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Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition

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ARTICLES

SPIRITED AWAY (INTO A LEGAL BLACK HOLE?): THE CHALLENGE OF INVOKING STATE RESPONSIBILITY FOR EXTRAORDINARY RENDITION

*Jillian Button**

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* BA, LLB (Hons.) (Melb.). An earlier draft of this Article was submitted as part of coursework undertaken for the LLB in the Faculty of Law, University of Melbourne. The author is currently an LLM candidate with Harvard Law School. Sincere thanks go to University of Melbourne lecturer Jessica Howard for her comments and suggestions during the drafting process.

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This Article explores the difficulties of invoking state responsibility for the commission of a wrongful act in breach of international human rights law, by examining the legal issues raised by the U.S. "extraordinary rendition" program. Extraordinary rendition usually involves the seizure of a terror suspect in a foreign state, from which the person is "spirited away" to a state sponsor of torture, to be subjected to brutal interrogation techniques by the security apparatus of that state. It constitutes a clear breach of non-refoulement provisions contained in several international treaties, as well a breach of the non-derogable *jus cogens* and *erga omnes* prohibition of torture under customary international law. Although the acts of torture are undertaken by the receiving state, the act of rendering a suspect to torture, conducted by a special unit of the Central Intelligence Agency (CIA), is attributable to the United States. The receipt of "diplomatic assurances" that rendered persons will not be tortured in their destination state—in the light of clear evidence that torture does occur—does not obviate responsibility; nor do the doctrines of necessity and self-defense. Despite the clarity of the breach, several obstacles prevent states or individuals from holding the United States responsible. Procedural constraints, especially standing, pose difficulties in the extraordinary rendition context. The author also comments that a lack of political will has prevented her home country of Australia from taking action as an "injured state." This Article concludes that the secondary rules contained in the International Law Commission's Articles on State

Responsibility (ILC Articles)[1] have not yet "connected" with the primary obligations of human rights, with worrying connotations in a future where states will have greater opportunities to obfuscate responsibility for international wrongs by engaging in proxy human rights breaches.

"If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt."[2]

I. INTRODUCTION

In 2005, Khaled El-Masri, a German citizen of Lebanese descent, brought a complaint against George Tenet and several security contractors that he alleges were involved in his forcible abduction, incommunicado detention, beating, drugging, and transportation to a secret prison in Afghanistan, where he was subjected to inhumane conditions and coercive interrogation.[3] He claims to be a victim of the alleged U.S. practice of "extraordinary rendition": the transfer of terror suspects by U.S. security forces to third states known to engage in torture, where they are surrendered to local security forces.[4] The purported purpose of extraordinary rendition is to enable the United States to subject terrorism

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1. Articles on State Responsibility for Internationally Wrongful Acts, Aug. 9, 2001 [hereinafter ILC Articles], *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20 articles/9_6_2001.pdf. Although the ILC Articles do not have the binding status of a treaty, many of its provisions are declaratory of customary international law. An international court will rely heavily upon its provisions when it finds it appropriate to do so. *See* Ian Brownlie, *State Responsibility and the International Court of Justice*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTION 11, 12 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) [hereinafter ISSUES OF STATE RESPONSIBILITY]. The ICJ in the Israeli Wall Advisory Opinion referred to them in relation to the test of necessity. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 194-95 (July 9).

2. Bob Baer, a former covert agent who worked for the CIA in the Middle East, *quoted in* Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy & Juridical Othering*, 45 BRIT. J. CRIMINOLOGY 504, 516 (2005).

3. *See* ACLU.org, Extraordinary Rendition, http://www.chrgj.org/docs/TortureByProxy.pdf (last visited Dec. 31, 2007). For more examples of extraordinary rendition, see ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUM. RTS. & GLOBAL JUST., TORTURE BY PROXY: INT'L & DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 12 (2004) [hereinafter TORTURE BY PROXY], *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf.

4. Complaint ¶ 7, El-Masri v. Tenet, No. 1:05cv1417 (U.S. District Court for the Eastern District of Virginia), *available at* http://www.aclu.org/images/extraordinaryrendition/asset_ upload_file829_22211.pdf.

suspects to the more "effective" modes of interrogation practiced by receiving states.

Rendition to torture is a contemporary example of "a longstanding strategy for evasion of responsibility for actions carried out in pursuance of [a state's] 'organizational goals'"[5] involving placing distance between the state and the actors personally carrying out an illegal activity on its behalf.[6] It involves the "othering" of the victims of international wrongs by placing them territorially and conceptually beyond the jurisdiction of local courts, and the "othering" of perpetrators themselves, by giving the task of removing suspects to a special unit of the CIA, which enjoys a high level of operational and bureaucratic privilege, and by cooperating with security apparati of obliging third states. Its key aim appears to be to obfuscate U.S. responsibility for acts of torture that it facilitates, which are carried out at its direction and on its behalf. For this very reason, this Article seeks to evaluate the prospects for the invocation of state responsibility in respect of this conduct. In this context, obtaining a "free-standing finding of State responsibility"[7] (a finding of state responsibility by an international forum which is significant in its own right, independent of a remedy) is vital, in order to clearly demonstrate to the United States and to the rest of the world that accountability for fundamental human rights obligations cannot be circumvented by "othering" the actors.

After briefly introducing the practice of extraordinary rendition, this Article will apply the general principles of state responsibility, as enunciated in international cases and embodied in the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts,[8] which were adopted by the General Assembly of the United Nations on 12 December 2001,[9] to the problem of extraordinary rendition. We will see that extraordinary rendition is an internationally wrongful act, which constitutes a breach of the U.S.'s international obligations under the *U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)[10] and other treaties.[11] However, there are almost insurmountable practical and

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5. Jamieson & McEvoy, *supra* note 2, at 504.

6. *Id.* at 504-05.

7. For a discussion of when it is appropriate to seek a free-standing finding of state responsibility, see Rosalyn Higgins, *Issues of State Responsibility Before the International Court of Justice*, *in* ISSUES OF STATE RESPONSIBILITY, *supra* note 1, at 7-8.

8. ILC Articles, *supra* note 1.

9. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

10. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1988 U.S.T. Lexis 202, 1465 U.N.T.S. 85 [hereinafter CAT].

11. International Covenant on Civil and Political Rights, Dec. 16, 1966, 1996 U.S.T. Lexis 521, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Relating to the Status of Refugees, July

procedural challenges faced by a state or individual wishing to invoke state responsibility in this situation. This leads us to reflect on whether the ILC Articles really "facilitate the holding to account of those who are responsible for breaching international obligations,"[12] particularly international human rights obligations.

II. THE PRACTICE OF EXTRAORDINARY RENDITION

The term "extraordinary rendition" is used to refer to the transfer of an individual to a foreign state, where there are grounds to believe that the transferee may be subjected to torture or cruel, inhuman, or degrading treatment in that state. Recent reports indicate that the United States and its agents have removed persons suspected of being linked to Islamic terror organizations to recipient states including Egypt, Syria, Saudi Arabia, Jordan, and Morocco, each of which has been noted by the State Department's *Country Reports on Human Rights Practices* to engage in the torture of detainees by security and police forces.[13] Extraordinary renditions are also known to have been carried out by states other than the United States,[14] but only the United States could be said to have a *program* of extraordinary rendition. This Article will focus on the United States, but much of the discussion will obviously be relevant to any state which renders a person to torture.

Commentators believe that renditions are motivated on two fronts: to avoid granting terror suspects access to American courts, where they

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28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Convention Relating to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 6 U.N.T.S. 3365 [hereinafter Geneva IV]; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

12. Malcolm D. Evans, *State Responsibility and the European Convention on Human Rights: Role and Realm, in* ISSUES OF STATE RESPONSIBILITY, *supra* note 1, at 139, 140.

13. U.S. DEPARTMENT OF STATE, 2003 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004) [hereinafter 2003 Country Reports], *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/ (last visited Apr. 9, 2007); U.S. DEPARTMENT OF STATE, 2004 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2005) [hereinafter 2004 Country Reports], *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/ (last visited Apr. 9, 2007).

14. According to Human Rights Watch, various states other than the United States have rendered security suspects to Egypt. Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, 16 HUM. RTS. WATCH, Apr. 2004, at 1 [hereinafter H.R.W. Report 1], *available at* www.hrw.org/reports/2004/un0404/diplomatic0404.pdf; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, 17 HUM. RTS. WATCH, Apr. 2005, at 1 [hereinafter H.R.W. Report 2], *available at* http://hrw.org/reports/2005/eca0405/.

would be afforded due process[15] (i.e., to "other" the victim), and to enlist foreign institutions to extract answers from them by brutal methods that American interrogators dare not use (i.e., to "other" the perpetrator).[16] The United States has been reported to provide a list of questions they want answered when handing over suspects and to accept intelligence from these countries.[17] The CAT Article 15 explicitly prohibits this ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"),[18] but the United States has not implemented Article 15 domestically, and the U.S. District Court has supported the view that it is not judicially enforceable.[19]

The practice of extraordinary rendition, which has been dubbed "outsourcing torture"[20] and "torture by proxy,"[21] forms a less well known

15. "[T]he C.I.A. was wary of granting terrorism suspects the due process afforded by American law. The agency did not want to divulge secrets about its intelligence sources and methods, and American courts demand transparency." Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, *available at* http://www.newyorker.com/printables/fact/050214fa_fact6.

16. Center for Human Rights and Global Justice New York University School of Law, Torture by Proxy: International Law Applicable to "Extraordinary Renditions" (Briefing to the All Party Parliamentary Group on Extraordinary Rendition), at 6, *available at* http://www.chrgj.org/docs/APPG-NYU%20Briefing%20Paper.pdf.

17. Dana Priest & Barton Gellman, *U.S. Turns to Torture to Crack Prisoners of War*, SYDNEY MORNING HERALD, Dec. 27, 2002, *at* http://www.smh.com.au/articles/2002/12/26/1040511135568.html?oneclick=true (last visited Apr. 26, 2005).

