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The Practice of Shared Responsibility in relation to Detention and Interrogation Abroad: The 'Extraordinary Rendition' Programme

Helen Duffy[*]

1. Introductory overview

The focus of the chapter is extraterritorial detention and interrogation, and specifically the practice of 'extraordinary rendition'. While not a legal term of art, rendition is broadly recognised as involving the state-sponsored abduction from one state, with or without the cooperation of the government of that state, and the extra-judicial transfer to another state for detention and abusive interrogation outside the normal legal system. [1] The 'war on terror' saw a multifaceted 'extraordinary rendition programme' (ERP or the programme) operated by the Central Intelligence Agency (CIA), designed and authorised at the highest levels of the United States (US) Bush administration, and made possible by the participation of a global network of support from many other states and non-state actors.

The unusual characteristics of the ERP make it a rich scenario to analyse shared responsibility. In addition to the responsibility of the United States for the acts of its intelligence agents abroad, others states have housed CIA-operated 'black sites', assisted in abductions and transfers, provided staging stopover or refuelling support on their territories, or provided intelligence cooperation in various guises to the ERP.

Section 2 of this chapter provides a factual overview of the ERP. Section 3 explores the multiple breaches of international law, by multiple states, involved in the ERP. Secondary rules are addressed in section 4, including 'aiding and assisting' or 'complicity'. The examination of the

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[1] ECtHR working definition in *Babar Ahmad and others* v. *the United Kingdom*, App. Nos. 24027/07, 11949/08, and 36742/08 (ECtHR, 6 July 2010), para. 113.

law is followed by a sketch of its potential application in relation to particular ERP scenarios in section 5.

The focus on this chapter is on the responsibility of multiple states. In addition to state partners, the programme appears to have involved a range of non-state actors. Among them are private companies, including those that disguised flight plans and provided and operated aircraft for rendition flights.[2] Important issues also arise regarding individual responsibility of a broad range of individuals. The many processes underway, relevant to assessing responsibility, are sketched out at section 6.

2. Overview of the facts

As a secret detention programme, driven by the CIA and supported by many other agencies, which targeted those detainees deemed to be of highest intelligence value (High Value Detainees or HVDs), the facts concerning the extraordinary rendition programme are predictably untransparent. Its *modus operandi*, and the wall of secrecy that has surrounded it since, reflects the resolute determination to ensure its secrecy at the time and thereafter.[3] European states have been found by Council of Europe Commissioners to have been involved in the 'systematic cover up' of facts related to the programme,[4] while a 'cult of secrecy' has been said to have made the rendition programme possible in the first place and prevented determinations of responsibility.[5]

[2] E.g. *Mohamed* v. *Jeppesen Dataplan Inc.*, 614 F.3d 1070 (9th Cir. 2010) (*en banc*), rejected on states secrets grounds.

[3] E.g. Parliamentary Assembly of the Council of Europe (PACE), First Dick Marty report, 'Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States', 7 June 2006 (CoE Rendition Report 2006), at 1.

[4] Second PACE Dick Marty report, 'Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States', Doc. 11302 rev., 11 June 2007 (CoE Rendition Report 2007); statement by T. Hammarberg in 'Rights chief: Europe "complicit" in U.S. torture', *CBS News*, 1 September 2011.

[5] Third PACE Dick Marty Report (2011), 'Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations', at 6, available at www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf. He describes resort to secrecy laws to shield intelligence agencies from accountability within the Council of Europe states as 'simply unacceptable' (Marty 2011 Report).

In these circumstances, it is remarkable that so much information has seeped into the public domain. The sources of such information are many and varied: investigative journalists;[6] non-governmental organisations;[7] insider accounts;[8] official documents from within the US administration;[9] information emerging from litigation processes (national[10] and international);[11] regional or international reports, such as by the Parliamentary Assembly of the Council of Europe, the European Parliament and the United Nations (UN) Joint Study;[12] and national level enquiries,[13] including most notably the report of the US intelligence senate committee (SSCI).[14]

The original authorisation for the ERP appears to have emanated from a classified Presidential Memorandum of Notice, signed by President Bush on 17 September 2001, granting the CIA authority to set up secret detention facilities outside the US where it could detain and interrogate

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[6] For one of the earliest accounts to grasp public attention, see D. Priest and B. Gellman, 'U.S. Decries Abuse but Defends Interrogations', *Washington Post*, 26 December 2002.

[7] E.g. Open Society Justice Initiative, 'Globalising Torture: CIA Secret Detention and Extraordinary Rendition', Report, 5 February 2013.

[8] See e.g. FBI interrogator Ali Soufan's account – A. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (New York: W.W. Norton & Co., 2011); or that of CIA former head of counter-terrorism Jose Rodriguez, J. Rodriguez, *Hard Measures: How Aggressive CIA Actions after 9/11 Saved American Lives* (New York, Threshold Editions, 2012).

[9] Office of the Inspector General, Central Intelligence Agency, 'CIA OIG Special Review of [redacted] Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)', 7 May 2004, (released 24 August 2009); 'Background Paper on CIA's Combined Use of Interrogation Techniques', CIA to Office of Legal Counsel, Department of Justice, 30 December 2004, (released 24 August 2009); Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Programme (22 April 2009); Committee on Armed Services, United States Senate, 'Inquiry into the Treatment of Detainees in U.S. Custody', 20 November 2008, (released 22 April 2009), at 14.

[10] E.g. *Habeas* proceedings and civil litigation have revealed information, in particular the 'Richmor' civil litigation between private incorporations involved in the ERP (*Richmor Aviation* v. *Sportsflight Air*, Columbia County Index No. 2171/07 (N.Y. App. Div. 2011), as has the Italian trial in the *Abu Omar* case.

[11] E.g. *El Masri* v. *the Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (ECtHR, 13 December 2012) (*El Masri*); *Abu Zubaydah* v. *Poland*, App. No. 7511/13 (ECtHR, 24 July 2014); *Al Nashiri* v. *Poland*, App. No. 28761/11 (ECtHR, 24 July 2014).

[12] E.g. 'Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin', Doc. A/HRC/13/42 (19 February 2010), para. 103 (UN Joint Study on Secret Detention 2010).

[13] E.g. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Commission); UK Parliamentary Joint Committee On Human Rights, 'Nineteenth Report', 18 May 2006; German Bundestag, 'Report of the 1st Inquiry under Article 44 of the Basic Law', 18 June 2009.

[14] US SSCI, 'Study of the Central Intelligence Agency's Detention and Interrogation Program', 13 December 2012 (a summary was released on 3 December 2014) (Senate Report). At page 10, the Senate Report notes the classified Executive Summary and full Committee Study lists specific countries by letter (for example 'Country J'), but the letters have been redacted by the executive branch for public release of this Report.

HVDs.[15] The CIA developed a set of 'enhanced interrogation techniques' (EITs) for use on these HVDs. In 2002 these techniques were given the legal seal of approval in memoranda from the US Department of Justice Office of Legal Counsel.[16] The authorised treatments were described as comprising 'conditioning', 'corrective', and 'coercive' techniques.[17] They included: whipping by the neck into concrete walls; chaining to chairs for a period of weeks; forcing into a small box for up to 18 hours; stripping and hanging naked; exposure to extreme noise and cold; sleep deprivation; and 'waterboarding' or simulated drowning.[18] In addition, the official 'standard conditions of confinement'[19] involved solitary confinement, hooding to disorient the detainee and keep him 'from learning his location or the layout of the detention facility', use of leg shackles, constant noise, and continuous bright light. These conditions have been described as being 'in place for several years', and as having exacted, over time, 'a significant psychological toll'.[20] In turn, the 'standardised conditions of *transfer*' involved photographing the detainee naked, dressing in a diaper and denying access to the toilet; using blindfolds, goggles, earphones or taping the ears; shackling by hands and feet; and transportation in semi-reclined position causing severe pain and discomfort.[21] The treatment of detainees was designed and implemented to maximise disorientation and vulnerability. As noted below, many of these approved techniques and conditions have themselves, or cumulatively, been found to amount to torture and cruel, inhuman and degrading treatment. It is now clear that the treatment was far more barbaric than these authorised techniques.[22]

[15] Presidential Memo, 17 September 2002.
[16] U.S. Department of Justice, Office of Legal Counsel, 'Memorandum for Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. paras. 2340–2340A', 1 August 2002.
[17] OLC Combined Techniques Memo (10 May 2005).
[18] Info from: CIA OIG Special Review 2004, n. 9; Department of Justice, Office of Professional Responsibility, Report, 'Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', 29 July 2009, available at www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf (Department of Justice Report 2009); ICRC, 'Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody', 2007, at 28–31 (ICRC Report).
[19] CIA Director, George Tenet on 28 January 2003: Guidelines on Confinement Conditions for CIA Detainees, Appendix D of CIA OIG Special Review 2004, n. 9.
[20] Ibid.
[21] CIA Background Paper on Combined Techniques (2004), at 2.
[22] Senate Report, n. 14; 'Inquiry into the Treatment of Detainees in US Custody', US Senate Armed Services Committee, 20 November 2008; Interview with John Helgerson, 'Ex-CIA Inspector General on Interrogation Report: "The Agency Went over Bounds and Outside the Rules"', *Spiegel Online*, 31 August 2009.

Rendition victims were held and interrogated in undisclosed locations, sometimes called 'black sites'.[23] They were generally flown to multiple 'black sites', helping to ensure they could not be traced, and sites were closed if information concerning their existence threatened to come to light.[24] The CIA at times operated in unmarked planes, and filed false flight plans showing erroneous destinations, or flew without flight plans altogether.[25] The widely reported use of 'front companies' made it possible to more effectively obscure the programme's activities.[26] The design and implementation sought to ensure maximum secrecy and to avoid supervision, judicial or other, pursuant to the end of unfettered intelligence gathering.[27]

Although the programme was largely operated by the CIA, it is now a matter of public knowledge that the US programme of detention and interrogation has been carried out with, and depended upon, many other states.[28] The extent of collaboration from particular states remains uncertain, but one report puts the number of states known to have participated in some way in the ERP at fifty four.[29] In some cases, foreign authorities were involved in the arrest, detention, and transfer of individuals into US custody.[30] Others took custody of rendered individuals following their abduction and transfer.[31] Some states have housed CIA-operated 'black sites' for interrogation and detention, including Afghanistan, Lithuania, Morocco, Poland, Romania, and

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[23] Ibid.

[24] On 4 December 2002, the secret detention facility in Thailand was closed down, reportedly as information on its existence had come to light: D. Priest, 'CIA holds terror suspects in secret prisons', *Washington Post*, 2 November 2005; OIG Documents FOIA request F-2004-01456, document 8, dated 3 December 2002, available at www.aclu.org/files/assets/20091120_Govt_Para_4_55_Hardcopy_Vaughn_Index.pdf, at 15.

