

TANIA NEDELICHEVA

**EXTRAORDINARY RENDITION- A CRIME
AGAINST HUMANITY?**

LLM SEMINAR PAPER
INTERNATIONAL CRIMINAL LAW: LAWS 522

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
2006

N 37 | NEDELICHEVA, T. M. *Extraordinary rendition: a crime against humanity*

W

741
W
6
71
06



Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



LIBRARY

ABSTRACT

Extraordinary rendition is a practice used by the United States in the fight against terror. The practice places suspected terrorists outside the reach of any legal system for the purpose of interrogation. Extraordinary rendition violates some of the most fundamental human rights such as the right not to be arbitrary arrested the right to be recognised before the law, the right to a fair trial, the right not to be subjected to torture or other inhumane treatment and the right not to be arbitrary detained.

This paper sets out to define “extraordinary rendition” and to emphasise the seriousness of the violations that result from this practice. The focus of the paper is to consider whether perpetrators of extraordinary rendition will attract criminal liability for crimes against humanity as provided in the Rome statute of the International Criminal Court.

WORD COUNT

The length of this paper comprises of 15 337 words (excluding abstract, contents page, footnotes and the bibliography).

INTRODUCTION	5
I BACKGROUND	7
A CIA's Programme 'Rendition'	7
1 <i>The Original Programme</i>	7
2 <i>The Rendition Programme after 9/11</i>	9
II RENDITION	12
A Rendition	12
B Defining Extraordinary Rendition	13
C Extraordinary Rendition- Breach of Fundamental Human Rights	17
III EXTRAORDINARY RENDITION AND THE INTERNATIONAL CRIMINAL COURT	19
A The International Criminal Court	19
B Perpetrators from the United States	19
1 <i>Problems with Bringing American Perpetrators in front of the ICC</i>	20
C Crimes against Humanity	22
IV ADDRESSING EXTRAORDINARY RENDITION THROUGH THE CRIME OF ENFORCED DISAPPEARANCES	23
A Brief History of the Crime of Enforced Disappearance of Persons	23
B Enforced Disappearance of Persons as a Crime against Humanity in the Rome Statute	24
C Elements of the Crime of Enforced Disappearance of Persons	26
1 <i>Arrest, Detention and Abduction</i>	26
2 <i>Refusal to acknowledge deprivation of freedom or to give information on the fate or whereabouts of a person</i>	28
3 <i>Authorization, support or acquiescence of the State</i>	38
4 <i>Outside the reach of the law</i>	39
5 <i>Widespread or systematic attack directed against a civilian population</i>	40
D Evaluation	46
V ACTS COMPRISING EXTRAORDINARY RENDITION AND ARTICLE 7	47
A Addressing Extraordinary Rendition through Other Crimes against Humanity	47
1 <i>Imprisonment or Other Severe Deprivation of Physical Liberty</i>	47
2 <i>Persecution</i>	48
3 <i>Torture</i>	50
4 <i>Other inhumane acts of similar character</i>	52
5 <i>Widespread or systematic attack on a civilian population</i>	52
B Evaluation of this Approach	53
VI OTHER INHUMANE ACTS OF A SIMILAR CHARACTER	53
A Elements of the Crime	54
1 <i>Inhumane acts of similar character</i>	54
2 <i>Great suffering or serious injury to body or mental or physical health</i>	55
3 <i>Mental Element</i>	56
4 <i>Widespread or systematic attack on a civilian population</i>	57
B Evaluation	57
VII THE MISSING FROM THE BATTLEFIELD	58

<i>HIX</i>	<i>ASSISTING STATES AND CRIMES AGAINST HUMANITY</i>	59
<i>A</i>	<i>Perpetrators from other Countries</i>	59
<i>B</i>	<i>Starting Points and Stopover Points</i>	61
<i>C</i>	<i>Drop-Off Points and One-Off Pick Up Points</i>	63
<i>1</i>	<i>Drop-Off Points</i>	63
<i>2</i>	<i>One-Off Pick-Up Points</i>	64
<i>IX</i>	<i>WAR AGAINST TERROR</i>	66
<i>A</i>	<i>Is it a Justification?</i>	66
<i>X</i>	<i>CONCLUSION</i>	68

map also fell victim to what has become known as extraordinary rendition.

Allegations of CIA secret detentions and unlawful inter-state transfers of suspected terrorists to Europe first emerged at the end of 2001. The response of the Council of Europe was to appoint Senator Dick Marty on 7 November 2005 to inquire into the allegations. Meanwhile, Council of Europe Secretary General Terry Davis asked newly elected head powers, "what forty-five European governments to explain how their domestic laws prevent unacknowledged deprivation of liberty and aid foreign agents to carry out these acts. After a careful analysis of governments' replies to his request on 1 March 2006 Terry Davis said that "Europe appears to be 'a happy hunting-ground for torture victims'". On 7 June 2006 Dick Marty presented the *Convention on Legal Advice and Human Rights Report (Convention Final Report)* in which he confirmed the *Convention on Legal Advice*.

What next set out to examine whether the practice of extraordinary rendition can be regarded as a crime against humanity or genocide, will follow? at the Rome Statute of the International Criminal Court (ICC).

¹ Dick Marty "Torture Unhindered, Amnesty, Rights in Europe", *Human Rights Watch*, 2006, <http://www.hrw.org>.

² European Convention for the Protection of Human Rights and Fundamental Freedoms.

³ Council of Europe, <http://www.coe.int>.

⁴ Convention on Legal Advice and Human Rights Report (Convention Final Report) in which he confirmed the *Convention on Legal Advice*.

INTRODUCTION

“You are here in a country where no one knows about you, in a country where there is no law. If you die, we will bury you, and no one will know”.¹ According to Khaled El-Masri this is what he was told by an interrogator on the first night of his detention in Afghanistan. El-Masri, a German citizen of Arabic decent, was an innocent man who fell victim to what has become known as extraordinary rendition.

Allegations of CIA secret detentions and unlawful inter-state transfers of suspected terrorists in Europe first emerged at the end of 2005. The response of the Council of Europe was to appoint Senator Dick Marty on 7 November 2005 to inquire into the allegations. Meanwhile, Council of Europe Secretary General Terry Davis acting under rarely invoked legal powers,² asked forty-five European governments to explain how their domestic laws prevent unacknowledged deprivation of liberty and aid foreign agencies to carry out those acts. After a careful analysis of governments’ replies to his request, on 1 March 2006, Terry Davis said that “Europe appears to be ‘a happy hunting-ground for foreign services’”.³ On 7 June 2006 Dick Marty presented the Committee on Legal Affairs and Human Rights Report (European Final Report) in which he confirmed the allegations of illegal transfers.⁴

This paper sets out to examine whether the practice of extraordinary rendition can be considered as a crime against humanity in accordance with article 7 of the Rome Statute of the International Criminal Court (Rome Statute).

¹ Dana Priest “Wrongful Imprisonment: Anatomy of a CIA Mistake” (4 December 2005) *Washington Post* Washington A01.

² European Convention for the Protection of Human Rights and Fundamental Freedoms, art 52.

³ Council of Europe <http://www.coe.int> (last accessed 6 August 2006).

⁴ Committee on Legal Affairs and Human Rights Report ajdoc 16 Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States [2006] AS/Jur, par 22.

Part I of this paper provides background information about the practice of extraordinary rendition. This includes a description of the original programme and its development after the terrorist attacks of September 11.

Part II considers a number of definitions of "extraordinary rendition" and formulates an appropriate definition. This part examines the violations of human rights law caused by the practice and highlights the need to seek individual criminal responsibility from officials involved.

Part III of this paper examines the jurisdiction of the International Criminal Court and outlines a number of problems that may arise in the attempt to bring United States' perpetrators in front of the Court.

Part IV considers whether extraordinary rendition may fit within the definition of enforced disappearance. This part includes brief history on enforced disappearance and an analogy between extraordinary rendition and enforced disappearance.

Part V examines the option of addressing extraordinary rendition by dividing it into its components, which fit within separate headings of crimes against humanity such as imprisonment, torture, persecution and other inhumane acts.

Part VI examines the practice of extraordinary rendition as a whole, as an inhumane act.

In Part VII, it is briefly noted that the problem of individuals going missing in the context of armed conflict is becoming the subject of increasing focus in international humanitarian law.⁵

⁵ International humanitarian law is not within the main focus of this paper and thus the issue is not examined in much detail.