18. CAT, art. 5.

19. Evidence obtained by torture was admitted in a 1991 district court case, and went towards supporting an extradition order against an Israeli citizen accused of trafficking heroine in Turkey. *See* James Park Taylor, *Law in the Age of Terrorism, Dancing with the Scavenger's Daughter: Torture, Rendition of the United States*, MONT. LAW., June/July 2005, *available at* http://www.montanabar.org/montanalawyer/junejuly2005/torture.html (last visited Apr. 9, 2007). Evidence obtained by torture may be admissible in a criminal trial in light of the case of American citizen Ahmed Omar Abu Ali, who has been indicted in the U.S. District Court to face terrorist charges. The Court refused to disallow a confession allegedly obtained through harsh interrogation tactics (and arguably torture) in a Saudi Arabian prison in criminal proceedings against Ali, who was ultimately found guilty of terrorism charges. BBC News, *U.S. Man Guilty of Bush Death Plot*, Nov. 22, 2005, *at* http://news.bbc.co.uk/2/hi/americas/4461642.stm (last visited Apr. 9, 2007). The British Court of Appeal has held that evidence gathered by a third state pursuant to this arrangement may be admissible in special cases to try suspected terrorists, so long as the government can show that it neither procured nor connived at the torture. A, B, C, D, E, F, G, H, Mahmoud Abu Rideh Jamal Ajouaou v. Sec'y of State for the Home Dep't, [2004] EWCA (Civ.) 1123, [539] (Eng.). 1123.

20. Press Release, Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law, Congress Must Take Immediate Action to Stop Outsourcing Torture

technique justified by the "new paradigm,"[22] a moniker chosen by the U.S. Administration to refer to the special rules it suggests apply to the "new kind of war" it intends to wage in the wake of the September 11 attacks. The new paradigm, it is argued, renders obsolete the rules of war contained in the Geneva Conventions.[23] According to Gaita, the new paradigm is a unilaterally conceived model, used by the United States to attempt to justify a legally dubious, results-oriented program of detention and interrogation which "no one would have dreamt of publicly defending"[24] before September 11.[25] Other techniques include the direct use of coercive interrogation by U.S. civilian officers, which under international law would arguably constitute torture.[26] The transferal of suspects to special detention centers under U.S. control but outside the reach of domestic courts is another new paradigm technique.

Extraordinary renditions are different from "rendition to justice,"[27] a practice developed in the late 1980s whereby the CIA or FBI personnel, authorized by presidential directions,[28] apprehend individuals in states ravaged by civil war, such as Lebanon, and transfer them to states with an interest in trying them.[29] Rendition to justice is the cousin of extradition, without the formal procedures. The element of torture and cruel, inhuman or degrading treatment is what sets extraordinary rendition apart from rendition to justice, as well as the fact that extraordinary renditions are off-

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(Feb. 22, 2005) [hereinafter CHRGJ], *available at* http://www.nyuhr.org/docs/050221%20press %20release%20final.pdf (last visited Apr. 9, 2007).

21. TORTURE BY PROXY, *supra* note 3.

22. This is the term used by then presidential lawyer Alberto Gonzales as a response to terrorism, which is a "new kind of war" in Memorandum from Alberto Gonzales on the Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban to the President of the United States (Jan. 25, 2002).

23. *Id.*

24. Raimond Gaita, *quoted in* Jessica Howard, Book Review, *The Torture Papers: the Road to Abu Ghraib, Edited by Karen Greenberg & Joshua Dratel (New York, U.S.: Cambridge University Press, 2005)*, 6 MELB. J. INT'L L. 189, 202 (2005).

25. *See* Howard, *supra* note 24, at 197. Howard relays how the Gonzales memo bypasses any discussion of the possible restraints international law may place on the retaliatory or preemptive conduct.

26. Recently debate has centered on whether the practice known as waterboarding constitutes torture. *See* Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id= 1322866.

27. TORTURE BY PROXY, *supra* note 3, at 15.

28. *See id.* at 13.

29. *Id.* at 15.

the-record.[30] Khaled El-Masri's case, mentioned in the introduction, is typical. A similar story is told by Canadian citizen Maher Arar, who says he was seized by American officials in JFK Airport while in transit to Canada and deported to Syria.[31] Despite diplomatic assurances from Syria that he would not be harmed, he reported after his release that during his ten-month detention he was subjected to beatings and threatened with electric shocks.[32]

It is not known how many extraordinary renditions have taken place, but former CIA director George Tenet indicated to the 9/11 Commission that over 70 renditions occurred before the September 11 attacks.[33] The CIA has refused to reveal how many extraordinary renditions have taken place since 9/11, but sources have been quoted as saying that renditions are a "routine" occurrence.[34] Researcher Scott Horton estimates that the number is about 150.[35] The U.S. President and government officials have categorically denied that it takes place at all.[36] This Article will avoid speculation about the veracity of the allegations, and assuming the practice of extraordinary rendition exists, will instead examine its possible significance of international law.

III. EXTRAORDINARY RENDITION IS AN INTERNATIONALLY WRONGFUL ACT

Article 1 of the ILC Articles provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[37] Establishing that an act or omission is "an internationally wrongful act" involves showing that it "constitutes a breach of an international obligation of the State," and "is attributable to the State under

30. *Id.* at 4, 15.

31. Complaint ¶ 1, Arar v. Ashcroft, No. CV-04-0249 (U.S. District Court for the Eastern District of New York), *available at* http://www.maherarar.ca/cms/images/uploads/Arar_Complaint_FINAL.pdf.

32. Mayer, *supra* note 15.

33. 19 CONG. REC. E282 (daily ed. Feb. 18, 2005) (Edward Markey's Introduction of "The Torture Outsourcing Prevention Act").

34. CNN.com, Italy Seeks 6 More Arrests in CIA Case, *at* http://edition.cnn.com/2005/WORLD/europe/07/25/cia.italy/index.html (last visited Apr. 9, 2007).

35. Mayer, *supra* note 15.

36. Then White House Counsel Alberto Gonzales wrote in a letter to the *Washington Post* that "(c)onsistent with [CAT], the United States does not expel, return or extradite individuals to countries where the United States believes it is likely that they will be tortured." Alberto Gonzales, *The President's Stance on Torture*, WASH. POST, Oct. 5, 2004, at A24.

37. ILC Articles, *supra* note 1, art. 1.

international law."[38] The existence of a wrongful act gives rise to a right to hold a state responsible, but this right is not self-executing; it needs to be taken up on behalf of the injured party. As we will see later in this Article, implementing state responsibility poses the greatest challenge in the extraordinary rendition context. Nonetheless, it is logical to first explore the wrongfulness of the practice under the U.S. international legal obligations before turning to how state responsibility might operate in practice.

A. *Extraordinary Rendition Constitutes a Breach of the U.S.'s International Obligations*

A wide range of potential legal issues are raised by extraordinary rendition. A special report prepared by the Association of the Bar of the City of New York and New York University's Center for Human Rights and Global Justice argues that extraordinary renditions constitute three wrongs allied to the prohibition on torture: (i) refoulement of an individual to a state where they may be subject to torture; (ii) complicity to torture; and (iii) failure to prevent or remedy torture.[39] Other potential legal issues may arise, such as whether the forced removal of an individual from another state without its permission can constitute a breach of that state's sovereignty.[40] It is also likely that extensive denial of justice occurs when aliens are detained incommunicado for excessively long periods, without access to a lawyer or without having formal charges laid against them.[41] The failure to prevent extraordinary renditions potentially represents a failure of due diligence on the part of the state from which the individual disappears.[42] For the sake of brevity, this Article will focus only on the breach of the non-refoulement U.S. obligations as a basis for discussing international responsibility.

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38. *Id.* art. 2.

39. TORTURE BY PROXY, *supra* note 3, at 92-93.

40. This issue was raised in Italian Parliament Motion for hearing 3-01973 introduced by Cesare Salvi on 17 February 2005, session no. 743 (unofficial translation on file with the Center for Human Rights and Global Justice, New York University School of Law).

41. *See* ALWYN V. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 113-14, 201, 203, 206-07, 213 (1938).

42. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, at 30 (July 29, 1988) (holding that the government of Honduras's failure to prevent or even respond to the disappearances of individuals in breach of their human rights was found to have constituted a lack of due diligence, even when the disappearances were not carried out by the government.

1. Torture is a Breach of International Law

The general international law prohibition on acts of torture is an *erga omnes* norm, and as such is owed to the international community and enforceable by any state.[43] It has attained the status of *jus cogens* in customary international law,[44] and is thus binding on all states, regardless of whether they are party to a treaty prohibiting torture. It is also embodied in multilateral treaties, notably Article 2 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (CAT) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[45]

As mentioned above, there is the issue of whether the United States could bear imputed responsibility under ILC Articles 16 and 17 for acts of torture it facilitates but does not itself commit.[46] The prohibition also gives rise to concomitant obligations, including the obligation not to transfer someone to a country where they may be subject to torture.[47]

2. Extraordinary Rendition is a Breach of the Non-Refoulement Obligation

a. CAT

The widest protection against rendition to torture to which the United States is subject is contained in Article 3 of CAT, which provides that "[n]o 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."[48] A decision that there are substantial grounds for such a belief is made taking into account all relevant circumstances, both objective (the receiving state displays "a consistent pattern of gross, flagrant or mass violations of human rights"[49])

43. M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and Obligatio* Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 72-73 (1996); Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 HUM. RTS. BRIEF 1, 1 (2004).

44. Bassiouni, *supra* note 43, at 72 n.46; Goldman, *supra* note 43, at 1.

45. *See also* Geneva III, *supra* note 11, arts. 13 & 17; Geneva IV, *supra* note 11, arts. 31 & 32.

46. For an excellent discussion of this issue, see Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267 (1999).

47. ILC Articles, *supra* note 1, arts. 16-17.

48. CAT, *supra* note 10, art. 3.

49. *Id.*

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and subjective ("whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return"[50]).

Rendition to torture would in many cases breach Article 3.[51] The recipient states of Egypt, Jordan, Syria, Saudi Arabia, and Morocco are known by the United States to exhibit a systematic pattern of torture by the security forces,[52] thereby satisfying the objective criterion. The question of whether an individual is personally at risk of being subjected to torture upon transfer has been elaborated on by the Committee Against Torture (CAT Committee). In its General Comment 1, the CAT Committee stated that a person was personally at risk when he/she was engaged in activities "within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question."[53] Given that Egypt is known by the United States to be using violent methods in its crackdown on Islamic terrorism,[54] the logical conclusion is that persons suspected of engaging in Islamic terrorist activities or being connected to terrorist groups, are "particularly vulnerable" to the risk of torture upon transferal.