[25] See, e.g., official documents obtained through FOIA requests in Poland showing CIA and 'flight planning accomplice' Jeppesen filing 'dummy' flight plans while PANSA collaborated by not adhering to international flight planning regulations: Open Society Justice Initiative and Helsinki Foundation for Human Rights, 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency', Report, 22 February 2010, at 3.

[26] S. Shane et al., 'C.I.A. Expanding Terror Battle Under Guise of Charter Flights', *New York Times*, 31 May 2005; C. Bollyn, '"Ghost Planes" Make Suspects Disappear, Pentagon has new secret weapon in "war on terror"', *American Free Press*, 14 January 2004.

[27] CIA OIG Special Review 2004, n. 9; Department of Justice Report 2009, n. 18.

[28] Marty CoE Reports, n. 3, n. 4 and n. 5; European Parliament Temporary Committee, '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; 'Globalising Torture' Report, n. 7.

[29] Globalising Torture Report, ibid.

[30] UN Joint Study on Secret Detention 2010, n. 12.

[31] 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (Geneva: International Commission of Jurists, 2009), at 81 (Eminent Jurists Report), available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf.

Thailand.[32] Additional states, such as Syria, Jordan, Egypt, and Morocco are known to have received prisoners from the US for the purpose of using interrogation techniques amounting to torture.[33] Many others are alleged to have provided airports and military bases for 'staging' or 'stopover' by aircraft carrying detainees.[34] Some states are accused of having allowed agents to participate in interrogations on foreign soil,[35] of having provided intelligence to those carrying out this programme, or of systematically having relied on intelligence information extracted under it.[36] This multiple-actor global system led the Council of Europe to refer to the rendition programme as a 'spider's web spun across the globe'.[37]

On his second day in office, President Obama signed executive orders purporting to end secret detention and ensure 'lawful interrogations'.[38] The President ordered an end to torture by the US, withdrew the infamous 'torture memos' and ordered the closure of CIA detention sites.[39] He qualified the latter commitment in a footnote by noting that 'short term' or 'transitory' detention is not covered by the ban.[40] It has been reported that the administration retains the right of 'intelligence authorities' to transfer individuals to foreign states for temporary detention and interrogation. It is therefore a matter of on-going speculation to what extent, at the time of writing, rendition is a matter of history, and whether similar ends to those pursued by the ERP are achieved through other means, notably involving other states as 'proxies'.[41]

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[32] For a report on European states' involvement see e.g. CoE Rendition Reports 2006 and 2007, n. 3 and n. 4. See e.g. Abu Zubaydah's cases against Poland and Lithuania, n. 11. The Senate Report, n. 14, at 61, noting multiple sites in some states: '[four CIA detention facilities were established in Country [REDACTED]… The CIA later established two other CIA facilities in Country [REDACTED]'.

[33] UN Joint Study on Secret Detention 2010, n. 12.

[34] CoE First Rendition Report 2006, n. 3, cites 1,245 CIA flights from European territory to countries where suspects faced torture.

[35] See, for example, 'Report of the Special Rapporteur on The Protection and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin', HRC, UN Doc. A/HRC/10/3 (4 February 2009) (Scheinin Report 2009). See below section 5 for legal issues arising and examples.

[36] Ibid., paras. 51–57.

[37] CoE First Rendition Report 2006, n. 3.

[38] See 'Executive Order 13491 – Ensuring Lawful Interrogations'; 'Executive Order Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities', The White House, available at www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities (together Obama Executive Orders).

[39] Ibid.; on torture memos see Department of Justice Report 2009, n. 18.

[40] A footnote to the Order provides that: 'The terms "detention facility" … in this order do[es] not refer to facilities used only to hold people on a short-term, transitory basis.' Executive Order 13491, n. 38, at sec. 2 (g).

[41] 'Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President', Department of Justice, 24 August 2009; D. Johnston, 'U.S. Says Rendition to Continue, but With More Oversight',

This was illustrated by subsequent revelations of individuals abducted and transferred from Kenya, apparently by Kenyan officials, and held in Somali prisons, reportedly at US behest and pay, and with US involvement in interrogations.[42] While not CIA-run sites, the sites in practice are no less 'black' and the consequences for detainees are no less grave.[43] Several other cases have been brought to US courts recently against individuals detained and questioned unlawfully in violation of many rights in several African locations, before being transferred to the US for trial.[44] There may therefore be examples of similar questions concerning shared responsibility arising beyond the closure of the CIA-run facilities.[45]

3. Relevant international obligations

The implementation of the ERP constituted a violation of numerous obligations. Given the extent of state cooperation these may all be potentially relevant to shared responsibility. Human rights law is most straightforwardly relevant, though the programme also appears to have involved violations of a range of other rules of international law.

3.1 Wronging other states: territorial integrity of states, Chicago Convention, extradition treaties and consular relations

As regards the many states on whose territory aspects of the rendition programme have unfolded the principle of territorial integrity is relevant. Even limited incursions onto another state's

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New York Times, 24 August 2009, (describing policy of continued use of extraordinary rendition, but with greater reliance on 'diplomatic assurances').

[42] See A. McCoy, 'Impunity at Home, Rendition Abroad', *Huffington Post*, 14 August 2012: 'In July 2009, for example, Kenyan police snatched an al-Qaeda suspect, Ahmed Abdullahi Hassan, from a Nairobi slum and delivered him to that city's airport for a CIA flight to Mogadishu ... While Somali guards (paid for with U.S. funds) ran the prison, CIA operatives, reported the *Nation's* Jeremy Scahill, have open access for extended interrogation.'

[43] See the American Civil Liberties Union's letters to the FBI and State Department in which they express their concern about the detention of Kenyan national Ahmed Abdullahi Hassan in Somalia, available at www.aclu.org/sites/default/files/field_document/150122_fbi_overseas_interrogations_request_final.pdf and www.aclu.org/sites/default/files/field_document/150122_state_dept_overseas_interrogations_w_annex.pdf (both dated 22 January 2014).

[44] 'Renditions get Ongoing Embrace under Obama Administration', *Independent*, 2 January 2013.

[45] Alternative detention sites run by the Department of Defence continue to operate without judicial oversight raising comparable concerns. H. Duffy, *The War on Terror and the Framework of International Law*, 2nd edn (Cambridge University Press, 2015), Chapter 7.B.3.

territory, to effect an arrest or abduction operation for example, may violate the principles set down in Article 2(4) of the UN Charter,[46] and in any case the prohibition of the exercise of extraterritorial jurisdiction.

Also potentially relevant are the rules governing the circumstances in which civil aircraft may fly through or land in another state's territory, enshrined in the Chicago Convention on International Civil Aviation.[47] It has been suggested that the use of *civil* aircraft for extraordinary rendition would be a breach of the Chicago Convention, which excludes state aircraft.[48] In any case, a rendition flight landing on a state's territory absent prior agreement, or concealing the nature of the flight, would violate the Chicago Convention.

The ERP may also fall foul of applicable rules under the Vienna Convention on Consular Relations,[49] which are aimed at ensuring that individuals in states of which they are not nationals are afforded consular protection.[50] It has been the subject of criticism, for example, in the case of the Canadian victim Maher Arar, that the Canadian consulate was not informed of his detention, becoming aware of it only through his family, and that the US allegedly refused to acknowledge Arar's transfer even after inquiries by Canadian consular officials.[51] This could be a matter of shared responsibility between the US and other states where others were involved in the detention and transfer (e.g. Italian agents in Abu Omar's case, Pakistani officials in Abu Zubaydah's case).[52] As these rules are primarily obligations owed to the territorial state, a critical question is whether the operations on other states' territories – abductions, detentions or landing/flight of

[46] This is not uncontroversial, but see e.g. discussion Duffy, ibid., Chapter 5. Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).
[47] Convention on International Civil Aviation, Chicago, 7 December 1944, in force 4 April 1947, 15 UNTS 295 (Chicago Convention). See e.g. presentation by Richard Gardiner on rendition as a violation of the Convention in 'Blair's foreign policy and its possible successors', Chatham House Working paper EEDP 04/07, available at www.chathamhouse.org.
[48] Ibid. The Convention facilitates the entry of civilian aircraft (Article 3) while state aircraft are excluded from the Chicago Convention regime and may only enter the airspace of another state if authorised under special (ad hoc or standing) agreements (Article 4). State flights include military or police flights and would appear to cover rendition flights. As regards the sometimes unclear distinction between state and civilian aircraft, three possible approaches based on command and control, use and purpose, and registration, or a combination thereof, are explored by Gardiner, ibid. In practice, some but not all rendition flights were logged as 'state' flights.
[49] Vienna Convention on Consular Relations, Vienna, 24 April 1963, in force 19 March 1967, 596 UNTS 261.
[50] Article 36 Vienna Convention on Consular Relations, ibid.
[51] *Arar* v. *Ashcroft*, Complaint 60 18 CA No. 04-CV-249-DGT-VVP (EDNY 2004) (Arar Complaint), paras. 39–40. See also D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' 19 (2006) HHRJ 123, at 146.
[52] Hussan Mustafa Osama Nasr (Abu Omar) was abducted by US and Italian agents from Milan in 2003. Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah) was kidnapped by US and Pakistani intelligence officials in 2002.

aircraft – were preceded by the consent of the territorial states. This is a question of fact that in some situations remains uncertain. In most cases of abductions and detentions that have come to prominence, it would seem to be the case that such consent was forthcoming.[53] This is patently so for operations in which both states participated directly, and appears almost certainly the case for the establishment of detention sites that depended on state engagement in one form or another.[54] In respect of flights landing for refuelling and the like it may be less clear.

In cases where there was consent, leaving aside situations where peremptory norms would apply, no shared responsibility in the interstate relations would arise. However, potentially it could arise between the territorial state, and the US (or other states participating with the US) on the one hand, in relation to injured private persons, on the other.

If there were no consent, the acts of CIA agents on foreign territory would appear to give rise to responsibility on the part of the US, but questions of shared responsibility could still arise where one or more foreign states supported or worked with the US.

3.2 International humanitarian law

Successive US administrations have asserted that the US 'is engaged in an armed conflict with al-Qaeda, the Taliban, and their supporters [and as] part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not [human rights law], is the applicable legal framework governing these detentions'.[55] Whether or not International Humanitarian Law (IHL) in fact applies to the ERP is a controversial matter than can be left aside here.[56]

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[53] The act of state consent is often murky and states may never acknowledge consent that is given, as illustrated e.g. in relation to the killing of Osama bin Laden. Duffy, *The War on Terror*, n. 45, Chapter 9.

[54] See *Abu Zubaydah* litigation, n. 11, where there are allegations that a document was drawn up agreeing to the site, and the state actively removed the normal processes of law. Less information is available in some other cases. The CoE Rendition Report 2007, n. 4, para. 117 considers there were 'operating agreements' for black site detention in Romania.

