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**Extraordinary Rendition: A Study of the ‘Gaps’ in the
International Legal Framework
Obligations, Fault Lines and Hyper Legalism**

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A Thesis submitted for the Degree of Doctor of Philosophy

Supervised by

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March 2016

Extraordinary Rendition: A Study of the ‘Gaps’ in the International Legal Framework

R.M.Grozdanova

Following 9/11, the prevention and pre-emption of acts of terrorism has become a priority at domestic and international level. The immediate legislative and political responses of countries such as the US and the UK are illustrative of the preference for more expansive national security policies over effective protection of individual human rights and civil liberties. In this context, national security has become much more strongly associated with pre-empting and preventing acts of terrorism. Expansive counter-terrorism programmes such as the high value detainee programme including extraordinary rendition were developed in order to facilitate this push for pre-emption and prevention.

Extraordinary rendition in its post 9/11 construct has become a euphemism for the irregular transfer of individuals across borders for the purposes of their *incommunicado* detention and enhanced interrogation in conditions that constitute multiple violations of human rights, including the right to be free from torture. It is, thus, a complex phenomenon, comprising of grave and multiple violations of international obligations, and severely challenging the perception that international human rights law has the capacity to effectively protect individual rights and particularly to uphold the absolute, *jus cogens* character of the prohibition against torture.

However, while certain elements of the international and human rights frameworks may have lend themselves to hyper legalistic exploitation for the purposes of the ‘War on Terror’, human rights adjudicatory bodies such as the European Court of Human Rights and the UN Human Rights Committee have tried to resist the challenge posed by expansive counter-terrorism practices and have shown the strength within the human rights framework.

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“No part of this thesis has been submitted elsewhere for any other degree of qualification in this or other university. It is all my own work unless referenced to the contrary in the text”

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Dedications

This thesis is dedicated to my wonderful parents, Mario and Valentina, whose unwavering love and support have always been an invaluable source of strength. Even at the most difficult of times, they seem able to make me laugh to tears. I will forever be immensely grateful for their exceptionally hard work, without which this thesis would not have come into existence and for putting books in my hands since the age of 4. Thank you for being my Sgt. Peppers's PhD Support Band, I will always need you even when I am 64.

This thesis is also dedicated to my one and favourite aunt, Natasha, whose warm smile and kind words made the gloomiest and most challenging of days seem full of sunshine and possibilities. After I completed my undergraduate and Masters degrees, she told me that while not all doors will open, some definitely would. When I started this PhD thesis, she smiled knowingly and said this seems to fit perfectly as I like reading so much; I just had to keep at it. As always she was right. I wish I had the chance to say it in person.

Table of Contents

Extraordinary Rendition: A Study of the ‘Gaps’ in the International Legal Framework	1
Abstract	2
Acknowledgements	4
Dedications	5
Table of Contents	6
Introduction: The ‘Uniqueness’ of 9/11 – Prevention, Pre-Emption and Securitisation	9
<i>The Uniqueness of 9/11 and subsequent Securitisation</i>	16
2.1. <i>International Securitisation</i>	17
2.2. <i>Domestic Securitisation</i>	22
<i>The post 9/11 Securitisation Catalysts and US Hyper Legalism</i>	27
<i>Extraordinary Rendition in the post 9/11 Environment – a Unique Challenge to the International Human Rights Framework?</i>	33
4.1. <i>Historical Background of Renditions and Existing Jurisprudence</i>	34
4.2. <i>Post 9/11 Operation and Examination of Extraordinary Rendition</i>	36
Chapter 1: The Rendition Circuits in Practice: Four Case Studies	42
<i>Initiation of the Rendition Circuits: The ‘Authorising/Sending State’</i>	44
2.1. <i>Relevant Statutory Provisions governing Transfers and General Approach to International Legal Standards</i>	46
2.2. <i>Existing Jurisprudence and History of the US as an ‘Authorising State’ of Irregular Transfers</i>	49
2.3. <i>Post 9/11 Use of Extraordinary Renditions: Catalysts and Hyper Legalism</i>	53
<i>Rendition Circuits and Transit States: Diego Garcia and Shannon Airport</i>	54
3.1. <i>Transit Point Type 1 (Stopover, Refuelling and Detention Facilities): The Island of Diego Garcia</i>	56
3.2. <i>Transit Point Type 2 (Stopover, Refuelling and Overflight Clearances): Shannon Airport</i>	65

<i>Rendition Circuits and Receiving States: Syria</i>	73
Chapter 2: <i>Non-Refoulement</i> and Irregular Transfers in Peace, Armed Conflict and the ‘War on Terror’	82
<i>The Prohibition against Torture and Non-Refoulement pre 9/11: International Human Rights and Humanitarian Law Protections</i>	83
2.1. <i>Jus Cogens and Non-Derogable International Legal Norms</i>	84
2.2. <i>International Human Rights Non-Refoulement Provisions</i>	87
2.3. <i>International Humanitarian Law protections regulating Transfers</i>	95
<i>General Applicability of International Human Rights Law and International Humanitarian Law to the ‘War on Terror’</i>	98
<i>The ‘War on Terror’ – an Armed Conflict under IHL?</i>	103
4.1. <i>The Concept of Armed Conflict under IHL</i>	104
4.2. <i>The War on Terror – an Armed Conflict?</i>	107
4.3. <i>Restrictions on Common Article 3 and other Core IHL Protections</i>	111
4.4. <i>IHL, Hyper Legalism and Irregular Transfers</i>	116
Chapter 3: Diplomatic Assurances and Memoranda of Understanding – Limiting Liability under the Anti-Torture Norm and <i>Non-Refoulement</i> Obligations	120
<i>Diplomatic Assurances and Memoranda of Understanding: Definitions, Established Practice and (Lack of) Enforcement Mechanisms</i>	122
2.1. <i>Understanding Diplomatic Assurances and Memoranda of Understanding</i>	124
2.2. <i>Potential Enforcement Mechanisms</i>	125
<i>Transferring Individuals with Diplomatic Assurances – Existing Jurisprudence</i>	128
3.1. <i>International Approach to Diplomatic Assurances</i>	130
3.2. <i>Regional Approaches to Diplomatic Assurances</i>	134
3.3. <i>Domestic Courts’ Assessment of Diplomatic Assurances</i>	143
<i>Limiting Non-Refoulement Obligations – Diplomatic Assurances, Memoranda of Understanding and Extraordinary Rendition</i>	147

Chapter 4: The Concept of Jurisdiction and the Rendition Circuits	152
<i>Defining Jurisdiction</i>	155
2.1. <i>Traditional Approach to Jurisdiction in International Law</i>	156
2.2. <i>Territorial Approach to Jurisdiction and Extraordinary Renditions</i>	159
<i>Extraterritorial Application of Human Rights Standards</i>	161
3.1. <i>Regional Approach to Extraterritoriality</i>	163
3.2. <i>International Approach to Extraterritoriality</i>	182
3.3. <i>The Personal Jurisdiction Model at Regional and International Level: Concluding Remarks</i>	188
<i>Jurisdictional Rules, Extraordinary Rendition and the United States</i>	190
<i>Jurisdictional Rules, Extraordinary Renditions and Third Party Responsibility</i>	193
Chapter 5: Privatisation, Intelligence Cooperation and the Rendition Circuits	200
<i>The Use of Private Actors and Private Companies</i>	202
2.1. <i>Private Charter Companies and the Rendition Circuits: International Enforcement Gap</i>	203
2.2. <i>Private Charter Companies and the Rendition Circuits: Practical Enforcement Challenges at Domestic Level</i>	208
2.3. <i>Private Flight Operators: Concluding Remarks</i>	212
<i>The Post 9/11 Push for Enhanced Intelligence: An Expansion of an Existing Rights Enforceability Gap</i>	213
3.1. <i>Existing Concerns relating to Intelligence Cooperation</i>	215
3.2. <i>Post 9/11 Challenges posed by Intelligence Gathering and Cooperation</i>	217
Conclusion: Post 9/11 and the High Value Detainee Programme – The Human Rights Response	223

The Uniqueness of 9/11 – Prevention, Pre-Emption and Securitisation

1. Introduction

Following 9/11, the prevention and pre-emption of acts of terrorism has become a priority at domestic and international¹ level. Through Resolutions such as 1368,² 1373,³ 1624⁴ and most recently 2249,⁵ the UN Security Council (UNSC) has urged states to take “all necessary” measures to prevent acts of terrorism both individually and collectively.⁶ Some of the measures suggested have included more traditional counter-terrorism methods such as bi- and multi-lateral agreements to prevent and suppress acts of terrorism as well as bi- and multi-lateral sharing of intelligence information on movement of individuals within a country and across borders.⁷ The UNSC additionally placed emphasis on more contemporary methods of countering terrorism such as the freezing of funds, assets and any other economic resources of individuals suspected of or having committed acts of terrorism.⁸ The Security Council Counter Terrorism Committee (CTC) was specifically created to improve the ability of UN Member States to prevent terrorist acts within and outside their own country as

¹ Despite the number of signed Conventions prohibiting certain acts of terrorism in discrete circumstances there is however no single codified definition of terrorism in international law.

² This Resolution was adopted on 12 September 2001 in the immediate aftermath of the events of September 11. The Resolution referred to the events of the previous day as an ‘act of international terrorism’ and thus a ‘threat to international peace and security’. Full text available at: <http://www.un.org/Docs/scres/2001/sc2001.htm> [last accessed 30 March 2016].

³ Adopted on 28 September 2001, this Resolution expressly reaffirmed Resolutions 1269 (1999) and 1368 (2001). Full text available at <http://www.un.org/Docs/scres/2001/sc2001.htm> [last accessed 30 March 2016].

⁴ Adopted on 14 September 2005 two months after the events on 7 July 2005 in the United Kingdom. Full text available at <http://www.un.org/en/sc/documents/resolutions/2005.shtml> [last accessed 30 March 2016].

⁵ Adopted on 20 November 2015 following the attacks in Paris on 13 November 2015. Full text available at <http://www.un.org/en/sc/documents/resolutions/2015.shtml> [last accessed 30 March 2016].

⁶ There currently are 32 Security Council Resolutions adopted between September 2001 and December 2015 addressing, condemning or prohibiting acts of terrorism, the full list is available at <http://www.un.org/en/sc/ctc/resources/res-sc.html> [last accessed 30 March 2016].

⁷ UN Security Council Resolution 1373.

⁸ See further the text of Resolutions such as 1373 and 1624. In addition, in accordance with state obligations under Resolution 1373, the global initiative of the Counter-Terrorism Committee Executive Directorate (CETD), launched in 2012, has been aimed at assisting UN Member States to set up effective asset freezing mechanisms. Further details of the initiative are available at http://www.un.org/en/sc/ctc/news/2012-10-24_amsterdam.html [last accessed 30 March 2016].

well as monitor compliance with its founding Resolution – Resolution 1373.⁹ The overall approach of the UNSC post 9/11 based on the language and range of recommendations contained within the Resolutions and initiatives such as the CTC indicates an eagerness not to just advocate for a broad range of domestic, bi- and multi-lateral counter-terrorism measures but also willingness to facilitate a transnational environment accommodative of such wide-ranging counter-terrorism measures.¹⁰ Thus, while terrorism is not a new phenomenon, at international level, the threat posed by Al Qaeda and international terrorism in general post 9/11 has been approached as a deeply concerning¹¹ challenge requiring collaborative and expansive methods of counter-terrorism.

Domestically, countries such as the United Kingdom (UK)¹² and the United States (US)¹³ adopted a wealth of new Acts and/or amendments to existing counter-terrorism and security legislation. The swift introduction of comprehensive counter-terrorism laws such as the 2001 UK Anti-Terrorism, Crime and Security Act and the 2001 USA Patriot Act or modifications of existing legislation have reshaped¹⁴ the relationship between the state and an individual terrorist suspect.¹⁵ However, these additional

⁹ Please refer to the Counter Terrorism Committee's outline of their mandate available at <http://www.un.org/en/sc/ctc/> [last accessed 30 March 2016].

¹⁰ For similar arguments as well as academic commentary on the UN Security Council arguably engaging in international law making post 9/11 see for example Talmon, S., 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175 and Powell, C. H., 'The Legal Authority of the United Nations Security Council' in Lazarus, L. and Goold, B.J. (eds.), *Security and Human Rights* (2007, Portland; Hart Publishing).

¹¹ See further the perambulatory clauses of the UN Security Council Resolution 1373.

¹² After 9/11 and the adoption of the comprehensive Anti-Terrorism, Crime and Security Act 2001, the UK has been regularly renewing anti-terrorism legislation – either annually or biannually. In 2006 and 2008, the changes to the existing legislation included minor expansions to the definition of terrorism. The list of Acts containing the term 'terrorism' in their title and the full texts of the Terrorism Act 2006 and the Counter-Terrorism Act 2008 are available at <http://www.legislation.gov.uk/primary?title=Terrorism> [last accessed 30 March 2016].

¹³ The USA Patriot Act 2001 amended a number of existing pieces of legislation such as the Immigration and Nationality Act 1952. See further Section 412 US Patriot Act full text available at <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf> [last accessed 30 March 2016]. Other relevant legislation includes the Department of Homeland Security Act 2002, Enhanced Border Security and Visa Reform Act 2002, Detainee Treatment Act 2005 and the Military Commissions Act 2006.

¹⁴ See for example the use of first Control Orders and subsequently Terrorism Prevention and Investigation Measures (TPIMs) in the United Kingdom. Control Orders and TPIMs aimed to reduce the risk of terrorism by imposing significant constraints on the movements and activities of individuals suspected or convicted of terrorist activities. For the operation of these measures please refer to the Prevention of Terrorism Act 2005 and the Terrorism Prevention and Investigation Measures Act 2011 as well the relevant Annual Reports of the Independent Reviewer of Terrorism Legislation, available at <https://terrorismlegislationreviewer.independent.gov.uk/category/reports/tpims-control-orders/> [last accessed 30 March 2016].

¹⁵ On this point see further the following edited collection - Jenkins, D. *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, Oxford; Oxford University Press).

domestic legislative measures were not deemed sufficient to counter the threat posed by terrorism. The considerable legal and political effort devoted by the US in particular to construct multi-faceted and multi-front counter-terrorism responses based on their assessment of the threat posed by terrorism post 9/11 also resulted in the creation of the transnational counter-terrorism campaign otherwise known as the ‘War on Terror’.¹⁶

As a political paradigm, this ‘war’ was used to justify the military operations in Afghanistan and Iraq. In his State of the Union address on 21 September 2001, George W Bush announced the beginning of the ‘War on Terror’.¹⁷ In the same speech, he also noted that the “US would pursue nations that provide aid or safe haven to terrorism” thus linking any potential invasions with the ‘War on Terror’. In its subsequent National Security Strategies, the US has described states such as Iraq and Afghanistan as “rogue states”, which “sponsor terrorism around the globe”.¹⁸ As a legal paradigm, the ‘War on Terror’ was designed to construct an environment within which the applicability of the relevant international norms and standards was either severely restricted or was uncertain. The wealth of academic, legal and political debate focusing on the post 9/11 state compliance with international legal obligations and the impact on individual human rights during the use of expansive counter-terrorism measures attests to the transformative effect of this paradigm.¹⁹

¹⁶ The term ‘War on Terror’ was initially described by then President George W. Bush in his Address to Congress and the American People on 20 September 2001, full text available at http://www.history2u.com/bush_war_on_terror.htm [last accessed 30 March 2016]. The current Obama administration refers to it as Overseas Contingency Operations.

¹⁷ Full text available at <http://www.theguardian.com/world/2001/sep/21/september11.usa13> [last accessed 30 March 2016]. Tony Blair made a similar statement on 7 October 2001 at the start of the military campaign in Afghanistan, full text available at <http://www.theguardian.com/world/2001/oct/07/afghanistan.terrorism11> [last accessed 30 March 2016].

¹⁸ See for example the 2002 National Security Strategy of the United States of America, full text available at <http://www.state.gov/documents/organization/63562.pdf> [last accessed 30 March 2016].

¹⁹ For a short selection see Schmitt, M.N., *Counter-Terrorism and the Use of Force in International Law*, (2002) The Marshall Center Papers, No. 5; Bellamy, A. J., *Fighting Terror: Ethical Dilemmas* (2008, New York; Palgrave Macmillan); Poynting, S. and Whyte, D. (eds.), *Counter-Terrorism and State Political Violence: The ‘War on Terror’ as Terror* (2012, London; Routledge); Ni Aolain, F. and Gross, O. (eds.), *Guantanamo and Beyond* (2013, Cambridge; Cambridge University Press); Davis, F. D. and De Londras, F., *Critical Debates on Counter-Terrorism Judicial Review* (2014, Cambridge; Cambridge University Press); Dickinson, R. et al (eds.), *Examining Critical Perspectives on Human Rights* (2014, Cambridge; Cambridge University Press); Roach, K. (ed.), *Comparative Counter-Terrorism Law* (2015, Cambridge; Cambridge University Press).

The high value detainee programme (HVDP) was another significant component of the transnational counter-terrorism operations after 2001.²⁰ The programme was designed to target individuals who were in the inner circle of Al Qaeda, who occupied key positions within that organisation and held information, which could not be obtained from any other source.²¹ “Timely and accurate” intelligence information was seen as crucial in successfully leading the ‘War on Terror’.²² The main facet of the programme was the *incommunicado* detention and use of enhanced interrogation for the purposes of gathering intelligence. The initially clandestine existence of HVDP after 9/11 was perhaps due to its relatively small size in comparison to other strands of the ‘War on Terror’ such as Operation Enduring Freedom and Operation Iraqi Freedom.²³ The use and operation of extraordinary renditions particularly in the period between 2001 and 2006 was arguably another key factor.²⁴

The term ‘extraordinary rendition’ has been employed as a euphemism for the covert irregular transfers²⁵ of individuals across borders for the purposes of their detention and interrogation in conditions that constitute multiple violations of human rights, including the absolute *jus cogens* right to be free from torture.²⁶ Private air carriers

²⁰ The operation of the programme appears to have been authorised on 17 September 2001. Please refer to *ACLU v. Department of Defense*, 04 Civ. 4151, Sixth Declaration of Marilyn A. Dorn Information Review Officer (CIA), pp. 34–35 available at https://www.aclu.org/sites/default/files/pdfs/safefree/20070110/cia_dorn_declaration_items_1_29_61.pdf [last accessed 30 March 2016]. See further the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Programme*, available at <http://www.intelligence.senate.gov/study2014/executive-summary.pdf> [last accessed 30 March 2016].

²¹ Office of the Director of National Intelligence, *Summary of the High Value Terrorist Detainee Program*, Washington DC 20511, full text available at <http://www.defense.gov/pdf/thehighvaluedetaineeprogram2.pdf> [last accessed 30 March 2016].

²² *Ibid.*

²³ Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36, p. 10.

²⁴ In its 2012 report, the Senate Select Committee on Intelligence referred to 98 individuals who were detained and rendered as part of the HVDP as at 5 May 2006. This report was declassified in 2014. The 2014 Open Society Report, referred to a total of 136 individuals who were rendered after 9/11. This suggests that the height of extraordinary renditions was between 2001 and 2006. The full text of the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* is available at <http://web.archive.org/web/20150214225954/http://www.intelligence.senate.gov/study2014/sscistudy1.pdf> [last accessed 30 March 2016]. The full text of the Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* is available at <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> [last accessed 30 March 2016].

²⁵ The distinction between regular and irregular transfers will be discussed in more depth in Chapters 2 and 3 of this thesis.

²⁶ Please see further on this point Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005 CDL-AD (2006) 009 and Committee on Legal Affairs

and charter companies²⁷ were regularly used in order to further conceal the operation and purpose of flights on the ‘rendition circuit’.²⁸ 54 states reportedly participated in and facilitated extraordinary renditions in various ways such as hosting CIA temporary detention facilities and black sites, provided assistance in the capture, interrogation and transportation of detainees, allowed use of domestic airspace for regular flyovers, refuelling and stopover services at airports and intelligence sharing leading to the capture and extraordinary rendition of individuals.²⁹ This thesis will argue that extraordinary rendition is thus a complex phenomenon, comprising of grave and multiple violations of international obligations, which severely challenges the perception that international human rights law has the capacity to *effectively* protect individual rights and to uphold the absolute, *jus cogens* character of the prohibition against torture.

Before proceeding to outline the severity of the challenge posed by extraordinary rendition to the international legal framework in general and individual human rights in particular, the arguably exceptional legal and political environment within which the rendition circuits operated will be mapped out first. While counter-terrorism laws since September 2001 have considerably altered the relationship between the individual terror suspect and the state, the tensions between liberty and security, between normalcy and emergency³⁰ have nonetheless felt familiar to an extent.³¹

and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36.

²⁷ The focus of Chapter 5 of this thesis is the reliance on such private operators and whether and how this has impacted on the effectiveness of the human rights framework.

²⁸ The phrase ‘rendition circuit’ has been used to describe the full flight circuit of aircrafts engaged in extraordinary rendition from the originating state through a transit state (stopover, refuelling or additional staging site) and back to where possible the aircraft’s “home base”. Please refer to the report by the Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers involving Council of Europe Member States*, AS/Jur (2006) 16.

²⁹ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p. 6.

³⁰ The term ‘emergency’ here and throughout this thesis reflects the texts of Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights both of which refer to a public emergency threatening the life of the nation. For an academic discussion on what constitutes an emergency, see for example Gross, O. and Ni Aolain, F., “Emergency, War and International Law – Another Perspective” (2001) 70 *Nordic Journal of International Law* 29 and Dyzenhaus, D. and Thwaites, R., ‘Legality and Emergency – The Judiciary in a Time of Terror’ in Lynch, A. *et al* (eds.), *Law and Liberty in the War on Terror* (2007, Sydney; The Federation Press).

³¹ On this point see Ramraj, V. V., ‘Counter-Terrorism’s Engagement with Transnational Legality’ in Jenkins, D., *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; Oxford University Press). For further discussions on liberty/security debate and previous state responses to terrorism see Dickson, B., *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010, Oxford; Oxford University Press) and Taylor Saito, N., *From Chinese Exclusion to*

However what has been the distinctive characteristic of the post 9/11 security exigency is how, as a response to the threat posed by terrorism, the US has extensively relied on a number of transnational organisations as well as state allies such as the UK in order to embark on a worldwide multi-front campaign against terrorism as will be demonstrated further below.

By (exploitatively) engaging with a complex web of legal norms and institutions beyond the state, the US ‘War on Terror’ legal and political paradigm, while not the sole factor, has contributed to the significantly increased focus of international legal and institutional structures on national security and transnational security cooperation.³² Starting with the immediately following discussion on the post 9/11 securitisation in Section 2 and the drivers or catalysts behind the upsurge of international, regional and domestic cooperation on expansive security and counter-terrorism measures in Section 3, this chapter will explore how the creation of an atmosphere within which the ‘War on Terror’ paradigm was palatable³³ for a period of time was a necessary prerequisite for the operation of the transnational rendition circuits. This and the ensuing chapters will then address the core thesis question of how the rendition circuits – multi-actor, transnational and covert irregular transfers resulting in severe rights violations including the *jus cogens* prohibition on torture – became operationalised despite the comprehensive international rights protections. Concurrently, the thesis will assess whether the extraordinary rendition programme poses a unique and corrosive threat to the strength of the international legal framework in general and the practical effectiveness of individual human rights in particular.

By focusing on the hyper legalistic approach by the US towards perceived and/or fashioned gaps within the framework such as the shifting meaning and scope of the concepts of ‘armed conflict’ and ‘jurisdiction’ and the liability limiting use of

Guantánamo Bay: Plenary Power and the Prerogative State (2008, Colorado; University Press of Colorado).

³² Ramraj, V. V., ‘Counter-Terrorism’s Engagement with Transnational Legality’ in Jenkins, D., *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; Oxford University Press). See also Klabbers, J., *An Introduction to International Institutional Law*, 3rd ed. (2015, Cambridge University Press) and Kolb, R., *An Introduction to the Law of the United Nations* (2010, Portland; Hart Publishing).

³³ The majority of academic commentary as well as numerous UN, Council of Europe and NGO reports have been heavily and persistently critical of the ‘War on Terror’ and its various strands. However as evidenced by the facilitation of various aspects of the rendition circuits and the HVDP by 54 states as well as the multi-state involvement and cooperation in operations Enduring Freedom and Iraqi Freedom, between 2001 and 2007 the US enjoyed wide support by states.

diplomatic assurances and private operators, this thesis argues that these areas of definitional uncertainty together with practical enforcement deficiencies of individual rights have been exploited by the US in order to operationalise extraordinary renditions. Rather than just outlining the range of rights violations committed as part of the rendition circuits however, the thesis also explores the relationship between the interpretation catalysts,³⁴ which have influenced the conception and development of the extraordinary rendition programme post 9/11 and the subsequent reliance on hyper legalism³⁵ to provide a veneer of legality³⁶ to the programme through the creation and utilisation of perceived or actual gaps in the international legal framework.

The thesis thus argues that the operationalisation of extraordinary rendition is as much the result of multi-faceted, comprehensive and inter-connected legal and political arguments within a highly charged international and domestic environment focused on securitisation as is also the product of exploitative or *male fides* interpretation of the existing legal obligations relating to transfers and the potential extraterritorial applicability of human rights provisions. By approaching extraordinary renditions in this manner, the thesis distinguishes itself from the existing academic commentary and investigative work by NGOs and journalists which has focused on confirming the operation of the programme,³⁷ identifying the states involved,³⁸ providing an account

³⁴ For a detailed examination of the term 'interpretation catalysts' see Ingber, R., 'Interpretation Catalysts and Executive Branch Legal Decisionmaking', (2013) 38 *The Yale Journal of International Law* 359 and Ingber, R., 'Human Rights, National Security, and Executive Branch Legal Decisionmaking', (2013) *Administrative and Regulatory Law News* 19.

³⁵ For general reading on legality and different approaches to it see further Dyzenhaus, D., 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 *Australian Journal of Legal Philosophy* 1; Waldron, J., 'Hart and the Principles of Legality' in Kramer, M. H. (ed.) *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (2008, Oxford; Oxford University Press) and Posner, R., 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986-87) 37 (2) *Case Western Reserve Law Review* 179.

³⁶ The phrase "thin veneer of legality" was used in the *MB v. Secretary of State for the Home Department (Re)* [2006] EWHC 1000 (Admin) at para. 103 with reference to the arbitrariness of the control orders legal regime which replaced the use of indefinite detention of non-British nationals considered to pose a threat to national security. See further Dyzenhaus, D., 'Introduction: Legality in a Time of Emergency' (2008) 24 (1) *Windsor Review of Legal & Social Issues* 1 and Ewing, K.D., *The Bonfire of Liberties* (2010, Oxford; Oxford University Press).

³⁷ Paglen, T. and Thompson, A.C., *Torture Taxi: On the Trail of the CIA's Rendition Flights* (2006, New York; Melville House); Grey, S., *Ghost Plane: The True Story of the CIA Torture Program* (2006, New York; St. Martin's Press) and Mayer, J., 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program' *The New Yorker* 14 February 2005.

³⁸ Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers involving Council of Europe Member States*, AS/Jur (2006) 16; Human Rights Council, *Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances*, General Assembly UN Doc. A/HRC/13/42.

of the rendees transferred³⁹ or outlining in detail the international legal provisions violated⁴⁰ and makes an original contribution to the field.

2. The Uniqueness of 9/11 and subsequent Securitisation

Much of the academic and public discourse since 9/11 has focused on how states have sought to safeguard the security of society as a whole by placing restrictions on individual liberty – especially on those suspected of terrorist activity.⁴¹ Security – defined as the ability of a state to protect its citizens from internal and external threats⁴² - appears to have become more intrinsically associated with pre-empting acts of terrorism and detaining individual terrorist suspects than with more traditional crime prevention. The immediate domestic legislative and political⁴³ responses of countries such as the UK and the US are illustrative of this push for pre-emptive and more muscular national security policies. The USA Patriot Act 2001 included a wide range of measures such as indefinite detention of immigrants and other non-nationals (or aliens) and permission to conduct searches in the home or office of an individual without their prior knowledge or consent amongst many others.⁴⁴ In the UK, the

³⁹ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

⁴⁰ See for example Weissbrodt, D. and Bergquist, A., 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123 and Satterthwaite, M. and Fisher, A., 'Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law' (2006) 6 *The Long Term View* 52.

⁴¹ See for example Gearty, C., *Can Human Rights Survive?* (2006, Cambridge; Cambridge University Press); Gearty, C., *Liberty and Security* (2013, Cambridge; Polity Press); Waldron, J., *Torture, Terror and Tradeoffs: Philosophy of the White House* (2010, Oxford; Oxford University Press); Levinson, S. (ed.), *Torture: A Collection* (2004, Oxford; Oxford University Press); Bingham, T., *The Rule of Law* (2011, London; Penguin Books); Chaskalson, A., 'The Widening Gyre: Counter-Terrorism, Human Rights and The Rule of Law' (2008) 67 (1) *The Cambridge Law Journal* 69; 'Civil Liberty or National Security: How Far is Too Far?' *The Guardian* 28 January 2005; David Cameron Speech to the Centre for Policy Studies, *Balancing Freedom and Security – A Modern British Bill of Rights*, full text available at <http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution> [last accessed 30 March 2016]. *A and X v Secretary of State for the Home Department* [2005] 2 WLR 87 and many others.

⁴² Goold, B.J., 'Privacy, Identity and Security' in Goold, B.J. and Lazarus, L. (eds.), *Security and Human Rights* (2007, Portland; Hart Publishing), p. 57.

⁴³ Statement to the Nation by Tony Blair on 11 September 2001, full text available at <http://webarchive.nationalarchives.gov.uk/20040621031906/http://number10.gov.uk/page1596> [last accessed 30 March 2016]. Labour Party Conference Speech by Tony Blair on 2 October 2001, full text available at <http://www.theguardian.com/politics/2001/oct/02/labourconference.labour6> [last accessed 30 March 2016]. Speech on Terrorism by George W Bush on 6 September 2006, full text available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&_r=0 [last accessed 30 March 2016].

⁴⁴ See further Section 412, Title IV - Protecting the Border and Section 213, Title II - Surveillance Procedures respectively. Full text of these two provisions and the USA Patriot Act 2001 is available at

Anti-Terrorism, Crime and Security Act 2001 influenced by the recommendations of UN Security Council Resolution 1373 included a number of expansive provisions on countering terrorism and improving security such as asset freezing,⁴⁵ indefinite detention of suspected international terrorists⁴⁶ and extension of powers to prevent and enforce criminal law⁴⁷ amongst other modifications on existing legislation.⁴⁸

Before discussing in more depth the post 9/11 securitisation within the US and UK however, the immediate responses by both the UNSC and NATO will be considered first. While the determinations made by each of these two bodies illustrate the perceived uniqueness of 9/11, what is perhaps of even more significance is the extent of the domestic internalisation of the relevant UNSC Resolutions and NATO declarations and the resulting impact on national and regional counter-terrorism responses. In addition, some of the measures specifically recommended by these two bodies have had a substantial role in the construction of the ‘War on Terror’ paradigm as well as the operationalisation of extraordinary renditions within it.

2.1. International Securitisation

Two UNSC Resolutions led the international response to the events of 9/11. Both Resolutions 1368⁴⁹ and the subsequently quite influential 1373,⁵⁰ adopted shortly after the acts of terrorism on 9/11, have reaffirmed the “inherent right of individual or collective self-defence” of states. Both have expressed readiness and determination by the UNSC to take “all necessary steps” to combat all forms of terrorism. Resolution 1373 in particular urged states to intensify the exchange of operational information and to cooperate to prevent acts of terrorism particularly through bi- and multi-lateral arrangements and agreements.⁵¹ Further, the Resolution made an express link between

<https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf> [last accessed 30 March 2016].

⁴⁵ Sections 4–14, Part 2 – Freezing Orders.

⁴⁶ Sections 21–28, Part 4 – Immigration and Asylum. Part 4 of the Act has been since repealed and replaced by the Prevention of Terrorism Act 2005 following the case of *A and Others v Secretary of State for the Home Department* [2004] UKHL 56. In this case, Section 23 of the Act was found to be incompatible with the European Convention on Human Rights.

⁴⁷ Sections 17–20, Part 3 – Disclosure of Information.

⁴⁸ The original full text of the Anti-Terrorism Crime and Security Act 2001 is available at http://www.legislation.gov.uk/ukpga/2001/24/pdfs/ukpga_20010024_en.pdf [last accessed 30 March 2016].

⁴⁹ Security Council Resolution 1368 (2001) adopted 12 September 2001.

⁵⁰ Security Council Resolution 1373 (2001) adopted 28 September 2001.

⁵¹ *Ibid.*

refugee status and terrorism by noting that states should ensure that terrorists do not misuse refugee status.⁵² The Resolution has been described as one of the drivers behind the post 9/11 trend to rely on immigration provisions and in particular those relating to transfers and detention as well as the more widespread use of contemporary methods of counter-terrorism such as asset freezing as part of states' counter-terrorism toolkit.⁵³

More significantly perhaps Resolution 1373 has been described by the then President of the UNSC as the "first step" in the UNSC legislating for the "rest of the United Nations' membership".⁵⁴ The reasoning behind this statement lies in the distinction between classic individualised Resolutions and new generic Resolutions such as 1373.⁵⁵ While classic UNSC resolutions are expressly or implicitly limited in time until the specific purpose for which they are adopted – usually to secure performance of an obligation or the cessation of an internationally wrongful act by the addressee – is accomplished.⁵⁶ The same does in principle apply to legislative Resolutions however, as the language of UNSC Resolution 2249⁵⁷ suggests there seems at present to be no end to the fight against international terrorism.⁵⁸ With this Resolution, UN member states were urged to take all necessary measures to "redouble and coordinate their efforts to prevent and suppress terrorist acts". Additionally, the hallmark of any legislative Resolution is the general and abstract character of the obligations

⁵² UN Security Council Resolution 1624 (UN Doc. S/RES/1624 (2005)) similarly expressly noted that the protections of the 1951 Refugee Convention including *non-refoulement* should not extend to an individual who is suspected of acts contrary to the purposes and principles of the UN.

⁵³ Goldstone, R., "The Tension between Combating Terrorism and Protecting Civil Liberties" in Wilson, R. A. (ed.), *Human Rights in the 'War on Terror'* (2005, Cambridge; Cambridge University Press), p. 165. See also Robinson M., "Connecting Human Rights, Human Development and Human Security" in Wilson, R. (ed.), *Human Rights in the 'War on Terror'* (2005, Cambridge; Cambridge University Press), p. 308. Luban, D., "Eight Fallacies about Liberty and Security" in Wilson, R. (ed.), *Human Rights in the 'War on Terror'* (2005, Cambridge; Cambridge University Press), p. 249.

⁵⁴ Press Conference by Security Council President, 2 April 2004, full text available at <http://www.un.org/News/briefings/docs/2004/pleuigerpc.DOC.htm>. See also Talmon, S., 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, p. 175; Alvarez, J. E., 'The UN's 'War' on Terrorism (2003) 31 *International Journal of Legal Info* 238, p. 241; Krisch, N., 'The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council' in Walter, C., *et al*, *Terrorism as a Challenge for National and International Law: Security versus Liberty* (2003, New York; Springer), p. 883 and Alvarez, J., 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 873, p. 874. .

⁵⁵ Talmon, S., 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, p. 177.

⁵⁶ *Ibid*, p. 176.

⁵⁷ Adopted on 20 November 2015, this Resolution is a response to the events in Paris on 13 November 2015. Security Council Resolution 2249, UN Doc. S/RES/2249 (2015).

⁵⁸ Talmon, S., 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, p. 176.

imposed.⁵⁹ As noted by the Columbian delegate to the UNSC specifically in relation to Resolution 1373 – it “does not name a single country, society or group of people”.⁶⁰ Thus, the obligations are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time.⁶¹ While these obligations may well be triggered by a particular situation, conflict, or event, but they are not restricted to it and are hence arguably akin to obligations entered into by states in international agreements.⁶²

Concomitantly to the UNSC affirmation of the individual and collective right to self-defence by states and its attempts at law making, on 12 September 2001, NATO invoked the principle of collective self-defence under Article 5 of the North Atlantic Treaty, which states as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all ... if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force ...

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.⁶³

This was the first invocation of this Article since the adoption of the North Atlantic Treaty.⁶⁴ A subsequent NATO Press Release declared, “*if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an*

⁵⁹ *Ibid*, p. 176.

⁶⁰ Quoted in Farley, M., ‘U.N. Measure Requires Every Nation to Take Steps Against Terrorism’, *the Los Angeles Times*, 28 September 2001.

⁶¹ Talmon, S., ‘The Security Council as World Legislature’ (2005) 99 *American Journal of International Law* 175, p. 176.

⁶² *Ibid*, pp. 176 – 179.

⁶³ North Atlantic Treaty 1949, full text available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm [last accessed 30 March 2016].

⁶⁴ Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36, p. 16.

action covered by Article 5 of the Washington Treaty”.⁶⁵ On the basis of this phrasing, the NATO invocation of Article 5 was initially considered to be provisional. Following a number of classified briefings by the US however the conditional clause was removed. In October 2001, the NATO Allies declared a unanimous assessment that the 9/11 attacks had been directed against the US from abroad thus activating Article 5 provisions.⁶⁶ Eight measures, which were intended to improve the combatting of terrorism, were agreed upon and were to be relied on either individually or collectively.⁶⁷ Amongst the adopted measures were:

- Enhancing intelligence cooperation and sharing;
- Providing blanket overflight clearances for the US for military flights related to operations against terrorism;
- Providing access for the US to ports and airfields on the territory of NATO nations for operations against terrorism including refuelling;
- Providing, either individually or collectively, assistance to NATO Allies which are or may be subject to increased threat of terrorism.

Rather than the extensiveness of these measures itself, what is perhaps of more significance is that these were agreed upon at the request of the US.⁶⁸ According to NATO procedures, it is the International Staff that have the responsibility for drafting documents and resolutions.⁶⁹ The language of these particular measures was reportedly drafted, re-drafted and put forward by the US unilaterally.⁷⁰ Article 5 does accommodate the undertaking of individual self-defence measures and NATO did

⁶⁵ Statement by the North Atlantic Council, Press Release (2001) 124 of 12 September 2001, full text available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> [last accessed 30 March 2016].

⁶⁶ Statement by the NATO Secretary General, Lord Robertson, NATO Press Release of 08 October 2001, full text available at <http://www.nato.int/DOCU/pr/2001/p01-138e.htm> [last accessed 30 March 2016].

⁶⁷ Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision On Implementation Of Article 5 of the Washington Treaty following the 11 September Attacks against the United States, 04 October 2001, full text available at <http://www.nato.int/docu/speech/2001/s011004b.htm> [last accessed 30 March 2016].

⁶⁸ *Ibid.*

⁶⁹ Buckley, E., ‘Invoking Article 5’, *NATO Review* full text available at <http://www.nato.int/docu/review/2006/issue2/english/art2.html> [last accessed 30 March 2016].

⁷⁰ Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36, p. 18.

outline that while any collective action would be decided by the North Atlantic Council, the US could also carry out *independent actions*, consistent with its rights and obligations under the UN Charter.⁷¹ However, the departure from the regular NATO procedures and the involvement of the US in the drafting process suggests that a) there was an acceptance of the uniqueness of events on 9/11 and b) the adopted measures would be of some operational significance. A report by the Council of Europe's Committee on Legal Affairs and Human Rights⁷² suggests that there were additional components of the NATO measures that have remained classified adding to the perceived 'extraordinariness' of the post 9/11 security emergency.⁷³

The invocation of Article 5 of the NATO Treaty and the adoption of UNSC Resolutions such as 1368 and 1373 has influenced the adoption and further development of expansive international, regional and domestic counter-terrorism measures as well as contributed to the post 9/11 securitisation. While the above outlined measures could arguably be seen as necessarily broad due to the nature of the terrorism threat post 9/11, the development of an international security regime through the CTC and UNSC Resolutions such as 1373, 1624 and 2249,⁷⁴ the engagement in international law making in matters of security⁷⁵ and the multi-layered impact on domestic legislation as will be discussed in the immediately following section is an illustration of the perceived uniqueness of the events of 9/11.

More significantly perhaps, the determinations made by the UNSC and NATO have contributed to the creation of a legal and political environment within which an expansive transnational counter-terrorism campaign such as the 'War on Terror' and its components such as HVDP could exist. Both the UNSC and NATO strongly

⁷¹ 'NATO and the Scourge of Terrorism: What is Article 5?' 18 February 2005 full text available at <http://www.nato.int/terrorism/five.htm> [last accessed 30 March 2016].

⁷² Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36, p. 19.

⁷³ As noted above, the term 'emergency' here and throughout this thesis reflects the texts of Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights. For a judicial discussion what constitutes an emergency, please refer to cases such as *Lawless v Ireland* (No 3) [1961] ECHR 2, *Ireland v the United Kingdom* [1978] ECHR 1 and more recently *A. and Others v the United Kingdom*, Application no. 3455/05, Judgment of 19 February 2009 as well as *Landinelli Silva v Uruguay*, Case No. 34/1978, Views adopted on 8 April 1981. In addition, refer to UN Human Rights Committee General Comment No. 29.

⁷⁴ See also Ramraj, V. V., 'Counter-Terrorism's Engagement with Transnational Legality' in Jenkins, D., *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; Oxford University Press).

⁷⁵ See further Happold, M. 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593 and Szasz, P., 'The Security Council starts Legislating' (2002) 96 *American Journal of International Law* 901 as well as Klabbers, J., *et al*, *The Constitutionalization of International Law* (2009, Oxford; Oxford University Press).

encouraged states to engage in bi- and multi-lateral arrangements to fight terrorism, bi- and multi-lateral intelligence cooperation and exchange of information and individual or collective assistance for a state or states facing a severe threat of terrorism. As Chapters 1, 4 and 5 will illustrate, the role of transit states – states which provided some support to the US such as stopover and refuelling facilities and/or blanket overflight clearances – and the post 9/11 expansion of intelligence sharing and cooperation were of particular importance to the transnational operation of the extraordinary rendition programme. Without this support by 54 other states,⁷⁶ the US arguably would not have been able to operationalise the rendition circuits post 9/11 in the same expansive and transnational manner as it did.

2.2. Domestic Securitisation

The US engagement in a transnational ‘War on Terror’ and the operation of HVDP and its components has been widely criticised.⁷⁷ The US approach to the relevance of core international human rights and humanitarian law protections and the legal tools used to limit or circumvent the general applicability of these legal frameworks will be discussed in detail in the following chapters. It is however apt at this point to briefly distinguish the legislative response embodied by the USA Patriot Act 2001 and the Executive⁷⁸ response which resulted in the authorisation of profoundly problematic counter-terrorism measures such as HVDP as a whole and ‘enhanced interrogations’, extraordinary rendition and *incommunicado* detentions in black sites across the world within in HVDP.⁷⁹

⁷⁶ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

⁷⁷ See for example International Commission of Jurists, *Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009, Geneva; ICJ); Report of the Special Rapporteur on the Promotion and Protections of Human Rights and Fundamental Freedoms while Countering Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3; Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program: Findings and Conclusions*; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* amongst many others.

⁷⁸ The role of the Executive response and executive lawyering will be addressed in more detail as part of the discussion on the interpretation catalysts which led to the construction of the ‘War on Terror’ and the development of the extraordinary rendition programme in Chapter 1.

⁷⁹ See for example the full text of John Yoo’s Memorandum Opinion for the Deputy Counsel to the President available at <http://www.justice.gov/olc/warpowers925.htm> [last accessed 30 March 2016]; See further the infamous 2003 Torture Memo by John Yoo and Jay Bybee as discussed in Coman, J. ‘Interrogation Abuses were Approved at the Highest Levels’ *The Sunday Telegraph (London)*, 13 June 2004, p. 26; see also Yoo, J., ‘The Continuation of Politics by Other Means: The Original

The USA Patriot Act 2001 (Patriot Act), codified into law a mere 45 days after 9/11,⁸⁰ aimed to “deter and punish terrorist acts in the United States and *around the world*” and “to enhance law enforcement investigatory tools”.⁸¹ Surveillance and physical powers under existing legislation such as the Foreign Surveillance and Intelligence Act of 1978 and the Electronic Communications Privacy Act of 1986 were expanded.⁸² Under Section 214 in particular and Title II of the Patriot Act in general, government agencies were allowed to gather “foreign intelligence information” from both US and non-US citizens. Title IV of the Patriot Act – Border Security – has amended the Immigration and Nationality Act of 1952 (INA) to expand the law enforcement and investigative powers of the US Attorney General⁸³ and the Immigration and Naturalisation service.⁸⁴

Under Section 411 of the Patriot Act, non-US nationals or aliens who endorse or espouse terrorist activity or have persuaded others to support such activity are prevented from entering the US. The spouse or child of such an alien would similarly be restricted from travelling into the US. Thus, by relying on immigration legislation as part of counter-terrorism measures, the Patriot Act – similar to UN Security Council Resolution 1373 – has made express links between the prevention and pre-emption of terrorism with immigration status. In addition, despite the existence of approximately 150 definitions of terrorism in federal law,⁸⁵ the definition of ‘terrorist activity’ was expanded to include actions involving the use of any dangerous device other than explosives and firearms as well as the solicitation of funds for a terrorist organisation and of individuals to engage in terrorist activity.⁸⁶ Overall, the US legislative response to 9/11 has resulted in the expansion of the pre-emptive security capabilities of various agencies to the detriment of individual civil liberties and protections. As a result, the provisions of the Patriot Act have drawn wide attention

Understanding of War Powers’ (1996) 84 *California Law Review* 167; Goldsmith, J., *The Terror Presidency: Law and Judgment inside the Bush Administration* (2009, New York; W.W. Norton & Company) and Goldsmith, J., *Power and Constraint* (2012, New York; W.W. Norton & Company).

⁸⁰ The Act was signed into law by President George W Bush on 26 October 2001 following very brief discussions in both Houses of Congress. Please refer to <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/images/20011026-5.html> [last accessed 30 March 2016].

⁸¹ Full text of the Act is available at <https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf> [last accessed 30 March 2016].

⁸² See for example Sections 202, 207, 216 and 217 of the USA Patriot Act of 2001.

⁸³ See for example Subtitle A, Section 401.

⁸⁴ See for example Subtitle A, Section 402 and 403.

⁸⁵ Perry, N., ‘The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails’, (2003) 30 *Journal of Legislation* 249.

⁸⁶ See Subtitle B, Section 411.

and criticism.⁸⁷ In comparison, the British anti-terrorism legislation albeit similarly expansive has drawn less external criticism despite becoming quite transnationally influential.⁸⁸

Prior to the attacks of 9/11, the UK adopted the Terrorism Act 2000 in order to consolidate the existing – and already extensive – counter-terrorism prevention legislation from the 1970s and 1980s.⁸⁹ One of the core features of the Act is the broad definition of terrorism,⁹⁰ which has influenced similarly expansive definitions in Australia, Canada and Israel amongst other countries.⁹¹ The existing definitions of terrorism have been vastly expanded from politically motivated violence to include politically and religiously motivated serious property damage and interference with electronic systems.⁹² The Act also outlines a proscription regime based on intelligence evidence and introduced offences relating to being a member of or identifying with a proscribed organisation.⁹³ Other broad offences, which can be potentially applied to individuals suspected of terrorist activities have been introduced, appear to push the boundaries of inchoate or pre-crime liability by criminalising the possession of articles.⁹⁴

The Act further provides for broad police powers including preventative arrests on suspicion and without charge and random stop and search powers for articles, which

⁸⁷ On this point see further K., *The 9/11 Effect: Comparative Counter Terrorism* (2011, New York; Cambridge University Press), p. 238.

⁸⁸ *Ibid.* On internal criticism see commentary such as Ewing, K., ‘The Political Constitution of Emergency Powers: A Comment’ (2007) 3 *International Journal of Law in Context* 313; Walker, C., ‘The Treatment of Foreign Terror Suspects’ (2007) 70 *The Modern Law Review* 427; Gearty, C., ‘11 September 2001, Counter-Terrorism and the Human Rights Act’ (2005) 32 *Journal of Law and Society* 18 and Fenwick, H., ‘The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September’ (2002) 65 (5) *Modern Law Review* 724 amongst many others.

⁸⁹ Murphy, C. C., *EU Counter-Terrorism Law* (2012, Oxford; Hart Publishing), p. 24.

⁹⁰ Part I, Section 1 – Terrorism: interpretation – Terrorism Act 2000. The full text of the provision is available at <http://www.legislation.gov.uk/ukpga/2000/11/section/1> [last accessed 30 March 2016]. See also *R v. Gul* (appellant) [2013] UKSC 64 and Greene, A., ‘The Quest for a Satisfactory Definition of Terrorism: *R v Gul*’ (2014) 77 (5) *Modern Law Review* 780.

⁹¹ Roach, K., *The 9/11 Effect: Comparative Counter Terrorism* (2011, New York; Cambridge University Press), p. 238; see also the Australian Security Legislation Amendment (Terrorism) Act 2002 and the Canadian Anti-Terrorism Act 2001. Australia has also followed Britain’s introduction of control orders and offences that target speech associated with terrorism. Please refer to the text of Anti-Terrorism Act (no.2) 2005 which makes a number of changes to existing counter-terrorism legislation. Full text available at <http://www.comlaw.gov.au/Details/C2006C00754> [last accessed 30 March 2016].

⁹² The full text of Part I - Introductory, Section 1 Terrorism Interpretation in the Terrorism Act 2000 is available at <http://www.legislation.gov.uk/ukpga/2000/11/contents> [last accessed 30 March 2016].

⁹³ Part II - Proscribed Organisations of the Terrorism Act 2000, full text available at <http://www.legislation.gov.uk/ukpga/2000/11/contents> [last accessed 30 March 2016].

⁹⁴ Roach, K., *The 9/11 Effect: Comparative Counter Terrorism* (2011, New York; Cambridge University Press), p. 241.

can be used in connection with terrorism.⁹⁵ Counter-terrorism measures such as proscription, limitations on speech, administrative detention based on secret evidence, emergency based legislation, the use of immigration as an aid to counter-terrorism and derogation from rights, which already had roots in the UK's pre-9/11 approach to terrorist violence, were given a more firm basis.⁹⁶ This legislative approach towards a permanent basis for counter-terrorism measures was followed by the Anti-Terrorism, Crime and Security Act 2001 (ATCSA).⁹⁷

One of the most important features of ATCSA was the inclusion of measures adopted following the notification of a 15-month derogation from Article 5(1)(f) of the European Convention on Human Rights (ECHR).⁹⁸ The UK was the only Council of Europe Member State to seek derogation under Article 15 ECHR following 9/11. The UK advised that as a result of a public emergency, linked to the presence of an unspecified number of foreign nationals who were suspected of being engaged in the commission, preparation or instigation of acts of international terrorism, of being members of or having links to organisations or groups engaged in such terrorist activities, additional arrest and detention measures were necessary.⁹⁹ Without such derogation, the proposed additional and necessary means for detention would have been inconsistent with the obligations contained in Article 5(1)(f).¹⁰⁰ The derogation in question was used to authorise indeterminate administrative detention of non-UK citizens who were suspected of terrorist activities however could not be deported due to the principle of *non-refoulement*.¹⁰¹

It is within this security-focused environment both domestically and internationally that extraordinary rendition was operationalised. Both the US and UK adopted very

⁹⁵ Part V - Counter-terrorist Powers and Part VIII General of the Terrorism Act 2000, full text available at <http://www.legislation.gov.uk/ukpga/2000/11/contents> [last accessed 30 March 2016].

⁹⁶ See for example Northern Ireland (Emergency Provisions) Act 1973; The Prevention of Terrorism (Temporary Provisions) Act 1974 and the Terrorism Act 2000 which maintained similar provisions; also Immigration Act 1971. See also Jackson, J., 'Many Years on in Northern Ireland: the Diplock Legacy', (2009) 60 *Northern Ireland Legal Quarterly* 213; Donohue, L., 'Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law', (2007) 59 *Stanford Law Review* 1321.

⁹⁷ *Ibid.*

⁹⁸ The 2001 Act was enacted as a response to 9/11 and UN Security Council Resolution 1373. Fenwick, H., 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?', (2002) 65 *Modern Law Review*, pp. 724 - 762.

⁹⁹ Declaration contained in a *Note Verbale* from the Permanent Representative of the United Kingdom, 18 December 2001, registered by the Secretariat General 18 December 2001.

¹⁰⁰ *Ibid.*

¹⁰¹ Please refer to Sections 21-23, Part 4 Immigration and Asylum, Anti-Terrorism, Crime and Security Act 2001. Part 4 of the Act has been since repealed following the case of *A. and Others v Secretary of State for the Home Department* [2004] UKHL 56. Section 23 of the Act in particular was found to be incompatible with the European Convention on Human Rights.

muscular counter-terrorism responses relying on a number of comprehensive domestic legislative measures and procedures as well as transnational cooperation through NATO and the UNSC to pre-empt and prevent acts of terrorism. However, the creation of the high value detainee programme (HVDP) and reliance on extraordinary rendition to capture, immobilise and detain individual terrorist suspects suggests that within the US expansive legislative measures were not seen as sufficient. Thus, while the UK explored domestic and regional legal avenues and sought to push the boundaries of the relevant legal provisions in a more transparent and accountable manner,¹⁰² the US engaged in mostly clandestine and unaccountable national security policies operating outside the established legal framework.¹⁰³ Both of these approaches raise questions in relation to the strength and effectiveness of the relevant human rights protections.

Concurrently, the divergence of counter-terrorism tactics by close allies such as the US and the UK particularly considering the role of the UK in most if not all main strands on the ‘War on Terror’,¹⁰⁴ raises the question of what drives a specific counter-terrorism approach or what are the interpretation catalysts – legal and political – behind the Executive’s decision to adopt a certain counter-terrorism programme. To put this question in a slightly different manner – why did the US consider its expansive and comprehensive legislative measures as insufficient to combat the threat of terrorism thus opting to develop and rely on covert and transnational counter-terrorism operations such as HVDP and extraordinary rendition? This is a rather salient question when taking into consideration an international atmosphere accommodative and supportive of wide ranging domestic, bi- and multi-lateral counter-terrorism measures, an atmosphere the US contributed to particularly in the context of the NATO decision to trigger Article 5 as discussed above. Before proceeding to outline how the post 9/11 operation of extraordinary

¹⁰² This will be discussed in more detail in Chapter 3 of this thesis in the context of diplomatic assurances and memoranda of understanding.

¹⁰³ On this point see for example Cole, D., ‘English Lessons: Analysis of UK and US Responses to Terrorism’ (2009) 62 (1) *Current Legal Problems* 136, pp. 146–148; Roach, K., *The 9/11 Effect: Comparative Counter-Terrorism* (2011, New York; Cambridge University Press), pp. 238–308. The Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc) did outline the involvement of the United Kingdom within HVDP.

¹⁰⁴ The UK has been heavily involved in Operation Iraqi Freedom and Operation Enduring Freedom in addition to having facilitated elements of the HVDP. See for example Report of a Committee of Privy Counsellors, *The Report of the Iraqi Inquiry* (2016, London; Government Publications) and (interim) Report of the Detainee Inquiry (2013, London; Government Publications).

rendition differs from other regular and irregular transfers and thus why it poses a unique challenge on the international legal framework, the section that follows will discuss the interpretation catalysts which have led to the construction of the ‘War on Terror’ paradigm within which the transnational rendition circuits could exist and the link between these catalysts and the reliance on hyper legalism in order to operationalise the circuits.¹⁰⁵ Section 3 will also assess what hyper legalism is and the role of this interpretation method in the context of HVDP and extraordinary renditions.

3. The post 9/11 Securitisation Catalysts and US Hyper Legalism

In 2003, David Dyzenhaus noted that the US and a number of other states were gripped by a ‘moral panic’ following the events of 9/11.¹⁰⁶ While periods of moral panic are not new to societies – particularly in the context of national security emergencies – what tends to change is the episode, person or group of persons, which becomes defined as a threat to society.¹⁰⁷ The object of the panic can be quite novel; however it can also be something which has been in existence for a long time and has suddenly reappears in the limelight.¹⁰⁸ While the threat of terrorism and public acts of terrorism are certainly not new, as discussed above, the events of 9/11 have been perceived as unique and the threat by international terrorist organisations as unprecedented. This approach to the events of 9/11 could be explained by the correlation between the volatility or intensity moral panic and the Executive decisions taken as a response to the event resulting in the panic.¹⁰⁹

For an event to be a moral panic, three key elements are required: a suitable enemy or folk devil,¹¹⁰ a suitable victim¹¹¹ and a consensus that the actions being denounced were not insulated entities but could become integral parts of society or regular

¹⁰⁵ A more detailed discussion of interpretation catalysts and hyper legalism will follow in Chapter 1.

¹⁰⁶ Dyzenhaus, D., ‘Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security’ (2003) 28 *Australian Journal of Legal Philosophy* 1, p. 2.

¹⁰⁷ Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. 1. See also Tushnet, M., “Defending *Korematsu*?: Reflections on Civil Liberties in Wartime” (2003) *Wisconsin Law Review* 273 and Young, J., *The Vertigo of Late Modernity* (2007, London; Sage Publications).

¹⁰⁸ Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. 1.

¹⁰⁹ *Ibid*, p. xxxii.

¹¹⁰ Described as soft and easily denounced target with little power.

¹¹¹ Someone with whom individuals could easily identify with.

occurrences unless decisive action is taken.¹¹² Once blame is allocated, i.e., an individual or a group has been identified as being responsible for causing the damage, the Executive will then assess the level of risk and by proxy the measures required to both apprehend those responsible and to pre-empt further occurrences of violence.¹¹³ Aside from the potential longevity of the measures adopted as a response, the volatility or intensity of the particular moral panic could also result in an expansive and assertive immediate reaction targeting everyone deemed responsible for the events triggering the panic.¹¹⁴ Thus, a comprehensive and long-lasting legislative and executive response could follow the aftermath of a particularly intense moral panic such as the one immediately following 9/11.

The events of 9/11 – the scale of destruction, the callousness of the attack and the number of casualties – arguably touched a chord with the international community in a manner previous terrorist attacks have not.¹¹⁵ The multi-faceted and multi-front response led by the US has been forceful; as noted by then President George W. Bush himself: “every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war” was to be used for “the destruction and the defeat of the global terror network”.¹¹⁶ The ensuing ‘War on Terror’ has resulted in severe and lengthy restrictions of the rights and liberties of individual terrorist suspects and has perhaps permanently recalibrated¹¹⁷ the relationship between such suspects and the state; moreover as the expansive domestic legislative and other measures suggest this recalibration has affected not only those who are suspected of terrorist activity but also those who may become a terrorist or a folk devil.¹¹⁸

¹¹² Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge), p. xii.

¹¹³ *Ibid*, p. xxxii.

¹¹⁴ *Ibid*, p. xix.

¹¹⁵ Jenkins, D., *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; Oxford University Press), p. 5.

¹¹⁶ Please see further ‘Transcript of President Bush’s Address’, *CNN News* 21 September 2001 available at <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> [last accessed 30 March 2016].

¹¹⁷ The concept of ‘downward recalibration’ of rights has been discussed in detail in De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011, Cambridge; Cambridge University Press) and Fenwick, H., ‘Recalibrating ECHR Rights and the Role of the HRA post 9/11: Reasserting International Human Rights Norms in the ‘War on Terror?’’ (2010) 63 (1) *Current Legal Problems* 153.

¹¹⁸ See for example Duffy, H., *The ‘War on Terror’ ad the Framework of International Law*, 2nd ed. (2015, Cambridge; Cambridge University Press); Donohue, L., *The Cost of Counter-Terrorism: Power, Politics and Liberty* (2008, Cambridge; Cambridge University Press); Ramraj, V. V., *et al*, *Global Anti-Terrorism Law and Policy*, 2nd ed., (2012, Cambridge; Cambridge University Press); Masferrer, A. and Walker, C. (eds.), *Counter-Terrorism, Human Rights and the Rule of Law* (2013, Gloucester;

Jenkins has argued that the entrenched post 9/11 moral panic and lingering fear of whether/when another attack might occur, has challenged both the ability of the state to provide security and the integrity of the international order in a world increasingly reliant on transnational networks.¹¹⁹ Thus the US and other states had to be seen to respond forcefully; the ensuing domestic and international securitisation and transnational intelligence and political cooperation have been some of the results.¹²⁰ There is arguably a (strong) link between the intense moral panic, which gripped the US and the announcement of and subsequent engagement in a multi-front transnational counter-terrorism campaign. However, there are other factors, which also need to be examined to understand what drove the construction of the ‘War on Terror’ as a whole as well as separate counter-terrorism measures within it such as extraordinary renditions.

In recent years there have been many speculations over the Executive’s legal interpretation and decision-making, particularly in relation to matters of national security.¹²¹ The debates on how and why the Executive arrives at a certain understanding of its legal constraints and the extent to which expansive national security and counter-terrorism measures proposed by the Executive can be adequately restrained by existing legal obligations have persevered.¹²² The current legal scholarship has predominantly focused on rational, political and structural arguments¹²³ to explain Executive action however the diverse manner in which legal

Edward Elgar). See also UK Counter Extremism and Safeguarding Bill 2016 and the UK Investigatory Powers Act 2016.

¹¹⁹ Jenkins, D., *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; Oxford University Press), p. 9

¹²⁰ *Ibid.*

¹²¹ Ingber, R., ‘Human Rights, National Security, and Executive Branch Legal Decisionmaking’, (2013) *Administrative and Regulatory Law News* 19, p. 19.

¹²² *Ibid.* See also Posner, R., *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006, New York; Oxford University Press); Posner, E. A. and Vermeule, E., *Terror in the Balance: Security, Liberty, and the Courts* (2007, New York; Oxford University Press); Sunstein, C., ‘Minimalism at War’ (2004) *Supreme Court Review* 47; Cole, D., *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003, New York; W.W. Norton & Co), Bickel, A. M., *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd ed. (1986, New Haven; Yale University Press) and Kavanagh, A., ‘Constitutionalism, Counter-Terrorism and the Courts: Changes in the British Constitutional Landscape’ (2011) 9 *International Journal of Constitutional Law* (ICON) 172.

¹²³ Ingber, R., ‘Interpretation Catalysts and Executive Branch Legal Decisionmaking’, (2013) 38 *The Yale Journal of International Law* 359; see also Goldsmith, J., *The Terror Presidency: Law and Judgment inside the Bush Administration* (2009, New York; W.W. Norton & Company); Katyal, N., ‘Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within’ (2006) 115 *Yale Law Journal* 2314; Rao, N., ‘Public Choice and International Law Compliance: The Executive Branch is a They not an It’ (2011) 96 *Minnesota Law Review* 194 and Magill, E. and Vermeule, A., ‘Allocating Power within Agencies’ (2011) 120 *Yale Law Journal* 1032 amongst others.

questions arise for the Executive following a moral panic such as 9/11 should also be considered.¹²⁴ Understanding these distinct triggers or interpretation catalysts for legal decision-making is important as they can have a significant effect on the Executive process and resulting decisions.¹²⁵ In particular, these catalysts can have a role in driving and shaping the Executive decision-making when balancing national security and counter-terrorism considerations against existing international law and human rights obligations.¹²⁶

In the immediate aftermath of an emergency and at the onset of a moral panic, the Executive's positioning tends to be the initial and at times pivotal declaration of how the state will respond legally, politically and/or militarily. The above quoted statement of then President George W. Bush is an apt illustration. Such declarations can also provide strong indications of how existing legal obligations will be approached, i.e., in the context of this legal, political and/or military response what is the relevant and applicable area of law. Military Order of November 13, 2001¹²⁷ by George W. Bush on the Detention, Treatment and Trial of individuals captured as part of the 'War on Terror' is a good example.¹²⁸ Ingber has argued that in this context the Executive's interpretation of its national security authority can often serve not only as one level of an inter-branch interpretive exercise but also as law making.¹²⁹ Thus, how a legal question arises for the Executive can shape both the process of decision-making and the key choices made.¹³⁰ This is an important consideration as the Executive choices and decisions made in relation to national security tend to become the entrenched governmental position.¹³¹

Within the moral panic following 9/11 one of key legal questions for the US Executive arguably would have been what is the proper – i.e. within our existing international and domestic legal commitments – response to terrorism. This question would likely have been followed by another – would a strictly legislative approach be sufficient to effectively respond to 9/11 and pre-empt future terrorism threats. As

¹²⁴ Ingber, R., 'Human Rights, National Security, and Executive Branch Legal Decisionmaking', (2013) *Administrative and Regulatory Law News* 19, p. 19.

¹²⁵ *Ibid.*, p. 19 – 20.

¹²⁶ *Ibid.*

¹²⁷ Military Order of November 13, 2001, Federal Register, Vol. 66, No. 222, full text available at <http://www.gpo.gov/fdsys/pkg/FR-2001-11-16/pdf/01-28904.pdf> [last accessed 30 March 2016].

¹²⁸ The text and significance of this order will be discussed in detail in Chapter 2.