There are certainly reasonable grounds for believing that there is the danger of torture, but do they constitute "substantial grounds" for the belief? According to former Department of Justice lawyer Martin Lederman, "[t]he Convention only applies when you know a suspect is more likely than not to be tortured. . . ."[55] This is a misreading of the provisions of CAT. For there to be an Article 3 breach,[56] it is not necessary that torture in fact takes place in the recipient state. Nor is it even necessary that torture would be the most probable outcome. The CAT Committee has made it clear that it is enough that the risk of torture is

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50. S.U.A. v. Sweden, Communication No. 223/2002 ¶ 6.3, U.N. Doc. CAT/C/33/D/223/2002 (2004), *available at* http://www1.umn.edu/humanrts/cat/decisions/223-2002.html (last visited Apr. 9, 2007) [hereinafter Communication No. 223].

51. CAT, *supra* note 10, art. 3.

52. 2004 Country Reports, *supra* note 13.

53. COMMITTEE AGAINST TORTURE, GENERAL COMMENT 1, COMMUNICATIONS CONCERNING THE RETURN OF A PERSON TO A STATE WHERE THERE MAY BE GROUNDS HE WOULD BE SUBJECTED TO TORTURE (ARTICLE 3 IN THE CONTEXT OF ARTICLE 22), U.N. Doc. A/53/44, annex IX, at 52, ¶ 8 (1998), *reprinted in* COMPILATIONS OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003).

54. *See* Mayer, *supra* note 15.

55. *Id.*

56. CAT, *supra* note 10, art. 3.

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more than "mere theory or suspicion."[57] Contrary to Lederman's assertion, when a Government "kind of know[s]"[58] that a suspect may be tortured, this is sufficient knowledge.

Furthermore, if domestic law sets up a different test of knowledge, this does not affect the character of an "internationally wrongful act." Under ILC Article 3, the characterization of an act of a state as wrongful under international law "is not affected by the characterization of the same act as lawful by internal law."[59] Therefore, the narrower test of knowledge in a proposed section 3032 in the *9/11 Recommendations Implementation Act of 2004*,[60] which would have required an applicant to provide "clear and convincing evidence" of the risk of torture,[61] would not have altered the wrongfulness of the transfer of a detainee under international law. In situations where knowledge falls short of clear and convincing evidence of the risk of torture, CAT may still be breached.

b. Other Sources of Non-Refoulement Obligations

Extraordinary renditions are likely to be caught by the indirect prohibition on *refoulement* to torture in the ICCPR.[62] Its scope is slightly narrower than that of Article 3 of CAT, because it requires "substantial grounds for believing that there is a real risk of irreparable harm" through torture,[63] before the prohibition is invoked. The United States is subject to similar obligations under Article 33 of the Convention Relating to the Status of Refugees[64] (Refugee Convention), but this prohibition is not

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57. Communication No. 223, *supra* note 50.

58. Mayer, *supra* note 15.

59. *See also* Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (according to which a State Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

60. H.R. Res. 10, 108th Cong. § 3032 (2004) (enacted).

61. 9/11 Recommendations Implementation Act, H.R. 10, 108th Cong. § 3032(a)(3) (2004).

62. This prohibition is derived from the prohibition of torture. ICCPR, *supra* note 11, arts. 2 & 7. *See* HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 20, ARTICLE 7, U.N. Doc. A/47/40 (1992) *reprinted in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994) [hereinafter HRC GENERAL COMMENT 20], *cited in* TORTURE BY PROXY, *supra* note 3, at 54; HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 31, CCPR/C/21/Rev.1/Add.13, Mar. 26, 2004 (adopted on Mar. 29, 2004) [hereinafter HRC GENERAL COMMENT 31].

63. HRC GENERAL COMMENT 31, *supra* note 62, ¶ 12.

64. Article 33 provides that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social ground or political opinion." Convention Relating to the Status of Refugees, *adopted* Apr. 22, 1954, 189 U.N.T.S. 150.

absolute.[65] The United States is also a signatory to the Inter-American Torture Convention (IATC), under which extradition of a person shall not occur "when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment. . . ."[66]

The Third and Fourth Geneva Conventions prohibit the torture of prisoners of war[67] and civilians,[68] and restrict the transfer of prisoners or civilians to states where there is the risk of torture.[69] It should be noted that Administration lawyers and representatives of the CIA have taken the stance that the Geneva Conventions are inapplicable to so-called "illegal enemy combatants."[70] This view is contrary to the principle that a person falling under the authority of a state in armed conflict is to be treated as a prisoner of war until his status has been determined by a competent tribunal.[71] It has also been rejected at various junctures by the Department of State[72] and by members of the academic community who, amongst other things, view this as an "exceptionalist and unilateral reinterpretation of international law"[73] which contributes to the "juridical othering" of victims of state crimes by placing them in a legal black hole.[74] The issue may be resolved, at least at a domestic level, by the findings of the Combatant

65. Exceptions are listed in Article 1F of the Convention. For example, if a person has committed a crime, they are not considered a refugee and do not attract the protection of the instrument. *Id.* art. 1(F).

66. Inter-American Convention to Prevent and Punish Torture art. 13, *opened for signature* Sept. 12, 1985, O.A.S. T.S. No. 67.

67. Geneva III, *supra* note 11, arts. 13 & 17.

68. Geneva IV, *supra* note 11, arts. 31 & 32.

69. Geneva III, *supra* note 11, arts. 12; Geneva IV, *supra* note 11, art. 45.

70. In a memo to the President, Presidential Counsel Alberto Gonzales advised the President that members of both al Qaeda and the Taliban do not attract protection under Geneva III, because they came from a "failed state" and were "not a government, but a militant, terrorist-like group." Gonzales, *supra* note 36. *See also* Statement of Former U.S. Interrogator Bob Newman on Australian television show *Insight* was quoted as saying, "[w]ell we must understand that terrorists do not rate protection under the Geneva Conventions. Guerillas are protected because if they follow particular rules that are involved with the Geneva Conventions, regular forces are protected. But when it comes to the Geneva Conventions, terrorists are not." *Insight: Whatever It Takes* (SBS television broadcast Apr. 5, 2005) (on file with author). The Gonzales memo ratified earlier opinions expressed by Administration lawyers that terror suspects were neither civilians nor prisoners of war, but were "illegal enemy combatants." *See* Mayer, *supra* note 15.

71. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5 rev., 1 corr. ¶¶ 202-203 (2002). The Commission states at ¶ 203 that this applies "whether or not the individuals are suspected to have engaged in acts of terrorism."

72. *See* Mayer, *supra* note 15.

73. Jamieson & McEvoy, *supra* note 2, at 505.

74. For a discussion of juridical othering, see Jamieson & McEvoy, *supra* note 2, at 517-19.

Status Review Panel which was established by the U.S. Department of Defense on 7 July 2004 in response to this debate.[75]

The prohibitions contained in the ICCPR, the Refugee Convention, the IATC, and Geneva III and IV vary in scope, but none are as broad as the CAT prohibition. They are, therefore, only briefly mentioned as "fall back" provisions, but may prove to be important if a complainant has trouble invoking CAT provisions. This is discussed in further detail below.

B. *The Attribution of Internationally Wrongful Acts to the United States*

The general rule is that only breaches, which can be characterized as acts of the state, and are therefore attributable to it, may entail state responsibility. Customary international law views the acts of organs of states as acts of the state.[76] This is also encapsulated in ILC Article 4: "[t]he conduct of any state organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . ."[77] Extraordinary renditions are allegedly conducted by the "Special Removal Unit"[78] of the CIA, which is an organ of the U.S. government.

Even if an activity of the Special Removal Unit is *ultra vires*, it can be attributed to the government. ILC Article 7 indicates that it is irrelevant to the question of attribution whether the acts in question were commissioned in excess of the CIA's authority or in contravention of instructions from the executive.[79] The international community has endorsed a broad approach to this test,[80] but it still requires that the act in question be "within the apparent limits of its functions."[81] For conduct to be outside an organ's official capacity, it would need to be "so removed from the scope

75. Howard, *supra* note 24, at 198-99.

76. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 (Apr. 29).

77. ILC Articles, *supra* note 1, art. 4.

78. Mayer, *supra* note 15. This has also been referred to as the "Special Collection Services." Jamieson & McEvoy, *supra* note 2, at 517.

79. ILC Articles, *supra* note 1, art. 7; Estate of Jean-Baptiste Caire (France v. Mexico), 5 R. Int'l Arb. Awards 516, 531 (1929); Thomas H. Youmans (United States v. Mexico), 4 R. Int'l Arb. Awards 110 (1926).

80. Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 99-103, U.N. Doc. A/56/10 (2001) [hereinafter Report of the International Law Commission], *available at* http://untreaty.un.org/ilc/reports/english/a_56_10.pdf (last visited Jan. 16, 2006).

81. Différend Dame Mossé 13 R. Int'l Arb. Awards 486, 494 (1953). *See also* American Bible Society Case, 6 MOORE'S DIGEST § 1000, at 743.

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of their official functions that it should be assimilated to that of private individuals, not attributable to the State."[82] Even if President Bush's public denial that extraordinary renditions occur[83] is taken to suggest that extraordinary renditions are not authorized by the central administration, the practice is too systematic and well resourced to be regarded as the private vigilantism of a few "bad eggs"[84] within the CIA.

A state will be responsible for an act of an official or state organ even if a domestic law prohibits that behavior, and the act therefore simply "ought not to have occurred."[85] Therefore, the *Torture Outsourcing Prevention Act*, a piece of legislation introduced to the U.S. House of Representatives by Senator Edward Markey proposing to explicitly "prohibit the transfer or return of persons by the United States, for the purpose of detention, interrogation, trial, or otherwise, to countries where torture or other inhuman treatment of persons occurs,"[86] will not alter the imputability for any future extraordinary renditions if it is passed.