[55] See 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America, Addendum, Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee', HRC, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (1 November 2007), available at www.univie.ac.at/bimtor/dateien/usa_ccpr_2008_govresponse.pdf. The Obama administration essentially maintains this line. See e.g. Executive Order 13491, n. 38; *Al-Bihani* v. *Obama (Al-Bihani II)*, 590 F. 3d 866, 872-73

However, to the extent that IHL would apply, the ERP would involve violations of IHL. These include most notably the prohibition on torture and ill treatment, and the requirement of some degree of oversight and procedural guarantees in respect of detention.[57] In international conflicts, specific provisions require registration of detainees and access by, among others, the International Committee of the Red Cross (ICRC),[58] and prohibit transfer of detainees between detaining powers, absent safeguards and guarantees of the protection under IHL.[59] Violations, inter alia, of Article 49 concerning forced transfers in occupation constitute a 'grave breach' of the Geneva Conventions, also carrying individual criminal responsibility, which all states are obliged to repress. Although there are no comparable explicit rules for non-international conflicts, Common Article 3 protects against ill treatment and provides for basic fair trial guarantees. Transfer to a situation in which there is a clear risk of such violations cannot be consistent with the positive obligations to 'do everything in their power' to safeguard respect for the Geneva Conventions, applicable in either type of conflict.[60]

(D.C. Cir. 2010); *Hamlily* v. *Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); R. Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 48. The US has refused to answer questions of e.g. the UN Human Rights Committee on the basis, inter alia, that International Humanitarian Law (IHL) not International Human Rights Law (IHRL) applies. See US report to the HRC, ibid.

[56] See Duffy, *The War on Terror*, n. 45, Chapter 10.3.2.

[57] Ibid., Chapter 8.B.1. See also J. Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375.

[58] ICRC Report, n. 18.

[59] Pejic, 'Procedural Principles and Safeguards', n. 57. Article 12(2) Geneva Convention III, n. 60, permits transfer of prisoners of war only into the hands of a party to the conflict where the transferring power has satisfied itself 'of the willingness and ability of such transferee Power to apply the convention. See likewise Article 49(1) Geneva Convention IV, n. 60, for transfer of civilians in occupation – 'forcible transfers as well as deportation of protected persons' are 'prohibited, regardless of their motive'.

[60] J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press, 2012), 80. See ICRC Customary Rule 139 (available at www.icrc.org): 'Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control' (applicable to both international armed conflicts and non-international armed conflicts). Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31 (Geneva I); Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85 (Geneva II); Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135 (Geneva III); Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (Geneva IV).

If applicable in any particular case, IHL prohibits the secret detention, transfer and abuse associated with the rendition programme, and obliges a range of states to ensuring justice and accountability in its aftermath.[61]

3.3 Human rights law

The practice of ERP is self evidently a violation of many human rights, notably torture, secret and arbitrary detention, as well as equality, fair trial, the right to family life and others. It runs counter to underlying principles of legality, and has been recognised by the European Court of Human Rights (ECtHR or Court) as 'anathema to the rule of law'.[62] A number of the obligations violated by several states in the course of the ERP are recognised as obligations owed *erga omnes* to the international community as a whole, and as giving rise to *jus cogens* norms. While this is clearest in relation to the prohibition on torture, arbitrary detention is increasingly recognised as enjoying this status.[63]

Some of the key rules of relevance to the current enquiry envisage that multiple states can be involved in breaches. Examples are obligations of *non-refoulement* where there is a risk of wrongs in another state, or the rules governing the admissibility of torture evidence illegally obtained. The fact that the other state(s) involved may or may not be bound by the same human rights obligations does not preclude the responsibility of the state, as a state will be held responsible commensurate with its own wrongdoing for violations of its own human rights obligations, though it will preclude shared responsibility. This section sketches key human rights norms of relevance to the ERP and to the shared responsibility of various states.

[61] On the interplay between IHRL and IHL in respect of the right to remedy and obligation to investigate, see H. Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight against Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press, 2013), 482.

[62] *Babar Ahmad*, n. 1, para. 114.

[63] On torture see e.g. *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Judgment, ICTY Case Nos. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 466. On the prohibition on arbitrary detention as *jus cogens* see e.g. Human Rights Council, 22nd sess., Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44 (24 December 2012), paras. 37–75.

3.3.1 'Jurisdiction': the scope of human rights obligations

In the light of the fact patterns above, two preliminary jurisdictional matters arise concerning the applicability of a state's human rights obligations: whether such obligations apply abroad (e.g. where the CIA is engaged in the abduction or detention of individuals abroad, as in each of the cases), and the scope of obligations of states on whose territories other states act, in circumstances where the other state might be argued to exercise control (e.g. of a small area of the territory, base or prison). These issues are critical for the shared responsibility of various states.

As regards the first issue, the ERP was designed to put detainees beyond judicial, political, or public oversight, premised on the view that the US government was not bound by normal constitutional protections, or by international human rights law, when engaged outside its own territory.[64] The US government has asserted that its obligations under human rights treaties – such as the International Convention on Civil and Political Rights (ICCPR),[65] and UN Convention against Torture (CAT)[66] – do not arise in respect of the ERP on the basis of its 'extraterritorial' nature.[67] This would preclude its (shared) responsibility as far as violations of these treaty obligations are concerned.[68] A preliminary question is therefore the relevance, in human rights law, of the fact that generally the state driving the rendition programme, and in some cases other states involved in various forms of supporting it, have acted outside their own territories.

[64] See UN Joint Study on Secret Detention 2010, n. 12, para. 101; see US position in *Ali* v. *Rumsfeld*, that constitutional protections did not apply to foreigners in US custody in Afghanistan and Iraq, available at www.cadc.uscourts.gov.

[65] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).

[66] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (CAT).

[67] 'Second, Third and Fourth Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights,' Annex I: and recognition that its position is different from the Committee's in its 4th report. For the Committee's response, see e.g. UNHRC, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006).

[68] Many of the norms are also norms of customary law in respect of which shared responsibility may also arise.

Under human rights treaties, obligations are owed to individuals within the state parties' territory *or* subject to their jurisdiction.[69] Jurisdiction is primarily territorial, but arises abroad either where the state exercises effective control, *either* of territory abroad *or* in certain circumstances 'power or control' over an individual.[70] While some controversy has surrounded aspects of the test over time (notably in the ECtHR in relation to the use of lethal force abroad),[71] for present purposes what is key is that it has been consistently accepted by courts and human rights bodies that if the state exercises its authority, power and control abroad to take physical control or custody of individuals, its obligations under human rights conventions are applicable.[72] Many examples from across human rights practice of individuals being detained or forcibly removed from one state to the jurisdiction of another illustrate that the state's extraterritorial human rights obligations arise in this context.[73] In *The Wall*, Advisory Opinion, the International Court of Justice (ICJ) describes this extraterritorial reach of the ICCPR as 'natural', 'considering the object and purpose' of the human rights provisions.[74]

Where an individual is subject to the sort of direct and overwhelming power and control, as was at issue in the abduction or detention under the ERP, he or she would come within the jurisdiction of the abducting or detaining state. Where territorial states' organs or agents carried out the arrest, detention, interrogation, torture, or ill-treatment – whether by implementing the operation together (as seems to have been alleged in the *Abu Omar* case) or at behest of US authorities (as

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[69] Article 2 ICCPR, n. 65, states 'within its territory and subject to its jurisdiction' but like the regional conventions has been interpreted as giving rise to a disjunctive territory or jurisdiction test. 'General Comment no. 31 [80] The nature of the General Legal Obligation Imposed on States Parties to the Covenant', HRC, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004); HRC, 'Concluding Observations of the Human Rights Committee on the United States of America', UN Doc. CCPR/C/USA/CO/3 (15 September 2006).

[70] *Al-Skeini and others* v. *United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011) (*Al-Skeini*); *Al-Saadoon and Mufdhi* v. *United Kingdom*, App. No. 61498/08 (ECtHR, 2 March 2010), para. 36.

[71] See e.g. *Banković and others* v. *Belgium and 16 other states*, App. No. 52207/99 (ECtHR, 12 December 2001), where the ECtHR found it did not have jurisdiction in respect of the use of force by NATO states in the former Yugoslavia, and by contrast the more recent *Al-Skeini*, ibid.; *Hassan* v. *the United Kingdom*, App. No. 29750/09 (ECtHR, 16 September 2014); and *Jaloud* v. *the Netherlands*, App. No. 47708/08 (ECtHR, 20 November 2014), affirming the extra-territorial applicability of the ECHR in Iraq.

[72] HRC, General Comment 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004), para. 18; *Al-Skeini*, ibid., para. 136.

[73] *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No. R.12/52, HRC, UN Doc. Supp. No. 40 (A/36/40) (1981), 176, para. 2.2. *Öcalan* v. *Turkey*, App. No. 46221/99 (ECtHR, 12 March 2003); *Freda* v. *Italy*, App. No. 8916/80, Admissibility Decision (EComHR, 7 October 1980). *Ilich Sánchez Ramirez* v. *France*, App. No. 28780/95, Admissibility Decision (EComHR, 24 June 1996); *Precautionary Measures in Guantanamo Bay*, *Coard et al.* v. *The United States*, IACHR, Case 10.951, Report No. 109/99, 29 September 1999, 1999 Annual Report of the IACHR, para. 37.

[74] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras. 109–111 (*Wall* advisory opinion).

in *El Masri*)[75] – they have direct responsibility for the wrongs committed in so doing. This has been recognised, in the context of the ERP specifically, by the Human Rights Committee (HRC), the Committee Against Torture and the UN Joint Report on Secret Detention.[76]

As regards the many states accused of providing logistical support to the renditions programme in the form of, for example, refuelling at airports and allowing use of airspace,[77] slightly more complex jurisdictional issues arise. One question is whether planes landing on the state's territory or passing through its airspace provides sufficient link between the violations and the state for the 'jurisdictional' requirement of human rights treaties. Where an individual is present on the aircraft on the state territory, however briefly, the obligations of prevention of violations on that territory, and particularly of *non-refoulement* to violations elsewhere, would appear to arise, provided knowledge of the risk can be established or inferred.[78] Another approach might be to see the ERP as encompassing ongoing violations, part of which took place within the territory used for refuelling or other purposes.[79]

The second group of preliminary questions relate to the scope and reach of the human rights obligations of states on whose territory unlawful acts of abduction, secret detention or torture occur at the hand of other states. In circumstances where another state – in this case the US – may be said to have *de facto* control over the individuals or of a particular facility within the state's territory, do the territorial state's human rights obligations continue to apply? States have on occasion suggested that their human rights obligations do not apply in areas under the exclusive control of other states, such as in the case of *Al Asad* v. *Djibouti* in respect of detentions at Camp Lemonier under US control in Djibouti.[80]

[75] See *El Masri*, n. 11. El Masri was detained by Macedonian border officials at US's behest.
[76] UN Joint Study on Secret Detention 2010, n. 12, para. 37.
[77] See, e.g., Marty 2011 Report, n. 5; ibid., at 84; Scheinin Report 2009, n. 35, para. 54; J.M. Irujo, 'La CIA vuela bajo, muy bajo', *El País*, 10 October 2010; see also 'Portugal: Evidence of Illegal CIA Rendition Flights Surfacing', *Statewatch*, October 2006.
[78] IHRL courts often rely on 'concordant inferences' to prove violations where information lies within the exclusive control of the state.
[79] This is consistent with the continuing nature of enforced disappearance; see International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, in force 23 December 2010, 2716 UNTS 3, Article 8.
[80] *Al Asad* v. *Djibouti*, para. 38 of the respondent state's submissions on admissibility (public document, on file with author). The author was co-counsel on behalf of the applicant. On 28 April to 12 May 2014 at Luanda, Angola, the case was found inadmissible on other grounds and is currently subject to a request for reconsideration. On the positive obligations of the state in this situation see below.