¹²⁹ Ingber, R., 'Human Rights, National Security, and Executive Branch Legal Decisionmaking', (2013) *Administrative and Regulatory Law News* 19, p. 19 – 20.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

discussed above, the US opted for a multi-faceted and multi-front transnational counter-terrorism campaign with the Executive approach, particularly in relation to the interpretation of the applicability and scope of certain international legal obligations, being heavily criticised. Some of the measures adopted as part of the ‘War on Terror’ such as components of the HVDP have consistently been referred to as unlawful¹³² and have subsequently been dismantled.¹³³ However, as noted by Dyzenhaus, all institutional actors involved in the proposal, implementation and assessment of national security measures – the Executive in particular – tend to demonstrate a compulsion of legality or the compulsion to justify all acts of state as having a legal basis or the authority of law.¹³⁴

The Executive’s compulsion for legality can set in motion or catalyse two distinct cycles of legality. The significant difference between these two cycles can be quite important in the context of an intense moral panic, which can influence the Executive to undertake a more minimalist approach to its obligations towards the ‘folk devils’.¹³⁵ While in the first cycle the institutions of the legal order cooperate and ensure compliance with legality (understood as a substantive conception of the rule of law), in the second cycle the content of legality or the rule of law is approached in an increasingly more formal or empty manner resulting in the mere appearance or

¹³² For commentary see for example Wilson, R. A. (ed.), *Human Rights in the ‘War on Terror’* (2005, Cambridge; Cambridge University Press); Duffy, H., *The ‘War on Terror’ ad the Framework of International Law*, 2nd ed. (2015, Cambridge; Cambridge University Press); Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363 / 2005 CDL-AD (2006) 009 amongst many others.

¹³³ Executive Order 13491 revoked all executive directives, orders, and regulations including but not limited to those issued to or by the CIA between 11 September 2001 and January 2009. Thus, in effect, secret detention facilities were no longer to be used, enhanced interrogation was prohibited, the full protections of Geneva Conventions I-IV and all other relevant international provisions were made available to remaining detainees. Extraordinary renditions – subject to improved monitoring mechanisms to prevent ill treatment – have however remained an available counter-terrorism tool for the US. Special Task Force on Interrogations and Transfer Policies Issues: Its Recommendations to the President, Department of Justice (Office of the Attorney General), 24 August 2009 (updated on 15 September 2014), full text available at <https://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president> [last accessed 30 March 2016].

¹³⁴ Dyzenhaus, D., ‘Introduction: Legality in a Time of Emergency’ (2008) 24 (1) *Windsor Review of Legal & Social Issues* 1; For further discussion on legalism and legality please refer to Fuller, L. L., ‘The Case of the Speluncian Explorers’ (1949) 62 *Harvard Law Review* 616; Shklar, J., *Legalism* (1964, Cambridge, Massachusetts; Harvard University Press); Shapiro, S. J., *Legality* (2011, Cambridge, Massachusetts; Harvard University Press); Dyzenhaus, D., *The Constitution of Law: Legality in a Time of Emergency* (2006, New York; Cambridge University Press).

¹³⁵ Dyzenhaus, D., ‘Introduction: Legality in a Time of Emergency’ (2008) 24 (1) *Windsor Review of Legal & Social Issues* 1.

pretence of legality.¹³⁶ Such an approach to the rule of law is problematic not just in itself but also in combination with what has been described by Raz as the “danger created by law itself”.¹³⁷ He noted that the law could be uncertain, unstable or obscure and thus potentially infringe on individual rights and freedoms however the rule of law is designed to prevent such dangers.¹³⁸ Thus, the rule of law could be seen as a negative virtue – “the evil which is avoided is evil which could only have been caused by the law itself”.¹³⁹

This “evil within” or uncertainty has also been described as a fault line¹⁴⁰ within the international legal framework. Fault lines in this context are areas of fracture or ambiguity within the international legal framework, which afford states the opportunity to reassess and adjust their obligations. Once identified, these fault lines could facilitate the adjustment (improvement) of the law or result in the exploitation of the law through the creation of legal grey holes.¹⁴¹ A legal grey hole is not a lawless void but is rather a legal space within which there are some legal constraints on state actions but these constraints are so weak that they permit governments to operate in the manner in which it desires. Such grey holes thus offer the appearance of governance in accordance with the rule of law.¹⁴² It should be noted however that as these areas of uncertainty or fracture can also be used to improve the law, it is the state’s approach to legality, which can result in the creation of such legal grey holes. Thus, the key consideration is how a state chooses to engage with such fault lines.

In constructing its ‘War on Terror’ paradigm, the US Executive put forward extensive legal arguments in support of its interpretation of the general applicability of the human rights framework, relevance of specific humanitarian law provisions to individuals captured and detained within the ‘War on Terror’ and the use of extraordinary rendition.¹⁴³ In addition, the US engaged in liability-limiting use of diplomatic assurances and private charter companies while operating the rendition

¹³⁶ *Ibid*, p. 4.

¹³⁷ Raz, J., ‘The Authority of Law: Essays on Law and Morality’ (1979, Oxford; Oxford University Press), pp. 223 – 224.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

¹⁴⁰ For a discussion on the concept of fault lines within the international legal framework and fault lines of legitimacy in particular, please refer to Charlesworth, H., and Coicaud, J.M., *Fault Lines of International Legitimacy* (2010, Cambridge; Cambridge University Press). In this book, fault lines are described as simultaneously being zones of fracture and opportunities for adjustment.

¹⁴¹ Dyzenhaus, D. *The Constitution of Law; Legality in a Time of Emergency* (2006, New York; Cambridge University Press), p. 202.

¹⁴² *Ibid*, p. 42.

¹⁴³ All of these will be discussed in depth in Chapter 1.

circuits arguably demonstrating both a normative acceptance of its obligations and a further attempt to provide a veneer of legality to its counter-terrorism measures. As will be discussed throughout this thesis starting with Chapter 1, the US aimed to provide legal justification for all key and distinct components of HVDP including extraordinary renditions and all the various rendition circuit stages as well as create an environment within which the applicability of the relevant human rights and humanitarian law provisions was uncertain or severely restricted. What could, in this context, be described as the US hyper compulsion for legality, or hyper legalism for short, triggered or catalysed the second cycle of legality.

In respect of the scope of jurisdiction and *non-refoulement* obligations the second cycle of legality has been triggered through a very narrow and formal reading and application of the letter of the law. This formal reading particularly in respect of the concept of jurisdiction and the language and scope of Article 3 UNCAT is akin to legal formalism.¹⁴⁴ As will be demonstrated in Chapter 4, both have been approached by the US Executive as having a fixed determinative meaning¹⁴⁵ based on the original text of the relevant provisions despite subsequent developments and extensions through case law and commentary by the relevant UN bodies. In comparison, the liability limiting use of diplomatic assurances and private contractors, the restrictions on *lex specialis* and *lex generalis* and the determination that the ‘War on Terror’ is a novel type of armed conflict have all been relied on to provide a veneer of legality for the severe restriction on individual rights. The manner in which this veneer of legality has been constructed however illustrates an ever more perfunctory approach to international legal obligations. This approach has also catalysed the second cycle of legality.

This raises the question of whether this engagement with existing legal obligations in combination with the practical operation of expansive and violatory counter-terrorism programme such as extraordinary rendition has eroded international human rights protections. Concomitantly, it also raises another question – has the international human rights framework shown strength and resilience within to resist the corrosive

¹⁴⁴ See further Carrigan , F., ‘A Blast from the Past: The Resurgence of Legal Formalism’ (2003) 27 *Melbourne University Law Review* 163 and Posner, R., ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986-87) 37 (2) *Case Western Reserve Law Review* 179.

¹⁴⁵ Carrigan , F., ‘A Blast from the Past: The Resurgence of Legal Formalism’ (2003) 27 *Melbourne University Law Review* 163, p. 165 in particular.

nature of such transnational and violatory counter-terrorism measures?

4. Extraordinary Rendition in the post 9/11 Environment – a Unique Challenge to the International Human Rights Framework?

Before proceeding with an assessment of the challenge posed by extraordinary renditions to the international human rights framework, the distinction between regular and irregular transfers should be outlined. The Venice Commission has outlined four situations in which a state may lawfully transfer an individual to another state: deportation, extradition, transit and transfer of a sentenced person for the purposes of serving their sentence in another country.¹⁴⁶ If a transfer involves an action or actions which contravene to existing legal standards, it is referred to as an irregular transfer.¹⁴⁷ The kidnapping of a person in violation of a state's territorial sovereignty or the active or passive facilitation of kidnapping are examples of contravening actions.¹⁴⁸ Irregular transfers have also been referred to as 'renditions'.¹⁴⁹ However, whether the rendition process is actually unlawful depends on the laws of the states involved and the applicable international legal framework.¹⁵⁰ The term 'rendition' is thus a general term, which refers to the actual result – the obtaining of custody over an individual – rather than the means.¹⁵¹

Martin Scheinin, the UN Special Rapporteur for human rights and counter-terrorism, has described rendition as a process which involves the transfer of a person from one jurisdiction to another or from the custody of one state to another by various means.¹⁵² A rendition to justice in circumstances where an individual is transferred outside formal extradition arrangements however is handed over to another state for the purposes of standing trial in that state may be found lawful if there was full compliance with *non-refoulement* obligations.¹⁵³ However, as noted by the Special

¹⁴⁶ Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363 / 2005 CDL-AD (2006) 009, paras 10–23.

¹⁴⁷ *Ibid*, paras 24–30.

¹⁴⁸ *Ibid*, paras 24–30.

¹⁴⁹ *Ibid*, para 30.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

¹⁵² Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, para. 36.

¹⁵³ *Ibid*.

Rapporteur, a rendition to justice might involve an unlawful detention. In contrast, an extraordinary rendition for the purposes of interrogation and/or detention without charge is always impermissible under international law as it places a detained individual at risk of ill treatment.¹⁵⁴

4.1. Historical Background of Renditions and Existing Jurisprudence

‘Rendition’ or ‘Rendition to justice’ and the practice of irregular transfers are not new phenomena at international, regional or domestic level. A particularly public and well-known example is the abduction of Adolf Eichmann, Head of Operations for the SS. In May 1960, while living under a false identity in Argentina, he was captured by Mossad operatives.¹⁵⁵ He was transferred to Israel where he faced trial in accordance with the Nazis and Nazi Collaborators (Punishment) Law, 5710–1950. UNSC 138 found the violation of the sovereignty of a Member State to be incompatible with the UN Charter and declared that such acts if repeated may endanger international security and peace.¹⁵⁶ Israel was asked to make appropriate reparations in accordance with the UN Charter and international law rules. Domestically, in discussing the potential impact of the transfer, the District Court of Jerusalem referred to precedents from the US and the UK affirming the principle of *male captus bene detentus* – the circumstances of a suspect’s arrest do not compromise the jurisdiction of the trial court.¹⁵⁷

Another illustrative example of rendition to justice was the transfer of Ilich Ramirez Sanchez, otherwise known as Carlos ‘The Jackal’. He was transferred from Sudan to France in 1994 to face a criminal trial on a number of charges relating to terrorist activities.¹⁵⁸ The Indictments Division Court noted that there was no extradition treaty between France and Sudan at the time and the French authorities had made no request for the applicant to be detained pending extradition or to be extradited. A decision by the Sudanese authorities to transfer an individual was found to be within the sovereign

¹⁵⁴ *Ibid.*

¹⁵⁵ Details of the abduction are available at http://www.knesset.gov.il/lexicon/eng/aichman_eng.htm [last accessed 30 March 2016].

¹⁵⁶ UN Security Council Resolution 138 (1960), UN Doc S/4349 available at <http://unscr.com/en/resolutions/doc/138> [last accessed 30 March 2016].

¹⁵⁷ *Ibid.*, p. 684.

¹⁵⁸ *Ilich Sanchez Ramirez v. France*, Application No. 28780/95, European Commission of Human Rights, Decision 24 June 1996.

powers of Sudan and thus, in the absence of a treaty, the use of extradition fell within Sudan's sovereign discretion. No extradition proceedings were taken against Mr Sanchez and the offences he was charged with were not amongst those listed within the extradition procedure under the French Law of 10 March 1927.¹⁵⁹ Thus, no breach of a provision of a treaty could be established and the applicant was found not to have been subject of a 'disguised extradition'.¹⁶⁰ The European Commission on Human Rights found that the ECHR did not contain provisions either concerning the circumstances in which an extradition may be granted or the procedure to be followed before an extradition may be granted. Thus even if the transfer of Mr Sanchez from Sudan to France could be described as a disguised extradition, it could not, as such, constitute a violation of the ECHR.¹⁶¹

Reportedly rendition, as part national security strategy, was approved in the US in 1986.¹⁶² According to a classified document, originally the rendition programme was used in circumstances where a suspected terrorist was 'picked up' from either a) a country in which no government exercises effective control (failed state, civil war or substantial civil unrest), b) a country known to plan and support international terrorism or c) international waters and airspace.¹⁶³ In 1993, President George H.W. Bush reportedly authorised specific procedures for renditions into the US through National Security Directive 77, which is still classified.¹⁶⁴ The State Department Report on 'Patterns of Global Terrorism 2001' lists out 10 cases of rendition of terrorist suspects to the US between 1993 and 2001 – in some cases the country of capture is not listed.¹⁶⁵

Extraordinary rendition is not strictly a post 9/11 phenomenon.¹⁶⁶ In 1995, US intelligence agents reportedly picked up from Croatia one of Egypt's most wanted Islamic militants, placed him on a ship in the Adriatic Sea for the purposes of

¹⁵⁹ The Law Relating to the Extradition of Foreigners; *Loi relative à l'extradition des étrangers*. Full text available at: <http://www.refworld.org/docid/3e68aadd4.html> [last accessed 30 March 2016].

¹⁶⁰ *Ilich Sanchez Ramirez v. France*, Application No. 28780/95, European Commission of Human Rights, Decision 24 June 1996, p. 158.

¹⁶¹ *Ibid*, p. 162.

¹⁶² Satterthwaite, M. and Fisher, A., 'Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law' (2006) 6 *The Long Term View* 52, p. 55, 66.

¹⁶³ *Ibid*, p. 55.

¹⁶⁴ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p.14.

¹⁶⁵ United States Department of State, *Patterns of Global Terrorism 2001*, full text available at <http://www.state.gov/documents/organization/10319.pdf> [last accessed 30 March 2016].

¹⁶⁶ For an overview, please refer to Weissbrodt, D. and Bergquist, A., 'Extraordinary Rendition: A Human Rights Analyses' (2006) 19 *Harvard Human Rights Journal* 123.

interrogation and subsequently handed him over to Egyptian authorities.¹⁶⁷ His family believe that he has been executed in Egypt.¹⁶⁸ In 1998, US agents reportedly transferred Tallat Fouad Qassem, a leader of an Egyptian extremist organisation to Egypt after he was picked up in Croatia.¹⁶⁹ Egyptian lawyers stated that he was questioned aboard a US ship off the Croatian coast before he was taken to Cairo where a military tribunal had already sentenced him to death *in absentia*.¹⁷⁰

The post 9/11 operation of extraordinary rendition appears to have been authorised on 17 September 2001 – just 6 days after the events of 9/11.¹⁷¹ In 2006 President George W. Bush acknowledged the existence of the extraordinary rendition programme.¹⁷² In comparison with the renditions to justice, the scale and span of the rendition circuits has been vastly expanded. 54 states provided operational support to various stages of the transnational rendition circuits with at least 136 individuals confirmed as rendered to *incommunicado* detention and interrogation facilities between 2001 and 2009.¹⁷³ The relatively limited number of individuals affected and the origins of the programme prior to 9/11 arguably suggest that extraordinary rendition was an already existing challenge to the international human rights framework. The complexity and comprehensiveness of the structures required to operate ER on a transnational level, the extent of the intelligence sharing and cooperation and the duration of its clandestine operation suggest otherwise however. During this period, the extraordinary rendition programme developed into a large, complex, transnational and multi-actor structure of rights violation including the absolute, *jus cogens* prohibition on torture. The scale, scope, operation and purpose of the renditions circuits thus raise severe concerns in relation to the practical enforceability and effectiveness of the human rights framework.

¹⁶⁷ The Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004, ABCNY & NYU School of Law; New York), p. 9.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Please refer to *ACLU v. Department of Defense*, 04 Civ. 4151, Sixth Declaration of Marilyn A. Dorn Information Review Officer (CIA), pp. 34-35 available at https://www.aclu.org/sites/default/files/pdfs/safefree/20070110/cia_dorn_declaration_items_1_29_61.pdf [last accessed 30 March 2016].

¹⁷² Stolberg, S. G., ‘President Moves 14 Held in Secret to Guantanamo’ *The New York Times* 7 September 2006, full text available at <http://www.nytimes.com/2006/09/07/us/07detain.html?pagewanted=all> [last accessed 30 March 2016].

¹⁷³ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p.12.

4.2. Post 9/11 Operation and Examination of Extraordinary Rendition

There has been much work done establishing the contours of the programme and outlining the violations that extraordinary rendition entails, however much of that work has characterised it as a case of ‘simple’ violation of international human rights law.¹⁷⁴ The existing academic commentary as well as the various UN and regional reports has approached these irregular transfers by outlining the list of international and regional human rights provisions that have been violated and concluding that the operation of extraordinary rendition is detrimental to individual rights protections. This thesis approaches the issue from a different and original standpoint by not only establishing the violations but also exploring whether these violations were perhaps in part facilitated by practical enforcement deficiencies and areas of legal uncertainty within human rights law and international humanitarian law. In other words, it explores whether, by operationalising the extraordinary rendition programme, the US and other implicated countries were manipulating and exploiting perceived or existing gaps within the international legal system through misapplication or hyper legalistic interpretation of the law. Hyper legalism throughout this thesis refers to the hyper compulsion of the US to provide a veneer of legality to every facet of its transnational counter-terrorism campaign; a compulsion which resulted in either a very formal or empty reading and application of the letter of the law for the purposes of exploiting it, as discussed further above. Concomitantly, the thesis assesses what are drivers or interpretation catalysts behind this particular approach to the rule of law and the significance of these catalysts for Executive decision making. As will be demonstrated in the chapters that follow, hyper legalism has been used to identify existing or create new areas of definitional uncertainty. Once these areas have been

¹⁷⁴ Satterthwaite, “M. Rendered Meaningless: Extraordinary Rendition and the Rule of Law” (2007) 75 *George Washington Law Review* 1; Satterthwaite, M., “Extraordinary Rendition and Disappearances in the “War on Terror”” (2006) 10 *Gonzaga Journal of International Law* 70; Weissbrodt, D. and Bergquist, A. “Extraordinary Rendition and the Torture Convention”, (2005) 46 *Virginia Journal of International Law* 586; Council of Europe, *Secretary General’s Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, notably by or at the instigation of Foreign Agencies*, available here <https://wcd.coe.int/ViewDoc.jsp?id=976731&Site=COE> [last accessed 30 March 2016]; Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States*, AS/Jur (2006) 16 Part II; Irish Human Rights Commission, “*Extraordinary Rendition: A Review of Ireland’s Human Rights Obligations*” (2007, Dublin; Irish Human Rights Commission).

uncovered, they have been engaged in a manner allowing for or providing legitimacy to violatory behaviour.

The analysis identifies the engagement of private corporate actors as a gap within the international legal framework while the strict interpretation of jurisdictional rules and the liability-limiting use of diplomatic assurances are classified as perceived gaps exploited by the US through hyper legalism. These are conceptualised in the thesis in combination as having been utilised to create an environment within which extraordinary rendition was pursued. The thesis thus explores how extraordinary rendition — a large, complex, transnational and multi-actor structure of rights violation — became operational through US hyper legalism which took advantage of conceptual spaces of uncertainty and enforceability deficiencies within the international legal framework. In so doing, the operation of the extraordinary rendition programme raises important questions about the structures and capacity of international human rights provisions from an effectiveness perspective.

The discussion of these questions will begin with an outline of the severity of the challenge posed by the rendition circuits through a set of four case studies. The relevant domestic provisions and existing jurisprudence on irregular transfers within the US as an authorising/sending state will be examined first. The analysis will add to the assessment of Executive decision making process and the interpretation catalysts which influenced the US hyper legalistic approach and led to the construction and operationalisation of extraordinary renditions in their post 9/11 iteration. The cases studies of Shannon Airport (Ireland) and the island of Diego Garcia will highlight how transit states have facilitated extraordinary renditions either by providing flyover rights, refuelling/stopover transit services and/or temporary detention facilities. These two examples will further highlight the state obligations engaged, if any, depending on whether a rendee is on board a rendition circuit flight during a transit stopover or not. The obligations of Syria as a receiving state and by proxy the US as a sending/authorising state will be assessed last with particular focus on the consequences of an extraordinary rendition once a person's transfer is complete.

The aim of Chapter 1 is thus to illustrate the important role that jurisdictional analysis has played in involving third states to facilitate extraordinary renditions, especially in conjunction with diplomatic assurances and the multitude of violations the programme engages in. The assessment of the effectiveness of the accountability mechanisms within the human rights framework in the post 9/11 context will start

within this Chapter and will be a recurring theme explored throughout the thesis. The assessment of the four case studies will be further used to introduce the recurring theme of discourse between national and international legal standards and in particular to what extent international legal standards influence and form an enforceable part of national law. The domestic enforceability of international provisions will also be discussed within Chapter 4 with reference to the concept of jurisdiction.

The next step in assessing the challenge posed by extraordinary rendition on individual rights protections is the examination of the relevant international legal standards (international humanitarian law and international human rights law) and the principle of *jus cogens*, which should have offered protections to individuals rendered as part of HVDP. Chapter 1 of the thesis will first focus on the applicability of core human rights and humanitarian law provisions and argue that extraordinary rendition was illegal as the law was understood and applied by states as at 10 September 2001. The Chapter will then assess the post 9/11 US interpretation of what constitutes an ‘armed conflict’ and the significance of their approach to the applicable *lex specialis* and *lex generalis* to the operation of extraordinary rendition. This Chapter will begin the examination of the fashioned or existing gaps within the international legal framework.

Diplomatic assurances and memoranda of understanding and whether they constitute a limitation on the applicability of the international legal framework with reference to the anti-torture norm will then be assessed in Chapter 3. The absoluteness of the anti-torture norm will be examined through a study of international, regional and domestic jurisprudence with particular emphasis on whether it should be possible to have diplomatic assurances or memoranda of understanding relating to the positive obligations of the anti-torture norm. The thesis argues that diplomatic assurances and memoranda of understanding are an example of the minimalist approach adopted by certain states after 9/11 towards international rights norms resulting in the restricted practical enforceability of these norms.

As will be demonstrated through the case law analysis – in respect of regular and irregular transfers – within Chapter 3, due to their nature diplomatic assurances and memoranda of understanding are unreliable and unenforceable and thus in the context of the non-derogable *non-refoulement* obligations there is arguably a strong presumption that the promises contained within instruments will not be sufficient to

provide the necessary safeguards. Existing regional and international case law including the post 9/11 ECtHR cases on extraordinary renditions will be used to demonstrate this point. However it will also be discussed that the comprehensive multi-prong tests developed by the ECtHR and the relevant international bodies suggest that in theory diplomatic assurances could exceptionally offer the necessary safeguards in relation to regular transfers. It will be shown that this is not the case in the context of extraordinary renditions. From this perspective diplomatic assurances can be seen as a milder manifestation of the minimalist approach towards international human rights norms and extraordinary rendition as a far more severe manifestation. Both however sit on a spectrum of exploitation and *male fides* interpretation of international legal obligations.

The concept of jurisdiction and whether states and the US in particular have adopted a hyper legalistic approach towards it post 9/11, will be assessed through an examination of the evolving regional and international jurisprudence on the extraterritorial application of human rights provisions. Chapter 4 will also discuss the concept of jurisdiction as a condition necessary to engage state responsibility for transnational counter-terrorism programmes such as extraordinary rendition. The emphasis will be on whether states have attempted to limit their obligations by refuting the extraterritorial application of the relevant human rights treaties. The role and significance of transit states will be addressed with reference to how their involvement feeds into the extraordinary rendition landscape through an analysis of the recent ECtHR decisions on the matter.

The core question of whether the international legal framework itself has facilitated the operation of extraordinary rendition due to practical effectiveness deficiencies will be further illustrated by a discussion on the use of private military contractors and the post 9/11 scope of intelligence cooperation in Chapter 5. The growing role of private operators in transnational military or counter-terrorism operations has become a significant contemporary challenge for the effective protections of international human rights law and is arguably another existing 'gap'. In outlining the operative importance of these private contractors for the rendition circuits, the emphasis will be on the exposed practical effectiveness deficiencies of the current international legal framework. Private companies have also been increasingly as part of intelligence gathering and processing. While bilateral and multilateral intelligence sharing and cooperation is not a new phenomenon, the scope, span and capabilities of the

contemporary means of data gathering and sharing and in particular, the use of such data within the HDVP has raised serious concerns for the reliability of individual rights and protections.

As a conclusion the accountability, transparency and protection mechanisms, which have been utilised to expose the operation of extraordinary rendition will be discussed with reference to the current initiatives seeking to strengthen the practical enforceability of the human rights framework. The concluding remarks will also assess whether despite the challenge posed by the 'War on Terror' paradigm in general and extraordinary renditions in particular the human rights framework has demonstrated strength and resilience within to resist the corrosive nature of ever more expansive and transnational counter-terrorism measures.

All of the above discussions will then form part of the answer to the central question of this thesis: has extraordinary rendition through a hyper legalistic exploitation of perceived and existing gaps exposed practical ineffectiveness deficiencies within the human rights framework and thus eroded the framework in its current form?

Chapter 1: The Rendition Circuits in Practice – Four Case Studies

1. Introduction

In the immediate aftermath of 11 September 2001, both the United States (US) and the United Kingdom (UK) declared a ‘war on terror’.¹⁷⁵ What was described as “a lengthy campaign unlike any other”¹⁷⁶ was aimed at defeating and eradicating international terrorism or “the new evil of our world”.¹⁷⁷ A number of contentious counter-terrorism measures designed to pre-empt and prevent future acts of terrorism were introduced as part of this transnational counter-terrorism campaign.¹⁷⁸ Extraordinary rendition – which has since become synonymous with multiple violations of human rights – was one of these measures.¹⁷⁹ The UN Special Rapporteur on Human Rights and Counter-Terrorism has expressly stated that extraordinary renditions resulting in the outsourcing of torture are “impermissible under international law”.¹⁸⁰ Yet the rendition circuits operated transnationally with the strategic and operative support of a number of states. The various key stages of this operation will be the focus of this chapter.

¹⁷⁵ The phrase ‘war on terror’ was used by President George W Bush on 21 September 2001 in an address to a joint session of. Please see further ‘Transcript of President Bush’s Address’, *CNN News* 21 September 2001. British Prime Minister Tony Blair used the phrase ‘at war with terrorism’ on 16 September 2001 as a response to reports that the death toll of British citizens was between 200 to 300 following the events of 9/11. Please see further ‘Britain at War with Terrorism’, *BBC News*, 16 September 2001.

¹⁷⁶ ‘Transcript of President Bush’s Address’, *CNN News* 21 September 2001.

¹⁷⁷ Description by Tony Blair made on 11 September 2001 during his statement to the nation. ‘Blair’s statement in full’, *BBC News*, 11 September 2001.

¹⁷⁸ See for example the Annual and Quadrennial US Defence Reviews immediately following 9/11. The National Security Strategy of the United States of America 2002 is one illustrative example as it emphasises expressly on the legitimacy of pre-emption and pre-emptive actions (pages 6, 15, 16 in particular), full text available at <http://www.state.gov/documents/organization/63562.pdf> [last accessed 30 March 2016].

¹⁷⁹ See the strong criticisms contained in the following reports: International Commission of Jurists, *Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009, Geneva; ICJ); All Party Parliamentary Group on Extraordinary Rendition, *Extraordinary Rendition: Closing the Gap - A proposal to Criminalise UK Involvement*, available at <http://www.statewatch.org/news/2009/nov/uk-apg-extraordinary-rendition-closing-the-gap.pdf> [last accessed 30 March 2016]; European Parliament Plenary Sessions, *Extraordinary Renditions: EU Member States are also Responsible*, MEPs say, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20090218IPR49768&language=EN> [last accessed 30 March 2016] amongst many others.

¹⁸⁰ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Mission to the United States of America, UN Doc. A/HRC/6/17/Add.3, paras. 36 – 38.

The practice of extraordinary rendition comprises of grave and multiple violations of international obligations. Through an examination of four case studies each representing a strategic operative point of the rendition circuits – sending/authorising state, transit states and receiving states – the subsequent analysis will illustrate these violations and argue that extraordinary rendition has severely challenged the perception that IHRL has the capacity to effectively protect individual rights and to uphold the absolute, *jus cogens* prohibition on torture. The obligations of the US as an authorising and sending state will be discussed first. The analysis will focus on the relevant domestic provisions and jurisprudence applicable to regular and irregular transfers and discuss why the US choose to engage in extraordinary renditions instead of renditions to trial which had been previously relied on. In this context, the analysis will address the Executive decision making in relation to the post 9/11 iteration of renditions and the interpretation catalysts that drove the decision process.

The role of transit states in facilitating rendition circuits will be discussed next through two case studies: the island of Diego Garcia as transit point type 1 and Shannon Airport as transit point type 2. The potential state obligations engaged will be assessed on the basis of whether there was or was not a rendee on board when a flight on the rendition circuit landed at a particular transit point. With reference to applicable reports and existing evidence, it will be argued that the regional and international obligations potentially engaged are distinct due to the different purposes Diego Garcia and Shannon Airport were used for. Shannon Airport (Ireland) offered airport stopover and refuelling services as well as the flyover rights the US had negotiated with Ireland. In comparison, the island of Diego Garcia provided temporary detention facilities in addition to airport stopover and refuelling. The final destination of an extraordinary rendition – the receiving state – will be examined with reference to Syria. The use of Syrian detention and interrogation facilities within the high value detainee programme (HVDP) demonstrates that despite the existing IHRL protections on *non-refoulement* individuals were nevertheless subjected to *incommunicado* detention and enhanced interrogation.¹⁸¹

¹⁸¹ The enhanced interrogation techniques have been described as involving conduct amounting to a breach of the prohibition on torture and any form of cruel, inhuman or degrading treatment. Please see further Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, para. 33.

Through these four case studies, this chapter will commence the discussion on existing or fashioned gaps the US has relied on in order to operationalise extraordinary rendition. Through these four case studies, this chapter will commence the discussion on existing or fashioned gaps the US has relied on in order to operationalise extraordinary rendition. The subsequent analysis will argue that the liability limiting use of diplomatic assurances to fulfil *non-refoulement* obligations both in the context of transit and receiving states¹⁸² and the strictly territorial scope of the concept of jurisdiction¹⁸³ post 9/11 demonstrate a normative appreciation by the US of at least some of its international legal obligations. However the US' hyper legalistic approach towards these concepts has resulted in their development into legal grey holes. The subsequent analysis will aim to outline how the US has been able to operationalise a transnational counter-terrorism programme such as extraordinary rendition through the creation and reliance on these legal grey holes.

2. Initiation of the Rendition Circuits: The 'Authorising/Sending State'

In December 2005, Condoleezza Rice described the use of renditions by the US as “a vital tool” in combatting international terrorism.¹⁸⁴ She did not refer to these irregular transfers as extraordinary renditions but rather as renditions to justice (or trial), which based on precedent were permissible under international law.¹⁸⁵ In the following year, George W Bush did acknowledge the use of extraordinary renditions as a core component of HVDP.¹⁸⁶ He expressly stated that it was necessary to transfer certain individuals captured “in Afghanistan, in Iraq and other fronts of this war on terror” to an “environment where they can be held secretly” and interrogated outside of the US.¹⁸⁷ He emphasised strongly however that HVDP and its constituent elements had been “subject to multiple legal reviews” by the Department of Justice, were in

¹⁸² The suitability of diplomatic assurance and Memoranda of Understanding as a means to satisfy or fulfil *non-refoulement* obligations will be the focus of Chapter 3.

¹⁸³ The concept of jurisdiction and the reluctance of states to recognize the extraterritorial application of human rights obligations will be examined in Chapter 4.

¹⁸⁴ 'Full Text: Rice defends US policy', *BBC News*, 5 December 2005, full text available at <http://news.bbc.co.uk/1/hi/4500630.stm> [last accessed 30 March 2016].

¹⁸⁵ *Ibid.* She specifically referred to the example of Carlos 'The Jackal', which has been discussed in the Introductory Chapter of this thesis.

¹⁸⁶ 'Transcript: President Bush' Speech on Terrorism' *The New York Times*, 6 September 2006, full text available at: http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all [last accessed 30 March 2016].

¹⁸⁷ *Ibid.*

compliance with existing US laws and legal obligations and were receiving “strict oversight” by the CIA’s Inspector General.¹⁸⁸

These, at the time, persistent links to renditions to justice and by proxy existing international and domestic jurisprudence as well as the adamant reaffirmations of the supervision and protection enforcement mechanisms in place suggest that the US Executive was eager to provide a veneer of legality to extraordinary renditions. This eagerness could have been out of perceived national security necessity – the desire to thwart an impending terrorist threat – or operational necessity to ensure the continued transnational operation of the programme without incurring the ire of US partner states and/or to limit reputational damage. The reason or reasons behind this insistence on legality is also arguably linked to the initial decision to engage in transnational rendition circuits rather than renditions to justice and the catalysts behind this decision.

The following section will outline briefly the domestic US approach towards regular transfers especially of those considered to pose a threat to national security before discussing the existing history of the US as a state authorising and engaging in irregular transfers and renditions to trial. Section 2.3 will then assess the US Executive’s drivers for hyper legality in relation to the rendition circuits and their various stages post 9/11 and the interpretation catalysts which have arguably driven this compulsion. It will be argued that this compulsion triggered the so-called second cycle of legality where the legal provisions are increasingly approached in a formal or empty manner with just the mere pretence of legality existing.¹⁸⁹

2.1. Relevant Statutory Provisions governing Regular Transfers and General Approach to International Legal Standards

The general US approach towards the international legal framework is one of severely limiting the potential impact of international obligations domestically if and when necessary. These limitations are achieved through a combination of the self/non-self executing treaties and ‘last in time’ doctrines together with the domestic implementation of international provisions such as those relating to transfers. The regulation of regular transfers under domestic US law is governed by the Foreign

¹⁸⁸ *Ibid.*

¹⁸⁹ See further Section 3 of the Introductory Chapter.

Affairs Reform and Restructuring Act of 1998 (FARRA). Under Section 1242 (a) of the Act no person shall be expelled, extradited or otherwise returned to a country where there are substantial grounds for believing that the person would suffer ill-treatment.¹⁹⁰ More significantly, the provision states that an individual should not be subjected to such a transfer regardless of whether they are physically present in the US. However, aliens¹⁹¹ referred to in Section 241 (b)(3)(B) of the Immigration and Nationality Act (INA) cannot rely on the protections afforded by the aforementioned subsections.¹⁹² Under this section of INA where there are reasonable grounds to believe that an alien poses a danger to the security of the US, this individual can be transferred or returned to a country where there is a risk that his life or freedom would be threatened.¹⁹³ These “reasonable grounds” include a range of terrorist related activities or suspected involvement with terrorist organisations as listed in Section 212(a)(3) INA.¹⁹⁴

Immigration legislation especially in relation to transfers, as illustrated by certain provisions of INA, has been increasingly relied on as part of the US’ counter-terrorism toolkit.¹⁹⁵ In the US, if an immigration judge determines that an alien is more likely than not to be tortured upon transfer, the removal to another country could be withheld¹⁹⁶ or deferred.¹⁹⁷ However, aliens who are suspected of having engaged in terrorist activity including those who are suspected of having provided material support to terrorist organisations can be removed or denied entry to the US even if they face ill treatment including torture abroad.¹⁹⁸ Under Section 235 (c) of the Immigration and Nationality Act (INA) such an individual may be removed/transferred out of the US without further hearing. Such a transfer would

¹⁹⁰ Section 1242 - United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, Foreign Affairs Reform and Restructuring Act of 1998 full text available at <http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt432/pdf/CRPT-105hrpt432.pdf> [last accessed 30 March 2016].

¹⁹¹ Under 8 U.S. Code § 1101 (a) (3) the term “alien” refers to any person who is not a citizen or national of the United States.

¹⁹² Please refer to Section 1242 (c) Foreign Affairs Reform and Restructuring Act of 1998.

¹⁹³ The full text of Article 241 (b)(3)(B) and the Immigration and Nationality Act are available at <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html> [last accessed 30 March 2016].

¹⁹⁴ The full text of Section 212 (a)(3)(B) is available at <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html> [last accessed 30 March 2016].

¹⁹⁵ See also the Introductory Chapter on this point.

¹⁹⁶ Subsection 208.16, Title 8, Code of Federal Regulation.

¹⁹⁷ Subsection 208.17, Title 8, Code of Federal Regulation.

¹⁹⁸ Section 212 (a)(3)(B) and (F) Immigration and Nationality Act.

occur if an immigration officer or an immigration judge suspects that an alien arriving at the US may be inadmissible on security and related grounds.¹⁹⁹

If the Attorney General is then satisfied on the basis of the provided “confidential information” that an alien is inadmissible on these grounds and disclosure of the information would be prejudicial to the public interest or security, he may order the alien to be removed without further inquiry.²⁰⁰ Under Section 235.8 (4) Federal Regulations Code (FRC), a removal cannot occur in circumstances, which would violate Article 3 of the UN Convention against Torture (UNCAT)²⁰¹ or Section 241 (b)(3)(A) INA.²⁰² However Section 241 (b)(3)(B), outlined above with reference to FARRA, also operates here as an exception to the Section 235.8 (4) FRC provisions. This approach to *non-refoulement* protections under Article 3 UNCAT is reflective of the overall US approach to international legal obligations. For many years the US has been reluctant in signing up to and/or ratifying international human rights treaties.²⁰³ The process through which international legal instruments are incorporated in domestic law is quite illustrative of this reluctance. The Senate has deemed the majority of international treaties to which the US is a part to be non-self executing.²⁰⁴ Non-self executing treaties are only binding on domestic US law if they have been incorporated by legislation.²⁰⁵ Thus if such treaties have not been incorporated, they cannot be relied upon in domestic proceedings as a regulatory constraint on the Government’s legislative powers or policies. If such a treaty has been incorporated,

¹⁹⁹ Section 235 (c) INA. The Section does not expand on how an immigration judge or an official are given access to the confidential information or how they assess it.

²⁰⁰ Section 235 (c)(2)(B) Immigration and Nationality Act.

²⁰¹ Under Article 3 UNCAT: “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

²⁰² Section 241 (b)(3)(A) Immigration and Nationality Act states that “*the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular group, or political opinion.*” Full text of the Section available at <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/withholding.pdf> [last accessed 30 March 2016].

²⁰³ See further Gearty, C., ‘Terrorism and Human Rights’ in Gearty, C., *Essays on Human Rights and Terrorism: Comparative Approaches to Civil Liberties in Asia, the EU and North America* (2008, London; Cameron May Publishers), p. 580; Douzinas, C., *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007, New York; Routledge-Cavendish).

²⁰⁴ See Reisman, W. M., ‘US Ratification of Human Rights Conventions: The Ghost of Senator Bricker’, (1995) 89 *American Journal of International Law* 341; Paust, J., ‘Self Executing Treaties’, (1988) 82 *American Journal of International Law* 760; Vazquez, C., ‘Treaty based Rights and Remedies of Individuals’, (1992) 92 *Columbia Law Review* 1082; De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011, Cambridge; Cambridge University Press), p. 41.

²⁰⁵ *Foster v. Neilson* 27 US 253 (1829); *Medellin v. Texas* 552 US 491 (2008).

Congress can utilise the ‘last in time’ doctrine.²⁰⁶ This doctrine allows Congress to pass an incompatible law that will overtake the effect of an incorporated treaty provided the law was passed ‘last in time’. Where a principle of international human rights law can be said to form part of customary law, it forms part of federal common law.²⁰⁷ As the ‘last in time’ doctrine also applies to federal common law, the effect of customary international law can be undone by legislation.²⁰⁸

The overall US approach towards the international legal framework is thus one of first restricting the general applicability of the relevant international legal instrument and then through additional legislation severely limiting the potential impact of specific international provisions if and when necessary. The approach seems to follow what Grotius has described as such an adjustment that in case of a “dire necessity”, laws – in this case international legal provisions – are not binding.²⁰⁹ While this may be an exaggeration, the ever present possibility that international treaty provisions may cease to be enforceable or are limited in scope within the US due to the above doctrines, suggests that the institutions of legal order have devised certain controls to ensure that Executive and Legislative decisions can and do comply with international legal obligations at any given time even if there are substantial changes to national security policy for example. This approach is akin to the first cycle of legality where institutional decisions comply with the principle of legality; legality being understood as a substantive conception and appreciation of the rule of law.²¹⁰ The comprehensive legislative effort – ratification of international treaties and domestic law-making processes – suggests that the US has a normative acceptance and understanding of its international obligations. However, the utilisation of legislative control mechanisms such as the self/non-self executing treaties and ‘last in time’ doctrines indicates a reluctance to fully internalise these obligations into domestic policy and an overall restrictive approach towards international law. Sections 1242 (a) FARRA and 235.8 (4) FRC limiting the operation of *non-refoulement* protections in respect of aliens

²⁰⁶ *Taylor v. Morton* 23 F. Case. 784 (C.C.D. Mass. 1855); *Head Money Cases* 112 US 580 (1884).

²⁰⁷ *The Paquete Habana* 175 US 677 (1900); De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (Cambridge, Cambridge University Press 2011) p. 41.

²⁰⁸ De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011, Cambridge; Cambridge University Press) p. 41; J. Ku, ‘Treaties as Laws: A Defence of the Last In Time Rule for Treaties and Federal Statutes’, (2005) 80 *Indiana Law Journal* 319.

²⁰⁹ Grotius, H., *De Jure Belli ac Pacis* 444 as quoted in Gross, O. and Ni Aolain, F., ‘Emergency, War and International Law – Another Perspective’ (2001) 70 *Nordic Journal of International Law* 29, p. 29.

²¹⁰ Please refer to the discussion in Section 3 of the Introductory Chapter. See also Dyzenhaus, D., ‘Introduction: Legality in a Time of Emergency’ (2008) 24 (1) *Windsor Review of Legal & Social Issues* 1, p. 4.

suspected of terrorism is a good example of how the US has constrained or controlled the domestic scope of international obligations.

Thus, while domestic regular transfer procedures have aimed to afford protections to individuals in compliance with international legal obligations such as those under UNCAT, the US government has at its disposal rather flexible legislative means to remove or deport terrorist suspects even in circumstances where there is a risk of ill treatment in the receiving country. More importantly, the US can choose to alter or cease its existing obligations under international treaties through the self/non-self executing treaties and 'last in time' doctrines. Concomitantly, the US has a long history of authorising and engaging in irregular transfers such as renditions to justice or trial as will be outlined in the immediately following section. Yet despite this domestic legislative framework, the US opted to instead operationalise extraordinary renditions as a more suitable response to the events of 9/11; a response which will be the focus of Section 2.3.

2.2. Existing Jurisprudence and History of the US as an 'Authorising State' of Irregular Transfers

The reliance by the US on irregular transfers such as renditions is not a post 9/11 phenomenon. The US courts have adjudicated on irregular transfers and renditions to trial as early as 1886. In the earliest case of *Ker v. Illinois*,²¹¹ the US Supreme Court found that a forcible abduction was not a sufficient reason to remove the jurisdiction of a court to try an offence and invalidate the trial. In a subsequent 1952 case also involving a forcible abduction – *Frisbie v. Collins*²¹² - the Court reaffirmed the decision in *Ker*. The Court found that the power to try a person was not impaired by the manner in which an individual was brought to the jurisdiction of the Court.²¹³ The Court further stated that the Constitution did not require a court to permit an individual who was rightfully convicted to escape justice on the basis of being brought to trial against their will.²¹⁴

The courts have however been less willing to accept jurisdiction in circumstances where a rendition to justice has involved ill treatment or the cooperation of the US

²¹¹ 119 U.S. 436, 7 S.Ct. 225 (1886).

²¹² 342 U.S. 519, rehearing denied, 343 U.S. 937, 72 S.Ct. 509 (1952).

²¹³ *Ibid.*

²¹⁴ *Ibid.*

itself. In *United States v. Toscanino*,²¹⁵ the Court of Appeals for the Second Circuit refused to exercise jurisdiction over an individual who was convicted on a charge of conspiracy to import drugs in the US. Francisco Toscanino was sentenced to 20 years in prison following a conviction in the Eastern District Court of New York.²¹⁶ He argued that *en route* to the US he had been tortured in Brazil by his captors. With reference to previous precedent, the Court of Appeal did note that jurisdiction obtained through “an indisputably illegal act” might be exercised even though this would in practice be rewarding “police brutality and lawlessness” in certain cases.²¹⁷ However the Court found that the *Ker-Frisbie* doctrine could not be reconciled with the Supreme Court’s expansion of the concept of due process. Thus, in circumstances where there was a conflict between the two principles, due process would be supreme and would require a court to divest itself of jurisdiction over an individual who was subjected to unnecessary and unreasonable violation of constitutional rights during a transfer. Further, the Court distinguished *Ker*²¹⁸ and *Frisbie*²¹⁹ on the basis that unlike this case, they did not involve violation of international obligations undertaken by the US. Both cases were decided before the Security Council 1960 Resolution condemning the rendition to justice (or “international kidnapping” as referred to by the Court of Appeals) of Adolf Eichmann as a violation of the UN Charter.²²⁰ The 1992 case of *United States v. Alvarez-Machain*²²¹ is illustrative of the pre 9/11 domestic US courts’ approach to renditions to justice. Mr Alvarez-Machain, a Mexican citizen and resident, was forcibly kidnapped from his home and transferred to the US to stand trial for his involvement in the kidnapping and murder of a Drug Enforcement Agency (DEA) agent in 1985. The US Supreme Court relying on the cases of *United States v. Rauscher*,²²² *Ker v. Illinois*²²³ and *Frisbie v. Collins*,²²⁴ found

²¹⁵ 500 F. 2d 267 (2d Cir. 1974), rehearing denied, 504 F.2d 1380 (2d Cir. 1974). Full text available at <http://www.jstor.org/stable/2200276?seq=6> [last accessed 30 March 2016].

²¹⁶ *U.S. v. Toscanino*, 398 F.Supp. 916 (E.D.N.Y. Jul. 10, 1975) (No. 73 CR 194).

²¹⁷ *Ibid*, 272-273.

²¹⁸ 119 U.S. 436, 7 S.Ct. 225 (1886).

²¹⁹ 342 U.S. 519, rehearing denied, 343 U.S. 937, 72 S.Ct. 509 (1952).

²²⁰ 500 F. 2d 267 (2d Cir. 1974), 277, rehearing denied, 504 F.2d 1380 (2d Cir. 1974).

²²¹ 504 U.S. 655 (1992).

²²² 119 U.S. 407 (1886). In this case, the Supreme Court found that a person who has been brought to the jurisdiction of the court *by virtue of proceedings under an extradition treaty*, could only be tried for one of the offences described in that treaty, and for the offence with which he was charged in the extradition proceedings.

²²³ 119 U.S. 436 (1886). In this case, decided on the same day as *Rauscher* and written by the same justice, the court distinguished the case from *Rauscher* on the basis that Mr Ker was *not* brought to the US by virtue of an extradition treaty between the US and Peru.

²²⁴ 342 U.S. 519, rehearing denied, 343 U.S. 937 (1952).

that the language of the Extradition Treaty between the US and Mexico²²⁵ in the context of its history did not prohibit abductions outside of its terms. Thus, to infer from the Treaty that it prohibits all means of capturing an individual outside of the Treaty's terms would be to go beyond the established precedent and practice. Further, to imply from the terms of the Treaty that it prohibited the obtaining of an individual in a manner outside the established procedures required a substantial "inferential leap" only supported by the most general principles of international law.²²⁶ In *United States v. Best*²²⁷ - a case decided post 9/11 – the Circuit Court reaffirmed that the manner of the capture would not ordinarily affect the court's power to try a defendant.

Apart from the courts' jurisprudence, renditions to trial have also featured within US defence strategy since the late 1980s. In 1986, the US National Program for Combatting Terrorism stated that US citizens and installations, particularly abroad, were increasingly being targeted by terrorism and thus that US counter-terrorism policies had to be effective in ameliorating the threat to US people, property and interests.²²⁸ Within the list of Immediate Recommendations to be implemented, emphasis was placed on improving intelligence sharing and international cooperation in combatting terrorism through both bi- and multi-lateral agreements.²²⁹ Particular emphasis was placed on concluding agreements for more effective measures of apprehending, extraditing and prosecuting known terrorists.²³⁰ The establishment of a clandestine capability for preventing, pre-empting and/or disrupting international terrorist activity was also recommended.²³¹

While rendition was not expressly referred to in the declassified sections of the 1986 National Program, reportedly it was approved then.²³² Allegedly, the rendition

²²⁵ Extradition Treaty between the United States of America and the United Mexican States, signed on 4 May 1978 and in force since 25 January 1980, full text available at <http://www.mcnabbassociates.com/Mexico%20International%20Extradition%20Treaty%20with%20the%20United%20States.pdf> [last accessed 30 March 2016].

²²⁶ 504 U.S. 655 (1992). Full text available at <http://www.law.cornell.edu/supct/html/91-712.ZO.html> [last accessed 30 March 2016].

²²⁷ 304 F.3d 308 (3rd Circuit 2002). Robert Best was seized by the Coast Guard outside the territorial sea of the US and convicted for attempting to smuggle aliens into the US. The court had to decide whether it had jurisdiction over Mr Best as the US did not obtain permission from Brazil to intercept the vessel and capture the defendant.

²²⁸ The National Program for Combating Terrorism, National Security Decision Directive 207, 20 January 1986 signed by then President Ronald Reagan, full text available at <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDNS/NSDD207.pdf> [last accessed 30 March 2016].

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Satterthwaite, M. and Fisher, A., 'Tortured Logic: Renditions to Justice, Extraordinary Rendition,

programme was originally used in circumstances where a suspected terrorist was ‘picked up’ from either a country in which no government exercises effective control, a country known to plan and support international terrorism or international waters and airspace.²³³ In 1993, President George H.W. Bush reportedly authorised specific procedures for renditions into the US through National Security Directive 77.²³⁴ This Directive is still classified. The State Department Report on ‘Patterns of Global Terrorism 2001’ lists out ten cases of rendition of terrorist suspects to the US between 1993 and 2001 – in some cases the country of capture is not listed.²³⁵

Thus, the pre 9/11 operation of irregular transfers or renditions appears to have been very limited in scope and subject to detailed operative procedures. On the basis of the existing domestic jurisprudence as reaffirmed by the 2002 *Best* case and statutory provisions, the US could potentially have continued to engage in rendition to trial in a post 9/11 world. Sections 1242 (a) FARRA and 235.8 (4) FRC do afford *non-refoulement* protections to individuals who may not be physically present in the US. However, in the context of other applicable statutory provisions offering limited, if any, protections to individual terror suspects, it appears that an extraordinary rendition transporting an alien suspected of terrorism to a country where there is a risk of ill treatment, may not be a violation of US domestic laws. Even if such a rendition could potentially amount to a violation of the relevant statutory provisions, the existing jurisprudence suggests that the US courts would be unwilling to adjudicate on the case.

And yet the US chose to develop and operationalise transnational rendition circuits instead of relying on its existing legislative and national security counter-terrorism toolkit. The following section will complement the Introductory Chapter discussion on moral panic and interpretation catalysts in assessing further why the rendition circuits were seen as “a vital tool” in combatting international terrorism by the US Executive.²³⁶

and Human Rights Law’ (2006) 6 *The Long Term View* 52, p. 55, 66.

²³³ *Ibid*, p. 55.

²³⁴ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p.14 available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> [last accessed 30 March 2016].

²³⁵ United States Department of State, *Patterns of Global Terrorism 2001*, full text available at <http://www.state.gov/documents/organization/10319.pdf> [last accessed 30 March 2016].

²³⁶ ‘Full Text: Rice defends US policy’, *BBC News*, 5 December 2005, full text available at <http://news.bbc.co.uk/1/hi/4500630.stm> [last accessed 30 March 2016].

2.3. Post 9/11 Use of Extraordinary Renditions: Catalysts and Hyper Legalism

Following the events of 9/11, the world has been described as intrinsically insecure and unpredictable; a world within which the immediately following moral panic was an intense and collective one desperately requiring a collective enemy against whom forceful and decisive action could be taken.²³⁷ The threat of international terrorism was deemed unprecedented and resulted in a highly charged atmosphere within which states and international bodies alike were preoccupied with comprehensively improving domestic, transnational and international security.²³⁸ Such a powerful triggering event was likely to compel the US Executive to both construct a swift response to prevent and pre-empt further security threats and to consider, determine and assert – publicly or not – the necessary legal interpretation required to adopt and operationalise such a response.²³⁹

Thus, arguably, one of the first outcomes prompted by the post 9/11 intense and lingering moral panic has been the extent of US Executive involvement in the interpretation of US' international obligations and the type of measures to be adopted in order to respond to the unprecedented terrorist threat. Through a variety of different instruments such as Executive Orders and Memos by the Office of the Legal Counsel, the Executive legal interpretation on issues such as the non-applicability of IHRL as *lex generalis*, the very restricted definition of torture²⁴⁰ and the irrelevance of specific provisions such as Common Article 3 of the Geneva Conventions aimed to provide the substantive and most relevant statements of law in these legal areas.²⁴¹ Concomitantly, the US Executive relied on these determinations to provide a legal justification for every component of the HVDP including extraordinary renditions.²⁴² For example, torture was described as the infliction of such prolonged and severe pain

²³⁷ Jenkins, D., *et al* (eds.), *The Long Decade: How 9/11 Changed the Law* (2014, New York; Oxford University Press), p. 6.

²³⁸ Please refer to the discussion in the Introductory Chapter.

²³⁹ Ingber, R., 'Interpretation Catalysts and Executive Branch Legal Decisionmaking', (2013) 38 *The Yale Journal of International Law* 359, p. 367.

²⁴⁰ Memorandum for Alberto R. Gonzales Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, Washington, D.C. 20530, full text available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf> [last accessed 30 March 2016].

²⁴¹ These will be discussed in more detail in Chapter 1 of this thesis.

²⁴² See for example Office of the Director of National Intelligence, *Summary of the High Value Terrorist Detainee Program*, Washington DC 20511 and Executive Orders 13284 (2003) and 13355 (2004).

that it results in “a sufficiently serious condition or injury such as death, organ failure, or serious impairment of body function” or the “most egregious conduct”.²⁴³ ‘Enhanced’ interrogations – the end goal of an extraordinary rendition – were deemed not to reach the threshold of this definition.²⁴⁴ Diplomatic assurances were requested from receiving states promising not to engage in ill treatment and these assurances were relied on despite the poor human rights record of these states suggesting that ill treatment could occur as the example of Syria will demonstrate. This hyper compulsion to coat every stage of the rendition circuits in a veil of legality or hyper legalism seems to have triggered the second cycle of legality where law is understood in an ever more empty manner until only the pretence of legality remains.²⁴⁵ Through this legalism in addition to the already existing restrictive approach towards its international legal obligations, the US arguably aimed to achieve the following objectives. One goal was to create and exploit spaces of legal uncertainty within which the rendition circuits could operate. In one such example, the operation of IHRL as *lex generalis* was interpreted as inapplicable to the ‘War on Terror’²⁴⁶ thus rendering IHRL protections inaccessible to individuals captured as part of HVDP. Then, by relying on transit points such as Diego Garcia and Shannon Airport and outsourcing its enhanced interrogation to receiving states like Syria, the US sought to limit even further its international legal obligations including *non-refoulement*. The potential obligations engaged for these transit points and Syria will be discussed in the following sections.

3. Rendition Circuits and Transit States: Diego Garcia and Shannon Airport

Following the invocation of Article 5 of the North Atlantic Treaty,²⁴⁷ the NATO Allies recommended a range of measures in order to combat and respond to the threat of terrorism including US access to ports and airfields on the territory of NATO nations and enhanced intelligence cooperation, sharing and assistance amongst

²⁴³ Memorandum for Alberto R. Gonzales Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, Washington, D.C. 20530.

²⁴⁴ *Ibid.*

²⁴⁵ Please refer to the discussion in Section 3 of the Introductory Chapter. See also Dyzenhaus, D., ‘Introduction: Legality in a Time of Emergency’ (2008) 24 (1) *Windsor Review of Legal & Social Issues* 1, p. 4.

²⁴⁶ Please refer to the discussion in Chapter 2 of this thesis.

²⁴⁷ Please refer to the discussion in the Introductory Chapter of this thesis.

others.²⁴⁸ In addition, NATO Member States agreed to provide the US with blanket over-flight clearances in accordance with the relevant air traffic agreements and national procedures in order to assist the transnational campaign against Al Qaeda and related terrorist groups.²⁴⁹ As evidence of the operation and scale of the extraordinary rendition programme became more public, a number of high-profile investigations have subsequently concluded that many European States assisted either actively or passively in the transportation of suspects by providing access to airports or airspace.²⁵⁰ Implicated states have facilitated the operation of extraordinary rendition by assisting in the capture and detention of individuals, providing intelligence leading to the capture and transfer of an individual and hosting temporary detention facilities in addition to failing to protect rendees from a transfer.²⁵¹

The following discussion will assess the potential legal responsibility of two transit points each providing different operational support to the rendition circuits. This examination will be based on the sliding scale of participation categorisation identified by the Marty Report on Inter-state Transfers.²⁵² The sliding scale distinguished between four categories of aircraft landing points, which indicate different degrees of collusion and thus legal responsibilities by the countries involved: a) “stopover points” where the aircrafts land to refuel, mostly after a rendition on the way back home; b) “staging points” from which the operations are often launched; c) “one-off pick-up points” from which a detainee or a group of detainees was picked up but not part of a regular occurrence and d) “detainee transfer/drop-off points” which

²⁴⁸ Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision On Implementation Of Article 5 of the Washington Treaty following the 11 September Attacks against the United States, 04 October 2001.

²⁴⁹ *Ibid.* See also the Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006) 009, paras. 113–114. In application of this agreement certain NATO member states granted US aircraft either blanket overflight clearances for certain time-periods or overflight rights upon request.

²⁵⁰ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc); Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States AS/Jur* (2006) 16 Part II; Egan, S., *Extraordinary Rendition and the Quest for Accountability in Europe*, UCD Working Papers in Law, Criminology and Socio Legal Studies Research Paper No. 05/2012.

²⁵¹ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

²⁵² Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States AS/Jur* (2006) 16 Part II, para. 43 and Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006) 009.

were places visited often in the vicinity of a detention facility albeit far off the obvious route for just short periods of time.²⁵³ These can be more broadly described as landing points, which either directly or indirectly facilitated the operation of the rendition programme. In this context, potentially assigning legal responsibility to a state will depend on whether or not there was a rendee on board when a flight on the rendition circuit landed at a particular transit point. The comparative case analysis of the island of Diego Garcia as an example of a transit point involving a rendee on board and Shannon Airport (Ireland) where there have been no confirmed renees on board will be used to assess the legal responsibility of different types of transit states.

3.1. Transit Point Type 1 (Stopover, Refuelling and Detention Facilities): The Island of Diego Garcia

In February 2008, David Miliband admitted that two US aircrafts carrying rendered suspects had landed on Diego Garcia Island in 2002.²⁵⁴ This admission followed a 2007 Council of Europe Report on secret detentions and illegal transfers of individuals, which alleged that Diego Garcia was used within the rendition circuit.²⁵⁵ In March 2008, the then Special Rapporteur on Torture, Manfred Nowak, claimed he had received credible evidence that between 2002 and 2003 individuals were detained in the large US naval base on the island suggesting that there were more than two renees transferred to Diego Garcia.²⁵⁶ In response to these allegations, the UK government emphasised the number of verbal assurances previously received by the US that no individuals would be transported or detained through the territory or territorial waters of Diego Garcia.²⁵⁷ These assurances were however exposed as

²⁵³ Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States* AS/Jur (2006) 16 Part II, para. 43.

²⁵⁴ Doward, J., “British Island ‘used by US for rendition’”, *The Observer*, 2 March 2008, available at <http://www.guardian.co.uk/world/2008/mar/02/ciarendition.unitednations> [last accessed on 30 March 2016]. See further, Tran, M., ‘Miliband admits US rendition flights stopped on UK soil’, *The Guardian* 21 February 2008, available at <http://www.theguardian.com/world/2008/feb/21/ciarendition.usa> [last accessed 30 March 2016]. On 6 July 2010 in a statement to the House of Commons, then Prime Minister David Cameron promised an official inquiry into allegations of UK’s involvement in the rendition and “improper treatment” of detainees. Full text of statement is available at <https://www.gov.uk/government/speeches/statement-on-detainees> [last accessed 30 March 2016].

²⁵⁵ Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States* AS/Jur (2007) 36, p. 13.

²⁵⁶ Doward, J., “British Island ‘used by US for rendition’”, *The Observer*, 2 March 2008.

²⁵⁷ The assurances were received as recently as 12–13 September 2007 according to David Miliband, the then Foreign and Commonwealth Office Minister in a written response during House of Commons debates available at

inadequate following the admission by Mr Miliband. There have been subsequent claims that the UK government also shared intelligence with the US, which information led to the capture, extraordinary rendition and ill treatment of individuals.²⁵⁸ In addition, evidence has emerged that the US might have held detainees on ships operating outside the three-mile zone, which defines British territorial waters and maritime jurisdiction.²⁵⁹ While such detention is thus immaterial while assessing the potential liability of the UK for facilitating extraordinary renditions, it does provide further support and context to the aforementioned allegations surrounding the Diego Garcia Island.

The legal relationship of the island to the UK in the context of the US and UK agreement regarding the use of the island for a military base is essential in understanding the relevant human rights and jurisdictional framework. The manner in which the UK has opted not to extend its regional and international obligations to Diego Garcia is particularly important in assessing the UK's potential liability as a transit state. The following section will begin with a brief history of the island as it informs the present day legal status of Diego Garcia and why it arguably has been used as a detention facility rather than as just a stopover and refuelling site.

3.1.1. Legal History of Diego Garcia

The Chagos Archipelago, to which the Diego Garcia geographically belongs, used to be part of the British Empire after the early 19th century.²⁶⁰ In December 1960 the UN General Assembly passed the Declaration on the Granting of Independence to

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080320/text/80320w0004.htm#08032072000055> [last accessed on 30 March 2016]. See also the 2004 written response of former Foreign Secretary Jack Straw in House of Commons Debates on the issues of US assurances for the Diego Garcia islands available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040621/text/40621w13.htm#40621w13.html_sbhd6 [last accessed on 30 March 2016].

²⁵⁸ Please refer to Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p. 113 – 117. In December 2013, 'The Report of the Detainee Inquiry' (interim report) by Sir Peter Gibson was published and one of its findings was that UK's intelligence agencies had been involved in extraordinary renditions. The full text of the report is available at http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf [last accessed 30 March 2016].

²⁵⁹ Campbell, D. and Norton-Taylor, R., 'US Accused of Holding Terror Suspects on Prison Ships', *The Guardian*, Monday 2 June 2008 available at <http://www.guardian.co.uk/world/2008/jun/02/usa.humanrights> [last accessed on 30 March 2016].

²⁶⁰ Sand, P.H., *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009, New York; Palgrave Macmillan), p. 2.

Colonial Countries and People, asking countries to grant independence to their colonies and urged governing powers to be transferred to the people in the colonized territories without any conditions or reservations.²⁶¹ By 1964, the Mauritius (and Diego Garcia Island as part of it) was granted an intermediate level of self-government and was due to attain full independence by 1968.²⁶² The US had however identified the island as a potential military base due to its unique strategic location and in 1965 a diplomatic arrangement was offered to the Mauritius.²⁶³ Under the agreement, the Chagos Archipelago was to be excised from the Mauritius and joined with some of the neighbouring outer islands of the British Seychelles in order to create a new separate colonial territory.²⁶⁴ This territory was to be separate from both the Mauritius and the Seychelles. The terms were orally agreed on the (un)written understanding that the Chagos Islands would revert back to the Mauritius when they were no longer needed for defence purposes and a new colony known as the British Indian Ocean Territory (BIOT) was formed.²⁶⁵

As this was however a violation of the December 1960 Declaration, UN General Assembly Resolution 2066 (XX) urged the UK to take no action, which would dismember the territory and violate the sovereignty of the Mauritius.²⁶⁶ Both UN documents were ignored and the UK and US proceeded to establish and gradually upgrade under joint administration of the US military facilities on Diego Garcia.²⁶⁷ Of particular significance are the express agreements that the base will be used for an indefinitely long period and after the initial period of 50 years, which expires in 2016, the agreements will remain in force for another 20 years unless terminated by two year's notice.²⁶⁸ Such notice has not been given. The supplementary arrangements of 1972 and 1976 specify that the agreements relating to the use of the base by the US would continue to be in force while the BIOT agreement itself is in force or until such time that the UK and US decide that Diego Garcia is no longer required for the

²⁶¹ United Nations General Assembly Resolution 1514 (XV) of 14 December 1960.

²⁶² United Nations General Assembly Resolution 2066 (XX) of 16 December 1965, Question of the Mauritius.