IV. NO CIRCUMSTANCES PRECLUDING WRONGFULNESS ARE PRESENT

The power of the executive to protect national security has been put forward as a justification for derogating from the prohibition on torture.[87] The Office of the Legal Counsel has attempted to draw on the doctrines of necessity and self-defense to justify breaches of human rights obligations in the "war on terrorism."[88] The invocation of these doctrines is flawed because necessity and self-defense do not preclude wrongfulness in the case of a peremptory human rights norm. Diplomatic assurances have also been put forward as an excuse for extraordinary rendition. This also fails to preclude the wrongfulness of extraordinary rendition, for the reasons outlined in this part.

82. Report of the International Law Commission, *supra* note 80, at 102.

83. Gonzales, *supra* note 36.

84. *See* Howard, *supra* note 24, at 190.

85. GILLIAN TRIGGS, INTERNATIONAL LAW—CONTEMPORARY PRINCIPLES AND PRACTICES 12 (Butterworths/Lexis Nexis) (2006).

86. H.R. 952, 109th Cong. (2005).

87. Goldman, *supra* note 43, at 3.

88. *Id.*

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A. *The Non-Refoulement Obligation is a Non-Derogable* Jus Cogens *Obligation*

Balancing the human rights of an individual considered a security threat, and the security interests of a nation, tends to raise conflicts between international and domestic law. Under international law, the prohibitions on torture and rendition to torture are non-derogable and, as such, cannot be justified in the interests of national security. Domestic legislation, not only in the United States but in Canada, New Zealand, and other states, usually accepts and incorporates the standards set by international law but creates exceptions for national security. In the United States, aliens suspected of engaging in terrorist activity are considered a security threat under section 241(b)(3)(B) of the *Immigration and Nationality Act*[89] and are removable from the United States regardless of whether they will face persecution upon return because they do not rate protection under the *Code of Federal Regulations*.[90] New Zealand has similar rules in its immigration legislation.[91] In *Suresh v. Canada (Minister of Citizenship and Immigration)*[92] and *Zaoui v. Attorney General of New Zealand*,[93] executive acts were considered in the light of domestic legislation which permits national security to justify compromising the rights of accused.

The Court in *Suresh*, generally supportive of the *jus cogens* status of the torture prohibition, nonetheless did not rule out that "in exceptional circumstances, deportation to face torture might be justified."[94] "Exceptional circumstances" were, of course, the threat posed by a person to national security, which the case broadly defined.[95] The case concerned an appeal of a decision to deport Manickavasagam Suresh, a Sri Lankan Convention refugee,[96] whose membership of the Liberation Tigers of

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89. Immigration and Nationality Act § 241(b)(3)(B), 8 U.S.C. § 1231 (1952).

90. *See* TORTURE BY PROXY, *supra* note 3, at 21.

91. Part 3 of the Immigration Act 1987 (NZ) provides for deportation of persons who threaten national security or who are suspected terrorists. Immigration Act 1987, 1987 S.N.Z. No. 74 §§ 72-73 (N.Z.). Under section 72, the Minister of Immigration may certify a person to be a threat to national security, following which a deportation order can be made by Order in Council. The Minister can also order the deportation of suspected terrorists under section 73.

92. Suresh v. Canada, [2002] 1 S.C.R. 3.

93. Attorney General v. Zaoui, Dec. No. CA20/04 (N.Z.C.A. Sept. 30, 2004).

94. *Suresh*, [2001] 1 S.C.R. 3, ¶ 78.

95. *Id.* ¶¶ 82-92.

96. A refugee is defined as a person who is unable or unwilling to return to their country of nationality or habitual residence due to a well-founded fear of persecution on the basis of race, religion, political opinion, nationality, or membership in a social group.

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Tamil Eelam was considered to make him a threat to the security of Canada.[97] The decision was handed down approximately four months after September 11, 2001, leading some to question whether the human rights stalwarts of the Canadian Supreme Court were not immune to the post-September 11 heebie-jeebies.[98] Suresh's appeal was nonetheless upheld, and the Canadian Supreme Court left the underlying issue open-ended: "[t]he ambit of an exceptional discretion to deport to torture, if any, must await further cases."[99]

The more recent case of *Zaoui* concerned the case of Ahmed Zaoui, a Convention refugee in respect of whom a security certificate had been issued by the New Zealand government.[100] The New Zealand Court of Appeal dealt with how Part 4A of the *Immigration Act 1987* (NZ), which explicitly requires the application of provisions of the Refugee Convention, is to be applied by government officials.[101] The non-derogable nature of the *non-refoulement* obligation, as evidenced by international conventions including the Refugee Convention,[102] was viewed not as creating an absolute prohibition on refoulement but meaning that "the [Refugee Convention] art 33.2 exception must be interpreted restrictively. . . . [T]his means that the danger to security must be serious enough to justify frustrating the whole purpose of the Refugee Convention by sending a person back to persecution."[103] CAT, which does not make exceptions to the prohibition on *refoulement*, barely rated a mention, and appears not to guide the decision in the slightest.

Regardless of the potential ambit of the national security exception a country's courts decide what is appropriate, the concern is that the judicial arms of federal governments are prepared to defer to executive discretion and support legislative reworkings of international obligations at all. This is because the ILC Articles and General Comment 31 clearly maintain that domestic law does not justify a breach of international law.[104]

97. *Suresh*, [2001] 1 S.C.R. 3, ¶ 1.

98. *E.g.*, John Terry, counsel for the U.N. High Commissioner for Refugees as intervener in the *Suresh* appeal, wrote that "[t]he Supreme Court of Canada's decision would have been very different if the events of 9/11 had not occurred before it was released." John A. Terry, *Human Rights and Security Interests:* Suresh v. Canada *and Its Uncertain Legacy*, 1 TRANSATLANTIC Q. 38, 39 (2005).

99. *Suresh*, [2001] 1 S.C.R. 3, ¶ 78.

100. Attorney General v. Zaoui, Dec. No. CA20/04.

101. Immigration Act 1987, *supra* note 91, pt. 4A.

102. Convention Relating to the Status of Refugees, *supra* note 64.

103. *Zaoui*, Dec. No. CA20/04, ¶ 136.

104. HRC GENERAL COMMENT 31, *supra* note 62, ¶ 4; ILC Articles, *supra* note 1, art. 3.

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CAT Article 2(2) affirms that the prohibition on torture is non-derogable. It provides, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[105] Knowingly delivering individuals to a state sponsor of torture therefore constitutes collaboration in commission of torture, leading to responsibility for breaches of the *jus cogens* prohibition on torture.

In addition, it is now widely accepted that the absolute ban on torture gives rise to the derivative prohibition on *refoulement* to torture under customary international law[106] and that, like torture, *non-refoulement* is a non-derogable *jus cogens* obligation. The U.N. Special Rapporteur on Torture maintains that the principle of non-refoulement "is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment"[107] and is non-derogable.[108] In the asylum context, the Executive Committee of the program of the U.N. High Commissioner for Refugees[109] has determined that the principle of *non-refoulement* "is not subject to derogation."[110] There is also some evidence of state practice and *opinio juris* in support of a *jus cogens* characterization.[111] The CAT Committee decision in *Tapia Paez v. Sweden* also implied that the prohibition is absolute:

> Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State Party is under obligation not to return the person concerned to that State. *The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.*[112]

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105. CAT, *supra* note 10, art. 2(2).

106. TORTURE BY PROXY, *supra* note 3, at 44 (citing a range of sources at footnote 235).

107. The Special Rapporteur, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 28, delivered to the Security Council and the General Assembly, U.N. Doc. A/59/324 (Aug. 23, 2004).

108. *Id.* ¶ 31.

109. The pronouncements of the Executive Committee of the program of the U.N. High Commissioner for Refugees carry a great deal of weight in determining the question of whether because it is composed of representatives from states most affected by non-refoulement-related issues. Jean Allain, *The* Jus Cogens *Nature of* Non-Refoulement, 13 INT'L J. REFUGEE L. 533, 539 (2001).

110. U.N. High Commission for Refugees, *Report of the Forty-Fourth Session of the Executive Committee of the High Commissioner's Programme on the General Conclusion on International Protection*, U.N. Doc. A/AC.96/821 (1996).

111. Allain, *supra* note 109, at 539-40.

112. Tapia Paez v. Sweden, Communication No. 39/1996, ¶ 14.5, U.N. CAT/C/18/D/39/1996 (1997) (emphasis added).

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European international human rights jurisprudence also takes this approach. For instance, *Chahal v. United Kingdom* confirms that a potential threat to national security posed by a returnee's alleged terrorist activities was not a relevant consideration for the purposes of determining state responsibility for rendition to torture.[113]

B. *Diplomatic Assurances Are Not a Valid Excuse*

The United States is not alone in claiming that obtaining a diplomatic assurance from the country of return that the transferee will not be harmed prevents a rendition or extradition from breaching international law. In a string of cases discussed in Human Rights Watch briefs *"Empty Promises:" Diplomatic Assurances No Safeguard Against Torture*[114] and *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*,[115] Canada, Germany, Austria, Sweden, the United Kingdom, and others attempt to defend transfers on the basis of diplomatic assurances.

The Human Rights Watch reports argue emphatically that because of the clandestine nature of torture, and because neither the sending nor receiving governments have an interest in exposing a human rights abuse arising from a rendition, diplomatic assurances cannot be relied on to prevent torture. By its very nature, a diplomatic assurance is not a legal safeguard: it is an unreliable, unaccountable, unenforceable diplomatic measure. But from a state responsibility perspective, can a diplomatic assurance have legal effect by vitiating the transferor's actual knowledge of the risks of torture?[116]

The answer emanating from all quarters is in the negative. Not only is it implausible that, as a matter of fact, the United States is unaware of the problem of torture in receiving countries[117] but as a matter of law. Because

113. Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (1996). This was followed by Lord Hoffman in Secretary of State. Department v. Rehman [2003] 1 A.C. 153 (H.L.).