The approach that human rights courts and bodies have taken to date suggests that a state's human rights obligations apply throughout its territory.[81] While the degree of control and factual ability to influence the situation will be relevant to determining whether obligations have been *violated* (see positive obligations below), a state cannot avoid the applicability of human rights obligations throughout its territory on the basis of the control of another state.[82]

Thus the territorial states where abductions occur, where black sites are located, or where individuals are brought, however temporarily, in transit to other states, owe human rights obligations to those individuals by virtue of their presence on the state's sovereign territory. These human rights obligations apply alongside the obligations of the states exercising power or control extraterritorially.

3.3.2 'Positive' obligations

Also relevant for questions of shared responsibility are the positive duties of states to persons within their jurisdiction, to prevent, protect and respond to human rights violations. This entails an obligation to exercise 'due diligence' to protect individuals from infringements of their rights which is triggered where the state knew or *ought* to have known that there was a real risk of violations. Implicit in this is the positive nature of the duty on the state to take active measures to ensure that it is aware of risks and can act to prevent them.[83]

Positive obligations have been held to apply whether the acts that give rise to the violations are carried out by private actors or foreign states, and case law makes no apparent distinction in this respect.[84] It is a question of fact whether a state knew or should have known, and has taken sufficient measures of prevention. The state's knowledge and failure to protect may be proved by concordant inferences, and the onus rests with a state on whose territory systematic violations

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[81] *Ilaşcu and others* v. *Moldova and Russian Federation*, App. No. 48787/99 (ECtHR, 8 July 2004); *Ivantoc* v. *Moldova and Russian Federation*, App. No. 23687/05 (ECtHR, 15 November 2011); *Catan and others* v. *Moldova and Russian Federation*, App. Nos. 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012), noting the obligations of the sovereign state towards those living on its territory.

[82] Particular issues arise as regards embassies or areas of special status under international law where IHRL would have to be read in light of relevant international law.

[83] See *El Masri*, n. 11, para. 103.

[84] Ibid., *Mohammed Alzery* v. *Sweden*, Communication No. 1416/2005, HRC, UN Doc. CCPR/C/88/D/1416/2005 (2006); *Abu Zubaydah*, n. 11.

unfold to demonstrate either that it did not know and could not reasonably have known of violations, or that it did all within its power to prevent them.

In the cases of secret prisons,[85] such as those allegedly housed on Lithuanian, Polish, and Romanian soil, facts continue to come to light regarding the extent of the involvement of territorial states, in the establishment, running or facilitating of those sites, whether by agreements entered into, or by removing the normal protections of law and process.[86] In relation to Poland, for example, the ECtHR found it 'inconceivable that the rendition aircraft crossed Polish airspace, landed in and departed from a Polish airport and that the CIA occupied the premises in Stare Kiejkuty without some kind of pre-existing arrangement enabling the CIA operation in Poland to be first prepared and then executed'.[87] Yet even without such agreements or arrangements, where states passively acquiesce in, turn a blind eye to, or otherwise knew or should have known of the risk of unlawful detention, transfer, or torture on their territory, and fail to take all possible measures to prevent, they are responsible for violations of their positive obligations of due diligence. In light of information on rendition publicly available since 2002, the ECtHR was able to conclude that the state knew, or at a minimum *should have* known, and failed to take reasonable measures of prevention. Where the CIA may have been given free reign without close oversight or engagement by local authorities, this may incriminate, not protect, the state in light of its positive obligations.

Somewhat less well established is whether, when a state exercises jurisdiction extraterritorially, the full range of its convention rights – including its positive obligations – arise as they would on its own territory. Recent case law suggests that whether this is so may depend on the degree of the influence and control enjoyed by the state in the particular situation.[88] Both the territorial state and state acting abroad may therefore have negative obligations of restraint, and positive obligations of due diligence to protect rights of individuals subject to ERP, potentially leading to questions of shared responsibility.

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[85] See e.g. UN Joint Study on Secret Detention 2010, n. 12, paras. 112, 114, 120l.

[86] See e.g. *Abu Zubaydah*, n. 11, where customs officials were precluded from normal inspections, and others kept away from the Polish Stare Keijkuty black site in the ECHR litigation.

[87] Ibid., para. 430.

[88] *Al-Skeini*, n. 71, talks about the 'full range of rights under the convention' where there is effective control of territory. In *Catan*, n. 81, Russia was responsible for failing to secure positive obligations extraterritorially where it failed to secure the right to education of children in Transnistria.

3.3.3 Specific obligations

3.3.3.1 Torture, forced disappearance, cruel, inhuman and degrading treatment

The ERP has led to violations of the prohibition on torture and cruel, inhuman and degrading treatment in various ways, relevant to shared responsibility.[89] First, a system of secret, incommunicado detention may itself amount to torture or inhumane treatment, as recognised by human rights courts and bodies.[90] Second, inherent in the obligation to protect against torture is the obligation to provide detainees with access to a lawyer, medical examinations, and judicial scrutiny upon detention.[91] Third, given the design and effect of removing the person from the protection of law, and withholding information from that person and his/her family, the ERP has been held to amount to 'enforced disappearance'.[92] Disappearances have in turn been held to *per se* constitute torture by e.g. the UN Human Rights Committee[93] and the Working Group on Enforced or Involuntary Disappearances.[94] Fourthly, 'enhanced interrogation techniques', particularly when considered cumulatively and in the context of the secret detention programme,

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[89] On the applicability of the prohibition at all times including situations of terrorism, see *Chahal* v. *the United Kingdom*, App. No. 22414/93 (ECtHR, 15 November 1996), para. 79; and *Saadi* v. *Italy*, App. No. 37201/06 (ECtHR, 28 February 2008), para. 127. See also *Gäfgen* v. *Germany*, App. No. 22978/05 (ECtHR, 1 June 2010), para. 107, where a child's life may have been at stake but the prohibition remained absolute.

[90] See UN Joint Study on Secret Detention 2010, n. 12, paras. 31–35; see also UN Doc. A/RES/60/148 (2005). On three years secret incommunicado detention as torture in another context see *Yussef El-Megreisi* v. *Libyan Arab Jamahiriya*, Communication No. 440/1990, HRC, UN Doc. CCPR/C/50/D/440/1990 (23 March 1994), para. 5.4.

[91] See e.g. *Kurt* v. *Turkey* (Merits), App. No. 24276/94 (ECtHR, 25 May 1998), para. 123; *Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS (on behalf of Sabbah and others)* v. *Arab Republic of Egypt*, Communication No. 334/06 (ACHPR, 1 March 2011); *Habeas Corpus in Emergency Situations* (Articles 27(2) and 7(6) of the American Convention on Human Rights), IACtHR, Advisory Opinion OC-8/87, (Ser. A) No. 8 (30 January 1987).

[92] See 'Report to the General Assembly on the First Session of the Human Rights Council', HRC, 2006, UN Doc. A/HRC/1/L.10. See e.g., the UN Joint Study on Secret Detention 2010, n. 12, para. 28. International Convention for the Protection of All Persons from Enforced Disappearance, n. 79. The definition involves 'the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'.

[93] See e.g. *María del Carmen Almeida de Quinteros et al.* v. *Uruguay*, Communication No. 107/1981, HRC, UN Doc. CCPR/C/OP/2 (1990), at 138, para. 14; see also *El-Megreisi* v. *Libyan Arab Jamahiriya*, Communication No. 440/1990, HRC, UN Doc. CCPR/C/50/D/440/1990 (21 March 1994), paras. 2.1–2.5.

[94] Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1983/14 (1983), para. 131.

amount to both torture and ill treatment under human rights law, as several international human rights bodies have noted.[95] Finally, rendition may itself amount to cruel or degrading treatment not only of the individual involved, but also their family members, where the lack of any information leads to extreme anguish and suffering.[96]

3.3.3.2 Reliance on torture evidence

Other specific obligations include the prohibition on use of torture evidence in legal proceedings. This prohibition is explicit in Article 15 CAT and implicit in the prohibition against torture.[97] The extent of any such prohibition on reliance on such information for other (for example operational) purposes, as an integral part of the torture prohibition, is open to question and an area where the law may well be developing through practice (as noted further below).[98]

3.3.3.3 *Non-refoulement*

Another rule relevant to the conduct of multiple states in the ERP is the rule of *non-refoulement.* Human rights courts and bodies have repeatedly expressed concern that the rendition programme violates the *non-refoulement* rule,[99] which requires that states refrain from transferring an individual to a state where there is a 'real' and 'foreseeable' risk of serious rights violations

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[95] See e.g., UN Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture to the United States of America', UN Doc. CAT/C/USA/CO/2 (25 July 2006), para. 17: 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Addendum', ibid.; ICRC Report, n. 18, at 26; Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012 (4 June 2014), available at www.cpt.coe.int/documents/ltu/2014-18-inf-eng.pdf.

[96] See e.g., *Bazorkina* v. *Russia*, App. No. 69481/01 (ECtHR, 27 July 2006); ICRC Report, ibid.; *María del Carmen Almeida de Quinteros* v. *Uruguay*, Communication No. 107/1981, HRC, interim decision (15 October 1982), para. 14; *Varnava and others* v. *Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (ECtHR, 18 September 2009); paras. 200–202.

[97] Article 15 of the CAT, n. 66, specifically so provides, though it is also part of the general positive obligations in respect of torture or cruel, inhuman, and degrading treatment; *Othman (Abu Qatada)* v. *the United Kingdom*, App. No. 8139/09 (ECtHR, 17 January 2012); *El Haski* v. *Belgium*, App. No. 649/08 (ECtHR, 25 September 2012).