Part VIII considers the criminal responsibility of authorities of other States who have been involved in extraordinary renditions.

In Part IX, the question of whether extraordinary rendition is justified in the fight against terrorism is examined. It is briefly noted that the defences in the Rome Statute may not be available for the crimes against humanity committed by perpetrators of extraordinary rendition.

I BACKGROUND

A CIA's Programme 'Rendition'

1 The Original Programme

In the mid-1990s, under the Clinton administration, the United States designed a programme called "rendition", which aimed at capturing alleged terrorists abroad and transporting them to other parts of the world.⁶ The main focus of the programme was and still is the terrorist network Al- Qaeda.⁷

The original programme was designed in such a way as to comply with the United States' interpretation of its international obligations.⁸

In order to perform a rendition the following were needed:⁹

- an "outstanding legal process" against the suspect, usually connected to terrorist offences in his country of origin;
- a CIA "dossier", or profile of the suspect, based on prior intelligence and in principle reviewed by lawyers;
- a "country willing to help" in the apprehension of the suspect on its territory; and
- "somewhere to take him after he was arrested".

⁶ Committee on Legal Affairs and Human Rights Report, above n4, par 26.

⁷ Committee on Legal Affairs and Human Rights Report, above n4, par 28.

⁸ Committee on Legal Affairs and Human Rights Report, above n4, par 29.

⁹ Committee on Legal Affairs and Human Rights Report, above n4, par 29.

The State to which the suspect was transported was asked by the United States to provide diplomatic assurance that the suspects will be treated in accordance with that country's national law. However, once the transfer was complete no efforts were made by the United States to assess how the detainee was being treated.¹⁰

In regards to the involvement of European States in these early stages of the rendition programme, a number of European countries have been known to have closely co-operated with the United States. The United Kingdom's government has admitted to the Council of Europe that a system of prior notification existed at the stages of the original programme, when it was still under the Clinton administration, where the United States would report intended stopovers or over flights prior to the particular rendition operation.¹¹ However, the United Kingdom Foreign Secretary has stated that since 1998 no requests to use United Kingdom airspace in the carrying out of renditions have been made by the United States.¹² In 1998, two requests in relation to rendition of suspects being flown to the United States to face trial were granted and another request to refuel an aeroplane carrying two detainees to the United States was denied.¹³

The act of rendition does not necessarily constitute a breach of international law¹⁴ and if it is carried in accordance with international law it can be used as a helpful tool in the war against terrorism. What is considered to be lawful rendition will be discussed in Part II.

¹⁰ Committee on Legal Affairs and Human Rights Report, above n4, par 30.

¹¹ Committee on Legal Affairs and Human Rights Report, above n4, par 32.

¹² United Kingdom Joint Committee on Human Rights *The UN Convention Against Torture* (HL 185 I, UK, 2006) par 151.

¹³ United Kingdom Joint Committee on Human Rights, above n11, par 151.

¹⁴ Committee on Legal Affairs and Human Rights Report, above n4, par 33.

After the terrorist acts of September 11 in the United States, the rendition programme underwent a change of focus. Although the aim of the programme is still to capture terrorist suspects, the effect of the programme is to place the suspects outside the reach of any judicial system and to keep them there.¹⁵ Moreover, victims of extraordinary rendition have been known to undergo torture or be subjected to other inhumane or degrading treatment.¹⁶

(i) "Spider's Web"

The CIA's rendition flights and detention centres located around the world have formed what has become known as a global "spider's web".¹⁷ However, it must be recognised that not all of the CIA flights are involved in extraordinary renditions. As stressed by reporter Dick Martin in the European Final Report, the allegations should not be exaggerated as that may undermine their credibility as well as the possibility of a serious investigation. In fact, it is indicated in the report that only two per cent of the CIA flights are of interest to the investigation at hand.¹⁸ However, this should not be taken as a factor that detracts from the seriousness of the present situation.

(ii) Rendition Circuit

It is believed that rendition flights are carried out on the same single flight circuit. For example, in the independent cases of extraordinary rendition of Binyam Mohamed al

¹⁵ Committee on Legal Affairs and Human Rights Report, above n4, par 36.

¹⁶ Committee on Legal Affairs and Human Rights Report, above n4, par 36.

¹⁷ Committee on Legal Affairs and Human Rights Report, above n4, par 39.

¹⁸ Committee on Legal Affairs and Human Rights Report, above n4, par 49.

Habashi and Khaled El-Masri, the two were taken aboard on the same aircraft within 48 hours of each other as part of the same 12 day tour in early 2004.¹⁹

There are four types of stops on one rendition circuit. The first is the “starting point” where the crew meets and the aircraft is prepared. Three European States identified as starting points are Germany, Turkey and Spain. The second type is the “stopover point” where the aircraft lands to refuel such as the United Kingdom, Ireland, Italy, Greece and the Czech Republic. Thirdly, there are the “one-off pick-up points” where a detainee or a group of detainees is picked up for extraordinary rendition. European States mentioned in the Final Report are Sweden, Macedonia, Italy and Bosnia and Herzegovina. The last type is the “drop off point” where an aircraft lands for a short period of time at a location which is far from the ordinary route. The locations of the drop-off points are close to detention facilities that are either known or a prima facie case can be made to point to their existence. Two European States that have been identified as drop-off points are Romania and Poland.²⁰

(iii) Treatment of the Suspect During an Extraordinary Rendition

The individual cases of extraordinary rendition examined in the preparation of the European Final Report point to a similar pattern in the treatment of detainees. Typically a suspected individual is stopped at the border of a country, detained and then prepared for an extraordinary rendition operation. This preparation is in the form of a “security check”

¹⁹ Committee on Legal Affairs and Human Rights Report, above n4, par 52- Binyam Mohamed al Habashi is an Ethiopian citizen who has been subjected to extraordinary rendition on two occasions and is currently detained at Guantanamo Bay.

²⁰ Committee on Legal Affairs and Human Rights Report, above n4, par 43.

and is carried out in twenty minutes. Upon its completion the suspect is left in a "state of almost total immobility and sense deprivation".²¹

Usually the security check takes place at a small room at the particular airport or the transit facility close by that airport. Some detainees reported being punched and shoved in a rough or brutal fashion at the beginning of the security check. The detainee usually stays blindfolded while four to six CIA agents dressed in black with their faces fully covered perform the operation in silence, communicating only through hand gestures. The detainee's hands and feet are shackled while all clothes including underwear are cut away in a careful and measured manner. This is followed by a full-body search. The detainee is then photographed naked or almost naked. Some accounts speak of foreign objects being inserted in the anus of detainees. The detainees are then dressed in nappies and jump-suits and have their ears muffled. A bag with no holes is placed over their head.²²

Upon the completion of the "security check" the detainee is forced onboard an aircraft where the detainee is either placed shackled on a stretcher, strapped to a mattress or bound down on the floor of the aeroplane in uncomfortable position. In some cases the detainee is drugged and experiences very little of the flight. In other instances, however, the pain of the shackles or the refusal of water or use of the toilet makes the flight an almost unbearable ordeal.²³

²¹ Committee on Legal Affairs and Human Rights Report, above n4, par 84.

²² Committee on Legal Affairs and Human Rights Report, above n4, par 85.

²³ Committee on Legal Affairs and Human Rights Report, above n4, par 85.

II *RENDITION*

A *Rendition*

As the European Commission for Democracy Through Law (Venice Commission) noted, the term “rendition” is often used in the public debate to refer to irregular and illegal transitions and detentions.²⁴ However, as noted above, renditions are not necessarily illegal. A number of human rights NGOs have agreed with this statement to the extent that the object of an inter-state transfer is to bring an individual to a recognised legal system which is respectful of human rights.²⁵

The Venice Commission has identified four situations in which a State could transfer a prisoner to another State in compliance of international law and human rights law. These are deportation, extradition, transit and transport of a sentenced person for the purpose of serving their sentence in another country.²⁶ The two situations which are of particular interest to the present discussion are extradition and transit. The Venice Commission defined extradition as “a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial”.²⁷ Moreover, States should not extradite or otherwise remove an individual to another state where there are substantial grounds to believe that that individual will face torture in that State or will not be treated humanely and with

²⁴ European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD, par 30.

²⁵ Committee on Legal Affairs and Human Rights Report, above n4, par 34.