114. H.R.W. Report 1, *supra* note 14.

115. H.R.W. Report 2, *supra* note 14.

116. Such knowledge is found in the Bureau of Human Rights, Democracy and Labor's Human Rights Reports 1 and 2, H.R.W. Report 1, *supra* note 14; H.R.W. Report 2, *supra* note 14.

117. *See* James Ross, *Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 9, 14 (Fons Coomans & Menno T. Kamminga eds., 2004) [hereinafter EXTRATERRITORIAL APPLICATION]. *See also* Transcript, *Senate Judiciary Hearing on the Patriot Act*, WASHINGTONPOST.COM, Apr. 5, 2005, www.washingtonpost.com/wp-dyn/articles/A28081-2005Apr5.html (last visited Apr. 10, 2007) (where U.S. Senator Patrick J. Leahy states that Attorney General Alberto Gonzales has admitted that he was unaware of whether the promises of recipient states were complied with).

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the prohibition on torture is absolute, "formal assurances cannot suffice where a risk nonetheless remains."[118] Take the case of *Chahal*,[119] which dealt with the equivalent European Convention on Human Rights (ECHR) prohibition to CAT Article 3[120] as an example. In May 2005, in concluding that Sweden violated CAT, the CAT Committee found the "procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.[121] In that case the European Court of Human Rights found that a diplomatic assurance from the Indian government was not a sufficient safeguard for the safety of the individual given the "recalcitrant and enduring problem" of human rights abuses by its security forces.[122]

The rejection of diplomatic assurances is indicative of a strict approach to the "mens rea" element of state responsibility in the *refoulement* context. However, the state responsibility jurisprudence available at the time of writing does not expressly endorse a strict mens rea approach. In the absence of a clear pronouncement on the issue in the ILC Articles, we turn to various conflicting authorities, which have held states responsible on the bases of strict liability, fault, negligence, intention and knowledge, in order to discover where the *non-refoulement* obligation sits on the fault continuum.

The "objective responsibility" approach of the *Neer Claim*[123] and the *Roberts Claim*[124] is not exactly appropriate, because it finds responsibility on the result of the actions, and a breach of Article 3 of CAT may occur without any appreciable harm. The *Corfu Channel* Case[125] provides more guidance. In that case, the International Court of Justice (ICJ) found that

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118. *Report by Mr Alvara Gil-Robles, Commissioner from Human Rights, on His Visit to Sweden*, CommDH (2004) ¶ 19, (July 8, 2004) [hereinafter Report by Gil-Robles], *available at* https://wcd.coe.int/ (type "Gil-Robles" and "Sweden" into reference box; then follow "The Commissioner-CommDH (2004) 13/08 July 2004" hyperlink) (last visited Apr. 10, 2007); The Special Rapporteur, *supra* note 107, ¶ 31. U.N. Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Robert Goldman also holds this view. Goldman, *supra* note 43.

119. Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1996).

120. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) 14, ¶¶ 80-88 (1989) (establishing that a *nonrefoulement* obligation attaches to the Article 3 provision that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment" giving rise to a derivative responsibility not to extradite a person in circumstances where they may be tortured).

121. U.N. Committee Against Torture, *Decision, Communication No. 233/2003*, ¶ 13.4, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005).

122. *Chahal*, 23 Eur. H.R. Rep. 413 at 104-05.

123. Neerclaim (U.S. v. Mex.), 4 R. Int'l Arb. Awards 60 (1926).

124. Robert Claim (U.S. v. Mex.), 4 R. Int'l Arb. Awards 77 (1926).

125. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

the Albanian Government ought to have known of the risk of harm to foreign vessels moving through its waters, and was therefore bound as a matter of humanity to warn them.[126] By analogy, the CIA *ought* to know that there is a significant chance that a diplomatic assurance from a known human rights violator cannot be relied on, and this knowledge is to be imputed to the highest levels of the executive branch.[127]

Unlike the *Corfu Channel* situation, which dealt with an omission, extraordinary rendition is a positive act, and a tribunal would arguably take a stricter approach than in that case.[128] Furthermore, Special Rapporteur, James Crawford states that the mental element "depends on the interpretation of that rule in the light of its object or purpose."[129] The object of the customary international law and the relevant treaty prohibitions is to prevent any person from being tortured abroad, and because this rule is non-derogable, a strict approach is justified. The bottom line for the purposes of our discussion is that, because governments *ought* to know that the risk of torture exists notwithstanding a diplomatic assurance, a diplomatic assurance is not a way of contracting out of their fundamental *non-refoulement* obligations under CAT.

C. *Necessity and Self-Defense Do Not Preclude the Wrongfulness of Extraordinary Renditions*

A state may be exculpated from responsibility for otherwise wrongful acts when the acts are "lawful measures of self-defence,"[130] which are proportional to the threat of armed attack and necessary to respond to it.[131] Because self-defense may be anticipatory, the U.S. government would argue that, in the light of the 9/11 attack, which has been characterized as an armed attack,[132] there is a "reasonable belief" that further armed attacks by terrorist organizations are imminent,[133] and this justifies practices such as extraordinary rendition. Such an argument would fail on at least three

126. *Id.*

127. "The effectiveness of international duties would be much reduced if the complainant State had to prove some level of knowledge or intention at a high level of government in respect of the acts or omissions of subordinate officials." Brownlie, *State Responsibility and the International Court of Justice*, *in* ISSUES OF STATE RESPONSIBILITY, *supra* note 1, at 12.

128. TRIGGS, *supra* note 85, at 8.

129. *Id.* at 7.

130. ILC Articles, *supra* note 1, art. 21.

131. Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 90 (June 27), *cited in* TRIGGS, *supra* note 85, at 22.

132. Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 29 (2003).

133. *Id.* at 41.

bases. First, it is unlikely that self-defense forms a valid foundation for lawful measures taken against a terrorist organization, as opposed to a state.[134] Next, a measure which involves the breach of a non-derogable human right cannot be a "lawful measure." As established above, *non-refoulement* is an obligation from which a state may not derogate. Finally, sending a suspect to be tortured is not a "proportional" response to a perceived security threat which, in reality, might or might not actually exist.

The invocation of necessity is also flawed. ILC Article 25 states that necessity may be invoked as a ground for precluding the wrongfulness of an act, when the act was the only way to safeguard an essential interest against a grave and imminent peril, and it does not seriously impair the essential interests of a state or the international community.[135] Whether the first limb of this test—the existence of a grave and imminent peril—is satisfied is difficult to know in the context of terrorism.[136] Regardless of whether there is such a threat, the second limb of the doctrine—that the act was the *only way* to safeguard an essential interest—is not satisfied. In the *Case Concerning the Gabčíkovo-Nagymaros Project*,[137] Hungary's reliance on the necessity doctrine was rejected because it could have taken other courses which were in harmony with their international obligations to avert the threat.[138] In the context of the "war on terror," there are other lawful, not to mention humane, ways of dealing with suspects to avert the threat of another 9/11:

> Prohibiting the removal of someone to state sponsors of torture does not mean that they must be released. The Supreme Court has held that people who receive CAT protection can be held in detention if they pose a danger to the United States. In response to the Court, the former Immigration and Naturalization Service promulgated regulations for determining the circumstances under which an alien may be held in custody beyond the statutory removal period. Pursuant to the Court's decision and the INS regulations, it is clear

134. *See id.* at 43.

135. ILC Articles, *supra* note 1, art. 25.

136. International law can be criticized for failing to address the nature of the threat of terrorism, which differs from traditional concepts of war because by their nature they are unexpected attacks.

137. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

138. *Id.* at 46.

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> that removal to state sponsors of torture is not necessary to fight terrorism.[139]

Necessity also fails because it "seriously impair[s] an essential interest of the international community as a whole" by breaching an *erga omnes* norm, contrary to ILC Article 25.

V. INVOKING STATE RESPONSIBILITY FOR EXTRAORDINARY RENDITIONS

At the time of publication, the U.S.'s program of extraordinary rendition has well and truly entered the public consciousness. Even before the Hollywood Film *Rendition* introduced the term "extraordinary rendition" into the vocabulary of ordinary Americans, the international community called for the practice to stop. At the 61st session of the UNHCR, the World Organization Against Torture urged the U.S. government to put an immediate end to the practice of extraordinary rendition.[140] On February 5, 2004, Canada established a Commission of Inquiry in relation to the involvement of Canadian officials in the rendition of Maher Arar, the case mentioned above.[141] In 2004, Sweden also commenced an investigation into a 2001 operation in which two terror suspects were spirited from Sweden to Egypt by the United States.[142]At the insistence of several of its own senators in February 2005,[143] the Italian government has launched litigation in respect of the seizure and rendition of Muslim cleric Abu Omar from Milan to Egypt for interrogation and torture, "a totally illegal act,"[144] which it insists it neither knew about nor

139. Judiciary Democrats, *Dissenting Views* (House of Representatives), at 249.

140. U.N. Commission on Human Rights, 61st Sess., Geneva, Switz., Mar. 14-Apr. 22, *Position Paper of the World Organisation Against Torture*, at 25, *available at* http://www.omct.org/pdf/general/2005/position_paper_2005.pdf (last visited Apr. 26, 2005).

141. *See* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm.

142. Boston.com reported in 2004 that "[t]his spring, the Swedish government launched a series of investigations into the 2001 operation" (in which two terror suspects were transported to Egypt from Sweden by the United States). Farah Stockman, *Terror Suspects' Torture Claims Have Mass. Link*, BOSTON GLOBE, Nov. 29, 2004, *available at* http://www.boston.com/news/world/middleeast/articles/2004/11/29/terror_suspects_torture_claims_have_mass_link?pg=full (last visited Dec. 31, 2007); *see also* Report by Gil-Robles, *supra* note 118, ¶ 18.

143. *See* CHRGJ, *supra* note 20 (stating Cesare Salvi asked for an investigation).

144. CNN.com, *supra* note 34 (quoting Armando Spataro, deputy district attorney of Milan and lead investigator in June 2005).