[98] See discussion below on intelligence cooperation, section 4.1.2.

[99] See *Agiza* v. *Sweden*, Communication No. 233/2003, UNCAT, UN Doc. CAT/C/34/D/233/2003 (2005); 'Report of the Committee against Torture Thirty-third Session (16-26 November 2004) Thirty-fourth Session (2-20 May 2005)', UNGA, Supplement No. 44, UN Doc. A/60/44 227 (3 October 2005); *Abu Zubaydah*, n. 11, paras. 45–456.

arising.[100] The obligation has been recognised by courts as arising not only in the face of risks of torture or ill-treatment, but also of the right to life, of a 'flagrant denial of justice', arbitrary detention, and potentially of other serious violation of human rights.[101] In the context of an ECtHR case concerning transfer of terrorist suspects from the United Kingdom (UK) to the US's criminal justice system, it was suggested that *refoulement* would arise where a transfer ran the risk of exposing the individual to unlawful rendition.[102] The rendition programme has also exposed the unreliability of diplomatic assurances, though these may be taken into account as factors in determining risk.[103]

All of these issues arise in respect of the transfer of individuals first, to CIA detention; second, to states where they were detained at black sites; and third from the territories of states (of abduction or black sites) to further violations elsewhere, including to third states or Guantanamo.

The transfer may arise within a state when the authorities of one state hand over an individual to another (e.g. El Masri was handed over to the CIA in Macedonia).[104] It may also arise, in certain circumstances, where the territorial state on which black sites operate fails to prevent the transfer by other states from its territory (e.g. the transfer of Abu Zubaydah and Al Nashiri from Poland despite the risk of further rendition, arbitrary detention, and the prospect of military justice at Guantanamo, has been held to amount to a violation by Poland of multiple rights).[105]

It may be questioned whether this is also a transfer *by* the US, where it remained the captor, though the transfer from one state to another absent the basic protections does seem to be treated as *refoulement* by the US.[106] States carrying out *refoulement*, or allowing individuals to be transferred from their territories, where the degree of information was such that they knew or

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[100] Article 3 CAT, n. 66; *Chahal*, n. 89; *Saadi*, n. 89; *Agiza*, ibid.

[101] *Othman*, n. 97; *Baysakov and others* v. *Ukraine*, App. No. 54131/08 (ECtHR, 18 February 2010); *Abu Zubaydah*, n. 11, paras. 451–453.

[102] *Babar Ahmad*, n. 1.

[103] Several of those rendered to torture were supposedly subject to 'assurances' that they would not be mistreated. In the *Arar* case the US claimed it was not responsible on the basis of having sought assurances: Transcript of Attorney General Alberto R. Gonzales, Press Conference, Department of Justice, 2006-09-19, available at www.usdoj.gov/ag/speeches/2006/ag_speech_0609191.html. See also remarks of Secretary of State Condoleezza Rice Upon Her Departure for Europe, 5 December 2005, available at http://2001-2009.state.gov/secretary/rm/2005/57602.htm. On legal standards see e.g. *Othman*, n. 97; *Agiza*, n. 99.

[104] *El Masri*, n. 11, para. 21.

[105] Poland was found in violation of the rights to liberty, fair trial, torture and *non-refoulement*.

[106] Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture Concerning the Second Report of the United States of America', CAT/C/USE/CO/2 (25 July 2006), paras. 15, 20.

should have known of the real risk at the relevant times, will share responsibility for violations of *refoulement* obligations.

3.3.3.4 Duties of investigation, prosecution, truth and reparation

One particular obligation that can rest on multiple states is the duty, in face of plausible claims or information indicative of serious rights violations, to carry out a prompt, thorough, independent and effective investigation, and where appropriate to proceed to hold to account those responsible.[107]

Several states share these obligations of investigation and accountability. It is clear from the Convention against Torture that multiple states should, in principle, exercise criminal jurisdiction.[108] Under human rights treaties, states must investigate violations in contexts where their jurisdiction arises abroad, or where violations arise on its territory, whether or not the state is responsible in any way for the original wrong. The obligation to investigate would not generally arise as regards violations by other states on the territory of other states. However, the ECtHR suggested in *Rantsev* v. *Cyprus and the Russian Federation* that a state may be obliged under the European Convention on Human Rights (ECHR) to cooperate with other investigating states in respect of evidence on its territory.[109]

IHRL also enshrines the right to remedy and reparation.[110] The obligation to provide reparation may take many forms including recognition or acknowledgement, information, investigation and accountability, guarantees of non-repetition, restitution and compensation.[111] The rights of victims of serious rights violations to know the 'truth' concerning the violations committed

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[107] E.g. Article 12 CAT and Article 5 CAT, n. 66, obligates a state party to extradite or prosecute accused torturers who are present in any territory under its jurisdiction. The duty is recognised across IHRL.
[108] Territorial state, perpetrator nationality and passive personality jurisdictions are referred to.
[109] *Rantsev* v. *Cyprus and the Russian Federation*, App. No. 25965/04 (ECtHR, 7 January 2010), para. 242: although not responsible for violations in relation to human trafficking or the obligation to investigate the death, the Court interestingly noted a duty to 'cooperate' with the Cypriot investigation and to take investigate steps on Russian territory. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).
[110] The right to remedy is explicit in IHRL treaties, e.g. Article 2(3)(a) ICCPR, n. 65; Article 13 ECHR, ibid., and inherent in the duty to 'ensure' protection of rights in human rights treaties.
[111] E.g. Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (16 December 2005).

against them has been the subject of growing recognition internationally.[112] It was in the context of a series of rendition cases that the ECtHR recognised, for the first time, 'the right to the truth regarding the relevant circumstances of the case [which] does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened'.[113]

In practice, investigations, prosecutions and reparation in relation to the ERP have been limited and bedevilled with obstacles. The US has refused to cooperate with foreign processes related in any way to the rendition programme.[114] Reports indicate 'enormous pressure from Washington not to give any facts on this programme'.[115] The US has been condemned for 'threatening' states as to implications if any information concerning the programme emerged in the future.[116] One question is whether this should be considered as leading to shared responsibility in circumstances where an international wrong – the failure to conduct a thorough, effective investigation – arises. In ECtHR litigation, the Polish government relied on non-cooperation from the US,[117] among other challenges, to suggest that it cannot in fact meet its investigative obligation.[118]

Numerous states have been criticised for overreaching approaches to national security and state secrecy. While withholding some information regarding intelligence gathering is necessary and appropriate, withholding information to shield from accountability is not. In such circumstances, could states be considered to share responsibility for maintaining a situation in which victims' rights to truth, to information as part of the right to reparation, have almost universally gone unsatisfied?[119]

[112] Most recently see, e.g., *Gomes-Lund et al. (Guerrilha do Araguaia)* v. *Brazil (Preliminary Exceptions, Merits, Reparations and Costs)*, IACtHR, (Ser. C) No. 219 (24 November 2010); *Abu Zubaydah*, n. 11, para. 489.
[113] *Abu Zubaydah*, ibid., para. 489; see also *El Masri*, n. 11, para. 191.
[114] See e.g. the refusal to cooperate with the Polish investigation, documented in the Polish government's response in proceedings before the ECtHR, though other examples are now public.
[115] T. Hammarberg, European Commissioner of Human Rights, stated that there was 'enormous pressure from Washington to keep all this secret. In fact, instructions from the CIA, with the support of the White House, are not to give any facts on this', in 'Who takes the rap for rendition?', *RT News*, 8 September 2011. Wikileaks information indicates pressure on the Spanish authorities from the US.
[116] E.g. *Binyam Mohamed* v. *Secretary of State of State for Foreign Affairs* [2010] EWCA Cir. 65; Hammarberg, ibid.
[117] See also the criminal investigations in Spain where the US has, with one exception, refused to respond.
[118] *Al Nashiri*; *Abu Zubaydah*, n. 11, governments observations.
[119] UN Joint Study on Secret Detention 2010, n. 12, para. 39 referring to CAT case law on 'concealment' as complicity.

4. Principles of international responsibility

Much of rendition practice does not involve any particular problems in terms of the application of 'secondary rules' of international responsibility. It is plain that intelligence agencies fall within the state apparatus for purposes of attribution, as do others directly involved in the operation of the ERP, such as the Italian police involved in Abu Omar's abduction, or the customs officials (PANSA) involved in removing the normal processes and oversight in *Abu Zubaydah* v. *Poland*. The conduct of other non-state entities may be attributable to the state so far as the conduct in question is carried out under the direction or control of the state. However, not all questions are easily answered. For instance, where states detain or transfer individuals at the behest of other states – as in the examples of detentions in Africa (see section 2) – questions of fact may arise as regards whether wrongs arising are in fact attributable to the US.

International law on state responsibility provides that states may contribute to, and bear responsibility for, international wrongs in a variety of ways of potential relevance. This may take the form of 'aiding and assisting' other states (Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)),[120] as well by 'directing or controlling' their actions (Article 17 ARSIWA), or 'coercing' them into international wrongs (Article 18 ARSIWA). In light of the fact pattern that has been revealed to date, and allegations of 'conspiracy' and support for the ERP, it seems that most relevant to an assessment of the involvement of other states with the US rendition programme is 'aiding and assisting'.[121] It is on this principle that the analysis will focus.

4.1 Aiding and assisting/complicity

[120] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).
[121] The failure to cooperate to bring violations to an end is also relevant. It is not inconceivable that questions may arise regarding the 'control' or even 'coercion' of certain states by the US, though to the author's knowledge no such claims have been made.

Under Article 16 of the ARSIWA, responsibility for aiding and assisting requires that the particular assistance is given with *knowledge* of the circumstances of the internationally wrongful act of that state,[122] a 'close connection' between the actions of the states, and a 'causal link' between the state's conduct and the wrong.[123]

Many reports and decisions on the ERP refer to 'complicity,' though the legal significance of the term is not always clear. Complicity is not a term included in the ARSIWA as such and the question arises whether 'complicity' is simply used as a shorthand to describe the 'aid and assistance' enshrined in Article 16 ARSIWA, or whether it has significance beyond that. Some suggest that as complicity is referred to in the Convention against Torture, it should be understood in line with the CAT's rather broader interpretation of the term, as a separate and distinct form of responsibility, at least in respect of torture.[124]

CAT case law has been described as 'considering complicity to include acts that amount to instigation, incitement, superior order and instruction, consent, acquiescence and concealment'.[125] It has been suggested that in certain situations, perhaps including in relation to the receipt of intelligence information outlined further below, states may be 'complicit' without perhaps having made the direct and concrete contribution to the harmful outcome implicit in aiding and assisting.[126] Complicity in this sense would appear then to go considerably beyond the aiding and assisting of the ARSIWA scheme, offering a broader basis for responsibility, and alleviating the onerous practical difficulties of demonstrating either the concrete contribution or the level of the state's knowledge enshrined in Article 16 ARSIWA.