²⁶³ Sand, P.H., *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009, New York; Palgrave Macmillan), p. 3. In exchange, the UK offered substantial monetary benefits to the Mauritius.

²⁶⁴ *Ibid*, p. 3.

²⁶⁵ *Ibid*, p.4.

²⁶⁶ UN General Assembly Resolution 2066 (XX) of December 16, 1965, UN Doc. A/6014/57.

²⁶⁷ Sand, P.H., *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009, New York; Palgrave Macmillan), p. 4.

²⁶⁸ *Ibid*, p.5.

purposes of a military base.²⁶⁹ The creation of BIOT and the disregard towards international obligations by the US and UK in the context of the island are illustrative of the subsequent approach taken to the extension of regional and international human rights standards to Diego Garcia.

3.1.2. Diego Garcia and Jurisdiction: Whose Relevant Regional and International Obligations Apply?

Following the initial agreement with the UK to excise the island, the Mauritian government has subsequently alleged to have been misled and has sought to reclaim Diego Garcia by urging the UK to end its “unlawful occupation” as recently as 2012.²⁷⁰ A sovereignty claim by the Mauritius is significant as it raises the question of which maritime and territorial jurisdiction the US chooses to recognise in the context of its military base on Diego Garcia. Currently, the island is surrounded by a 200-mile zone claimed by the UK for fisheries management, environment protection and preservation and an overlapping 200-mile “exclusive economic zone” claimed by Mauritius.²⁷¹ The British Indian Ocean Territory (BIOT) has a three-mile territorial sea except for the area surrounding Diego Garcia, where BIOT has placed a ban on all unauthorised vessels within twelve miles from the shore.²⁷² Thus, the 200-mile zone claimed by the UK is contiguous to a three-mile zone of territorial waters while the exclusive economic zone declared by the Mauritius is contiguous to a twelve-mile territorial zone.²⁷³

The protections of UNCAT, the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the UK Human Rights Acts 1998 (HRA) have not been extended to BIOT by the UK. UNCAT was

²⁶⁹ *Ibid*, p. 5.

²⁷⁰ See the statement of the Mauritian Foreign Minister at the General Debate of the 65th Session of the United Nations General Assembly on 28 September 2010 available here http://www.un.org/en/ga/65/meetings/generaldebate/Portals/1/statements/634212729543281250MU_en_fr.pdf [last accessed 30 March 2016]. In this statement he refers to “a sovereignty” the Mauritius have over the Chagos Archipelago. See also Norton-Taylor, R., ‘David Cameron to Discuss Chagos Islands Sovereignty with Mauritius’, *The Guardian*, 30 May 2012, available at <http://www.guardian.co.uk/world/2012/may/30/david-cameron-chagos-islands-mauritius> [last accessed on 30 March 2016].

²⁷¹ Sand, P.H., *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009, New York; Palgrave Macmillan), p. 9.

²⁷² *Ibid*, p. 10.

²⁷³ *Ibid*, p. 10. See also the Maritime Zones Act No.2 2005 outlining the geographical coordinates of the exclusive economic zone as including the Chagos Archipelago.

ratified in 1988 however it has not been extended to BIOT.²⁷⁴ In 2002, while responding to comments by the Human Rights Committee (HRC), the UK government stated that the ICCPR does not apply to BIOT because while the UK “ratified the Covenant in respect of itself and certain of its Overseas Territories, it did not ratify it in respect of BIOT”.²⁷⁵ In its Declarations and Reservations upon ratification, the UK has expressly extended the application of the ICCPR to certain overseas territories – BIOT is not one of them.²⁷⁶ This position was reaffirmed in 2007 with the UK noting that Overseas Territories retain a special constitutional status.²⁷⁷

In 2008, the House of Lords affirmed that neither the HRA nor the ECHR applied to Diego Garcia and the Chagos Islands.²⁷⁸ The decision was made based on an assessment of the applicability of Article 1 ECHR²⁷⁹ with reference to Article 56 (also known as the colonial clause Article)²⁸⁰. The House of Lords noted that while the ECHR was extended to the Mauritius in 1953, this declaration lapsed when the Mauritius became independent.²⁸¹ No such declaration has been made in relation to BIOT, which since 1965 has been a “new political entity”.²⁸² Similarly, the HRA, which implements within the UK the rights afforded by the ECHR, was also inapplicable as BIOT is not part of the UK.²⁸³ In making this finding, Lord Hoffman stated “the Human Rights Act, though it may be part of the law of England, has no

²⁷⁴ Please refer to UNCAT ratification - END Note 11, full text available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec [last accessed on 30 March 2016].

²⁷⁵ Human Rights Committee, *Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, Addendum, Comments by the Government of the United Kingdom of Great Britain and Northern Ireland on the reports of the United Kingdom (CCPR/CO/73/UK) and the Overseas Territories*, UN Doc. CCPR/CO/73/UK/Add.2 (2002), para. 88.

²⁷⁶ Full text of the Declarations and Reservations available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec [last accessed 30 March 2016].

²⁷⁷ Human Rights Committee, *Consideration of Reports submitted by State Parties under Article 40 of the Covenant, Sixth Periodic Review: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/6 (2007), para. 12.

²⁷⁸ *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61.

²⁷⁹ Article 1 is also known as the jurisdictional article. Full text available at http://www.echr.coe.int/Documents/Convention_ENG.pdf [last accessed 30 March 2016].

²⁸⁰ Article 56 (1) allows states to expand the application of the ECHR to “all or any of the territories for whose international relations it is responsible.” The full text of Article 56 is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf [last accessed 30 March 2016].

²⁸¹ *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [65].

²⁸² *Ibid.*

²⁸³ *Ibid.*, [65].

more relevance in BIOT than a local government statute for Birmingham.”²⁸⁴ Thus, it appears that there are very limited human rights protections, if any, to be afforded to individuals rendered through the island.

In May 2002, the UK formally extended Protocols I and II of the Geneva Conventions on the Protection of Victims of Armed Conflict to the Chagos Islands.²⁸⁵ It did not however take the same approach to Geneva Conventions III and IV on the Treatment of Prisoners of War and the Protection of Civilian Persons in Time of War.²⁸⁶ While the UK has not extended the provisions of the Rome Statute of the International Criminal Court (ICC),²⁸⁷ the Statute may however still apply to BIOT on the basis of Article 12.²⁸⁸ Under Article 12 (2), the ICC may exercise its jurisdiction over a State Party if a crime under Article 5²⁸⁹ has occurred on board a vessel or aircraft registered to that state or when an individual accused of a crime under Article 5 is a national of that state.

In comparison, the Mauritius has ratified the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and UNCAT. The full protections of these international documents have been afforded to Diego Garcia, which could become significant in the context of the sovereignty claims over the Chagos Islands. The Rome Statute was also ratified in 2002 however the Mauritius subsequently reached a bilateral immunity agreement with the US exempting US personnel on its territory from the jurisdiction of the ICC.²⁹⁰ In relation to the disagreements on the

²⁸⁴ *Ibid.*

²⁸⁵ Please see The Geneva Conventions (Amendment) Act (Overseas Territories) Order 2002.

²⁸⁶ See The Geneva Conventions Act 1957, which does not extend the protections under III and IV to the overseas territories.

²⁸⁷ The Rome Statute was ratified in 2001 but its protections were not extended to BIOT (see END Note 9 and 10) http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#9 [last accessed on 30 March 2016].

²⁸⁸ The full text of Article 12 – Preconditions to the Exercise of Jurisdiction is available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [last accessed 30 March 2016].

²⁸⁹ Article 5 – Crimes within the Jurisdiction of the Court - identifies the crime of genocide, crimes against humanity, war crimes and crime of aggression as the relevant crimes. Full text available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [last accessed 30 March 2016].

²⁹⁰ In relation to the ratification of the Rome Statute see http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en [last accessed on 30 March 2016]. In relation to the bilateral agreement see US Presidential Determination No. 2003–28 pursuant to the American Servicemen’s Protection Act 2002 available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030729-11.html> [last accessed on 30 March 2016].

issue of sovereignty, the US has noted that legally this is an issue strictly between the UK and the Mauritius and not relevant to the US and its military base.²⁹¹

As Diego Garcia is still under the effective control of the UK and is considered part of BIOT, potential violations of individual rights will be assessed in the context of the application of regional and international documents extended by the UK to BIOT. This approach is supported by the existing agreements relating to the operation of the base. The BIOT bilateral agreement between the US and UK grants the US military authorities the right to exercise criminal and disciplinary jurisdiction over persons subjected to US military law.²⁹² However, the UK authorities retain an exclusive jurisdiction over members of the US forces with respect to offences including offences relating to security punishable by the law in force on the territory but not by the law of the US.²⁹³ In practice, the effective jurisdiction and control of the UK over the island has been tested on a number of issues including antipersonnel mines, the stockpiling and use of which are strictly prohibited by the Convention on the Prohibition of Anti-Personnel Landmines.²⁹⁴ During a House of Commons debate in the early 2000, the then Secretary of State for Foreign and Commonwealth Affairs noted that while there were no US anti-personnel mines *on* the island of Diego Garcia, the US appears to store munitions of various kinds on US warships anchored *off* the island of Diego Garcia.²⁹⁵ As such vessels enjoy state immunity however they are outside the jurisdiction and control of the UK. This is particularly significant in relation to the broader enforceability of the UK legal regime over the US military base, operations and personnel as both the UK and the Mauritius are signatories to this Convention unlike the US.²⁹⁶ This suggests that regardless of whether the UK or the Mauritius has jurisdiction over Diego Garcia, they may not be able to impose any

²⁹¹ See statement of former US Secretary of State Madeleine Albright in MacAskill, E. and Evans, R., *Diego Garcia Exiles to Seek £4bn from US* *The Guardian* Wednesday 13 December 2000 available at <http://www.guardian.co.uk/world/2000/dec/13/ewenmacaskill.robervans> [last accessed on 30 March 2016].

²⁹² Sand, P.H., *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009, New York; Palgrave Macmillan), p. 11.

²⁹³ *Ibid.*

²⁹⁴ Opened for signatures in Ottawa in 1997, full text available at United Nations, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997.

²⁹⁵ The full text of the response is available at http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000306/text/00306w15.htm#00306w15.html_sbhd4 [last accessed on 30 March 2016].

²⁹⁶ A full list of signatories is available at http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvi-5&chapter=26&lang=en [last accessed on 30 March 2016].

obligations on US personnel if operations occur on a vessel, which enjoys state immunity.

3.1.3. *Diego Garcia as Transit Point Type 1: (Potential) Violations of Human Rights Standards*

An assessment of the applicable legal standards to Diego Garcia as part of BIOT suggests that the island is a legal black hole. A legal black hole creates a zone in which officials can act unconstrained by the rule of law and it suggests that what they do is legal as the official decisions are either necessary or made in good faith.²⁹⁷ If such a legal black hole is properly created, it would not cause tension within the rule of law.²⁹⁸ The decisions of the House of Lords²⁹⁹ and the European Court of Human Rights³⁰⁰ (ECtHR) on the applicability of HRA and ECHR to the Chagos Islands appear to suggest that a legal black has been properly created. Even though the ECtHR did not make a ruling on alternative basis for jurisdiction following the *Al Skeini*³⁰¹ case, it did expressly state that the meaning of Article 56 is clear and cannot be ignored “merely because of a perceived need to right an injustice”.³⁰² Thus, it appears that access to redress for an individual rendered and detained within Diego Garcia is very limited.

The lack of transparency and accountability, which appear to permeate the US and UK legal, political and military approaches towards the Diego Garcia island, has been further emphasized by the refusal of the UK’s Foreign Office to release the minutes of the annual UK/US political–military meetings on the Diego Garcia island.³⁰³ The refusal to release information on the use of the Diego Garcia military base under the Freedom of Information Act to an All Parliamentary Group on Extraordinary Rendition was justified with reference to potential negative effects on the bilateral

²⁹⁷ Dyzenhaus, D. *The Constitution of Law: Legality in a Time of Emergency* (2006, New York; Cambridge University Press), p. 202.

²⁹⁸ *Ibid*, p. 42.

²⁹⁹ *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61.

³⁰⁰ *Chagos Islanders v. the United Kingdom*, Application no. 35622/04, Judgment 11 December 2012.

³⁰¹ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Judgment 7 July 2011. This case is discussed in much more detail in Chapter 4 of this thesis.

³⁰² *Chagos Islanders v. the United Kingdom*, Application no. 35622/04, Judgment 11 December 2012, para. 74.

³⁰³ Verkaik, R., ‘Freedom of Information: Government Blocks Access to Secret Military Papers on Diego Garcia’, *The Independent*, Friday 1 February 2008, available at <http://www.independent.co.uk/news/uk/home-news/freedom-of-information-government-blocks-access-to-secret-military-papers-on-diego-garcia-776731.html> [last accessed on 30 March 2016].

diplomatic relationship between the US and the UK and national security.³⁰⁴ The overall approach towards reduced accountability has also been represented by the UK interpretation of the applicability of the Convention on the Access of Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.³⁰⁵ While the UK is a signatory to it, the position taken by the Foreign Office is that as there are no permanent residents on BIOT, the Convention does not have a practical application or relevance to it.³⁰⁶

While there is a legal regime governing the actions and scope of the military base and operations, the practical implementation of a number of fundamental legal instruments protecting human rights, freedom of information and attaching enforcement mechanisms has been severely limited both by the UK and the US. As aptly noted by Lord Rodger of Earlsferry, the BIOT Courts Ordinance itself provides that UK legal obligations “shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.”³⁰⁷ Thus, it would seem that as long as the UK and US continue to require the use of Diego Garcia for a military base and the UK ownership is preserved, the hyper legalistic regime towards human rights would remain in place.

If the protections of UNCAT, ICCPR and ECHR were extended by the UK to the island, renditions flights carrying an individual on board would arguably be in breach of *non-refoulement* obligations and potentially Article 5 ECHR³⁰⁸ and Article 9 ICCPR.³⁰⁹ The prohibition on torture is a non-derogable *jus cogens* norm. However as individuals have no practical access to an adjudicatory or state monitoring body - ECtHR, the HRC³¹⁰ or the Committee against Torture (CAT)³¹¹ - the absoluteness of

³⁰⁴ *Ibid.*

³⁰⁵ The Convention was adopted on 25 June 1998. Full text of the Convention is available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [last accessed on 30 March 2016].

³⁰⁶ Sands, P.H., *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009, New York; Palgrave Macmillan), p. 49 and 176 (note 45).

³⁰⁷ *R (On the Application of Bancoult) (Respondent) v. Secretary of State for Foreign and Commonwealth Affairs (Appellant)* [2008] UKHL 61, para.85.

³⁰⁸ Article 5 ECHR protects the right to liberty and security and protects against arbitrary arrest and detention. Full text available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed on 30 March 2016].

³⁰⁹ Article 9 ICCPR protects the right to liberty and security and address lawful detentions

³¹⁰ The Committee governs the implementation of the ICCPR by State Parties. Please refer to <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> [last accessed on 30 March 2016].

³¹¹ The Committee governs the implementation of the UNCAT by State Parties. Please refer to <http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> [last accessed on 30 March 2016].

its protections appear ineffective in the context of Diego Garcia. Thus, arguably, the hyper legalism employed by the UK and US to exploit enforcement deficiencies within the international legal framework has resulted in the utilisation of a legal vacuum or a legal black hole.

3.2. Transit Point Type 2 (Stopover, Refuelling and Overflight Clearances): Shannon Airport

The disclosure of documents as part of a 2011 court case involving a business dispute between Richmor Aviation Inc. and SportsFlight Air confirmed that Shannon Airport was used as part of the US transnational extraordinary rendition programme.³¹² According to the court records at least 13 flights operated by Richmor Aviation Inc. with US personnel on board landed in Shannon Airport between 2002 and 2004.³¹³ A subsequent 2013 report into the programme further confirmed that flights operated by Richmor Aviation had been involved in extraordinary renditions.³¹⁴ As early as 2005, the Irish Human Rights Commission recommended that the Irish government inspect suspect aircraft in order to safeguard the effectiveness of Irish law and practice towards the protection of human rights following concerns that extraordinary rendition flights were landing in Ireland.³¹⁵

In denouncing the practice of extraordinary rendition, the Irish Government advised that it had obtained extensive diplomatic assurances from the highest level in the US confirming that no prisoners subject to a rendition would be transported through Irish territory against Irish and international law.³¹⁶ As noted by the Government, these assurances had been subsequently orally re-affirmed on a number of occasions.³¹⁷ Thus, it was claimed that the need for an inspection and monitoring regime was negated.³¹⁸ The Government further stated that it was satisfied it could rely on clear and explicit factual assurances provided by a friendly state on a matter within the

³¹² Quinn, B. and Cobain, I., 'Mundane Bills bring CIA's Rendition Network into Sharper Focus', *The Guardian*, Wednesday 31 August 2011, available at <http://www.guardian.co.uk/world/2011/aug/31/cia-rendition-flights-cost> [last accessed on 30 March 2016].

³¹³ *Ibid.*

³¹⁴ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York: GHP Media, Inc), p. 84.

³¹⁵ Irish Human Rights Commission, "*Extraordinary Rendition: A Review of Ireland's Human Rights Obligations*" (2007, Dublin; Irish Human Rights Commission), p. 10.

³¹⁶ *Ibid.*, pp.18, 33.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

direct control of the government in compliance with its ECHR obligations.³¹⁹ The subsequent discussion will compare the obligations, if any, which are potentially engaged by a transit point such as Shannon Airport. The legal obligations of Ireland, which has assisted indirectly in the rendition circuits by providing flyover clearances, stopover and refuelling facilities when there is no rendee on board are arguably less clear in comparison with the obligations of a state, which has provided direct assistance such as Syria. However such obligations could similarly be assessed in the context of jurisdictional issues and a state's positive obligations towards rights protections such as those imposed by the anti-torture norm.

3.2.1. Domestic, Regional and International Obligations

Ireland has been a signatory of the ECHR since November 1950.³²⁰ Ireland incorporated the ECHR domestically through the European Convention on Human Rights Act 2003.³²¹ The preamble of the Act expressly states that subject to the Irish Constitution, further effect is given only to certain provisions and Protocols of the ECHR.³²² Ireland has been a signatory to the ICCPR since October 1973 and has recognised the competence of the HRC.³²³ Ireland signed UNCAT in 1992 and ratified it in 2002.³²⁴ It has also recognised the competence of CAT to receive and consider communications on behalf of individuals within Irish jurisdiction who claim to have been victims of a right violation under UNCAT.³²⁵ All four Geneva

³¹⁹ *Ibid*, p. 33.

³²⁰ Ireland signed the ECHR on 4 November 1950 and ratified it on 25 February 1953. Please refer to http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=QmuEesat [last accessed on 30 March 2016].

³²¹ Full text of the Act is available at <http://www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf> [last accessed on 30 March 2016].

³²² *Ibid*. This implementation has been criticised by amongst others the Irish Human Rights and Equality Commission. See further <http://www.ihrec.ie/legal/europeanconvent.html> [last accessed on 30 March 2016].

³²³ Ireland signed the ICCPR on 1 October 1973 and ratified it on 8 December 1989. Please refer to https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en [last accessed on 30 March 2016].

³²⁴ UNCAT was signed on 28 September 1992 and ratified on 11 April 2002. Please refer to https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en#EndDec [last accessed on 30 March 2016].

³²⁵ *Ibid*.

Conventions were signed in December 1949 and ratified in September 1962.³²⁶ Ireland signed the Rome Statute in October 1998 and ratified it in April 2002.³²⁷ Thus, in comparison to Diego Garcia, a rendee, who was physically transported through Ireland and the rendition flight stopped over on Shannon Airport with the rendee still on board, would have access to redress under the *non-refoulement* and prevention of arbitrary detention protections of the relevant international, regional and domestic legal standards. Such a transfer would also engage Irish state obligations under the applicable legal provisions. However, there have been no confirmed cases of individuals on board a rendition flight when such an aircraft stopped over on Shannon Airport. Thus it appears that the role of Ireland as a transit state was to facilitate rendition planes, which were potentially either *en route* to capture an individual or after a rendee was dropped off. In these circumstances, the potential liability of Ireland would depend on whether jurisdiction can be established, which will be the focus of the subsequent discussion.

3.2.2. Jurisdiction of Ireland as a Transit State

Under Article 1 of the ECHR, all Contracting States are obliged to secure the Convention rights of individuals within their jurisdiction.³²⁸ Article 2(1) of the ICCPR limits the concept of jurisdiction to individuals within a state territory.³²⁹ Similarly, the ECtHR has previously interpreted the concept of jurisdiction to be of primarily territorial nature.³³⁰ However, in its more recent jurisprudence, the ECtHR has confirmed the extraterritorial application of ECHR protections to cases where a Contracting State exercises effective control over a territory outside its national

³²⁶ Please see further <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> [last accessed on 30 March 2016].

³²⁷ Please see further https://www.icc-cpi.int/en_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/ireland.aspx [last accessed on 30 March 2016].

³²⁸ The full text of Article 1 and the European Convention on Human Rights is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf [last accessed on 30 March 2016].

³²⁹ The full text of Article 2(1) and the International Covenant on Civil and Political Rights is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed on 30 March 2016].

³³⁰ See further *Banković and Others v. Belgium and 16 Other Contracting States* (2001) 11 BHRC 435; *Ilaşcu and Others v. Moldova and Russia* (2004) 17 BHRC 141.

borders or where its agents exercise physical control and authority over an individual abroad.³³¹

Under the formative case of *Soering v. the United Kingdom*,³³² a state may be culpable of ECHR violations extraterritorially if it transferred or by extension was involved in the transfer of an individual to a state where he would be subjected to ill treatment. The concept of incidental jurisdiction as a sub-category of extraterritoriality is also relevant in assessing the potential triggering of obligations in cases where an individual visits an embassy or interacts with members of the consular services.³³³ Thus, if a state provided direct assistance for an extraordinary rendition or an individual was rendered through its territory, a jurisdictional nexus could be established under one or more of the above categories arguably engaging the state's obligations under regional and international human rights documents.³³⁴ When an individual is not on board an aircraft, there has been no interaction with consular services and a state has not provided direct assistance to an extraordinary rendition or had effective control over an individual, it would be difficult to establish a jurisdictional nexus between an individual and a state. Thus, imposing liability on a state for its indirect participation in an extraordinary rendition when there has been no rendee on board a plane flying through the territory of a transit state would be similarly difficult.

The ECtHR has occasionally expanded the concept of jurisdiction through purposive interpretation relying on the role of the ECHR as an instrument of collective rights enforcement within Europe.³³⁵ Thus, if such an interpretation is applied to an aircraft stopping over and/or refuelling during a rendition circuit, arguably the relevant questions would be a) are there reasonable grounds or evidence to believe that the aircraft has been or will be involved in a rendition operation? and b) is it or was it within the effective control and authority of a transit state to investigate or prevent the

³³¹ *Al Skeini and Others v. the United Kingdom* [2011] ECHR 1093; *Al-Jedda v. United Kingdom* [2011] ECHR 27021/08; *Öcalan v. Turkey* [2005] ECHR 46221/99.

³³² *Soering v. the United Kingdom* (1989) 11 EHRR 439. This case was reaffirmed in *Chahal v. the United Kingdom* (1997) 23 EHRR 413 and *Saadi v. Italy*, Application no. 37201/06, Judgment 28 February 2008.

³³³ *Stocke v. Germany* [1991] ECHR 25.

³³⁴ See further Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006) 009.

³³⁵ *Loizidou v. Turkey* (1995) 20 EHRR 99, (1996) 21 EHRR 188; *Soering v. the United Kingdom* (1989) 11 EHRR 439.

rendition?³³⁶ By using such an object and purpose approach, a jurisdictional nexus could possibly be established between a transit state and an individual outside its territory. However, the ECtHR jurisprudence to date suggests that such an expansion of ECHR obligations is unlikely.³³⁷ The concept of jurisdiction, within its application in *Soering*,³³⁸ could potentially be expanded by the Court to include individuals extraordinarily rendered on aircrafts whose flight path was facilitated by a transit state without the individuals having entered the physical territory of the transit state.³³⁹ There is currently however no definitive approach within the Article 1 jurisprudence of the ECtHR that would trigger Ireland's *non-refoulement* obligations due to the use of Shannon Airport as an indirect transit point.

If jurisdiction could be established over an extraordinarily rendered individual in the context of an indirect participation by a state, then the positive obligations under Article 3 ECHR could be triggered.³⁴⁰ In this scenario Ireland could potentially be found in violation as individuals rendered within HVDP for the purposes of enhanced interrogation are at real risk of being subjected to ill treatment. Should this occur however the Irish government would argue that it has fulfilled its positive obligations by virtue of the diplomatic assurances provided by the US. The adequacy of diplomatic assurances in discharging Ireland's obligations as a transit state will be briefly discussed in the following section.

³³⁶ See further Egan, S., *Extraordinary Rendition and the Quest for Accountability in Europe*, UCD Working Papers in Law, Criminology and Socio Legal Studies Research Paper No. 05/2012, p. 24.

³³⁷ *Banković and Others v. Belgium and 16 Other Contracting States*, Application no. 52207/99, Judgment 12 December 2001. *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Judgment 7 July 2011 and *Al-Jedda v. the United Kingdom*, Application no. 27021/08, Judgment 7 July 2011.

³³⁸ *Soering v. the United Kingdom* (1989) 11 EHRR 439.

³³⁹ De Londras, F., 'Shannon, Saadi and Ireland's Reliance on Diplomatic Assurances under Article 3 of the ECHR' (2007) *Irish Yearbook of International Law* 79.

³⁴⁰ Article 3 ECHR prohibits the use of torture, inhuman or degrading treatment or punishment; in the context of *non-refoulement* it requires states **not** to deport an individual thus creating a negative obligation. However the ECtHR has made increasing use of the concept of positive obligations – states need to take direct action to ensure effective protection of human rights. On the development of 'positive obligations' and the ECtHR please refer to Mowbray, A.R., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004, Portland; Hart Publishing), Chapter 3 in particular and Dickson, B., 'Positive Obligations and the European Court of Human Rights', (2010) 61(3) *Northern Ireland Legal Quarterly* 203.

3.2.3. Potential Violations of Human Rights Standards

The judicial approach towards diplomatic assurances can be summarised thus: provided that DAs and/or MoUs meet some, not necessarily all, of the criteria referred to by the courts, in certain circumstances they may be adequate in discharging state obligations and prove sufficient to remove any real risk of ill treatment under Article 3 of the ECHR.³⁴¹ Once the use of Shannon Airport as a transit point became known, the Irish Government strongly emphasised that the DAs received from the US were factual with the explicit promise that no prisoners would be transported through Ireland.³⁴² In the Government's view the obtained DAs negated the need for an aircraft inspection regime as they were sufficient in fulfilling Ireland's obligations.³⁴³ The Government further argued that as the DAs were not in relation to *non-refoulement* obligations, the existing regional and international jurisprudence on the effectiveness of assurances in protecting against ill treatment was inapplicable.³⁴⁴ However, by virtue of their nature – non-legally binding diplomatic means to regulate bi/multi-lateral state relations – these agreements have been found to be unenforceable and insufficient to ensure the effective protection of individuals from ill treatment.³⁴⁵ Thus, their capacity to discharge obligations under regional and international legal instruments should be assessed on a case-by-case basis irrespective of the content of the promise or the credibility of the promisor. The assurances received in relation to the use of Shannon Airport and Irish airspace can be distinguished from the existing jurisprudence on the basis that the US has full knowledge and control over its counter-terrorism operations.

Thus, as the US is in control of the fulfilment mechanisms and was not seeking to transport individuals directly from Ireland to a country with a dubious human rights record, the promise contained in the assurances may be adequate. Further, in a letter to the Irish Human Rights Commission (IHRC), the then Minister of Foreign Affairs,

³⁴¹ Please refer to the in depth discussion in Chapter 3 of this thesis.

³⁴² Irish Human Rights Commission, *“Extraordinary Rendition: A Review of Ireland's Human Rights Obligations”* (2007, Dublin; Irish Human Rights Commission), p. 8.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ Please refer to cases such as *Agiza v. Sweden*, Opinion of the Committee against Torture, 24 May 2005, CAT/C/34/D/233/2003, *Alzery v. Sweden*, Human Rights Committee, Communication No 1416/2005, CCPR/C/88/ D/1416/2005, *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment 15 November 1996 and *Saadi v. Italy*, Application no. 37201/06, Judgment 28 February 2008 amongst others. See also the comprehensive analysis in Chapter 3.

stated that “Ireland is in the unique position in Europe of having explicit, categorical, bilateral assurances” confirmed by the US Secretary of State.³⁴⁶ In assessing the strength of diplomatic assurances in a particular case, the ECtHR has referred to the existing diplomatic relationship between states. Most notably in recent times, the ECtHR assessed the relationship between Jordan and the UK in the case of *Othman (Abu Qatada) v. the United Kingdom*.³⁴⁷ However, in light of the diminished credibility of the US as a guarantor of human rights post 9/11³⁴⁸ and its hyper-legalistic attitude towards international legal standards, arguably the assurances provided by the US may not be sufficiently credible and enforceable if a *rendee* was found to have been on board.

The Venice Commission has noted that states party to the ECHR are under an obligation to prevent an individual’s *exposure to risk of ill treatment* and the risk assessment should be carried out very vigorously.³⁴⁹ Thus, if an individual is physically transferred through the territory of a transit state, *non-refoulement* obligations could be triggered based on such an interpretation. Potentially, these obligations could also be engaged if there are strong reasons to believe that an aircraft stopping over and refuelling without an individual on board is on a rendition circuit. As noted by the Irish Government however, as the aircrafts engaged in the rendition circuit flew or stopped over in Ireland without a *rendee* on board, it was impossible to comprehend the value of identifying and searching such aircrafts.³⁵⁰ Instead, the Government proposed that individuals who possessed specific evidence regarding an extraordinary rendition or have a credible complaint of criminal activity should advise An Garda Síochána who would then investigate further.³⁵¹ The IHRC strongly

³⁴⁶ Irish Human Rights Commission, “*Extraordinary Rendition: A Review of Ireland’s Human Rights Obligations*” (2007, Dublin; Irish Human Rights Commission), pp. 82-83.

³⁴⁷ *Othman (Abu Qatada) v. the United Kingdom*, Application no. 8139/09, Judgment 17 January 2012.

³⁴⁸ See for example the following reports, which make a number of references to the HVDP and its components as part of the broader transnational US counter-terrorism campaign post 9/11: Consideration of Reports submitted by States Parties under Article 40 of the Covenant, *Concluding Observations: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1, Report of the Special Rapporteur on the Promotion and Protections of Human Rights and Fundamental Freedoms while Countering Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3 and other publications such as Chaskalson, A., ‘The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law’ (2008) 67 (1) *The Cambridge Law Journal* 69 and Wilson, R. A., *Human Rights in the ‘War on Terror’* (2005, Cambridge; Cambridge University Press) amongst many others.

³⁴⁹ Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006) 009.

³⁵⁰ Irish Human Rights Commission, “*Extraordinary Rendition: A Review of Ireland’s Human Rights Obligations*” (2007, Dublin; Irish Human Rights Commission), p. 40.

³⁵¹ *Ibid*, p. 34.

criticised these suggestions noting that without the introduction of an inspection and search mechanism, Ireland had left itself open to criticisms that it only has a rhetorical rather than an effective and practical approach towards its human rights obligations.³⁵²

The CAT similarly expressed concerns at Ireland's alleged cooperation in the rendition programme through the use of Irish airports and airspace.³⁵³ The Committee further stated that the Irish Government's approach to investigating these allegations was inadequate.³⁵⁴ The Committee requested that further information be provided on the measures taken to investigate the allegations and, in particular, clarification on the outcome of any investigations as well as actions implemented to ensure that further facilitation of the extraordinary rendition programme was prevented.³⁵⁵ These recommendations suggest that indirect participation in the rendition circuit could engage a transit state's regional and international human rights obligations. However, this potentially will only be the case if a rendee is on board during a stopover or if there are strong reasons to believe that an aircraft is on a rendition circuit, which will result in the ill treatment of an individual.

3.3. Transit State Obligations – Concluding Remarks

In its post 9/11 construct, an extraordinary rendition entails the irregular transfer of an individual across borders for the purposes of their *incommunicado* detention and enhanced interrogation in conditions that constitute multiple violations of human rights, including the right to be free from torture. This thesis argues that through a hyper legalistic exploitation of perceived and/or fashioned gaps within the international legal framework, the US has sought to create spaces of legal uncertainty. These spaces combined with practical enforcement deficiencies of individual protections have facilitated the operation of the rendition circuits and have resulted in violations of individual rights. As illustrated by the case studies of Diego Garcia Island and Ireland, the reliance on transit states has not only supported the operation

³⁵² *Ibid*, p.41.

³⁵³ Consideration of Reports submitted by States Parties under Article 19 on the Convention, *Concluding Observations of the Committee against Torture: Ireland*, UN Doc. CAT/C/IRL/CO/1, p.2.

³⁵⁴ *Ibid*.

³⁵⁵ *Ibid*.

of the rendition circuits but it has also restricted the practical effectiveness and enforceability of individual rights.

As outlined in relation to BIOT, a rendee who was transported through and/or detained within the Island would find it very difficult, if not impossible, to impose obligations or access redress through the UK due to existing jurisprudence and the severe limitations on the applicability of human rights standards. In the context of Ireland, the biggest challenge would be imposing jurisdiction for potential violations, which have occurred after a plane transited through Ireland. This can occur only if an aircraft, which flew and stopped over in Shannon Airport was a flight within a rendition circuit, which transferred an individual to a detention facility for the purposes of enhanced interrogation.

The protections afforded by *non-refoulement* are designed to prevent the risk of ill treatment following a transfer. Based on regional and international courts' jurisprudence, the existing human rights record of a state forms part of the assessment as to whether there is such a risk.³⁵⁶ However, Syria, a country with a persistently poor record of human rights protections was one of the receiving states within HVDP. Between 2002 and 2004, a number of individuals were rendered here despite Syria not being a signatory to UNCAT. Thus, the operation of extraordinary rendition has resulted in practical limitations of *non-refoulement* obligations. The final section of this Chapter will focus on Syria and how it was used as a detention facility by the US.

4. Rendition Circuits and Receiving States: Syria

One of the first known instances of extraordinary rendition as part of HVDP, which exposed the violations suffered by renees was the case of Maher Arar.³⁵⁷ He was detained for a year and during this period suffered multiple violations of his individual rights.³⁵⁸ Within HVDP, Syria was one of the most common destinations for rendered suspects with at least 9 individuals being transferred there prior to Syria becoming a signatory to UNCAT.³⁵⁹ Before discussing the role of Syria as receiving

³⁵⁶ Please refer to the discussion in Chapter 3 of this thesis.

³⁵⁷ Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events relating to Maher Arar: Factual Background* (2006, Ottawa; Publishing and Depository Services).

³⁵⁸ *Ibid.*

³⁵⁹ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York: GHP Media, Inc), p. 111.

state within HVDP, the following discussion will outline the relevant domestic and international obligations applicable to Syria.

4.1. Existing Domestic and International Human Rights Obligations

Syria has been a party to the ICCPR through accession since 1969 without any Reservations or Declarations.³⁶⁰ It is thus subject to all the rights protection obligations imposed by the ICCPR including the non-derogable prohibition against torture, cruel, inhuman or degrading treatment and punishment under Article 7. Syria is not however a signatory to the Optional Protocol to the ICCPR.³⁶¹ The Optional Protocol establishes the HRC as a body responsible to receive and consider communications from individuals claiming to be victims of ICCPR violations.³⁶² Thus, while Syria has consented to be bound by the provisions of the ICCPR, it has not agreed to the additional measures ensuring more practically effective and enforceable ICCPR protections by assenting to the competence of the HRC.

In its Concluding Observations in 2001, the HRC noted the considerable delay by Syria in submitting its second periodic report originally due in 1984.³⁶³ In particular, the HRC expressed regret at the lack of information on the domestic implementation of human rights, as it was difficult to determine whether Syria's population was able to fully and effectively exercise its fundamental rights under the ICCPR.³⁶⁴ The HRC further found that rather than being an additional guarantee of the rights and freedoms afforded by the Syrian Constitution, the scope of the provisions of the ICCPR were often restricted in terms of their application.³⁶⁵ The HRC also noted the absence of any independent oversight body and non-governmental organisations able to consider the implementation of human rights.³⁶⁶ Most significantly, however, in the context of

³⁶⁰ For a full list of state parties to the ICCPR, please refer to https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en#EndDec [last accessed on 30 March 2016].

³⁶¹ For a full list of state parties to the Optional Protocol to the ICCPR, please refer to https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en [last accessed on 30 March 2016].

³⁶² Preamble of the Optional Protocol to the ICCPR. Full text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> [last accessed on 30 March 2016].

³⁶³ Consideration of Reports submitted by States Parties under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee Syrian Arab Republic*, UN Doc. CCPR/CO/71/SYR.

³⁶⁴ *Ibid.*, para. 2.

³⁶⁵ *Ibid.*, para. 5.

³⁶⁶ *Ibid.*, para. 11.

the use of Syria as a receiving state were the “constant and duly substantiated allegations” of violations of Article 7 ICCPR by members of law enforcement.³⁶⁷

In addition, the HRC raised concerns as to the conditions of detention in Syrian prisons and the many allegations of inhumane prison conditions.³⁶⁸ The 2005 Concluding Observations of the HRC stated that the 2001 recommendations have not been fully taken into consideration and in particular the continuing reports of ill treatment and violations of Article 7 facilitated by prolonged *incommunicado* detention in relation to individuals considered to pose a security risk.³⁶⁹ The HRC added that the state of emergency declared over 40 years ago was still in force thus providing for a number of derogations in law or practice from the ICCPR rights.³⁷⁰ The HRC did however welcome the accession of Syria to other international human rights instruments such as UNCAT.

Syria became a signatory to UNCAT in August 2004 without any Declarations or Reservations. However, UNCAT only applies to state signatories thus its provisions and protections were not enforceable prior to 2004. In assessing the initial report submitted by Syria, CAT noted the five year delay in submitting the report.³⁷¹ The CAT further criticised the lack of statistical and practical information on the implementation of the provisions of UNCAT and relevant domestic legislation.³⁷² One of the principal issues raised by CAT was the lack of a domestic definition of torture in accordance with Article 1 UNCAT, which seriously obstructed the practical implementation of UNCAT in a state party.³⁷³ Further, the domestic provisions criminalising torture do not impose appropriate penalties applicable to a rights violation such as torture as they set the maximum penalty at only three years of imprisonment.³⁷⁴ Most significantly, CAT noted the “numerous, on going and consistent” allegations of routine use of torture by law enforcement and investigative

³⁶⁷ *Ibid*, para. 12. Article 7 ICCPR prohibits torture, cruel, inhuman or degrading treatment and punishment. Full text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [last accessed on 30 March 2016].

³⁶⁸ *Ibid*, para. 13.

³⁶⁹ *Ibid*, para. 9.

³⁷⁰ *Ibid*, para. 6. While there is no exact date provided, it appears that the notification of a state of emergency was made during the accession of Syria to the ICCPR in 1969. Please refer to https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec [last accessed on 30 March 2016].

³⁷¹ Consideration of Reports submitted by States Parties under Article 19 of the Convention, *Concluding Observations of the Committee against Torture-Syrian Arab Republic*, UN Doc. CAT/C/SYR/CO/1.

³⁷² *Ibid*, para. 2.

³⁷³ *Ibid*, para. 5.

³⁷⁴ *Ibid*, para. 6.

officials at their instigation or with their consent particularly in detention facilities.³⁷⁵ In addition, it was reported that there are internal regulations, which, in practice, allow for the use of measures contrary to domestic legislation and are in violation of UNCAT provisions.³⁷⁶

The Committee noted that it was gravely concerned by the absence of systematic registration of all individuals in places of detention under Syrian jurisdiction.³⁷⁷ In 2011, the Committee requested that Syria submit a special report on the measures taken to ensure that all the obligations under UNCAT were fully implemented.³⁷⁸ In particular, the Committee raised a number of concerns in relation to the torture and ill treatment of detainees, arbitrary detention by police forces and the military and enforced and involuntary disappearances.³⁷⁹ Thus, with regards to its international human rights obligations both under the ICCPR and UNCAT, Syria has shown consistent deficiencies in protecting individual rights leading to widespread violations and lack of effective enforcement mechanisms.

The US State Department expressed similar concerns in its 2001 Country Report on Syria.³⁸⁰ The Report noted that despite the existence of constitutional provisions and Penal Code penalties for individuals who engage in torture, credible evidence existed that security forces continued to use torture albeit to a lesser extent.³⁸¹ A subsequent 2005 Annual Country Reports expressed similar concerns in relation to the poor human rights records of Syria across a number of categories with the use of torture in detention, poor prison conditions, arbitrary arrest and detention and prolonged detention without trial being described as serious abuses.³⁸² However despite the number of domestic and international reports documenting the series of human rights violations, a number of individuals were extraordinarily rendered or transferred to Syria as part of HVDP.

³⁷⁵ *Ibid*, para. 7.

³⁷⁶ *Ibid*.

³⁷⁷ *Ibid*.

³⁷⁸ Consideration by the Committee against Torture of the Implementation of the Convention in the Syrian Arab Republic in the Absence of a Special Report requested pursuant to Article 19, paragraph 1, *in fine*, *Concluding Observations of the Committee against Torture–Syrian Arab Republic*, UN Doc. CAT/C/SYR/CO/1/Add.2.

³⁷⁹ *Ibid*, para.2.

³⁸⁰ US Department of State Country Reports on Human Rights Practices, *Syria* 2001, 4 March 2002 available at <http://www.state.gov/j/drl/rls/hrrpt/2001/nea/8298.htm> [last accessed on 30 March 2016].

³⁸¹ *Ibid*.

³⁸² Full text of the Report available at <http://www.state.gov/j/drl/rls/hrrpt/2005/61699.htm> [last accessed on 30 March 2016].

4.2. Involvement in HVDP: Syria as a Receiving State and Detention Site

A number of individuals were transferred to Syria for the purposes of *incommunicado* detention and enhanced interrogation.³⁸³ Amongst those transferred, were a student whose current whereabouts following his extraordinary rendition to Syria are unknown,³⁸⁴ a teenager captured in Pakistan and rendered to Syria whose current whereabouts are also unknown,³⁸⁵ a Spanish national of Syrian origin who following the extraordinary rendition was detained in Syria for 6 years³⁸⁶ amongst many others - some of whose current whereabouts are also still unknown.³⁸⁷ The most illustrative example of an individual rendered to Syria as part of HVDP was however Maher Arar. Maher Arar, a dual Canadian-Syrian citizen, was detained at JFK airport during a flight transit through the US on suspicion of being involved with terrorist activities.³⁸⁸ At the point of his detention he had no criminal record and was not wanted on any charges in any country.³⁸⁹ While he had been identified as a “person of interest” by Canadian intelligence investigators, he was not considered a “target”.³⁹⁰ The intelligence information shared between the relevant authorities in Canada and the US, which led to his detention at JFK airport, included “a number of misleading or false statements”.³⁹¹

In October 2002, the Immigration and Naturalisation Service (INS) ordered that Mr Arar was to be removed from the US as he had been found to be a member of Al Qaeda.³⁹² Despite the numerous reports on human rights abuses in Syria including the Annual US Department of State reports noted above, an INS Commissioner determined that the removal of Mr Arar to Syria would be compliant with the US obligations under Article 3 UNCAT. As the US authorities declined to be part of the

³⁸³ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

³⁸⁴ *Ibid*, p. 37.

³⁸⁵ *Ibid*, p. 38.

³⁸⁶ *Ibid*, p. 51.

³⁸⁷ Please refer to the Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), which provides a detailed account including the names the individuals who were extraordinarily rendered to Syria.

³⁸⁸ Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events relating to Maher Arar: Factual Background* (2006, Ottawa; Publishing and Depository Services), p. 54.

³⁸⁹ *Ibid*.

³⁹⁰ *Ibid*.

³⁹¹ *Ibid*, p. 113, 149. The broader impact of such intelligence sharing and cooperation on the human rights framework and lack of effective accountability mechanisms will be the focus of Chapter 5.

³⁹² *Ibid*, p. 204.

investigations of the Canadian Commission of Inquiry, the Commission did not obtain an official copy of the removal order or an explanation of why Mr Arar was transferred to Syria instead of Canada.

Mr Arar was held *incommunicado* for approximately two weeks during which he was interrogated and tortured for the purposes of obtaining intelligence information.³⁹³ The behaviour Mr Arar was subjected to is consistent with the existing pattern of rights violations individuals suffer while detained in Syria on national security grounds. Mr Arar's detention lasted a year during which he was confined in a small cell with no natural light, poor sanitary conditions and no bed. Poor detention conditions for a prolonged period of time can constitute a violation of Article 3 UNCAT as discussed in Chapter 1 of this thesis.

The decision to transfer Maher Arar to Syria appears to have been based on DAs received from Syrian authorities.³⁹⁴ These DAs were not submitted to the Commission of Inquiry; neither was the content of the DAs provided.³⁹⁵ In this context, an assessment of whether the promise contained within them was sufficient would amount to a hypothetical conjecture. However, the following argument can be made on the basis of the persistent pattern of serious human rights violations in Syria. If these DAs were provided by Syria and were subsequently relied on by the US, the ill treatment suffered by Mr Arar is illustrative of the practical unenforceability and ineffectiveness of DAs in the context of the anti-torture norm.

4.3. Unlawful Nature of Engagement and State Response

Syria chose not to cooperate with the investigation by the Canadian Commission of Inquiry. Further, while Syria appears to have facilitated and/or engaged in the detention and enhanced interrogation including torture of extraordinarily rendered individuals so far there are no known inquiries or investigations into its participation in the HVDP. Thus, despite being a signatory to the ICCPR prior to 9/11 and to UNCAT post 2004, Syria has not provided the necessary enforcement mechanisms to ensure practically effective protection of individual human rights. In addition, Syria has not adequately addressed the patterns of violatory behaviour noted both in UN

³⁹³ *Ibid*, p. 32.

³⁹⁴ *Ibid*, p. 156.

³⁹⁵ *Ibid*.

reports and the Annual US State Department reports. In its most recent report CAT expressed “deep concerns” that the widespread violations of UNCAT have continued.³⁹⁶ These violations – based on consistent and substantiated reports – include torture and ill treatment of detainees including children.³⁹⁷ While this Report was submitted after the beginning of the on going conflict in Syria, it is illustrative of the persistent and severe violations of human rights and international norms.

In this context, any diplomatic or other assurances the US may have obtained prior to transferring any detainees to Syria would appear insufficient in fulfilling the US’ *non-refoulement* obligations. The lack of transparency surrounding the decision process that led to dual nationals³⁹⁸ being transferred to Syria combined with extraordinary renditions to a country with such poor human rights record illustrates the challenges the human rights framework faces in ensuring accountability and effective rights enforcement.

5. Conclusion

After 9/11, the concept of national security has arguably become a powerful state discretion used to override policies and human rights when there is a perceived threat.³⁹⁹ The scope of state action has been vastly expanded both domestically and transnationally,⁴⁰⁰ which in the context of the ‘War on Terror’ legal and political paradigm offered an open-ended authorisation for a variety of pre-emptive counter-terrorism measures. Extraordinary rendition was one such measure, which was used to capture, immobilise and detain *incommunicado* individuals considered to possess accurate and valuable intelligence information.⁴⁰¹ While extraordinary rendition and the HVDP were described at the time as unlawful and violatory in numerous UN and Council of Europe reports, the US government contended that its policy is to comply

³⁹⁶ Committee against Torture, *Consideration by the Committee against Torture of the implementation of the Convention in the Syrian Arab Republic in the absence of a special report requested pursuant to article 19, paragraph 1*, in fine: *Concluding observations of the Committee against Torture*, UN Doc. CAT/C/SYR/CO/1/Add.2, paras. 2-5.

³⁹⁷ *Ibid.*, para. 2.

³⁹⁸ Please refer to Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc) for cases other than Maher Arar.

³⁹⁹ Douzinas, C., *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007, New York; Routledge-Cavendish), p.184.

⁴⁰⁰ Please refer to the discussion in the Introductory Chapter of this thesis.

⁴⁰¹ Office of the Director of National Intelligence, *Summary of the High Value Terrorist Detainee Program*, Washington DC 20511.

with all its treaty obligations.⁴⁰² Once it became more public, the US Executive engaged in a committed defence of the programme providing a variety of legal justifications. Initially this defence was based on the international and domestic precedent relating to renditions to trial – irregular transfers with very different operation and purpose – and on the oversight mechanisms put in place. However, the 2014 Senate Select Committee on Intelligence Report found that the HVDP oversight mechanisms had been impeded, avoided or obstructed.⁴⁰³ This and other findings⁴⁰⁴ by the Committee suggest that either there were deficiencies in both the supervision and protection enforcement mechanisms or these mechanisms were approached in a perfunctory or empty manner or likely both.

Thus, while on a normative level the US appears to accept its international obligations, the use of expansive and violatory counter-terrorism measures such as extraordinary rendition, indicates a much more rhetorical rather than practical acceptance of obligations. This is further illustrated by the transit and receiving states relied on to provide strategic operational support for the rendition circuits. The practical operationalisation of the rendition circuits through these states was facilitated by the exploitation of DAs and MoUs and the lack of accountability and transparency mechanisms in relation to private contractors and the strictly territorial interpretation of the concept of jurisdiction. Each of these perceived spaces of legal uncertainty or gaps will be examined in turn in the following chapters. Before proceeding to these discussions however Chapter 2 will explore the relevant international and humanitarian law provisions and the US approach towards them.

⁴⁰² ‘Full Text: Rice defends US policy’, *BBC News*, 5 December 2005; ‘Transcript: President Bush’ Speech on Terrorism’ *The New York Times*, 6 September 2006, full text available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all [last accessed 30 March 2016].

⁴⁰³ Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program: Findings and Conclusions*, full text available at <http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf> [last accessed 30 March 2016].

⁴⁰⁴ The Committee found that interrogations of CIA detainees were “brutal and far worse” than represented to policymakers, detention conditions were “harsher” than previously advised and detainees were subject to coercive techniques that had not been approved by the Department of Justice or authorised by CIA Headquarters amongst other findings. *Ibid*, pp. 3–12.

Chapter 2: *Non-Refoulement* and Irregular Transfers in Peace, Armed Conflict and the ‘War on Terror’

1. Introduction

The expansive development of the international human rights and humanitarian law frameworks post-1945 has been one of the defining features of the 20th century. The number of signed Conventions, Treaties and associated documents indicates states’ normative acceptance of their international legal obligations. These obligations however tend not to be a priority when set against national security concerns.⁴⁰⁵ Post 9/11 countries such as the United States (US) have sought to restrict individual rights protections and limit the applicability of international human rights law (IHRL) both through legislative and Executive decisions in order to engage in an expansive transnational counter-terrorism campaign.⁴⁰⁶ Concurrently, the US adopted the language of war and proceeded to rely on a very restrictive interpretation of international humanitarian law (IHL) obligations. The overall US approach was to severely restrict the comprehensive protections offered by IHRL and IHL through the creation of an environment within which the general applicability of IHRL combined with specific core provisions of IHL was uncertain or was in flux. This uncertainty was then utilised to allow the US to operationalise expansive counter-terrorism measures such as extraordinary rendition.

In order to understand how the US constructed this environment, the following discussion will first focus on the relevant legal standards as they were understood and applied as at 10 September 2001. The overall aim of this chapter is to illustrate that

⁴⁰⁵ See for example Gearty, C., *Liberty and Security* (2013, Cambridge; Polity Press), Wilson, R. A., *Human Rights in the ‘War on Terror’* (2005, Cambridge; Cambridge University Press), Brems, E., ‘Transitional Justice in the Case Law of the European Court of Human Rights’ (2011) 5 *The International Journal of Transitional Justice* 282; UN General Assembly, ‘*Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Working Group on Arbitrary Detention the Working Group on Enforced or Involuntary Disappearances*’, UN Doc. A/HRC/13/42 amongst many texts making this argument.

⁴⁰⁶ This has been discussed briefly in the Introductory Chapter of this thesis and will be discussed in detail in Chapter 2.

the rendition circuits are in violation of core international legal provisions such as the non-derogable *jus cogens* anti-torture norm and the principle of *non-refoulement*. However, as the transnational multi-actor operation of extraordinary rendition suggests while the applicable legal provisions *should* robustly protect individual rights, practical enforcement deficiencies within the international legal framework exist. Thus, after the immediately following Section on the concept of *jus cogens*, the prohibition of torture and *non-refoulement* provisions across international legal instruments, Section 3 will then aim to illustrate how the US has sought to discount the application of the IHRL and severely limit the operation of international humanitarian law (IHL). What this Chapter argues is that while international human rights and humanitarian law provide a comprehensive framework for rights protections and regulation of transfer, areas of definitional uncertainty and practical enforcement deficiencies in the application of rights exist. These deficiencies in combination with the definitional uncertainties have been relied on by the US in order to construct its ‘War on Terror’ legal paradigm as a novel form of armed conflict; a paradigm within which extraordinary rendition can operate.

2. The Prohibition against Torture and *Non-Refoulement* pre 9/11: International Human Rights and Humanitarian Law Protections

The US is a signatory to a number of international legal documents regulating the transfer of individuals in circumstances where such a transfer may place an individual at the risk of ill treatment. The UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT),⁴⁰⁷ the International Covenant on Civil and Political Rights (ICCPR)⁴⁰⁸ and the Geneva Conventions of 1949,⁴⁰⁹ all of which the US has ratified, impose a number of obligations on states

⁴⁰⁷ The full text of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), 10 December 1984, U.N. Doc. A/RES/39/46, is available at <http://www.un.org/documents/ga/res/39/a39r046.htm> [last accessed 30 March 2016]. The US signed UNCAT on 18 April 1988 and ratified it subject to a Declaration and Reservations on 21 October 1994. The significance of the US Reservations, Understandings and Declarations (RUDs) to international legal documents will be discussed in Chapter 5 of this thesis.

⁴⁰⁸ International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, full text available at <http://www.refworld.org/docid/3ae6b3aa0.html> [last accessed 30 March 2016]. The US signed the ICCPR on 5 October 1977 and ratified it on 8 June 1992 subject to Declarations and Reservations.

⁴⁰⁹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (Geneva Convention I), Convention for the Amelioration of the Condition of

relating to such transfers. Each of these treaties also prohibits torture and cruel, inhuman and degrading treatment⁴¹⁰ albeit with variations in the definition of what constitutes such treatment.

The prohibition on torture is not just one human rights protections amongst many others – it is a legal archetype; a provision which is emblematic of states' commitment to non-brutality in the legal system.⁴¹¹ The prohibition thus has significance not in and of itself but also is as the embodiment of a persuasive principle.⁴¹² As such, the anti-torture norm has been codified as an absolute, *jus cogens* norm of international law, which is non-derogable and not subject to any modified application in times of peace, conflict or emergency. A transnational counter-terrorism measure engaging in regular violations of the anti-torture norm such as extraordinary rendition does however raise the question as to how practical this absoluteness is particularly in the context of a war.

The immediately following subsection will first assess the concept of *jus cogens* before proceeding to outline the relevant international human rights and humanitarian law provisions and how they apply to the post 9/11 construct of extraordinary rendition. Understanding the purpose and scope of each of these provisions is important in contextualising the hyper compulsion for legality, which led the US to interpret its international obligations in a manner allowing for the operation of extraordinary rendition.

2.1. Jus Cogens and Non-Derogable International Legal Norms

The prohibition against torture and the principle *non-refoulement* have developed into *jus cogens* norms in the international legal framework in addition to being codified as non-derogable under UNCAT, the ICCPR and regional documents such as the

Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (Geneva Convention II), Convention relative to the Treatment of Prisoners of War, 12 August 1949 (Geneva Convention III) and Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention IV), full text of each Convention available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> [last accessed 30 March 2016]. The US signed all four Conventions on 8 December 1949 and ratified them subject to Reservations and Declarations on 8 February 1955.

⁴¹⁰ The relevant provisions are Article 3 of UNCAT, Article 7 of the ICCPR, Common Article 3 of the Geneva Convention I-IV and Articles 46-48 of Geneva Convention III.

⁴¹¹ Waldron, J., 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 (6) *Columbia Law Review* 1681, pp. 1681, 1687.

⁴¹² *Ibid.*

European Convention on Human Rights (ECHR). The *jus cogens* status afforded to certain human rights norms has been central in their development and practical enforcement. In general, *jus cogens* norms can be defined as either fundamental rules of customary international law that cannot be modified by treaty provisions or as law that imports notions of universally applicable norms into the international legal process.⁴¹³ Peremptory norms have also been described as ones which prevail within the hierarchy of norms in international law because they are ‘intrinsically superior’ and cannot be restricted or circumvented by states or through inter-state cooperation.⁴¹⁴ These superior norms also determine the framework within which inferior norms could be valid; these inferior rules or norms must then comply with the content of the superior ones within the relevant framework.⁴¹⁵ In the context of international law and states as lawmakers, the concept of *jus cogens* is a peremptory norm, which places limitations on the international law provisions states can adopt.⁴¹⁶ The concept of *jus cogens* was formally codified by Article 53 of the Vienna Convention on the Law of Treaties under which a treaty would be void if at the time of its conclusion it conflicts with a peremptory norm.⁴¹⁷ While many other international obligations have an ‘opt out’ option for states under international rules (*jus dispositivum*), *jus cogens* norms do not allow such freedom.⁴¹⁸ As noted by the Special Rapporteur of the UN International Law Commission, *jus cogens* norms are imperative and mandatory in all circumstances while *jus dispositivum* norms can be modified in certain circumstances if such an amendment is permissible under the relevant legal framework and providing that the position and rights of third states are not affected.⁴¹⁹ This was observed shortly before the adoption of the Vienna

⁴¹³ De Londras, F., ‘The Religiosity of *Jus Cogens*: a Moral Case for Compliance?’ in Rehman, J. & Breau, S (eds.), *Religion and Human Rights Law: A Critical Examination of Islamic Law and Practices* (2007, Hague; Martinus Nijhof), p. 247.

⁴¹⁴ Orakhelashvili, A., *Peremptory Norms in International Law* (2008, Oxford; Oxford University Press), p. 8. Please see further the comprehensive discussion in this book and Chapter 1 in particular.

⁴¹⁵ Rozakis, C.L., *The Concept of Jus Cogens in the Law of the Treaties* (1976, Amsterdam; North-Holland), pp. 19-20.

⁴¹⁶ Orakhelashvili, A., *Peremptory Norms in International Law* (2008, Oxford; Oxford University Press), p. 9.

⁴¹⁷ Article 53 Vienna Convention on the Law of the Treaties, full text available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [last accessed 30 March 2016].

⁴¹⁸ Ford, C., ‘Adjudicating *Jus Cogens*’, (1994) 13 *Wisconsin International Law Journal* 145, p.147

⁴¹⁹ Fitzmaurice, G.G., *Fourth Report on the Law of the Treaties*, Document A/CN.4/120, full text available at http://legal.un.org/ilc/documentation/english/a_cn4_120.pdf [last accessed 30 March 2016].

Convention in a dissenting opinion in the *Rights of Passage*⁴²⁰ case. Judge Fernandez noted that several *jus cogens* rules took precedence over any other special rules hence no special practice could prevail over the true rules of *jus cogens*.

The consistent strength of *jus cogens* to withhold the challenges posed during times of national security considerations can be seen recently in the reasoning of the Court of First Instance (CFI) in a number of actions for the annulment of relevant EU regulations imposing financial sanctions on individuals or entities who were suspected of terrorist affiliation.⁴²¹ The court indirectly reviewed the legality of the Security Council's anti-terrorism resolutions against the non-derogable nature of human rights. The CFI held that *jus cogens* norms were a body of higher rules of public international law binding on all subjects of international law including the bodies of the United Nations and from which derogations were not possible.⁴²²

Jus cogens norms have been of particular importance in recent times in the context of violations of the anti-torture norm and have been applied very rigorously. In the case of the *Prosecutor v. Anto Furundzija*,⁴²³ the International Criminal Tribunal for the former Yugoslavia suggested *obiter dictum* that the violation of a *jus cogens* norm such as the prohibition on torture has direct consequences for the legality of all official domestic measures and actions relating to such a violation. What is more important is that the perpetrators of torture who act on or benefit from such domestic measures may be held criminally responsible for torture either in their own state or another state.⁴²⁴

In addition to being a *jus cogens* norm, the non-derogability of the prohibition of torture has been reaffirmed in the provisions of UNCAT, ICCPR and ECHR as will be discussed in more depth in the immediately following section. The absoluteness of the prohibition has been of particular legal and moral significance in ensuring

⁴²⁰ *Right of Passage over Indian Territory (Port. v India)* [1960] ICJ Reports 6.

⁴²¹ Case T - 306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005; Case T - 315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005; Case T - 253/02, *Chafiq Ayadi v. Council of the European Union*, Judgment of the CFI of 12 July 2006; Case T - 41/04, *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI of 12 July 2006.

⁴²² Case T - 306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005, para. 277; Case T - 315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005, para. 226.

⁴²³ Case no. IT-95-17/1-T10, Trial Chamber, Judgment, 10 December 1998, paras. 155–157 in particular.

⁴²⁴ *Ibid.*, para. 155.

practical and effective enforcement of the necessary protections. This is aptly illustrated by one of the seminal cases of the ECtHR – *Ireland v. the United Kingdom*.⁴²⁵ In this case, the ECtHR expressly noted that “a special stigma” attaches to the “deliberate inhuman treatment causing very serious and cruel suffering”.⁴²⁶ The court further stressed that prohibition of torture provides for “no exceptions, no special cases and no derogations on emergency grounds” unlike other derogable provisions.⁴²⁷

2.2. International Human Rights Provisions

The non-derogable prohibition against torture as stated in the texts of UNCAT⁴²⁸ and the ICCPR⁴²⁹ has been operationalised in practice through the prohibition against the *refoulement* or transfer of an individual to a country where they face the risk of ill treatment or torture. While the US is a signatory to both these documents, this is subject to Reservations, interpretive Understandings and/or Declarations (RUDs) deemed necessary.⁴³⁰ In the 1967 Protocol to the Refugee Convention and the more recent 2001 Declaration, state parties have acknowledged the relevance and resilience of the international human rights framework in general and the refugee protection framework in particular.⁴³¹ More importantly however state parties have acknowledged that the principle of *non-refoulement* is at the core of the framework and its applicability is embedded in international law.⁴³² While the following discussion will focus on the language of provisions of UNCAT and the ICCPR, whether these documents have extraterritorial application and the US approach to such an application will be examined in detail in the Chapter 4.

⁴²⁵ *Ireland v. the United Kingdom*, Application no. 5310/71, Judgment 18 January 1978, para. 167.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*, para. 14 (Separate Opinion of Judge Sir Gerald Fitzmaurice).

⁴²⁸ Article 1 UNCAT in particular.

⁴²⁹ Article 7 ICCPR in particular.

⁴³⁰ The full text of the US Declaration and Reservations upon ratification of UNCAT is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-9&chapter=4&lang=en#EndDec [last accessed 30 March 2016].

⁴³¹ Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees.

⁴³² *Ibid.*

2.2.1 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

The aim of UN Convention against Torture (UNCAT) is the more effective prevention of torture across the world.⁴³³ In seeking to achieve this goal, the Convention prohibits the expulsion, extradition or *refoulement* of a person to a state where there are substantial grounds for believing that an individual would be in danger of being subjected to torture.⁴³⁴ Torture is defined as the infliction of severe physical or mental pain or suffering for the purposes of intimidating or coercing an individual or obtaining information or a confession amongst other intentions.⁴³⁵ Article 2(2) expressly states that the prohibition is non-derogable and no exceptional circumstances such as a state of war, threat of war, internal political instability or any other public emergency could be invoked as a justification for torture.⁴³⁶ The scope of Article 3 indicates an intention to encompass all types of regular transfers to which any individual may be subject to. In addition, Article 3 imposes procedural obligations to ensure compliance by requiring the competent authorities to take into consideration all relevant factors.

Initially, the US had intended to include a reservation to the effect that they would be bound by UNCAT only to the extent that Article 3 does not conflict with US obligations towards states not party to the Convention under bilateral extradition treaties with such states.⁴³⁷ This Reservation did not form part of the final US ratification.⁴³⁸ Other RUDs which limit the scope of the protections to be afforded under the anti-torture norm however were part of the ratification process. The US

⁴³³ The particular section of the Preamble states: "...Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world..." The full text of the preamble and the Convention itself is available at <http://www.un.org/documents/ga/res/39/a39r046.htm> [last accessed 30 March 2016].

⁴³⁴ Article 3 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, UN Doc. A/RES/39/46.

⁴³⁵ The full text of Article 1 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, UN Doc. A/RES/39/46 is available at <http://www.un.org/documents/ga/res/39/a39r046.htm> [last accessed 30 March 2016].

⁴³⁶ *Ibid*, Article 2.

⁴³⁷ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Senate Treaty Doc. No. 100-20, 100th Congress 2d session, full text available <http://libguides.law.umn.edu/FCThumanrights> [last accessed 30 March 2016].