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approved.[145] Specifically, proceedings against twenty-six CIA agents and five Italian intelligence operatives for the kidnapping of Omar were commenced in the Milan's Palace of Justice in January 2007.[146] In addition, several individuals who have survived brutal treatment abroad have taken their stories to the media, and in very few instances, to local courts.[147]

Such actions impute to the United States responsibility for the human rights breach involved, but as far as international law is concerned, they are merely "background noise."[148] Diplomatic pressure, domestic criminal actions against individual perpetrators, and public shaming do not fall within the narrow concept of an "invocation" of state responsibility, which would require the commencement of proceedings before an international court, committee, or tribunal.[149] The difficulty of invocation was anticipated by Deputy Assistant Attorney-General John Yoo, who wrote in 2002 that even if Administration lawyers had read international law incorrectly in regards to the use of torture in the war against terror, "there is no international court to review the conduct of the United States . . . ."[150] This part will discuss why injured states avoid invoking state responsibility, and why individuals and third party states—while formally recognized as actors in the international community and theoretically capable of invoking state responsibility—have difficulty invoking responsibility for extraordinary renditions.

145. According to an Italian government statement, "neither the government, nor diplomatic corps, nor the director of SISMI nor the information and security apparatus ever received any sort of advisement from United States authorities." *Id.* On the other hand, U.S. intelligence officers have intimated that such denials are false, saying that it would be nearly impossible for the operation to have been launched without the permission of the Italian government. Tracy Wilkinson, *Italian Ire Mounts at C.I.A. Kidnapping of Egyptian Imam*, L.A. TIMES, June 26, 2005.

146. John Crewdson, *Cleric's Story of Adbduction, Torture*, CHI. TRIB., Jan. 7, 2007, *available at* http://www.chicagotribune.com/news/nationworld/chi-070107abuomar-main-story,1,7418553.story.

147. *See, e.g.*, *Arar Launches Lawsuit Against U.S. Government*, CBC News, http://www.cbc.ca/news/story/2004/01/22/ararsuit040122.html (last visited Apr. 10, 2007).

148. Evans, *supra* note 12, at 156.

149. Commentary to ILC Articles, art. 42, *cited in* Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century* 96 AM. J. INT'L L. 798, 800 (2002).

150. Letter from John Yoo, Deputy Assistant Attorney-General, to Alberto Gonzales, Counsel to the President, (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 218, 220 (Karen Greenberg & Joshua Dratel eds., 2005) [hereinafter THE TORTURE PAPERS].

A. *Invoking State Responsibility for Human Rights* Breaches—Locus Standi *of International Actors*

1. The Individual

Traditionally, state responsibility could only be invoked by one state against another state. With the advent of human rights in international law, the Westphalian system has been adapted so as to allow an individual to bring a complaint against his[151] own state for breaching his rights.[152] The institution of citizenship is the basis of the individual's legal relationship with a particular state.[153] However, as we have seen, human rights issues arise not only between a state and its own citizens, but between a state and a foreign citizen. In fact, except in the case of Ahmed Ali Abu, an American citizen allegedly held and tortured in Saudi Arabia after being captured by U.S. security personnel in Pakistan,[154] *all* alleged extraordinary renditions have involved non-U.S. citizens. This is not due purely to the foreign nature of the terrorist threat (recent experience shows that the danger of homegrown terrorism is as real and imminent as any foreign threat[155]) but a reflection of the overall policy of othering the victim.

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151. Masculine terminology is used in this Article because reported cases of extraordinary rendition are usually against men.

152. *See* Evans, *supra* note 12, at 140; Weiss, *supra* note 149, at 798.

153. *See* Gibney et al., *supra* note 46, at 262-63.

154. Abu Ahmed Ali's parents have served a writ of habeas corpus in the domestic courts. His is an atypical case of extraordinary rendition, because he was actually captured by U.S. security forces in Pakistan, where he was studying, and placed in detention there. *See* Memorandum Opinion, at 1-2, Ali v. Ashcroft, No. 04-1258 (U.S. District Court for the District of Columbia).

155. For example, the July 7, 2005 London bombings, which killed 56 people and injured approximately 700 people, are believed to have been carried out by UK-based Islamic paramilitary organizations. *See* Wikipedia, *7 July 2005 London Bombings*, http://en.wikipedia.org/wiki/7_July_2005_London_bombing (describing the incident and its investigation) (as of Apr. 10, 2007, 8:31 EST). A video entitled "The War of the Oppressed People" portraying a masked man delivering threats of terrorists attacks against the West in an Australian accent was released in August 2005, with forensic linguist concluding that the man was Australian-born. Ian Munro & Jesse Hogan, *Terror Video Man is Australian*, THE AGE, Aug. 10, 2005. Around the same time, a taped monologue believed to have been delivered by the eldest of the four London bombers before the attacks was published in English on Al-Jazeera satellite channel and America's ABC News obtained a copy of a video of a man delivering threats in "a stilted American accent." Mark Hosenball, *Terrorists: Bloodcurdling Qaeda Threats—In English*, NEWSWEEK, Sept. 26, 2005, *available at* http://www.msnbc.msn.com/id/9378357/site/newsweek/ (last visited Apr. 10, 2007).

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In assessing the prospects for a successful claim, it is important to notice that the practice usually involves both (1) extraterritorial human rights breaches, and (2) human rights breaches against foreign nationals.

As the case of *López Brugos v. Uruguay* shows, the extraterritoriality of a human rights violation is not a bar to state responsibility.[156] This case involved an application under the ICCPR by the wife of a citizen of Uruguay who was allegedly captured in Argentina by Uruguayan security and intelligence forces and detained in Buenos Aires for two weeks, before being transported back to Uruguay and eventually arrested. The Human Rights Committee (HRC) held that:

> Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction," but . . . [it] . . . does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.[157]

The court's finding in that case that the violation came under the ICCPR rested heavily upon the relationship between the citizen and the state.[158] This is a relationship that extraterritoriality does not sever. As Tomuschat comments, it would be absurd if an interpretation of the ICCPR and the Optional Protocol to the ICCPR were to grant a state "unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity [of] their citizens living abroad."[159]

If Brugos had been victim to the actions of a foreign government, according to HRC General Comment 31 the nature of the obligation would be unchanged:

> a State party must respect and ensure the rights laid down in the Covenant to *anyone within the power or effective control of that State Party*, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-

156. Sergio Euben Lopez Burgos v. Uruguay, Communication No. R12/52, U.N. Doc. Supp. No. 40 (A/36/40). *See* Dominick McGoldrick, *International Application of the International Covenant on Civil and Political Rights*, *in* EXTRATERRITORIAL APPLICATION, *supra* note 117, at 47.

157. *Burgos*, Communication No. 12/52, U.N. Doc. Supp. No. 40 (A/36/40) ¶ 12.3.

158. *Id.* ¶ 12.2.

159. McGoldrick, *in* EXTRATERRITORIAL APPLICATION, *supra* note 117, at 62.

https://scholarship.law.ufl.edu/fjil/vol19/iss3/1

> seventh session (1986), *the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness*, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[160]

Standing to enforce a foreign government's obligation is more problematic. Individual claims against foreign governments can only be made under an instrument specifically conferring on an individual *locus standi* to do so. CAT provides that the CAT Committee can form "views" on complaints forwarded to it by individuals against a state which has made an Article 22 declaration giving it jurisdiction to do so,[161] and the ICCPR gives a similar jurisdiction to the HRC, but the United States has refused the CAT Committee and the HRC jurisdiction over complaints lodged by individuals.[162] The only forum that has jurisdiction to hear an individual claim against the United States is the Inter-American Commission and Court on Human Rights.[163] This court's screening process, which has resulted in just over 25 cases out of 12,000 complaints being heard,[164] makes a successful application a distant prospect.

Foreign victims of international human rights breaches have successfully brought civil actions in American domestic courts under certain federal legislation. Because the prohibition of torture is a "specific, universal and obligatory" norm, a foreign individual could file a claim against a government official or a private military firm under the *Alien Tort Claims Act* (ACTA)[165] or the *Torture Victim Protection Act* (TVPA)[166] in respect of a rendition. The El-Masri case is one example of this. This form of redress offers the advantage of assisting a victim to gain

160. HRC GENERAL COMMENT 31, *supra* note 62, ¶ 10 (emphasis added).

161. CAT, *supra* note 10, art. 22.

162. Office of the U.N. High Commissioner for Human Rights, Declarations and Reservations, *available at* http://www2.ohchr.org/english/law/cat-reserve.htm; *see* TORTURE BY PROXY, *supra* note 3, at 33 n.177.

163. The United States has signed but not ratified the American Convention on Human Rights. ACHR, *supra* note 11. Article 44 confers jurisdiction on the Inter-American Court to hear claims by an individual against a State Party to the Convention. *Id.* Because the United States has not ratified the Convention, the Commission would examine a claim under the American Declaration on the Rights and Duties of Man. *See* TORTURE BY PROXY, *supra* note 3, at 101.

164. TRIGGS, *supra* note 85, Draft Chapter on Dispute Resolution, at 49 (citing Sands & Klein).

165. 28 U.S.C. § 1350 (1992).

166. *Id.* Section 2 of the TVPA states: "(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . ."

compensation and begin to rebuild his life, but because a claim can be brought only against a natural person or a corporation, and cannot be brought against the United States as a state, this enables the U.S. Administration to maintain distance between itself and the "othered" perpetrator. This is essentially a side issue because, as a domestic civil action, ATCA and TVPA proceedings fall short of an invocation of state responsibility, which needs to be in an international forum.

An individual does not have the opportunity to challenge the legality of his removal prior to it occurring because he is spirited away without warning and held incommunicado whilst in transit. International procedural law empowers international dispute resolution mechanisms to request the application of "interim measures" by a government when there is a risk that return may result in irreparable harm to the rights claimed by a petitioner.[167] In *Shamayev and 12 Others v. Georgia and Russia*,[168] the European Court of Human Rights requested that the Georgian Government delay the extradition to Russia of thirteen Chechens who had allegedly illegally crossed the border into Georgia, until the Court had time to review the men's cases.[169] Unlike extraditions, which involve a formal application process, extraordinary renditions are occur off-the-record and outside the law; individuals are removed swiftly and silently without the chance to seek an order for interim measures from an international tribunal.