It has to be noted however that the CAT refers to complicity in relation to individual responsibility in the context of the obligation on states to hold to account those engaged in torture

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[122] Article 16 ARSIWA, n. 120, requiring also that the act would be internationally wrongful if committed by the accessory state. On knowledge of the ERP from early stages see amicus by the International Commission of Jurists and Amnesty International on 5 November 2012 in *Al Nashiri*, n. 11.

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

[124] S. Fulton, 'Cooperating with the Enemy of Mankind: Can States simply turn a blind eye to torture?' (2012) 16(5) IJHR 773.

[125] UN Joint Study on Secret Detention 2010, n. 12. Conspiracy has different meaning in domestic criminal law, but would generally involve a level of agreement to commit a crime and an overt act, reflecting the lower threshold than Article 16 ARSIWA, n. 120.

[126] Fulton, 'Cooperating with the Enemy of Mankind', n. 124, 776–778.

or 'participation' or 'complicity' in torture.[127] As such it reflects forms of criminal responsibility long-recognised on the domestic level, and in respect of which terms would have to be defined in domestic law in accordance with requirements of clarity and specificity in criminal law. It is quite a different proposition to suggest that the state is responsible for 'complicity' in this sense.

Recent practice has, however, lent considerable support to the notion of complicity, though whether it expands or alters existing forms of responsibility, or will come to do in the future, remains unclear. The UN Joint Experts report notes that a broad range of activity whereby states 'take advantage of' or support secret detention may be covered by complicity.[128]

In its first rendition judgment, *El Masri* v. *Macedonia*, the ECtHR referred to Macedonian responsibility 'for acts performed by foreign officials on its territory with the *acquiescence* or *connivance* of its authorities'.[129] It has been noted that this standard is a reminder that 'there is a world outside the conceptual framework established by the ILC' of relevance to the rendition programme.[130] However, in this context the language of acquiescence or connivance is more likely to reflect the primary obligations of states – in this case the positive obligations of states to protect individuals from violations on their territories – than suggesting an extension or departure from the secondary rules enshrined in the ARSIWA. Likewise, while substantial sections of the *Abu Zubaydah* and *Al Nashiri* judgments before the ECtHR are framed under the headings 'Polish complicity', the violations found under these headings are in fact direct violations of the primary rules of international law discussed in the previous section.

Whether 'complicity' constitutes a basis for state responsibility for torture or other wrongs (distinct from aid and assistance) may remain controversial as a statement of current law, and the

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[127] Conspiracy is also 'punishable' under Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention).

[128] UN Joint Study on Secret Detention 2010, n. 12, at 4-5: 'For purposes of the study ... a State is complicit in the secret detention of a person when it (a) has asked another State to secretly detain a person; (b) knowingly takes advantage of the situation of secret detention by sending questions to the State detaining the person, or solicits or receives information from persons kept in secret detention; (c) has actively participated in the arrest and/or transfer of a person when it knew, or ought to have known, that the person would disappear in a secret detention facility, or otherwise be detained outside the legally regulated detention system; (d) holds a person for a short time in secret detention before handing them over to another State where that person will be put in secret detention for a longer period; and (e) has failed to take measures to identify persons or airplanes that were passing through its airports or airspace after information of the CIA programme involving secret detention has already been revealed.'

[129] *El Masri*, n. 11, para. 206 (emphasis added).

[130] P.A. Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?', *EJIL Talk*, 24 December 2012.

parameters of the concept remain underexplored. Several scenarios arising in the ERP context raise the question, however, as to whether the states' involvement would be covered by aid and assistance. In some cases they may highlight the limitations of this category, as well as the distinct practical challenges of evidence and proof that go with it, raising debate on whether the law is evolving, or should evolve, to embrace a broader range of inter-state cooperation in relation to serious international wrongs.

4.1.1 Staging, stopover, and logistical support as aid and assistance?

Rules on 'aiding and assisting', unlike human rights obligations discussed above, are not limited to violations within the state's territory or subject to its 'jurisdiction' extra-territorially so far as the state has territorial control or control of individuals through its agents acting abroad. Therefore, where it is unclear whether detainees were on the flights that came through a state's territory, stopping to refuel en route to collect detainees or having deposited them for example, the relevance of the rules on aiding and assisting come to the fore. While responsibility would not arise from the failure to prevent or from providing moral support or political cover, on the basis of the principle of aiding and assistance it is likely to arise from concrete support such as providing airports, airspace, or other logistical support without which the rendition programme could not operate as it did. It would depend however on knowledge of a risk of violations being established or inferred, which is inevitably extremely challenging in the context of the clandestine nature and 'systematic cover-up' enshrined in the ERP.[131]

4.1.2 Transnational intelligence cooperation as aid and assistance?

The ERP involves an enormous transnational intelligence operation. Several states may share responsibility in respect of 'intelligence cooperation' with states responsible for torture or arbitrary detention.[132] This may prove to be one of the most significant areas of on-going legal

[131] CoE Rendition Reports 2006 and 2007, n. 3 and 4.
[132] UN Joint Study on Secret Detention 2010, n. 12; Eminent Jurists Report, n. 31.

development to arise from the debate around the ERP. It is worth considering some forms of cooperation that may give rise to shared responsibility.

Firstly, questions arise whether presence at interrogations and questioning detainees might constitute aid and assistance. While the nature and extent of their involvement remains unknown, it appears that foreign intelligence officials have been present during interrogations in CIA secret prisons, and have themselves questioned prisoners in the ERP, as they have in Guantanamo. Evidence suggests that British, Canadian, and Australian intelligence agents questioned persons held by US, Pakistani, and other intelligence services during incommunicado detention.[133]

Questions relevant to determining what form of responsibility, if any, such presence might give rise to would include whether the states were functioning jointly with the interrogators such that they could themselves be said to be directly involved in the detention or interrogation operations, or whether there was sufficient causal connection between the participation of foreign officials and the wrongs to amount to 'aiding and assisting'. Presence certainly limits plausible deniability on the nature of the programme, and absent clear indications to the contrary, would appear to imply a level of condoning of the conduct that is on its face inconsistent with any obligation to cooperate to end the wrong. The Special Rapporteur on Terrorism has described the involvement of foreign officials as amounting to 'condoning', 'encouraging', or 'even support' for unlawfulness which, in his view, constitutes as an 'internationally wrongful act'.[134] He concludes that 'the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary

[133] E.g., El Masri alleged a German was present, and UK resident Binyam Mohamed alleged that UK officials were present, during their interrogation/arbitrary detention. Scheinin Report 2009, n. 35, at footnote 63 notes: 'Australian, British and United States intelligence personnel have themselves interviewed detainees who were held incommunicado by the Pakistani ISI in so-called safe houses, where they were being tortured.' Many states have sent interrogators to Guantánamo Bay. UK intelligence personnel conducted or witnessed just over 2,000 interviews in Afghanistan, Guantanamo Bay and Iraq: UK Intelligence and Security Committee Report, 'The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq' (2005), para. 110.
[134] Scheinin Report, ibid., at 20.

detention'.[135] In this vein, the Supreme Court of Canada has likewise found that the presence of Canadian interrogators in Guantanamo fell foul of the Canadian Charter.[136]

Secondly, rules of responsibility are also relevant to the provision by foreign states of intelligence information that is relied upon to subject individuals to the ERP, or is used during abusive interrogation. Examples of information transmission include Canadian Maher Arar's case, where the Canadian intelligence agents handed what transpired to be erroneous information to their US counterparts, leading to Arar's detention and torture.[137] In British resident Binyam Mohamed's case, the UK government was found to have 'facilitated interviews … by or on behalf of the U.S. government in the knowledge of what had been reported to them in relation to his detention and treatment'.[138] Several other cases have been reported of lesser forms of engagement, such as authoritative sources reporting western governments providing questions to interrogating governments.[139]

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

States must exchange intelligence to fulfil their obligations to protect against serious crimes, including terrorism. The principle of effectiveness demands that the law is not interpreted so as to impede such intelligence cooperation. As such, a state cannot be responsible for every act of intelligence sharing that may ultimately contribute to a violation. However, as the Eminent Jurists Panel has suggested, where 'intelligence and other agencies are systematically sharing information with countries and agencies with a known record of human rights violations it is

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[135] Ibid.
[136] *Canada (Prime Minister)* v. *Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 wherein the Supreme Court of Canada found that participation by Canadian officials in Guantanamo interrogations was a breach of the Canadian Charter.
[137] Arar Commission, n. 13; Eminent Jurists Report, n. 31, at 84.
[138] *R (B Mohamed)* v. *Foreign Secretary* [2008] EWHC 2048 (Admin) (21 August 2008).
[139] Scheinin Report 2009, n. 35, para. 54, fn. 63 states: 'German and Canadian intelligence agencies provided questions to Syrian Military Intelligence in the cases of Muhammad Zammar and Abdullah Almalki. Both detainees were tortured afterwards while in Syrian custody.' He concludes that 'the active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices'.

difficult to resist the argument that States are complicit, wittingly or unwittingly, in the serious human rights violations committed by their partners in counter-terrorism'.[140]

Lastly, an emerging controversy is the responsibility of states for the receipt of intelligence information obtained from other states, including from the ERP. This could implicate many states that rely on intelligence from states engaged in international wrongs, notably extraction of information under torture. Under the Convention against Torture, the information cannot be used in legal proceedings.[141] Less clear is the situation in respect of other, operational, uses of such information. In the *A & others* case before the UK House of Lords,[142] it was suggested that a distinction might be drawn between the inadmissibility of torture information as evidence in court proceedings, which is clearly unlawful,[143] and the receipt and use of intelligence for other (operational) purposes.[144] This has since been upheld in English courts.[145] However, whether a sharp distinction can be drawn as regards receipt for operational purposes is open to question. So far as the principled basis for excluding torture evidence is, as the Court in *A & others* suggested, that the reliance on such evidence has the effect of 'encouraging' torture, it must surely have the same effect whether it is used for legal proceedings or other purposes.[146]

Undoubtedly, the idea of a ban on receipt of certain intelligence information raises many tensions, including between the duty to obtain information to protect citizens from violence on the one hand, and the obligations to prevent torture on the other.[147] A separate but related question is whether such information is, in any event, reliable.[148] Particular practical challenges arise as regards the knowledge of a state as to its provenance, and the extent of any effective duty to enquire. It has been suggested that where intelligence is sought and obtained from a state