⁴³⁸ The full text of the US Declaration upon signature and Reservations upon Ratification, please refer to https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en#EndDec [last accessed 30 March 2016].

understanding of the scope and text of Article 1 UNCAT⁴³⁹ is that non-compliance with the applicable legal procedural standards does not *per se* constitute torture.⁴⁴⁰ In addition, the provisions of Articles 1–16 have been declared non-self executing.⁴⁴¹

In accordance with the provisions of Article 3 UNCAT, the US has enacted statutes and regulations prohibiting the transfer of aliens to countries where they may be subjected to ill treatment such as the provisions of FARRA 1998 as discussed in Chapter 1. Thus, under its obligations as a signatory to UNCAT, the US is prohibited from transferring or removing individuals to a country where they might face torture. While the US implemented UNCAT domestically, it did so subject to the understanding that the phrase “substantial grounds for believing that an individual would be in danger of being subjected to torture” means “if it is more likely than not that an individual would be tortured”.⁴⁴²

The Committee against Torture (CAT) has interpreted “substantial grounds” as meaning that the risk of torture must be assessed by the state and the Committee on grounds extending beyond mere suspicion or theory.⁴⁴³ The risk does not have to meet a test of being highly probable.⁴⁴⁴ The Committee has further determined that the “substantial grounds for belief” requirement incorporates an objective assessment of the conditions in the state to which an individual is to be transferred and a subjective assessment of the danger of torture to the individual to be transferred.⁴⁴⁵ Evidence of a consistent pattern of gross, flagrant or mass violations of human rights and whether the domestic approach towards human rights has changed would fall within the objective assessment.⁴⁴⁶ The credibility of the individual and whether he has engaged in an activity within or outside the receiving state, which makes him vulnerable to the

⁴³⁹ Article 1 UNCAT provides a definition of what ‘torture’ is. Full text is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [last accessed 30 March 2016].

⁴⁴⁰ The full text of this particular Understanding is available at <https://www1.umn.edu/humanrts/usdocs/tortres.html> [last accessed 30 March 2016].

⁴⁴¹ *Ibid.*

⁴⁴² The full text of the US Declarations and Reservations is available at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en#EndDec [last accessed 30 March 2016].

⁴⁴³ Report of the Committee against Torture, Annex IX: General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22, UN Doc. A/53/44, p. 52.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ The Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004, ABCNY & NYU School of Law; New York), p. 38.

⁴⁴⁶ Report of the Committee against Torture, Annex IX: General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22, UN Doc. A/53/44, p. 53.

risk of torture would form part of the subjective assessment.⁴⁴⁷

Article 16 places an additional obligation on states to protect prisoners from abuses and it requires the prevention of any acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction.⁴⁴⁸ The text of Article 16 refers to these as other acts of ill treatment which do not amount to torture however are also committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The US considers itself bound by the obligations imposed under Article 16 UNCAT⁴⁴⁹ only in so far as the term cruel, inhuman or degrading treatment or punishment equates to cruel, unusual and inhumane treatment or punishment prohibited by the US Constitution.⁴⁵⁰ The UN Committee against Torture has found that depriving someone of food and/or water⁴⁵¹, long periods of detention (two weeks or more) in detention cells that are sub-standard⁴⁵² or the use by prison authorities of instruments of physical restraint that may cause unnecessary pain and humiliation⁴⁵³ to amount to cruel, inhuman or degrading treatment.

In the context of the goal of UNCAT – more effective prevention of torture – it is important to note that the application of the Convention is restricted to signatories only. Under Article 24 (3) of the Vienna Convention on the Law of the Treaties all treaties can only impose obligations on states post ratification.⁴⁵⁴ This can restrict the protection and practical enforceability mechanisms under UNCAT as discussed in Chapter 1 with reference to Syria. The Committee against Torture (the Committee)

⁴⁴⁷ *Ibid.*

⁴⁴⁸ Article 16, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, UN Doc. A/RES/39/46.

⁴⁴⁹ The full text of Article 16 UNCAT is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [last accessed 30 March 2016].

⁴⁵⁰ The full text of the US RUDs upon ratification of UNCAT are available at <https://www1.umn.edu/humanrts/usdocs/tortres.html> [last accessed 30 March 2016].

⁴⁵¹ Concluding Observations of the Committee against Torture: Germany (1993), UN Doc. No. A/48/44 (SUPP), paras. 161–180; Concluding Observations of the Committee against Torture: New Zealand (1998), UN Doc. No. A/53/44 (SUPP), paras. 167–178.

⁴⁵² Report of the Committee against Torture, *Summary Account of the Results of the Proceedings Concerning the Inquiry on Peru under Article 20*, UN Doc. No. A/56/44, paras. 144–193. The Committee found that this conduct might amount to torture if the period of detention was extremely long (para. 178).

⁴⁵³ Concluding observations of the Committee against Torture: Australia (2000), UN Doc. No. A/56/44, paras. 47–53.

⁴⁵⁴ Article 24(3) states that “When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides”. See also Article 4 – Non-Retroactivity of the Present Convention as well as Articles 14–18. Full text of the Vienna Convention is available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [last accessed 30 March 2016].

did however address this issue prior to 9/11. In *Khan v. Canada*,⁴⁵⁵ the Committee determined that by transferring an individual to a country not a party to UNCAT (Pakistan), Canada had violated Article 3. The Committee stated that such a transfer would subject a person to the risk of ill treatment and make it impossible for that individual to apply for protections under the Convention. This approach has been reaffirmed post 9/11 in *Agiza v. Sweden*⁴⁵⁶ where the Committee found that Sweden's transfer of Mr Agiza to Egypt in December 2001 violated Article 3. It was noted that Sweden should have known that the risk of torture was particularly high and that there was a lack of an effective and impartial review and appeal mechanisms to challenge the transfer order.

Within the HVDP, the role of extraordinary renditions was to transport individuals to various detention facilities for the purposes of their enhanced interrogation. The techniques used within these enhanced interrogations involved physical and psychological coercion such as stress positions, extreme temperature changes and 'waterboarding'; the detention further included physical restraints that cause unnecessary pain and humiliation and deprivation of water and/or food.⁴⁵⁷ In 2014, the CIA Select Committee Senate Report described the enhanced interrogations of CIA detainees as "brutal" with waterboarding being so physically dangerous that one detainee became "completely unresponsive".⁴⁵⁸ With reference to courts' jurisprudence as well as established practice by the UN Human Rights Committee and the UN Committee against Torture, these techniques involve conduct amounting to a breach of the absolute prohibition on torture and any form of cruel, inhuman or degrading treatment.⁴⁵⁹ Thus, while extraordinary rendition as a form of irregular

⁴⁵⁵ *Tahir Hussain Khan v. Canada*, Communication No. 15/1994, UN Doc. A/50/44 (1994) available at <http://www1.umn.edu/humanrts/cat/decisions/catD-Canada1.htm> [last accessed 30 March 2016].

⁴⁵⁶ *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee against Torture (CAT), 24 May 2005, available at: <http://www.refworld.org/docid/42ce734a2.html> [last accessed 30 March 2016].

⁴⁵⁷ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Mission to the United States of America, UN Doc. A/HRC/6/17/Add.3, para. 33. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006, Ottawa; Public Works and Government Services Canada) and *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment 13 December 2012.

⁴⁵⁸ Report of the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, p. 3. Full text available at <https://www.gpo.gov/fdsys/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf> [last accessed 30 March 2016].

⁴⁵⁹ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Mission to the United States of America, UN Doc. A/HRC/6/17/Add.3, para. 33. See further the following sections of this chapter.

transfer is not expressly prohibited by international law, when it results in the above described *incommunicado* detention and enhanced interrogation of an individual for the purposes of intelligence gathering, it is a practice violatory of UNCAT.

2.2.2. *International Covenant on Civil and Political Rights*

The US has been a signatory of the International Covenant on Civil and Political Rights (ICCPR)⁴⁶⁰ since 1992 subject to a number of RUDs. These include the Declaration that Articles 1 to 27 ICCPR were not-self executing and thus would require implementation through domestic legislation.⁴⁶¹ However while the US has yet to implement the provisions of the ICCPR into domestic legislation, upon ratification under Article VI of the US Constitution the ICCPR as a treaty made under the authority of the US arguably becomes part of federal common law.⁴⁶² Following the *Paquete Habana*⁴⁶³ case, international law forms part of domestic US law and should be administered by domestic courts. Where there is no signed treaty, executive or judicial decision or domestic legislation, reference should be made to customary international law to ensure correct interpretation. However even if international obligations are not legislated for domestically or are not deemed to be binding within the US, they are still relevant and arguably enforceable at international level.

Article 7 of the ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment. The prohibition is non-derogable. Unlike UNCAT, the ICCPR does not define what may constitute torture. While the Covenant does not expressly prohibit *refoulement* in its text, the Human Rights Committee (HRC) has interpreted Article 7 as imposing an obligation on states not to expose an individual to the danger of ill treatment in another country through an extradition, expulsion or *refoulement*.⁴⁶⁴ The HRC has further stated that the obligations under Article 2 – to respect and to ensure to all individuals within a state party territory and subject to its jurisdiction the rights

⁴⁶⁰ Full text available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed 30 March 2016].

⁴⁶¹ The full list and text of these reservations, understandings and declarations is available at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtmsg_no=iv-4&lang=en#EndDec [last accessed 30 March 2016].

⁴⁶² The full text of Article VI and the US Constitution is available at http://www.archives.gov/exhibits/charters/constitution_transcript.html [last accessed 30 March 2016].

⁴⁶³ 175 U.S. 677 (1900).

⁴⁶⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* available at <http://www.refworld.org/docid/453883fb0.html> [last accessed 30 March 2016].

recognized in the ICCPR⁴⁶⁵ - include a *non-refoulement* obligation.⁴⁶⁶ The HRC has applied this interpretation consistently in a number of cases.

In *A.R.J. v. Australia*,⁴⁶⁷ the HRC found that to surrender a prisoner knowingly to another state where there are substantial grounds for believing that that person would be in danger of torture, is contrary to the object and purpose of the ICCPR. The HRC has further determined that where a transfer may create a risk of treatment contrary to Article 7, countries conducting such transfers would violate the ICCPR provisions.⁴⁶⁸ Such risk is heightened when a state party has already determined that the detainee has a well-founded fear of persecution upon return.⁴⁶⁹

In *Ahani v. Canada*,⁴⁷⁰ the HRC expressly emphasized that the right to be free from torture requires that a state not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties. Further, where the right to be free from torture is at stake, the closest scrutiny should be applied to ensure fairness of procedure and adequate review to determine whether the risk of torture is substantial.⁴⁷¹

In *Kindler v. Canada*,⁴⁷² the HRC found that if a state party extradites a person within its jurisdiction to another country where the individual faces a “real risk” of breach of their ICCPR rights, the state party itself might be in violation of the ICCPR. While the HRC has provided limited guidance on what constitutes “a real risk” of a violation of Article 7, it has noted that a real risk could be deduced from the intent of the country to which an individual is being transferred as well as from the pattern of state conduct in similar cases.⁴⁷³ The “real risk” assessment thus appears to entail both an objective and subjective element comparable to the relevant assessments under UNCAT. It has been argued that the HRC terminology looks to follow that of the European Court of

⁴⁶⁵ Article 2 ICCPR states in full: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁴⁶⁶ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12 available at: <http://www.refworld.org/docid/478b26ae2.html> [last accessed 30 March 2016].

⁴⁶⁷ *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997.

⁴⁶⁸ *Jonny Rubin Byahuranga v. Denmark*, CCPR/C/82/D/1222/2003, UN Human Rights Committee (HRC), 9 December 2004.

⁴⁶⁹ *Mr. C. v. Australia*, Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (2002).

⁴⁷⁰ *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), 15 June 2004.

⁴⁷¹ *Ibid.* See also Article 13 International Covenant on Civil and Political Rights.

⁴⁷² *Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991 (1993).

⁴⁷³ *Mrs. G.T. v. Australia*, Communication No. 706/1996, UN Doc. CCPR/C/61/D/706/1996 (1997).

Human Rights (ECtHR) hence Article 7 should be interpreted in a manner reflective of the ECtHR's jurisprudence under Article 3 of the European Convention on Human Rights (ECHR).⁴⁷⁴

Decisions of the ECtHR such as *Soering v. United Kingdom*,⁴⁷⁵ *Chahal v. United Kingdom*⁴⁷⁶ and *Cruz Varas v. Sweden*,⁴⁷⁷ suggest that the “real risk standard” is more stringent than UNCAT's “in danger of” standard. In comparison to UNCAT, which only prohibits *refoulement* in relation to torture, the obligations of the ICCPR and the ECHR encompass all forms of ill treatment. In addition, the HRC has noted that state parties should not discriminate between their own citizens and aliens.⁴⁷⁸ In particular, aliens must not be subjected to torture or cruel, inhuman or degrading treatment or punishment and should be afforded equal protection by the law.⁴⁷⁹ These provisions are particularly relevant in the context of some of the domestic US regulations regarding aliens and the level of protection afforded to aliens who may be suspected of terrorist activities.

Furthermore, if a state party handed over an individual to another state in circumstances where it was foreseeable that torture would take place, the state party would itself be in violation of the ICCPR.⁴⁸⁰ The HRC has also found that state obligations are activated when a person is within the power or effective control of that

⁴⁷⁴ Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) as discussed in The Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004, ABCNY & NYU School of Law; New York), p. 56.

⁴⁷⁵ *Soering v. the United Kingdom*, Application no. 14038/88, Judgment 7 July 1989, paras. 91. The assessment of “real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country ... inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention.”

⁴⁷⁶ *Chahal v. the United Kingdom*, Application no. 22414/93, Judgment 15 November 1996, paras. 96, 97 “...in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 (art. 3)...In determining whether it has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to Article 3 (art. 3), the Court will assess all the material placed before it ... ”

⁴⁷⁷ *Cruz Varas v. Sweden*, Application no. 15576/89, Judgment 20 March 1991, paras. 73–86. The European Commission and the ECtHR accepted that Mr Cruz Varas had been subjected to treatment contrary to Article 3 (art. 3) in the past by persons for whom the Chilean State was responsible. However, in view of the political evolution, which had taken place in Chile, it was found that no real risk that he would again be exposed to such treatment.

⁴⁷⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, available at: <http://www.refworld.org/docid/45139acfc.html> [last accessed 30 March 2016].

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Chitat Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994).

state.⁴⁸¹ As such the application of the ICCPR does not necessarily depend on a strictly territorial jurisdiction test. The process of extraordinary rendition entails a number of violations of the relevant ICCPR procedural obligations from the manner of the capture, the subsequent transfer outside standard extradition procedures to the *incommunicado* detention and interrogation of individual terrorist suspects. Thus, if a person, being subjected to an extraordinary rendition is in the effective control of a state party to the ICCPR or is knowingly transferred to be enhancedly interrogated in an ICCPR state party, the obligations of both the transferring state and the receiving state will be triggered. In other words, by engaging in extraordinary renditions the US is in violating of its ICCPR obligations.

The human rights standards discussed above form part of the comprehensive state obligations under the non-derogable *jus cogens* anti-torture norm. The principle of *non-refoulement* in particular is an important practical aspect of these obligations in order to ensure effective enforcement during time of peace and an emergency. International humanitarian law (IHL) compliments these protections with a number of state obligations regulating the transfer of protected categories of individuals during an armed conflict. The aim of the immediately following section is to outline the relevant regulations on transfers in respect of certain categories of individuals under IHL before proceeding to discuss how the US sought to fully discount its IHRL obligations and severely limit core IHL obligations.

2.3. International Humanitarian Law protections regulating Transfers

The four Geneva Conventions of 1949⁴⁸² (Geneva Conventions I – IV) and their Additional Protocols⁴⁸³ set out the core IHL provisions including those relating to the

⁴⁸¹ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.

⁴⁸² Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (Geneva Convention I), Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (Geneva Convention II), Convention relative to the Treatment of Prisoners of War, 12 August 1949 (Geneva Convention III) and Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention IV), full text of each Convention available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> [last accessed 30 March 2016].

⁴⁸³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed

transfers of individuals in the context of an armed conflict. The US ratified all four Geneva Conventions in 1955.⁴⁸⁴ The core aim of IHL is to limit the effects of an armed conflict for humanitarian reasons and to provide affected persons with the necessary legal protections against the effects of violations committed during an armed conflict.⁴⁸⁵ The protections afforded under the Geneva Conventions I – IV apply to the actions of a state party in a territory under its control during an armed conflict and to individuals who fall within the specified categories of protected persons. Under Common Article 2, IHL provisions should be implemented both in times of peace as well as all cases of declared war or of any other armed conflict and all cases of partial or total occupation of the territory of a state party, even if such occupation has met no armed resistance.⁴⁸⁶

Geneva Convention III focuses on the treatment of certain categories of detainees during an armed conflict.⁴⁸⁷ Under the relevant provisions, individuals falling within the specified categories of protected persons should at all times be treated humanely and must not be endangered or placed at risk of death, ill treated⁴⁸⁸ or subjected to serious endangerment of health from the time of their capture to their final release.⁴⁸⁹ Common Article 3 of the Geneva Conventions I – IV is one of the core provisions, which sets out a minimum baseline standard for protection of individuals who are not taking part in the hostilities to be treated humanely and without discrimination in all circumstances.⁴⁹⁰ Violence to life and person and in particular cruel treatment and

Conflicts (Protocol II), 8 June 1977 and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, full text of each protocol available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> [last accessed 30 March 2016].

⁴⁸⁴ The US ratified all four Geneva Conventions on 2 August 1955, see further https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=375 [last accessed 30 March 2016].

⁴⁸⁵ Rehman, J., *International Human Rights Law*, 2nd ed., (2010, Essex; Pearson Education Limited), p. 764; Cassese, A., *International Criminal Law*, 2nd ed., (2008, Oxford New York; Oxford University Press), p. 81–84.

⁴⁸⁶ The full texts of the Geneva Conventions I – IV and their provisions are available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/> [last accessed 30 March 2016].

⁴⁸⁷ The full texts of the Geneva Conventions I – IV and the Additional Protocols are available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/> [last accessed 30 March 2016].

⁴⁸⁸ Article 13 Geneva Convention III. Full text available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=CD863DC518A5E1D7C12563CD0051AB7A> [last accessed 30 March 2016].

⁴⁸⁹ Articles 5, 12, 13, 14 Geneva Convention III.

⁴⁹⁰ Under Common Article 3 such individuals include: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause ...”

torture as well as humiliating and degrading treatment are specifically prohibited at any time for the specified categories of individuals.⁴⁹¹ Under Article 5 of Geneva Convention IV, individuals who have engaged in an activity threatening the security of an occupying state should be treated with humanity and afforded the right to fair trial.⁴⁹² In particular, Articles 31 and 32 of Geneva Convention IV prohibit coercion for the purposes of obtaining information and torture or any measure that causes physical suffering or death respectively.

Article 4 of Geneva Convention III outlines the necessary conditions for an individual or a combatant to qualify for a Prisoner of War (POW) status and thus be afforded the relevant protections. Under Article 13 of Geneva Convention III, all POWs must be treated humanely at all times – causing death or seriously endangering the health of a POW in custody constitutes a grave breach.⁴⁹³ In the context of an interrogation of a POW, Article 17 expressly prohibits physical or mental torture or any other form of coercion for the purposes of obtaining information.⁴⁹⁴ In relation to transfers of POWs, Article 12 states that individuals may only be transferred by a detaining state to another state party to the Geneva Convention III after the detaining state is satisfied that the receiving state can comply with the provisions of Geneva Convention III. If the receiving state is not affording the required protections, the sending state should take effective measures to correct the situation or request the return of the POW. If there is doubt as to whether an individual is a POW, he should still be treated as such until his status is established by a competent and properly constituted tribunal under Article 5.⁴⁹⁵

In a decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY), it was held that if an individual is not entitled to the protections of Geneva Convention III as a POW (or Geneva Conventions I and II) then such a person necessarily falls within the protections of Geneva Convention IV.⁴⁹⁶ In addition, all

⁴⁹¹ Common Article 3 (1) (a) and (c).

⁴⁹² Article 5 Geneva Convention IV.

⁴⁹³ The full text of Article 13 Geneva Convention III and prohibited treatments is available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=CD863DC518A5E1D7C12563CD0051AB7A> [last accessed 30 March 2016].

⁴⁹⁴ In particular Article 17 states: “ ... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind ... ”

⁴⁹⁵ Article 5 Geneva Convention III. Please also refer to *Public Prosecutor v. Koi* [1968] AC 829.

⁴⁹⁶ *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16

four Conventions expressly specify that torture and inhumane treatment of POWs and civilians qualified as protected persons constitute grave breaches of Geneva Conventions I – IV.⁴⁹⁷ In addition, Geneva Convention IV states that the unlawful deportation or transfer or unlawful detention of a protected person also amounts to a grave breach.⁴⁹⁸ Thus, the combined application of Geneva Conventions I – IV aims to provide a core baseline standard of protections to both civilians and combatants (with or without POW status) during an armed conflict. The US has fully ratified all four Geneva Conventions and thus it is bound by their provisions during an armed conflict of either international or non-international nature.

The rendition circuits operated within the ‘War on Terror’ legal and political paradigm. On the basis of the above outlined international legal provisions, the practice of extraordinary rendition is in violation of the individual protections governing humane treatment and transfers codified in IHRL and IHL. The transnational operation of extraordinary renditions, initially undetected, for a number of years does however raise severe concerns as to how effective the absoluteness of the anti-torture norm is in practice. In parallel, it raises the question of how the US were able to operationalise the programme on a transnational scale with the support of 54 states. The answer partly lies in the liability-limiting use of diplomatic assurances and private contractors as illustrated in Chapter 1. However the starting point was creation of an environment of legal uncertainty within which the applicability of the relevant legal standards was in flux allowing for the use of expansive counter-terrorism operations such as extraordinary rendition. The construction of this environment will be the focus of the subsequent section followed by a discussion on whether the ‘War on Terror’ is an armed conflict.

3. General Applicability of International Human Rights Law and International Humanitarian Law to the ‘War on Terror’

In response to the events of 9/11, the US designed the ‘War on Terror’ legal and

November 1998, available at <http://www.refworld.org/docid/41482bde4.html> [last accessed 30 March 2016] and *Prosecutor v. Dusko Tadić (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at <http://www.refworld.org/docid/40277f504.html> [last accessed 30 March 2016].

⁴⁹⁷ Article 50 Geneva Convention I, Article 51 Geneva Convention II, Article 130 Geneva Convention III and Article 147 Geneva Convention IV.

⁴⁹⁸ Article 147 Geneva Convention IV.

political paradigm in order to create operational spaces for some of its counter-terrorism programmes such as extraordinary rendition. The first step in creating these spaces was George W. Bush's Address to the nation equating the 9/11 attacks to an act of war against the US.⁴⁹⁹ Shortly after his Address to the Nation, Military Order of 13 November 2001 identified IHL as the only applicable legal standard to the counter-terrorism operations due to be undertaken by the US.⁵⁰⁰ The Order stated that the actions of international terrorists including Al Qaeda had created a state of armed conflict, which required the use of US Armed Forces.⁵⁰¹ Further, in order to protect the US and its citizens, conduct effective military operations and prevent future acts of terrorism, the US would detain and try individuals subject to this Order for violations of the laws of war and other applicable laws by military tribunals.⁵⁰²

In a subsequent 2002 Memorandum, George W. Bush, stated that the 'War against Terror' had ushered in a new paradigm, which while requiring a new approach towards the laws of war, should be consistent with the principles of the Geneva Convention.⁵⁰³ International human rights protections were not referred to or noted as relevant to HVDP within these documents. This position will be discussed in more detail below with reference to the jurisprudence of the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR).

Contrary to the above outlined position, the protections offered by IHRL and IHL are complimentary.⁵⁰⁴ If a conflict arises between the provisions of these two legal regimes and their applicability to a particular situation, the relevant *lex specialis* should be identified and applied.⁵⁰⁵ Thus, the operation of IHL within an international or non-international armed conflict as the *lex specialis* does not exclude the continued applicability of IHRL as *lex generalis*.⁵⁰⁶ This is the approach adopted by the ICJ and subsequently confirmed in the jurisprudence of the ECtHR.

⁴⁹⁹ President George W Bush in September 2001 in an address to a joint session of Congress. Please see further 'Transcript of President Bush's Address', *CNN News* 21 September 2001.

⁵⁰⁰ Military Order of November 13, 2001, Federal Register, Vol. 66, No. 222.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ Memorandum on Humane Treatment of Taliban and al Qaeda Detainees, The White House, 7 February 2002.

⁵⁰⁴ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7, para. 70. See also Report by the Special Rapporteur, *Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/2005/7, para. 50.

⁵⁰⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice (ICJ), 8 July 1996, para. 25 and *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, paras. 108–111.

⁵⁰⁶ *Ibid.*

In its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*,⁵⁰⁷ the ICJ was asked by the UN General Assembly to assess whether the threat or use of nuclear weapons is permitted in any circumstances under international law. The ICJ noted that in order to answer the question set, it must decide what the relevant law is within the corpus of international law norms.⁵⁰⁸ In its considerations, the Court focused on the right to life as guaranteed under Article 6 ICCPR and whether the applicable international law regarding the use of nuclear weapons stemmed from the ICCPR or the laws of armed conflict. The argument that the ICCPR was directed to the protection of human rights in peacetime rather than the unlawful loss of life during hostilities was also noted.⁵⁰⁹

The ICJ stated however that the protections of the ICCPR do not cease during an armed conflict unless and to the extent that there have been derogations under Article 4 of the ICCPR. The Court proceeded to advise that as the right to life is non-derogable, in principle the right not to arbitrarily be deprived of one's life also applies in hostilities.⁵¹⁰ However, the test of what is an arbitrary deprivation of life is to be determined by the relevant *lex specialis* namely the law applicable in armed conflict as it is specifically designed to regulate the conduct of hostilities. Thus whether a particular loss of life is arbitrary contrary to Article 6 ICCPR can only be decided by reference to the law of armed conflict rather than the terms of the ICCPR itself.⁵¹¹

In a subsequent Advisory Opinion while considering the rules and principles of international law applicable to measures taken by Israel – *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁵¹² – the ICJ rejected the argument that the human rights instruments to which Israel was party were not applicable to the occupied territory. Israel, a signatory to both the ICCPR⁵¹³ and

⁵⁰⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice (ICJ), 8 July 1996.

⁵⁰⁸ *Ibid*, para.24.

⁵⁰⁹ *Ibid*.

⁵¹⁰ Under Article 6.1 of the ICCPR the right to life is defined thus: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The full text of Article 6 ICCPR is available here: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed 30 March 2016].

⁵¹¹ *Ibid*, para. 25.

⁵¹² *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004.

⁵¹³ Israel ratified the ICCPR on 3 October 1991 subject to a Reservation as well as notification of derogation under Article 4(3) in relation to Article 9 – right to liberty and security. Please refer to <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed 30 March 2016].

International Covenant on Economic Social and Cultural Rights,⁵¹⁴ had argued that neither of these Covenants was applicable to the occupied Palestinian territory.⁵¹⁵ While Israel had acknowledged that the protections of IHL are relevant to a conflict situation such as the one in the West Bank and Gaza Strip, it argued that human rights treaties were intended to protect citizens from their own governments during peacetime.⁵¹⁶ The ICJ referred to its Advisory Opinion on Nuclear Weapons and noted more generally that the protections afforded under human rights Conventions do not cease during an armed conflict unless there has been a permissible derogation such as one under Article 4 ICCPR.⁵¹⁷ The Court further noted that there are three possible scenarios with regards to the relationship between IHL and IHRL: 1) “some rights may be exclusively matters of international humanitarian law”, 2) “others may be exclusively matters of human rights law” and 3) “yet others may be matters of both these branches of international law”.⁵¹⁸ In answering the particular question set to it, the ICJ noted that it had to consider human rights as *lex generalis* and international humanitarian law as *lex specialis*. This decision was reaffirmed in the ICJ judgment in the *Armed Activities on the Territory of the Congo*.⁵¹⁹

The ECtHR has taken a similar view in its jurisprudence in the 2001 case of *Al-Adsani v. the United Kingdom*⁵²⁰ and subsequently in the 2009 case of *Varnava v. Turkey*.⁵²¹ Most recently, the ECtHR has reaffirmed that IHRL and IHL can apply concurrently with reference to the jurisprudence of the ICJ in *Hassan v. the United Kingdom*.⁵²² In its decision, the ECtHR held that both the ECHR and IHL must be interpreted in harmony with other rules of international law.⁵²³ The ECtHR acknowledged its previous case law and the jurisprudence of the ICJ before proceeding to state that during an armed conflict ECHR provisions continue to apply however the provisions needed to be interpreted with reference to the applicable IHL protections.⁵²⁴

⁵¹⁴ Israel ratified the ICESCR on 3 October 1991.

⁵¹⁵ *Ibid*, para. 102.

⁵¹⁶ *Ibid*.

⁵¹⁷ *Ibid*, para. 106.

⁵¹⁸ *Ibid*, para. 106.

⁵¹⁹ *Democratic Republic of Congo (DRC) v. Uganda*, Judgment 19 December 2005.

⁵²⁰ *Application no. 35763/97*, Judgment 21 November 2001.

⁵²¹ Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment 18 September 2009.

⁵²² *Hassan v. the United Kingdom*, Application no. 29750/09, Judgment 16 September 2014.

⁵²³ *Ibid*, para. 102.

⁵²⁴ *Ibid*, para. 104.

The ICJ and ECtHR's discussion of the relationship of *lex specialis* and *lex generalis* in the context of IHL and IHRL provisions is helpful in understanding the minimum baseline of protections to be afforded to individuals during an armed conflict. In all of the above cases the ICJ (reaffirmed by the ECtHR) expressly stated that human rights provisions continue to operate during an armed conflict. In comparison, the applicability of IHL is conditional on the presence of either an international or a non-international armed conflict. Under Article 4 of the ICCPR, a state party can derogate from certain provisions during an officially declared public emergency threatening the life of the nation.⁵²⁵ A state of declared war or an armed conflict would satisfy the criteria for derogation. Thus, while the rules of IHL are applicable in the particular or special circumstances of an armed conflict, they do not displace entirely the protections afforded by IHRL. Rather, the operation of IHL can have a role in the application of human rights standards such as in interpreting what 'arbitrary' is or expanding on the grounds allowing for detention of individuals.⁵²⁶

However, despite the above jurisprudence, in 2006, while addressing the UN Committee against Torture, John Bellinger⁵²⁷ reaffirmed the US position that IHL was the relevant *lex specialis* governing the US detention operations in Guantanamo Bay, Afghanistan and Iraq.⁵²⁸ While acknowledging the similarity between certain IHL and IHRL protections, he explicitly restated this position twice in his address.⁵²⁹ Further, when referring to the provisions of UNCAT, John Bellinger expressly stated that at the conclusion of negotiations on UNCAT the US had clearly noted that UNCAT was not intended to apply during an armed conflict.⁵³⁰ He emphasised that if UNCAT were applicable to armed conflicts, this would result in an overlap of different treaties and undermine efforts to eradicate torture.⁵³¹ A similar view was adopted towards the obligations of the ICCPR.

Thus, the overall position endorsed by the US post 9/11 in relation to its international

⁵²⁵ Article 4, International Covenant on Civil and Political Rights.

⁵²⁶ For a detailed discussion in relation to grounds for detention, please refer to the *Hassan v. the United Kingdom*, Application no. 29750/09, Judgment 16 September 2014.

⁵²⁷ Legal Adviser of the US Department of State and head of the US delegation to the Committee against Torture.

⁵²⁸ US Meeting with UN Committee against Torture, Opening Remarks by John Bellinger, full text available at <http://www.state.gov/j/drl/rls/68557.htm> [last accessed 30 March 2016].

⁵²⁹ *Ibid.*

⁵³⁰ The US has regularly resisted the extraterritorial application of human rights treaties. The impact of this resistance on the enforceability of rights will be discussed in more depth in Chapter 4 – Jurisdiction.

⁵³¹ *Ibid.*

legal obligations appears to be as follows: when IHL is operating as *lex specialis*, IHRL is deemed not applicable. However, in seeking to severely restrict the operation of the IHRL and IHL, the US did not just focus on the principles of *lex specialis* and *lex generalis*. Following the determination that IHL as the applicable *lex specialis* fully displaced the operation of IHRL, the US then proceeded to adopt a hyper legalistic interpretation of the language, text and scope of the concept of ‘armed conflict’ as well as other core provisions in order to limit its obligations under the four Geneva Conventions.⁵³²

Section 4 will first address the debate surrounding the concept of armed conflict and in particular how the US interpreted the events of 9/11 to be of an intensity triggering the operation of the laws of war.⁵³³ It will be argued that the US hyper compulsion for legality in outlining why the War on Terror is an armed conflict – it will be argued in Section 4.2 that it is not – is not the most problematic issue. What is more concerning however is how the term ‘war’ can be manipulated to provide an escape route from the constraints of international law.⁵³⁴ The discussion on this point in Section 4.3 will first address how the US sought to limit the applicability of Common Article 3 – a baseline standard of protections – to individuals captured, detained and subject to transfer during the US-led transnational counter-terrorism campaign. Section 4.4 will outline the severe limitations in other core IHL provisions before addressing extraordinary renditions in the context of this ‘armed conflict’.

4. The ‘War on Terror’ – an Armed Conflict under IHL?

On 13 November 2001, the then US President George W. Bush declared that the attacks carried out on 9/11 were on “a scale that has created a state of armed conflict”.⁵³⁵ This determination was made on the basis that the terrorist attacks were “a sufficiently organised and systematic set of violent actions”, which have reached a level of intensity amounting to an armed conflict.⁵³⁶ While construing IHL as the only

⁵³² The full text of the Geneva Conventions is available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> [last accessed 30 March 2016].

⁵³³ Common Article 2, Geneva Convention I–IV, full text available at <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> [last accessed 30 March 2016].

⁵³⁴ Megret, F., ‘“War”? Legal Semantics and the move to Violence’ (2002) 13 (2) *European Journal of International Law* 361, p. 361.

⁵³⁵ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57, 833 § 1(a) (Nov. 16, 2001).

⁵³⁶ Memorandum Opinion for the Counsel to the President, Opinions of the Office of Legal Counsel, Vol 25, 6 November 2001.

relevant legal framework, the US Attorney General's Office stated that a declaration of war was not required to create a state of war or to subject persons to the laws of war.⁵³⁷ In addition, the US could be engaged in an armed conflict with a non-state actor.⁵³⁸ The scale of the 9/11 attacks, the number of casualties and necessary military response required were found to be sufficient to create a state of war *de facto*, which allowed the application of IHL.⁵³⁹

IHL applies in “all cases of declared war and any other armed conflict” of either international or non-international character.⁵⁴⁰ Even if IHL was the only applicable legal framework, the US would still be obligated to comply with the rules governing transfers of protected individuals and treat detainees humanely. However, by relying on a hyper legalistic interpretation of domestic and international legal sources, the US challenged the core understanding of the concept of armed conflict in order to create a legal environment within which the War on Terror was the relevant conflict; a novel type of armed conflict to which core IHL provisions were not applicable. In order to achieve this, the US claimed that the operation of IHL is in actuality more malleable than the texts of the four Geneva Conventions suggest. By fashioning a broad rhetorical fault line⁵⁴¹ within the international legal framework in this manner, the US aimed to create spaces of legal uncertainty within which expansive counter-terrorism activities such as the HVDP and extraordinary rendition could operate. The focus of the following sections is to examine how the US created this fault line. The discussion will also assess the scope of the limitations imposed on the applicability of IHL protections.

4.1. The Concept of Armed Conflict under IHL

Under Common Article 2, IHL and its protections apply to “all cases of declared war and any other armed conflict” which may arise between two or more states signatories

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ The full texts of Common Article 2 and 3 and the four Geneva Conventions is available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> [last accessed 30 March 2016].

⁵⁴¹ Please refer to the discussion in Section 3 of the Introductory Chapter.

to the Geneva Conventions.⁵⁴² This is the case even if one party does not recognise the state of war.⁵⁴³ In addressing the scope of Article 2, the 1960 Conventions Commentary notes that a formal declaration of war or the recognition of the existence of a state of war are not necessary to trigger the application of IHL.⁵⁴⁴ Rather the occurrence of *de facto* hostilities is sufficient.⁵⁴⁵ In addressing the concept of armed conflict, the Commentary adds that the use of this wording was chosen deliberately in order to avoid uncertainties or disputes.⁵⁴⁶ Any difference arising between two states, which lead to the involvement of members of the military forces, would thus amount to an armed conflict within the meaning of Common Article 2 even when one of the parties denies that a state of war exists.⁵⁴⁷ More recently, an armed conflict has been found to exist when states resort to the use of armed force or when there is protracted armed violence between governmental forces and organised armed groups.⁵⁴⁸

Under Common Article 3, the provisions of the Geneva Conventions are extended to armed conflicts of a non-international character. While the 1960 Commentary acknowledges that the phrasing might be too vague, it notes that isolated events involving the use of force and requiring a response by members of the armed force would not trigger the operation of Article 2 or 3.⁵⁴⁹ What is within the scope of Article 3 however are “armed conflicts, with *armed forces* on either side engaged in *hostilities* – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country”.⁵⁵⁰ In the *Tadić* case, the International Tribunal for Former Yugoslavia (ICTY) adopted a similar interpretation and referred to extended armed violence between organised armed groups within a

⁵⁴² The full text of Common Article 2 and the four Geneva Conventions is available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> [last accessed 30 March 2016].

⁵⁴³ *Ibid.*

⁵⁴⁴ Pictet, J.S., *Commentary on the Geneva Conventions 12 August 1949* (1960, International Committee of the Red Cross; Geneva), p. 22. While the International Committee of the Red Cross has begun a project to update the Commentary on all four Geneva Conventions, the 1960 Commentary is the relevant one in the context of the ‘War on Terror’.

⁵⁴⁵ *Ibid.*, p. 23.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Prosecutor v. Dusko Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 70.

⁵⁴⁹ Pictet, J.S., *Commentary on the Geneva Conventions 12 August 1949* (1960, International Committee of the Red Cross; Geneva), pp. 35-37.

⁵⁵⁰ *Ibid.*, p. 37.

state.⁵⁵¹ The core aim of Common Article 3 during such a conflict is to provide a minimum baseline of protections for individuals no longer engaging in hostilities. These protections have been interpreted as being automatically applicable without prior determination as to the nature of the conflict.⁵⁵²

In a subsequent ICTY case of *Haradinaj*,⁵⁵³ the ICTY elaborated on the criteria for non-international armed conflict. The Trial Chamber when discussing armed groups, emphasised on characteristics such as the existence of a General Staff with the powers to appoint commanders, give directions and issue public statements on behalf of the organisation, and the capacity to issue ceasefire orders as well as conclude ceasefire agreements.⁵⁵⁴ Furthermore, the ability to engage in armed clashes across a certain territory was interpreted as an indicator of a sufficient level of organisation.⁵⁵⁵ The Appeals Chamber concluded that an armed conflict could only exist between parties that are sufficiently organised to confront each other with *military* means.⁵⁵⁶

The concept of armed conflict as defined and interpreted above is not easily reconciled with the arguments that a large-scale terrorist attack could amount to a conflict triggering IHL obligations. State practice suggests that acts of terrorism do not amount to an armed conflict.⁵⁵⁷ This approach is supported by the Venice Commission findings that the activities of terrorist networks such as sporadic bombings and other violent acts and ensuing counter-terrorism responses (even when military units are engaged) do not amount to an armed conflict.⁵⁵⁸ Similarly, Article I of Additional Protocol II to the UN Convention on Conventional Weapons states that isolated and sporadic acts of violence and other acts of similar nature do not constitute

⁵⁵¹ *Prosecutor v. Dusko Tadić aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 70.

⁵⁵² *Ibid.*, p. 35.

⁵⁵³ *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, ICTY, 3 April 2008.

⁵⁵⁴ *Ibid.*, paras. 55 – 57.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*, para. 60.

⁵⁵⁷ This is expressly stated in UK Ministry of Defence Law of Armed Conflict Manual - UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004, Oxford; Oxford University Press), p. 31. The manual also refers to the French government's approach in 1954-1956 during the Algerian uprising. Domestic law was exclusively relied on to address the uprising until June 1956 when only Common Article 3 was formally accepted as applicable.

⁵⁵⁸ Venice Commission, *Opinion on the International Legal Obligations of Council Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006), para. 78.

an armed conflict.⁵⁵⁹ The US nonetheless deviated from this established practice and interpreted the War on Terror to be an armed conflict exclusively governed by IHL.

4.2. *The War on Terror – an Armed Conflict?*

On the 18 September 2001, a Joint Resolution by the US Senate and House of Representatives authorised the use of the US Armed Forces as a response to the events of 9/11.⁵⁶⁰ Under Section 2 of the Resolution, the US President was permitted to use all necessary and appropriate force against nations, organisations or persons considered to have been involved in the 9/11 attacks.⁵⁶¹ The determination of whether a state, organisation or an individual had planned, aided, authorised or committed the terrorist acts rested with the President.⁵⁶² On 20 September 2001 while declaring a global war on terrorism, then President George W. Bush also stated that this would be a lengthy multifaceted campaign involving US military and intelligence services.⁵⁶³ At the core of the War on Terror legal paradigm was the assessment by the Office of the Legal Counsel that the terrorist attacks of 9/11 amounted to an armed conflict triggering the applicability of the four Geneva Conventions.⁵⁶⁴ By relying on relevant domestic provisions and legal precedents, the Memorandum stated that where an organised force has engaged in a campaign of violence that reaches a sufficient level of intensity, the US President could regard such a campaign as an armed conflict justifying the operation of IHL.⁵⁶⁵ In addition, the determination whether the laws of war applied in this context was also within the purview of the President.⁵⁶⁶ This was

⁵⁵⁹ The full text of the Article is available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=21F4149CD8C96361C12563FB00611D93> [last accessed 30 March 2016].

⁵⁶⁰ Joint Resolution To Authorize the Use of United States Armed Forces against those Responsible for the Recent Attacks launched against the United States, Public Law 107-40, 107th Congress, Sept. 18, 2001 [S.J. Res.23].

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

⁵⁶³ Please refer to the Address to Congress and the American People by George W. Bush on 20 September 2001, full text available at http://www.history2u.com/bush_war_on_terror.htm [last accessed 30 March 2016].

⁵⁶⁴ Memorandum Opinion for the Counsel to the President, Opinions of the Office of Legal Counsel, Vol 25, 6 November 2001, pp. 1-23. The role of the Office of Legal Counsel is to provide legal advice to the President and Executive Branch agencies. The Office also drafts legal opinions of the Attorney General, provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. Please see further <http://www.justice.gov/olc> [last accessed 30 March 2016].

⁵⁶⁵ *Ibid.*, p. 24.

⁵⁶⁶ *Ibid.*, pp. 6, 7, 29, 33.

the first step in determining whether IHL was applicable to the “present conflict with terrorist forces”.⁵⁶⁷

The Memorandum then assessed the relevant international legal standards. With reference to previous terrorist attacks attributed to Al Qaeda,⁵⁶⁸ it was argued that the events of 9/11 were the culmination of a “lengthy and sustained campaign” against military and civilian targets in the US.⁵⁶⁹ Viewed from this perspective, the 9/11 attacks were said to be part of a systematic campaign of hostilities rather than an isolated or sporadic event. Thus, the terrorist attacks of 9/11 were sufficient to create a *de facto* state of war triggering the operation of IHL. In addition, the scale of the military response following the Joint Congress Resolution and the declaration of war by President Bush further justified the conclusion that IHL could be invoked.

The final factor considered was NATO’s immediate response to 9/11. On 12 September 2001, NATO invoked for the first time in its history the principle of collective self-defence under Article 5⁵⁷⁰ of the North Atlantic Treaty.⁵⁷¹ While initially the invocation of Article 5 by NATO was considered to be provisional,⁵⁷² following a number of classified briefings by the US the conditional clause was removed.⁵⁷³ In October 2001, the NATO Allies declared a unanimous assessment that the 9/11 attacks activated Article 5 provisions.⁵⁷⁴ This was described as a factor “virtually conclusive in itself” in establishing that the attacks of 9/11 reached the level of hostilities required to be classified as an armed conflict.⁵⁷⁵ This determination was made without any reference to the US involvement, which appears to have strongly influenced the invocation of Article 5 in the first place.⁵⁷⁶

⁵⁶⁷ *Ibid.*

⁵⁶⁸ The events referred to were the bombings of the World Trade Centre in 1993, Khobar Towers in Saudi Arabia in 1996, US embassies in Kenya and Tanzania in 1998 and the U.S.S. Cole in 2000.

⁵⁶⁹ Memorandum Opinion for the Counsel to the President, Opinions of the Office of Legal Counsel, Vol 25, 6 November 2001.

⁵⁷⁰ North Atlantic Treaty 1949, full text available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm [last accessed 30 March 2016].

⁵⁷¹ Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36, p. 16.

⁵⁷² Please refer to the relevant discussion in the Introductory Chapter of this thesis. The initial conditional clause of the invocation of Article 5 is available at Statement by the North Atlantic Council, Press Release (2001) 124 of 12 September 2001.

⁵⁷³ See further Statement by the NATO Secretary General, Lord Robertson, NATO Press Release of 08 October 2001.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ Memorandum Opinion for the Counsel to the President, Opinions of the Office of Legal Counsel, Vol 25, 6 November 2001, p. 29.

⁵⁷⁶ *Ibid.* Please also refer to the relevant discussion in the Introductory Chapter of this thesis.

The manner in which the US has interpreted what constitutes an armed conflict and its subsequent application to the events of 9/11 is illustrative of the hyper legalism employed by the US. While assessing the applicability of IHL, the US adopted a very strict and narrow reading of the text of the Geneva Conventions and attaching Commentary. The analysis of the concept of armed conflict appears to have followed very closely, if not mirrored exactly, the language used within the Commentary in order to illustrate that the events of 9/11 constitute an armed attack. The phrase “*de facto* hostilities”⁵⁷⁷ was relied on in the 1960 Commentary to describe what would trigger the application of Common Article 2 Geneva Conventions I-IV. Isolated events involving force and requiring a response by members of the armed forces were expressly noted as not amounting to either an international or non-international armed conflict.⁵⁷⁸ The attacks of 9/11 were described thus: the culmination of a widespread and sustained campaign of hostilities, which required the engagement of US troops on a massive scale.⁵⁷⁹ In other words – these were not isolated or sporadic events but rather *de facto* hostilities, which would engage IHL.⁵⁸⁰ Protracted armed violence between governmental forces and organised armed groups has been found to trigger the applicability of IHL.⁵⁸¹

The decision to declare a ‘war’ on terrorism has been criticised as a normative and pragmatic error.⁵⁸² However, the above definitions provided by the ICTY are broad enough to encompass conflicts between a state and a terrorist group provided that the latter is sufficiently organised and more importantly capable of sustaining military operations.⁵⁸³ The core question that needs to be examined is whether various acts attributed to Al Qaeda are sufficiently related to each other to be interpreted as acts of war in the same conflict.⁵⁸⁴ The US Executive determination that it is at war with Al Qaeda and international terrorist groups in general has been criticised on the basis that

⁵⁷⁷ Pictet, J.S., *Commentary on the Geneva Conventions 12 August 1949* (1960, International Committee of the Red Cross; Geneva), p. 23.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Memorandum Opinion for the Counsel to the President, Opinions of the Office of Legal Counsel, Vol 25, 6 November 2001, p. 28.

⁵⁸⁰ *Ibid.*, pp. 1,31.

⁵⁸¹ *Prosecutor v. Dusko Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 70.

⁵⁸² J. Habermas, *The Divided West* (London, Polity Press 2006) p. 14 – 15.

⁵⁸³ Lehto, M., ‘War on Terror – Armed Conflict with Al-Qaida?’ (2010) 78 *Nordic Journal of International Law* 499, p. 508.

⁵⁸⁴ *Ibid.*, p. 508.

it lacks any geographical delimitation.⁵⁸⁵ Even if the attacks on the World Trade Centre in 1993, Khobar Towers in Saudi Arabia in 1996 and US embassies in Kenya and Tanzania in 1998 could be attributed to Al Qaeda or categorised as linked, serious questions nonetheless arise as to the geographical proximity and temporal closeness of these attacks.⁵⁸⁶ The identification of one core target – Al Qaeda and its affiliates – does not help to delimit the location of war but rather seems to broaden it. For the ‘War on Terror’ to amount to an armed conflict under IHL, there should be a more specified geographical connection and more substantial or closer temporal links.

However four benefits of the paradigm of war stand out in particular. As part of a war it is permissible to use lethal force against enemy troops regardless of the degree of involvement such troops have with the enemy, thus, vastly expanding the number of individuals who can be legitimate targets.⁵⁸⁷ Further, collateral damage, which is the unintended but foreseen killing of non-combatants, is permissible as part of operations against military targets provided the principle of proportionality is followed.⁵⁸⁸ Quite significantly, the requirements in relation to evidence and proof in terms of detaining individuals or subjecting them to other restrictive practices are far less stringent than in comparison with the criminal justice system.⁵⁸⁹ Thus, an enemy combatant can be captured and imprisoned without having to reach the beyond reasonable doubt standard of proof. Finally, within the context of war, legitimate targets are those who are considered to pose a threat and cause harm rather than only those who have already caused harm.⁵⁹⁰ Under Military Order of 13 November 2001,⁵⁹¹ the individuals subject to this Order were non-US citizens who had been determined a) to be or have been members of Al Qaeda, b) to be or have been engaged in aiding, abetting or conspiring to commit acts of international terrorism or have aimed to cause adverse effects on the US and c) to have knowingly harboured such individuals.⁵⁹² Individuals whose capture and detention was in the interest of the

⁵⁸⁵ *Ibid*, p. 509.

⁵⁸⁶ *Ibid*.

⁵⁸⁷ D. Luban, ‘The War on Terrorism and the End of Human Rights’, 22 *Philosophy & Public Policy Quarterly* (2002) p. 9; Section 52 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts outlines what military objectives are – full text available at <http://www.un-documents.net/gc-p1.htm#part-1>.

⁵⁸⁸ *Ibid*, p. 9.

⁵⁸⁹ *Ibid*, p. 9.

⁵⁹⁰ *Ibid*, p. 9.

⁵⁹¹ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57, 833 § 1(a) (Nov. 16, 2001).

⁵⁹² *Ibid*, Section 2 (a)(1).

US were also subject to the Order.⁵⁹³ The significance of these determinations to individuals identified as subjects to this order will be discussed in Section 4.3.

Having developed a multi-faceted argument that the events of 9/11 activated the laws of war, the US proceeded to severely restrict the protections afforded to individuals captured, detained and potentially subject to transfer under Common Article 3 and Geneva Convention III. This was achieved through a determination that while the ‘War on Terror’ was the relevant armed conflict, it was a type of armed conflict not expressly governed by either Common Articles 2 or 3. Concurrently, the US proceeded to restrict other core IHL protections linked to the operation of Common Articles 2 and 3.

4.3. Restrictions on Common Article 3 and other core IHL protections

Common Article 3 or as it has also been described - a “Convention in miniature” - expresses the fundamental core principles governing all four Geneva Conventions.⁵⁹⁴ It applies automatically without a prior determination of the nature of the conflict and sets a compulsory minimum standard ensuring the humane treatment of detained individuals.⁵⁹⁵ In assessing the applicability of Common Article 3, the ICTY in *Prosecutor v. Tadić*⁵⁹⁶ found that the rules contained in the Article applied outside the narrow geographical context of the actual zone of combat operations.⁵⁹⁷ In addition, some of the language in Protocol II to the Geneva Conventions was found to imply a broad scope of application beyond actual hostilities.⁵⁹⁸ The nexus required was a relationship between the conflict and deprivation of liberty; it was not necessary for the deprivation to occur within the conflict zone.⁵⁹⁹ The tribunal found that the

⁵⁹³ *Ibid*, Section 2 (a)(2).

⁵⁹⁴ Pictet, J.S., *Commentary on the Geneva Conventions 12 August 1949* (1960, International Committee of the Red Cross; Geneva), p. 33.

⁵⁹⁵ The full text of Common Article 3 is available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66> [last accessed 30 March 2016].

⁵⁹⁶ *Prosecutor v. Dusko Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995.

⁵⁹⁷ *Ibid*, para. 69.

⁵⁹⁸ *Ibid*.

⁵⁹⁹ *Ibid*.

character or nature of a conflict was irrelevant to the applicability of the minimum baseline obligations of Common Article 3.⁶⁰⁰

This interpretation was challenged on the basis that it ignored the text and context within which Common Article 3 (and the Geneva Conventions) was ratified by the US.⁶⁰¹ According to the US, Common Article 3 obligations traditionally applied to internal conflicts within one territory between a State Party and an insurgent group amounting to a large-scale civil war rather than to all forms of armed conflict not covered by Common Article 2.⁶⁰² Thus, an armed conflict between a state and a transnational terrorist organisation should not trigger the applicability of Common Article 3. It was argued that under the decision in the *Tadić* case, Common Article 3 would apply to all conflicts, which do not satisfy the provisions of Common Article 2. By interpreting Article 3 in this manner, the ICTY was effectively expanding its scope beyond the original text of the Geneva Conventions without the approval of state parties to the Geneva Conventions.

While the actual text of Common Article 3 has not been amended since the adoption of the Conventions, two Additional Protocols have been drafted to adapt the Conventions to more contemporary forms of warfare.⁶⁰³ The US has signed both Protocols, however it has not ratified either one yet.⁶⁰⁴ In this context it was argued that the broader scope of Article 3 promoted by the two Protocols should be deemed inapplicable to the US.⁶⁰⁵ A state signature⁶⁰⁶ to an international treaty subject to ratification does not establish consent to be bound.⁶⁰⁷ It does however create an obligation on a state to refrain, in good faith, from acts which would defeat the object

⁶⁰⁰ *Ibid*, para. 102.

⁶⁰¹ Memorandum from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel to William J. Haynes II, General Counsel, Department of Defence, available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> [last accessed 30 March 2016].

⁶⁰² *Ibid*, p. 7.

⁶⁰³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁶⁰⁴ Please see further the list of states, which have ratified the Protocols, available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=470 [last accessed 30 March 2016].

⁶⁰⁵ Memorandum from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel to William J. Haynes II, General Counsel, Department of Defence.

⁶⁰⁶ The term ‘signature’ refers to a signature subject to ratification, approval or accession and not signature *ad referendum*, which constitutes a full signature of the treaty. Please refer to Articles 10, 12 and 18 of the Vienna Convention on the Law of the Treaties.

⁶⁰⁷ Please refer to Article 12 and 18 of the Vienna Convention on the Law of the Treaties.

and purpose of the treaty.⁶⁰⁸ The strict and narrow interpretation of the processes relating to the creation of binding international obligations in combination with the existing domestic implementation approach is further illustration of how the US have aimed to restrict the scope and applicability of the relevant IHL provisions.

As discussed earlier in Section 3, the US adopted the position that the operation of IHRL protections was fully displaced by IHL as the relevant *lex specialis* during an armed conflict. Having proceeded to then severely limit core IHL provisions such as Common Article 3, the US created a broad rhetorical fault line within which individual detainees – in particular those considered to have links with Al Qaeda and the Taliban – were afforded very restricted if any individual rights and protections. In a 2002 U.S. Department of Justice Memorandum (DoJ Memo) advocated that the provisions and protections afforded under Geneva Convention III were not applicable to detainees associated with Al Qaeda.⁶⁰⁹ This conclusion was reached on the basis of three factors.

It was first reiterated that as the “novel” nature of the conflict precluded the operation of Common Article 3, the military treatment of members of Al Qaeda was thus not restricted or governed by Common Article 3.⁶¹⁰ In addition, as Al Qaeda was not a state but rather a non-governmental terrorist organisation operating across a number of countries, the provisions of Geneva Convention III were also not applicable to Al Qaeda detainees. This argument was made on the basis that Common Article 2, which triggers the provisions regulating the detention and POWs was limited to cases of declared war or armed conflict between two or more states signatories to the Conventions.

It was further argued that Al Qaeda members failed to satisfy the eligibility requirements for treatment as POWs.⁶¹¹ The reasoning was based on interpretations of Article 4(A)(1), 4(A)(2) and 4(A)(3) in combination with the contention that Al Qaeda members have demonstrated clear disregard for the basic requirements of lawful warfare.⁶¹² As Common Articles 2 and 3 were deemed inapplicable, Al Qaeda

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Memorandum from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel to William J. Haynes II, General Counsel, Department of Defence, available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> [last accessed 30 March 2016], p. 10.

⁶¹⁰ *Ibid.*, p. 1.

⁶¹¹ *Ibid.*, pp. 9, 30-31, 37.

⁶¹² *Ibid.*, pp. 9-11.

members also could not request POW status.⁶¹³ It was determined that the scope of Article 4 did not expand beyond the circumstances expressly addressed in Common Article 2 and 3.⁶¹⁴ Both Taliban and Al Qaeda detainees were thus deemed ineligible for POW status as a matter of domestic law.⁶¹⁵

In addition to this Executive interpretation of the applicability of the Geneva Conventions, §948a Military Commissions Act of 2006 codified the above outlined determinations by defining two categories of combatants – lawful enemy and unlawful enemy combatants. Lawful enemy combatants were deemed to be subject to the U.S. Code⁶¹⁶ and by proxy the Geneva Conventions; unlawful enemy combatants however, subject to a trial by a military commission under the Act, could not invoke the protections of the Geneva Conventions.⁶¹⁷ Individuals who were linked to Al Qaeda, the Taliban or associated forces were specifically listed as falling under the category of unlawful enemy combatant.⁶¹⁸ Consequently, despite the Taliban’s generally accepted status as the official armed forces of the then *de facto* Afghanistan government,⁶¹⁹ Taliban and Al Qaeda detainees could not be granted POW status.⁶²⁰ Thus, through the hyper legalistic approach adopted by the US in interpreting the concept of armed conflict and by proxy the applicability of the Geneva Conventions, individual terrorist suspects captured during military operations were effectively denied the protections afforded by Common Article 3.

In this context the decision in *Hamdan v. Rumsfeld*⁶²¹ is of particular significance.⁶²² Mr. Hamdan was captured in Afghanistan in 2001 and subsequently transferred to Guantánamo Bay in 2002.⁶²³ In 2003 he was deemed eligible for trial by a military

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*, pp. 9-10.

⁶¹⁵ *Ibid.*, pp. 25, 26, 28

⁶¹⁶ The relevant provisions are outlined in Title 10, Subtitle A, Part II, Chapter 47 US Code and are available at <http://uscode.house.gov> [last accessed 30 March 2016].

⁶¹⁷ §948b(2)(g) and §948c Military Commissions Act of 2006.

⁶¹⁸ §948a(1)(i).

⁶¹⁹ Satterthwaite, M. ‘Rendered Meaningless: Extraordinary Rendition and the Rule of Law’ (2007) 75 *George Washington Law Review* 1333.

⁶²⁰ Memorandum from Jay S. Bybee, Assistant Attorney General to William J. Haynes II, General Counsel, Department of Defence and Alberto R. Gonzales, Counsel to the President on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees, available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> [last accessed 30 March 2016].

⁶²¹ 548 U.S. 557 (2006).

⁶²² The decision in *Hamdan* followed the earlier Supreme Court rulings in *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004) and *Rasul v. Bush* 124 S. Ct. 2686 (2004). In both cases, the Court found that Guantánamo Bay detainees are entitled to a meaningful opportunity to contest the factual basis for their detention before a neutral decision maker and to invoke the jurisdiction of US federal courts.

⁶²³ *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

commission for then-unspecified crimes. In 2004 he was charged with conspiracy to commit offences triable by a military commission. In his *habeas corpus* petition, he argued that the procedures adopted to try him violated basic aspects of military and international law. The District Court granted the *habeas* relief and stayed the commission proceedings finding that the Presidential authority to establish military commissions extended only to offenders or offences triable under the law of war.⁶²⁴ As the laws of war include Geneva Convention III, Mr. Hamdan was thus entitled to the full protections of the Convention until his status was determined. However regardless of whether he was classified as a POW, the commission convened to try him was established in violation of both the Uniform Code of Military Justice (UCMJ) and Common Article 3 Geneva Conventions as it had the power to convict based on evidence the accused had no access to.

The D.C. Circuit reversed the decision ruling that the Geneva Conventions were not judicially enforceable.⁶²⁵ The Circuit Court further noted that Mr. Hamdan's trial before a military commission would not violate the UCMJ or the Armed Forces regulations, which implement the Geneva Conventions. In particular, the Circuit Court noted that Common Article 3 was inapplicable in this case as the conflict with Al Qaeda was of an international character rather than a non-international character within the text of the Article.

The Supreme Court reversed the decision, finding that Common Article 3 affords minimal protection to individuals associated either with a signatory or a non-signatory of the Conventions who are involved in a conflict on the territory of a signatory.⁶²⁶ The Court further disagreed with the contention of the US government that the conflict with Al Qaeda does not fall within the scope of the Geneva Conventions.⁶²⁷ It noted that the term "conflict not of an international character" under Common Article 3 is applied in contradistinction to a conflict between nations, which is demonstrated by the fundamental logic of the Convention's provisions.⁶²⁸ The phrase should thus be read in its literal meaning and interpreted as having as wide a scope as possible.⁶²⁹ The Court did acknowledge that the scope and application of Common Article 3 and

⁶²⁴ *Hamdan v. Rumsfeld* 344 F. Supp. 2d 152 (D.D.C. 2004). petition for *habeas corpus* granted.

⁶²⁵ *Hamdan v. Rumsfeld* 415 F.3d 33 (D.C. Cir., 2005).

⁶²⁶ *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

⁶²⁷ *Ibid*, p. 65.

⁶²⁸ *Ibid*, p. 67.

⁶²⁹ *Ibid*, p. 68. The US Supreme Court referred to a number of Geneva Convention III commentaries in discussing this point.

in particular the meaning of “not of an international character” is not expressly defined within the text of the Conventions. Rather, it has been explained by additional treatises and commentaries relied on by the US Supreme Court itself.

The Court’s decision has been criticised on the basis that it has not clarified the legal status of the conflict to which IHL applies.⁶³⁰ In particular, while sustained references were made to the term ‘war’ and the applicability of IHL, there appeared to be limited engagement with the status of the relevant conflict and by proxy the appropriate status of the parties involved in the conflict.⁶³¹ The goal of Common Article 3 is to protect core humanitarian values for both state and non-state actors hence conflicts which fall under the scope of Common Article 3 should be formally recognised.⁶³² In this respect the decision was a missed opportunity as it did not assess comprehensively the thresholds of violence, which formally trigger the applicability of IHL.⁶³³ Thus, until a formal judicial determination on the particular conflicts, which fall within the mandate of Common Article 3 is made, states can continue to interpret the application of Common Article 3 in a manner restricting Geneva Convention obligations. However, while the Court may not have grounded its conclusions in a particularly rigorous legal argumentation, it has arguably tried to constrain or close the fault line exploited by the US in the context of the War on Terror in order to operate the rendition circuits.⁶³⁴

4.4. IHL, Hyper Legalism and Irregular Transfers

The 2013 Open Society Report on extraordinary rendition and the 2014 Senate Select Committee on Intelligence have both noted that a number of the individuals were captured, detained and rendered from/through Afghanistan.⁶³⁵ A significant number

⁶³⁰ Ni Aolain, F., ‘*Hamdan* and Common Article 3: Did the Supreme Court Get it Right?’ (2006-2007) 91 *Minnesota Law Review* 1523, p. 1546.

⁶³¹ *Ibid.*, p. 1551.

⁶³² *Ibid.*, p. 1560.

⁶³³ *Ibid.*

⁶³⁴ De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011, Cambridge; Cambridge University Press), p. 256.

⁶³⁵ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc) and Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program: Executive Summary*, full text available at http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf [last accessed 30 March 2016].

of the known rendees were detained due to suspected Al Qaeda involvement.⁶³⁶ As noted previously, the Venice Commission report advised that the transnational US-led counter-terrorism operations post 9/11 did *not* constitute an armed conflict.⁶³⁷ The armed operations in Afghanistan do however constitute an international armed conflict under Common Article 2 of the Geneva Conventions.⁶³⁸ This view is supported by the US Quadrennial Defence Reviews post 2001, which have consistently referred to the operations in Afghanistan as a war.⁶³⁹ The application of IHL should thus be triggered for any detainee or rendee captured and detained within this conflict who has been transferred from/through Afghanistan.⁶⁴⁰ However, this is where one particular benefit of the reliance on a war paradigm stands out – the operation of HVDP and the long-term detention of persons captured outside the battlefield of Afghanistan.⁶⁴¹ The US determinations relating to the inadequacy and “quaintness” of IHL primarily related to this element of the ‘War on Terror’.⁶⁴²

As discussed above, the crux of the US argument relating to detainees and rendees has been to strip them of POW status. However, if the War on Terror is an armed conflict, in the context of irregular transfers of individuals, the relevant IHL protections are consistent with the generally applicable IHRL rules on transfer. In such circumstances, IHL as *lex specialis* will compliment and not displace IHRL as *lex generalis*.⁶⁴³ Thus, while *lex specialis* within an armed conflict would mean that certain individuals facing a transfer might have greater protection under IHL, no individual should have less than the protections afforded under IHRL.⁶⁴⁴

Instead however, the US adopted an approach limiting the relevant obligations for individuals captured and detained in Afghanistan. While Afghanistan has been a

⁶³⁶ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

⁶³⁷ Venice Commission, *Opinion on the International Legal Obligations of Council Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006), paras 78–80.