2. The Injured State

A victim of extraordinary rendition could petition his government to invoke state responsibility as an injured state under ILC Article 42.[170] In practice, states rarely respond to such requests.[171] It is completely at the discretion of the state whether to invoke responsibility, and in many cases, there are innumerable reasons not to invoke responsibility, including aid reliance.[172] Taking the United States to task in relation to the manner in

167. *See* H.R.W. Report 1, *supra* note 14, at 24.

168. Shamayev and 12 Others v. Georgia and Russia, 2005-III Eur. Ct. H.R. (2005).

169. *See* Press Release, Registrar of the European Court of Human Rights, Interim measures in case of Shamayev and 12 Others v. Georgia and Russia (Oct. 10, 2002), *available at* www.echr.coe.int/eng/press/2002/oct/chechensvgeorgia%26russia.htm (last visited Apr. 10, 2007). Requests for interim measures are not always successful in preventing a wrong from occurring.

170. ILC Articles, *supra* note 1, art. 42.

171. TORTURE BY PROXY, *supra* note 3, at 100 n.586.

172.

The United States cut US $70 million aid to Yemen when it voted against the United States in the Security Council Resolution 678 in 1990, relating to the legitimation of Operation Desert Storm. Michael Byers & Simon Chesterman, *Changing the Rules about Rules?*, *in*

Button: Spirited Away (Into a Legal Black Hole?): The Challenge of Invoki

which it prosecutes the war on terror may be viewed, of course over-simplistically, as an endorsement of the activities of terrorist groups. Situations where an individual is rendered to torture in his country of citizenship is even more problematic. It would be absurd if Egypt for example was to bring an action against the United States for facilitating a human rights breach Egypt committed against its own citizen.

Australia may not view itself as such, but it is an injured state. Australian citizen Mumdouh Habib alleges that he was a victim of extraordinary rendition when in 2001, he was delivered by the CIA to Egypt where he was tortured for six months before being transferred to Guantánamo Bay.[173] Does the Australian government have the political will to render the United States accountable for the *refoulement* of its citizen Mumdouh Habib? Probably not, given its hands-off approach to the Guantánamo Bay detention and potentially illegal military trial of Australian terror suspect David Hicks, in spite of public concern.[174] What about other injured states? The Canadian government would be the most likely to take action, as a financially independent, clearly anti-terrorist and pro-human rights nation, which has shown its preparedness to meet the United States in the courtroom over international legal issues in the past.[175] It remains to be seen whether Canada will attempt to bring the Maher Arar case before the ICJ or make an Article 21 communication to CAT.

3. A "Non-Injured" State

Given the extreme difficulties of having an action brought by the citizen's state, it may be more plausible for states other than the injured state to engage the state responsibility of the offending state. This is known as "inter-State responsibility" and is allowed under ILC Article 48

HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 177, 192 (J.L. Holzgrete & Robert O. Keohane eds., 2003).

173. Dana Priest & Dan Eggen, *Terror Suspect Alleges Torture*, WASH. POST, Jan. 6, 2005, http://www.washingtonpost.com/wp-dyn/articles/A51726-2005Jan5.html.

174. Public sentiment has been expressed in various forms. *See, e.g.*, Welcome to "Fair Go for David," http://www.fairgofordavid.org, (last visited Apr. 10, 2007).

175. However, disputes between the two countries have tended to relate to economic or environmental interests rather than human rights. *See, e.g.*, Trail Smelter (United States v. Can.), 3 R.I.A.A. 1905 (1938 & 1941); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. United States), 1984 I.C.J. 246 (Oct. 12). Numerous disputes between Canada and the United States have been adjudicated in the World Trade Organization dispute settlement body, including the *U.S.-Canada Softwood Lumber* Case, which was resolved in 2005. Panel Report on *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse by Article 21.5 of the DSU by Canada*, WT/DS277/RW, circulated on Nov. 15, 2005.

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and the *Barcelona Traction* Case.[176] Article 48 provides that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State . . . if: . . . the obligation breached is owed to the international community as a whole,"[177] including individuals.[178] The prohibition against torture and refoulement to torture is owed *erga omnes*.[179] HRC General Comment strongly endorses the invocation of inter-state responsibility: "[w]hile article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant every State Party has a legal interest in the performance by every other State Party of its obligations."[180]

Theoretically, a third state could invoke the responsibility of the United States for its breaches, but again, theory and practice diverge. *Barcelona Traction* and subsequent cases[181] have removed the legal obstacles for third party enforcement of *erga omnes* norms erected by the *South Western Africa* cases[182] but failed to address practical problems, including the lack of impetus and the jurisdiction of relevant international courts and tribunals. There has been a "complete failure of States to take advantage of the machinery provided for in the U.N. human rights instruments to bring inter-State claims."[183] Where inter-state responsibility has been invoked, it has hitherto been done for political or economic reasons, and not purely to uphold the principles of international law.[184] In the unlikely event that a third state attempts to invoke inter-state responsibility, it would probably be a state from which a person has been abducted. Such a country finds itself simultaneously affronted at having had its sovereignty undermined, and in danger of being accused of failing to

176. Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

177. ILC Articles, *supra* note 1, art. 48(1)(b).

178. TRIGGS, *supra* note 85, at 38.

179. Bassiouni, *supra* note 43, at 68-75.

180. HRC General Comment 31, *supra* note 62, ¶ 2.

181. The existence of the *erga omnes* norm of self-determination was recognized in *East Timor*. East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30) (confirming the *erga omnes* character of rights and obligations). Convention on the Prevention and Punishment of the Crime of Genocide in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo), 1996 I.C.J. 595, 616 (July 11).

182. South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6 (July 1966). By a narrow majority, the ICJ held that there was no customary international law equivalent of *actio popularis*. *Id.* at 46. A state must have a "real and existing individual interest which is legally protected" in order to have *locus standi*. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 454 (Dec. 21).

183. Evans, *supra* note 12, at 147 n.29.

184. *Id.*

practice due diligence to prevent the disappearance of the individual in question, as mentioned previously in this Article. International proceedings are but one mode of attempting to clarify a state's stance on the matter. As mentioned above, the Italian reaction to this situation has been to bring criminal proceedings against individual agents.

B. *Invoking State Responsibility—Practical and Procedural Difficulties*

1. Admissibility

International courts impose several admissibility requirements,[185] of which the availability of sufficient evidence is briefly flagged as a difficult one here.

Individuals are subjected to the juridical othering mentioned in the introduction. They are "ghost detainees" whose cases are undocumented[186] and whose existence is denied.[187] A testimonial account by a victim retelling what was done to them will, due to the clandestine nature of the practice, be likely to go unsupported, with the possible exception of a traceable collection of mobile telephone calls, credit card transactions and hotel tabs, like the ones reportedly used as evidence in the indictment of CIA operatives by Milan prosecutors in the Abu Omar case.[188]

If a potential complainant utilized the *Freedom of Information Act*,[189] pursuant to which he would have access to CIA documents not suppressible subject to national security privileges (under the *CIA Information Act*[190] the operational records of the CIA's Office of Security and Directorate of Operations are exempt from the *Freedom of Information Act*), it may be that sufficient evidence to execute a right to invoke state responsibility simply does not exist. Unlike the better documented activities of state organs (and private military firms) in relation to Abu Ghraib and Guantánamo Bay, the activities of the Special Removals Unit are completely off the books. A thick cloud of secrecy obfuscates extraordinary renditions, and as yet, no U.S. government memos have entered the public domain that could back a claim of direct authorization "from the top." It is quite possible that the U.S.

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185. In general, for a claim to admissible in an international tribunal, the claim must be national, local remedies must be exhausted, and there must be sufficient evidence of the breach.

186. Jamieson & McEvoy, *supra* note 2, at 517.

187. *See* Jamieson & McEvoy, *supra* note 2, at 518.

188. *See* CNN.com, *supra* note 34.

189. 5 U.S.C. § 552 (2002).

190. 50 U.S.C. § 431 (2004).

Administration has purposefully chosen extraordinary rendition as a way of prosecuting the war on terror without leaving an incriminating "paper trail"[191] such as the one evident in *The Torture Papers*.[192] In this fashion, an evidentiary black hole is created, adding another hurdle to the path of a potential complainant.

2. Jurisdictional Constraints

The new paradigm has seen the swelling of U.S. government executive power and, conversely, the inaccessibility of domestic or international judicial review.[193] Government memoranda reveal that security strategies, including extraordinary rendition, were designed with the aim of depriving the federal court of jurisdiction over the subject matter.[194] Similarly, it was carefully noted that certain wrongs were beyond the reach of international dispute mechanisms such as the ICJ and CAT Committee.[195]

Since the United States revoked its general consent to the jurisdiction of the ICJ,[196] it would be necessary to gain the consent of the United States for the ICJ to adjudicate a claim against it.[197] In practice, jurisdiction by special agreement only arises in territorial disputes,[198] presenting an

191. Anthony Lewis, *Introduction*, *in* THE TORTURE PAPERS, *supra* note 150, at xiii.

192. *Id.*

193. *See* Howard, *supra* note 24, at 194.

194. *See* Memorandum from Patrick Philbin & John Yoo on Possible Habeas Jurisdiction over Aliens Held in Guantanámo Bay, Cuba to William J Haynes II, General Counsel, Department of Defense (Dec. 28, 2001), *in* THE TORTURE PAPERS, *supra* note 150 ("If a federal district court were to take jurisdiction over a habeas [corpus] petition, it could review the constitutionality of the detention and the use of a military commission, the application of certain treaty provisions, and perhaps even the legal status of al Qaeda and Taliban members."), *quoted in* Howard, *supra* note 24, at 193.

195. *See* Howard, *supra* note 24, at 202.

196. The United States revoked its acceptance of compulsory jurisdiction under the Statute of the ICJ article 36(2) when Nicaragua made an application to the ICJ against it. Frederic L. Kirgis, International Law Aspects of the 2005 World Summit Outcome, http://www.asil.org/insights/2005/10/insights051004.html.

197. Under the Statute of the ICJ article 36(1), the ICJ has jurisdiction over "all cases which the parties refer to it." Statute of the International Court of Justice art. 36(1) [hereinafter Statute of the ICJ].