²⁶ European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD, par 10.

²⁷ European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD, par 12.

dignity.²⁸ The practice of extraordinary rendition is in breach of this international obligation.

Transit is the practice where one State provides facilities for another State to send a prisoner through its territory.²⁹ However, if there is reason to believe that an extradited person's freedom may be threatened because of race, nationality or political opinion, no transfer should be carried out.³⁰

Transfers that are carried contrary to international law and human rights law are irregular forms of rendition.³¹

B Defining Extraordinary Rendition

Extraordinary rendition is a form of irregular rendition. Although the term has not been yet defined in international law, it is commonly used to refer to flights of suspected terrorists carried by the CIA.

In order to assess the practice of extraordinary rendition in terms of international criminal law it is necessary to define what this term actually means.

The Venice Commission has stated that “‘extraordinary rendition’ appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applicable in the State where the person

²⁸The U.N. Sub-Commission on the Promotion and Protection of Human Rights E/CN.4/Sub.2/2005/L.12/Rev.1, para. 12.

²⁹European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD, par 17.

³⁰European Convention on Extradition, art 21.

³¹European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD, par 24.

was situated at the time”.³² This is a true but rather broad statement, as irregular forms of rendition can be defined in the same way. If extraordinary rendition and irregular rendition are defined the same way than the new term “extraordinary rendition” is superfluous. It seems that the emergence of the new term refers to a specific class of irregular renditions. It will be attempted below to narrowly define this class of extraordinary renditions and identify characteristics which are specific to this class and which set it apart from other forms of irregular rendition.

A good starting point is examining how the United States defines “extraordinary rendition”. The United States Chief Legal Advisor to the Department of State, Mr John Bellinger has said that:³³

To the extent that extraordinary rendition – as I have seen it defined – means the intentional transfer of an individual to a country, expecting or intending that they will be mistreated.

This is as narrow as the definition of “extraordinary rendition” gets. It is very specific in a sense that it puts emphasis on the *intention* and *expectation* of the State which carries out the extraordinary rendition. This approach to the definition is consistent with the approach the United States has been known to adopt in determining the compliance of their actions with the interpretation of their international obligations. In particular the United States has been known to make a distinction between specific and general intent. Specific intent means the “intent to accomplish the precise criminal act that one is later charged with” while general intent usually takes the form of recklessness

³² European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD, par 31

³³ Committee on Legal Affairs and Human Rights Report, above n4, par 269.

or negligence.³⁴ Therefore, when a suspected terrorist is captured and illegally transferred to another State where that suspect is interrogated, this is done with the specific intent to fight terrorism. The fact that it is highly probable that in doing so the suspected terrorists will be transferred to states where they will be mistreated is irrelevant. The position the United States maintains, which is that they have not carried extraordinary renditions, is consistent with this interpretation.³⁵ However, this position is not consistent with international law and human rights law. To hold that it was consistent would surely defeat the purpose of international human rights treaties such as the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).

Non Governmental Organisations have also attempted to define "extraordinary rendition" in their reports. In its report *Below the Radar: Secret Flights to Torture and Disappearance*, Amnesty International says the aim of extraordinary rendition is to "ensure that suspects are not brought to stand trial, but are handed over to foreign governments for interrogation".³⁶ In the Human Rights Watch Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, it was recognised that although "extraordinary rendition" usually refers to" transfers

³⁴ United States Department of Justice *Standards of Conduct for Interrogation under 18 USC §§2340-2340A* (submitted to the Office of the Assistance Attorney General, US Department of Justice, Washington, 2002) 3-4 in which the alleged distinction between specific and general intent was used as a basis for justifying interrogation techniques akin to torture. Although this memorandum was subsequently repudiated, it is not at all clear whether the specific/ general intent distinction died with it.

³⁵ Committee on Legal Affairs and Human Rights Report, above n4, par 269.

³⁶ Amnesty International AMR 51/051/2006 *Below the Radar: Secret Flights to Torture and Disappearance* [2006] AI, 3.

that occur outside of any legal framework”³⁷, many use the term to “signify the transfer of terror suspects to countries where they may face torture”.

Another definition of “extraordinary rendition” can be found in the article of Professor of Law David Weissbrod, published in *Harvard Human Rights Journal*. He defines it as “the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation”.³⁸ This definition includes all the key feature of what has become known as “extraordinary rendition”. However, there is scope for improvement. Under definition only a case where there is state sponsored abduction will qualify as extraordinary rendition. The cases of extraordinary rendition which have emerged indicate that some individuals were detained at airports by the local authorities.³⁹ In other instances of extraordinary rendition the individuals were arrested by the local authorities of the country.⁴⁰ Thus, the definition from Professor Weissbrod should be altered so as to take account of these cases.

There is another feature which sets apart extraordinary rendition from other forms of irregular rendition. Professor Weissbrod’s definition acknowledges that the purpose of extraordinary rendition is to bring suspected terrorist to countries where they could be

³⁷ Human Rights Watch <www.hrw.org> (last accessed 28 September 2006).

³⁸ D Weissbrodt & A Bergquist “Extraordinary Rendition: A Human Rights Analysis” (2006) 19 *Harv Hum Rts J* 123, 126.

³⁹ An example of this is the cases of El-Masri who was initially detained at the Macedonian border by the local authorities.

⁴⁰ Committee on Legal Affairs and Human Rights Report, above n4, par 186; - For example Mohammed Zammar, a German of Syrian origin was allegedly arrested at a Moroccan airport. Committee on Legal Affairs and Human Rights Report, above n4, par 184; - Muhammad Bashmila and Salah Ali Qaru who have never been accused of any terrorist crimes were arrested in Jordan. Bisher Al-Rawi and Jamil El-Banna are British citizens who were arrested in Gambia.

effectively interrogated. However, this definition does not recognise that the effect of extraordinary rendition is to bring these people beyond the reach of any legal system.

Having taken the above considerations into account, the definition of extraordinary rendition can be formulated in the following way: extraordinary rendition means the arrest or detention of a person or the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation, thereby placing that person outside the protection of the law.

C Extraordinary Rendition- Breach of Fundamental Human Rights

The practice of extraordinary rendition is contrary to many of the rights provided for in human rights treaties such as the Universal Declaration of Human Rights, the ICCPR, the ECHR, and CAT.

As noted above, individuals who become victims of extraordinary rendition are subjected to torture or other inhumane acts. This is contrary to one of the most fundamental human rights, the right not to be tortured. The right not to be tortured has been included in all major human rights agreements and has been recognised as a right from which it cannot be derogated under any circumstances.⁴¹ The prohibition of torture has achieved the status of *jus cogens* under customary international law.⁴²

⁴¹ Universal Declaration of Human Rights, art 5; International Covenant on Cultural and Political Rights (ICCPR), art 7; European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), art 3.

⁴² D Weissbrodt & A Bergquist "Extraordinary Rendition: A Human Rights Analysis" (2006) 19 Harv Hum Rts J 123, 130.

Extraordinary rendition is a practice which at present is used to bring suspected terrorists outside a legal system for the purpose of interrogation. Keeping these individuals outside the scope of a legal system denies them the right to a fair trial.⁴³ This includes the right to be presumed innocent until proven guilty.⁴⁴ Victims of extraordinary rendition are given neither an opportunity to have a trial nor the chance to challenge their detention. Thus, they are considered guilty from the beginning. This is a dangerous practice, which undermines the foundations of any legal system. The case of El-Masri, an innocent man who fell victim to extraordinary rendition, is a clear illustration of this danger.⁴⁵ Furthermore, denying people any legal standing denies the right which provides that everyone is equal before the law.⁴⁶ As many victims of extraordinary rendition are arrested on fabricated or no charges and then unlawfully detained, their right to liberty and security of the person⁴⁷, and their right not to be arbitrary arrested⁴⁸ are also infringed.

The United Nations Economic and Social Council's Human Rights Commission has declared that the right not to be tortured and the right to a fair trial have reached the status of international criminal law and therefore all States are under an obligation to safeguard those rights.⁴⁹

The breaches of such basic human rights as the ones noted above only emphasise the need to take active steps to prevent any further occurrence of extraordinary rendition,

⁴³ Universal Declaration of Human Rights, art 10; ICCPR art 14; ECHR 6.

⁴⁴ Universal Declaration of Human Rights art 11; ICCPR art 14(2).