⁶³⁸ *Ibid*, para 78.

⁶³⁹ The full text of the reports is available at http://archive.defense.gov/Home/features/2014/0314_sdr/qdr.aspx [last accessed 30 March 2016].

⁶⁴⁰ *Ibid*.

⁶⁴¹ Lehto, M., ‘War on Terror – Armed Conflict with Al-Qaida?’ (2010) 78 *Nordic Journal of International Law* 499, p. 506.

⁶⁴² *Ibid*.

⁶⁴³ Satterthwaite, M., ‘The Legal Regime Governing Transfer of Persons in the Fight against Terrorism’ Public Law & Legal Theory Research Paper Series, New York University School of Law, Working Paper No. 10-27 (2010) 11, p. 11.

⁶⁴⁴ *Ibid*, p. 12.

signatory of the Geneva Conventions since 1956,⁶⁴⁵ it was argued that the US President had “ample grounds” to suspend partially or in full Geneva Convention III obligations towards Afghanistan during the period of conflict.⁶⁴⁶ Such an exercise of Presidential authority was justified on the basis of Afghanistan being described as a “failed state” which territory had been largely held by a violent militia during the period in question.⁶⁴⁷ It was additionally argued that the Taliban leadership had become increasingly associated with, if not fully dependent upon, Al Qaeda thus rendering the Taliban more akin to a terrorist organisation.⁶⁴⁸ In such circumstances, the US President could unilaterally decide that none of the Geneva Convention III obligations were applicable.⁶⁴⁹

Thus, through a hyper legalistic interpretation by the US on the applicability of the Geneva Conventions, detainees and rendees associated with Al Qaeda could not benefit from the provisions governing the transfers of POWs and other protected persons.⁶⁵⁰ Further, while the US recognised its IHRL responsibilities such as preventing ill treatment and torture, it argued that in the context of its transnational counter-terrorism operations the only applicable rules under the *lex specialis* principle were those of IHL. The application of the relevant human rights protections was hence blocked. The US then argued that while the War on Terror was an armed conflict, the nature of this “novel” armed conflict did not fall within the recognised categories under Common Articles 2 and 3.⁶⁵¹ Thus core IHL protections relating to allowed transfers of protected categories of individuals under IHL as well as procedural mechanisms while in detention were severely restricted.⁶⁵² Having fashioned a broad rhetorical fault line based on the perceived definitional uncertainty of the armed conflict concept, the US created a non-regulated legal space within which extraordinary rendition could operate.

⁶⁴⁵ See further list of IHL related Treaties Afghanistan is signatory to here http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=AF [last accessed 30 March 2016].

⁶⁴⁶ Memorandum from Jay S. Bybee, Assistant Attorney General to William J. Haynes II, General Counsel, Department of Defence and Alberto R. Gonzales, Counsel to the President on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees, available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> [last accessed 30 March 2016].

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Articles 46–48, 109–111 Geneva Convention III, Articles 127–128 Geneva Convention IV.

⁶⁵¹ Memorandum from Jay S. Bybee, Assistant Attorney General to William J. Haynes II, General Counsel, Department of Defence and Alberto R. Gonzales, Counsel to the President on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees.

⁶⁵² Please see further Articles 45 (4), 49 (1) and 147 of the Geneva Convention IV.

5. Conclusion

Following 9/11, the US Executive engaged in a comprehensive set of legal arguments and legal interpretations specifically designed to deny the applicability or substantive content of the relevant international legal protections.⁶⁵³ The transnational operation of expansive US-led counter-terrorism operations such as HVDP was facilitated by the determination that the War on Terror was the relevant armed conflict. As this was a “novel” type of armed conflict, the “quaint” provisions of IHL had limited, if any applicability, to individual terrorist suspects captured and detained as part of the War on Terror.⁶⁵⁴ Concomitantly, the comprehensive protections of IHRL were deemed inapplicable to this particular armed conflict. Through a hyper legalistic approach to its obligations triggering a formal or empty application of its obligations, the US sought to limit or entirely bypass both its IHRL and IHL obligations. The aim of this approach was two-fold: construct the War on Terror legal and political paradigm and provide a veneer of legality to the operation of extraordinary renditions as a means of outsourcing torture. Having created this broader atmosphere within which the rendition circuits were palatable, the US proceeded to operationalise these transfers on a transnational scale through non-justiciable legal agreements, limitations on the extraterritorial application of human rights treaties and private flight operators. These three key components to the transnational operation of extraordinary renditions are the focus of the next three chapters to follow starting with Chapters 3 and the use of non-justiciable agreements such as diplomatic assurances and memoranda of understanding.

⁶⁵³ For a broadly similar argument see also Scheinin, M., ‘Terrorism’ in Moeckli, D., *et al. International Human Rights Law* (2010, New York; Oxford University Press), p. 599–600.

⁶⁵⁴ Memorandum from Alberto R. Gonzales, Counsel to the President, 25 January 2002 available at http://lawofwar.org/torture_memos_analysis.htm [last accessed 30 March 2016].

Chapter 3: Diplomatic Assurances and Memoranda of Understanding – Limiting Liability under the Anti-Torture Norm and *Non-Refoulement* Obligations

1. Introduction

Since 9/11 states have increasingly faced the dilemma of complying with their *non-refoulement* obligations while still being able to deport or return individual terrorist suspects to countries with dubious human rights records. This dilemma seems to be particularly challenging in cases where an individual who is considered to pose a risk to national security either cannot be deported to his country of origin due to the risk of torture or it is perceived that he cannot be successfully prosecuted in a national court due to the nature of the evidence against him and its security sensitivity.⁶⁵⁵ Extraordinary rendition, as part of the high value detainee programme (HVDP), was used as one solution to this dilemma with individual terrorist suspects being transferred outside the established extradition procedures.⁶⁵⁶

The increasing reliance on non-justiciable legal agreements such as diplomatic assurances (DAs) and memoranda of understanding (MoUs) post 9/11 both in respect of regular transfers and irregular transfers within HVDP⁶⁵⁷ has been another solution. States have increasingly resorted to these bi- and multi-lateral agreements in their efforts to both transfer suspected terrorists and fulfil their positive and negative obligations⁶⁵⁸ under the anti-torture norm including *non-refoulement*.⁶⁵⁹ The assessment of states' approaches via the regional and international jurisprudence in

⁶⁵⁵ Jones, K., 'Deportations with Assurances: Addressing Key Criticisms', (2008) *International and Comparative Law Quarterly* 183; Skoglund, L., 'Diplomatic Assurances against Torture – An Effective Strategy?', (2008) *77 Nordic Journal of International Law* 319; Michaelsen, C., 'The Renaissance of *Non-Refoulement*? The *Othman* (Abu Qatada) Decision of the European Court of Human Rights', (2012) 61 (3) *International and Comparative Law Quarterly* 750, p. 751.

⁶⁵⁶ For an overview of regular transfers, please refer to the Introductory Chapter.

⁶⁵⁷ Please refer to the discussion in Chapter 1.

⁶⁵⁸ The anti-torture prohibits the use of torture, inhuman or degrading treatment or punishment; in the context of *non-refoulement* it requires states **not** to deport an individual thus creating a negative obligation. Positive obligations in this context require states need to take direct action to ensure effective protection of human rights. See further Mowbray, A.R., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004, Portland; Hart Publishing), Chapter 3 in particular and Dickson, B., 'Positive Obligations and the European Court of Human Rights', (2010) 61(3) *Northern Ireland Legal Quarterly* 203.

⁶⁵⁹ Johnston, J., 'The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11' (2011) 11 *International Criminal Law Review* 1; Moeckli, D., '*Saadi v. Italy*: The Rules of the Game Have *Not* Changed', (2008) 8 (3) *Human Rights Law Review* 534, p. 537; Martin, J., 'Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings', (2006) 8 *European Journal of Migration and Law* 9.

Section 3 suggests that for states such as the US and the UK, assurances are another step in the on-going development and specification of state human rights obligations.⁶⁶⁰ The relevant adjudicatory bodies at domestic, regional and international level have assessed the reliability of these agreements with reference to the particular circumstances surrounding mostly regular transfers. This Chapter will argue that the reliance on DAs and MoUs is problematic from a practical effectiveness of rights perspective in the context of all types of transfers. The potential impact on the anti-torture norm and restrictions on *non-refoulement* does however vary depending on whether these agreements are being used to proceed with a regular transfer or operate extraordinary renditions.

By their diplomatic and non-justiciable nature, DAs and MoUs are unreliable and unenforceable, which creates a strong presumption that they will not provide the necessary safeguards. However, in theory – as the comprehensive international, regional and domestic jurisprudence tests suggest – these agreements could offer the necessary protections. As the *Othman (Abu Qatada)*⁶⁶¹ case illustrates, there are exceptional circumstances where these agreements could be sufficient to fulfil *non-refoulement* obligations in the context of regular transfers. Nevertheless, while DAs and MoUs are subject to stringent assessment by the courts in respect of regular transfers, there is no such scrutiny when these agreements are relied on to ensure the operation of a rendition circuit or circuits. It is within this context, as illustrated by the case studies in Chapter 1, that DAs and MoUs become much more problematic.

The theoretical possibility that these agreements could potentially fulfil *non-refoulement* obligations, informs their use in the context of the rendition circuits as will be argued further below. However unlike their use in respect of regular transfers, the promises and guarantees provided in DAs and MoUs regarding extraordinary rendition operations are not evaluated in the transparent and accountable manner a court case provides. In this context, these agreements appear to have been utilised as legal grey holes by the US – there is an appearance of legality however the constraints on states, in this case both sending⁶⁶² and receiving⁶⁶³ state, are weak.

⁶⁶⁰ Noll, G., ‘Diplomatic Assurances and the Silence of Human Rights Law’, (2006) 7 *Melbourne Journal of International Law* 104, p. 106.

⁶⁶¹ *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

⁶⁶² Please refer to the case study of the US as a sending state in Chapter 1. While the US made promises and provided DAs and MoUs to transit states that it will not render individuals through these countries, it nevertheless did.

The following discussion will begin by outlining the nature of DAs and MoUs in Section 2 before proceeding to examine in depth their use within the human rights framework with reference to the relevant international, regional and domestic jurisprudence in Section 3. As the ECtHR jurisprudence offers the most thorough examination of DAs and MoUs in terms of regular transfers, its jurisprudence will be discussed in comparatively more detail. While the US is not a Contracting State to the ECHR, assessing the jurisprudence of the ECtHR is needed as it provides a rigorous and comprehensive evaluation of the reasons behind the (un)reliability and (un)enforceability of these non-justiciable agreements in practice. What the case-by-case analysis of the ECtHR illustrates is that even in the context of regular transfers governed by extradition treaties or deportation orders, in order to ensure compliance with *non-refoulement*, the Court will engage in a meticulous examination of the strength and adequacy of these agreements.

Outlining the European Court of Human Rights (ECtHR) jurisprudence is relevant not just in the context of regular transfers however; a number of European Convention of Human Rights (ECHR) Contracting States, aside from the UK and Ireland, facilitated various stages of the operation of the rendition circuits.⁶⁶⁴ As such understanding the ECtHR approach towards DAs and MoUs in respect of regular transfers, is important in then assessing the (un)reliability and (un)enforceability of these non-justiciable agreements in the context of irregular transfers. Section 4 will then focus on the use of DAs and MoUs for the purposes of operationalizing extraordinary renditions.

2. Diplomatic Assurances and Memoranda of Understanding: Definitions, Established Practice and (Lack of) Enforcement Mechanisms

Reliance on DAs has been a long-standing practice in extraditions where assurances have been used to enable the requesting state to transfer an individual in compliance with existing human rights obligations.⁶⁶⁵ In this context, the DAs are an undertaking

⁶⁶³ The example of Syria as a receiving state which provided DAs to the US that it would not engage in ill treatment of detainees is a particularly illustrative one.

⁶⁶⁴ According to the Open Society Report, 15 other ECHR member states facilitated the rendition circuits including Italy, Lithuania, Macedonia and Poland, which subsequently have had judgments made against them. See Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p.6.

⁶⁶⁵ UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at <http://www.unhcr.org/refworld/docid/44dc81164.html> [last accessed 30 March 2016].

by the receiving state to the effect that a particular individual will be treated in accordance with both the conditions set by the sending state and the relevant human rights obligations.⁶⁶⁶ The use of these agreements appears particularly desirable for states where such international, regional and domestic obligations may otherwise preclude an extradition.⁶⁶⁷ Increasingly however DAs have been used in cases involving the transfer of an individual to a country where there is a risk that they will be subjected to torture or other forms of ill treatment.⁶⁶⁸

Post 9/11, as part of HVDP, DAs have been linked with rendition circuits in cases where individuals have been transported to countries for the purposes of enhanced interrogation and *incommunicado* detention.⁶⁶⁹ As outlined in Chapter 1, transit points such as Ireland (Shannon Airport) and the UK (Diego Garcia) were provided with DAs promising that no rendees will be transported through the territory of either country. DAs were also reportedly secured by the US from Syria confirming that individuals detained in Syrian prisons following an extraordinary rendition would be treated humanely in accordance with the applicable international legal standards.⁶⁷⁰ In both cases, these DAs have proven to be ineffective. As the nature of these agreements is essential in understanding why DAs and MoUs are unenforceable in practice, the following discussion will first outline what DAs and MoUs are before proceeding to assess the relevant courts' jurisprudence.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ See further Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Liberties while Countering Terrorism*, U.N. Doc. A/HRC/4/88; Venice Commission, *Opinion on the International Legal Obligations of Council Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL-AD (2006) and many others.

⁶⁶⁸ See for example the commentary by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation of Human Rights, International Helsinki Federation for Human Rights and World Organization against Torture, *Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment, Joint Statement*, 12 May 2005, available at <http://www.statewatch.org/cia/documents/ai-hrw-joint-statement.pdf> [last accessed 30 March 2016].

⁶⁶⁹ Please refer to the discussion in Chapter 2 of this thesis. See also High Commissioner for Human Rights, *On Terrorists and Torturers*, 7 December 2005, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E> [last accessed 30 March 2016] and numerous other reports by the UN Commission on Human Rights.

⁶⁷⁰ *Ibid.*

2.1. Understanding Diplomatic Assurances and Memoranda of Understanding

Traditionally, DAs have been sought on an individual basis with reference to a specific person or persons whom a state was seeking to extradite.⁶⁷¹ More recently however DAs forming general clauses concerning the treatment of deportees have been included in agreements relating to the transfer of persons between states.⁶⁷² These bi- or multi-lateral agreements do not normally constitute legally binding obligations.⁶⁷³ Further, the DAs generally do not provide for enforcement mechanisms or a legal remedy for the individual who is being transferred if the receiving state is not complying with the terms of the DAs once the individual is transferred.⁶⁷⁴ When states pursue a policy of obtaining assurances as a means of facilitating transfers of individuals, the assurances may be provided in the form of a Memorandum of Understanding (MoU).

MoUs are informal international instruments, commonly used to set out operational arrangements under a framework agreement or for the regulation of technical or detailed matters.⁶⁷⁵ Usually MoUs are in the form of a single instrument and do not require ratification.⁶⁷⁶ Further, they can be entered into either by states or international organisations.⁶⁷⁷ MoUs typically express a diplomatic and political commitment at senior level that the individual or individuals to whom they apply will be treated in accordance with the international human rights standards (IHRL) as outlined in the MoUs.⁶⁷⁸ They can be supplemented by specific assurances based on the circumstances of an individual case.⁶⁷⁹

Under international law DAs and MoUs could potentially form legally binding agreements between states. Article 2(1)(a) Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or

⁶⁷¹ *Ibid.*

⁶⁷² UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, para. 4 available at <http://www.unhcr.org/refworld/docid/44dc81164.html> [last accessed 30 March 2016].

⁶⁷³ *Ibid.*, para.5.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ United Nations, *Treaty Handbook*, (2006, New York; Treaty Section of the Office of Legal Affairs).

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*, p. 61.

⁶⁷⁸ Jones, K., ‘Current Developments’, (2008) 57 *International and Comparative Law Quarterly* 183, p. 184.

⁶⁷⁹ *Ibid.*, p. 184.

in two or more related instruments and whatever its particular designation.”⁶⁸⁰ The text of the Article also suggests that the particular designation of the treaty is not of relevance.⁶⁸¹ The decisive factor thus is whether the parties to a treaty actually intend to create legal obligations and be legally bound by such a treaty.⁶⁸²

In the context of removing individual terror suspects, DAs and MoUs have been relied on by states in order to provide additional guarantees or promises that individuals will be treated in accordance with already existing international obligations.⁶⁸³ DAs and MoUs have thus not been designed or used to create new or legally binding obligations rather have served as bi- and multi-lateral diplomatic reaffirmation of existing and accepted human rights obligations.⁶⁸⁴ From this perspective, in theory, these agreements could provide the necessary safeguards. Practice however suggests otherwise. The unreliability and unenforceability of these agreements in actuality will be illustrated in the comprehensive examination on the relevant courts’ jurisprudence with reference to the promises provided by receiving states in Section 3. Before this detailed assessment of relevant case law, Section 2.2 will outline whether there may be international mechanisms through which a receiving state can ensure enforcement of DAs and MoUs.

2.2. Potential Enforcement Mechanisms

The criticisms levelled at the use of both DAs and MoUs have stemmed from their diplomatic, hence non-justiciable, nature. The Inter-American Commission on Human Rights has noted that the human rights framework obliges states to refrain from supporting or tolerating methods of inter-state cooperation that fail to conform with

⁶⁸⁰ The full text of the Vienna Convention is available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [last accessed 30 March 2016].

⁶⁸¹ *Ibid.* This is supported by *Aegean Sea Continental Shelf (Greece v. Turkey)*, 1976 ICJ Report, para. 107.

⁶⁸² Please see further *Qatar v. Bahrain (Jurisdiction and Admissibility)*, 1994 ICJ Reports, paras. 23-25 and Oppenheim, L. and Lauterpacht, H., *International Law: A Treatise* (1995, London; Longmans), p. 900.

⁶⁸³ See for example High Commissioner for Human Rights, *On Terrorists and Torturers*, 7 December 2005, full text available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E> [last accessed 30 March 2016] amongst numerous other reports by the UN Commission on Human Rights.

⁶⁸⁴ In this context, the term ‘agreement’ within this chapter is not being used as synonymous to the term ‘treaty’ or within the meaning of Article 2 Vienna Convention.

their commitments.⁶⁸⁵ The Commission has further added that states should ensure that there are effective protection and enforcement mechanisms to guarantee the rights of individuals.⁶⁸⁶ Sending, transit and receiving states within the rendition circuits have however argued they have relied on DAs and MoUs precisely to confirm that they are complying with their human rights obligations and are affording the minimum baseline standard of protections governing transfers to individuals.⁶⁸⁷ Yet, as numerous state, UN, NGO and regional body reports suggest, violations of individual human rights including the right to be free from torture have occurred.

The crux of the debate is thus not the substantive content of the DAs and MoUs *per se* but rather the lack of an effective mechanism to guarantee that the promise(s) contained within these agreements can be enforced. International human rights bodies do monitor IHRL compliance in general. As illustrated by the case study of Syria however, DAs and MoUs have been requested in a context where the monitoring bodies have identified persistent patterns of human rights violations yet individuals have not been in a position to seek any redress or even access a mechanism such as a complaints process through which to potentially enforce their rights. Thus, the general monitoring of IHRL compliance may not be sufficient to ensure effective protections in practice.

The UN Committee against Torture (CAT) – an example of an international treaty based enforcement mechanism – can consider communications by states alleging that another state is not giving effect to the obligations imposed by UN Convention against Torture (UNCAT).⁶⁸⁸ However, if the competence of CAT has not been accepted by a state, the Committee cannot receive or assess communications alleging rights violations by this state.⁶⁸⁹ Further, a complaint can be made only by a state which itself has accepted the competence of CAT.⁶⁹⁰ In addition, even if the preceding two requirements have been fulfilled, CAT will examine the complaint only after it has been ascertained that all domestic remedies have been invoked and

⁶⁸⁵ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2002) OEA/Ser.L/V/II.116, p.159.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Please refer to the discussion of Chapter 1 of this thesis.

⁶⁸⁸ Article 21, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/57/199.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Ibid.*

exhausted in conformity with international legal standards.⁶⁹¹ Similar rules apply under Article 41 of the International Covenant on Civil and Political Rights (ICCPR) in relation to the competence of the Human Rights Committee (HRC) as a treaty enforcement mechanism.⁶⁹²

Thus, it appears, that if a state providing DAs has not accepted the competence of CAT and has engaged in ill treatment in violation of UNCAT despite the promises provided, CAT cannot investigate a complaint relating to the ill treatment and by proxy the breach of assurances. In this context, the state receiving the DAs, may arguably have to assume responsibility itself for monitoring compliance, investigating potential breaches of assurances and seeking penalties to ensure that the DAs are practically effective.⁶⁹³ It is difficult to envisage however that states would willingly acknowledge a breach of DAs as it would amount to an admission that there has been a failure to comply with *non-refoulement* obligations. This might explain why it is usually the individuals in questions who have sought a remedy or challenged the strength of DAs and MoUs, as will be discussed later on in this chapter.

International, regional and domestic adjudicatory bodies have assessed in depth whether these agreements could be sufficient in fulfilling state *non-refoulement* obligations and comply with the anti-torture norm.⁶⁹⁴ The strength and reliability of these agreements has been found to depend on a number of factors including the history of state compliance with human rights obligations and post transfer enforcement and monitoring mechanisms as will be outlined further below.⁶⁹⁵ The thorough case-by-case assessment of the courts suggests that the presence of these agreements does not automatically guarantee that *non-refoulement* requirements will be satisfied. While the courts have accepted that DAs and MoUs could in theory be used to fulfil *non-refoulement* obligations, the below outlined decisions show that in practice these agreements have been found to be insufficient as a means of

⁶⁹¹ *Ibid.*

⁶⁹² The full text of Article 41 and the International Covenant on Civil and Political Rights is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed 30 March 2016].

⁶⁹³ For a broadly similar point, please refer to Amnesty International, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' against Torture*, (2010, London; Amnesty International Publications), p. 9.

⁶⁹⁴ See further cases such as *Agiza v. Sweden*, Opinion of the Committee against Torture, 24 May 2005, CAT/C/34/D/233/2003, *Alzery v. Sweden*, Human Rights Committee, Communication No 1416/2005, CCPR/C/88/D/1416/2005, *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment 15 November 1996 and *JI v. Secretary of State for the Home Department* [2013] EWCA Civ 279.

⁶⁹⁵ *Ibid.*

demonstrating compliance with the anti-torture norm. The rationale behind this approach could be found in the non-justiciable and thus unenforceable nature of DAs and MoUs; this unenforceability in the context of the non-derogable *jus cogens* prohibition on torture creates a strong presumption that these agreements will not provide the necessary safeguards.

Section 3 will proceed to examine the legal tests regulating the use of these agreements at international, regional and domestic level. The discussion will focus on whether DAs and MoUs have been deemed sufficient in fulfilling *non-refoulement* obligations and ensuring compliance with the anti-torture norm. The purpose of this analysis is to gauge how the traditional reliance on these non-justiciable agreements informs the post 9/11 use of DAs and MoUs within HVDP. What this assessment aims to illustrate is the difference in the use of DAs and MoUs by the US and its close strategic partner the UK particularly post 9/11.⁶⁹⁶ This thesis will argue that while the US has attempted to entirely circumvent its *non-refoulement* obligations and transfer individuals outside the established legal framework, the UK has instead argued for an adjusted interpretation of *non-refoulement*, which includes a balancing of national security considerations against individual rights in certain circumstances.

3. Transferring Individuals with Diplomatic Assurances – Existing Jurisprudence

The absolute non-derogable prohibition against torture as stated in the texts of UNCAT,⁶⁹⁷ the International Covenant on Civil and Political Rights (ICCPR)⁶⁹⁸ and the ECHR⁶⁹⁹ has been operationalised in practice through the prohibition against the *refoulement* or transfer of an individual to a country where they face the risk of ill treatment or torture.⁷⁰⁰ Similarly, albeit during a time of armed conflict, the combined application of all four Geneva Conventions and Additional Protocol I aim to provide a

⁶⁹⁶ Please see further the relevant discussion in the Introductory Chapter, which refers to the “unique relationship” of the US with the UK. Full text of the 2006 US Quadrennial Defense Report where this phrase is used is available at <http://archive.defense.gov/pubs/pdfs/QDR20060203.pdf> [last accessed 30 March 2016].

⁶⁹⁷ Full text of the UNCAT and Article 1 in particular is available at <http://www.un.org/documents/ga/res/39/a39r046.htm> [last accessed 30 March 2016].

⁶⁹⁸ Full text of the ICCPR and Article 7 in particular is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed 30 March 2016].

⁶⁹⁹ Full text of the ECHR and Article 3 in particular is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf [last accessed 30 March 2016].

⁷⁰⁰ Please also refer to the comprehensive examination of the relevant standards in Chapter 1.

core baseline standard of protections to both civilians and combatants during an armed conflict.⁷⁰¹ Geneva Convention III prohibits against ill treatment of Prisoners of War while Geneva Convention IV prohibits ill treatment and the unlawful transfer of civilians.⁷⁰² These protections apply both during an international and non-international armed conflict.⁷⁰³ As discussed in depth in Chapter 2, IHRL as *lex generalis* and IHL as *lex specialis* would apply concurrently during an armed conflict. Thus, a minimum baseline of rights and protections regulating humane treatment and transfers operates and imposes obligations on states at times of peace, conflict and/or a state of emergency.⁷⁰⁴

If a state requires specific DAs and MoUs requesting confirmation that an individual will be treated in compliance with existing regional and international obligations before a transfer, the following can arguably be inferred. First, there is an implicit acknowledgment by the sending state that the individual in question may be at risk of ill treatment in the receiving state. Second, despite the risk, it has been determined that the transfer of the individual needs to proceed while fulfilling state *non-refoulement* obligations. And third, the sending state has decided that in the particular circumstances the presence of DAs and/or MoUs could fulfil these obligations. In practice in the context of extraordinary renditions, as illustrated in Chapter 1, the presence of such agreements has not been sufficient to ensure effective enforcement of individual rights. Very few of the DAs and MoUs provided in respect of renditions have been examined by adjudicatory bodies, however, the ones that have, have been found to be insufficient and unreliable. For a number of years, courts at domestic, regional and international level have sought to regulate the use of these agreements in respect of regular transfers by imposing multi-prong legal tests with which sending states need to comply when relying on DAs and MoUs. The following subsections

⁷⁰¹ The full texts of all four Geneva Conventions and Additional Protocol I are available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> [last accessed 30 March 2016].

⁷⁰² Articles 2, 130 and 131 Geneva Convention III and Articles 2, 146 and 147 Geneva Convention IV.

⁷⁰³ *Ibid.*

⁷⁰⁴ Under Article 4 of the ICCPR and Article 15 of the ECHR, if there is a public emergency threatening the life of the nation, state can opt to derogate from certain provisions under each of these two rights treaties. However, both Articles expressly state that the prohibition on torture remains non-derogation even if states have triggered other derogations. The full text of Article 4 ICCPR is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; the full text of Article 15 ECHR is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf [both last accessed 30 March 2016].

will outline and assess these tests before the examination in Section 4 of the use of these agreements outside established legal contours.

3.1. International Approach to Diplomatic Assurances

An examination of the UN human rights bodies' approaches to DAs and MoUs, which is directly applicable to the US, suggests that there are minimum baseline procedural requirements governing their use.⁷⁰⁵ DAs that do not meet this standard are considered to be a violation of the sending state's human rights obligations.⁷⁰⁶

In a case arising under UNCAT, *Agiza v. Sweden*, the CAT dealt with a complaint arising from the expulsion of a suspected terrorist on national security grounds from Sweden to Egypt.⁷⁰⁷ Mr Agiza attempted to claim asylum in Sweden during a transit stopover in Stockholm while travelling to Canada in September 2000. He argued that if he were returned to Egypt, his country of origin, he would be subjected to ill treatment in violation of Article 3 UNCAT. On 18 December 2001, his and his wife's asylum applications were rejected. He was deported on the same day while his wife went into hiding from the police. Sweden had obtained DAs from Egypt guaranteeing that Mr Agiza and his family would be treated in accordance with international law upon return in Egypt. Sweden noted that without such assurances, Mr Agiza would have not been transferred. Following the expulsion, Mr Agiza claimed that he was ill treated and tortured while in prison.

CAT found that the DAs provided were not sufficient and that the expulsion was in violation of Article 3 of UNCAT.⁷⁰⁸ There were a number of signs that should have alerted Sweden to the potential unreliability of the assurances provided. As torture and other inhumane practices were systematically used as part of interrogations in Egypt, particularly in relation to prisoners detained for political or security related reasons, Sweden should have known that the DAs were inadequate.⁷⁰⁹ Further, Egypt had breached a clause in the provided assurances relating to a fair trial and fairness of

⁷⁰⁵ Satterthwaite, M., 'The Legal Regime Governing Transfer of Persons in the Fight against Terrorism' Public Law & Legal Theory Research Paper Series, New York University School of Law, Working Paper No. 10-27 (2010), p. 12.

⁷⁰⁶ *Ibid.*, p. 12.

⁷⁰⁷ Opinion of the Committee against Torture, 24 May 2005, CAT/C/34/D/233/2003.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

procedure, which undermined the weight and integrity of the assurances as a whole.⁷¹⁰ Thus, Egypt as a promisor could not reach the necessary level of credibility rendering the assurances provided unreliable.⁷¹¹ In the months preceding the trial, the CAT was presented with additional information concerning Mr Agiza's removal and his subsequent mistreatment in Egypt.⁷¹² This led CAT to change its earlier decision that the assurances concerning Mr Agiza were adequate.⁷¹³ The receipt of new evidence of mistreatment and the discovery of further information led CAT to find that the assurances relating to Mr Agiza provided no mechanism for their practical enforcement and thus did not suffice to protect against the manifest risk of torture.⁷¹⁴ In a separate opinion, one of the CAT members offered a partially dissenting opinion in relation to some of the findings under Article 3.⁷¹⁵ He noted that Sweden was clearly aware of its obligations under Article 3 and the prohibition on *refoulement* hence it had sought DAs at senior level from the Egyptian government. He then referred to a report from the Special Rapporteur of the Commission on Human Rights on Torture,⁷¹⁶ which had been accepted by the Commission. The report noted that before extraditing or transferring individuals under terrorism or other charges, in all appropriate circumstances⁷¹⁷ the sending state should request unequivocal guarantees from the receiving state that the individual in question would not be subjected to torture or other forms of ill treatment upon return.⁷¹⁸ In addition, a monitoring system should be in place to ensure effective protection of the individual's rights.⁷¹⁹ The partially dissenting Committee member thus found that as Sweden had requested such assurances and had engaged in monitoring Mr Agiza's treatment after the expulsion, the *refoulement* had not been in violation of Article 3.

In a similar case arising under the ICCPR, *Alzery v. Sweden*,⁷²⁰ the HRC had to assess whether there had been a violation of the prohibition against torture and ill treatment under Article 7. Mr Alzery, as Egyptian national, had sought asylum in Sweden. He

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*, paras. 13.4 and 13.5.

⁷¹² Jones, M., "Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings", (2006) 8 *European Journal of Migration and Law* 9, p. 22.

⁷¹³ Opinion of the Committee against Torture, UN Doc. CAT/C/34/D/233/2003, paras. 13.4–13.5.

⁷¹⁴ *Ibid.*, paras. 13.4 – 13.5

⁷¹⁵ *Ibid.*, Separate Opinion of Committee Member Mr. Alexander Yakovlev.

⁷¹⁶ Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/57/173.

⁷¹⁷ The report did not expand further on the phrase "all appropriate circumstances".

⁷¹⁸ *Ibid.*, para. 35.

⁷¹⁹ *Ibid.*

⁷²⁰ Human Rights Committee, Communication No 1416/2005, CCPR/C/88/ D/1416/2005.

claimed that around 1991, he had been temporarily detained by the Egyptian Security Services and mistreated before being released. While deciding on his asylum application, Sweden requested and received DAs by a senior representative of the Egyptian government. The assurances guaranteed that Mr Alzery would be treated humanely and in compliance with international and domestic human rights obligations. In addition, the Swedish government requested that a Swedish Embassy representative would be allowed to attend the trial. On 18 December 2001, he was handed over to US and Egyptian security agents at Bromma airport where he was first handcuffed, hooded and blindfolded before then being transferred in Egypt. Following his release from prison, Mr Alzery argued that his expulsion from Sweden had breached Article 7 of the ICCPR as Sweden was or should have been aware that he faced a real risk of torture if returned to Egypt despite the assurances provided.

The HRC noted that in determining whether a real risk of torture or other ill treatment exists, it must consider all the relevant elements including the general approach towards human rights in a state.⁷²¹ The existence of DAs, their content and the existence and implementation of enforcement mechanisms were factual elements relevant to the overall determination whether real risk of ill treatment existed. The Committee noted that Sweden itself had conceded that there was a real risk of ill treatment, which without additional guarantees would have prevented the deportation under Sweden's international obligations.⁷²² Thus, the Swedish government's reliance on DAs was based on the belief that the assurances provided sufficiently reduced the risk of the alleged ill treatment to avoid a breach of the *non-refoulement* prohibition.⁷²³ The HRC found that the assurances contained no mechanism for monitoring their enforcement and there were no arrangements made for the effective implementation of the assurances.⁷²⁴

In both of the above cases, the DAs obtained by Sweden were found to be inadequate to ensure effective protection against ill treatment. The decisions focused on the credibility of the promisor and adequacy of the promise by assessing the general approach of a state to human rights and whether there is history of rights violations. The existence of an enforcement and monitoring mechanism following the transfer of an individual was another important element in assessing the strength of DAs. In

⁷²¹ *Ibid*, para 11.3.

⁷²² *Ibid*, para 11.4.

⁷²³ *Ibid*.

⁷²⁴ *Ibid*.

addition, both Committees referred to the existence, content or breach of DAs as a relevant factor in assessing whether there is a risk of ill treatment. Thus, the IHRL principles relating to DAs are as follows: if the promisor is credible, the promise is adequate, monitoring procedures have been provided, sufficient enforcement mechanism exists and all of these elements have been complied with, a DA could be found to satisfy *non-refoulement* obligations.

The ECtHR has similarly developed a multi-prong test in assessing the reliability of DAs and MoUs. While the US is not a Contracting State to the ECHR, the jurisprudence of the ECtHR offers the most established and thorough examination of DAs and MoUs in terms of regular transfers. As such it provides the most rigorous and consistent assessment and opportunity for analysis of the (un)reliability and (un)enforceability of these non-justiciable agreements. What the comprehensive case-by-case analysis of the ECtHR illustrates is that even in the context of regular transfers governed by extradition treaties or deportation orders, in order to ensure compliance with *non-refoulement*, the Court will engage in a meticulous examination of the strength and adequacy of these agreements. Thus the ECtHR does not automatically consider DAs and MoUs to be sufficient to fulfil *non-refoulement*. Rather it assesses all relevant facts of the case and as will be demonstrated in Section 3.2 it has found on many occasions that the provided DAs and MoUs were unreliable for reasons such lack of enforceability mechanisms or lack of credibility of the promisor. More significantly perhaps, such determinations in most cases were made before an individual was transferred. In comparison, in respect of extraordinary renditions, in the limited cases where DAs and MoUs were evaluated, this evaluation was *ex post facto*.⁷²⁵ As such the jurisprudence of the ECtHR – as the most comprehensive and influential in relation to DAs and MoUs – will be used to provide a basis for comparison for the post 9/11 use of these agreements in the context of extraordinary renditions which will be the focus of Section 4.

⁷²⁵ See further Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006, Ottawa; Public Works and Government Services Canada).

3.2. Regional Approaches to Diplomatic Assurances

In its efforts to both respect the confidentiality inherent in diplomatic relations and enforce the provisions of ECHR, the ECtHR has been treading a careful path through a politically delicate field.⁷²⁶

In the formative case of *Soering v. the United Kingdom*,⁷²⁷ the UK was seeking to extradite Jens Soering to the US where he was due to face charges for two murders. Before proceeding with the extradition, the UK sought DAs from the US that if he were convicted, the death penalty would not be imposed as a sentence.⁷²⁸ Alternatively, if the death penalty was imposed as a sentence, the UK sought an assurance that he would not be executed. In its submissions, the UK stated that Article 3 does not create positive obligations to protect an individual from ill treatment outside a state's jurisdiction.⁷²⁹ In addition, the UK argued that if the risk of a death sentence was found sufficient to trigger the applicability of Article 3, the DAs received from the US significantly reduced the risk of a death sentence being imposed or carried out.⁷³⁰

In assessing the potential violation under Article 3, the ECtHR accepted that in the particular circumstances the DAs received might have been the best the UK could have obtained from the US.⁷³¹ The Court noted that the existing UK-US Extradition Treaty of 1972⁷³² applied to situations where an individual suspect sought by the US was facing charges carrying the death penalty. Under Article IV of the Treaty, the Secretary of State could allow for an individual to be transferred to the US on assurance from the prosecuting authorities that the judge in the case would be advised that the UK was against imposing and/or carrying out the death penalty.⁷³³ The effectiveness of such assurances had not yet been tested in practice.⁷³⁴ The Court found that despite the existing extradition relations between the US and the UK the

⁷²⁶ Brems, E., 'Transitional Justice in the Case Law of the European Court of Human Rights', (2011) 5 *The International Journal of Transitional Justice* 282, p. 303.

⁷²⁷ *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989.

⁷²⁸ *Ibid*, para. 15.

⁷²⁹ *Ibid*, para. 83.

⁷³⁰ *Ibid*, para. 93.

⁷³¹ *Ibid*, para.97.

⁷³² Please note that the UK and US signed a new Extradition Treaty in 2003, in force since April 2007, which has replaced the 1972 Treaty. See further <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15608.htm> and <http://www.state.gov/documents/organization/187784.pdf> [both last accessed 30 March 2016].

⁷³³ *Ibid*, para. 37.

⁷³⁴ *Ibid*, paras. 37 and 97.

assurances offered in this particular case did not satisfy Article 3 as the promise contained within the assurances was inadequate.⁷³⁵ In particular, the Court stated that the undertaking to inform a judge of the wishes of the UK at the sentencing stage did not eliminate the risk that the death penalty would be imposed. In addition, the legitimate purpose for extradition - combatting crime and punishment for two murders - could be achieved by other means.⁷³⁶ Mr Soering could be transferred and tried in his home country of Germany, which would remove the risk of intense and prolonged suffering on death row.

The Court found that in the particular circumstances of the case the extradition to the US would expose the applicant to a real risk of ill treatment triggering Article 3 obligations.⁷³⁷ The Court based its reasoning on the need for effective safeguards to give full effect to the guarantee contained in Article 3 and referred to any potential violations of Article 3 as being of “serious and irreparable nature”.⁷³⁸ The Court stated that it was not compatible with the underlying values of the ECHR to surrender an individual to another country where there was a substantial risk of violations under Article 3.⁷³⁹ This principle was then extended to include cases of expulsion and deportation.⁷⁴⁰

In a subsequent case arising under Article 3 ECHR - *Chahal v. United Kingdom*⁷⁴¹ - the ECtHR assessed whether the activities and potential dangerousness of an individual should be balanced against *non-refoulement* obligations. Since 1984 Mr Chahal had been a prominent figure in the Sikh community in the UK and was involved in a number of activities. In October 1985, he was detained under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA) on suspicion of involvement in a conspiracy to assassinate the then Indian Prime Minister during an official visit of the UK. Mr Chahal was released due to lack of evidence. In August 1990, the UK Home Secretary reached a decision that Mr Chahal’s continued presence in the UK was posing a threat to national security and to the international fight against terrorism and as a result he was served with a deportation notice. Mr

⁷³⁵ *Ibid*, para. 98.

⁷³⁶ *Ibid*.

⁷³⁷ *Ibid*, para. 111.

⁷³⁸ *Ibid*, para. 90.

⁷³⁹ *Ibi.*, pp. 440–442.

⁷⁴⁰ *Cruz Varas and Others v. Sweden* (1992) 14 EHRR 1, pp. 1-2. The approach to state responsibility for human rights violations was further endorsed by the Supreme Court of Canada in the case of *United States v. Burns* [2001] 1 SCR 283.

⁷⁴¹ *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment 15 November 1996.

Chahal applied for political asylum within the terms of the 1951 UN Refugee Convention on the basis that he had a well-founded fear of persecution if returned to India. He argued that he would be also subjected to torture and ill treatment. Unlike UNCAT, the Refugee Convention does not expressly prohibit deportation where there is a risk of torture or cruel or degrading treatment. The Home Secretary denied the asylum application and following a judicial review process this decision was upheld. Mr Chahal lodged an application against the UK claiming that his deportation to India would constitute a violation of Article 3 ECHR.

The UK government argued that no real risk of ill treatment had been established.⁷⁴² In their submissions, they emphasised that the intended deportation was due to national security considerations. In this context, the UK stated that the guarantees afforded under Article 3 were not absolute in cases where a Contracting State was seeking to remove an individual from its territory. In cases of removal, which required an uncertain prediction of future events in the receiving state, various factors should be taken into consideration including the danger to national security posed by the individual to the host state. In particular, the UK stated that based on these recognised implied limitations of Article 3, a state could expel an individual even where risk of ill treatment exists, if national security grounds necessitated such a removal.⁷⁴³ Alternatively, the threat posed by an individual to national security should be weighed against the risk of ill treatment when considering the applicability of Article 3. Thus, where substantial doubt existed in relation to the risk of ill treatment, the threat to national security could weigh heavily in balancing individual rights and the interests of the community. In addition, the UK had twice sought and received DAs from the Indian government guaranteeing that Mr Chahal would not be ill treated.⁷⁴⁴

The ECtHR stated that the prohibition on *refoulement* as construed from Article 3 in the *Soering* case was of an absolute and non-derogable nature.⁷⁴⁵ Thus, whenever substantial grounds had been shown that an individual faced a real risk of ill treatment if removed, the responsibility of the sending state to protect this individual was engaged regardless of the individual's conduct. In assessing the risk of ill treatment, the ECtHR referred to the violations of human rights by certain members of the

⁷⁴² *Ibid*, para. 76.

⁷⁴³ *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment 15 November 1996, para. 76.

⁷⁴⁴ *Ibid*, para. 37.

⁷⁴⁵ *Ibid*, para. 79.

security forces in India as a recalcitrant and enduring problem.⁷⁴⁶ In this context, the Court felt that while the DAs were offered in good faith, they were unlikely to provide an adequate guarantee of safety.⁷⁴⁷ Thus, an adequate promise will not be sufficient to meet state obligations if the promising state does not have effective control over the relevant authorities to ensure that the promise is actually fulfilled, even if the promise is given in good faith. A majority of 12 judges found that if Mr Chahal were deported to India, despite the existence of DAs, the UK would be in violation of Article 3.

In *Mamatkulov and Askerov v. Turkey*, the ECtHR accepted that DAs as part of extradition or deportation proceedings can be sufficient to reduce the risk of torture even in circumstances where monitoring procedures were not extensive.⁷⁴⁸ In this particular case there was no substantiated evidence that the individuals in question had been tortured during their imprisonment in Uzbek prisons. The court noted that the existence of the risk must be assessed primarily with reference to the facts, which were known or ought to have been known to the state at the time of expulsion. The court found that the *non-refoulement* principle was not violated.⁷⁴⁹

In *Saadi v. Italy*, the ECtHR was asked to re-assert the absoluteness of Article 3 ECHR.⁷⁵⁰ Italy had obtained DAs from Tunisia and submitted (agreeing with the submissions of the UK as a third part intervener) that taking into account the scale of the terrorist threat in the world today, the benefit of the doubt should rest with the country seeking to deport a person on grounds of national security.⁷⁵¹ The assurances provided by Tunisia promised that Mr Saadi would be treated in compliance with domestic laws and that his right to fair trial would be respected.⁷⁵² The DAs also referred to Tunisia's voluntary accession to the relevant international treaties and Conventions. Italy had however also requested assurances that Mr Saadi would not be ill treated in violation of Article 3 ECHR, that he would have access to a lawyer and that a post transfer monitoring mechanism would be put in place.⁷⁵³ These guarantees were not provided in the assurance accepted by Italy.

⁷⁴⁶ *Ibid*, para. 105.

⁷⁴⁷ *Ibid*.

⁷⁴⁸ Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, 24–25.

⁷⁴⁹ *Ibid*.

⁷⁵⁰ *Saadi v. Italy*, Application no. 37201/06, Judgment 28 February 2008.

⁷⁵¹ *Ibid*, paras. 114 – 116.

⁷⁵² *Ibid*, paras. 51 – 55.

⁷⁵³ *Ibid*.

In its submissions as a third party intervener, the UK argued that the ECtHR's approach was too rigid and needed to be altered and clarified.⁷⁵⁴ As acts of terrorism seriously endangered the right to life, states had an obligation to protect their citizens from terrorist acts and this protection might require deportation.⁷⁵⁵ According to the UK, the judgment in *Chahal* prevented states from protecting their citizens by removing foreign terrorist suspects to countries where they might be subjected to ill treatment. The UK also emphasised that a state could obtain DAs that an individual would not be subjected to ill treatment in violation of Article 3 ECHR. Referring to the *Chahal*⁷⁵⁶ case, the UK noted that identical assurances could be interpreted differently depending on the circumstances of the case.⁷⁵⁷

The ECtHR reasserted the absoluteness of Article 3 and refused to draw a distinction between the treatment inflicted directly by a sending state and the treatment that might be inflicted by a receiving state – Article 3 was deemed clear and unequivocal on this point. The Court rejected unanimously the argument that the risk of ill treatment in the receiving state should be weighed against the threat posed by the actions of the person in question.⁷⁵⁸ While assessing the strength of the DAs, the ECtHR stressed that these assurances did not contain a promise that Mr Saadi would not be subjected to treatment contrary to Article 3 ECHR.⁷⁵⁹ The existence of domestic laws and accession to international treaties guaranteeing compliance with individual human rights in principle without enforcement in practice was found not to be sufficient to protect against the risk of ill treatment if there was a history of rights violations in a particular state.⁷⁶⁰ The ECtHR further noted that the weight to be given to the DAs provided depends on all of the circumstances in a particular case. Thus, in each case, the Court would assess whether the DAs provided included a sufficient practically enforceable guarantee that an individual would be protected against ill treatment.⁷⁶¹ In this particular case, if Mr Saadi were deported to Egypt, this would amount to a violation of Article 3.⁷⁶²

⁷⁵⁴ *Ibid*, paras. 117 – 123.

⁷⁵⁵ *Ibid*.

⁷⁵⁶ *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment 15 November 1996.

⁷⁵⁷ *Saadi v. Italy*, Application no. 37201/06, Judgment 28 February 2008, para. 123.

⁷⁵⁸ *Ibid*.

⁷⁵⁹ *Ibid*, para. 147 – 148.

⁷⁶⁰ *Ibid*.

⁷⁶¹ *Ibid*.

⁷⁶² *Ibid*, para. 149.

In the case of *Babar Ahmad and Others v. the United Kingdom*,⁷⁶³ the applicants were detained in the UK awaiting extradition to the US, where they had all been indicted on terrorism charges. The US government had provided assurances that the applicants would be prosecuted before a federal court rather than a military commission and would not be treated as enemy combatants. The ECtHR (Fourth Section) found that the DAs were provided in good faith and refused to accept the submission that the US Government would dishonour its commitments and “commit such a serious breach” to an extradition partner such as the UK.⁷⁶⁴ The Court noted that the US’ “long term interest in honouring its extradition commitments alone would provide sufficient dissuasion from doing so.”⁷⁶⁵ As such, there was no real risk that the applicants would be designated as enemy combatants or would be subjected to extraordinary rendition to countries where their ECHR rights could not be safeguarded.⁷⁶⁶ The strength and longevity of diplomatic relations between two states is thus a relevant and potentially a decisive factor in deciding whether DAs and MoUs can be sufficient to fulfil obligations. This has been illustrated in one of the more recent ECtHR cases involving the use of DAs.

One of the most debated cases in relation to the reliance on assurances, certainly within the UK, has been the case of *Othman (Abu Qatada) v. the United Kingdom*.⁷⁶⁷ The case involved the long-term battle of the UK to extradite the radical cleric Abu Qatada to Jordan on the basis of MoUs signed by both countries. In 1999, he was convicted *in absentia* of conspiracy to cause explosions. In late 2000, he was tried and convicted *in absentia* in Jordan of conspiracy to cause explosions at Western and Israeli targets coinciding with the millennium celebrations. He argued that a return to Jordan would likely result in a retrial of the offences he was convicted for *in absentia*, lengthy pre-trial detention and long-term imprisonment upon conviction, which in turn would put him at real risk of treatment breaching Article 3 ECHR. The decision

⁷⁶³ *Babar Ahmad and Others v. the United Kingdom*, Applications Nos. 24027/07, 11949/08 and 36742/08, Partial Decision as to the Admissibility of Applications, Judgment 6 July 2010.

⁷⁶⁴ *Ibid.*, para. 108.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*, para. 110 in particular, which referred to this part of the complaint as “manifestly ill founded”. See also “Case Comment – *Ahmad and Others v. the United Kingdom* (Admissibility)” (2010) *European Human Rights Law Review* 639. The extradition was halted pending further examination of the likely conditions of detention in the United States if they were convicted.

⁷⁶⁷ Application No. 8139/09, Judgment of 17 January 2012. For some of the attaching discussion and details of the case see further Richard Norton-Taylor, ‘Why hasn’t Abu Qatada been tried in an English court’ *The Guardian* 13 November 2012. ‘Timeline: Abu Qatada’ *The Guardian* 18 February 2009. Editorial, ‘Abu Qatada: Spiral of Failure’ *The Guardian* 13 November 2012 and many others.

of the ECtHR was highly anticipated in the context of the constantly increasing use of DAs and MoUs by the UK and other ECHR Contracting States. In relation to Article 3 ECHR, the Court had to assess the sufficiency of the DAs given by Jordan. In relation to Article 6 ECHR, the Court had to assess whether a state signed up to the Convention could deport an individual to a country not bound to the ECHR to face a trial falling short of the standards expected under Article 6. In his submissions, the applicant argued that there ought to be an enhanced requirement for transparency and procedural fairness if DAs were relied upon as the burden fell on the state to dispel any doubts about the risk of ill treatment.⁷⁶⁸

In its decision, the Court emphasised that it was acutely aware of the difficulties faced by states in pre-empting acts of terrorism hence states should be allowed to deport non-nationals whom they consider to be a national security threat.⁷⁶⁹ Thus, it was not for the Court to rule upon the propriety of seeking assurances or to assess the long-term consequences of the use of assurances.⁷⁷⁰ Rather, the task for the Court was to examine whether the assurances obtained in a particular case were sufficient to remove any real risk of ill treatment.⁷⁷¹ The Court also noted that there was no requirement for transparency and procedural fairness when assessing the adequacy of the DAs rather what was required by the existing jurisprudence was the independent and rigorous scrutiny of assurances.⁷⁷² In assessing the quality of the assurances given and whether compliance could be objectively verified through diplomatic or other monitoring mechanisms, the Court noted that it was necessary to consider the bilateral relations between the sending and receiving state.⁷⁷³ The Court found that the MoUs between the UK and Jordan were sufficiently specific and comprehensive, were given in good faith by a government whose bilateral relations with the UK had been historically strong and were approved by the highest levels of the Jordanian government.⁷⁷⁴ Thus, there would be no real risk of ill treatment and there would not

⁷⁶⁸ ‘Case comment – Deportation of Foreign National – Safety on Return – *Othman v. United Kingdom*’ (2012) *European Human Rights Law Review* 339, p. 341.

⁷⁶⁹ *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

⁷⁷⁰ *Ibid*, para.186.

⁷⁷¹ *Ibid*, para. 186.

⁷⁷² ‘Case comment – *Othman v. United Kingdom*’, (2012) *European Human Rights Law Review* 339, p. 341.

⁷⁷³ *Ibid*, para. 189.

⁷⁷⁴ *Ibid*, paras 195–206.

be a violation of Article 3 ECHR if Abu Qatada were deported subject to assurances of this kind.⁷⁷⁵

An assessment of the ECtHR's jurisprudence suggests that similar to the international approach towards DAs and MoUs, the reliability of a particular assurance would depend on the adequacy of the promise, the credibility of the promisor, existence of enforcement and monitoring mechanisms, the good faith by the promisor and the guarantees within DAs and MoUs provided by the receiving state must observe in full the request by the sending state. Recently, following the *Babar Ahmed*⁷⁷⁶ and *Othman (Abu Qatada)*⁷⁷⁷ cases, existing extradition arrangements between states and/or historically strong diplomatic relationship have evolved into an important factor in deciding whether the DAs or MoUs provided would be respected.

Most significantly perhaps, the latest jurisprudence of the ECtHR has acknowledged that DAs and MoUs could be sufficient to fulfil *non-refoulement* obligations if they are provided in good faith, are specific and comprehensive and comply with the above listed requirements. The *Othman*⁷⁷⁸ case is of particular note here as even though the MoUs were found to be more wide-ranging than ones provided in previous cases, the MoUs had practical weaknesses. The nominated monitoring body had little experience in such tasks and there was no guarantee that it would be granted regular access to the deportee.⁷⁷⁹ Nonetheless, the ECtHR stated its role is to assess the strength of the particular assurances provided in each individual case rather than examine whether DAs and MoUs should ever be used to fulfil state *non-refoulement* obligations. Thus there are exceptional circumstances where DAs and MoUs could be sufficient to fulfil *non-refoulement* obligations. Nonetheless, as the majority of the ECtHR jurisprudence suggests DAs and MoUs tend to be unenforceable due to the lack of effective monitoring mechanism and unreliable due to the poor human rights

⁷⁷⁵ *Ibid.*, paras 195–206. Following this case, Mr Qatada brought a second appeal to SIAC and the appeal was allowed on Article 6 grounds (*Othman v. Secretary of State for the Home Department*, SIAC Appeal No. SC/15/2005). The Court of Appeal confirmed SIAC's decision that that Mr Qatada would face difficulties in discharging a burden of proof that statements were obtained by torture (*Othman v. Secretary of State for the Home Department* [2013] EWCA Civ 277). In April 2013 a new treaty was signed between Jordan and the UK and on 7 July 2013, Abu Qatada was deported to Jordan.

⁷⁷⁶ *Babar Ahmad and Others v. the United Kingdom*, Applications Nos. 24027/07, 11949/08 and 36742/08, Partial Decision as to the Admissibility of Applications, Judgment 6 July 2010.

⁷⁷⁷ *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ Michaelsen, C., 'The renaissance of *non-refoulement*? The Othman (Abu Qatada) decision of the European Court of Human Rights', (2012) 61 (3) *International and Comparative Law Quarterly* 750, p. 764.

record of the promisor. These findings in a number of cases combined with the non-justiciable nature of these agreements reinforce the presumption that DAs and MoUs are not sufficient to adequately protect individuals from ill treatment.

Before proceeding to assess the domestic approaches to DAs and MoUs, it should however be noted that the arguably muscular assertion of the absoluteness of Article 3 in ECtHR cases is somewhat undermined by its contemplation of national security considerations in several cases. The significance of these observations is not strictly limited to Contracting States of the ECtHR as the next two brief paragraphs will illustrate. In *Soering*, the ECtHR stated that inherent to the whole ECHR was the search for a fair balance between the demands of the public interest and the requirement for protection of individual rights.⁷⁸⁰ The Court further acknowledged that national security interests must be included among the factors taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases, even if they were not to be balancing factors in the decision whether or not deportation was permissible *per se*.

This, in essence, dilution of the meaning of inhuman and degrading treatment or punishment suggests that Article 3 ECHR is not viewed as being absolute in its entirety, but rather that its absoluteness is tiered based on the severity of the ill treatment. If this is the case, then these tiers may work as follows. The top tier (torture) merits strict or absolute application and rigorous enforcement, the middle (inhuman and degrading treatment) and bottom tier (punishment) may be subject to balancing exercises. This reasoning of the ECtHR is hard to reconcile with the text and spirit of Article 3. Article 3 establishes a strict prohibition for all forms of ill treatment that meet the severity threshold for inclusion within the Article's prohibition as outlined in *Ireland v. the United Kingdom*.⁷⁸¹

The dissenting judgment in the *Chahal*⁷⁸² case stated that where a state is seeking to remove an individual from its jurisdiction, it might legitimately strike a balance between the nature of a national security threat and extent of the potential risk of ill treatment. The security balancing arguments presented by the UK in the subsequent *Saadi*⁷⁸³ case arguably echoed the minority opinion in *Chahal* and parts of the

⁷⁸⁰ *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989.

⁷⁸¹ Application No. 5310/71, Judgment of 18 January 1978.

⁷⁸² *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment 15 November 1996, p. 48.

⁷⁸³ *Saadi v. Italy*, Application no. 37201/06, Judgment 28 February 2008.

*Soering*⁷⁸⁴ judgment. Both of these decisions appear to have influenced similar cases in Canada⁷⁸⁵ and the US.⁷⁸⁶ If the courts at domestic and regional level are to ensure effective protection of non-derogable norms, mixed-message court decisions regarding the practical application of non-derogable norms need to be avoided if possible. Otherwise, states may be tempted to challenge a non-derogable norm in national security exigencies and restrict its application if they believe that there is jurisprudence, which implies support for their cause. As the US approach towards core IHRL and IHL provisions post 9/11 has demonstrated if there is even the perception of an area of legal uncertainty or possibility to adjust obligations, a state will engage an interpretation which limits the scope and applicability of a particular provision if it is deemed necessary for the purposes of national security.

3.3. Domestic Courts' Assessment of Diplomatic Assurances

Domestic courts have also addressed the question of whether these non-justiciable agreements could be sufficient to fulfil state *non-refoulement* obligations. The below Section will focus on the legal practices within the UK and US and in particular, whether domestic courts have aimed to follow the international and regional tests regulating the use of DAs and MoUs. This Section will provide further basis for comparison between the US and UK approach to transfers on the basis of non-justiciable legal agreement post 9/11.

The domestic UK approach towards DAs and MoUs is well illustrated within the decision of the Special Immigration Appeals Commission (SIAC).⁷⁸⁷ SIAC has purview over asylum and immigration decisions made in the interest of national security and it has the same status as the High Court.⁷⁸⁸ As a general rule, SIAC must be satisfied that there are no substantial grounds for believing that an individual will face a real risk of ill treatment in violation of Article 3.⁷⁸⁹ SIAC analyses assurances on a case-by-case basis and has rejected the argument that assurances can never be

⁷⁸⁴ *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989.

⁷⁸⁵ In *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

⁷⁸⁶ In *Arar v. Ashcroft* 414 F.Supp.2d 250. See also Kathrine Hawkins, 'The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"', 20 *Georgetown Immigration Law Journal* (2005 - 2006) 214, p. 216.

⁷⁸⁷ Please refer to the relevant discussion in the Introductory Chapter of this thesis, which outlines how and why SIAC has been created.

⁷⁸⁸ Section 5, Special Immigration Appeals Commission Act 1997.

⁷⁸⁹ *Ibid*, 378.

relied upon when given by countries with dubious human rights record.⁷⁹⁰ In particular, the prospect of breach of assurances is held by SIAC to be a matter for an evidence-based judgment taking into account the strength, intent and incentive to adhere to the assurances and the attaching penalties if the assurances are breached.⁷⁹¹ As assessed domestically, the precision or firmness of the DAs has been found to depend on the diplomatic relationship between states amongst other criteria.⁷⁹² SIAC has developed a four-part test, which in general needs to be satisfied if assurances are to prove adequate in preventing a violation of Article 3 ECHR to the satisfaction of the Court:⁷⁹³

- a) The terms of the assurances must be such that, if they are fulfilled, the person returned will not be subject to violations under Article 3 ECHR;
- b) There must be a sound objective basis for believing that the assurances will be fulfilled;
- c) The assurances must be given in good faith;
- d) The fulfilment of the assurances must be capable of being verified.

These principles are applied in an *ex ante* fashion and generally not *ex post facto*. In the recent case of *J1 v Secretary of State for the Home Department*, SIAC appeared to take a less stringent approach towards the use of assurances however.⁷⁹⁴ In this case SIAC found that the Ethiopian government could be trusted to comply with the assurances provided even though only one human rights monitoring organisation existed in Ethiopia. SIAC noted that this organisation had not yet developed the capacity for monitoring and could not be relied upon to report deliberate breaches by the Ethiopian government. However, SIAC did uphold its decision to deport J on the basis of undertakings by the Secretary of State. The Secretary of State accepted not to deport J until the necessary work had been done to develop the monitoring capacity of the Ethiopian organisation. The Court of Appeal found that SIAC had not been

⁷⁹⁰ *Ibid*, p. 378. This view has been endorsed by the House of Lords in *RB (Algeria) and OO (Jordan)* [2009] 2 WLR 512 [114].

⁷⁹¹ *Y v. Secretary of State for the Home Department* [2006] EWCA Civ 1223 [394]. *MS (Algeria) v. Secretary of State for the Home Department* [2011] EWCA Civ 306.

⁷⁹² *Y v. Secretary of State* [339].

⁷⁹³ *G v. Secretary of State for the Home Department* [2007] SC/02/05. *Y v. Secretary of State. Y, BB and U v. Secretary of State for the Home Department* Appeal Nos. SC/32/36/39/2005.

⁷⁹⁴ *J1 v. Secretary of State for the Home Department* [2013] EWCA Civ 279.

entitled to conclude that the deportation of J would be compliant with Article 3 ECHR.⁷⁹⁵ SIAC was obliged to determine compliance on the basis of current evidence. In particular, the decision whether the Ethiopian organisation was competent to monitor the conduct of officials fell to SIAC and not to the Secretary of State. Thus, SIAC should have held that the deportation would be a violation of Article 3. While re-affirming the above four-prong test in assessing assurances domestically, the Court of Appeal noted that in many cases a monitoring regime would not be required.⁷⁹⁶ In cases of countries with dubious human rights records, however, such as Ethiopia, such a regime would be required.⁷⁹⁷

Domestically in the US, the provisions of UNCAT are implemented within Section 208.18 of the US Code of Federal Regulations (C.F.R.).⁷⁹⁸ This Section contains a specific reference to DAs as a means of complying with *non-refoulement* and anti-torture norm obligations. In seeking to remove an alien or a non-US citizen to another country, the Secretary of State can obtain DAs guaranteeing that the individual in question would not be tortured. These assurances are then forwarded to the Attorney General who determines in consultation with the Secretary of State whether the assurances are sufficiently reliable to allow the transfer in compliance with Article 3 UNCAT. Once the DAs have been provided and are under review, a claim by the individual seeking protection under UNCAT would not be considered further by an immigration judge, the Board of Immigration Appeals or an asylum officer.

The case of *Arar v. Ashcroft*⁷⁹⁹ was one of the first cases within the US to challenge the deportation of an individual terrorist suspect (also an alien) to a country with dubious human rights record. Arar's lawsuit alleged that after solitary confinement for a number of days, he was deported first to Jordan and then to Syria where he was allegedly subjected to ill treatment in violation of Article 3 UNCAT.⁸⁰⁰ Separately, Mr Arar alleged that he had been subjected to an extraordinary rendition in violation of domestic and international legal standards.⁸⁰¹ The US claimed that they had obtained assurances from the Syrian government that Mr Arar would not be tortured

⁷⁹⁵ *Ibid* [67] in particular.

⁷⁹⁶ *Ibid* [66].

⁷⁹⁷ *Ibid* [66].

⁷⁹⁸ The full text of Section is available at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title8-vol1/pdf/CFR-2012-title8-vol1-sec208-18.pdf> [last accessed 30 March 2016].

⁷⁹⁹ 414 F.Supp.2d 250.

⁸⁰⁰ The lawsuit was filed against the then US Attorney General, the directors of the FBI and Immigration and Naturalization Service (INS) and other federal law enforcement officials.

⁸⁰¹ *Ibid*, p. 570.

and cited the subsequent denials of the Syrian government that torture took place during interrogations.⁸⁰² The District Court judge dismissed the case.⁸⁰³

In November 2009, the Second Circuit United States Court of Appeals upheld the ruling by the District Court.⁸⁰⁴ The Court restated the US Supreme Court position⁸⁰⁵ that matters of foreign policy and national security were within the purview of the Executive and not the judiciary.⁸⁰⁶ The Court noted that Congress had expressly limited the review of transfer proceedings when these involve the removal of aliens such as Mr Arar due to national security considerations.⁸⁰⁷ The Court then referred to Section 208.18 C.F.R. and reaffirmed that the removal of an alien could proceed following the receipt of sufficiently reliable DAs guaranteeing that the individual would not be tortured.