[140] Eminent Jurists Report, n. 31, at 85. See also Scheinin Report, ibid., at 20.
[141] E.g. Article 15 CAT, n. 66.
[142] See *A* v. *SSHD* [2005] UKHL 71 (*A & others*).
[143] The Lords held that such evidence was inadmissible. See Article 15 CAT, n. 66.
[144] See discussion of the *A & others* case; and H. Duffy, 'Human Rights Litigation and the "war on terror"' (2008) 90 IRRC 871.
[145] *R* v. *Ahmed*, 2011 SCC 6 (Supreme Court of Canada).
[146] The Lords found that states could not condemn torture while making using for torture confessions as 'the effect is to encourage torture', *A & others*, n. 142, at 30. Cf. where preservation of the 'integrity of proceedings' is given as rationale for the exclusion of torture evidence.
[147] The UK's Intelligence and Security Committee Report of 2005 describes as 'for debate' whether such intelligence should be rejected as a matter of principle. UK Intelligence and Security Committee Report on Handling Detainees in Afghanistan, Guantanamo Bay and Iraq 2005, n. 133, para. 32.
[148] ISC Report 2005, ibid., para. 32. See also M.D. Davis, 'Consign Bush's "torture memos" to history', Op-Ed, *LA Times*, 30 July 2012, noting that: 'Torture is counter-productive. Professional interrogators – Ali Soufan of the FBI, Matthew Alexander of the Air Force and Glenn Carle of the CIA – have said this clearly.'

known to engage in serious rights violations, such that states become 'consumers of torture'[149] or create a 'market' for human rights violations, they fall foul of their international obligations.[150] While it may remain 'debatable' whether information obtained through torture or cruel, inhuman, and degrading treatment must be rejected as a matter of principle,[151] this looks set to be an area for further development in law and practice.[152]

4.1.3 Information obtained through torture and implications for the criminal process?

From the international obligations highlighted above, it is clear that violations by one state may give rise or contribute to violations by another in respect of criminal proceedings, notably through reliance on torture evidence, or extraditing individuals to trials where such evidence may be used, or which would otherwise be flagrantly unfair.[153] The wrongs of the ERP may thus impact on that state's or other states' abilities to secure suspects or evidence.

One complex question, in the context of which secondary rules have been given close consideration, is whether the torture of the individual by another state should preclude the possibility of criminal trial. In *R* v. *Ahmed*, where the applicant had allegedly been tortured in Uzbekistan and Pakistan, the English Court looked closely at rules of state responsibility in order to determine whether there was any link between the alleged torture and the trial.[154] The Court ultimately refused to stay proceedings, as it found there was no link and no evidence of wrongdoing by UK authorities in the receipt of the intelligence itself.[155] The judgment may imply

[149] Eminent Jurists Report, n. 31, para. 85.
[150] See Scheinin Report 2009, n. 35.
[151] Ibid.
[152] Juan Mendez, Special Rapporteur on Torture identifies this it as an area for future attention: 'Enforcing the Absolute Prohibition Against Torture', Chatham House, 10 September 2012, at www.chathamhouse.org/events/view/185367.
[153] See e.g. *Othman*, n. 97.
[154] *R* v. *Ahmed (Rangzieb)*, *R* v. *Ahmed (Habib)*, Court of Appeal (Criminal Division), 25 February 2011, [2011] EWCA Crim. 184; [2011] Crim. LR 734. The Court looked closely at secondary rules of state responsibility, but followed the earlier English case *A & others*, n. 142, in finding that the receipt of intelligence itself – as opposed to its use in proceedings – was not itself wrongful. See also *R* v. *Benbrika (Ruling No. 20)* [2008] VSC (20 March 2008), an Australian Court found it could not proceed with the trial (on charges of membership in a terrorist organisation) unless the 'most austere conditions of detention' were improved as otherwise the trial would be rendered unfair.
[155] *Ahmed*, ibid. The *Ahmed* case suggested that the rule on staying proceedings serves to preserve integrity of proceedings, which arguably applies irrespective of whether the trial arises in the wrong-going state or another. It rightly rejected the idea that the purpose of the exclusionary rule is punishment of wrongdoing national authorities. If

that *were* there such a link between the information and the trial, or *were* state officials involved in unlawfulness, a stay of proceedings may be required.

4.2 International Humanitarian Law

IHL contains specific rules that appear on their face to go beyond the rules on responsibility enshrined in the ARSIWA. The duty enshrined in Common Article 1 of the Geneva Conventions to 'respect and ensure respect' for the Conventions would render states that assist, support, acquiesce in or are otherwise complicit in violations of these IHL provisions to fall foul of the Geneva scheme of protection, without need to have regard to the rules under Articles 16-18 of the ARSIWA.

4.3 Broader obligations in face of serious breach of peremptory norm

When the wrongful acts referred to above amount to a breach of a *jus cogens* norm, the obligations of all states to 'cooperate' to bring to an end and not to recognise as lawful a situation created by a serious breach, and not to render aid or assistance in maintaining that situation, are relevant. This is reflected in Articles 40 and 41 of the ARSIWA and in the case law of the ICJ.[156] While these broader obligations apply only to a small group of 'peremptory norms' and only in respect to gross, flagrant, systematic, or organised violations of those norms, there is a strong case that these criteria are satisfied by the widespread and systematic nature of torture, secret detention and enforced disappearance intrinsic to the ERP.[157]

5. Individual responsibility

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the purpose of the rule is in whole or part the protection of individuals, or avoiding 'encouragement' of torture, this would also apply irrespective of the wrong-doing state.

[156] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16; *Wall* advisory opinion, n. 74; *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, Second Phase, ICJ Reports 1970, 3.

[157] See UN Joint Study on Secret Detention 2010, n. 12, para. 42; CoE Rendition Report 2007, n. 4; ICRC Report, n. 18. See also E.A. Wyler and L.A. Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms', in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 285.

While the focus of the above assessment has been on state responsibility, it is worthy of note that the ERP also appears to entail numerous crimes under international law. These may include war crimes, if the acts are committed 'in the context of' or 'associated with' an armed conflict,[158] or crimes against humanity on account of the 'systematic' nature of the attack on segment of the civilian population.[159] In accordance with forms of responsibility recognised in international law, an individual may be responsible for directly committing crimes, individually, jointly, and through other persons,[160] or for indirectly participating in their commission, including by direct or indirect co-perpetration, ordering [161] or aiding and abetting, [162] by acting in 'common purpose',[163] or through a 'joint criminal enterprise'.[164] In addition, superiors, whether civilian or military, may also be held responsible under the doctrine of superior responsibility if they fail to prevent or punish the criminal acts of subordinates over whom they have effective control. While the requirement that an individual participating in the ERP has knowledge of the broader criminal enterprise may raise issues for lower level participants (or indeed high level officials in some states may claim ignorance as is often done), it is clear that he or she need not have knowledge of the scale or precise details of the ERP.[165] In principle, a wide range of individuals – members of intelligence agencies, officials of various governments, and private actors, some of whom have acknowledged their roles in authorising acts deemed to amount to torture[166] – would share responsibility, and could be held to account, for these crimes under international criminal law.

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[158] E.g. *Kunarac et al.*, n. 63, para. 58.

[159] Article 7 Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3 (ICC Statute). *Prosecutor* v. *Kordić, Mario Cerkez*, Appeal Judgment, ICTY Case No. IT-95-14/2-A, 17 December 2004, para. 93. The requirement of 'widespread or systematic' for a crime against humanity is disjunctive and a prosecutor need only satisfy one or the other. Widespread has no particular numerical value, it denotes a certain scale, whereas systematic relates to organisation or method of execution. See e.g. R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd edn (Cambridge University Press 2014), 234–235; or K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000' (2002) 13 CLF 1, 18–20.

[160] Article 25(3)(a) ICC Statute, ibid.

[161] Article 25(3)(b), ibid.

[162] Article 25(3)(c), ibid.

[163] Article 25(3)(d), ibid.

[164] ICTY case law relies on joint criminal enterprise and has described it as established in customary law: see, e.g., *Prosecutor* v. *Milutinovic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ICTY Case No. IT-99-37-AR72, 21 May 2003, para. 18. However it is not relied upon at the ICC.

[165] ICC, *Elements of Crimes* (The Hague: ICC, 2011), para. 2, making clear that 'knowledge of all characteristics of the attack or the precise plan or policy' is unnecessary.

[166] E.g. Bush memoires, admitting ordering waterboarding; Jose Rodriquez memoires, admitting overseeing waterboarding and destroying videotapes thereof. 'Former CIA clandestine chief in memoir to explain why interrogation videos destroyed', *Reuters*, 5 May 2011.

6. Processes

Many of the facts, and some of the issues of responsibility, discussed above are currently subject to litigation on the national level, which have helped to clarify facts, but have only in very limited cases led to finding of responsibility, at least as yet. On the international level, the first group of rendition cases have led to important findings of state responsibility.

National level processes include civil litigation seeking reparation. This includes cases brought in US courts against state and private actors (see e.g. cases against Jeppesen International, in the US), which have been blocked by the state secrets privilege, and in at least one case by immunities.[167] However, civil litigation between corporations engaged in the ERP has proceeded, and proved a rich source of information on the ERP.[168]

As regards criminal accountability, many investigations have been lodged or are underway, with varying degrees of credibility and effectiveness, of which the following is a small selection. Spanish investigations were opened into US officials' roles in torture and crimes against humanity, but interestingly, in one case Spain has deferred to the US as the natural forum for such investigation. The US has however announced that there will not be further investigation or charges in respect of the ERP.[169] Investigations stammer forward elsewhere. Abu Zubaydah and Al Nashiri are formally joined as victims in Polish investigations for example. However, the process is blighted by secrecy, obstacles, and non-cooperation from the US, and the scope of the investigation and its targets remain unclear, and has been found by the ECtHR to lack the

[167] *El Masri* v. *Tenet*, 437 F. Supp. 2d 530, 532-4 (E.D. Va. 2006); *Arar* v. *Ashcroft*, 532 F. 3d 157 (2d Cir. 2008), paras. 162–163; *Mohamed* v. *Jeppesen Dataplan*, n. 2.

[168] See the 'Richmor' litigation between private companies involved in the ERP, n. 10; and P. Finn and J. Tate, 'N.Y. billing dispute reveals details of secret CIA rendition flights', *Wahington Post*, 31 July 2011.