⁴⁵ Committee on Legal Affairs and Human Rights Report, above n4, pars 92-132.

⁴⁶ ICCPR, art 14.

⁴⁷ Universal Declaration of Human Rights, art 3; ICCPR, art 9, ECHR, art 5.

⁴⁸ Universal Declaration of Human Rights, art 9; ICCPR, art 9.

⁴⁹ D Weissbrodt & A Bergquist "Extraordinary Rendition: A Human Rights Analysis" (2006) 19 Harv Hum Rts J 123, 130.

as well as to seek the individual responsibility of people involved in this practice through international criminal law. It is necessary to consider next whether perpetrators involved in the practice could be brought in front of the International Criminal Court.

III EXTRAORDINARY RENDITION AND THE INTERNATIONAL CRIMINAL COURT

A The International Criminal Court

The International Criminal Court (ICC) was established by the Rome Statute which entered in force on 1 July 2002.⁵⁰

The ICC is a permanent institution which has jurisdiction over natural persons for the most serious crimes of international concern.⁵¹ It is necessary to consider who the perpetrators responsible for extraordinary rendition are and examine any problems that may arise in bringing them in front of the ICC.

B Perpetrators from the United States

Although extraordinary rendition is mainly carried out by the CIA, allegations have been made that other United States agencies have been involved in the practice.⁵² The reports allege that members of the United States Navy and military Special Forces Units have participated in the extraordinary rendition programme.⁵³ Michael Scheuer, a former senior CIA official in the Counterterrorist Centre has disclosed in an interview

⁵⁰ Rome Statute of International Criminal Law <www.un.org/icc> (last accessed on 28 September 2006)- Currently, the Rome Statute has 139 signatories and 102 parties.

⁵¹ Rome Statute of International criminal Law, arts 1 & 25.

⁵² Amnesty International *Below the radar: Secret flights to torture and 'disappearance'* (AMR 1/051/2006, 5 April 2006), 13.

⁵³ Amnesty International *Below the radar: Secret flights to torture and 'disappearance'* (AMR 1/051/2006, 5 April 2006), 13-14.

with *60 Minutes* that, in the Clinton and Bush administrations as well as in Congress, details of rendition flights were well known to top officials.⁵⁴ United States officials have admitted carrying out the flights while trying to argue that their actions are compliant with the United States' interpretation of its international obligations.⁵⁵ Moreover, United States President George W Bush has recently admitted that the CIA operates secret detention centres around the world.⁵⁶

Under the Rome Statute agents and members of the defence force who had been directly involved in the operations, as well as officials who have authorised the acts such as politicians and policy makers and the president, can attract individual criminal responsibility in international law.⁵⁷ However, bringing these individuals in front of the ICC in the near future may prove problematic.

1 Problems with Bringing American Perpetrators in front of the ICC

The ICC has no jurisdiction over the United States as the United States is not a party to the Rome Statute. Although the United States signed the Rome Statute, it has since expressed its intention not to become a party to the treaty and has announced that no legal obligations arise from its signature.⁵⁸

Although the United States is not a party to the Rome Statute that does not mean that United States' officials will under any circumstances escape criminal responsibility in international law. Under the Rome Statute, the ICC may issue an indictment charging

⁵⁴ CBS News < www.cbsnews.com > (last accessed on 28 September 2006).

⁵⁵ Committee on Legal Affairs and Human Rights Report, above n4, par 268.

⁵⁶ "Bush Admits secret CIA Jails" (8 September 2006) *The Dominion Post* Wellington B1.

⁵⁷ Rome Statute of the International Criminal Court, arts 25(3) & 28.

⁵⁸ Rome Statute of the International Criminal Court www.un.org/icc (last accessed 28 September 2006).

American citizens with crimes against humanity or any other crimes within the jurisdiction of the Court where those acts had been committed on the territory of a State which is Party to the Rome Statute.⁵⁹ Since extraordinary rendition is a trans-national practice there are a number of State Parties on the territory of which elements of extraordinary rendition were committed.⁶⁰ However, before the Court could issue an indictment, a State Party must have referred the situation to the Prosecutor.⁶¹

Since 2002, the United States has strongly opposed the ICC and has "launched a full-scale multi-pronged campaign against the International Criminal Court".⁶² In 2002 the United States passed the American Servicemembers' Protection Act which restricts cooperation between the United States and the ICC.⁶³ The legislation goes as far as granting the President power to use any means necessary to free any American citizens or allies from the custody of the Court.⁶⁴ Furthermore, the United States have approached a number of States seeking to conclude bilateral agreements which would "prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and US employees (including contractors) and nationals".⁶⁵ In 2004, the United States enacted legislation which cut the aid from the Economic Support Fund to all the States that have ratified the Rome statute but have not entered into a bilateral agreement with the United States.

⁵⁹ Rome Statute of the International Criminal Court, art 12(2)(a).

⁶⁰ Some of these State Parties are Italy, Macedonia, Poland, Romania and Afghanistan.

⁶¹ Rome statute of the International Criminal Court, arts 13, 14 & 15.

⁶² Coalition for the International Criminal Court <www.iccnw.org> (last accessed 28 September 2006).

⁶³ Coalition for the International Criminal Court <www.iccnw.org> (last accessed 28 September 2006).

⁶⁴ Coalition for the International Criminal Court <www.iccnw.org> (last accessed 28 September 2006).

⁶⁵ Coalition for the International Criminal Court <www.iccnw.org> (last accessed 28 September 2006).

At present, given the status of the United States as a super power and its efforts to keep its citizens outside the reach of the ICC it is unlikely that any United States official will be brought in front of the Court in the near future. However, history has shown that eventually perpetrators who have committed serious crimes in international law have been called upon by the courts to take responsibility for their actions. In regards to the present situation, the judiciary in Italy may be given as an example. The Italian courts have issued warrants for twenty-six Americans and two Italian members of the Italian Intelligence Service. These warrants were issued in regards to the abduction of Abu Omar by the CIA.⁶⁶ The CIA actions undermined the efforts of the Italian Police which has been investigating Abu Omar in relation to terrorist allegations.

Thus, it will not be surprising if in the distant future United States' perpetrators are brought in front of the ICC to answer for any crimes they have committed.

C Crimes against Humanity

Some of the most serious crimes identified in the Rome Statute are crimes against humanity set out in article 7.⁶⁷ A person will be found liable for crimes against humanity if he has committed any one of the acts set out in article 7 as part of a widespread or systematic attack directed against any civilian population.⁶⁸ It is necessary to examine whether extraordinary rendition could be addressed through crimes against humanity listed in this provision. Firstly it will be considered whether the practice falls within the heading of enforced disappearance of people.

⁶⁶ CNN < www.cnn.com > (last accessed on 28 September).

⁶⁷ Rome Statute of the International Criminal Court, art 7.

⁶⁸ Rome Statute of the International Criminal Law, art 7(1).

IV ADDRESSING EXTRAORDINARY RENDITION THROUGH THE CRIME OF ENFORCED DISAPPEARANCES

Enforced disappearance of persons is an act identified in the Rome Statute that is most relevant to extraordinary rendition.⁶⁹ To compare the two practices, it is first necessary to examine the history of the crime of enforced disappearance.

A *Brief History of the Crime of Enforced Disappearance of Persons*

The act of enforced disappearance can be described as a state kidnapping where knowledge of the detention is denied by the authorities.⁷⁰ Some of the countries that have practiced enforced disappearance include Guatemala, Uganda, South Africa, Sri Lanka and Morocco.⁷¹ The Inter-American Court of Human Rights has noted that “[a]lthough this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America”.⁷² The practice was adopted by the regime of General Augusto Pinochet Ugarte in Chile in the 1970s and later by other governments in South America such as Uruguay and El Salvador.⁷³ The practice was used most barbarously in Argentina where tens of thousand of people disappeared in what become known as the “Dirty War”.⁷⁴

Enforced disappearance was used by corrupt governments as a tool to eliminate opponents of the government without the inconvenience of proving guilt at a delayed

⁶⁹ Rome statute of the International Criminal Law, art 7(1) (i).

⁷⁰ Mark Lattimer & Philippe Sands (ed) *Justice for Crimes Against Humanity* (Oxford, Portland, 2003) 389.

⁷¹ M C Bassiouni *Crimes Against Humanity in International Criminal Law* (2ed, Kluwer Law International, Boston, 1999) 245.