In relation to the claim of extraordinary rendition, the Court found that such a rendition involves multilevel cooperation between the US and the relevant ministries and agencies of other countries on diplomatic, security, and intelligence issues. Thus, without a clear Congressional authorisation, judicial review of extraordinary rendition would impact on the US' foreign policy and be in breach of separation of powers.⁸⁰⁸ If the Court were to assess whether DAs were in fact provided and relied on in good faith during the extraordinary rendition process, it would be engaging in an inquiry in the work of several federal agencies and foreign governments.⁸⁰⁹ Such an analysis would involve access to certain classified information and an inquiry into secret diplomatic relations. Taking into account the role and authority of the Executive in matters of foreign policy and limited experience of the federal judiciary, such an examination of the DAs could result in a breach of the separation of powers

⁸⁰² See Shane, S., 'Torture Victim had no Terror Link, Canada told U.S.' *The New York Times* 25 September 2006, available at <http://www.nytimes.com/2006/09/25/world/americas/25arar.html?pagewanted=all> [last accessed 30 March 2016]. See also Hawkins, K., 'The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"', (2005 - 2006) 20 *Georgetown Immigration Law Journal* 214, p. 216.

⁸⁰³ Hawkins, K., 'The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"', (2005 - 2006) 20 *Georgetown Immigration Law Journal* 214, p. 216.

⁸⁰⁴ *Arar v. Ashcroft* 585 F.3d 559 (2d Cir 2009).

⁸⁰⁵ Reference was made to *Lincoln v. Vigil*, 508 U.S. 182, p. 192 (1993) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, p. 819 (1992)) and *Dep't of Navy v. Egan*, 484 U.S. 518, pp. 529-30 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, pp. 293-94 (1981)).

⁸⁰⁶ *Ibid*, p. 575.

⁸⁰⁷ *Ibid*, p. 573. See also 8 U.S.C. 1225(c).

⁸⁰⁸ *Ibid*, p. 576.

⁸⁰⁹ *Ibid*, p. 578.

doctrine.⁸¹⁰ In comparison, the Arar Commission in Canada reached the conclusion that the extraordinary rendition of Mr Arar was a concrete example that assurances from countries with dubious human rights record such as Syria were completely insufficient and inadequate and should not be relied upon in order to discharge the obligations under UNCAT.⁸¹¹

The comprehensive jurisprudence of domestic, regional and international adjudicatory bodies regulating the use of these non-justiciable agreements suggests that where they are used, DAs and MoUs do not release states from their obligations under international human rights standards.⁸¹² However, domestic courts have at times been more willing to accept national security considerations while assessing DAs and MoUs. While in the US the domestic courts would not engage in an examination of the reliability of DAs, in the UK SIAC and other domestic UK courts have aimed to follow the existing regional and international jurisprudence and have regulated the use of these agreements via multipronged tests. The different domestic judicial review mechanisms governing the reliance on DAs and MoUs arguably contextualises why the US and the UK have sought to adjust and limit their *non-refoulement* obligations differently. This will be focus of the last section of this Chapter.

4. Limiting *Non-Refoulement* Obligations – DAs, MoUs and Extraordinary Rendition

In a report on the impact of counter-terrorism on human rights, the Eminent Jurist Panel noted that the attacks on 9/11 and 7/7 had influenced many states to introduce a number of counter-terrorism measures, which undermine the core values of the international legal framework and hinder the effective implementation of human rights.⁸¹³ In this environment, the widespread use of DAs and MoUs as means of justifying or seeking to legitimise counter-terrorism measures has been described as a

⁸¹⁰ *Ibid.* On this point, the Court referred to the *Kiyemba v. Obama* 130 S.Ct. 1235 (2010), 555 F.3d 1022 (2009) case, where it was stated that separation of powers principles preclude the courts from reviewing Executive's assessment of the likelihood a detainee would be tortured by a foreign sovereign.

⁸¹¹ Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services), p. 176.

⁸¹² United Nations General Assembly Resolution 60/148, UN Doc. A/RES/60/148, para. 8.

⁸¹³ Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*, available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_09_ejp_report.pdf [last accessed 30 March 2016].

“new normal”.⁸¹⁴ In a similar vein, the former UN Special Rapporteur on Torture, Theo van Boven, has questioned whether the practice of resorting to DAs or MoUs post 9/11 has become a politically inspired substitute for non-derogable principles of *non-refoulement* and the anti-torture norm.⁸¹⁵

As they have been used in the context of *non-refoulement* obligations, DAs and MoUs can thus be seen as an adaptable tool adjusting the boundaries of existing transfer and extradition procedures by seeking to limit the sending state’s liability under the anti-torture norm. The reliability and adequacy of these non-justiciable agreements has however been challenged in domestic, regional and international adjudicatory bodies. Thus, in this context, DAs and MoUs have arguably been a mild manifestation of the restrictive state approaches to *non-refoulement* obligations, to which the courts’ have mostly responded strongly. However, the deployment of DAs and MoUs to facilitate the operation of rendition circuits has posed a more fundamental challenge to the practical effectiveness of human rights in general and the anti-torture norm in particular.

The post 9/11 US approach towards IHRL obligations in general, and established extradition and regular transfer rules in particular, indicates that the US sought to entirely limit its liability under the anti-torture norm and circumvent its *non-refoulement* obligations.⁸¹⁶ In comparison, while the UK has attempted on a number of occasions to deport or extradite individuals who were perceived to pose a threat to national security, these attempts have been made through domestic and regional legal systems. In order to achieve a non-regulated legal space within which the rendition circuits could operate, the US have relied on what was identified as a broad fault line within the framework. The US first approached IHRL thus: as *lex generalis*, IHRL provisions were not applicable within an armed conflict thus resulting in no violations under the relevant treaties.⁸¹⁷ While IHL was identified as the exclusively applicable

⁸¹⁴ Arbour, L., ‘In Our Name and on Our Behalf’, (2006) 55 (3) *International and Comparative Law Quarterly* 511, p. 514.

⁸¹⁵ Report of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 30 August 2005, UN Doc. A/59/324, para. 31.

⁸¹⁶ Please refer to the preceding discussions in Chapter 1 and Chapter 2 and the specific examination of US domestic legal standards as well as the creation and exploitation of broad fault lines within the framework.

⁸¹⁷ See Memorandum Opinion for the Counsel to the President, Opinions of the Office of Legal Counsel, Vol. 25, 6 November 2001, Military Order of November 13, 2001, Federal Register, Vol. 66, No. 222 and US Meeting with UN Committee against Torture, Opening Remarks by John Bellinger, full text available at <http://www.state.gov/j/drl/rls/68557.htm> [last accessed 30 March 2016] discussed in depth in Chapter 1.

lex specialis,⁸¹⁸ the applicability of core provisions such as Common Article 3 was severely restricted.⁸¹⁹ Having established this environment of legal uncertainty, the US nonetheless proceeded to rely on DAs from receiving states to demonstrate normative compliance with the relevant legal standards regulating transfers. The case study of Syria is a particularly illustrative example of a receiving state with consistently poor human rights record whose DAs were accepted as adequate.⁸²⁰ As a sending/authorising state, the US provided assurances to transit states such as the UK, and then proceeded to breach them and transport detainees through the Diego Garcia Island without the permission of the UK.⁸²¹ Overall, little is known about the content of DAs and MoUs used within the rendition circuits; of the content that is known, the promises appear to simply reaffirm existing obligations and go no further.⁸²² In this context, DAs and MoUs were relied on as legal grey spaces – while there was the appearance of legality, the relevant promises or constraints were weak and merely perfunctory.

Within the HVDP, transit states allowing for stopovers, refuelling and temporary detention facilities were provided with DAs and MoUs by the US. The US in turn requested DAs and MoUs by the receiving states who detained *incommunicado* and enhancedly interrogated detainees.⁸²³ While there is some clarity on the assurances offered to transit states such as Ireland,⁸²⁴ it is uncertain what type of assurances, if any, have been agreed with receiving states and in particular, the content of such

⁸¹⁸ *Ibid.*

⁸¹⁹ Please refer to the in depth discussion in Chapter 1 of this thesis.

⁸²⁰ Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services and Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

⁸²¹ See further comments by then Foreign Secretary David Miliband, Hansard HC Deb, 21 February 2008, cols. 547–548.

⁸²² See further Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006, Ottawa; Public Works and Government Services Canada) and the Irish Human Rights Commission, “*Extraordinary Rendition: A Review of Ireland’s Human Rights Obligations*” (2007, Dublin; Irish Human Rights Commission).

⁸²³ Please see further the cases of Maher Arar (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services) and Khaled el Masri (*El Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012).

⁸²⁴ Irish Human Rights Commission, *Extraordinary Rendition: A Review of Ireland’s Human Rights Obligations* (2007, Dublin; Irish Human Rights Commission).

assurances.⁸²⁵ Further, as discussed further above, the reliability of such DAs is not subject to judicial review as the domestic courts have deferred such assessment to the Executive. The reliance on DAs and MoUs in this context and the involvement of transit states illustrates how detrimental the use of these agreements can be for the effective accountability and enforcement of human rights protections. The UN High Commissioner for Human Rights has described this particular use of DAs and MoUs as threatening to empty IHRL of its content.⁸²⁶ Thus, while in comparison to extraordinary rendition, DAs are a milder manifestation of restrictive state approaches towards *non-refoulement*, DAs and MoUs are nonetheless part of the post 9/11 spectrum of exploitation and *male fide* interpretations of international legal obligations.

5. Conclusion

After 9/11, both the US and UK have attempted to reduce the scope of the relevant legal provisions relating to regular transfers by seeking to adjust *non-refoulement* obligations and limit their liability under the anti-torture norm.⁸²⁷ The UK's approach to these non-justiciable agreements suggests that rather than seeking to limit or circumvent entirely its obligations under the anti-torture norm, the UK has instead consistently argued for an adjusted interpretation of *non-refoulement*, which includes a balancing of national security considerations against individual rights in certain circumstances.⁸²⁸ Thus, despite attempting to extradite individuals to countries where a risk of ill treatment exists, through the use of these non-justiciable agreements the UK has sought to comply with their obligations albeit at a more nominal normative level. In comparison, rather than seeking to adjust its *non-refoulement* obligations in a

⁸²⁵ See for example Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc), p.6.

⁸²⁶ As quoted in Johnston, J., 'The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11' (2011) 11 *International Criminal Law Review* 1.

⁸²⁷ See for example Fitzpatrick, J., 'Speaking Law to Power: The War against Terrorism and Human Rights', (2003) 14 *European Journal of International Law* 214. Hoffman, P., 'Human Rights and Terrorism', (2004) 26 (4) *Human Rights Quarterly* 932. Langbein, J.H., 'The Legal History of Torture' in Levinson, S. (ed.), *Torture: A Collection* (2004, Oxford; Oxford University Press).

⁸²⁸ For broadly similar comments see further Cole, D., 'English Lessons: Analysis of UK and US Responses to Terrorism', (2009) 62 (1) *Current Legal Problems* 136; Fenwick, H., 'Recalibrating ECHR Rights and the Role of the HRA post 9/11: Reasserting Human Rights Norms in the 'War on Terror?', (2010) 63 (1) *Current Legal Problems* 153; Roach, K., *The 9/11 Effect: Comparative Counter-Terrorism* (2011, Cambridge; Cambridge University Press).

similar manner, the US adopted the extraordinary rendition programme. Extraordinary renditions post 9/11 – a complex, transnational and multi-actor structure – have involved the irregular covert transfers of individuals across borders for the purposes of their *incommunicado* detention and interrogation in conditions that constitute multiple violations of human rights, including the right to be free from torture.⁸²⁹

Thus while the UK has explored domestic and regional legal avenues and has sought to adjust the boundaries of the existing legal framework in a more transparent and accountable manner, the US have engaged in mostly clandestine and unaccountable counter-terrorism measures such as HVDP operating outside the established legal frameworks.⁸³⁰ The difficulties detainees have subsequently faced in obtaining a remedy following their extraordinary rendition, *incommunicado* detention and enhanced interrogation illustrate the challenge posed by HVDP on the practical effectiveness of the applicable protections.⁸³¹ Much of this difficulty has been linked to the scope of the concept of jurisdiction and in particular the potential extraterritorial application of human rights obligation, which is the focus of the following chapter.

⁸²⁹ Satterthwaite, M., 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', (2007) 75 *George Washington Law Review* 1. Satterthwaite, M., 'Extraordinary Rendition and Disappearances in the "War on Terror"', (2006) 10 *Gonzaga Journal of International Law* 70. Weissbrodt, D. and Bergquist, A., 'Extraordinary Rendition and the Torture Convention', (2005) 46 *Virginia Journal of International Law* 586. Irish Human Rights Commission, "*Extraordinary Rendition: A Review of Ireland's Human Rights Obligations*" (2007, Dublin; Irish Human Rights Commission). Borelli, S., 'Rendition, Torture and Intelligence Cooperation' in Born, H., Leigh, I. and Wills, A., (eds.) *International Intelligence Cooperation and Accountability* (2011, London; Routledge), p. 98.

⁸³⁰ Cole, D., 'English Lessons: Analysis of UK and US Responses to Terrorism', (2009) 62 (1) *Current Legal Problems* 136, pp. 146-148.

⁸³¹ Please see further the cases of Maher Arar (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services) and Khaled el Masri (*El Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012).

Chapter 4: The Concept of Jurisdiction and the Rendition Circuits

1. Introduction

After 9/11, the concept of national security has become a powerful state discretion used to restrict the scope of human rights when there is a perceived threat.⁸³² The United States (US) decision to engage in a ‘War on Terror’ is an apt example. Within this legal and political paradigm, through a combination of legislative measures and Executive decisions, national security considerations appear to have offered an open-ended authorisation for a variety of pre-emptive counter-terrorism measures severely limiting individual rights.⁸³³ As illustrated by the use of extraordinary renditions as part of the high value detainee programme (HVDP),⁸³⁴ state security and terrorism prevention measures have expanded beyond US national borders with the operation of the rendition circuits being of an entirely transnational nature. Over the course of the so-called ‘War on Terror’, hundreds of suspected terrorists were captured and extraordinarily rendered to various detention facilities where they were subjected to ill treatment.⁸³⁵ The difficulties such detainees have subsequently faced in obtaining a remedy is illustrative of the challenges posed by extraordinary rendition on the enforceability of the applicable protections.⁸³⁶ Much of these difficulties have been linked to the scope of the concept of jurisdiction and in particular whether the relevant human rights protections have an extraterritorial application.

The question whether a state can be held responsible for extraterritorial human rights violations has frequently occupied regional courts and international bodies.⁸³⁷ As

⁸³² Douzinas, C., *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007, New York; Routledge-Cavendish), p.184. See also the discussion on the post 9/11 securitisation in the Introductory Chapter of this thesis.

⁸³³ Please refer to the relevant discussions in the Introductory Chapter of this thesis and in Chapter 1.

⁸³⁴ Apart from the HVDP and its transnational reach, the US engaged in military operations against “nations that provide aid or safe haven to terrorism”; such nations have included Iraq and Afghanistan. See further <http://www.theguardian.com/world/2001/sep/21/september11.usa13> and <http://www.state.gov/documents/organization/63562.pdf> [both last accessed 30 March 2016].

⁸³⁵ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

⁸³⁶ Please see further the cases of Maher Arar (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services) and Khaled el Masri (*El Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012).

⁸³⁷ See cases such as *Banković and Others v. Belgium and 16 Other States*, Application no. 52207/99 Judgment 12 December 2001, *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07,

states are increasingly asserting their power abroad in a manner that engages individual human rights beyond national borders, this question is likely to remain a pressing issue.⁸³⁸ While defending the use of extraordinary renditions, the US government at the time vigorously asserted that its policy is to comply with all its treaty obligations.⁸³⁹ The rendition circuits have however been described as unlawful and violatory in numerous UN and Council of Europe reports.⁸⁴⁰ In rejecting these criticisms the US, represented by John Bellinger⁸⁴¹ at a Committee against Torture (CAT) hearing, denied the use of extraordinary rendition as a means of outsourcing torture and first noted that: "...Article 3 does not prohibit the return or transfer of individuals to countries with a poor human rights record *per se*, nor does it apply with respect to returns that might involve "ill treatment" that does not amount to torture."⁸⁴² He then proceeded to state that "...To the extent that the [CAT] Committee's question is directed to returns or transfers of individuals that are effected outside of U.S. territory, the U.S. reiterates its view that Article 3, by its terms, does not apply to individuals outside of U.S. territory."⁸⁴³

This Chapter argues that in adopting a strictly territorial and mechanical approach to the concept of jurisdiction and the scope of human rights obligations, the US designed the post 9/11 construct of extraordinary renditions to circumvent state borders and by proxy the relevant human rights obligations. This interpretation by the US has arguably been facilitated by the underdeveloped international and inter-American regional jurisprudence, which unlike the ECtHR case law, offers little in terms of guidelines. As will be discussed in Section 3, the evolution of the international and

7 July 2011, *Coard et al. v. the United States* Case 10.951, Inter-American Commission on Human Rights Report No. 109/99, OEA/Ser.L/V/II.106 doc. 6 rev (1999), *Munaf v. Romania*, Human Rights Committee Communication 1539/2006 UN Doc CCPR/C/96/D/1539/2006 amongst others.

⁸³⁸ Van Schaak, B., 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Law Studies* 20, p. 20.

⁸³⁹ 'Full Text: Rice defends US policy', *BBC News*, 5 December 2005; 'Transcript: President Bush' Speech on Terrorism' *The New York Times*, 6 September 2006;

⁸⁴⁰ See for example Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7; International Commission of Jurists, *Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009, Geneva; ICJ); Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States* AS/Jur (2007) 36 amongst others.

⁸⁴¹ Mr Bellinger served as the Legal Adviser for the U.S. Department of State and the National Security Council within the administration of the George W. Bush administration.

⁸⁴² Please see United States' Response to the Questions Asked by the Committee Against Torture: U.S. Delegation Oral Responses to CAT Committee Questions 5 May 2006 (Answers to Questions 16-20 in particular), available at <http://www.state.gov/j/drl/rls/68561.htm> [last accessed 30 March 2016].

⁸⁴³ *Ibid.*

inter-American regional approaches is still in the early stages of its development and thus restraints on states are somewhat limited. Nonetheless, the most recent approach of the relevant bodies has been clear – states can have extraterritorial obligations. As such to ensure that the transnational operation of extraordinary renditions as a means of outsourcing torture has a veneer of legality at every stage of the circuits, the US have persistently ignored these developments and engaged in a very traditional interpretation of what is jurisdiction.

Section 2 will first outline the traditional approach to jurisdiction within international law before proceeding to examine the following question in Section 3: can a state be said to be responsible under the international and regional legal framework for its extraterritorial activities? This question will be addressed by examining when a state has jurisdiction to act extraterritorially with particular reference to the competence of recognised regional and international treaty bodies to assess human rights violations abroad. In addition, the analysis will discuss whether specific rights enforcement mechanisms such as the European Court of Human Rights (ECtHR) or the UN Human Rights Committee (HRC) have jurisdiction to consider potentially violatory states' activities abroad. The cases discussed within this Chapter are predominantly from the ECtHR jurisprudence as to date most of the jurisprudence assessing whether states have extraterritorial obligations have arisen under the ECHR regime. Cases such as *Banković*⁸⁴⁴ decided in late 2001 are significant in understanding the scope of ECHR Contracting States' obligations particularly as a number of them contributed to various components of the 'War on Terror' including strategic operative support for the rendition circuits.

The significance of some of these cases has not however been limited to just other ECtHR case law. ECtHR decisions have been discussed and cited by the Inter-American Commission on Human Rights (IACHR) in adopting a personal jurisdictional model in cases where states have exerted their power over individuals abroad. UN bodies have similarly begun interpreting human rights treaties and provisions as having an extraterritorial scope based on a personal jurisdiction model. As such it will be illustrated how the comprehensive ECtHR jurisprudence has influenced the current IACHR and international approaches to extraterritoriality. In addition, as a number of ECHR Contracting States facilitated the operation of the

⁸⁴⁴ *Banković and Others v. Belgium and 16 Other States*, Application no. 52207/99 Judgment 12 December 2001.

rendition circuits, assessing the relevant ECtHR standards in relation to the extraterritorial scope of obligations is important in understanding potential state liability for transit or third party states to renditions. Transit states and the emerging ECtHR jurisprudence on state liability for complicity in the rendition circuits will be the focus of Section 4.

2. Defining Jurisdiction

As an international law concept, jurisdiction epitomises the power of a state to regulate or impact upon individuals, property or circumstances.⁸⁴⁵ It is an exercise of state authority, which can create, alter or terminate legal relationships and obligations⁸⁴⁶ – a central feature of state sovereignty, which will be explored in the context of extraordinary rendition. In its application, jurisdiction encompasses the power to legislate (jurisdiction to prescribe), the power to resolve disputes (jurisdiction to adjudicate) and the power to implement laws and court decisions (jurisdiction to enforce).⁸⁴⁷ The legal rules and principles governing jurisdiction are of fundamental importance to international relations as they determine both the reach of domestic law and the boundaries of external state power.⁸⁴⁸

Thus, perhaps unsurprisingly, the limits of jurisdiction have been widely discussed and contested.⁸⁴⁹ What this thesis argues is that under traditional approaches to jurisdiction in international law – territorial prescriptive and enforcement jurisdiction – it is uncertain whether domestic rights-protections and laws could have been used to protect rendees who were captured, transferred and ill treated abroad. As noted in the introduction, the US has committedly defended the scope of jurisdiction as strictly territorial. This argument does however disregard the IACHR and international findings that human rights treaties can have extraterritorial application. Through the

⁸⁴⁵ Shaw, M., *International Law*, 6th ed., (2008, Cambridge; Cambridge University Press); Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press).

⁸⁴⁶ Shaw, M., *International Law*, 6th ed., (2008, Cambridge; Cambridge University Press), p.645.

⁸⁴⁷ Ben-Naftali, O. and Shany, Y., ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003-2004) 37 (1) *Israel Law Review* 17, p. 60.

⁸⁴⁸ Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), p. 314.

⁸⁴⁹ See for example Milanovic, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011, Oxford; Oxford University Press), Lowe, V., *International Law 2007*, Oxford; Oxford University Press); Ryngaert, C., *Jurisdiction in International Law*, 2nd ed. (2015, Oxford; Oxford University Press); Simma, B., and Müller, A., ‘Exercise and Limits of Jurisdiction’ in Crawford J., and Koskeniemi, M. (eds.), *The Cambridge Companion to International Law* (2012, Cambridge; Cambridge University Press) amongst many others.

use of extraordinary rendition, the US appear to have approached the concept of jurisdiction – understood in its traditional construct – as a ‘gap’ in the practical applicability of rights protections i.e. states only have obligations within their own territory. Thus transnational operations and violations of rights in another jurisdiction do not trigger state obligations even if these violations were facilitated or outsourced by the sending/authorising state. The US proceeded to exploit this ‘gap’ post 9/11 for the purposes of the transnational operation of HVDP and in particular the rendition circuits. As will be discussed in Section 3, the US has persistently contested the extraterritorial application of human rights provisions and has regularly argued against such extension of the scope of jurisdiction. This approach appears to have become even more entrenched post 9/11.

2.1. Traditional Approach to Jurisdiction in International Law

Traditionally, several bases upon which states are entitled to exercise types of jurisdiction have been recognised.⁸⁵⁰ Prescriptive jurisdiction, which addresses questions such as the extent to which a state can impose legal characterisations upon persons and events, is based on principles such as territoriality, nationality, universality and protection (preservation).⁸⁵¹ This type of jurisdiction was addressed in the 1927 *Lotus* case, where the Permanent Court of International Justice found that states are free to exercise what is in essence prescriptive jurisdiction over a given situation – in fact states had a “wide measure of discretion” – unless a prohibitive rule to the contrary could be identified.⁸⁵²

The principle of nationality reflects a state’s prerogative to extend the application of its laws to its nationals.⁸⁵³ In the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* case, in a Separate Opinion Judge Guillaume, stated

⁸⁵⁰ Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), pp. 315–316.

⁸⁵¹ *Ibid*, p. 318–330; for further discussion on all principles see also Council of Europe, *Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law*, Resolution (68) 17 adopted in June 1968 and its amendment in June 1997 through Recommendation No. R (97) 11, both available at https://www.coe.int/t/cm/adoptedtexts_EN.asp [last accessed 30 March 2016], Shaw, M., *International Law*, 6th ed., (2008, Cambridge; Cambridge University Press) and Lowe, V. *International Law*, (2007, Oxford; Oxford University Press) amongst many others.

⁸⁵² *SS Lotus*, 1927 PCIJ Reports, Series A, No. 10, pp. 18–19. See also Ryngaert, C., *Jurisdiction in International Law*, 2nd ed. (2015, Oxford; Oxford University Press).

⁸⁵³ § 401 (a) Restatement (Third) of Foreign Relations Law of the United States. See also Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), p. 323.

that “under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State, or if the crime threatens its internal or external security.”⁸⁵⁴ This principle is however used relatively infrequently.⁸⁵⁵ In circumstances where vital state interests are at stake, a state can act and exercise prescriptive jurisdiction in order to preserve them under the protective principle.⁸⁵⁶ Universal jurisdiction will arise in circumstances where a crime is considered to be so heinous that other states would be justified in taking action to prevent further occurrences of it.⁸⁵⁷

In the context of the transnational operation of extraordinary rendition and the practical deficiencies in rights enforcement mechanisms, the application of the principle of territoriality is arguably most relevant. The principle of territoriality – a corollary to the sovereignty of a state over its national territory – is conceivably the most important principle in the day-to-day application of state laws.⁸⁵⁸ The principle of territoriality has been described as the most certain way of delimiting competences between states.⁸⁵⁹ Under this principle, a state can exercise prescriptive jurisdiction and apply its domestic laws to an incident, which was initiated within its territory but concluded outside its territory.⁸⁶⁰ A state could also exercise prescriptive jurisdiction in the reverse scenario – i.e. apply domestic laws to an incident, which was initiated outside state territory but completed within state territory.⁸⁶¹ In practice, the application of territorial jurisdiction in such circumstances could be problematic. The principle presupposes that it is clear where a violatory act is committed however it may be problematic to establish the starting point of a violation.⁸⁶² This difficulty is particularly relevant in the context of irregular transfers as illustrated by the infamous trial of Adolf Eichmann.

⁸⁵⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, ICJ Reports 2002, Separate Opinion of Judge Guillaume.

⁸⁵⁵ Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), pp. 323–324.

⁸⁵⁶ *Ibid*, p. 325.

⁸⁵⁷ See for example *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, ICJ Reports 2002, p.3.

⁸⁵⁸ Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), p. 327.

⁸⁵⁹ Buxbaum, H.L., ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’, (2009) 57 *American Journal of Comparative Law* 631. See also Ryngaert, C., *Jurisdiction in International Law*, 2nd ed. (2015, Oxford; Oxford University Press).

⁸⁶⁰ *Ibid*, p. 321–322.

⁸⁶¹ *Ibid*, p. 321–322.

⁸⁶² *Ibid*, p. 331.

One of the most contentious issues in the Eichmann trial was the manner in which the accused was brought before the District Court of Jerusalem.⁸⁶³ Israel and Argentina had each signed an extradition treaty, however neither party had ratified it.⁸⁶⁴ Fearing that he might flee, Israel abducted Eichmann from Argentina.⁸⁶⁵ Eichmann contended that the court had no jurisdiction to try him as to do so would be to lend support to an illegal act of the state.⁸⁶⁶ In addressing this issue, the court referred to precedents from the US⁸⁶⁷ and the UK⁸⁶⁸ affirming the principle of *male captus bene detentus* – the circumstances of a suspect’s arrest do not compromise the jurisdiction of the trial court.⁸⁶⁹ The court further invoked the agreement reached by Argentina and Israel by which Argentina had “forgiven Israel for that violation of her sovereignty”, claiming that there no longer was a violation of international law upon which Eichmann could rely.⁸⁷⁰

The kidnapping of Dragan Nikolić from Serbia and his subsequent handover to the International Criminal Tribunal for the former Yugoslavia (ICTY) raised similar issues. Nikolić challenged the jurisdiction of the Tribunal as a result of the manner in which he was brought to the tribunal.⁸⁷¹ In addressing the issue, the Tribunal noted that the Eichmann case was a classic example of the application of the principle of *male captus bene detentus*.⁸⁷² The Trial Chamber referred to the relevant domestic case law in the US and the UK as well as other countries on the matter and found that taking into account the circumstances of the case, there was no legal impediment to the Tribunal’s exercise of jurisdiction.⁸⁷³ In its decision, the Chamber did note that

⁸⁶³ In the District Court of Jerusalem, Criminal Case No. 40/61, full text available at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf [last accessed 30 March 2016]. See also Schabas, W., ‘The Contribution of the Eichmann Trial to International Law’, (2013) 26 (3) *Leiden Journal of International Law* 667, p. 683.

⁸⁶⁴ Amnesty International, *Eichmann Supreme Court Judgment* (2012, London; Amnesty International Publications).

⁸⁶⁵ *Ibid.*

⁸⁶⁶ Schabas, W., ‘The Contribution of the Eichmann Trial to International Law’, (2013) 26 (3) *Leiden Journal of International Law* 667, p. 683.

⁸⁶⁷ *United States v. Rauscher* 119 U.S. 407 (1886); *Ker v. Illinois* 119 U.S. 436 (1886) and *Frisbie v. Collins* 342 U.S. 519, rehearing denied, 343 U.S. 937 (1952).

⁸⁶⁸ *Ex parte Susanna Scott* (1829) 9 B. &C. 446; 109 E.R. 106; *R. v. Nelson and Brand* (1867) as quoted in O’Higgins, P., ‘Unlawful Seizure and Irregular Extradition’ (1960) 36 *British Yearbook of International Law* 285; *R. v. O/C Depot Battalion, RASC Colchester Ex parte Elliott*, (1949) 1 All E.R. 373.

⁸⁶⁹ *Ibid.*, p. 684.

⁸⁷⁰ *Ibid.*, p. 684.

⁸⁷¹ *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, para. 23.

⁸⁷² *Ibid.*, para. 84.

⁸⁷³ *Ibid.*, paras. 79–94, 103–105.

national jurisdictions functioned “concurrently on an equal level” and thus it was of utmost importance that the exercise of jurisdiction under the nationality principle should be respectful of the sovereignty of other states.⁸⁷⁴

2.2. Territorial Approach to Jurisdiction and Extraordinary Renditions

If territorial prescriptive jurisdiction were applied in the context of the rendition circuits, individuals would not be able to access the necessary rights enforcement mechanisms in their circumstances. In the case of Khaled el Masri, it was established that the Former Yugoslav Republic of Macedonia (FYRM) had voluntarily handed him over to the US before he was extraordinarily rendered.⁸⁷⁵ The ECtHR has noted that his pre-flight treatment at Skopje Airport was “remarkably consistent with...the so-called “capture shock” treatment” by CIA rendition teams”.⁸⁷⁶ While he has been able to enforce his rights against the FYRM for the ill treatment suffered on FYRM territory, he has not been able to obtain redress from the US.⁸⁷⁷ In another known extraordinary rendition case Maher Arar,⁸⁷⁸ a Canadian citizen was a number of years, was eventually transferred to Syria from the US who determined that he was posing a threat to national security.⁸⁷⁹ He was detained *incommunicado* in Syria for a year; he was subjected to torture in the initial stages of his detention.⁸⁸⁰ He has similarly been unable to obtain redress from the US.⁸⁸¹

Both have contended that the inhuman treatment – involving physical and mental suffering – began in flight *en route* to their *incommunicado* detentions. Neither of their captures and subsequent transfers have however resulted in breaches of states sovereignty as the transit and sending states acted voluntarily. Thus, establishing the exact location of violatory acts on the basis of territorial prescriptive jurisdiction would prove challenging.

⁸⁷⁴ *Ibid*, para. 100.

⁸⁷⁵ Khaled el Masri (*El Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012, paras. 20–22.

⁸⁷⁶ *Ibid*, para. 22.

⁸⁷⁷ *El-Masri v. Tenet* 437 F. Supp. 2d 530 (E.D. VA. 2006).

⁸⁷⁸ Maher Arar (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services).

⁸⁷⁹ *Ibid*, p. 174.

⁸⁸⁰ *Ibid*, p. 408.

⁸⁸¹ *Arar v. Ashcroft* 414 F.Supp.2d 250 (E.D.N.Y. 2006).

The cases of Eichmann⁸⁸², Nikolić⁸⁸³ and similar could also be discussed through the prism of enforcement jurisdiction. The fundamental principle governing enforcement jurisdiction is that it cannot be employed on the territory of another state without the consent of that state.⁸⁸⁴ For the purposes of the (ir)regular transfers of individuals, one particular application of this principle is relevant – the courts of one state would not be permitted to enforce the public laws of another state.⁸⁸⁵ There is a wealth of regional and international treaties and jurisprudence addressing the extradition of individuals for the purposes of prosecution as discussed in previous chapters. There are occasions however where states do not follow extradition procedures and engage in irregular transfers such as renditions.

If state sovereignty is violated, a state could nonetheless retroactively consent to the transfer and thus not pursue the breach of sovereignty as demonstrated by the *Eichmann* case. In terms of the individuals themselves, national practice regarding the legality of a trial after an irregular transfer varies. Jurisprudence from the US suggests that violations of international agreements would not be sufficient to prevent the trial of an individual who was forcibly abducted.⁸⁸⁶ The UK courts used to follow a similar approach however in more recent cases have found that the forcible abduction of individuals in violation of established obligations might be serious enough to amount to abuse of process and prevent a trial.⁸⁸⁷

Thus, the standing of an individual who has been forcibly abducted/irregularly transferred in the context of enforcement jurisdiction is unclear. Such legal uncertainty in relation to possible violations of international legal norms including the non-derogable anti-torture norm indicates that neither territorial nor enforcement jurisdiction would provide practically effective rights enforcement for individuals. This in turn suggests that the traditional approach towards the concept of jurisdiction

⁸⁸² In the District Court of Jerusalem, Criminal Case No. 40/61, full text available at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf [last accessed 30 March 2016].

⁸⁸³ *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT.

⁸⁸⁴ Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), p. 335.

⁸⁸⁵ *Ibid*, p. 336.

⁸⁸⁶ See for example the cases of *United States v. Alvarez-Machain*, 504 US 655 (1992), *United States v. Matta-Ballesteros*, 71 F.3d 754 (1995), *United States v. Noriega*, 11th Circuit Court, Nos 92-4687 and 96-4471 (1997) and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁸⁸⁷ See further *Scott (Susannah)*, *Ex parte* (1829) 9 B. & C. 446, *Regina v. O./C. Depot Battalion, R.A.S.C. Colchester (Ex parte Elliott)*, 1 All E.R. 373 (K.B.) (1949), *Regina v. Bow Street Magistrates' Court (Ex parte Mackeson)*, 75 Crim. App. 24 (1982) and *Bennett v. Horseferry Road Magistrates' Court* [1994] 1 AC 442; [1993] 3 All ER 138 (HL).

and the at times inconsistent manner in which different jurisdictional rules have developed in international law has arguably allowed the US to engage in hyper legalism and exploit what it has identified as a 'gap' facilitating the transnational operation of the rendition circuits. In more recent times however – including shortly after 9/11 – the regional and international bodies have explored whether human rights obligations can be imposed extraterritorially on states and thus penalise violatory state behaviour. This will be the focus of the following section.

3. Extraterritorial Application of Human Rights Standards

If the principle of territoriality forms the core basis for the application of domestic laws (prescriptive jurisdiction), the expanding network of regional and international human rights treaties has developed into the primary basis for asserting extraterritorial jurisdiction.⁸⁸⁸ The various human rights treaties differ in their formulations of jurisdiction and in particular whether it is strictly territorial in its application. The texts of both Article 1 ECHR and Article 2 ICCPR use the term jurisdiction with reference to state territory.⁸⁸⁹ The potential extraterritorial application of human rights in this context engages complex legal issues and has thus tended to be contentious for states.⁸⁹⁰

The contentiousness stems from the possibility of finding a state liable for human rights violations committed outside its territorial borders. The on-going debates on the extraterritorial application of human rights treaties, which will be outlined further below, are quite illustrative of what in essence is a recurrent tension between different perspectives on human rights.⁸⁹¹ This friction is caused by the idealised visions of human rights as universal attributes which all persons enjoy by virtue of their shared humanity, and the more pragmatic views that human rights obligations are contractual

⁸⁸⁸ Evans, M. D. (ed.), *International Law*, 2nd ed., (2010, Oxford; Oxford University Press), p. 327.

⁸⁸⁹ Full text of Article 1 of the ECHR is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf; Full text of Article 2 of the ICCPR is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [both last accessed 30 March 2016].

⁸⁹⁰ Conte, A., 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) 18 (2) *Journal of Conflict and Security* 233, p. 233.

⁸⁹¹ Van Schaak, B., 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Law Studies* 20, p. 24.

undertakings binding insofar as states have expressly consented to them as a function of *pacta sunt servanda*.⁸⁹²

The evolution of the concept of extraterritoriality – the doctrinal development of which has at times been inconsistent – has contributed to this contentiousness.⁸⁹³ The relevant regional and international formulations of jurisdiction and its scope contain noteworthy differences as will be outlined in more depth further below. It is within this context that in recent years, domestic courts, regional human rights bodies and international tribunals have faced claims that a particular human rights obligation applies extraterritorially. In reaching a decision, the relevant bodies have had to take into consideration different formulations of the concept of jurisdiction. Thus, as a result a doctrinal convergence appears discernible within the more recent opinions and decisions of the various regional and international bodies.⁸⁹⁴ This will be examined in detail in the following discussion with reference to the regional jurisprudence of the ECtHR and the IACHR first and then the international approach as exemplified by the UN HRC and CAT.

Aside from being the most comprehensively developed and influential jurisprudence, the ECtHR case law is particularly illustrative of the inconsistency and fluctuations of the evolution of the concept of extraterritoriality. As such, it is arguably the most useful source of tracing the development of the scope of jurisdiction. By proxy, the ECtHR jurisprudence helps contextualise the scope of ECHR Contracting State obligations – an assessment which is relevant to analysing the liability of transit or third party states which facilitated various stages of the rendition circuits. More significantly perhaps, the recent ECtHR approach towards the extraterritorial scope of states' rights obligations is another strand of its muscular response towards violations committed within expansive counter-terrorism and military operations undertaken within the 'War on Terror' – Operation Iraqi Freedom and extraordinary renditions within HVDP in particular. The decisions in the relevant cases, to be discussed further below and in Section 4, illustrate that the ECtHR is seeking to ensure the practical

⁸⁹² *Ibid.*

⁸⁹³ See for example Lowe, V., *International Law* 2007, Oxford; Oxford University Press); Milanovic, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011, Oxford; Oxford University Press), Conte, A., 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) 18 (2) *Journal of Conflict and Security* 233 and others.

⁸⁹⁴ Van Schaak, B., 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Law Studies* 20, p. 22.

effectiveness of human rights protections even when states engage in potentially violatory behaviour beyond their borders. This being the goal of all international treaties and the relevant treaty bodies – effective (and universal) respect for human rights and freedoms⁸⁹⁵ – in combination with the existing influence of the ECtHR jurisprudence, arguably suggests that the ECtHR approach could serve as a model for other institutions such as the HRC, CAT and IACHR in respect of imposing extraterritorial obligations on states and imposing liability for violatory transnational counter-terrorism operations such as the rendition circuits.

3.1. Regional Approach to Extraterritoriality

A state will be found to owe human rights obligations extraterritorially to individuals within its authority and control if these individuals have suffered rights violations, which can be attributed to the state within this period of authority and control as will be illustrated further below. In terms of the specific rights and obligations, which can apply extraterritorially, human rights bodies appear to be increasingly adopting a calibrated approach based on the nature of the right and the degree of control a state exercises over a territory, an individual or event in question.⁸⁹⁶ As the constantly growing jurisprudence of the ECtHR provides the most thorough examination of when extraterritorial obligations may be imposed on states, it will be discussed first. At times, the approach of the ECtHR towards the imposition of extraterritorial obligations has been inconsistent – an illustration of the contentiousness referred to above. The decisions of the ECtHR have proven quite influential in the approach taken by the Inter-American Commission in cases involving the US. The discussion will further argue that in comparison the ECtHR jurisprudence, the international approach towards the extraterritorial application of rights is underdeveloped, which has resulted in the creation of exploitable areas of legal uncertainty or ‘gaps’.

⁸⁹⁵ Please refer to the Preambles of the Universal Declaration of Human Rights, the ICCPR and UNCAT.

⁸⁹⁶ *Ibid*, p. 22.

3.1.1. European Court of Human Rights

Article 1 of the ECHR provides that State Parties shall secure to everyone in their jurisdiction the rights and freedoms defined in the Convention.⁸⁹⁷ The ECtHR has developed significant and at times contested jurisprudence relating to the imposition of jurisdiction over extraterritorial activities of states where such activities are alleged to have violated the standards contained in the ECHR. In interpreting the scope of Article 1 ECHR, the court has found that acts of state authorities within the territory of the state may produce external effects, which could be attributable to the state.⁸⁹⁸ Such effects include placing an individual at real risk of violations of Article 3 rights following a transfer to foreign authorities.⁸⁹⁹ In its approach to extraterritoriality, the Court has oscillated between two models of jurisdiction: the geographical jurisdiction model as exemplified in the case of *Banković*⁹⁰⁰ and the personal jurisdiction model as illustrated in subsequent cases such as *Al-Skeini*⁹⁰¹.⁹⁰² These two models for potential extraterritorial application of rights have also been described as follows: the spatial model or jurisdiction as control over territory or an area⁹⁰³ and the personal model or jurisdiction as state authority and effective control over an individual.⁹⁰⁴

In order to illustrate how the ECtHR approach in relation to the scope of jurisdiction has oscillated, it is pertinent to briefly discuss several cases preceding *Banković*. In *Cyprus v. Turkey*, the European Commission found that Article 1 of the ECHR was not limited to national territory.⁹⁰⁵ The Commission noted that it is clear from the language and object of Article 1 and from the purposes of the Convention as a whole that Contracting States were bound to secure the Convention rights and freedoms to all persons under a state's actual authority and responsibility regardless of whether

⁸⁹⁷ Full text of the Convention is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf [last accessed on 30 March 2016].

⁸⁹⁸ *Drozd and Janousek v. France and Spain* (1992) ECHR 52.

⁸⁹⁹ *Soering v. the United Kingdom* (1989) 11 EHRR 439 and *Chahal v. the United Kingdom* (1996) 23 EHRR 413 amongst many other examples.

⁹⁰⁰ *Banković and Others v. Belgium and 16 Other States*, Application no. 52207/99 Judgment 12 December 2001.

⁹⁰¹ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, 7 July 2011.

⁹⁰² See further for a similar argument Conte, A., 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) 18 (2) *Journal of Conflict and Security* 233.

⁹⁰³ As held in the case of *Loizidou v. Turkey*, Application No. 15318/89, Judgment 23 March 1995

⁹⁰⁴ See the detailed examination in Milanovic, M., *Extraterritorial Application of Human Rights Treaties* (2011, Oxford; Oxford University Press), Chapter 4 – Models of Extraterritorial Application in particular. He has criticised both models "as neither being entirely satisfactory". (p. 119)

⁹⁰⁵ *Cyprus v. Turkey* (1975), Application No. 6780/74 and No. 6950/75, 2 D. & R. 125, p. 136.

that authority is exercised within state territory or abroad.⁹⁰⁶ The Commission further noted that authorised agents of a state including diplomatic or consular agents and armed forces not only remain under state jurisdiction abroad but they also bring individuals or property within the jurisdiction of the state to the extent that they exercise authority over such an individual or property.⁹⁰⁷ Insofar as acts or omissions of authorised agents affect individuals or property under their authority, the responsibility of a state would be engaged.⁹⁰⁸ Thus, obligations would be imposed on a state, which during the exercise of control over persons or property, negatively impacted on the enjoyment of individual rights.

In *Drozd and Janousek v. France and Spain*, the ECtHR expressly approved the above Commission decision by noting that the term jurisdiction is not limited to the national territory of a Contracting State Party – state responsibility could be involved due to acts of state authority producing effects outside a state’s own territory.⁹⁰⁹ While the ECtHR did not elaborate further on this point, it did find that the applicants had not come under the jurisdiction of either France or Spain within the meaning of Article 1 due to their conviction by an Andorran court. The Court found that while judges from France and Spain sat as members of Andorran courts, they did not do so in their capacity as either French or Spanish judges.⁹¹⁰ Further, the judgments of the Andorran courts and in particular the Tribunal de Corts exercised their functions autonomously. Thus, Drozd and Janousek’s trial had not been under the control of France and Spain and their rights had not been impacted by activities which could be attributed officials of these two states.

In *Loizidou v. Turkey*, the applicant argued that Turkish forces in Kyrenia, Northern Cyprus were preventing her from returning to Kyrenia and from peaceful enjoyment of her property.⁹¹¹ Turkey contested jurisdiction arguing that the applicant’s complaint stemmed from acts of the local administration, the Turkish Republic of Northern Cyprus (TRNC).⁹¹² The Court noted that its decision on the issue of jurisdiction was limited to determining whether the matters complained of by the

⁹⁰⁶ *Ibid*, p. 136.

⁹⁰⁷ *Ibid*, p. 136.

⁹⁰⁸ *Ibid*, p. 136.

⁹⁰⁹ *Drozd and Janousek v. France and Spain*, Application No. 12747/87, Judgment 26 June 1992, para. 91.

⁹¹⁰ *Ibid*, para. 96.

⁹¹¹ *Loizidou v. Turkey*, Application No. 15318/89, Judgment 23 March 1995, para. 11.

⁹¹² *Ibid*, para. 36.

applicant are capable of falling within the jurisdiction of Turkey even though they occurred outside Turkish national territory.⁹¹³ The Court then proceeded to outline two bases for extraterritorial jurisdiction based on its existing jurisprudence: (1) extradition or expulsion scenarios,⁹¹⁴ and (2) circumstances in which state responsibility was engaged due to acts of state agents within or outside national borders which acts produced effects outside state territory.⁹¹⁵

The Court did not however limit itself to simply restating its previous position that the concept of jurisdiction under Article 1 is not restricted to the national territory of a Contracting State Party. It further noted that taking into consideration the object and purpose of the Convention, where a state exercises lawful or unlawful effective control over an area outside its national territory as a consequence of military action, extraterritorial jurisdiction could arise.⁹¹⁶ The obligation to secure Convention rights and freedoms stemmed from such effective control exercised either directly, through armed forces or through subordinate local administration.⁹¹⁷ Turkey had acknowledged that the applicant's loss of control over her property was a consequence of the occupation of the northern part of Cyprus by Turkish troops and the establishment of the TRNC. In the circumstances of the case, the Court found the acts complained of were capable of falling within Turkish jurisdiction within the meaning of Article 1 of the ECHR.⁹¹⁸ In reaching this conclusion, the ECtHR referred to "the large number of troops engaged in active duties", which exercised effective overall control over Northern Cyprus.⁹¹⁹ Thus, according to the Court, those affected by the resulting policies and actions would come under the jurisdiction of Turkey for the purposes of Article 1 ECHR.⁹²⁰

In *Banković*, the Court stated that the underlying principles of the Convention could not be interpreted in a vacuum and thus it was necessary for the Court to take into

⁹¹³ *Ibid*, para. 61.

⁹¹⁴ *Soering v. the United Kingdom* (1989) 11 EHRR 439 and *Cruz Varas and Others v. Sweden* (1992) 14 EHRR 1 were two cases which the Court expressly referred to as sources of this type of extraterritorial jurisdiction.

⁹¹⁵ *Drozđ and Janousek v. France and Spain*, Application No. 12747/87, Judgment 26 June 1992 was explicitly mentioned by the Court in para. 62.

⁹¹⁶ *Loizidou v. Turkey*, Application No. 15318/89, Judgment 23 March 1995, para. 52

⁹¹⁷ *Ibid*, para. 52.

⁹¹⁸ *Ibid*.

⁹¹⁹ *Ibid*, para. 56.

⁹²⁰ *Ibid*.

account the relevant applicable principles of international law.⁹²¹ From the standpoint of public international law, extraterritorial bases⁹²² for the application of jurisdiction exist however jurisdictional competence is primarily territorial. In this context, Article 1 of the ECHR had to be interpreted to reflect “this ordinary and essentially territorial notion of jurisdiction”.⁹²³ Other (extraterritorial) bases for jurisdiction were found to be exceptional and requiring special justification in the particular circumstances of each case.⁹²⁴ Citing the *Soering*⁹²⁵ case, the Court noted that Article 1 set a territorial limit on the reach of the Convention thus the engagement undertaken by a state was confined to securing rights and freedoms to individuals within its own jurisdiction.⁹²⁶ The Court added that it was inclined to agree with the Turkish government’s submission that the text of Article 1 did not accommodate an ‘effective control’ approach towards jurisdiction. The Court stated that the ECHR was a multi-lateral treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of contracting states.⁹²⁷ As a corollary, the Convention was not intended to be a means of requiring states to impose standards on states not party to the Convention.

The Court further engaged in a narrow interpretation of its previous jurisprudence relating to extraterritorial application of the ECHR. In referring to the *Soering* and *Cruz Varas*⁹²⁸ decisions, liability was found to incur based on state’s actions within its territorial jurisdiction. In relation to the case of *Loizidou v. Turkey*,⁹²⁹ the Court noted that it was not necessary to determine whether Turkey actually exercised control over the policies and actions of the authorities of the Turkish Republic of Northern Cyprus (TRNC) – this was “obvious from the large number of troops engaged in active duties in Northern Cyprus” as discussed above.⁹³⁰ Thus, extraterritorial jurisdiction was only

⁹²¹ *Banković and Others v. Belgium and 16 Other States*, Application No 52207/99 Judgment 12 December 2001, para. 57.

⁹²² The Court here referred to “nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality” however went on to note in a subsequent paragraph that “a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence (paras. 59–60).

⁹²³ *Ibid*, para. 61.

⁹²⁴ *Ibid*, para. 61.

⁹²⁵ *Soering v. the United Kingdom* (1989) 11 EHRR 439.

⁹²⁶ *Ibid*, para. 66.

⁹²⁷ *Ibid*, para. 80.

⁹²⁸ *Cruz Varas and Others v. Sweden* (1992) 14 EHRR 1 which expanded the *Soering* case principle to expulsion and deportation;

⁹²⁹ *Case of Loizidou v. Turkey (Preliminary Objections)*, Application No 15318/89 Judgment 23 March 1995.

⁹³⁰ *Ibid*, para. 70.

applicable in circumstances where through the effective control over the relevant foreign territory and its inhabitants as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, a state exercises all or some of the public powers normally exercised by a government.⁹³¹

In the context of the ‘War on Terror’, it is relevant to note that *Banković* was decided after 9/11 and shortly after the initiation of Operation Enduring Freedom, which arguably may have heightened the ECtHR’s sensitivity towards assigning extraterritorial human rights obligations in military operations/armed conflict circumstances.⁹³² This point is of particular relevance to the Court’s notion of *espace juridique*. The lack of explanation of the concept by the Court has sparked much criticism and the following argument has been raised to challenge it – as human rights are intended to be universal in their nature, the regional basis of the ECHR should not be pertinent to extraterritoriality.⁹³³ Further, the Court’s suggestion that the ECHR is applicable as one whole is not reflective of the ECHR divisible content in practice i.e. individual application and enforcement of rights protections.⁹³⁴ In its application of the law to the facts of *Banković*, the ECtHR did not address either implicitly or explicitly whether the bombing involved the use of powers normally exercised by a local government.⁹³⁵ In other words, the ECtHR did not discuss whether the exercise of public governmental powers was part of the test for the application of extraterritoriality.⁹³⁶ As such, the decision in the case has been accused of being

⁹³¹ *Ibid.*, para. 71.

⁹³² Please see Van Schaak, B., ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change’, (2014) 90 *International Law Studies* 20, p. 43. This view is also supported by Marko Milanovic in Milanovic, M., ‘*Al-Skeini* and *Al-Jedda* in Strasbourg’ (2012) 23 (1) *European Journal of International Law* 121, p. 123. In a speech given on 31 January 2002, the President of the ECtHR, Mr Luzius Wildhaber noted that the ECHR should not be applied in a manner which prevents states from taking reasonable and proportionate action to defend democracy and the rule of law – European Court of Human Rights, *Annual Report 2001*, (2002, Strasbourg; Registry of the European Court of Human Rights), p. 20.

⁹³³ Milanovic, M., ‘*Al-Skeini* and *Al-Jedda* in Strasbourg’ (2012) 23 (1) *European Journal of International Law* 121, p. 129.

⁹³⁴ Conte, A., ‘Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?’ (2013) 18 (2) *Journal of Conflict and Security* 233, p. 244.

⁹³⁵ Wilde, R., ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’ (2007) 40 (2) *Israeli Law Review* 503, p. 516.

⁹³⁶ *Ibid.*

opportunistic and arbitrary.⁹³⁷ In addition the case has been criticised on the basis of creating a legal vacuum – while citizens of ECHR Contracting States are afforded high standards of human rights protections, individuals living outside such Contracting States are denied access to justice for severe violations or omissions directly attributable to ECHR Contracting Parties.⁹³⁸ This is thus a highly problematic decision as it could be read by states as providing a “green light to commit human rights violations outside of Europe”.⁹³⁹ While this may be an overstatement, the decision in the case is not consistent with the core purposes of the ECHR or the divisible operation of its rights protections in practice.

In the subsequent case of *Öcalan v. Turkey*,⁹⁴⁰ the applicant had been arrested by Kenyan officials and was subsequently handed over to members of the Turkish security service who then returned him to Turkey. The Court found that Öcalan was physically forced to return to Turkey by Turkish officials and thus had been subject to their authority and control in Nairobi Airport and in transit. This sequence of events was sufficient to establish jurisdiction. The Court found that the applicant had been brought under the jurisdiction of Turkey as soon as he was handed over to the Turkish officials.⁹⁴¹

In *Issa and Others v. Turkey*,⁹⁴² the Court noted that a state might be held accountable for violations of the Convention rights of persons who were under its authority and control through agents operating in the territory of another state.⁹⁴³ On the facts of this case however, the Court found that despite the large number of troops involved in the military operation in question, Turkey did not exercise effective overall control of the entire area of Northern Iraq. The Court further noted that it had not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question and in particular that the victims were there at that time.⁹⁴⁴

⁹³⁷ Tzevelekos, V., ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2014) 36 *Michigan Journal of International Law* 129, p. 149.

⁹³⁸ *Ibid*, p. 149

⁹³⁹ *Ibid*, p. 149.

⁹⁴⁰ (2003) ECHR 125.

⁹⁴¹ *Ibid*, paras. 91–93.

⁹⁴² Application no. 31821/96 Judgment 16 November 2004. Six Iraqi nationals acting on their own behalf and on behalf of deceased relatives alleged unlawful arrest, detention, ill treatment and the subsequent killing of their relatives in the course of a military operation conducted by Turkey in northern Iraq in April 1995.

⁹⁴³ *Ibid*, para. 71.

⁹⁴⁴ *Ibid*, paras. 81–82.

The *Banković* test was applied in both of the above cases. In *Öcalan*, the Court (First Section) noted that the circumstances in the case were quite distinguishable from the facts of *Banković* as the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return.⁹⁴⁵ In *Issa*, the Court (Second Section) noted that from the standpoint of public international law, the scope of Article 1 should be understood to indicate that a state's jurisdictional competence is primarily territorial and *Banković* was an illustration of this principle.⁹⁴⁶ However, the Court further stated that Article 1 is not necessarily restricted to national territory and restated the *Loizidou* case with reference to the extraterritorial application of rights based on a state's effective control of an area.

Effective control of an individual through state agents operating abroad would also result in extraterritorial imposition of obligations under Article 1.⁹⁴⁷ Quite significantly, the Court noted that the ECHR could not be interpreted in a manner, which would allow a state to commit such violations on the territory of another state, that it could not perpetrate on its own territory.⁹⁴⁸ In *Medvedyev v. France*, the Court appeared to further distinguish *Banković* on its facts by noting that situations involving an "instantaneous extraterritorial act" as in *Banković* would not fall under the recognised bases for extraterritoriality.⁹⁴⁹ The rationale for this exclusion was that the provisions of Article 1 do not permit a "cause and effect" interpretation of jurisdiction.⁹⁵⁰ On the facts of the case, the Court decided that France had, at least *de facto*, exercised full and exclusive control over the ship in question and its crew from the moment of the ship's inception in a continuous and uninterrupted manner and thus the applicants were effectively under French jurisdiction for the purposes of Article 1.⁹⁵¹ The judgments in these cases appear to have revitalised the effective control test for extraterritoriality and limited the impact of the *Banković* decision to its facts.⁹⁵² Thus, the judgment in *Al-Skeini* is arguably the next substantial phase in the evolving ECtHR's approach on the extraterritorial application of rights.

⁹⁴⁵ *Öcalan v. Turkey* (2003) 37 EHRR 10, para. 91.

⁹⁴⁶ *Issa and Others v. Turkey*, Application no. 31821/96, Judgment 16 November 2004, para. 67.

⁹⁴⁷ *Ibid*, para. 71.

⁹⁴⁸ *Ibid*, para. 71.

⁹⁴⁹ *Medvedyev v. France*, Application 3394/03, Judgment 29 March 2010, para. 64.

⁹⁵⁰ *Ibid*, para. 64.

⁹⁵¹ *Ibid*, para. 67.

⁹⁵² Van Schaak, B., 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Law Studies* 20, p. 44.

The scope of the potential extraterritorial application of the ECHR, was a central aspect in the UK High Court's judgment in *R. (On the Application of Mazin Jumaa Gatteh Al-Skeini and Others) v. Secretary of State for Defence*.⁹⁵³ The UK High Court found that the concept of jurisdiction under Article 1 ECHR did not extend to a broad, worldwide extra-territorial personal jurisdiction, which arises from the exercise of authority by state agents anywhere in the world.⁹⁵⁴ Extra-territorial jurisdiction under Article 1, the Court noted, was exceptional and limited to the specific cases recognised in international law.⁹⁵⁵ Although the claims of the first five applicants failed, the Court reached a different decision on the claim of the sixth applicant – Baha Mousa. Mr Mousa died while in custody in a British military base in the province of Basra in Iraq. The Court found that his detention in British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities and containing arrested suspects, fell within the narrow scope of extraterritorial jurisdiction and in particular the exception relating to embassies, consulates vessels and aircrafts. This judgment was affirmed in the Court of Appeal. The House of Lords (HoL) upheld the decision and also found that of the six applicants, only Baha Mousa was under the jurisdiction of the UK.⁹⁵⁶ The HoL noted that finding extraterritorial jurisdiction in relation to the other five applicants, would amount to 'human rights imperialism' through the application of European human rights standards in a non-European country.⁹⁵⁷

The ECtHR, unanimously, reached a different decision than the HoL. The Court reiterated *Banković* in stating that a state's jurisdictional competence under Article 1 ECHR was primarily territorial; only in exceptional circumstances the acts of states or effects of such acts outside the territory of a state could be found to constitute an exercise of jurisdiction under Article 1.⁹⁵⁸ The Court further noted that its previous

⁹⁵³ [2004] EWHC 2911 (Admin), [2004] WLR 1401. The case examined the claims of the relatives of 6 Iraqi citizens who had died in Iraq at a time and within the geographical areas where the United Kingdom was recognized as the occupying power. Five of them had been killed in incidents with British troops; the sixth applicant died with in the custody of British troops in a military prison.

⁹⁵⁴ [2004] EWHC 2911 (Admin), [2004] WLR 1401, [269].

⁹⁵⁵ *Ibid*. The exceptional circumstances included alleged violations which have occurred due to the exercise of state authority in or from a location which has a form of "discrete quasi-territorial quality" or where the state agent's presence in a foreign state has been consented to by that state and is protected by international law – diplomatic or consular premises, vessels or air-crafts registered to the state. (para. 270) .

⁹⁵⁶ *Al-Skeini and Others v. the Secretary of State for Defence* [2007] UKHL 26.

⁹⁵⁷ *Ibid* [76] – [79].

⁹⁵⁸ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, 7 July 2011, paras. 130–131.

jurisprudence demonstrated that in certain circumstances, the use of force by a state's agents operating outside its territory might bring an individual under the state's control thus leading to Convention obligations under Article 1.⁹⁵⁹ The Court then turned to the general principles relevant to jurisdiction under Article 1: the territorial principle, state agent authority and control, the effective control over an area, the Convention's legal space. In addressing the territoriality principle, the Court noted that in its case law it has recognised a number of exceptional circumstances allowing the exercise of extraterritorial jurisdiction.⁹⁶⁰ In each case, the decision as to whether a state was exercising extra-territorial jurisdiction must be determined with reference to the particular circumstances.

Following an examination of its own case law, the ECtHR found that it was clear that whenever a state exercised control and authority through its agents over an individual thus resulting in an individual being under a state's jurisdiction, the state was under an obligation under Article 1 to apply the relevant ECHR rights to that individual.⁹⁶¹ In determining whether effective control exists, the Court stated that it would assess the strength of the military presence in an area.⁹⁶² Further factors could be relevant, such as the extent to which military, economic and political support for a local subordinate administration provided a state with influence and control over a region. In relation to the Convention's legal space, the Court emphasised that where the territory of one Convention state occupied by the armed forces of another, the occupying state should in principle be held accountable for human rights violations occurring within the occupied territory.⁹⁶³ To hold otherwise and deprive a population of Convention rights and freedoms would, it was claimed, create a "vacuum of protection within the Convention legal space".⁹⁶⁴

The significance of establishing the occupying state's jurisdiction in such circumstances however did not imply that jurisdiction under Article 1 of the ECHR can never exist outside the territory covered by the Council of Europe member states.⁹⁶⁵ In the particular circumstances of the case, the UK had assumed authority

⁹⁵⁹ *Ibid*, para. 136.

⁹⁶⁰ *Ibid*, para. 131–132.

⁹⁶¹ *Ibid*, para. 137.

⁹⁶² *Ibid*, para. 139.

⁹⁶³ *Ibid*, para. 142.

⁹⁶⁴ *Ibid*, para. 142. The court was quoting both the *Case of Loizidou v. Turkey (Preliminary Objections)*, Application No 15318/89 Judgment 23 March 1995 and *Banković and Others v. Belgium and 16 Other States*, Application No 52207/99 Judgment 12 December 2001.

⁹⁶⁵ *Ibid*, para. 142.

and responsibility for the maintenance of security in Southeast Iraq. The ECtHR found that the UK, through its soldiers engaged in a security operation during the time in question, had exercised authority and control over the six individuals killed in the course of such operations. The authority and control was sufficient to establish a jurisdictional link between the deceased and the UK for the purposes of Article 1 ECHR.⁹⁶⁶

Conte has argued that the ECtHR applied a hybrid personal-geographical model of jurisdiction in this case by treating the engagement of British soldiers in security operations as an exercise of authority and control over individuals without adjudicating on whether British forces had actual control over the region in question.⁹⁶⁷ The deceased individuals were treated as being in the jurisdiction of the UK because the British soldiers were exercising authority and control through the acts in question and as a result of the exercise of public powers – overall effective control of an area was not required.⁹⁶⁸ The significance of this decision cannot be understated. It denotes a new approach to the interpretation of the concept of jurisdiction under Article 1 ECHR. More importantly, spatial jurisdiction, which in *Banković* was found to be based on control exercised over buildings, aircraft or ships, is now also based on the exercise of physical power and control over the person in question.⁹⁶⁹ From the perspective of effective transnational human rights protections, the *Al-Skeini* judgment appears to allow for a model of greater accountability for extraterritorial conduct resulting in violations. Such an approach towards the application of jurisdiction is particularly relevant to extraordinary rendition. During an extraordinary rendition, an individual is under the effective control and physical authority of the so-called “rendition teams”,⁹⁷⁰ which the authorising state has tasked with supervising and completing the transfer to the chosen detention facility. After a rendition, an individual is under the control and authority of the state or state agents who administer and supervise the relevant detention facility. Under a personal jurisdiction model such as this one, a rendee could potentially invoke the extraterritorial

⁹⁶⁶ *Ibid*, para. 149.

⁹⁶⁷ Conte, A., ‘Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?’ (2013) 18 (2) *Journal of Conflict and Security Law* 233, p. 249.

⁹⁶⁸ *Ibid*.

⁹⁶⁹ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, 7 July 2011.

⁹⁷⁰ See a detailed outline in Khaled el Masri (*El Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012, paras. 20–22.

application of Convention rights both in the context of the transfer itself and the subsequent detention.