198. Cases that have been referred to the ICJ pursuant to special agreement are usually territorial disputes. North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20) (relating to a dispute as to the sovereignty of disputant states over a common continental shelf between the states); Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17); Sovereignty over Pedra Branca/Lulau Batus Puteh (Malay. v. Sing.), 2003 I.C.J. 146 (Sept. 1); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 17) (involving disputes regarding the sovereignty over nearby islands to the disputant states).

unrealistic option. A unilateral application would also require the consent of the United States to be heard[199]—another unlikely prospect. Treaties may specifically provide for the jurisdiction of the ICJ over certain questions,[200] but the relevant treaties—CAT, ICCPR, the Refugee Convention and the Geneva Conventions—do not.

Because conventional routes towards ICJ jurisdiction are blocked, we turn to alternative paths: proceedings which may not bind the United States directly but which would publicize the issue.

First, a third state could attempt to go ahead with a case in the absence of the United States, but the credibility of such a proceeding—already questionable in cases such as *Tehran Hostages* where a directly affected party was present[201]—would be almost nil given that neither the injured state nor the "defendant" state would be present. Second, a complainant state could choose a different defendant by bringing proceedings against a receiving state for acts of torture, thereby indirectly raising the issue of extraordinary rendition. Egypt, for example, has accepted the compulsory jurisdiction of the ICJ,[202] but in other cases, consent to ICJ jurisdiction would be required. Thirdly, concerned states can lobby the U.N. Human Rights Committee or the General Assembly to seek an advisory opinion from a court,[203] which could be done against the wishes of the United States.[204] An advisory opinion has been made to determine the question of state responsibility for environmental damage in *Legality of the Threat or*

199. Such consent may be expressed or implied by the conduct of the "defendant" state. *See* TRIGGS, *supra* note 85, ch. 15.

200. Statute of the ICJ, *supra* note 197, art. 36(1); *see* Military & Paramilitary Activities (Nicar. v. United States), 1984 I.C.J. 392, 426-29.

201. Tehran Hostages (United States v. Iran), 1980 I.C.J. 3 (May 24).

202. On the condition of reciprocity. *See* International Court of Justice, Declarations Recognizing as Compulsory the Jurisdiction of the Court, www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm.

203. The ICJ may offer an advisory opinion on "any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request" under article 65(1) of the Statute of the ICJ. Statute of the ICJ, *supra* note 197, art. 65(1). Only the General Assembly or the Security Council, or a U.N. organ approved by the General Assembly to hold this right, may seek an advisory opinion. *Id.* art. 96. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95 (July 8) is an example of the Court using its advisory jurisdiction to offer an opinion on a substantive question of law.

204. *See generally* Applicability of Article VI, Section 22, of the Convention on the Privileges & Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177 (Dec. 15) (went ahead without the consent of Romania, and the Western Sahara case went ahead despite the protestations of Spain).

Use of Nuclear Weapons[205] and for the Israeli construction of a wall in the Occupied Palestinian Territory in the *Israeli Wall* case.[206]

Because remedies cannot be granted against the United States by a court in the above three types of proceedings, the ability and willingness of a court to make a free-standing finding of state responsibility in the human rights context is vital. Such a finding would make it clear that the United States cannot bypass state responsibility and prevent the international community attributing human rights abuses to it by othering perpetrators and victims of torture.[207]

C. *State Responsibility and International Human Rights—Incompatible or Unconnected?*

Extraordinary rendition is one example of how globalization creates opportunities for states to attempt to obfuscate responsibility for human rights abuses by "outsourcing" them.[208] In the words of Mégrét, "[we are witnessing the emergence of] a global network of loosely interconnected security apparati which are profoundly redrawing the boundaries of the law of deportation and extradition, with the blessing of panic-stricken liberal states and only-too-happy-to-oblige illiberal ones."[209] This global security network, with the world's sole superpower at its center, challenges the traditional concept that the international community is made up of separate, discrete, independent states. It challenges the monolithic concept of the state by facilitating indirect, collaborative, and proxy human rights breaches. It widens the range of ways in which perpetrators and victims can be othered. This form of international order amplifies the importance of a direct finding of state responsibility for breaches of international human rights. The invocation of state responsibility by bringing a state before an international court or tribunal is imperative.

However, do the difficulties outlined above mean that it is inappropriate to attempt to apply the general rules of international law on

205. Legality of the Threat of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95 (July 8).

206. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

207. *See* Higgins, *Issues of State Responsibility Before the International Court of Justices, in* ISSUES OF STATE RESPONSIBILITY, *supra* note 1, at 7.

208. For example, could a state, which purports to condemn the death penalty, outsource capital punishment by having its own citizens arrested in a foreign country where the death penalty is practiced?

209. Frédéric Mégret, *Justice in Times of Violence* 14 EUR. J. INT'L L. 327, 343 (2003).

state responsibility to situations involving breaches of human rights?[210] Some would say that this is the case,[211] but the majority opinion amongst academics[212] and decision-makers is that the human rights context is one in which state responsibility can be invoked. In the *Rainbow Warrior* case,[213] the U.N. Secretary-General, acting as arbitrator, stated "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility"[214] and the ICJ in *Gabčikovo-Nagymaros Project*[215] stated that "when a State has committed an internationally wrongful act, its international responsibility is likely to be involved *whatever the nature of the obligation it has failed to respect*."[216] The ILC Articles also expressly countenance the impact of human rights on state responsibility.[217] Barriers to state responsibility for human rights breaches are certainly not due to a lack of theoretical support.

This said, should it be conceded that, from a human rights perspective, "state responsibility ILC-style"[218] is better adapted to promulgating moral standards in relation to international human rights, rather than enabling actual enforcement? It is true that the obligations binding on states under primary rules such as those in CAT and the ICCPR have not yet "connected" sufficiently with the secondary obligations enunciated by the

210. Andrew Clapham, Professor of Public International Law at the Graduate Institute of International Studies in Geneva, is cited as saying that the general rules of international law on state responsibility "should not be . . . considered appropriate" in convention instruments. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, E.T.S. No. 5, *cited in* Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELB. J. INT'L L. 1, 9 (2004). Andrew Clapham, *The "Drittwirkung of the Convention," in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 163, 170 (Franz Mutscher, R. St. John Macdonald and Herbert Petzold eds., 1993), *quoted in* Danwood Mzikerge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actions Accountable for Human Rights*, 5 MELB. J. INT'L L. 1, 9 (2004).

211. Chirwa, *supra* note 210, at 9. Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights*, *in* ISSUES OF STATE RESPONSIBILITY, *supra* note 1, at 162-63 (discussing the difficulties of finding where human rights fit into the principle of state responsibility).

212. For example, Nicola Jagers, Viljam Engstrom, Celina Romany, and Danwood Mzikenge Chirwa. *See* Chirwa, *supra* note 210, at 9; *see also* Gibney et al., *supra* note 46; Evans, *supra* note 12, at 144.

213. New Zealand v. France 20 R. Int'l Arb. Awards 217 (1990).

214. *Id.* at 251.

215. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7 (Sept. 25).

216. *Id.* at 38 (emphasis added).

217. ILC Articles, *supra* note 1, art. 50(1)(a) (providing that countermeasures must not affect obligations for the protection of human rights); *see* Evans, *supra* note 12, at 142.

218. Evans, *supra* note 12, at 158.

ILC Articles.[219] What I mean by this is that a clear breach of primary rules contained in treaties and customary international law, such as extraordinary rendition, for which a state is theoretically responsible under the principles, does not translate into the legal consequences posited by the ILC Articles. Put simply, extraordinary rendition shows us that the United States has—through the othering of perpetrator and victim—managed to commit a grave breach of a fundamental human right without judicial scrutiny.

The lack of connection between primary human rights rules and secondary rules, due to procedural issues such as standing, leaves a legal black hole so to speak into which individuals like Mumdouh Habib may be thrown without the repercussions naturally flowing from a human rights breach. It makes room for the leaders of so-called liberal states to plan and engage in state practice with greater attention to secondary rules, which govern the consequences of primary rules, rather than the obligations to which they are bound by the primary rules. The purpose of authoritative human rights and humanitarian instruments will continue to be subverted by security strategies which, despite being quite illegal, are nonetheless assured of legal impunity.

Making the connection between human rights and state responsibility will require not only the continued evolution of secondary rules, but also a shift or even an expansion in the way that we deal with these primary rules, particularly with regard to procedural matters. For instance, the rules of standing, which currently emphasize the relationship between a citizen and his state of citizenship, could be rethought in order to adapt to the reality of interstate human rights breaches. The international community should strive to achieve this, rather than settling for a diluted concept of state responsibility for international human rights.

VI. CONCLUSION

The ILC Articles establish a sound theoretical framework for state responsibility, but since procedural barriers prevent enforcement, do they really "facilitate the holding to account of those who are responsible for breaching international obligations"?[220]

The invocation of an international human right is virtually impossible. Unless an individual is "fortunate" enough to be a victim at the hands of his state of nationality, giving him a right to personally invoke his rights,

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219. McGoldrick, *in* ISSUES OF STATE RESPONSIBILITY, *supra* note 1, at 161.

220. Evans, *supra* note 12, at 140.

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or to be a citizen of a country willing to take up his case, he has no recourse to justice against a state that has rendered him to torture. As an *erga omnes* norm owed to the international community at large, third states could respond by attempting to invoke responsibility. The feasible options available to third states, however, are not true invocation of state responsibility, and there is insufficient impetus for inter-state responsibility in the enforcement of human rights.

With this situation in mind, let us return to the idea expressed in ILC Article 1 that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[221] Is this overly optimistic? The use of the word "entails" indicates some inevitable consequence, but the extraordinary rendition context shows us that being able to invoke state responsibility where a wrong is made out is anything but certain. The principles and practice of state responsibility are not yet well connected enough in the enforcement of human rights to enable the invocation of the international responsibility for every internationally wrongful act. The future is likely to see the continued international cooperation between states to address the threat of terrorism. A system of primary and secondary responsibility that correctly recognizes the responsibility of individual states participating in and using this security network, and facilitates the prosecution of breaches in international forums, is needed to close up the legal black holes which currently allow international crime by proxy to go unrecognized.

221. ILC Articles, *supra* note 1, art. 1.

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