⁷² *Velasquez Rodriguez Case* (1988), Inter-Am Ct HR (Ser. C) No. 4 (1988) par 149.

⁷³ M C Bassiouni *Crimes against Humanity in International Criminal Law* (2ed, Kluwer Law International, Boston, 1999) 245.

⁷⁴ Lisa Avery “A Return to Life: The Right to Identify and the Right to Identify Argentina’s “Living Disappeared” (2004) 27 Harv Women’s L J 235, 235.

trial.⁷⁵ In Argentina, for example, after overthrowing the Peron government in 1976 the military junta used the method of enforced disappearance to eliminate tens of thousands of government opponents.⁷⁶ Similarly, in other countries such as Morocco, Chile and Republic of Honduras hundreds of people who were alleged to have opposed the government have disappeared.

Another common practice of governments that have been involved in enforced disappearances is to deny any knowledge of the crimes in order to avoid international condemnation. Governments refuse to acknowledge that deprivation of liberty has occurred or to give information on the whereabouts or the fate of the kidnapped opponents. In their efforts to distance themselves as much as possible from the kidnappings, these governments use secret forces in plain cloths, death squads or agents acting on their behalf.⁷⁷

B Enforced Disappearance of Persons as a Crime against Humanity in the Rome Statute

Enforced disappearance, like extraordinary rendition, is a serious breach of a number of fundamental human rights. The practice of enforced disappearance is most associated with physical torture. However, the prolonged isolation of a detainee may by itself constitute cruel and inhumane treatment.⁷⁸ Moreover, the impact of enforced

⁷⁵ M C Bassiouni *Crimes against Humanity in International Criminal Law* (2ed, Kluwer Law International, Boston, 1999) 245.

⁷⁶ Lisa Avery "A Return to Life: The Right to Identify and the Right to Identify Argentina's "Living Disappeared" (2004) 27 Harv Women's L J 235, 235.

⁷⁷ Mark Lattimer & Philippe Sands (ed) *Justice for Crimes Against Humanity* (Oxford, Portland, 2003) 390.

⁷⁸ *Velasquez Rodriguez v Honduras* (1988) Inter-Am Ct HR (Ser. C) No. 4 par 156; Maria Fernanda Perez Solla *Enforced Disappearances in International Human Rights* (McFarland & Company Inc, USA, 2006) 68-86; - The Inter-American Court of Human Rights; The Human Rights Committes and The Inter-American Comission on Human Rights have held that the prolonged isolation and incommunication peRome Statute of the International Criminal Courte constitute cruel and inhumane acts. However, the

disappearance on the relatives of the victim has been recognised by the international courts. The anguish and the distress the family of the disappeared goes through, as well as the continuing uncertainty about the fate of the loved one, has been held to constitute inhumane treatment.⁷⁹

Acts of enforced disappearance also breach fundamental human rights such as the right to a fair trial and the right not to be arbitrary detained. The gravity of these violations combined with the widespread policy of enforced disappearance in Latin America led to the classification of the practice as a crime against humanity.⁸⁰

At the time of the drafting of the Rome Statute, many delegates sought formal acknowledgment for specific inhumane acts that have been of particular concern to the international community.⁸¹ It was acknowledged that enforced disappearance has already been identified as a crime against humanity. By the end of the negotiations in Rome, the view was that enforced disappearance should not be dealt with only through deprivation of freedom or inhumane acts, and thus it was agreed that the practice should be explicitly acknowledged in the Rome Statute.⁸²

European Court of Human Rights has held otherwise and requires actual evidence of the inhumane treatment.

⁷⁹ Maria Fernanda Perez Solla *Enforced Disappearances in International Human Rights* (McFarland & Company Inc, USA, 2006) 68-86.

⁸⁰ Gerhard Werle *Principles of International Criminal Law* (T.M.C Asser Press, Netherlands, 2005) 260; UNGA Declaration on the Protection of All Persons from Enforced Disappearance (IIL) (18 December 1992) A/RES/47/133, preamble; Inter-American Convention on Forced Disappearance of Persons, preamble.

⁸¹ Darryl Robinson "Developments in International Criminal Law: Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 AJIL 43, 55.

⁸² Darryl Robinson "Developments in International Criminal Law: Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 AJIL 43, 55.

C Elements of the Crime of Enforced Disappearance of Persons

In order to compare extraordinary rendition with enforced disappearance it is necessary to examine the definition and the elements of the crime of enforced disappearance in more detail and consider whether the practice of extraordinary rendition falls into this definition and satisfies these elements.

“Enforced disappearance of persons” is defined in the Rome Statute as meaning:⁸³

The arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The Rome Statute provides that the Elements of Crimes should assist the Court in interpretation and application of the crimes against humanity provisions.⁸⁴ Below, the definition of “enforced disappearance of persons” is broken down and the elements of the crime are considered in the context of extraordinary rendition.

1 Arrest, Detention and Abduction

Under this definition a person has to be arrested, detained or abducted. The Elements of Crime state that the perpetrator:

- (a) Arrested, detained or abducted one or more persons; or

⁸³ Rome Statute of the International Criminal Court, art 7 (2)(i).

⁸⁴ Rome statute of the International criminal Court, art 9(1).

- (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

Historically, enforced disappearances occurred in domestic context. The arrests, abductions or detentions were carried out either by the authorities of governments or by their agents in the territory of that State. Thus, the practice can be traced back to perpetrators of that particular State. The practice of extraordinary rendition can be distinguished in this way. Extraordinary rendition is carried out on an international scale. Often the individual will be arrested by the authorities of one state, transported by authorities of another state to a secret detention centre situated in the territory of a third state. For example, El-Masri was initially detained by Macedonian authorities and later transported from Macedonia to Kabul by an aircraft operated by the CIA. In Kabul, El-Masri was detained and was interrogated by American officials. This is most likely to have happened in one of the secret detention centers operated by the United States. This illustrates that in extraordinary rendition cases the arrest, detention or abduction is usually carried by perpetrators from different States.

However, for the purpose of satisfying this element of the crime, this difference between extraordinary rendition and enforced disappearance is not a significant one. The element of the crime only requires prove that the perpetrator arrested, detained, or abducted a person. Thus, showing that the perpetrator detained that person at some stage will be enough. The Elements of Crimes provides that the word "detained" includes a perpetrator who maintains an existing detention.⁸⁵ The fact that the perpetrator did not

⁸⁵ Rome Statute of International Criminal Court, Elements of Crimes, fn 25.

carry out the initial arrest or detention is irrelevant for the purpose of satisfying the element of the crime.

It follows from the above that when considering acts of extraordinary rendition the first element of the crime of enforced disappearance of persons will be satisfied.

2 *Refusal to acknowledge deprivation of freedom or to give information on the fate or whereabouts of a person*

The Elements of Crimes require that the arrest, detention or abduction by the perpetrator must be “followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons”.⁸⁶

There are a number of problems that arise when this requirement is considered in regards to the practice of extraordinary rendition.

(i) Request

The word “refuse” used in the definition of enforced disappearance and the Elements of Crimes assumes that a request for the acknowledgment of deprivation of freedom or information on the whereabouts or fate of the person must be made. The simple failure to provide information without a request is not sufficient to commit the crime.⁸⁷ Thus, it must be shown that specific requests were made in respect of particular individuals.

⁸⁶ Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(i) 2(a), element 2 (a).

⁸⁷ Gerhard Werle *Principles of International Criminal Law* (T.M.C Asser Press, Netherlands, 2005) 261.

This however could be problematic. In the instances where a request was made by a relative, the requirement will be satisfied if the State refuses to give an acknowledgment or the particular information. In some instances, relatives of people who have gone missing have approached organisations which have made request to the particular governments on the behalf of the relatives.⁸⁸ However, in instances where no requests were made, although extraordinary rendition did occur, the case could not be treated under the crime of enforced disappearances as the requirement will not be satisfied. An Amnesty International report discloses that in many countries, families are reluctant to report relatives as missing fearing intelligence services may turn their attention to them.⁸⁹ Those cases will fail to satisfy the requirement and thus will not constitute crimes of enforced disappearance.