The case of *Al-Jedda v. the United Kingdom*⁹⁷¹ was decided on the same day as *Al-Skeini*. The applicant in this case, a dual British and Iraqi citizen, was detained in a facility in Basra City in Iraq for suspected terrorist activity in October 2004. During his three-year internment, he had not been charged with any offence. His internment “for imperative reasons of security” was initially authorised by the senior officer in the detention facility.⁹⁷² Reviews were conducted regularly by the Divisional Internment Review Committee, which included both UK and non-UK personnel. In June 2005, he brought a judicial review claim in the UK challenging the lawfulness of his continued detention and the refusal of the Secretary of State for Defence (SSD) to return him to the UK.⁹⁷³ The SSD accepted that the applicant’s detention within a British military facility brought him under the jurisdiction of the UK under Article 1 of the ECHR and that the detention did not fall within any of the permitted scenarios outlined in Article 5(1) ECHR. However, the SSD contended that Article 5 of the ECHR did not actually apply to Mr Al-Jedda as his detention was authorised by UN Security Council (UNSC) Resolution 1546 and as a matter of international law, the effect of the Resolution was to displace Article 5(1).⁹⁷⁴

Domestically, the HoL rejected Al-Jedda’s challenge to the lawfulness of his detention.⁹⁷⁵ One of the central issues in the case was the relationship between Article 5(1) ECHR and Article 103 of the UN Charter⁹⁷⁶. The HoL held that Article 103 UN Charter gave primacy to the UNSC Resolution 1546. As the detention was an action covered by this Resolution, the HoL found that the ECHR would not be interpreted in a manner that would subject the detention to scrutiny.⁹⁷⁷ Thus, a complaint by Mr Al-Jedda alleging violation of Article 5(1) ECHR would be held incompatible *ratione personae* with ECHR provisions.

⁹⁷¹ *Al-Jedda v. the United Kingdom*, Application no. 27021/08, Judgment 7 July 2011.

⁹⁷² *Ibid.*

⁹⁷³ *Ibid*, para. 16.

⁹⁷⁴ *Ibid.* Full text of UN Security Council Resolution 1546 is available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> [last accessed 30 March 2016].

⁹⁷⁵ *R. (on the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58.

⁹⁷⁶ Article 103 of the UN Charter states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Available at <http://www.un.org/en/sections/un-charter/chapter-xvi/index.html> [last accessed 30 March 2016].

⁹⁷⁷ *Ibid* [111].

The ECtHR upheld the complaint of Mr Al-Jedda.⁹⁷⁸ The Court noted that under Article 1 ECHR, the exercise of jurisdiction was a necessary condition to hold a Contracting State responsible for infringements of Convention rights.⁹⁷⁹ The Court stated that the detention had taken place within a facility under the exclusive control of British forces. Thus, Mr Al-Jedda was within the authority and control of the UK throughout. The decision to detain Mr Al-Jedda was made by a British officer who was in command of the facility. The existence of detention reviews committees, which included Iraqi officials and non-UK representatives, did not prevent the detention from being attributable to the UK. The ECtHR found that during the period of detention, Mr Al-Jedda fell within the jurisdiction of the UK for the purposes of Article 1 ECHR.⁹⁸⁰ The Court further found that neither Resolution 1546 nor any other UN Security Council Resolutions had either explicitly or implicitly required the UK to place an individual into indefinite detention without charge. Thus, in the absence of a binding obligation to use detention, the provisions of Article 5(1) were not displaced and the grounds for detention under Article 5 were inapplicable.⁹⁸¹

The recent jurisprudence of the ECtHR suggests that, in principle, it currently recognises extraterritorial jurisdiction in two scenarios. One is spatial jurisdiction, which arises in circumstances where a state exercises effective control over a foreign territory as noted in cases such as *Banković*. The second one – personal jurisdiction arises in circumstances where a state exercises authority and control over an individual. Following the decisions in the cases of *Al-Skeini* and *Al-Jedda* it would have been reasonable to hope that perhaps the question of extraterritorial jurisdiction has become more settled.

In the more recent case of *Jaloud v. the Netherlands*,⁹⁸² the ECtHR has had to assess again the extraterritorial application of the ECHR. Azhar Sabah Jaloud was a front seat passenger of a car, which failed to stop at a checkpoint in south-eastern Iraq. A Dutch lieutenant fired a number of shots at the car injuring Mr Jaloud who later died of his injuries. Both the Netherlands and the UK, as a third party intervener, presented arguments that Mr Jaloud was not within the jurisdiction of the Netherlands when he was shot. According to the Netherlands and the UK, personal jurisdiction arose only

⁹⁷⁸ *Al-Jedda v. the United Kingdom*, Application no. 27021/08, Judgment 7 July 2011.

⁹⁷⁹ *Ibid*, para. 74.

⁹⁸⁰ *Ibid*, paras. 84–86.

⁹⁸¹ *Ibid*, paras. 101–102, 105, 109–110.

⁹⁸² Application no. 47708/08, Judgment 20 November 2014.

when a state had detained or captured an individual thus personal jurisdiction should not apply where an individual was shot. These submissions echo the arguments raised in the *Banković* case, specifically the arguments against a “cause-and-effect type of responsibility”,⁹⁸³ which the ECtHR accepted.⁹⁸⁴

Both states argued that extra-territorial jurisdiction should continue to be exceptional and restricted to very limited circumstances.⁹⁸⁵ The UK noted that it was only found to have jurisdiction in the case of *Al-Skeini* due to the unique circumstances of the case. The circumstances around Mr Jaloud’s death were thus to be distinguished on several grounds. The Netherlands had fewer troops deployed and these troops were under the operational command of the occupying powers. The US and the UK were designated as “occupying powers” by UN Security Council Resolution 1483 and thus authority lay with either or both.⁹⁸⁶ The role and mandate of the Dutch forces was more limited than the UK: the Dutch troops had no powers of arrest or detention and no role in governing Iraq. Both states argued that the Netherlands did not exercise public powers in a manner similar to the UK within the *Al-Skeini* context thus no jurisdiction arose.⁹⁸⁷

The ECtHR noted that in establishing jurisdiction under the ECHR, it would assess the particular factual context and the relevant rules of international law.⁹⁸⁸ The Court found that the status of “occupying power” within the meaning of Article 42 of the Hague Regulations⁹⁸⁹ was not *per se* determinative. Further, the execution of a decision or an order given by an authority of a foreign state was not in itself sufficient to relieve a Contracting State of its ECHR obligations. The Netherlands, solely by accepting the operational control of an occupying power, had not divested of its jurisdiction under Article 1 of the ECHR.⁹⁹⁰ The ECtHR noted that the Netherlands had retained full command over its military personnel. Although Dutch troops were stationed in an area in south-eastern Iraq under the command of a UK officer, the

⁹⁸³ *Banković and Others v. Belgium and Others*, Application no. 52207/99, para. 40.

⁹⁸⁴ The court noted that that applicants’ submission was tantamount to arguing that anyone adversely affected by an act of a contracting state anywhere in the world, would thereby be brought within the jurisdiction of that state under Article 1 ECHR. The court was thus inclined to agree with the government submissions that that text of Article 1 ECHR did not accommodate such an approach to jurisdiction (*Banković and Others v. Belgium and Others*, Application no. 52207/99, para. 75).

⁹⁸⁵ *Ibid*, paras. 112–118, 121–123.

⁹⁸⁶ *Ibid*, para. 140.

⁹⁸⁷ *Ibid*.

⁹⁸⁸ *Ibid*, para. 141.

⁹⁸⁹ Full text available at <https://www.icrc.org/ihl/WebART/195-200052?OpenDocument> [last accessed on 30 March 2016].

⁹⁹⁰ *Ibid*, para. 143.

Netherlands assumed responsibility for providing security in that area to the exclusion of other participating states and retained full command over its contingent. Further, it was not decisive that Iraqi Civil Defence Corps personnel nominally manned the checkpoints.

The ECtHR found that the Dutch troops were not placed “at the disposal” of any foreign power such as the UK and were not under “the exclusive direction or control” of any other state.⁹⁹¹ Personnel under the command and direct supervision of a Netherlands Royal Army Officer manned the checkpoint in question.⁹⁹² The ECtHR was thus satisfied that the Netherlands exercised jurisdiction within the limits of its mission and for the purpose of asserting authority and control over persons passing through the checkpoint. Thus, the death of Mr Jaloud had occurred within the jurisdiction of the Netherlands within the meaning of Article 1 of the ECHR. The ECtHR did add that it had not been asked to establish whether the UK might have exercised “concurrent” jurisdiction suggesting that perhaps in circumstances similar to this case in the future it may engage in such examination.⁹⁹³

With its reasoning in this case, the ECtHR appears to have increased the possibility for the ECHR to apply extraterritorially through the personal jurisdiction model. The Court reaffirmed its decision in the *Al-Skeini*⁹⁹⁴ case in respect of assumed control over a geographic area through the deployment of soldiers engaged in security operations in this particular area. The Court additionally focused on the supervision of the checkpoint in question – an arguably much narrower yet more mobile potential sphere of jurisdiction – without however expanding comprehensively on its reasoning. The decision of the Court thus suggests that jurisdiction was imposed on the Netherlands because Mr Jaloud came within the specific Dutch authority and control established at the checkpoint itself rather than just on the basis of a broader geographical area over which a state has assumed authority such as in *Al-Skeini*.

Overall, the approach of the ECtHR, especially in more recent cases, indicates that the Court is becoming more willing to rely on the personal or effective control jurisdiction model. The ECtHR, as noted above, is the main regime where questions relating to extraterritoriality arise and as such it is a valuable reference source for both

⁹⁹¹ *Ibid*, para. 151.

⁹⁹² *Ibid*, para. 152.

⁹⁹³ *Ibid*, para. 153.

⁹⁹⁴ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, 7 July 2011, para.149 in particular.

ECHR Contracting Parties and other human rights institutions.⁹⁹⁵ Its comprehensive and meticulous analysis on the scope of the concept of jurisdiction and in particular the extraterritorial obligations states may have through the personal or effective control model can thus have broader value and pertinence for different regional and international human rights regimes. As Section 3.1.2 will illustrate, the jurisprudence of the Inter-American system has been increasingly relying on the personal model of jurisdiction.

More importantly however, cases of the ECtHR have been referenced, analysed and utilised by the IACHR in reaching its decisions. In two of these cases involving the US, one concerning *incommunicado* detention, the IACHR expressly noted that a state could be held in violation of human rights obligations by subjecting an individual to violatory acts in another jurisdiction; furthermore the Commission found that a state has an obligation to respect the rights of a person who is within the authority and control of a state or state agents abroad. The existing albeit limited jurisprudence of the IACHR thus appears to follow closely the more comprehensive and established ECtHR case law. The IACHR jurisprudence to date also suggest that an extraordinary rendition being used as a means of outsourcing torture, severely limiting individual human rights protections and resulting in *incommunicado* detention will be found to be in violation of state obligations.

3.1.2. *The Inter-American System*

The American Convention on Human Rights⁹⁹⁶ (American Convention) and the American Declaration on the Rights and Duties of Man⁹⁹⁷ (American Declaration) have been the main focus of the Inter-American jurisprudence on extraterritoriality. Article II of the American Declaration protects the equality of all persons before the law as well as their rights and duties as stated in the Declaration. However, as noted

⁹⁹⁵ Tzevelekos, V., 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 *Michigan Journal of International Law* 129.

⁹⁹⁶ Full text available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm [last accessed on 30 March 2016].

⁹⁹⁷ The Declaration was adopted in 1948, six months prior to the adoption of the Universal Declaration of Human Rights. Full text available at <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp> [last accessed on 30 March 2016].

in the *Banković* case, it “contains no explicit limitation on jurisdiction”.⁹⁹⁸ Article 1 of the American Convention, does include a jurisdictional condition similar to Article 1 of the ECHR namely that state parties are to respect and protect the rights and freedoms of all individuals subject to their jurisdiction.⁹⁹⁹

While the American Declaration is a non-legally binding instrument, it was the only regional human rights instrument in existence when the Inter-American Commission¹⁰⁰⁰ (the Commission) was established. After it was granted authority in 1965 to examine and decide on individual petitions alleging human rights violations, the Commission began applying the Declaration to all member states of the Organisation of American States (OAS).¹⁰⁰¹ This is significant as regards to the US, which has not ratified the American Convention but is considered to be subject to the American Declaration. While the US is yet to recognise the jurisdiction of the Inter-American Court of Human Rights, the Commission has mandatory quasi-adjudicatory jurisdiction over the US compliance with the American Declaration.¹⁰⁰² Prior to 9/11, the Commission dealt with several petitions against US operations in Haiti and Grenada that raised questions of extraterritoriality.

*Haitian Centre for Human Rights v. the United States*¹⁰⁰³ related to the attempts by the US to prevent fleeing Haitians from landing on US shores and thus acquiring certain procedural rights to apply for asylum. The US noted that the issue for consideration here was whether the US had violated articles of the American Declaration by interdicting Haitian nationals on the high seas and repatriating them to Haiti. The US rejected the contention that the American Declaration had acquired legally binding force by virtue of US membership of the OAS and ratification of the Charter of OAS. As the Declaration was not a treaty, it had not acquired binding legal force according to the US. The Commission found the US in violation of multiple provisions of the Declaration. It concluded that through the processes of interdiction

⁹⁹⁸ *Banković and Others v. Belgium and 16 Other States*, Application No 52207/99 Judgment 12 December 2001, para. 78.

⁹⁹⁹ Article 1(2) of the American Convention specifically limits the obligation of states to ‘human beings’ rather than legal persons (ECHR).

¹⁰⁰⁰ The Commission’s mandate is the promotion and protection of human rights in the American hemisphere. It was created by the Organisation of American States in 1959.

¹⁰⁰¹ Cerna, C., ‘Extraterritorial Application of the Human Rights Instruments of the Inter-American System’ in Coomans, F., and Kamminga, M. T., (ed.) *Extraterritorial Application of Human Rights Treaties* (2004, Oxford; Hart Publishing), p. 141.

¹⁰⁰² Van Schaak, B., ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change’, (2014) 90 *International Law Studies* 20, p. 53.

¹⁰⁰³ IACHR Report No. 51/96, Case No. 10.675, Ann. Rep. IACHR 1996.

and repatriation, the US was exposing the Haitian refugees to genuine and foreseeable risk of death in violation of Article 1. The Commission referred to the *Soering*¹⁰⁰⁴ case in noting that a state can be held in violation of human rights obligations by subjecting an individual to violatory acts in another jurisdiction.

In *Coard et al. v. the United States*,¹⁰⁰⁵ the seventeen petitioners alleged to have been detained *incommunicado* for a number of days by US forces in Grenada, mistreated and deprived of their right to fair trial in violation of both the American Declaration and the applicable international norms. The extraterritorial application of the American Declaration was not raised as an issue by either party. The Commission nonetheless noted that under certain circumstances the exercise of extraterritorial jurisdiction would be both consistent and required by the norms, which pertain.¹⁰⁰⁶ It stated further that as the rights in question were inherent by virtue of a person's humanity, the US was obliged to uphold the protected rights of any person subject to its jurisdiction.¹⁰⁰⁷ While this was mostly applicable to a person within a state's territory (spatial jurisdiction), the Commission noted that in certain circumstances this obligation could also be applicable to a person who is within the authority and control of a state or state agents abroad (extraterritorial jurisdiction).¹⁰⁰⁸

In *Armando Alejandro and Others v. Cuba*¹⁰⁰⁹ the Commission found that under the terms of its *ratione loci*, it is competent to decide on human rights violations that occur within the territory of OAS member states regardless of whether or not they are party to the American Convention. While making its assessment, the Commission referred to the decision in *Loizidou v. Turkey* and the reasoning employed by the ECtHR in this case.¹⁰¹⁰ It further reaffirmed that in certain circumstances it has competency to consider reports that agents of an OAS member state have violated human rights protected in the Inter-American system outside the territory of that state.

¹⁰⁰⁴ *Soering v. the United Kingdom* (1989) 11 EHRR 439.

¹⁰⁰⁵ Case 10.951, Inter-American Commission on Human Rights Report No. 109/99, OEA/Ser.L/V/II.106 doc. 6 rev (1999). Following the violent overthrow of the Grenadian governing administration including the murder of the Prime Minister – Maurice Bishop, United States and Caribbean armed forces invaded Grenada on 25 October 1983, deposing the revolutionary government.

¹⁰⁰⁶ *Ibid*, para. 37.

¹⁰⁰⁷ *Ibid*.

¹⁰⁰⁸ The Commission took a similar in approach in *Victor Saldano v. Argentina*, Petition, IACHR Report No. 38/99, para. 17 where it found that Article 1(1) of the American Convention was not limited to national territory – in certain circumstances, a state party might be responsible for the acts and omissions of its state agents, which produce effects or were undertaken abroad.

¹⁰⁰⁹ IACHR Report No. 86/99, Case No. 11.589, Ann. Rep. IACHR, para. 23

¹⁰¹⁰ Application No. 15318/89, Judgment 23 March 1995.

Such extraterritorial jurisdiction would occur when an individual is subject to the control of a state through the actions of state agents outside the territory of that state.

In an inter-state claim brought by Ecuador against Colombia, the Inter-American Commission addressed issues similar to the ones raised in *Banković*.¹⁰¹¹ Acknowledging *Banković*, the Commission stated that the exercise of authority over persons by state agents acting outside state territory without necessarily having a formal, structured and prolonged legal temporal relation is essential in determining a jurisdictional link.¹⁰¹² Thus, it was necessary to establish whether there was a causal link between the extraterritorial conduct of a state and the alleged violatory behaviour.¹⁰¹³ In deciding that Colombia did exercise extraterritorial jurisdiction over the attacked area, the Commission found that rights obligations such as the right to life and humane treatment are triggered in the period of time that the agents of a state interfere in the lives of person in the territory of another state.¹⁰¹⁴

Following 9/11, the Inter-American Commission has faced renewed jurisdictional challenges by the US – this time in the context of the Guantánamo Bay detention facilities. Lawyers representing individuals detained in Guantánamo – some of whom were rendered – sought precautionary measures (injunctive relief) from the Commission.¹⁰¹⁵ The US contested the jurisdiction of the Commission on a number of grounds including that the Commission could not issue precautionary measures against a non-state-party to the Convention, that the measures would not be binding, and that it could not decide on claims governed by international humanitarian law.¹⁰¹⁶ In addressing these arguments, the Commission essentially adopted an authority and control test. It stated that where an individual was within the authority and control of a state within an armed conflict context both international humanitarian and human rights law would be engaged.¹⁰¹⁷ Thus, no person under the authority and control of a state, regardless of his or her circumstances, would be devoid of legal protection for

¹⁰¹¹ *Franklin Guillermo Aisalla Molina, Ecuador – Colombia*, Inter-State Petition IP-02, Report no. 112/10, OEA/Ser.L/V/II.140 Doc. 10; the claim was brought by Ecuador on behalf of an Ecuadorian victim of a Colombian Air Force operation - Operation Phoenix.

¹⁰¹² *Ibid*, para. 99.

¹⁰¹³ *Ibid*.

¹⁰¹⁴ *Ibid*, para. 100–103.

¹⁰¹⁵ Inter-American Commission Resolution No. 2/11, *Regarding the Situation of the Detainees at Guantánamo Bay, United States*, MC 259-02.

¹⁰¹⁶ Inter-American Commission on Human Rights, *Additional Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba*, available at <http://www.state.gov/s/l/38642.htm> [last accessed on 30 March 2016].

¹⁰¹⁷ Inter-American Commission on Human Rights, *Precautionary Measures in Guantánamo Bay, Cuba*, PM 259/02.

fundamental and non-derogable rights. In an individual petition brought on behalf Djamel Ameziane, the Commission found the petitioner to have been within US jurisdiction during his capture in Pakistan, his temporary detention in a US airbase in Kandahar and his continued detention in Guantánamo.¹⁰¹⁸ During these periods of time, the US and its agents were deemed to have exercised exclusive physical power and control over Mr Ameziane.¹⁰¹⁹

Thus, influenced by a number of ECtHR decisions as illustrated above, the Inter-American Commission has similarly adopted the personal jurisdictional model and applied it in cases where states have exerted their power over individuals abroad.

3.2. *International Approach to Extraterritoriality*

The international approach towards the concept of jurisdiction and in particular whether human rights obligations could apply extraterritorially is aptly illustrated by the approach of CAT with reference to UNCAT and HRC with reference to the ICCPR. Unlike the American Convention, the US is a signatory to both UNCAT and the ICCPR.¹⁰²⁰ However, while the US has ratified the ICCPR and is thus subject to the HRC, the US has not yet ratified the necessary Optional Protocol, with which a state party accepts the competence of the HRC to receive and consider individual petitions – a further illustration of its restrictive approach to international obligation.¹⁰²¹ The process of an extraordinary rendition entails a number of violations of the obligations of both Conventions from the manner of the capture and the subsequent transfer outside standard extradition procedures to the *incommunicado* detention of individual terrorist suspects. However, the likelihood of renees imputing these violations on the US is linked to whether the relevant provisions have been interpreted as having extraterritorial scope. The following discussion will first assess the potential for extraterritorial application of UNCAT before proceeding to examine the ICCPR.

¹⁰¹⁸ *Ameziane v. United States*, Inter-American Commission on Human Rights, Report No. 17/12, Petition P-900-08.

¹⁰¹⁹ *Ibid*, para. 30-33.

¹⁰²⁰ Please refer to the discussion in Chapter 1.

¹⁰²¹ The full text of the Optional Protocol and list of signatories is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> [last accessed on 30 March 2016].

3.2.1. UN Convention against Torture

Under Article 2 (1) of UNCAT, state parties should take effective measures to prevent acts of torture in any territory under the jurisdiction of the Convention.¹⁰²² While the Convention is only applicable to signatory states, the right to be free from torture and inhuman (cruel) and degrading treatment has developed into a non-derogatory *jus cogens* norm in international law.¹⁰²³ State breaches of it tend to be met with indignation and stigmatisation within the international community.¹⁰²⁴ During the peak of its transnational counter-terrorism and military operations, the US vigorously denied any engagement in torture of individual terrorist suspects despite claims or evidence to the contrary – an acknowledgement of the significance of the anti-torture norm within the international legal framework.¹⁰²⁵

While the text of Article 2 (1) suggests a strictly territorial approach to the concept of jurisdiction, CAT has been interpreting Article 2 in broader terms. In its 2007 General Comment on Article 2, CAT advised that a state would have international responsibility for acts and omissions of state officials and others including agents, private contractors and individuals acting in an official capacity or on behalf of the state, in conjunction with the state, under state direction or control or otherwise under the colour of law.¹⁰²⁶ The scope of “in any territory under its jurisdiction” under Article 2 (1) was deemed to include areas where a state party exercises directly or indirectly, in whole or in part, *de jure* or *de facto* effective control in accordance with international law.¹⁰²⁷ The mention of private contractors is noteworthy, as the US has utilised private contractors – both to provide security to operational bases¹⁰²⁸ or

¹⁰²² The full text of the Convention is available <http://www.hrweb.org/legal/cat.html> [last accessed on 30 March 2016].

¹⁰²³ Please refer to the discussions in Chapters 1 on the use of Syria as a receiving state for rendition and 2 on *jus cogens* and UNCAT in particular.

¹⁰²⁴ *Ibid.*

¹⁰²⁵ See for example Tempest, M., ‘Bush ‘Disgusted’ at Torture of Iraqi Prisoners’, *The Guardian* 30 April 2004, ‘US does not Torture, Bush insists’ *BBC News* 7 November 2005 or ‘Full Text: Rice Defends US Policy’, *BBS News* 5 December 2005 in addition to the use of the now repealed ‘Torture Memos’.

¹⁰²⁶ Committee Against Torture, *General Comment 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2, para. 15.

¹⁰²⁷ *Ibid.*, para. 16.

¹⁰²⁸ Cameron, L., and Chetail, V., *Privatizing War: Private Military and Security Companies under Public International Law* (2013, Cambridge; Cambridge University Press), p. 98–101.

complete flights¹⁰²⁹ - within the so-called rendition circuit as part of its transnational counter-terrorism and military operations.¹⁰³⁰

Thus the US as a state signatory is strictly prohibited from engaging in behaviour in violation of the anti-torture norm and *non-refoulement* both within its territory and abroad. However, as illustrated in Chapter 1, the US has consistently sought to restrict the applicability of UNCAT through domestic legislative mechanisms. Its post 9/11 approach has become even more problematic as Executive interpretations as well as existing legislative means have been used to limit US obligations in respect of the anti-torture norm. The above quoted comments by John Bellinger are illustrative of how the US Executive understands US obligations under UNCAT. Similarly concerning approach – (severe) restriction of the domestic and extraterritorial applicability core human rights protections – has been adopted in respect of the ICCPR.

3.2.2. *International Covenant on Civil and Political Rights*

Article 2 (1) of the ICCPR outlines that each state party undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant.¹⁰³¹ On a conjunctive reading of the Article, the US has interpreted the obligations to apply only to those individuals who were within both the territory and jurisdiction of a state i.e. a very strict and narrow territorial approach.¹⁰³² The HRC¹⁰³³ has however noted that the obligations under Article 2 (1) are applicable to any individual within the *power or effective control* of the state including in circumstances where the individual is not within the territory of the state.¹⁰³⁴ Significantly, the HRC has outlined categories of individuals to whom ICCPR rights

¹⁰²⁹ Quinn, B., and Cobain, I., ‘Mundane Bills bring CIA’s Rendition Network into Sharper Focus’, *The Guardian* 31 August 2011.

¹⁰³⁰ Please refer to the relevant discussion in Chapter 5 of this thesis.

¹⁰³¹ Full text of the Covenant is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last accessed on 30 March 2016].

¹⁰³² Van Schaack, B., ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change’, (2014) 90 *International Law Studies* 20, p. 28.

¹⁰³³ Article 28 of the ICCPR established the Human Rights Committee (HRC) as the monitoring body, which can receive complaints from individuals who have allegedly suffered human rights violations once all available domestic remedies have been exhausted - Full text of the Optional Protocol is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx> [last accessed on 30 March 2016].

¹⁰³⁴ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, para. 10.

would be applicable as all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the state party.¹⁰³⁵

The reference to “other persons” is particularly relevant in the context of extraordinary rendition as it could potentially apply to *rendees*. The cases of *Lopez Burgos v. Uruguay*¹⁰³⁶ and *Celiberti de Casariego v. Uruguay*¹⁰³⁷ are quite illustrative in this respect. Both cases concerned the kidnapping of Uruguayan citizens by Uruguayan state agents. On return to Uruguay, the individuals in question were subjected to treatment, which violated their human rights. The HRC noted that while the arrest, initial detention and mistreatment of Lopez Burgos allegedly took place on foreign soil, the individuals in question were subject to the jurisdiction of Uruguay.¹⁰³⁸ In interpreting Article 1 of the Optional Protocol, the HRC focused on the relationship between the individual and the state in relation to a violation rather than on the place where it occurred. In both cases, the HRC did not expand on the basis of this relationship however in its reasoning it appears to link the imposition of jurisdiction to Uruguay with the Uruguayan citizenship of the agents. The HRC concluded that it would be unconscionable to interpret the obligations under Article 2 (1) ICCPR as permitting one state party to violate the Covenant on the territory of another state party.

3.2.3 Assessment of CAT and HRC Approach

In 2001, the Articles on the Responsibility of States for Internationally Wrongful Acts were adopted under a General Assembly Resolution.¹⁰³⁹ Under Article 7, the acts of a state agent committed abroad would be imputable to the state even in circumstances where the agent has acted beyond his or her authorised powers or in contravention of instructions. The recent findings of the HRC and the CAT have reaffirmed the doctrine of imputability. In addition, both Committees have expanded on the links

¹⁰³⁵ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, para. 10. The HRC was re-affirming General Comment 15 adopted in 1986 – Human Rights Committee, *General Comment 15: The Position of Aliens under the Covenant*, UN Doc HRI/Gen/1/Rev.6

¹⁰³⁶ Human Rights Committee Communication R.12/52 UN Doc Supp No 40 A/36/40, p. 176.

¹⁰³⁷ Human Rights Committee Communication 56/1979 UN Doc CCPR/C/OP/1, p. 92.

¹⁰³⁸ Human Rights Committee Communication R.12/52 UN Doc Supp No 40 A/36/40, para. 12.1 and Human Rights Committee Communication 56/1979 UN Doc CCPR/C/OP/1, para. 10.1.

¹⁰³⁹ Annex to General Resolution 56/83 (12 December 2001) UN Doc A/Res/56/83.

between the effective control of state agents over an individual and the conduct of foreign agents within the territory of a state.¹⁰⁴⁰

Ahmed Agiza¹⁰⁴¹ and Mohammed Alzery¹⁰⁴² lodged complaints with CAT and the HRC respectively after being expelled from Sweden to Egypt. In the case of Agiza, the CAT found that the combination of facts in this particular case should have informed Sweden that Mr Agiza would be at real risk of torture in Egypt.¹⁰⁴³ CAT noted that this was confirmed when immediately preceding the expulsion, Mr Agiza was subjected to treatment violatory of at least Article 16 of UNCAT on Swedish territory by foreign agents but with the acquiescence of Swedish police.¹⁰⁴⁴

The HRC reached a similar conclusion by stating that the treatment suffered by Mr Alzery was imputable to Sweden under the ICCPR and under the applicable rules of state responsibility.¹⁰⁴⁵ As the acts complained of had occurred in the presence of Swedish state agents, they could be treated as having been committed with the consent of Sweden and were thus imputable to Sweden.¹⁰⁴⁶

These international bodies have thus addressed extraterritoriality in cases involving the acts of foreign agents within the territory of a state with the consent of that state and acts by state agents when exercising direct control over an individual abroad. Both the HRC and CAT have dealt with the extraterritorial effects of state conduct and situations where this conduct may give rise to jurisdiction under the ICCPR.¹⁰⁴⁷ As discussed in the previous two Chapters, a state may be in violation of its human rights obligations if it transfers or extradites a person to a country where they are likely to suffer torture or other ill treatment.¹⁰⁴⁸ In the case of *Munaf v. Romania*, the

¹⁰⁴⁰ As referred to by Conte, A., ‘Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?’ (2013) 18 (2) *Journal of Conflict and Security* 233, p. 237.

¹⁰⁴¹ *Agiza v. Sweden* Opinion of the Committee against Torture, 24 May 2005, CAT/C/34/D/233/2003.

¹⁰⁴² *Alzery v. Sweden* Human Rights Committee Communication No 1416/2005 UN Doc CCPR/C/88/D/1416/2005.

¹⁰⁴³ *Agiza v. Sweden* Opinion of the Committee against Torture, 24 May 2005, CAT/C/34/D/233/2003, para. 13.4.

¹⁰⁴⁴ *Ibid.* Article 16 (1) of the Convention against Torture states: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

¹⁰⁴⁵ *Alzery v. Sweden* Human Rights Committee Communication No 1416/2005 UN Doc CCPR/C/88/D/1416/2005, paras. 11.3–11.4.

¹⁰⁴⁶ *Ibid.*, para 11.6.

¹⁰⁴⁷ *Ibid.*, p. 239.

¹⁰⁴⁸ *C v. Australia*, Human Rights Committee Communication 832/1998 UN Doc CCPR/C/72/D/832/1998; *Ahani v. Canada*, Human Rights Committee Communication 1051/2002 UN

HRC confirmed its previous findings that a state may be responsible for extraterritorial violations that are a necessary and foreseeable consequence of its conduct as judged on the facts known by the state.¹⁰⁴⁹

In the context of the extraordinary rendition programme, it is also important to note that both the HRC and CAT have found the extraterritorial extension of rights to apply to military operations abroad. As discussed in the preceding Chapter, the US persistently argued that the ‘War on Terror’, within which extraordinary renditions operated, was an armed conflict, which required the use of US Army Forces. CAT has interpreted the text of Article 2 (1) UNCAT to refer to all areas where the state exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control including embassies, detention facilities or other areas over which a state exercises factual or effective control.¹⁰⁵⁰ The HRC has similarly stated that the extraterritorial application of rights extends to those within the power or effective control of the forces of a state acting outside its territory, regardless of the circumstances in which such power or effective control was obtained including during military operations.¹⁰⁵¹

The Committees have not however defined what constitutes power or effective control by military forces abroad.¹⁰⁵² In addition, there is no clarity on the type(s) of actions by military personnel committed done outside a military base that could trigger jurisdiction in circumstances where a state is an occupying power or is undertaking aerial operations over a foreign territory unlike in the ECtHR jurisprudence.¹⁰⁵³ Thus, in comparison, there is much less clarity within the HRC and CAT approaches on whether an individual would be found to have been in the effective control of a state during military operations abroad. This suggests that there will continue to be an area of legal uncertainty, which states could exploit until the HRC and CAT findings encompass a broader and more comprehensive range of

Doc CCPR/C/80/D/1051/2002; *Mutombo v. Switzerland*, Committee against Torture Communication 13/1993 UN Doc A/49/44.

¹⁰⁴⁹ *Munaf v. Romania*, Human Rights Committee Communication 1539/2006 UN Doc CCPR/C/96/D/1539/2006, paras. 14.2–14.4.

¹⁰⁵⁰ Committee against Torture, *General Comment 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2, para. 7.

¹⁰⁵¹ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, para. 10.

¹⁰⁵² Conte, A., ‘Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?’ (2013) 18 (2) *Journal of Conflict and Security* 233, p. 241.

¹⁰⁵³ *Ibid*, p. 241.

circumstances within which the extraterritorial application of rights could be triggered similar to the ECtHR's jurisprudence. The existence of already comprehensive guidelines on the extraterritorial application of rights within the ECtHR could provide a model and be an important contribution to such future development and clarification by both the HRC and CAT. In order to ensure that international legal obligations are practically effective and accessible to individuals who have been subjected to violatory behaviour while in the effective control of a state, this future evolution is necessary. Otherwise states such as the US could continue – if deemed necessary to operate transnational counter-terrorism programmes – to interpret their obligations under both UNCAT and the ICCPR as strictly territorial. As the experience of the IACHR suggests, the case law of the ECtHR and its findings has proven quite beneficial in reaching and grounding a decision particularly in relation to the extraterritorial scope of obligations and ensuring practical effectiveness of rights. Additionally, as illustrated by numerous ECtHR decisions, the ECtHR itself has relied on the findings of other courts – for example the ICJ¹⁰⁵⁴ – due to already established precedent. Thus, arguably, other courts and adjudicatory bodies could similarly rely on the ECtHR.

3.3. The Personal Jurisdiction Model at Regional and International Level: Concluding Remarks

The examination of the relevant jurisprudence at regional and international level thus suggests that if there is an exercise of power or effective control by state agents over an individual within the terms of the personal model of jurisdiction, which leads to violations of the ECHR, ICCPR or UNCAT, such violations can be imputed to the state. As expressly stated by the HRC, jurisdiction is applicable regardless of whether the acts were committed with the acquiescence of the government of the foreign state.¹⁰⁵⁵ The development of the personal jurisdiction model has however been inconsistent and there are discernible disparities between the regional and international approaches. This arguably facilitates states at international level in

¹⁰⁵⁴ Please refer to the discussion on *lex specialis* and *lex generalis* in Chapter 2.

¹⁰⁵⁵ *Lopez Burgos v. Uruguay* Human Rights Committee Communication R.12/52 UN Doc Supp No 40 A/36/40 and *Celiberti de Casariego v. Uruguay* Human Rights Committee Communication 56/1979 UN Doc CCPR/C/OP/1.

particular when attempting to restrict the scope of their obligations by relying on areas of legal uncertainty or crevasses within the jurisprudence.

As the case law of the ECtHR illustrates, the jurisprudence on jurisdiction has been quite contested and prone to big shifts; an approach states have sought to capitalise on. As the more recent case law of the ECtHR and other regional and international bodies illustrates, courts have become increasingly willing to adopt and apply an interpretation of jurisdiction based on effective control. States have however continued to challenge the scope of extraterritorial jurisdiction. In particular, while questioning whether extraterritorial human rights obligations arise, states have relied at times on previous case law not explicitly repealed – an approach similar to the one justifying the use of balancing in respect of Article 3 of the ECHR.¹⁰⁵⁶

Due to the length and scale of US-led transnational counter-terrorism operations, reliant on strategic partners such the UK, cases similar to *Jaloud* and *Al-Skeini* are likely to continue to arise. Thus, a more consistent interpretation of extraterritorial obligations is preferable both at regional and international level. It is important that the ECtHR does not regress from its judgments in *Al-Skeini* and *Jaloud* but rather continues to refine it and reinforce it. The alternative would be a further convolution of the existing jurisprudence. In particular, the approach the ECtHR adopts towards scenarios falling somewhere between *Banković* and *Al-Skeini* could be quite significant. *Banković* illustrated the harm that can be caused by state agents who are entirely remote from a victim and exercise limited to no territorial control; *Al-Skeini* addressed circumstances where a state had voluntarily assumed some control over a territory and population during a quasi-occupation.¹⁰⁵⁷ In *Jaloud*, the ECtHR focused on the supervision of a much narrower yet more mobile potential sphere of jurisdiction – a checkpoint – thus suggesting that jurisdiction could be imposed on the basis of specific state authority and control established in certain particular circumstances.

As *Banković* has not been expressly overruled, in circumstances where the state, its agents and instrumentalities become increasingly remote, finding a jurisdictional link between a state and an individual for the purposes of extending ECHR obligations

¹⁰⁵⁶ Please refer to the detailed discussion in Chapter 4 of this thesis.

¹⁰⁵⁷ Van Schaak, B., 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change', (2014) 90 *International Law Studies* 20, p. 47.

could prove particularly problematic.¹⁰⁵⁸ Thus, arguably, the crevasse between *Al-Skeini* and *Banković* has created a space of legal uncertainty within which a state could potentially limit or circumvent its obligations by embracing detached means of engaging in military or counter-terrorism operations such as bombing, taking the example from *Banković*. The support for and operation of various stages of the rendition circuits within a number of ECHR Contracting States is arguably a good illustration of the impact of these deficiencies stemming from the convoluted and fragmented ECtHR extraterritoriality test.

4. Jurisdictional Rules and Extraordinary Rendition and the United States

The period between 2001 (*Banković* decision) and 2011 (*Al-Skeini* decision) coincided with the height of the US-led transnational campaign against terrorism and the peak of extraordinary renditions. During this period, a number of European states such as Ireland (Shannon Airport) and the UK (Diego Garcia Island) facilitated the completion of rendition circuits either by providing refuelling facilities or authorising blanket flyovers.¹⁰⁵⁹ As discussed in Chapter 1 of this thesis, due to the type of operational support provided at Shannon Airport as a transit point, it would be very difficult to find jurisdiction and impose obligations on Ireland even if a flight stopping over was *en route* to render an individual, which transfer would result in ill treatment. In comparison, Diego Garcia has developed into a legal black hole despite being part of the British Indian Ocean Territory with Britain being a signatory to a number of regional and international human rights conventions and treaties. Following *Al-Skeini* and *Jaloud* rather than continuously re-evaluating the scope of the personal jurisdiction model on a case by case basis thus allowing states such as the UK to consistently challenge the scope of its extraterritorial obligations, the more pertinent question perhaps ought to be what human rights obligations a state should be realistically expected to uphold in its extraterritorial operations.

At international level, the HRC and CAT should adopt a similar approach. As the above analysis illustrates, the findings of these bodies are undeveloped in the context of ever expanding and ever more transnational state security operations and have thus

¹⁰⁵⁸ *Ibid*, p. 47.

¹⁰⁵⁹ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc). Please also refer to the discussion in Chapter 1 of this thesis.

left exposed areas of legal uncertainty. This is particularly problematic in the context of the US ‘War on Terror’ legal construct as an armed conflict and with reference to the pre-existing US approach towards international obligations.¹⁰⁶⁰ The US has strongly argued, in front of both international and regional bodies such as CAT and the Inter-American Commission, that the obligations contained in the relevant human rights instruments have no extraterritorial application.¹⁰⁶¹

This contentiousness surrounding the extraterritorial application of human rights standards arguably stems from the very core of the human rights project and its aspiration for universality¹⁰⁶² in particular. An idealised vision of human rights would suggest that all rights are inherently universal attributes by virtue of our humanity – in this context extraterritoriality should arguably be uncontested.¹⁰⁶³ However, a more pragmatic view in the post-9/11 context suggests that human rights obligations are contractual undertakings, which states are bound to only when they have specifically consented and chosen to be bound.¹⁰⁶⁴ Thus, the strength and practical application of the international legal standards will flow from their incorporation in the daily routine of states.¹⁰⁶⁵ One particular reason for state compliance (or such domestic incorporation of international standards) is that states are instrumental in the drafting of regional and international legal documents. However, within this context the international legal framework is arguably a constraint, which sits very lightly on the shoulders of those who conform to it.¹⁰⁶⁶ While in peaceful and harmonious times, it may be less detrimental for a state to concede to an international norm than to rebel against it, during times of national security emergency, a more powerful state may choose not to abide by the relevant international rules.¹⁰⁶⁷

¹⁰⁶⁰ See further the discussion in Chapters 1 and 2 of this thesis.

¹⁰⁶¹ Please see United States’ Response to the Questions Asked by the Committee Against Torture: U.S. Delegation Oral Responses to CAT Committee Questions 5 May 2006 (Answers to Questions 16-20 in particular), available at <http://www.state.gov/j/drl/rls/68561.htm> [last accessed 30 March 2016].

¹⁰⁶² The UN Human Rights Office of the High Commissioner refers to universality thus: “The principle of universality of human rights is the cornerstone of international human rights law.” See full text available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> [last accessed 30 March 2016].

¹⁰⁶³ Van Schaak, B., ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change’, (2014) 90 *International Law Studies* 20, p. 24.

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ Lowe, V. *International Law*, (2007, Oxford; Oxford University Press), p. 9.

¹⁰⁶⁶ *Ibid.*, p. 20.

¹⁰⁶⁷ De Londras, F., *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011, Cambridge, Cambridge University Press), p. 171. See also Baldwin, F., “The Rule of Law, Human Rights and Proportionality as Components of the War against Terrorism” (2004) 7 (3) *Journal of Money Laundering Control* 218.

Thus when faced with a national security emergency such as the events of 9/11, the US can choose to restrict its obligations in a manner which allows it to engage in the type of counter-terrorism measures deemed necessary to respond to a security threat. As illustrated in the preceding chapters, through a hyper legalistic exploitation of broad fault lines and specific gaps within the international legal framework, the US has sought to severely restrict the application of relevant international human rights provisions thus limiting its obligations. The evolution of the traditional understanding of the scope of jurisdiction in international law itself has resulted in the creation of exploitable legal spaces as discussed further above. CAT and the HRC have been increasingly focusing on the personal model of jurisdiction aiming to expand the international jurisdictional rules. Their undeveloped legal framework on the extraterritorial application of human rights obligations has however left areas of legal uncertainty exposed. Thus, while the US have persistently relied on a strictly territorial approach to jurisdiction, the development of the international legal framework in relation to the scope of jurisdictional rules has arguably left areas of legal uncertainty which have facilitated the US in restricting its human rights obligations by adopting a hyper legalistic approach. The concept of jurisdiction in this context has therefore been relied on by the US as an existing and exploitable ‘gap’ or fault line, which can facilitate the transnational operationalisation of the rendition circuits.

However while the relevant international bodies and IACHR have not and arguably may not be in a position to adjudicate on extraordinary rendition cases for the reasons outlined above, the ECtHR has had the opportunity to do so. The emerging jurisprudence of the ECtHR on these irregular transfers has resulted in the evolution of third party responsibility for wrongful acts of foreign (US) officials within Contracting States’ jurisdiction.¹⁰⁶⁸ Aside from being heavily critical of the US HVDP and extraordinary renditions, the Court has developed a test of complicity through which it has imposed liability on Contracting State parties for their connivance or acquiescence in such wrongdoing. As noted above, since the 2011 *Al-Skeini* case,¹⁰⁶⁹ the ECtHR appears to have taken a strong approach against states’ rights violations committed abroad as part of the Operation Iraqi Freedom strand of

¹⁰⁶⁸ Allen, S., ‘The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention of Human Rights: Wrongdoing in the British Indian Ocean Territory’ (2016) 16 (4) *Human Rights Law Review* 1.

¹⁰⁶⁹ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, 7 July 2011.

‘War on Terror’. Starting with its momentous decision in the *El-Masri* case,¹⁰⁷⁰ its first decision on an extraordinary rendition case, the ECtHR has taken a similarly muscular approach to another stand of the ‘War on Terror’ – HVDP and in particular the rendition circuits.

5. Jurisdictional Rules, Extraordinary Renditions and Third Party Responsibility

The decision of the ECtHR in *El-Masri v. Former Yugoslav Republic of Macedonia*¹⁰⁷¹ - the first one to address the operation of the extraordinary rendition programme within Europe – was long awaited. Mr El-Masri was travelling back to Germany from Macedonia when he was detained at the Macedonian border on suspicions of having a forged passport. He was questioned about possible ties with Islamic organisations and then transported to a hotel in Skopje. He was detained *incommunicado* and repeatedly interrogated in that hotel until he was handed over to a CIA rendition team at Skopje airport. He was then transferred to the ‘Salt Pit’ prison in Afghanistan where he was detained *incommunicado* again and subjected to enhanced interrogation and ill treatment for a number of months.¹⁰⁷² While he was eventually transferred back in a ‘disguised reverse rendition’¹⁰⁷³ to Europe, he was released in Albania rather than Germany where local police initially suspected him of being a terrorist. Thus, in this context, the decision and approach taken by the European Court of Human Rights in relation to its decision on Article 3 and 5 of the European Convention on Human Rights is of particular importance.

In discussing the procedural aspect of Article 3, the Court noted that Article 3 read in conjunction with Article 1 requires by implication that there should be an effective official investigation of the alleged violations of Article 3.¹⁰⁷⁴ The investigation by Macedonia was found to be inadequate and hence had deprived Mr El-Masri of having an accurate account of the suffering he endured and role of those responsible in his ordeal. The inquiry of the Macedonian Public Prosecutor was not thorough, independent from the executive nor was Mr El-Masri able to participate effectively in

¹⁰⁷⁰ *Khaled El-Masri (El Masri v. The Former Yugoslav Republic of Macedonia)*, Application no. 39630/09, Judgment 13 December 2012.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ibid.*, 24–25.

¹⁰⁷³ *Ibid.*, para. 31–33.

¹⁰⁷⁴ *Ibid.*, para. 182.

any capacity, thus, there was a violation of the procedural limb of Article 3.¹⁰⁷⁵ Similar finding was made by the Court in relation to Article 5.¹⁰⁷⁶

In relation to the substantive element of Article 3, the ECtHR stated that Mr El-Masri's transfer was not pursuant to a legitimate request for extradition or any other recognised international legal procedure, there was no arrest warrant for Mr El-Masri and the relevant international and foreign jurisprudence and numerous UN and NGO reports suggested that the US has resorted to or tolerated practices manifestly contrary to the principles of the ECHR including extraordinary rendition. Thus, Macedonia knew or ought to have known that there was a real risk that Mr El-Masri would be subjected to ill treatment and it failed to dispel any doubts on that matter.¹⁰⁷⁷ Further, taking into account the manner in which the applicant was transferred into the custody of the US, the court found that Mr El-Masri was subjected to an extraordinary rendition.¹⁰⁷⁸

The Court's robust approach towards the use of extraordinary rendition has continued in the two recent cases of *Al Nashiri v. Poland*¹⁰⁷⁹ and *Husayn (Abu Zubaydah) v. Poland*.¹⁰⁸⁰ Both cases involved allegations of torture, ill treatment and secret detention of two men suspected of terrorist acts. Both Al Nashiri and Abu Zubaydah allege that they were extraordinarily rendered on the same flight and held at a CIA 'black site' in Poland. With judgments on 24 July 2014, the Court held unanimously that Poland had violated its Article 38¹⁰⁸¹ ECHR obligations and in both the case of Al Nashiri and Abu Zubaydah there had been a violation of Article 3 in its substantive and procedural aspects, Articles 5, 6, 8 and 13.¹⁰⁸²

In its decision in relation to Mr Zubaydah, the Court noted that the lack of Polish cooperation with international inquiries into the rendition circuits is a relevant element in assessing Poland's alleged knowledge and complicity in the CIA rendition

¹⁰⁷⁵ *Ibid*, para. 182–194.

¹⁰⁷⁶ *Ibid*, para. 242–243.

¹⁰⁷⁷ *Ibid*, para. 218.

¹⁰⁷⁸ *Ibid*, para. 221.

¹⁰⁷⁹ Application no. 28761/11, Judgment 24 July 2014.

¹⁰⁸⁰ Application no. 7511/13, Judgment 24 July 2014.

¹⁰⁸¹ Article 38 states that: "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities." Full text of the ECHR available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=1&DF=27/01/2011&CL=ENG> [last accessed 30 March 2016].

¹⁰⁸² Application no. 28761/11, Judgment 24 July 2014 and Application no. 7511/13, Judgment 24 July 2014.

circuits.¹⁰⁸³ The Court also referred to statements made by the former President of Poland who had noted “the decision to cooperate with the CIA carried the risk that the Americans would use inadmissible methods.”¹⁰⁸⁴ The Court found that the Polish authorities had known that the CIA used Szymany Airport and the Stare Kiejkuty military base for the purposes of the HVDP.¹⁰⁸⁵ The Court added the following:

“It is inconceivable that the rendition aircraft could have crossed Polish airspace, landed in and departed from a Polish airport, or that the CIA occupied the premises in Stare Kiejkuty and transported detainees there, without the Polish State being informed of and involved in the preparation and execution of the HVD Programme on its territory. It is also inconceivable that activities of such character and scale, possibly vital for the country’s military and political interests, could have been undertaken on Polish territory without Poland’s knowledge and without the necessary authorisation being given at the appropriate level of the State authorities.”¹⁰⁸⁶

Poland ought to have known that due to the nature and purposes of the CIA activities, by “enabling” the CIA to detain individual terror suspects on its territory, it was exposing them to a serious risk of ill treatment.¹⁰⁸⁷ Thus, Poland had been in a position of responsibility to secure the rights of such individuals.¹⁰⁸⁸ In finding that Poland had facilitated the detention process and created the conditions for ill treatment, the Court made a formative judgment linking a European state to the extraordinary rendition programme.

As regards to Mr Al Nashiri, the Court held that there had been violations of Article 2 and 3 taken together with Article 1 of Protocol No. 6 (abolition of the death penalty).¹⁰⁸⁹ The Court similarly found that Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory and ought to have known that by facilitating the CIA in detaining the applicants on Polish territory, it was exposing the applicants to a serious risk of ill

¹⁰⁸³ Application no. 7511/13, Judgment 24 July 2014, para. 431.

¹⁰⁸⁴ *Ibid*, para. 438.

¹⁰⁸⁵ *Ibid*, para. 443.

¹⁰⁸⁶ *Ibid*.

¹⁰⁸⁷ *Ibid*, p. 444.

¹⁰⁸⁸ *Ibid*, p. 445.

¹⁰⁸⁹ Application no. 28761/11, Judgment 24 July 2014, para. 579.

treatment in violation of the Convention.¹⁰⁹⁰ In particular, the Court stated that Poland on account of its “acquiescence and connivance” in the HVDP was responsible for the violations of the applicants’ rights committed on Polish territory.¹⁰⁹¹

In its most recent 2016 decision – *Nasr and Ghali v. Italy*¹⁰⁹² - the Court found that having regard to all evidence in the case, it was established that the Italian authorities were aware that the applicant had been a victim of extraordinary rendition, which had begun with his abduction from Italy.¹⁰⁹³ The Court found that by allowing US authorities to abduct Mr Osama Nasr (known as Abu Omar), the Italian authorities had knowingly exposed him to a real risk of ill treatment contrary to Article 3 of the European Convention of Human Rights.¹⁰⁹⁴ The Court found that the legitimate principle of state secrecy had “clearly been applied by the Italian executive in order to ensure that those responsible did not have to answer for their actions.”¹⁰⁹⁵ Those who were responsible and facilitated his abduction had ultimately been granted impunity.¹⁰⁹⁶ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final yet, however it does strongly indicate will reaffirm its previous decisions and continue developing its extraordinary rendition jurisprudence particularly in relation to complicity.

While all four cases represent a strong criticism of the HVDP, extraordinary renditions and the behavior of the US as well as Macedonia, Poland and Italy for their complicity, there are important distinctions between the Macedonian and Italian case and the Polish cases. In both the *El-Masri*¹⁰⁹⁷ and *Nasr and Ghali*¹⁰⁹⁸ cases (based on what is known before the decision becomes final and is published in full), the ECtHR found that the complicity of Macedonia and Italy respectively in *non-refoulement* violations was based on actual knowledge. In *El-Masri* this decision was reached on the basis of two factors: first, as the Macedonian officials had failed to prevent acts of torture committed in their presence, they had connived or acquiesced to this ill treatment and second, the Macedonian officials knew or ought to have known that by handing over Mr El-Masri to a CIA rendition team there was serious risk of ill

¹⁰⁹⁰ *Ibid*, para. 442 – 443.

¹⁰⁹¹ *Ibid*, para. 452.

¹⁰⁹² Application no. 44883/09, Judgment 23 February 2016.

¹⁰⁹³ Press Release, ECHR 070 (2016).

¹⁰⁹⁴ *Ibid*, p. 3.

¹⁰⁹⁵ *Ibid*, p. 1.

¹⁰⁹⁶ *Ibid*, p. 1.

¹⁰⁹⁷ Application no. 39630/09, Judgment 13 December 2012.

¹⁰⁹⁸ Application no. 44883/09, Judgment 23 February 2016.

treatment following the transfer.

In comparison, while the Polish authorities were also found in violation of the *non-refoulement* principle, Polish officials did not possess full knowledge of the CIA wrongdoing at the ‘black site’ situated on Polish territory despite the fact that Poland had facilitated the transfer of detainees to and from this secret detention centre.¹⁰⁹⁹ It was acknowledged that it was unlikely that Polish officials had actually witnessed the ill treatment of detainees.¹¹⁰⁰ Nevertheless, the ECtHR decided that these officials ought to have known the full extent of the wrongdoing carried out by US officials within Poland’s jurisdiction as a result of the credible and detailed reports, which had entered the public domain.¹¹⁰¹ Thus, the lack of direct knowledge about the particular interrogation practices being used in the CIA black site did not mean that Poland could avoid responsibility under the ECHR.¹¹⁰² Instead, the Court drew attention to the reliable and publicly available evidence, which showed that Polish officials knew about the *general nature and purposes* of HVDP at the material time; evidence which indicated that the CIA practices were manifestly contrary to the principles enshrined in the ECHR.¹¹⁰³

From this perspective, the Polish cases in particular represent a significant advance in the ECtHR’s jurisprudence regarding the positive nature of the substantive and procedural aspects of the obligations contained in Article 3.¹¹⁰⁴ From a substantive perspective, the Court stressed that Contracting States are responsible for maintaining an environment within which all acts violatory of Article 3 are strictly prohibited. Thus, if a Contracting State’s official or officials have access to credible information which indicates that serious human rights violations are being committed within its jurisdiction, they ought to take the necessary steps to prevent further violations.¹¹⁰⁵ In addition, the authorities are under a positive procedural obligation in such circumstances – they must investigate credible allegations of such wrongdoing

¹⁰⁹⁹ On this point see also Allen, S., ‘The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention of Human Rights: Wrongdoing in the British Indian Ocean Territory’ (2016) 16 (4) *Human Rights Law Review* 1, p. 2.

¹¹⁰⁰ *Al Nashiri v. Poland*, Application no. 28761/11, Judgment 24 July 2014, para. 441–442 and *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, Judgment 24 July 2014, para. 443 – 444.

¹¹⁰¹ On this point see also Allen, S., ‘The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention of Human Rights: Wrongdoing in the British Indian Ocean Territory’ (2016) 16 (4) *Human Rights Law Review* 1, p. 2.

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ *Ibid.*

effectively as such official action is necessary for the maintenance of “public confidence in [their adherence to the rule of law and [for] preventing any appearance of impunity, collusion in or tolerance of unlawful acts”.¹¹⁰⁶

In summary, the emerging ECtHR jurisprudence on complicity thus indicates that there is a scale of conduct with which to assess the specific levels of knowledge and participation required to underpin a finding of third party responsibility.¹¹⁰⁷ This scale includes cases of active participation where Contracting State officials are directly engaged in acts of ill treatment carried out by foreign officials within its jurisdiction.¹¹⁰⁸ Such liability may arise where Contracting State officials witnessed wrongful acts being committed by foreign officials however [the state officials] neglected to take steps to prevent these wrongdoings from occurring such as in the *El-Masri*¹¹⁰⁹ and *Nasr and Ghali*¹¹¹⁰ cases.¹¹¹¹ However, as the Polish cases indicate, the threshold for engaging third party responsibility under the ECHR could be triggered by inactive participation or in other words through inactivity combined with a sufficient level of knowledge regarding the existence of potential rights violations.¹¹¹² The emerging ECtHR jurisprudence on third party responsibility for extraordinary renditions is a welcome addition to its most recent case law on the extraterritorial scope of right obligations. The Court’s muscular approach in ensuring practical effectiveness of individual human rights and providing a remedy for violations incurred during various strand of the ‘War on Terror’ is most commendable. The ECtHR case law has demonstrated that there is strength inherent within the regional human rights framework, which can resist the severity of the challenge posed by extraordinary renditions. This approach however is in stark contrast with the still developing and thus limited jurisprudence of other regional and international bodies. The inconsistencies and lack of clarity within the latter approaches has left areas of

¹¹⁰⁶ *Khaled El-Masri (El Masri v. The Former Yugoslav Republic of Macedonia)*, Application no. 39630/09, Judgment 13 December 2012, para. 192; *Al Nashiri v. Poland*, Application no. 28761/11, Judgment 24 July 2014, para. 495 and *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, Judgment 24 July 2014, para. 489.

¹¹⁰⁷ Allen, S., ‘The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention of Human Rights: Wrongdoing in the British Indian Ocean Territory’ (2016) 16 (4) *Human Rights Law Review* 1, p. 8.

¹¹⁰⁸ *Ibid.*

¹¹⁰⁹ Application no. 39630/09, Judgment 13 December 2012

¹¹¹⁰ Application no. 44883/09, Judgment 23 February 2016.

¹¹¹¹ Allen, S., ‘The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention of Human Rights: Wrongdoing in the British Indian Ocean Territory’ (2016) 16 (4) *Human Rights Law Review* 1, p. 8.

¹¹¹² *Al Nashiri v. Poland*, Application no. 28761/11, Judgment 24 July 2014 and *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, Judgment 24 July 2014.

uncertainty, which can and have been exploited by the US in constructing its ‘War on Terror’. Thus, as noted above, the ECtHR jurisprudence offers a worthwhile model, which other adjudicatory bodies should consider adopting to ensure the practical effectiveness of human rights protections going forward.

6. Conclusion

Over the course of co-called ‘War on Terror’, hundreds of suspected terrorists were captured and rendered to various known and unknown detention facilities where they were subjected to *incommunicado* detention and enhanced interrogation.¹¹¹³ Through hyper legalism, the US took advantage of conceptual spaces of uncertainty and practical enforcement deficiencies within the international legal framework in order to operationalise the rendition circuits. The development of the international jurisdictional rules especially in relation to the extraterritorial application of rights obligation has been one such area of uncertainty exploited by the US. As illustrated by the preceding analysis, the question whether a state can be held responsible for extraterritorial human rights violations has been frequently occupying regional courts and international bodies. It is likely to remain a pressing issue as seen by most recent ECtHR case of *Jaloud v. The Netherlands*.¹¹¹⁴

However, while the jurisprudence of the regional human rights bodies, in particular the ECtHR, has been consistently evolving with reference to the increasingly transnational nature of state security operations and third party involvement, the relevant international bodies have lagged behind. The underdeveloped and somewhat inconsistent international approach towards extraterritorial scope of obligations, has facilitated the US in adopting a strictly territorial approach to jurisdiction and by proxy restricting the applicability of the relevant human rights provisions to the HVDP and extraordinary renditions. Thus, the concept of jurisdiction has been approached as an existing exploitable gap within the international legal framework. The last chapter of this thesis will explore another such gap – the use of private operators as part of security operations.

¹¹¹³ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

¹¹¹⁴ Application no. 47708/08, Judgment 20 November 2014.

Chapter 5: Privatisation, Intelligence Cooperation and the Rendition Circuits

1. Introduction

The events of 9/11 were followed by a series of international bodies' recommendations urging improvement and expansion of domestic and transnational security and counter-terrorism measures. In the immediate aftermath of 9/11, UN Security Council Resolutions 1368 and 1373 recognised “the inherent right of individual or collective self-defence” and recommended greater exchange of operational or intelligence information amongst other security and counter-terrorism oriented measures.¹¹¹⁵ Having invoked Article 5 of the Washington Treaty,¹¹¹⁶ NATO Member States (Allies) similarly urged states to combat the threat posed by international terrorist organisations through collaboration and assistance with measures such as blanket flyover clearances, flight stopover and refuelling facilities and expanded intelligence sharing and cooperation mechanisms between Allies.¹¹¹⁷

It is within this highly charged and security-focused environment that the rendition circuits as part of HVDP were operationalised despite substantive enhancements in domestic US counter-terrorism and national security legislation.¹¹¹⁸ One of the most salient facets of such an extraordinary rendition – its transnational scope – would not have been possible without first the preliminary agreement and then on-going cooperation of transit and receiving states. Apart from providing operational support during a circuit, such states have facilitated the US in circumventing jurisdictional

¹¹¹⁵ Security Council Resolution 1368 (2001), Press Release SC/7143 full text available at <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm> [last accessed 30 March 2016] and Security Council Resolution 1373 (2001), Press Release SC/7158, full text available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> [last accessed 30 March 2016].

¹¹¹⁶ Article 5, North Atlantic Treaty 1949, full text available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm [last accessed 30 March 2016]. Please also refer to the discussion in the Introductory Chapter of this thesis.

¹¹¹⁷ Please refer to the discussions in Chapter 1, which examines transit points providing blanket overflight clearance, stopovers facilities and exchange of intelligence.

¹¹¹⁸ See for example US Patriot Act of 2001 as well extensions of the Immigration and Nationality Act of 1952, the Foreign Surveillance and Intelligence Act of 1978 and the Electronic Communications Privacy Act of 1986. See also the more detailed discussion in the Introductory Chapter.

rules¹¹¹⁹ and by proxy in diluting its obligations under the relevant international legal provisions. The expansion in intelligence cooperation, information sharing and use of private operators as part of state security services within counter-terrorism operations has enabled other key aspects of the rendition circuits. Private air carriers and charter companies – relying on blanket overflight clearances – have been used in order to conceal the operation and purpose of rendition flights.¹¹²⁰ Intelligence cooperation and sharing has facilitated, led to the capture of individual terrorist suspects and/or resulted in their subsequent extraordinary rendition as illustrated in known cases such as Maher Arar,¹¹²¹ Khaled El-Masri¹¹²² and Osama Nasr (or Abu Omar).¹¹²³

An extraordinary rendition violates a number of international human rights norms including the absolute *jus cogens* prohibition on torture. The use of private flight operators and the enhanced bi- and multi-lateral intelligence cooperation and sharing have facilitated this violatory behaviour by the US. This Chapter argues that the reliance on private operators and the post 9/11 enhanced intelligence cooperation mechanisms have been utilised by the US as specifically tailored gaps within the international legal framework in order to operate the rendition circuits. These two gaps and by proxy the US approach towards them should however be distinguished. As Section 2 will illustrate, there are very limited international law constraints in relation to private operators in general and private charter companies in particular. As such, this is an existing gap – or area of legal uncertainty – within the international legal framework.

In comparison, the nature of intelligence gathering, cooperation and exchange is one that requires a certain level of covertness and secrecy. By virtue of this nature,

¹¹¹⁹ The US has adopted a very strictly territorial approach to jurisdiction and do not accept the personal model of jurisdiction as discussed in Chapter 4 of this thesis.

¹¹²⁰ See for example the case of *Richmor Aviation, Inc. v. Sportsflight Air, Inc.*, 2011 NY Slip Op 01905 [82 AD3d 1423]. Richmor Aviation is a company identified as a legitimate charter agent in European Parliament Report on the Alleged Use of European countries by the CIA for the Transportation and Illegal Detention of Prisoners, (2006/2200(INI)) full text available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN> [last accessed 30 March 2016].

¹¹²¹ Maher Arar (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services).

¹¹²² *Khaled El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09 Judgment 13 December 2012.

¹¹²³ Sandberg, B., ‘Abu Omar Case: Italian Court Delivers Damning Verdict on CIA Renditions’ *Spiegel Online International* 5 November 2009 available at <http://www.spiegel.de/international/europe/abu-omar-case-italian-court-delivers-damning-verdict-on-cia-renditions-a-659418.html> [last accessed 30 March 2016].

accountability concerns have arisen before. However what distinguishes the pre and post-9/11 is the expansion of the scope and span of intelligence exchange and new methods for surveillance as Section 3 will demonstrate. These expansions in intelligence capabilities and sharing have not been matched by additional accountability mechanisms. It is within this context that the US has utilised intelligence cooperation to facilitate the operation of the rendition circuits. While both the use of private operators and intelligence cooperation are not new phenomena, their post 9/11 roles in the context of HVDP have posed a more multifaceted challenge to the enforcement mechanisms of the international legal framework. What distinguishes the two however is that the use of private charter companies is more akin to a legal black hole whereas expansive intelligence cooperation and sharing is more of a legal grey hole.

