly providing an essential facility for the abduction of persons.'[279] However, the limitations have been read as imposing a requirement for the aiding and assisting state to be at least aware of the specific intent of the main perpetrator.[280] In *Agiza* and *Alzery*'s cases, it would be difficult to establish that Sweden was aware of the specific intent of the US as the incidents occurred before details of the programme emerged and Sweden had obtained diplomatic assurances.[281] It would also be difficult to infer that Sweden was aware of the specific intent of the US authorities at the airport as Sweden 'lost control of the situation.'[282] In *El-Masri,* constructive knowledge of the risk of torture could be imparted as details of the rendition programme had emerged by this stage. However, there is no evidence that Macedonia was aware of his onward destination or that the capture shock treatment would take place. [283] The notion of complicity contained in the ARSIWA thus ultimately amounts to a tenuous basis of attribution in these cases.

[276] ILC Commentaries (n 176) 150.
[277] Ibid, 176.
[278] ARSIWA Art. 16 (b); Ibid.
[279] Ibid, 175.
[280] *Genocide Convention* case (n 185) [421].
[281] Details began to emerge in 2004, they were rendered in 2002 (at the same time): Egan (n 9) 5.
[282] *Alzery* (n 4) [4.21].
[283] El-Masri was rendered in 2004: *El-Masri* (n 3) [18] [21-22] [37] [74]: A Macedonian exit stamp was affixed to his passport, but further evidence would presumably have been raised if it existed.

3.5.2. Attribution to the Host State

The instances of attribution for the conduct of secret detention would be rare unless the wrongful act is conceived as arising from an omission.[284] However, the applicability of Article 16 is more readily apparent in these circumstances as it is conceivably an instance of 'knowingly providing an essential facility' for the commission of an internationally wrongful act.[285] Actual knowledge of the aspects of secret detention giving rise to a violation of the ICCPR could be imparted through the agreements facilitating the scheme and the conduct of logistical support and servicing of the arrangements. Nevertheless, the circumstances of secret detention apparently 'enabled [the CIA]… to use the place however they liked.'[286] Apart from 'sporadic visits' (which presumably would have been highly controlled in any case) the facilities were considered off limits for local authorities.[287] It may thus be difficult to infer that the host states were aware of the specific intent to commit torture. This requirement obviously imposes a higher standard than constructive knowledge.

3.5.3. Attribution to the Transit State

It has been contended that the transit state function is typical of aid or assistance.[288] An analogy can be drawn from the use of territory to facilitate an armed attack.[289] It has been suggested that an omission (a failure to investigate the planes) cannot fall within Article 16 although it is possible that the states granted express permission for transit.[290] However, it would be difficult to prove that the transit states were aware of the specific intent of the US to commit torture.[291] It may be easier to establish that a close ally (Britain) was aware of the specific intent of the US, as opposed to the position of a state that was otherwise generally passive (Ireland) in the War on Terror. Nevertheless, direct evidence of this awareness is unlikely to emerge amidst a climate of state secrecy and national security in any case. Moreover, the states have obtained diplomatic assurances from the US and have explicitly

[284] ILC Commentaries (n 176) 68.
[285] ILC Commentaries (n 176) 155.
[286] *Abu-Zubaydah v Lithuania* (n 110) [50].
[287] Ibid.
[288] ARSIWA Art. 16; Venice Commission Report (n 32) [45].
[289] C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility' in Crawford, J. Pellet, A. and Olleson, S. (eds) *The Law of International Responsibility* (Oxford UP, 2010) 280, 285.
[290] *Genocide Convention* case (n 185) [432]; ILC Commentaries (n 176) 155; See for example *Al-Nashiri v Poland* (n 87) [43].
[291] ARSIWA Art. 16 (b); *Genocide Convention* case (n 185).

denied awareness. In the absence of such evidence the effect of Article 16 would be emasculated. The problem of proving rendition is thus cumulative: as complicity extends to remote connections it becomes more difficult to secure evidence supporting attribution to the state.