Other instances where the requirement cannot be satisfied are cases where relatives may have not realised that a family member has become missing. For example, while El-Masri was detained by the CIA, his wife was under the belief that her husband had abandoned the family. In this case the family did not request information, the United States did not refuse to give an acknowledgement or information in regards to El-Masari and thus the element of the crime will not be satisfied. The case of El-Masri has been described as one of the most well documented cases of extraordinary rendition and yet this case will not fall within the definition of enforced disappearance.

Another difficulty in satisfying this requirement arises from the trans-national nature of the practice of extraordinary rendition. Enforced disappearance was used as a

⁸⁸ One such organisation is the International Committee of the Red Cross.

⁸⁹ Amnesty International *Below the radar: Secret flights to torture and 'disappearance'* (AMR 1/051/2006, 5 April 2006), 1.

domestic practice and thus, relatives of missing people naturally petitioned the authorities of that State about the disappearance. Extraordinary rendition is an international practice that involves the territories of a number of States. This presents a difficulty. Take the following for example. X is a national of state A, but while travelling X is detained by the authorities of state B. The authorities of state B hand over X to the CIA. The CIA transfers X to a secret detention centre, operated by the CIA, in State C. There are four states involved in this case. The relatives of X who presumably are nationals of state A must request acknowledgment of the detention and information of the whereabouts or fate of X from the United States in order to satisfy the element of the crime. However, it makes most sense for the relatives of X to turn to state A and request assistance in this case. This gives rise to another issue. Consider that State A requests acknowledgment and information from the United States in regards to X and the United States gives the acknowledgment and discloses the information to State A but in doing so the United States requests confidentiality of the highest level. In this case, State A cannot pass on the information to the relatives and therefore has refused to give information on the whereabouts or fate of X. However, the United States has provided the requested information. Moreover, in cases where X is transferred to state C and detained there in secret, the relatives of X are also likely to petition the government of State C about the detention.

Insisting that a request is made for acknowledgment of deprivation of freedom or information on the whereabouts or fate of a person is a requirement which is not particularly relevant to extraordinary rendition. It seems unjust to hold that the criminal status of the practice of extraordinary rendition depends on the act of a third party, such

as a relative or an organisation making a request. The requirement may have been considered relevant in the context of enforced disappearance; however it is not a necessary element of extraordinary rendition. The reason for this difference may be that although extraordinary rendition and enforced disappearance carry similarities, the two practices arose in different circumstances. This will be discussed in more detail below.

(ii) Refusal to acknowledge deprivation of freedom

Another problem which arises when this requirement is considered is that the United States has never denied the renditions of suspected terrorists. The Chief Legal Advisor to the Department of State, John Bellinger, has been quoted as saying that “[a]s Secretary Rice has said, we do conduct renditions, we have conducted renditions and we will not rule out conducting renditions in the future”.⁹⁰ Rather than deny they carry out the practice, the United States interprets its international obligations in such a way as to portray the practice as legal. As John Bellinger further explained:⁹¹

To the extent that extraordinary rendition – as I have seen it defined – means the intentional transfer of an individual to a country, *expecting or intending* that they will be mistreated, then the United States does not do extraordinary renditions to begin with.

The United States does not render people to other countries *for the purpose* of being tortured, or in the expectation that they will be tortured.

By adopting a definition of extraordinary rendition which emphasises the party’s intention, the United States denies the illegality of the acts but not the acts themselves. Thus, the United States has not refused to acknowledge the deprivation of freedom. For example the United States has acknowledged the capture of important Al-Qaida figures,

⁹⁰ Committee on Legal Affairs and Human Rights Report, above n4, par 268.

⁹¹ Committee on Legal Affairs and Human Rights Report, above n4, par 269.

such as the masterminds behind the September 11 terrorist attacks, Khalid Shaikh Mohammed and Ramzi Binalshibh.

(iii) Refusal to give information on fate or whereabouts

Even if the United States has not denied the deprivation of freedom, American perpetrators may be liable if it is shown that the perpetrators refused to give information on the fate or whereabouts of the particular person or persons in order to satisfy what is required by this element of the crime.

Until March 2006 United States' officials have declined to identify detainees at Guantanamo Bay.⁹² In the Elements of Crimes it is provided that in the case of a perpetrator who maintains an existing detention it is enough to show the perpetrator was aware that a refusal to give information has taken place.⁹³ Because United States officials did not immediately provide information of the whereabouts of the detainees, it is arguable that this is enough to show this element is present.

However, when considering this element it is necessary to enquire whether the requirement asks for a refusal to give information on the whereabouts of a particular person or whether it requires refusal to give information on the whereabouts of people who have become victims of extraordinary rendition in general.

If the element requires refusal to give information in regards to persons who have been subject to extraordinary rendition in general, it is arguable that there was no such refusal as the United States has indicated that many of these people have been detained at

⁹² Washington Post < www.washingtonpost.com > (last accessed on 28 September 2006).

⁹³ Rome Statute of the International Criminal Court, Elements of Crimes, fn 28.

Guantanamo Bay. However, this argument is not very strong because the detention centre in Guantanamo Bay is not the only one operated by the United States.

If this element of the crime requires refusal to give information in regards to a particular person, then it is arguable that in many cases the requirement will be satisfied. Some of these cases will be those involving top Al-Qaida figures. Until September 2006 the United States had refused on security grounds to specify where these individuals or other top Al-Qaida figures were being detained.

United States President George W Bush gave a White House speech in September 2006, in which he admitted the existence of United States secret prisons.⁹⁴ President Bush announced that fourteen prisoners have been transferred to Guantanamo Bay and currently there are no other detainees held in the secret detention centres.⁹⁵ If this is true, then the current whereabouts of all prisoners held by the United States is known. Moreover, the United States has made clear their intention to bring detainees in front of special military tribunals, thus giving information on the fate of these people. The crime of enforced disappearance is a continuing crime when it involves on-going detention.⁹⁶ The Elements of Crimes provide that in the case of existing detention, this element is satisfied if the perpetrator knew that a refusal has taken place.⁹⁷ Thus, once information on the whereabouts and fate of the persons is given, the crime of enforced disappearance is discontinued.

⁹⁴ "Bush Admits secret CIA Jails" (8 September 2006) *The Dominion Post* Wellington B1.

⁹⁵ "Bush Admits secret CIA Jails" (8 September 2006) *The Dominion Post* Wellington B1.

⁹⁶ Rome Statute of the International Criminal Court, Elements of Crimes, fn 25.

⁹⁷ Rome statute of the International criminal court, elements of Crimes, fn 28.

Although it is arguable that some of the cases of extraordinary rendition will fall within this requirement, this element of the crime may be more problematic in regards to future extraordinary renditions. President George W Bush has expressed the intention of the United States to continue the present CIA tactics in the fight against terrorism.⁹⁸ However, with time the fate and whereabouts of suspected terrorists who have been subjected to extraordinary rendition becomes clearer. It is arguable that after the United States has admitted so much about their practices, while suspected terrorists will continue to be subjected to extraordinary rendition because they are brought to Guantanamo Bay to stand trials in front of military tribunals, the requirement that there must be a refusal to give information will not be satisfied. Thus the commission of extraordinary rendition in those cases will not attract individual criminal responsibility under international law.

However, this element of the crime will be present where the suspects are kept in secret detention. In those instances the requirement will be satisfied once United States' officials refuse to give information. At present it is known that secret detention centres exist in the Middle East and there are serious allegations that detention centres are operated in Romania and Poland. As more countries where secret detention centres are operated become known, another issue arises. In instances where it is acknowledged that a person is kept in a particular country but the exact location of the detention centre is unknown, whether the United States can argue that the element to refuse to give information is not present. It is unlikely that the ICC will accept an argument such as this. Although identifying the country where the person is detained constitutes some

⁹⁸ CBS News < www.cbsnews.com > (last accessed on 28 September 2006).

information, it cannot be considered as sufficient information on the whereabouts of the person concerned.

(iv) The element is not relevant to extraordinary rendition

In Latin America and in other States where enforced disappearances occurred, governments refused to acknowledge the disappearances in order to avoid international condemnation. Any requests, made by the family of the disappeared, regarding the disappeared person's whereabouts were met by the government's denials of any knowledge of the crimes. This denial became a key characteristic in the definition of "enforced disappearance" and an element of the crime. It features in the definition of "enforced disappearance" in the Declaration on the Protection of Persons from Enforced Disappearances⁹⁹, the Inter-American Convention on Forced Disappearance¹⁰⁰ as well as the Rome Statute.