2. The Use of Private Actors and Private Companies

The growing importance of private or non-state actors in transnational military and counter-terrorism operations has become a significant contemporary challenge for the effective protections of international human rights law (IHRL).¹¹²⁴ For a number of years, states have engaged in outsourcing the provision of what traditionally were considered to be state services to private operators.¹¹²⁵ The most publicised aspect of such outsourcing has arguably been the rapid process of privatisation and commercialisation within the criminal justice system.¹¹²⁶ Court escort duties, routine parole supervision, specialist prison services as well as the building and management of penal institutions have increasingly been contracted out to commercial companies.¹¹²⁷

Thus, from this perspective, extending the use of private operators and contractors from domestic to transnational security operations is perhaps not a surprising

¹¹²⁴ For a broadly similar point, see further Cameron, L., and Chetail, V., *Privatizing War: Private Military and Security Companies under Public International Law* (2013, Cambridge; Cambridge University Press).

¹¹²⁵ See further on this note Garland, D., *The Culture of Control* (2002, Oxford; Oxford University Press); Simon, J., *Governing through Crime: How the War on Terror transformed American Democracy and created a Culture of Fear* (2006, New York; Oxford University Press); Born, H., Leigh, I. and Wills, A. (eds.) *International Intelligence Cooperation and Accountability* (2011, New York; Routledge)

¹¹²⁶ Garland, D., *The Culture of Control* (2002, Oxford; Oxford University Press), p. 116–117.

¹¹²⁷ *Ibid.*

phenomenon. Yet, this trend appears spurred on by the post-Cold War decline of the standing military across a number of countries and the exigencies of the ‘War on Terror’ following 9/11.¹¹²⁸ Since 9/11, such contractors have engaged in gathering intelligence, first covertly transporting and then interrogating detainees.¹¹²⁹ Despite this expansion of the range of activities fulfilled by private contractors and their ever growing number, the development of accountability mechanisms has lagged behind. The development of forms of privatisation catering for expansive and violatory counter-terrorism practices such as extraordinary rendition for the purposes of HVDP has thus been quite concerning.¹¹³⁰ In this context, private operators are not needed due to their comparatively lower cost or work efficiency.¹¹³¹ Their use within the rendition circuits as Section 2.1 will outline was specifically aimed at exploiting existing gaps in the international legal framework and by proxy circumventing international legal obligations.

2.1. Private Charter Companies and the Rendition Circuits: International Enforcement Gap

A great diversity of opinions exists on who is subject to international law with corporations in addition to states increasingly being considered bound by international law.¹¹³² In comparison, however, within the regional and international human rights Conventions and Treaties, the protections of rights and freedoms are constructed around a vertical individual/state relationship where individuals can invoke their human rights claims against the state.¹¹³³ The implementation mechanisms attached to

¹¹²⁸ Dickinson, L. A., ‘Outsourcing Covert Activities’ (2012) 5 *Journal of National Security Law and Policy* 521, p. 521. The ‘War on Terror’ has been credited with vast expansion of private military and security companies. See further Liu, H., ‘Leashing the Corporate Dogs of War: The Legal Implications of Modern Private Military Companies’ (2010) 15 (1) *Journal of Conflict & Security Law* 141 – 168 and White, N. D., ‘Regulation of Private Military and Security Sector: Is the UK Fulfilling its Human Rights Duties?’ (2016) 16 *Human Rights Law Review* 585.

¹¹²⁹ Dickinson, L. A., ‘Outsourcing Covert Activities’ (2012) 5 *Journal of National Security Law and Policy* 521, p. 521.

¹¹³⁰ For similar observations see further De Londras, F., ‘Privatized Sovereign Performance: Regulating in the ‘Gap’ between Security and Rights’, (2011) 38 (1) *Journal of Law and Society* 96.

¹¹³¹ *Ibid.*

¹¹³² See also Lowe, V., *International Law* (2007, Oxford; Oxford University Press); Crawford, J., and Koskenniemi, M., *Cambridge Companion to International Law* (2012, Cambridge, Cambridge University Press); Alvarez, J., ‘Are Corporations “Subjects” of International Law?’, (2011) 9 *Santa Clara Journal of International Law* 1; Ku, J., ‘The Limits of Corporate Rights under International Law’, (2012) 12 *Chicago Journal of International Law* 729.

¹¹³³ Cameron, L., and Chetail, V., *Privatizing War: Private Military and Security Companies under Public International Law* (2013, Cambridge; Cambridge University Press), p. 290 – 291. See for

various international Conventions or Treaties such as the Human Rights Committee (HRC) or the Committee against Torture (CAT) are geared towards State Parties only.¹¹³⁴ Therefore, as IHRL currently stands, a codified obligation to control private actors operating outside the national territory of a state and to prevent human rights violations from these private actors has not yet crystallised.¹¹³⁵ This is applicable even in circumstances where those private actors have the nationality of the state concerned and therefore a state may impose certain obligations in conformity with international law.¹¹³⁶

Thus, in general, IHRL does not have the capacity to govern the actions of private actors directly as its constituents are primarily states.¹¹³⁷ IHRL has sought to address this legal vacuum by requiring states to implement the necessary structures, standards and laws, which would protect individuals from violatory behaviour by non-state actors.¹¹³⁸ These measures however have focused on state accountability for actions of private operators rather than imposing obligations on private actors.¹¹³⁹ Therefore, in practical terms, a state continues to bear rights-related responsibilities while rights obligations remain limited, if any, for a corporation.¹¹⁴⁰ In the context of transnational

example the texts of the UN Convention against Torture and Optional Protocol, the International Covenant on Civil and Political Rights and Optional Protocol, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights, the Convention Relating to the Status of Refugees. See also the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, details available at <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> [last accessed 30 March 2016].

¹¹³⁴ Cameron, L., and Chetail, V., *Privatizing War: Private Military and Security Companies under Public International Law* (2013, Cambridge; Cambridge University Press), p. ix. See further the role of each Committee outline here <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> and here <http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> [last accessed 30 March 2016].

¹¹³⁵ De Schutter, O., *International Human Rights Law* (2010, Cambridge; Cambridge University Press), p. 162.

¹¹³⁶ *Ibid*, p. 163. See further the approach of the Human Rights Committee *Lopez Burgos v. Uruguay* Human Rights Committee Communication R.12/52 UN Doc Supp No 40 A/36/40 and *Celiberti de Casariego v. Uruguay* Human Rights Committee Communication 56/1979 UN Doc CCPR/C/OP/1.

¹¹³⁷ De Londras, F., 'Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights', (2011) 38 (1) *Journal of Law and Society* 96, p. 108.

¹¹³⁸ See example the Convention on Elimination of All Forms of Discrimination against Women (Article 2 and 4 in particular); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (its preamble in particular); UN Convention on the Rights of Persons with Disabilities; The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights; The European Parliament Code of Conduct for European Enterprises operating in Developing Countries.

¹¹³⁹ Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations, Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31.

¹¹⁴⁰ De Londras, F., 'Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights', (2011) 38 (1) *Journal of Law and Society* 96, p. 108.

counter-terrorism operations such as extraordinary rendition as part of HVDP, this construction of state/non-state rights-related obligations presents a convenient opportunity for a state to limit its obligations. As illustrated by regional body reports and case law, corporate entities including charter services for aircraft rentals, aviation and logistics companies have been regularly used by the US in the context of extraordinary renditions.¹¹⁴¹ The following brief assessment of the regulatory regime of the civil aviation industry will contextualise how the US were able to exploit the use of private flights as a legal black hole for the purpose of the rendition circuits. The discussion will also illustrate that this area of existing legal and regulatory uncertainty has lend itself to manipulative misuse by the US in operationalising the extraordinary rendition programme.

2.1.1 Aviation Industry: International Standards and Obligations

The 1944 Convention on International Civil Aviation¹¹⁴² imposes a number of requirements on civilian aircrafts such as adherence to appropriate nationality and registration marks,¹¹⁴³ possession of the necessary documents such as a list of passengers and their departure and arrival destinations¹¹⁴⁴ and prior authorisation of flight path over a state territory.¹¹⁴⁵ Under Article 16, the appropriate authorities of each Contracting State can, without reasonable delay, search the aircraft of another Contracting State on landing or departure and inspect the documents required under the Convention. Thus, for the purposes of the extraordinary rendition programme – concealment of an individual and their identity *en route to incommunicado* detention and enhanced interrogation¹¹⁴⁶ – the civil aircraft regulatory regime is too restrictive and by proxy incompatible. Military aircrafts are recognised as state aircrafts under Article 3 of the Convention thus similarly they would have to comply with the

¹¹⁴¹ Fava. G., Working Document No. 8 on the Companies linked to the CIA Aircraft used by the CIA and the European Countries in which the CIA Aircraft have made Stopovers, European Parliament DT641333EN.doc.

¹¹⁴² The full text of the Convention is available at http://www.icao.int/publications/Documents/7300_orig.pdf [last accessed 30 March 2016].

¹¹⁴³ Article 20 of the Convention on International Civil Aviation.

¹¹⁴⁴ Article 29 of the Convention on International Civil Aviation.

¹¹⁴⁵ Articles 5, 6 and 7 of the Convention on International Civil Aviation.

¹¹⁴⁶ See for example the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program: Executive Summary*, full text available at http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf [last accessed 30 March 2016] and Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

necessary identification requirements making such an aircraft easily recognisable. A chartered or rented civilian aircraft can however fulfil the requirement for concealment as they would not be immediately associated with facilitating state security or counter-terrorism operations.¹¹⁴⁷

In a report detailing the different private companies and charter services used by the CIA for extraordinary renditions, Giovanni Fava noted that through the use of such aircraft states could reach places where military aircraft would be considered suspicious.¹¹⁴⁸ What is of particular significance is that most of the charter or rent companies were ‘shell companies’, which only existed on paper (post office boxes for example) or had only one employee, usually a lawyer.¹¹⁴⁹ Such shell companies were listed as the owner of aircraft, which were subject to regular buy-and-sell transactions.¹¹⁵⁰ After each transaction, the aircraft were re-registered for the purposes of losing their track.¹¹⁵¹

On occasion, shell companies relied on what were referred to as ‘operating companies’ – they would provide a CIA chartered aircraft with all the necessary logistics (pilots, catering and technical assistance).¹¹⁵² However, there were also circumstances where aircraft were leased from recognised charter agents.¹¹⁵³ A case between one such charter agent – Richmor Aviation, Inc. and Sportsflight Air, Inc, an aircraft broker, confirmed that flights within the rendition circuits were privately outsourced by the US to a network of companies.¹¹⁵⁴ This further illustrates the significance placed on the covert operations of rendition flights and that the concealment requirement was subsidiary to the aim of limiting rights-related state obligations.

¹¹⁴⁷ De Londras, F., ‘Privatized Sovereign Performance: Regulating in the ‘Gap’ between Security and Rights’, (2011) 38 (1) *Journal of Law and Society* 96, p. 109.

¹¹⁴⁸ Giovanni Fava, Working Document No. 8 on the Companies linked to the CIA, Aircraft used by the CIA and the European Countries in which the CIA Aircraft have made Stopovers, European Parliament, DT\641333EN.doc, p. 2.

¹¹⁴⁹ *Ibid*, p. 2.

¹¹⁵⁰ *Ibid*, p. 2.

¹¹⁵¹ *Ibid*, p. 2.

¹¹⁵² *Ibid*, p. 2.

¹¹⁵³ *Ibid*, p. 2.

¹¹⁵⁴ *Richmor Aviation, Inc. v Sportsflight Air, Inc.* 2011 NY Slip Op 01905 [82 AD3d 1423]. The case in question concerned a dispute over fees. Richmor was a company identified as a legitimate charter agent in the Fava Reports.

2.1.2. 'Shell' or 'Rogue' Charter Companies: A Gap in the Aviation Regulation

Despite the comprehensively developed transnational civil aviation regulatory regime,¹¹⁵⁵ the primary focus is on organising and regulating the logistical elements of the industry.¹¹⁵⁶ As illustrated through regional and international cooperation, industry organisations tend to focus on harmonising regulatory requirements and ensuring that regulation does not negatively impact on competitiveness and profitability.¹¹⁵⁷ The International Civil Aviation Organisation did list strengthening the law governing international civil aviation as one of its strategic objectives however the language used was so broad that it is unclear whether human rights considerations formed part of the proposed measures.¹¹⁵⁸ There is no similar reference or progress update in subsequent strategic objectives.¹¹⁵⁹

In the context of shell or rogue companies used as part of the extraordinary rendition programme, the current regulatory regime for private aircraft operators offers little, if any, practically effective rights protection mechanisms. Arguably, the industry itself might not see the involvement of civil aviation companies as part of the rendition circuits as a problem.¹¹⁶⁰ Such an approach would not be due to the nature of the activities engaged in but rather as noted above the implicated companies are ones which are set up on very temporary basis, with limited, if any staff and no fixed premises. Therefore, these companies are not an on-going or long-term concern for the industry itself either in relation to competitiveness and profitability.¹¹⁶¹ Thus, at international level, there is no practically enforceable and effective deterrent for states such the US wishing to outsource activities, which facilitate or result in violatory

¹¹⁵⁵ Some of the international and regional organisations and industry bodies include: International Civil Aviation Organization and European Aviation Safety Agency with states as members; there are also a number of airlines, airports, travel agencies and others regulatory bodies and organisations such as International Air Transport Association, International Business Aviation Council and Association of European Airlines amongst many others.

¹¹⁵⁶ De Londras, F., 'Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights', (2011) 38 (1) *Journal of Law and Society* 96, p. 110.

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ 'Strategic Objectives of ICAO for 2005 – 2010' available at http://www.icao.int/Documents/strategic-objectives/strategic_objectives_2005_2010_en.pdf [last accessed 30 March 2016], Strategic Objective F.

¹¹⁵⁹ See further 'Strategic Objectives of ICAO for 2011 – 2013' and 'Strategic Objectives of ICAO for 2014 – 2016' available at <http://www.icao.int/about-icao/pages/strategic-objectives.aspx> [last accessed 30 March 2016].

¹¹⁶⁰ De Londras, F., 'Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights', (2011) 38 (1) *Journal of Law and Society* 96, p. 114.

¹¹⁶¹ *Ibid.*

practices to private aviation companies. As such, it appears the lack of accountability or deterrent mechanisms in respect of private aviation companies is a legal black hole. Such a hole in the law creates a zone in which officials – in the context of rendition circuits, those who authorise a circuit and hire a private charter company – can act unconstrained by the rule of law.¹¹⁶² The presence of this zone, allows officials to then argue that what they do is legal as the official decisions are either necessary or made in good faith. If such a legal black hole is properly created, it would not cause tension within the rule of law.¹¹⁶³ At present, there appears to be no incentive to regulate such companies more comprehensively or through stricter licensing or outright prohibition of certain activities.¹¹⁶⁴

Albeit for different reasons, at domestic level, there are similarly no incentives to dissuade a state determined to engage in expansive counter-terrorism measures not to outsource some of its operations.

2.2. Private Charter Companies and the Rendition Circuits: Practical Enforcement Challenges at Domestic Level

One of the core distinctions between the pre and post 9/11 construct of renditions has been the use of private operators within the transnational rendition circuits.¹¹⁶⁵ While the capturing, detention and interrogation have remained within the purview and authority of the state and its apparatuses such as intelligence services,¹¹⁶⁶ private aviation companies have operationalised the actual rendition flights. The rendition circuits relied on private actors for three core services: provision of logistics including aircraft and flight planning, contracting of pilots and other essential professionals for

¹¹⁶² Dyzenhaus, D. *The Constitution of Law: Legality in a Time of Emergency* (2006, New York; Cambridge University Press), p. 202.

¹¹⁶³ *Ibid*, p. 42.

¹¹⁶⁴ White, N. D., 'Regulation of Private Military and Security Sector: Is the UK Fulfilling its Human Rights Duties?' (2016) 16 *Human Rights Law Review* 585, p. 585.

¹¹⁶⁵ Please see cases such as *Ilich Sanchez Ramirez v. France*, Application No. 28780/95, European Commission of Human Rights, Decision 24 June 1996 and capture of Adolf Eichmann, details of the abduction are available at http://www.knesset.gov.il/lexicon/eng/aichman_eng.htm [last accessed 30 March 2016].

¹¹⁶⁶ Please see for example Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program: Executive Summary*, full text available at http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf [last accessed 30 March 2016] and the Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc).

the operation of the flight and provision of security to state agents on the flights.¹¹⁶⁷ There is no indication that private operators engaged directly in any mistreatment of detainees.¹¹⁶⁸ However, their specific role in facilitating the operation of extraordinary rendition has exposed weaknesses in the practical effectiveness of human rights obligations. Individuals rendered had limited, if any, chance of challenging successfully their irregular transfers and imposing liability on the private operators. The case of *Mohamed et al v. Jeppesen Dataplan, Inc*¹¹⁶⁹ is an illustrative example. The five plaintiffs brought a suit against Jeppesen under the Alien Tort Statute, 28 U.S.C. § 1350 claiming that they were subject to an enforced disappearance and torture and other cruel, inhuman or degrading treatment.¹¹⁷⁰ The plaintiffs contended that the CIA acting jointly with other government agencies and officials of foreign governments had operated the extraordinary rendition programme to gather intelligence by apprehending and transferring individuals suspected of terrorist activities clandestinely for the purposes of detention and interrogation.¹¹⁷¹ In this context, publicly available information established that Jeppesen had provided flight planning and logistical support services to aircraft and crew on all flights irregularly transferring the five plaintiffs. The claim further stated that Jeppesen played an integral role in the forced abductions and detentions and provided direct and substantial services to the US for the extraordinary rendition programme. Thus, Jeppesen should have had actual or constructive knowledge of the objectives of the programme including the forced disappearance and ill treatment the plaintiffs would be subjected to. The US, as an intervenor–appellee, argued that the petition should be dismissed on the basis of state secret privilege as it applied to the nature and extent of the alleged activities, which privilege it invoked on behalf of itself and Jeppesen.¹¹⁷² The Court originally acceded to the government’s application however this was reversed on appeal.¹¹⁷³ The Appeal Court found that the US government had failed to

¹¹⁶⁷ De Londras, F., ‘Privatized Sovereign Performance: Regulating in the ‘Gap’ between Security and Rights’, (2011) 38 (1) *Journal of Law and Society* 96, p. 100.

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ *Mohamed v. Jeppesen Dataplan, Inc*, No. 08-15693 D.C. No. 5:07-CV-02798-JW, 9th Circuit Court of Appeal, p. 13526. The five applicants were Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah and Bisher Al-Rawi.

¹¹⁷⁰ *Mohamed v. Jeppesen Dataplan, Inc*, No. 08-15693 D.C. No. 5:07-CV-02798-JW, 9th Circuit Court of Appeal, p. 13526.

¹¹⁷¹ *Ibid.*

¹¹⁷² *Ibid.*, p. 13528.

¹¹⁷³ *Mohamed et al. v. Jeppesen Dataplan, Inc*, US 579 F.3d 953, 961-962.

establish a basis for dismissal under the state secrets privilege.¹¹⁷⁴ The Appeal Court did permit the government to reassert the doctrine at subsequent stages of the litigation.¹¹⁷⁵ Following this decision by a three-judge panel, the US government submitted a petition for a re-hearing of the application by a full-panel Appeal Court as the case concerned information essential to the maintenance of national security.¹¹⁷⁶ If the case proceeded, this information was in danger of being publicly exposed thus jeopardising national security.

Jeppesen Dataplan also submitted a petition for re-hearing by a full Appeal Court arguing that discovery in this case would be impossible due to the government's state secrets privilege claim.¹¹⁷⁷ Thus, in these circumstances, Jeppesen would be unable to properly and effectively challenge the plaintiffs' allegations as the relevant information would be inaccessible under the state secrets privilege.¹¹⁷⁸ The plaintiffs argued that if the government succeeded in this case, anyone would be effectively prevented from taking an action for damages following ill treatment as part of being subject to an extraordinary rendition and potentially in even broader circumstances.¹¹⁷⁹

In September 2010, the Court of Appeal for the Ninth Circuit reached a very closely divided verdict in the case.¹¹⁸⁰ The government invocation of the state secrets privilege was upheld. The Court reiterated a long-standing Supreme Court precedent characterizing accession to a state secrets claim as "exceptional"¹¹⁸¹ and as including cases where discovery requirements might result in the exposure of evidence "revealing military" (and thus by proxy state) secrets.¹¹⁸² In this context, the Court concluded that compelling disclosure of evidence about the existence and scope of the extraordinary rendition programme, the role Jeppesen Dataplan and/or other governments might play in the rendition circuits or any element of CIA's counter-terrorism practices would result in the revelation of state secrets that it was bound to

¹¹⁷⁴ *Ibid.*

¹¹⁷⁵ *Ibid.*

¹¹⁷⁶ *Mohamed et al. v Jeppesen Dataplan, Inc*, Fed. R. App. P. 35(a)(2).

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ *Mohamed v. Jeppesen Dataplan, Inc*, No. 08-15693 D.C. No. 5:07-CV-02798-JW, 9th Circuit Court of Appeal. The Court was split 6-5 in reaching this decision.

¹¹⁸¹ *Totten v. US*, 92 U.S. 105 (1876).

¹¹⁸² *US v. Reynolds*, 345 U.S. 1, 6-7 (1953).

protect.¹¹⁸³ Thus, the entire case had to be struck out and could not proceed further.¹¹⁸⁴

Similar decision was reached in two other cases relating to extraordinary rendition on the basis of state secrets doctrine. In both the cases of *El-Masri v. Tenet*¹¹⁸⁵ and *Arar v. Ashcroft*¹¹⁸⁶, the courts dismissed the complaints. The US intervened as a defendant in the District Court case in *El-Masri* on the basis that the case posed an unreasonable risk that state secrets would be disclosed. The case was dismissed at District Court stage on this basis and the decision was reaffirmed by the Court of Appeals.¹¹⁸⁷ The Supreme Court declined to hear the case.¹¹⁸⁸ The *Arar* case was similarly decided on national security and foreign policy grounds.¹¹⁸⁹

Unlike these two cases, the Court in *Jeppesen* did however recognised the existence of extraordinary rendition and noted that the programme in itself was not a state secret. However, partial disclosure of the existence and some aspects of the practice, did not prevent other details from remaining a state secret if their disclosure would risk grave harm to national security.¹¹⁹⁰ The Court further acknowledged that the documents submitted by the plaintiffs to corroborate the alleged involvement of Jeppesen were not subject to the privilege. However, even if the plaintiffs could structure their entire argument on non-privileged evidence, unlikely as it might be, any defence put forward by Jeppesen's would unjustifiably risk the disclosure of state secrets.¹¹⁹¹ However, the Court went on to note that its decision did not intend to bar any potential non-judicial relief and acknowledged that the denial of a judicial forum based on state secrets privilege posed concerns at both individual and structural levels.¹¹⁹²

¹¹⁸³ *Mohamed v. Jeppesen Dataplan, Inc*, No. 08-15693 D.C. No. 5:07-CV-02798-JW, 9th Circuit Court of Appeal, p. 13532.

¹¹⁸⁴ *Ibid*, p. 13543.

¹¹⁸⁵ 437 F. Supp. 2d 530 (E.D. VA. 2006). Mr El-Masri filed a suit against the US for his detention in Macedonia, subsequent extraordinary rendition to Afghanistan and ill treatment and detention while in Afghanistan.

¹¹⁸⁶ 414 F.Supp.2d 250 (E.D.N.Y. 2006). Mr Arar filed a complaint against a number of US officials such the Attorney General of the US and the Director of the FBI amongst others following his detention by US officials at JFK Airport and subsequent extraordinary rendition to Syria via Jordan and his ill treatment while detained in Syria.

¹¹⁸⁷ *El-Masri v. Tenet* 479 F. 3d 296, 4th Circuit Court of Appeals.

¹¹⁸⁸ Greenhouse, L., 'Supreme Court refuses to hear Torture Appeal' *The New York Times* 9 October 2007 available at http://www.nytimes.com/2007/10/09/washington/09cnd-scotus.html?_r=0 [last accessed 30 March 2016].

¹¹⁸⁹ 414 F.Supp.2d 250 (E.D.N.Y. 2006).

¹¹⁹⁰ *Ibid*, p. 13551–13552.

¹¹⁹¹ *Ibid*, p. 13544, 13552.

¹¹⁹² *Ibid*, p. 13553.

At individual level, the Court noted, striking out this case has blocked access to one judicial remedy and deprived the plaintiffs from the opportunity to prove the alleged mistreatment and obtain damages.¹¹⁹³ At structural level, dismissing the case prevented further judicial review in this civil litigation – an important check on alleged abuses by government officials and alleged private contractors. Thus, the Court appeared to regret having to reach this decision. This apparent frustration by the Court is arguably a tacit acknowledgement that in this particular context individual rights protections were practically unenforceable. More significantly perhaps, what this litigation does illustrate is the ability of a state to rely on a sovereign defence such as state secrets privilege in relation to outsourced and privatised activities.¹¹⁹⁴ Thus, arguably, the most significant legacy of all three cases and *Jeppesen* in particular is the exposed structural deficiency in rights protections of the domestic US justice system, which can allow a private operator to benefit from the application of the state secret privilege.

2.3. *Private Flight Operators: Concluding Remarks*

The comprehensive IHRL framework, which protects individuals and imposes obligations to states, is yet to extend its application to private operators. In the context of the ‘War on Terror’, a complex, widely-publicised and multi-theatre transnational campaign against terrorism, the highly developed public sphere from a rights-protection perspective posed a conceptual challenge for a state wishing to engage in clandestine and irregular activities.¹¹⁹⁵ The solution to the problem of how a state might be able to operate or facilitate violatory practices thus arguably lay in the private sphere.¹¹⁹⁶ This is particularly the case if the private sphere is perceived as a mostly unregulated legal space or a legal black hole from a human rights perspective and therefore there is sufficient level of exploitable uncertainty or gap to facilitate the concealment of unlawful activity.¹¹⁹⁷

¹¹⁹³ *Ibid.*

¹¹⁹⁴ For broadly similar comments see further De Londras, F., ‘Privatized Sovereign Performance: Regulating in the ‘Gap’ between Security and Rights’, (2011) 38 (1) *Journal of Law and Society* 96.

¹¹⁹⁵ De Londras, F., ‘Privatized Sovereign Performance: Regulating in the ‘Gap’ between Security and Rights’, (2011) 38 (1) *Journal of Law and Society* 96, p. 98.

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ *Ibid.*

This thesis has argued that through the ‘War on Terror’ legal paradigm the US sought to exploit perceived or existing gaps within the international legal framework in order to operationalise the transnational scope of the rendition circuits. The regular reliance on private companies and charter services to complete rendition flights has exploited one such gap – the lack of regulation of rogue or shell private charter companies. This gap has developed as a result of the regulatory aims of both IHRL and the international civil aviation provisions. While IHRL has focused on protecting individual rights by imposing obligations only on states, the international civil aviation industry has accentuated competition and profitability. Within the thus created unregulated legal space facilitating and arguably encouraging states to outsource activities to private operators, the US designed the rendition circuits in manner allowing it to fully exploit this gap. The enhanced intelligence sharing and cooperation post 9/11 securitisation has been approached in a similar manner.

3. The Post 9/11 Push for Enhanced Intelligence: An Expansion of an Existing Rights Enforceability Gap

The immediate international responses by the UN Security Council and NATO and domestic legislative¹¹⁹⁸ and political¹¹⁹⁹ reaction of countries such as the US and the UK are illustrative of the extensive post 9/11 securitisation. A common feature of these responses has been the commitment to and inclination towards more collaborative and transnational counter-terrorism responses. Recent advances in surveillance and the increasing scope and span of bi- and multi-lateral intelligence sharing and cooperation are representative of this push for collaboration on matters of

¹¹⁹⁸ See further the discussions in the Introductory Chapter of this thesis on the USA Patriot Act, which came into force on 26 October 2001 and the UK Anti-Terrorism, Crime and Security Act 2001, which came into force on 14 December 2001. Both these Acts extended already available and broad counter-terrorism and crime prevention powers as well as expanded reliance on immigration and asylum measures amongst other modifications on existing legislation.

¹¹⁹⁹ Former UK Prime Minister Tony Blair’s Statement to the Nation 11 September 2001, full text available at <http://webarchive.nationalarchives.gov.uk/20040621031906/http://number10.gov.uk/page1596> [last accessed 30 March 2016]. Former UK Prime Minister Tony Blair Labour Party Conference Speech 2 October 2001, full text available at <http://www.theguardian.com/politics/2001/oct/02/labourconference.labour6> [last accessed 30 March 2016]. Former US President George W Bush Speech on Terrorism 6 September 2006, full text available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&_r=0 [last accessed 30 March 2016].

national security at both domestic and international level.¹²⁰⁰ More significantly perhaps, enhancing national security has been one of the key drivers for improved data sharing and expanding means of state surveillance.¹²⁰¹

Bilateral and multilateral intelligence cooperation between states is not a new phenomenon as evidenced by organisations such as Europol and Interpol and agreements such as the UKUSA.¹²⁰² With the end of the Cold War however and particularly after 9/11, the scope and span of intelligence agencies has expanded significantly in line with the increasingly transnational nature of the security threats.¹²⁰³ The fight against terrorism has spurred on a dramatic growth in bilateral and multilateral intelligence cooperation in terms of both the volume of the information shared and the number of joint operations.¹²⁰⁴ In addition, pieces of legislation such as the USA Patriot Act have aimed to achieve more enhanced integration of law enforcement and security agencies and improved information sharing – a cooperation described as vital in pre-empting terrorist attacks.¹²⁰⁵ The resulting dilution of institutional barriers between the agencies responsible for internal and external security and bi- and multi-lateral state cooperation has arguably led to the development of a much broader and more far-reaching understanding of what national security entails.¹²⁰⁶

This upsurge in intelligence cooperation similar to the use of private operators have presented a growing challenge to states' accountability at domestic and international level particularly in the context of covert and violatory counter-terrorism programmes such as extraordinary rendition. The exchange of intelligence information has been a

¹²⁰⁰ Please also refer to the discussion in the Introductory Chapter of this thesis.

¹²⁰¹ Goold, B.J., 'Privacy, Identity and Security' in Goold, B.J. and Lazarus, L. (eds.), *Security and Human Rights* (2007, Portland; Hart Publishing), p. 57.

¹²⁰² For further details on the UKUSA agreement please refer to the National Security Agency's declassification of certain papers available at http://www.nsa.gov/public_info/declass/ukusa.shtml [last accessed 30 March 2016].

¹²⁰³ See further Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States* AS/Jur (2006) 16 Part II, p. 56.

¹²⁰⁴ Leigh, I., "Accountability and Intelligence Cooperation" in Born, H., Leigh, I. and Wills, A. (eds.) *International Intelligence Cooperation and Accountability* (2011, New York; Routledge), p. 3.

¹²⁰⁵ The full text of the remarks by former US President George W Bush at the signing ceremony for the USA Patriot Act 2001 is available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_102601.html [last accessed 30 March 2016].

¹²⁰⁶ See further Ramraj, V.V. *et al* (eds.), *Global Anti-Terrorism Law and Policy* (2012, Cambridge; Cambridge University Press), Zedner, L. *Security* (2009, New York; Routledge), Born, H., Leigh, I. and Wills, A. (eds.) *International Intelligence Cooperation and Accountability* (2011, New York; Routledge), Goold, B.J. and Lazarus, L. (eds.), *Security and Human Rights* (2007, Portland; Hart Publishing).

core component of the rendition circuits as it has led to the capture of a number of individuals who were rendered as part of the HVDP.¹²⁰⁷ This Chapter argues that while intelligence cooperation is not necessarily a gap within the international legal framework *per se*, its use for the purposes of extraordinary renditions as a legal grey hole has resulted in serious violations of human rights.

3.1. Existing Concerns relating to Intelligence Cooperation

The main function of intelligence agencies is to detect potential threats to national security such as terrorism threats by gathering information in a covert manner without alerting targeted individuals.¹²⁰⁸ To achieve this goal, intelligence services utilise a range of investigative techniques including undisclosed surveillance and/or searches of premises and objects, interception and monitoring of (electronic) communications and infiltration of organisations amongst others.¹²⁰⁹ The adoption of such measures to counter-terrorism could arguably be justified in the context of state's positive obligations under IHRL to protect individual's life.¹²¹⁰ States are under an obligation to take preventative measures if there is a suspected or known risk to an individual or individuals from either criminal acts or acts of terrorism.¹²¹¹ The HRC has noted on several occasions that the International Covenant on Civil and Political Rights protects the right to security of the person in contexts other than formal deprivation of liberty.¹²¹²

While intelligence services have an important role in understanding and responding to terrorist threats, their role should arguably be defined and constrained more effectively within an institutional framework consistent with the rule of law and

¹²⁰⁷ See cases such as *Khaled El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09 Judgment 13 December 2012 and Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006, Ottawa; Public Works and Government Services). See also the comprehensive report of Open Society Justice Initiative, *Globalising Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; Open Society Foundations).

¹²⁰⁸ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/10/3, para. 25.

¹²⁰⁹ *Ibid*, para. 26.

¹²¹⁰ The right to life is codified in the European Convention on Human Rights (Article 2), the International Covenant on Civil and Political Rights (Article 6), American Convention on Human Rights (Article 4) amongst others.

¹²¹¹ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/10/3, para. 26.

¹²¹² See for example *Delgado Paez v. Colombia*, Communication No. 195/1985.

democracy.¹²¹³ This is particularly important in a context where both national and international accountability mechanisms intended to regulate intelligence cooperation and sharing are underdeveloped.¹²¹⁴ The lack of such a framework poses challenges in assessing the compliance of states with their human rights obligations and by proxy potentially renders individual rights protections practically ineffective if their rights have been violated due to incorrect intelligence as will be illustrated further below. The Special Rapporteur on Human Rights has noted that states can make use of certain preventative, intelligence-gathering measures regulated by courts in order to counter terrorism.¹²¹⁵ From this perspective the development of what has been described as intelligence legalism¹²¹⁶ within the US is of note.

Through the combined operation of the Foreign Intelligence Surveillance Act of 1978 (FISA)¹²¹⁷ and Executive Order 12 333¹²¹⁸, in actuality there is a comprehensive compliance apparatus staffed by hundreds of people in both the executive and judicial branches.¹²¹⁹ This infrastructure is tasked with implementing and enforcing a complex framework of rules in relation to intelligence gathering, cooperation and compliance with other obligations; thus if rights or rights-protecting procedures have been announced, this apparatus proceeds to effectuate these rights and follow these procedures going forward.¹²²⁰ Errors – at times quite significant as will be illustrated in Section 3.2 – do however occur. As such, a good oversight framework requires its institutions not just to support and enforce compliance but also to design adequate and appropriate rules and procedures.¹²²¹

However, the offices tasked with ensuring that the US intelligence apparatus complies with existing rules are almost entirely composed of compliance officers.¹²²² Thus,

¹²¹³ *Ibid*, p. 56

¹²¹⁴ Leigh, I., “Accountability and Intelligence Cooperation” in Born, H., Leigh, I. and Wills, A. (eds.) *International Intelligence Cooperation and Accountability* (2011, New York; Routledge), p. 6-7.

¹²¹⁵ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/10/3, para. 30.

¹²¹⁶ Schlanger, M., ‘Intelligence Legalism and the National Security Agency’s Civil Liberties Gap’ (2015) 6 *Harvard National Security Journal* 112, p. 113.

¹²¹⁷ Full text available at <https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1783.pdf> [last accessed 30 March 2016].

¹²¹⁸ Exec. Order No. 12 333, 46 Ref. Reg. 59941 (4 December 1981) amended by Exec. Order No. 13 284, 68 Fed. Reg. 4075 (23 January 2003); Exec. Order No. 13 355, 69 Fed. Reg. 53594 (27 August 2004) and Exec. Order No. 13 470, 73 Fed. Reg. 45325 (30 July 2008).

¹²¹⁹ For details please refer to Schlanger, M., ‘Intelligence Legalism and the National Security Agency’s Civil Liberties Gap’ (2015) 6 *Harvard National Security Journal* 112, p. 113.

¹²²⁰ *Ibid*, p. 113.

¹²²¹ *Ibid*.

¹²²² *Ibid*.

their role is to improve compliance with existing rules and not necessarily consider a more tailored approach reflective of individual rights protections. In this context the manner in which intelligence services approach the issue of compliance is to ask whether they legally could use a certain intelligence measure rather than whether they should.¹²²³ This methodology is similar to the reasoning adopted by the US Executive, following the 9/11 moral panic catalyst, in deciding what counter-terrorism approach to adopt.

The preference for engaging with the first question – the scope of legality – rather than the appropriateness and necessity considerations contained within the second question has resulted in what has been described as intelligence legalism. Intelligence legalism has three core features: imposition of substantive rules, which are given the status of law (i.e. veneer of legality) rather than policy, some albeit limited court enforcement of these rules and empowerment of lawyers.¹²²⁴ A crucial aspect of intelligence legalism has been that rather than shifting power to the courts, it has shifted power to agency counsel and the Department of Justice (part of the Executive) thus instituting internal rules governing intelligence operations.¹²²⁵ As a result of the comprehensive focus on compliance and law (understood as Executive Orders, legislative instruments such as FISA, court orders, regulations), intelligence legalism has in actuality obscured the absence of what should be an additional focus on tailored and enforceable individual rights protections.¹²²⁶ Thus, as this approach gives systematically insufficient weight to individual liberties and freedoms, it has resulted in legitimising liberty-infringing programmes.¹²²⁷ In other words, intelligence legalism has triggered the second cycle of legality where obligations are increasingly approached in a formal or empty manner suggesting an appearance of legality rather than a substantive commitment. As such, an extensive compliance regime in respect of intelligence gathering or cooperation, which gradually develops into a legal grey hole, can be as damaging as the inherent risk of over-inclusiveness as Section 3.2 will discuss.

¹²²³ *Ibid.*

¹²²⁴ *Ibid.*

¹²²⁵ *Ibid.*, p. 123.

¹²²⁶ *Ibid.*, p. 118.

¹²²⁷ *Ibid.*

3.2. Post 9/11 Challenges posed by Intelligence Gathering and Cooperation

Increasingly, intelligence agencies have used ‘data mining’ – matching material from various databases to a number of variables – as part of their information gathering methods particularly in relation to counter-terrorism pre-emption.¹²²⁸ However, the inherent risk of over-inclusiveness has arguably reduced the threshold of what constitutes acceptable targeted surveillance.¹²²⁹ The technical capabilities of data mining are such that if the parameters of what is considered suspicious are broadened, surveillance could amount to arbitrary or unlawful interference with privacy.¹²³⁰ This is particularly important in the context of counter-terrorism measures where intelligence gathering and sharing could have significant implications for individual human rights. Cases such as Maher Arar and Khaled El Masri – both of whom were extraordinarily rendered – have exposed the dangers of intelligence cooperation in such circumstances.

In each of these two cases, intelligence gathering and information sharing led to the capture, *incommunicado* detention and ill treatment during interrogation of the individuals in question.¹²³¹ In relation to Mr Arar, the Canadian Commission of Inquiry found that there was no evidence presented that Mr Arar had committed any offence or posed a threat in Canada.¹²³² Rather, the Canadian police had wished to interview him as a witness due to his association with other individuals.¹²³³ This information was passed on to US officials who then placed Mr Arar on a watch list.¹²³⁴ As was subsequently discovered the information was inaccurate and it portrayed Mr Arar in an unfairly negative fashion overstating his importance to the

¹²²⁸ Please refer to for example the extensive information provided as part of the Snowden Revelations available at <http://www.theguardian.com/us-news/the-nsa-files> [last accessed 30 March 2016].

¹²²⁹ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/10/3, para. 32.

¹²³⁰ *Ibid*, para. 32.

¹²³¹ *Arar v. Ashcroft* 414 F.Supp.2d 250 (E.D. N.Y. 2006) available at <http://caselaw.findlaw.com/us-2nd-circuit/1498466.html> [last accessed 30 March 2016] and *Khaled El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012.

¹²³² Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006, Ottawa; Public Works and Government Services), p. 13 – 15 available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf [last accessed 30 March 2016].

¹²³³ *Ibid*.

¹²³⁴ *Ibid*.

Canadian investigation.¹²³⁵ This information did however result in his extraordinary rendition to Syria where he was ill treated for nearly a year.¹²³⁶

Khaled El Masri was detained at a state border and subsequently also extraordinarily rendered following bilateral intelligence information sharing and cooperation.¹²³⁷ He was detained for 24 days in a Skopje hotel before being handed over to a CIA rendition team.¹²³⁸ The Macedonian authorities argued that his capture and detention were in line with increased security over the festive New Year period, border control officials were operating on a higher state of alert.¹²³⁹ The authorities stated that the investigation and interrogation Mr El Masri was subjected to was within routine domestic procedures and was necessary due to the suspicions relating to his passport.¹²⁴⁰ An electronic request was made to the central Interpol database – no Interpol warrant existed.¹²⁴¹

However as found within 2006 Council of Europe Report¹²⁴² – quoted by the European Court of Human Rights – the Macedonian Intelligence Services (UBK) routinely consulted with the CIA and exchanged information. A full description of Mr El Masri was transmitted to the CIA for analysis. The CIA analysis confirmed – based on still classified intelligence information – that Khaled El Masri was involved with terrorist organisations.¹²⁴³ The CIA requested that he be immobilised and detained until they could arrange for a transfer. A European Parliament Resolution adopted in 2006 has referred his detention in both Macedonia and Afghanistan as illegal.¹²⁴⁴ On the basis of the available evidence, the only known reason why Mr El Masri was eventually extraordinarily rendered was due to the unfounded suspicions that his passport was falsified.

As these two cases illustrate, the exchange of intelligence information and in particular the methods associated with its collection, require careful and thorough assessment of the validity of the information before it is relied upon to take punitive

¹²³⁵ *Ibid.*

¹²³⁶ Please also refer to the discussion of this case in Chapter 2 of this thesis.

¹²³⁷ *Khaled El-Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012.

¹²³⁸ *Ibid.*, para. 17, 21–22.

¹²³⁹ *Ibid.*, para. 37.

¹²⁴⁰ *Ibid.*

¹²⁴¹ *Ibid.*

¹²⁴² See further Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers involving Council of Europe Member States* AS/Jur (2006) 16 Part II.

¹²⁴³ *Ibid.*

¹²⁴⁴ Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, European Parliament 2006/2027 (INI), doc. P6_TA (2006) 0316.

actions against an individual.¹²⁴⁵ This is especially important in a terrorism prevention context where flawed intelligence information or exchange can result in severe collateral impacts such as violations of individual rights including the prohibition on torture.¹²⁴⁶ In the context of increasingly transnational counter-terrorism and security measures – extraordinary renditions being a particularly apt example – oversight and accountability of intelligence agencies needs to improve. Currently, the growing cooperation between domestic national intelligence and security agencies at regional and transnational level has not been matched by an equivalent growth in international collaboration on oversight, accountability and review bodies.¹²⁴⁷

The ICJ Eminent Jurist Panel recommended that it is imperative that states establish independent oversight mechanisms legally regulating the gathering and sharing of intelligence information and ensuring that the work of intelligence cooperation agencies is fully compliant with human rights standards.¹²⁴⁸ Similar recommendations were made by the Arar Commission in Canada and the Venice Commission, which while acknowledging the need for intelligence sharing, urged for caution in relation to the content of that information and the use it may be put to by a recipient.¹²⁴⁹ Both reports emphasised on the need for stronger and effective regulatory mechanisms regarding the operations of intelligence services to avoid the pitfalls of creating an accountability black hole within the state.¹²⁵⁰

¹²⁴⁵ Chaskalson, A., ‘The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law, (2008) 67 (1) *Cambridge Law Journal* 69, p. 85.

¹²⁴⁶ Forcese, C., ‘The Collateral Casualties of Collaboration: The Consequences for Civil and Human Rights of Transnational Intelligence Sharing’ in Born, H., Leigh, I. and Wills, A. (eds.) *International Intelligence Cooperation and Accountability* (2011, New York; Routledge), p. 72.

¹²⁴⁷ Leigh, I., ‘Accountability and Intelligence Cooperation’ in Born, H., Leigh, I. and Wills, A. (eds.) *International Intelligence Cooperation and Accountability* (2011, New York; Routledge), p. 4.

¹²⁴⁸ International Commission of Jurists, *Assessing Damage, Urging Action*, available here <http://icj.wpenet.netdna-cdn.com/wp-content/uploads/2012/04/Report-summary-of-the-eminent-jurists-panel-Report-of-the-Eminent-Jurists-Panel-2009.pdf> [last accessed 30 March 2016].

¹²⁴⁹ Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of the Events relating to Maher Arar – Factual Background*, (2006, Ottawa; Minister of Public Works and Government Services), p. 103; Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363/2005, CDL – AD (2006) 009, paras. 116 – 120; see also Council of Europe, *Secretary General’s Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, notably by or at the instigation of Foreign Agencies*, available here <https://wcd.coe.int/ViewDoc.jsp?id=976731&Site=COE> [last accessed 30 March 2016].

¹²⁵⁰ Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363 / 2005, CDL – AD (2006) 009, paras. 120 where the report makes reference to the creation of a “State within a State”.

Such an improvement on oversight and accountability is becoming even more necessary as post 9/11 states have increasingly outsourced intelligence collection to private contractors.¹²⁵¹ A UN report has noted that in the US seventy per cent of intelligence activities are being outsourced to private actors.¹²⁵² While the involvement of private actors could be necessary as a technical matter in order to have access to information such as electronic surveillance, some of the outsourced activities have included the interrogation of detainees by private contractors under the direction and control of the US government.¹²⁵³ This use of private contractors is yet another example of the increasing outsourcing of an array of state security services in the context of counter-terrorism operations. As noted in the preceding section, the private sphere is a relatively unregulated legal space from a human rights perspective and therefore there is sufficient level of exploitable uncertainty or gap to facilitate the concealment of unlawful activity.¹²⁵⁴

In order to operationalise the rendition circuits and the HVDP, the US relied on a transnational network of exchanging and gathering intelligence information. This exchange, as illustrated by the cases of Arar and El-Masri, has resulted in serious violations of individual human rights and by proxy, has posed severe challenges to the practical enforceability of the human rights framework. Thus, while traditionally, intelligence cooperation may not have been considered an exploitable gap with reference to IHRL *per se*, the significantly increased post 9/11 scope and span of available measures and growing reliance on private companies suggests that intelligence sharing and cooperation is developing into an exploitable non-regulated legal space.

¹²⁵¹ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/10/3, para. 41. See also Priest, D., and Arkin, W., *Top Secret America: The Rise of the New American Security State* (2011, New York; Little, Brown and Company).

¹²⁵² *Ibid*, p. 13.

¹²⁵³ *Ibid*, p. 13. See further, *United States v. Passaro* (No. 5:04-CR-211-1) US District Court for the Eastern District of North Carolina (17 June 2004). Michael Hayden, Hearing of the United States Senate Select Committee on Intelligence, Annual Worldwide Threat Assessment available at http://fas.org/irp/congress/2007_hr/011107transcript.pdf [last accessed 30 March 2016].

¹²⁵⁴ De Londras, F., 'Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights', (2011) 38 (1) *Journal of Law and Society* 96, p. 98.

4. Conclusion

Following the events of 9/11, the US has sought to limit its rights-related obligations by utilising or exposing what were perceived as gaps in the system. For the purposes of HVDP, they exploited existing effectiveness deficiencies within the international legal framework such as private flight operators in order to facilitate and engage in violatory behaviour. Without ignoring the potential for transnational private regulation to address and close this gap, the privatised operation of rendition circuit flights has exposed the practical inability of the regional and international human rights structures to disincentivise or curb violatory behaviour by states.¹²⁵⁵

The effects of the increasingly transnational and expansive exchange of intelligence information, the development of intelligence legalism in the US and the more recent inclusion of private entities as part of intelligence gathering have further contributed to decreased accountability for these measures and by proxy further restrictions on the practical effectiveness of human rights protections. The international human rights framework and practical effectiveness deficiencies within it have been exploited by the transnational operation of extraordinary renditions and individual rights protections have been severely challenged. However as the concluding remarks will argue through the recent developments in the European Court of Human Rights and international, regional and domestic inquiries, the human rights framework has demonstrated strength and resilience within.

¹²⁵⁵ For a broadly similar argument, please see De Londras, F., 'Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights', (2011) 38 (1) *Journal of Law and Society* 96.

Post 9/11 and the High Value Detainee Programme: The Human Rights Response

1. Introduction

Following 9/11, much of the academic and public discourse has focused on achieving – if at all possible – the ‘right’ balance between justifiable restrictions of civil liberties in order to (significantly) improve national security. The immediate legislative¹²⁵⁶ and political¹²⁵⁷ responses of countries such as the United States and the United Kingdom have been illustrative of the preference for more expansive national security policies balanced against the perceived necessary restrictions of the individual human rights and civil liberties of those who were suspected of acts of terrorism or were seen to be a security threat. Additionally, the US adopted the paradigm of war and announced that it will engage in a multi-front multi-faceted transnational campaign against terrorism in order to respond to and eradicate the threat.¹²⁵⁸

At international level, bodies such as the UN Security Council and NATO engaged in the development of transnational security framework and strongly urged states to adopt bi- and multi-lateral agreements and arrangements and expand intelligence sharing and cooperation in order to combat the threat of terrorism effectively. Through the so-called law making UN Security Council Resolution 1373, the creation of the Security Council Counter Terrorism Committee and the first invocation of Article 5 of the North Atlantic Treaty, these bodies demonstrated willingness to

¹²⁵⁶ See further the discussions in the Introductory Chapter of this thesis on the USA Patriot Act, which came into force on 26 October 2001 and the UK Anti-Terrorism, Crime and Security Act 2001, which came into force on 14 December 2001. Both these Acts extended already available and broad counter-terrorism and crime prevention powers as well as expanded reliance on immigration and asylum measures amongst other modifications on existing legislation.

¹²⁵⁷ Former UK Prime Minister Tony Blair’s Statement to the Nation 11 September 2001, full text available at <http://webarchive.nationalarchives.gov.uk/20040621031906/http://number10.gov.uk/page1596> [last accessed 30 March 2016]. Former UK Prime Minister Tony Blair Labour Party Conference Speech 2 October 2001, full text available at <http://www.theguardian.com/politics/2001/oct/02/labourconference.labour6> [last accessed 30 March 2016]. Former US President George W Bush Speech on Terrorism 6 September 2006, full text available at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&_r=0 [last accessed 30 March 2016].

¹²⁵⁸ Please see further ‘Transcript of President Bush’s Address’, *CNN News* 21 September 2001 available at <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> [last accessed 30 March 2016].

facilitate a transnational environment accommodative of expansive counter-terrorism measures. It is within this atmosphere focused on pre-empting, preventing and muscularly responding to the threat of Al Qaeda and international terrorism in general that counter-terrorism measures such as the high value detainee programme (HVDP) including extraordinary renditions were conceived.

In post 9/11 construct, extraordinary rendition, a form of covert irregular transfer, has developed into a means of outsourcing torture and facilitating *incommunicado* detention in conditions that constitute multiple and persistent violations of human rights. It is, thus, a complex phenomenon, comprising of grave and multiple violations of international obligations, which severely challenges the perception that international human rights law has the capacity to effectively protect individual rights and particularly to uphold the absolute, *jus cogens* character of the prohibition against torture. What this thesis has aimed to assess is whether extraordinary rendition poses a unique and corrosive threat to human rights protections; concurrently, it has examined whether the human rights framework has demonstrated strength within to resist the severity of the challenge posed by the rendition circuits.

There has been much work – from academic scholars, UN and regional bodies, NGOs and investigative journalism – establishing the contours of the extraordinary rendition programme. This work has focused on the actual existence of these circuits, the number of individuals rendered, Council of Europe member state involvement and on outlining the violations that extraordinary renditions entail.¹²⁵⁹ Much of this work has characterised extraordinary renditions as a case of ‘simple’ violation of international or regional human rights obligations and has engaged in listing exactly which provisions of the various human rights treaties were breached. This thesis has approached the issue from a different and original standpoint. By focusing on the hyper compulsion for legality (or hyper legalism for short) adopted by the US towards every component of its transnational counter-terrorism campaign starting with the

¹²⁵⁹ Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, AS/Jur (2007) 36; Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion no. 363 / 2005 CDL-AD (2006) 009; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3; Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc); Satterthwaite, M. and Fisher, A., ‘Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law’ (2006) 6 *The Long Term View* 52; Weissbrodt, D. and Bergquist, A., ‘Extraordinary Rendition: A Human Rights Analyses’ (2006) 19 *Harvard Human Rights Journal* 123 and many others.

negation of the applicability of IHRL as *lex generalis*, the determination that due to the “novel” nature of the ‘War on Terror’ ‘armed conflict’, core IHL protections were inapplicable or severely restricted, the denial of extraterritorial scope of rights obligations and the liability limiting use of diplomatic assurances and private operators, this thesis argues that these areas conceptualised in combination have been exploited by the US in order to operationalise extraordinary renditions. While the thesis assesses the comprehensiveness of the human rights and humanitarian law frameworks, it goes further than just outlining the range of rights violations committed as part of the rendition circuits. The thesis also explores the relationship between the post 9/11 moral panic and the interpretation catalysts, which have influenced the conception and development of the extraordinary rendition programme and the subsequent reliance on hyper legalism to provide a veneer of legality to every stage of the circuits.

The thesis thus argues that the existence and operation of the rendition circuits is as much the result of multi-faceted, comprehensive and inter-connected legal and political arguments within an international and domestic environment focused on pre-emption, prevention and securitisation as is also the product of exploitative or *male fides* interpretation of its existing obligations under public international law and the human rights and humanitarian law frameworks. In so doing, this thesis has raised questions about the fundamental structure and capacity of international human rights law from an effectiveness perspective. However, the recent forceful decisions of the European Court of Human Rights and numerous UN, regional and NGO reports exposing the operation of the programme, suggest that the institutions of the human rights framework have fought back and demonstrated that the human rights framework has resilience within.

2. Human Rights Fight Back?

Counter-terrorism legislation can pose not only an inherent threat to civil liberties but also as the history of the such preventative legislation demonstrates, it can have limited practical use in eradicating terrorism.¹²⁶⁰ Those caught in the wide net cast by

¹²⁶⁰ Dysenhaus, D., ‘Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security’ (2003) 28 *Australian Journal of Legal Philosophy* 1, p. 2; See also Jackson, J., ‘Many Years on in Northern Ireland: the Diplock Legacy’, (2009) 60 *Northern Ireland Legal Quarterly*

expansive counter-terrorism measures and legislation are more often than not the ‘other’ or the ‘alien’ – (illegal) immigrants, refugees, those of different skin colour, political dissidents, the already marginalised or within US domestic legislation anyone who is not a US citizen or non-nationals.¹²⁶¹ When such terrorism legislation is adopted, the normally broad and politically underpinned understandings of ‘terrorist’ and ‘national security’ tend to give the Executive a wide scope for dealing with those considered to be a security threat or a ‘folk devil’.¹²⁶² What has distinguished the pre and post 9/11 legislative counter-terrorism approaches, is that the relationship between the state and ‘other’ – the ‘folk devil’ who poses a security threat – appears to have been permanently recalibrated. Criminal law, immigration and general security related legislation together with specific counter-terrorism laws now operate in combination as part of the state terrorism pre-emption toolkit.

However, legislative tools – domestically and internationally – were not deemed sufficient by the US post 9/11. When faced with an intense moral panic and lingering fear, the transnational counter-terrorism approach catalysed by US Executive decision-making resulted in severe and persistent violations of human rights. These violations facilitated by a hyper legalistic approach towards international legal obligations also resulted in the resurfacing of a long-standing debate in the academic scholarship and practice – how much deference should be afforded to the Executive in respect of its activities in matters of foreign affairs and national security.¹²⁶³ History

213; Donohue, L., ‘Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law’, (2007) 59 *Stanford Law Review* 1321; English, R., *Terrorism: How to Respond* (2009, Oxford; Oxford University Press).

¹²⁶⁰ *Ibid.*

¹²⁶¹ Dysenhaus, D., ‘Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security’ (2003) 28 *Australian Journal of Legal Philosophy* 1, p. 2; Luban, D., ‘Eight Fallacies about Liberty and Security’ in Wilson, R. (ed.), *Human Rights in the ‘War on Terror’* (2005, Cambridge; Cambridge University Press); and Cohen, S., *Folk Devils and Moral Panics*, 3rd ed. (2002, New York; Routledge).

¹²⁶² Macklin, A., ‘Borderline Security’, in Daniels, R. J., *et al* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill (2001)* (2001, Toronto; Toronto University Press) and Dysenhaus, D., ‘Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security’ (2003) 28 *Australian Journal of Legal Philosophy* 1, p. 2. Saul, B., *Defining Terrorism in International Law* (2006, Oxford; Oxford University Press); Pantazis, C. and Pemberton, S., ‘From the ‘Old’ to the ‘New’ Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation’ (2009) 49 *British Journal of Criminology* 646; Greene, A., ‘The Quest for a Satisfactory Definition of Terrorism: *R v Gul*’ (2014) 77 (5) *Modern Law Review* 780.

¹²⁶³ Ingber, R., ‘International Law Constraints as Executive Power’ (2016) 57 (1) *Harvard International Law Journal* 49; Posner, E. A. and Sunstein, C. R., ‘Chevronizing Foreign Relations Law’ (2007) 116 *Yale Law Journal* 1170 and Posner, R., *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006, New York; Oxford University Press).

suggests that the courts have tended to be deferential – at times considerably – to executive national security policy and international law interpretation.¹²⁶⁴

The domestic US decisions relating to the operation of the rendition circuits and use of private charter companies - *Mohamed et al v. Jeppesen Dataplan, Inc.*,¹²⁶⁵ *El-Masri v. Tenet*¹²⁶⁶ and *Arar v. Ashcroft*¹²⁶⁷ - seem to follow previous US courts' history of judicial deference. However, the US Supreme Court decisions in the so-called Guantánamo jurisprudence – the cases of *Hamdi v. Rumsfeld*,¹²⁶⁸ *Rasul v. Bush*¹²⁶⁹ and *Hamdan v. Rumsfeld*¹²⁷⁰ suggest that this is not an entirely apt assessment. In the first two cases, the Supreme Court found that Guantánamo Bay detainees are entitled to a meaningful opportunity to contest the factual basis for their detention before a neutral decision maker and to invoke the jurisdiction of US federal courts. In the *Hamdan* case, the Court found that Common Article 3 of the Geneva Conventions affords minimal protection to individuals associated either with a signatory or a non-signatory of the Conventions who are involved in a conflict on the territory of a signatory.¹²⁷¹ Thus, in these cases, the Supreme Court refused to accept the US Executive interpretation that individuals detained as part of the conflict with Al Qaeda have limited, if any, protections under international humanitarian law.

In other domestic approaches relating to various strands of the 'War on Terror', the approach of the Italian Supreme Court towards the extraordinary rendition of Mr Osama Nasr (Abu Omar) is illustrative of the role domestic courts can play in enforcing the human rights framework. In 2009, twenty-three US agents were convicted *in absentia* and sentenced to imprisonment for their role in the kidnapping

¹²⁶⁴ Ingber, R., 'International Law Constraints as Executive Power' (2016) 57 (1) *Harvard International Law Journal* 49, p. 85, Ewing, K., 'The Political Constitution of Emergency Powers: A Comment' (2007) 3 *International Journal of Law in Context* 313 and Tushnet, M., "Defending *Korematsu*?: Reflections on Civil Liberties in Wartime" (2003) *Wisconsin Law Review* 273.

¹²⁶⁵ *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 D.C. No. 5:07-CV-02798-JW, 9th Circuit Court of Appeal, p. 13526. The five applicants were Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah and Bisher Al-Rawi.

¹²⁶⁶ 437 F. Supp. 2d 530 (E.D. VA. 2006). Mr El-Masri filed a suit against the US for his detention in Macedonia, subsequent extraordinary rendition to Afghanistan and ill treatment and detention while in Afghanistan.

¹²⁶⁷ 414 F.Supp.2d 250 (E.D.N.Y. 2006). Mr Arar filed a complaint against a number of US officials such the Attorney General of the US and the Director of the FBI amongst others following his detention by US officials at JFK Airport and subsequent extraordinary rendition to Syria via Jordan and his ill treatment while detained in Syria.

¹²⁶⁸ 124 S. Ct. 2633 (2004).

¹²⁶⁹ 124 S. Ct. 2686 (2004).

¹²⁷⁰ 548 U.S. 557 (2006).

¹²⁷¹ *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

of Mr Nasr.¹²⁷² Three US citizens were acquitted due to their diplomatic immunity. Two Italian agents were convicted of complicity in the abduction however five were acquitted as evidence which reportedly documented their cooperation with the US was classified as secret and could not be used in the trial.¹²⁷³

The forceful European Court of Human Rights' approach towards extraordinary renditions arguably stands out the most. The Court was highly critical of both the US high value detainee programme and in particular of the operation of extraordinary renditions as well as the connivance and acquiescence of European Convention of Human Rights Contracting States. In a particularly forceful comment across three of the cases, the Court stated that aside from compliance with its Convention obligations if there is to be "public confidence in [the adherence to the rule of law and [to] prevent any appearance of impunity, collusion in or tolerance of unlawful acts",¹²⁷⁴ state officials must investigate credible allegations of such wrongdoing effectively. Such official action is necessary for the maintenance of public confidence.

Overall, post 9/11 courts appear mostly resistant to state arguments relating to their role in or (lack of) knowledge of violatory counter-terrorism operations, Executive interpretations on the general applicability of international law standards and have rejected arguments severely restricting the availability of core rights protections to individuals. As such the courts have aimed to ensure access to practically effective individual protections and remedies. Concomitantly, they have added a supplementary layer of transparency further elucidating the violations committed by the operation of HVDP and the rendition circuits. This elucidation has been multi-front however – by courts, by journalists,¹²⁷⁵ by NGOs,¹²⁷⁶ by regional¹²⁷⁷ and international¹²⁷⁸ rights

¹²⁷² Sandberg, B., 'Abu Omar Case: Italian Court Delivers Damning Verdict on CIA Renditions' *Spiegel Online International* 5 November 2009 available at <http://www.spiegel.de/international/europe/abu-omar-case-italian-court-delivers-damning-verdict-on-cia-renditions-a-659418.html> [last accessed 30 March 2016].

¹²⁷³ *Ibid.*

¹²⁷⁴ *Khaled El-Masri (El Masri v. The Former Yugoslav Republic of Macedonia)*, Application no. 39630/09, Judgment 13 December 2012, para. 192; *Al Nashiri v. Poland*, Application no. 28761/11, Judgment 24 July 2014, para. 495 and *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, Judgment 24 July 2014, para. 489.

¹²⁷⁵ Mayer, J., 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program' *The New Yorker* 14 February 2005 and Paglen, T. and Thompson, AC, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (2006, New York; Melville House).

¹²⁷⁶ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013, New York; GHP Media, Inc)

¹²⁷⁷ Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Interstate Transfers involving Council of Europe Member States* AS/Jur (2007) 36 and Report by the Secretary General on the Use of His Powers under Article 52 of the European Convention on Human Rights, Council of Europe SG/Inf (2006) 5, 28 February 2006.

bodies and domestic investigations.¹²⁷⁹ Arguably, such a multi-front resistance and effort is needed when facing a clandestine, transnational and multi-actor operation such as the rendition circuits to pierce the veil of secrecy and start the process of accountability. This approach may also prove significant in the future, as, while other components of HVDP¹²⁸⁰ have been dismantled, extraordinary renditions – subject to improved monitoring mechanisms to prevent ill treatment – have remained available as a counter-terrorism tool for the US.¹²⁸¹

3. Concluding Remarks

This thesis has argued that extraordinary renditions through a hyper legalistic exploitation of gaps have sought to expose and utilise practical effectiveness deficiencies within the human rights framework potentially eroding the framework in its current form. These were areas of legal uncertainty or vacuum either fashioned or existing, which were exploited for the purposes of the US transnational counter-terrorism operations. The US ‘War on Terror’ legal and political paradigm, through reliance on these gaps, aimed to create a legal environment within which the relevant legal obligations were in flux and thus an expansive counter-terrorism programme such as extraordinary rendition could operate unchecked.

While the challenge posed by the rendition circuits has been severe and potentially corrosive, the human rights framework has aimed to resist the challenge posed by expansive counter-terrorism practices. The approach taken by the European Court of

¹²⁷⁸ For example Human Rights Council, *Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances*, General Assembly UN Doc. A/HRC/13/42.

¹²⁷⁹ For example Report of the Detainee Inquiry (2013, London; Government Publications) and Report of the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*.

¹²⁸⁰ Please refer to Executive Order 13491 – Ensuring Lawful Interrogations, The White House, 22 January 2009, Executive Order 13491 revoked all executive directives, orders, and regulations including but not limited to those issued to or by the CIA between 11 September 2001 and January 2009. Thus, in effect, secret detention facilities were no longer to be used, enhanced interrogation was prohibited, the full protections of Geneva Conventions I-IV and all other relevant international provisions were made available to remaining detainees.

¹²⁸¹ Special Task Force on Interrogations and Transfer Policies Issues: Its Recommendations to the President, Department of Justice (Office of the Attorney General), 24 August 2009 (updated on 15 September 2014), full text available at <https://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president> [last accessed 30 March 2016].

Human Rights – which jurisprudence has consistently influenced other regional and international bodies - and the Italian Supreme Court and the comprehensive UN, Council of Europe and NGO reports exposing the operation of extraordinary rendition are illustrative of this resistance. The human rights framework, in most recent times, is fighting back.

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