[169] The two (out of 101) cases of suspected detainee abuse that were reportedly being investigated closed in 2012 2012. See H. Duffy, 'Accountability for counter-terrorism: challenges and potential in the role of the courts', in F.F. Davis and F. de Londras (eds.), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press, 2014), 324; and Duffy, *The War on Terror*, n. 45, Chapter 4.B.5 for more detail on criminal law processes in the war on terror.

requirements of a prompt, thorough and effective investigation.[170] So far, the only convictions were in the trials in absentia in Italy of CIA agents convicted of 'aiding and abetting' the kidnapping of Abu Omar.[171] In 2012 the Italian Supreme Court ordered the re-trial of several Italian high-level intelligence officials, whose cases had been thrown out on state secrecy grounds.[172]

Criminal cases against individuals held in illegal detention or interrogated have also exposed the nature of the practices to which they have been subject, and elicited consideration of issues of state responsibility through for example challenges to the admissibility of evidence obtained through conspiracy in torture, or requests for stays of proceedings on 'abuse of process' grounds.[173]

A plethora of litigation has been initiated at the international level also. The first judgment was *El Masri* v. *Macedonia*, where Macedonia was held responsible for violations through its own detention and questioning of El Masri in a hotel, his torture by foreign officials on its soil, and for arbitrary detention in Afghanistan resulting from his transfer despite the risk of such violations.[174] This was followed in 2014 by *Abu Zubaydah* v. *Poland* and *Al Nashiri* v. *Poland*, where for the first time a state was found responsible for multiple violations of rights in black site detention by the CIA on its territory and transfer on to further rendition or to the Guantanamo military detention or prosecution.[175] Other cases are pending before the ECtHR at time of writing (against Lithuania, Poland and Romania) for black sites on their territories, and (against Italy) for its involvement in transfers to the rendition programme. Cases are also pending before the Inter-Commission on Human Rights as regards the US programme. Cases are beginning to filter

[170] See e.g. *Abu Zubaydah* v. *Poland*, filed 26 March 2013. Reports indicate charges against a former head of intelligence.
[171] J. Hooper, 'Italian court finds CIA agents guilty of kidnapping terrorism suspect', *The Guardian*, 4 November 2009.
[172] Supreme Court decision, 19 September 2012, in AI Public Statement EUR 30/015/2012, 'Italy/USA: Supreme Court orders re-trial of former high-level intelligence officials and upholds all convictions in Abu Omar kidnapping case', 21 September 2012.
[173] See notably the English courts determination in e.g. *R* v. *Ahmed*, n. 154, or in other cases cited in Duffy, *The War on Terror*, n. 45, Chapter 4B.4.4.
[174] The Court found the state responsible not only for the act of transferring the victim but also for violations arising thereafter in Afghanistan; the consistency between this approach and the ILC Articles has been questioned in Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA', n. 130.
[175] Abu Zubaydah remains detained without charge in Guantanamo. Al Nashiri is subject to military commissions prosecution. In both cases their transfer was found to violate Article 5 and 6 ECHR, n. 109, on liberty and fair trial.

through the African Commission on Human Rights too,[176] with related cases open before the East African Court of Justice regarding renditions from Kenya to Uganda.[177]

It is well established, as reflected in human rights practice, that multiple states may violate human rights at the same time. There is no notion of exclusive responsibility, and human rights courts have on many occasions found multiple states responsible under IHRL. However, to my knowledge, no rendition cases so far have been brought against more than one state, though in *Al Nashiri* and *Abu Zubaydah* v. *Poland* the Court heard joint private and public hearings on the two rendition cases brought against Poland with similar facts, but on behalf of distinct applicants.

These cases may with time serve to clarify the nature of states' obligations in the ERP and violations, and indirectly expose the contributions of other states to those violations. However, the jurisdictional limits of human rights courts and bodies are worthy of note, as they may restrict the possibility to adjudicate the shared responsibility of multiple states.

Some of those limits arise from patchy coverage of human rights bodies depending on ratifications and acceptance of jurisdiction, meaning that some states involved in rendition cannot be effectively brought to account in any judicial or quasi-judicial forum.[178] States that may share legal responsibility for the ERP often cannot be held to account together. For example, a case cannot be brought against Poland and the US together for the largest black site, or the failure to investigate and to cooperate respectively. This is an important limitation, not least as it can be beneficial for a court to hear submissions from each – as seen e.g. in the cases against Moldova and Russia of *Ilaşcu* or *Catan* – including in respect of the responsibility of the other state and its

[176] See *Al Asad* v. *Djibouti*, n. 80, which was found inadmissible for lack of conclusive evidence but was subject to a request for revision on the basis of new evidence at time of writing. Evidentiary challenges are naturally acute, and much may depend on the willingness of human rights bodies to draw 'concordant inferences' from available information and place the onus on the state to explain, as the ECtHR was willing to draw in *Abu Zubaydah*, n. 11, paras. 393–400.

[177] The case concerning renditions between Kenya and Uganda was filed in 2011 and is still pending. See *Omar Awadh Omar* v. *The Attorney General Republic of Kenya, The Attorney General of the Republic of Uganda & The Secretary General of the East African Community*, App. No. 4 of 2011, East African Court of Justice at Arusha, First Instance Division, 1 December 2011. A decision was also handed down in *Salim Awadh Salim, et. al.* v. *Commissioner of Police et. al*, Petition No. 822 of 2008, High Court of Kenya at Nairobi, Constitutional and Judicial Review Division, 31 July 2013.

[178] E.g. Thai responsibility in Abu Zubaydah's case, e.g., may go unadjudiciated for lack of a forum for individual complaint, just as US responsibility cannot be adjudicated by the IACtHR as the US is not party to the 1969 American Convention on Human Rights (1144 UNTS 123) and does not accept the jurisdiction of the Court. Cases against the US can and have been brought to the Inter-American Commission under the 1948 American Declaration on the Rights and Duties of Man ((1949) 43 AJIL Supp. 133).

impact on that state's responsibility.[179] The proceedings before the ECtHR for example, necessarily examine a small piece of the puzzle. However, in principle the Court can ask third parties for information, and in practice its findings involve, indirectly, findings regarding the responsibility of other states (e.g. the unlawful nature of the US practice of ERP, or the nature of violations in states to which individual were transferred in the context of *non-refoulement* cases).[180]

The 'jurisdictional' threshold of human rights treaties also means forms of shared responsibility, which do not relate to violations on the state's territory or are subject to its (extraterritorial) jurisdiction cannot be heard in those fora. Whether this may develop to embrace other situations where states aid and assist violations from their territories but which arise for individuals elsewhere, remains to be seen. For now it is questionable to what extent courts would have jurisdiction over the situations identified in relation to complicity, discussed above.

The extent to which human rights courts and bodies have referred to general international law on state responsibility in recent years is noteworthy.[181] Even if they have not always appeared to rely on these rules, or explained their understanding of their relevance to their decisions, in preference for reliance on human rights specific rules that may more obviously accord with their purpose and tradition, the newfound fondness for citing these principles and implicit recognition of their relevance may point towards finding several states parties responsible on this basis in the future.

To the extent that international processes are available, they face many challenges, of a legal, evidentiary and political nature, that may affect their ability to illuminate and provide accountability for shared responsibility in the ERP. An illustration is seen in the Polish state's request for confidentiality in the first ERP case brought against it, and upon refusal by the ECtHR, its unusual statement that it would not share information on its investigations with the

[179] E.g. Moldova's argument that Russia had effectively prevented it from meeting its own obligations, which was effectively accepted by the Court.
[180] For discussion of the ECtHR and the rules on state responsibility generally in this respect, see M. den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4(2) JIDS 361.
[181] See e.g. *Catan*, n. 81; and *El Masri*, n. 11.

Court on secrecy grounds. The extent and influence of external pressure, and whether respondent states will ultimately cooperate with the Court, is for now a matter for speculation.[182]

There are, moreover, other non-judicial procedures that have been used in practice to determine responsibility of multiple responsible actors in the context of detentions and torture abroad. Official commissions of enquiry on the national and international levels have reached findings of 'complicity' in the ERP. Notable examples include the Arar Enquiry, recognising Canadian contribution to the wrongs against Maher Arar;[183] the subsequent Internal Inquiry on Canadian role in Rendition; [184] the Parliamentary Report from the UK Security and Intelligence Committee;[185] the groundbreaking Parliamentary Assembly of the Council of Europe 'Marty' Reports;[186] several reports of successive Special Rapporteurs on Terrorism; and the UN Joint Study on global practices.[187] These are supplemented by civil society reports including the 'Eminent Jurists Panel' that endorsed the issue of complicity.[188]

These processes are noteworthy for the extent to which they have engaged with varying forms of state responsibility, and shared responsibility, somewhat unusually in the human rights field. While some of them may go beyond what international law currently provides for, in terms of secondary responsibility,[189] they may represent the progressive development of the law. It is certainly noteworthy the extent to which these processes have in turn been cited, including before courts of law, which may contribute to their impact on the way the law is interpreted and developed. Reports such as the Senate Report serve as crucial sources of information in respect of

[182] The state is obliged under Article 41 of the ECHR, n. 109, not to impede the right of individual petition. This would apply to other state parties.
[183] 'Report of the Events Relating to Maher Arar – Analysis and Recommendations', Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Commission), available at www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf#53.
[184] Internal Enquiry into the Actions Commission of Enquiry into the Actions of Canadian Officials in relation to Almalki, Abou-Elmatti and Muayyed Nureddin, 2008, asked whether detentions 'resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries'.
[185] U.K. House of Commons Intelligence and Security Committee Report on Rendition, July 2007, available at http://isc.independent.gov.uk/files/20070725_ISC_Rendition_Report.pdf.
[186] CoE Rendition Reports 2006 and 2007, n. 3 and 4; these were followed up on by European parliamentary resolutions. The European CPT fact finding commissions have done inspections and reached finding e.g. on Lithuania.
[187] E.g. Scheinin Report 2009, n. 35; On the current Special Rapporteur Ben Emmerson's criticism of 'Scotland Yard's complicity' in failing to investigate, see e.g. T. Judd, 'Scotland Yard accused of being complicit in torture for failing to investigate UK's role in alleged war crimes', *Independent*, 18 March 2013.
[188] Eminent Jurists Report, n. 31.
[189] *R* v. *Ahmed* (Canada), n. 145.

the myriad states involved in rendition, and the violations it gave rise to, and in turn have catalysed on-going accountability initiatives against states and individuals.[190]

7. Conclusion

In many respects the shared responsibility for the abduction, black site detention and torture involved in the ERP is clear, in view of the multiplicity of states involved and the large number of international obligations violated during this programme. In some scenarios, the involvement of multiple states in facilitating, supporting, or acquiescing in the programme raises more challenging questions related principally to the application of secondary rules of responsibility. It is open to question whether the existing rules can be interpreted and applied to embrace the myriad forms of involvement or support in the programme highlighted above, or whether the experience of the ERP supports the need for a broader approach to 'complicity' in international law. The consideration of the ERP, by the various entities and courts of law referred to above, certainly contributes to the appreciation of the relevance and significance of the (perhaps neglected) law of state responsibility in the human rights context.

[190] Examples include announcements on the reopening of the investigation into black site detention on Lithuanian soil and calls for the El Masri investigation in Germany to be reopened. See e.g. Amnesty International, 'Europe: Complicit governments must act in wake of US Senate torture report', 20 January 2015.