The context in which this requirement arose should be examined. The Inter-American Commission on Human Rights (IACHR) held that:¹⁰¹

The Commission's practice has demonstrated that the main cause of forced disappearances derives from abuse of powers conferred on the armed forces of the State during a state of emergency. Under a state of emergency, the number of arbitrary detentions increases, individuals are detained without charges and kept without trial, deprived of access to judicial remedies, and there is no record of their having been arrested, all of which is flagrantly at variance with the rule of law.

⁹⁹ UNGA Declaration on the Protection of All Persons from Enforced Disappearance (III.L) (18 December 1992) A/RES/47/133, art 1(2).

¹⁰⁰ Inter-American Convention on Forced Disappearance, art 2.

¹⁰¹ Maria Fernanda Perez Solla *Enforced Disappearances in International Human Rights* (McFarland & Company Inc, USA, 2006), 15.

This statement illustrates that enforced disappearances arose in domestic context where the government of the particular State abused its position and power by committing these crimes against its own nationals. In these circumstances it is not surprising such corrupt governments refused to acknowledge the crimes in order to avoid international condemnation.

Although the practice of extraordinary rendition shares similarities with that of enforced disappearance, it emerged in a different context. As described in Part I, the original aim of the Rendition programme performed by the United States was to bring suspected terrorists to countries where they could be prosecuted. However, after the September 11 attacks, the focus of the programme changed and the effect of the practice became bringing suspected terrorists for interrogation outside the protection of the law. There has been international concern about the manner in which the United States has treated and continues to treat captured suspected terrorists. For example the Council of Europe passed a resolution which stated:¹⁰²

The Assembly calls upon the member States of the Council of Europe to: ... urge the United States to dismantle its system of secret detention and unlawful inter-state transfers and to co-operate more closely with the Council of Europe in establishing common means of overcoming the threat of terrorism in line with international human rights and respect for the rule of law.

Although there is international concern regarding the actions of the United States, there are a number of facts that set this situation apart from the circumstances that gave rise to the practice of enforced disappearance.

¹⁰² Committee on Legal Affairs and Human Rights Report, above n4, Draft Resolution, par 18.4.

Firstly, the United States is a super power and as such, the United States is in a position to exercise political and economic power to influence international issues. Thus, it can be argued that the United States is not concerned in the same way as corrupt Latin American governments for example were, about international condemnation.

Secondly, the United States has adopted the practice of extraordinary rendition not to oppress its people but rather to fight a global war on terror. Although, this neither justifies the practice nor makes it legal, it may provide insight as to why international condemnation at present is not very strong. Although there is international concern expressed about the practice, many countries support the war on terror. The Council of Europe announced in its Resolution that:¹⁰³

The assembly reaffirms its absolute commitment to overcoming the threat of terrorism; but it must equally speak out in the strongest possible terms against the numerous and systematic human rights abuses committed in the pursuit of the so called "war on terror"

However, this resolution was passed in the aftermath of investigation into the alleged involvement of European States in extraordinary renditions and secret detentions. The investigation carried by rapporteur Dick Marty has confirmed the allegations of European involvement in extraordinary renditions carried by the United States. The Draft Resolution of the Council of Europe acknowledges that:¹⁰⁴

¹⁰³ Committee on Legal Affairs and Human Rights Report, above n4, Draft Resolution, par 3.

¹⁰⁴ Committee on Legal Affairs and Human Rights *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* Doc 10957 Draft Resolution, par 9.

Some Council of Europe member States have knowingly colluded with the United States to carry out these unlawful operations; some others have tolerated them or simply turned a blind eye.

This leads us to the third reason. Considering European States participate in the practice or at the very least ignore the fact that the practice is carried out on their territory, it is hard to expect strong international condemnation in respect of United States' actions.

Fourthly, because extraordinary renditions are performed in the context of a global "war on terror" the United States has an incentive to acknowledge the capture and detention of dangerous terrorists. By doing so the United States illustrates its success in the war as well as sending a deterrent message to other terrorists. Thus it is more appropriate for the United States to adopt a view which denies the illegality of the acts rather than deny the acts themselves.

For these reasons the element which requires a refusal to acknowledge the deprivation of freedom or to give information on the whereabouts or fate of the person is not relevant to extraordinary rendition. These reasons also explain why in a number of cases of extraordinary rendition difficulties arise when an attempt is made to demonstrate that the element is present.

3 *Authorization, support or acquiescence of the State*

Another element of the crime is that "such arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of the State".¹⁰⁵ The

¹⁰⁵ Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(i), element 4.

United States government, which considers the practice as legal under international law, has openly supported the practice. The United States have claimed that it will continue to practice renditions of suspected terrorists.¹⁰⁶ President Bush has recently announced that the CIA secret detention programme will continue to exist as it is an effective tool in the war against terror.¹⁰⁷

Thus, this element of the crime will be easily satisfied when extraordinary rendition is considered.

4 *Outside the reach of the law*

The Elements of Crimes require that the perpetrator intend to “remove such person or persons from the protection of the law for a prolonged period of time”.¹⁰⁸ As the United States has announced its plans to bring detainees in front of a Guantanamo Bay Military Commission, also known as Military Tribunal, the United States may argue that there was no intention to bring the detainees outside the protection of the law. This argument is likely to fail due to the illegal nature of the Military Tribunal. The Supreme Court of the United States has held that “[t]he military commission... lacks the power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the four Geneva Conventions signed in 1949”.¹⁰⁹ Even if President George W Bush succeeds in passing a law which would authorize the use of military tribunals for trials of terrorist suspects, the Military Tribunal would still be illegal under international law. Repporteur Dick Marty has expressed in the European Final Report that he does not

¹⁰⁶ Committee on Legal Affairs and Human Rights Report, above n4, par 268.

¹⁰⁷ BBC < www.bbc.co.nz > (last accessed on 28 September 2006)

¹⁰⁸ Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(i) element 6.

¹⁰⁹ *Hamdan v. Rumsfeld* (2006) US Lexis 5184, par 4 SC.

consider this tribunal to be a fair hearing.¹¹⁰ The Draft Resolution of the Council of Europe also acknowledges that the CIA's programme of extraordinary rendition flies terrorist suspects outside the scope of any legal protection.

Some prisoners have been detained in the detention centers for a number of years, thus the requirement that they are placed outside the scope of any legal system for a prolonged amount of time is satisfied.

For this reasons it is easy to demonstrate that this element is present in the allegations of extraordinary rendition in Europe was concerned with two percent of the total number of flights carried by the CIA.¹¹⁰ Currently there are twelve well

5 *Widespread or systematic attack directed against a civilian population*

The Elements of Crimes require that the any of the acts listed in article 7 of the Rome Statute are committed as a part of a widespread or systematic attack directed against a civilian population.¹¹¹ "Attack directed against any civilian population" is defined as "a course of conduct involving the multiple commission of acts... against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack".¹¹² This requirement emphasises on the collective nature of the crime and rules out isolated acts of violence.¹¹³

¹¹⁰ Committee on Legal Affairs and Human Rights Report, above n4, par 195.

¹¹¹ Rome Statute of the International Criminal Court, art 7(2)(a); Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(i), elements 7 and 8.

¹¹² Rome Statute of the International Criminal Court, art 7(2)(a).

¹¹³ Gerhard Werle *Principles of International Criminal Law* (T.M.C Asser Press, Netherlands, 2005) 221.

The use of the word "attack" does not require an armed conflict. The multiple acts that comprise the attack can be carried in peace time.¹¹⁴ Thus, for the purpose of this paper it will not be necessary to examine the nature of the "war on terror".

(i) Widespread or systematic character

The criteria of "widespread" and "systematic" are alternative. While "widespread" is a quantitative criteria, "systematic" is a qualitative one. The acts of extraordinary rendition can be described as both. The European Final Report regarding the allegations of extraordinary renditions in Europe was concerned with two percent of the total number of flights carried by the CIA.¹¹⁵ Currently, there are twelve well documented cases of extraordinary rendition. However it is recognised in the Final Report that "[i]n the light of the silence and obvious reluctance on the part of the bodies that could have provided the necessary information, it is legitimate to assume that there are more such cases than can be proven at present".¹¹⁶ Amnesty International has said that the number of cases appears to be in the hundreds but Amnesty International acknowledged the exact number is hard to determine because many relatives of people who have been subjected to extraordinary rendition are reluctant to step forward out of fear that this way they may attract attention to themselves.¹¹⁷ Since then the United States has admitted that the secret detention system has held nearly 100 people over the length of its existence.¹¹⁸ However, this excludes any cases where people have been transferred by extraordinary rendition to already known detention centres such as the one at

¹¹⁴ M C Bassiouni *The Legislative History of the International Criminal Court Volume 2* (Transnational Publishers, US, 2005) 55.