3.6. Preliminary Conclusion

This analysis has confirmed that the notion of complicity contained in Article 16 of the ARSIWA does not offer a more convincing basis for attribution. The requirement for the complicit state to be aware of the specific intent of the main perpetrator imposes a high standard. This may be possible to affirm to a deprivation of liberty in cases of detention but would be difficult to sustain in respect of the risk of torture. Commentators have criticised Article 16 'unduly monolithic' for these reasons.[292]

In *Agiza* the CAT relied on positive obligations and non-refoulement to isolate the independent wrongfulness of the state. The HRC took a broader stand in *Alzery* by finding that Sweden had acquiesced in wrongful conduct on state territory. The ECtHR went further in *El-Masri* by holding the sending state responsible for failing to prevent the conduct of foreign agents in a foreign state. The CAT allows wide scope for finding a host state liable through the prohibition on complicity. The *Alzery* formula of acquiescence lays a basis for finding host states in violation of a number of provisions of the ICCPR. The wide ambit of positive obligations under the ECHR will be of assistance in Abu-Zubaydah and Al-Nashiri's cases. As the HRC and ECtHR may encounter jurisdictional and evidential issues the UNCAT appears to offer the most viable basis for liability for the transit state. However, the analysis has revealed a cumulative problem of proving rendition, as it may be difficult to adduce evidence proving that transit and host states were aware of the risk of torture.

It is apparent that constructive knowledge is a lower threshold than shared intent. It is unsurprising that the ICJ afforded the focus to due diligence in the *Genocide* case.[293] The tribunals have carved out distinctive methods for holding a state responsible for human rights violations committed other states. An assumption of unity in the legal order appears to be

[292] HP Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge, 2011) 193.
[293] *Genocide Convention Case* (n 185); O Corten and P Klein, 'The Limits of Complicity as a Ground for Responsibility' in K. Bannelier, T. Christakis and S. Heathcote (eds), *The ICJ and the Evolution of International Law – The Enduring Impact of the Corfu Channel Case* (London, Routledge, 2012) 328.

difficult to uphold in this instance.[294] The interest of consistency can be legitimately scarified for the sake of the rights of the individual. Moreover, it is clear that positive obligations offer a more effective basis for liability in these cases.

Conclusion

In one sense, the tide has turned on extraordinary rendition. A Pandora's box now has opened implicating many European states in the practice. The decision in *El-Masri* was somewhat inevitable as a weight of evidence was assessed by a Court hostile to notions of acts of state, and in a climate abhorred by the excesses of the war on terror. It is likely that Al-Nashiri in Abu-Zubaydah will be successful in their pending cases. Nevertheless, the problem of proving acts shrouded in secrecy remains evident.

In Chapter II we saw the tribunals have adopted a flexible approach to the reception of evidence and will be willing to lower the standard of proof and shift the burden to the state to achieve a more equitable resolution. However, the analysis has revealed that states hold an interest in maintaining denial, which affirms the importance of securing the co-operation of the state. In Chapter III we saw the tribunals have followed traditional approach to attribution by isolating independent wrongfulness. However, they have also found states responsible for violations committed by foreign agents on territory and abroad through positive obligations and notions of acquiescence. They have thus carved out a broader path to responsibility than that arising under the ARSIWA and the efficacy of Article 16 was rendered nugatory.

The tribunals have adopted a common solution in issues of evidence and attribution by affirming positive obligations to uphold the accountability of misleading and recalcitrant states. However, the analysis has revealed a cumulative problem in proving extraordinary rendition: as the spider's web untangles to more remote connections it becomes more difficult to adduce evidence leading to a wide basis of liability for participatory states. This represents a 'cause and effect' situation reflecting the extra-jurisdictional nature of many contemporary human rights abuses.

[294] See generally A Nollkaemper, 'Constitutionalization and the Unity of the Law of State Responsibility' (2009) 16(2) IJGLS 535.

Human rights tribunals have thus adopted approaches to evidence and attribution that ease the burden of proving that host, state, and transit states are responsible for extraordinary rendition. The experience of these cases has demonstrated that states learn from their mistakes and will adopt increasingly covert operations. The resolve of these tribunals to affirm the rights of individuals against such insidious practices is an essential element of a legal order premised on human dignity and the rule of law.