¹¹⁵ Committee on Legal Affairs and Human Rights Report, above n4, par 49.

¹¹⁶ Committee on Legal Affairs and Human Rights Report, above n4, par 23.

¹¹⁷ Amnesty International *Below the radar: Secret flights to torture and 'disappearance'* (AMR 1/051/2006, 5 April 2006), 1.

¹¹⁸ "Bush Admits secret CIA Jails" (8 September 2006) *The Dominion Post* Wellington B1.

Guantanamo Bay. Furthermore, extraordinary rendition has become a practice that knows no geographical limits as a person anywhere in the world can fall victim to it. For these reasons the practice can be considered to be one of widespread character.

However, the commission of extraordinary rendition is also systematic. The operations are organised at high levels and require co-operation of intelligence services around the globe. The operations are carried out in strict manner, which involves international collaboration. There are four elements which have been identified as comprising the systematic characteristic of a practice:¹¹⁹

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

In extraordinary rendition all four elements are present. Firstly, the United States has created the "Rendition" programme with the intent to fight terrorism. This programme has developed after the attacks of September 11 as a useful tool in the "war against terror". Thus, the United States is pursuing a plan which sets out to destroy the terrorist community. This element emphasises a concern about the destruction of a community. The issue with the United States' plan, however, is not the fact that it sets to destroy or weaken the terrorist community but rather the illegal manner in which the

¹¹⁹ *Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14, par 203 (Trial Chamber, ICTY); *Prosecutor v Kordic and Cerkez* (Judgment) (26 February 2001) IT-95-14/2, par 179 (Trial Chamber, ICTY).

United States sets out to do so. However, if the wording of the element is applied to the present situation it will be satisfied.

Secondly, extraordinary rendition involves the repeated and continuous commission of inhuman acts such as torture and disappearance which are linked to one another.

Thirdly, the United States uses significant public and private resources in carrying out the rendition practices. The practice involves experienced CIA agents as well as military officials. Although private planes are usually used for the operations, on occasions military aircrafts are known to have been used. Operations of such high level demand large financial resources.

Fourthly, the practice is carried out mainly by the CIA. Michael Scheuer, a previous senior CIA official in the counterterrorist center stated in a *60 Minutes* interview that “in the Clinton and Bush administrations, and in Congress, details of rendition flights were known to top officials”.¹²⁰

(ii) Policy

As ad hoc tribunals have referred to “plan” or “policy” in the attempt to define “systematic” it can be concluded that they do not distinguish between these terms.¹²¹ In *Prosecutor v Tadic*, the Trial Chambers held that “if the acts occurred on a widespread or

¹²⁰ CBS <<http://www.cbsnews.com>> (last accessed on 28 September 2006).

¹²¹ *Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14 par 203 (Trial Chamber, ICTY); *Prosecutor v Kordic and Cerkez* (Judgment) (26 February 2001) IT-95-14/2 par 179 (Trial Chamber, ICTY); *The Prosecutor v Tadic* (Judgment) (11 November 1999) IT-94-1 par 648 (Trial Chamber ICTY); Machteld Boot *Genocide, Crimes against Humanity, War Crimes* (Antwerpen, New York, 2002) 481.

systematic basis that demonstrates a policy to commit such acts".¹²² As illustrated above, extraordinary rendition is a systematic practice which has become widespread. Moreover, President George W Bush has declared that rendition as well as secret detention programmes performed by the CIA are effective tools in the fight against terror. For these reasons it will not be hard to demonstrate a state policy for the purpose of satisfying this element.

(iii) Attack Directed against Any Civilian Population

Crimes against humanity can occur both in war and during peacetime. However, the acts will be crimes against humanity only if they are carried out against a civilian population. The two situations to consider are where people are captured in places where no organised fighting is taking place and where people are captured in places where organised fighting is taking place. In the former, no question about the status of the people arises as they are clearly members of a civilian population. Some of the well documented cases, the ones of Maher Arar and El-Masari amongst them, involve this situation.

In the later, however, where people are captured in a place where organised fighting takes place, a number of issues must be considered. International humanitarian law clearly distinguishes between members of the armed forces and civilians. However, the approach in the context of crimes against humanity is more flexible. What is important is not the person's formal status but rather the actual role that person had

¹²² *Prosecutor v Tadic* (Judgment) (11 November 1999) IT-94-1 par 653 (Trial Chamber ICTY).

during the commission of the crime.¹²³ As the Trial Chamber of the ICTY held in the judgment of *Prosecutor v Blaskic*:¹²⁴

Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore uniform or not - but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.

According to this decision, once people fighting in Afghanistan are captured they are no longer taking part in the hostilities and thus are accorded the status of civilians in the context of crimes against humanity. Since extraordinary rendition takes place once the individuals have been captured, it follows that the acts were carried out in relation to civilians and thus constituted an attack against a civilian population.

Alternatively, people who are no longer taking part in the hostilities are protected by international humanitarian law.¹²⁵

¹²³ *Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14 par 214 (Trial Chamber, ICTY).

¹²⁴ *Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14 par 214 (Trial Chamber, ICTY).

¹²⁵ This issue is not in the focus of this paper.

D Evaluation

It can be concluded that some cases of extraordinary rendition fall within the definition of enforced disappearance and thus constitute crimes against humanity. These are the cases where the United States has refused to give information on the whereabouts or fate of the detainees. Any other cases where no request have been made for information and where there has been no refusal to give information on the whereabouts and fate of the detainees, fall outside the scope of the definition of enforced disappearance. Moreover, as more details about detainees and detention centers become available, it is debatable whether the majority of future extraordinary rendition cases will fall within the definition of enforced disappearance.

Amending the definition of “enforced disappearance” by removing the requirement of a refusal may be one way to deal with this issue. This however may be problematic. The United States’ Restatement includes enforced disappearance as a violation of international customary law.¹²⁶ Moreover, the Rome Statute is an international agreement that codified international customary law. Provided prohibition of enforced disappearance has reached the status of international customary law, it will be difficult to amend the definition of “enforced disappearance”. However, if State Parties agree to an amendment, this may be considered as a small step towards achieving a new definition of “enforced disappearance” in customary international law.¹²⁷

¹²⁶ Lexis <www.lexis.com> (last accessed on 28 September 2006).

¹²⁷ Customary International Law exists if actual practice of States can be found, based on a sense of legal obligation. The international consensus to a treaty may serve as evidence in demonstrating States’ practice.

Until such an amendment is made, the existent provisions of the Rome Statute must be used to address extraordinary rendition. Even if an amendment is made, all extraordinary renditions that are committed before the amendment comes into force will be judged against the existing framework. Therefore it is necessary to examine whether these cases may fall under one of the other headings listed in article 7 of the Rome Statute.

V ACTS COMPRISING EXTRAORDINARY RENDITION AND ARTICLE 7

A Addressing Extraordinary Rendition through Other Crimes against Humanity

Since extraordinary rendition is a practice which consists of series of unlawful acts, another way to seek criminal responsibility is to prosecute perpetrators for the separate acts which comprise the practice. Acts identified under the crimes against humanity provision that can be used are imprisonment, torture, inhumane acts and persecution.¹²⁸

1 Imprisonment or Other Severe Deprivation of Physical Liberty

As extraordinary rendition leads to prolonged detention, this aspect of the practice can be addressed through the crime of imprisonment. As the Trial Chamber of the ICTY held in *Prosecutor v Kordic and Cerkez*:

The Trial Chamber concludes that the term imprisonment... should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law.... In that respect, the Trial Chamber will have to determine

¹²⁸ Rome Statute of the International Criminal Court, art 7(1).

the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question...

Because individuals who are subjected to extraordinary rendition are either arrested on fabricated charges or no charges at all or are simply detained or abducted, it will be easy to demonstrate these individuals have been deprived of their liberty without due process of law.

2 *Persecution*

It is also worth arguing that article 7(1) (h) will be applicable to extraordinary rendition. It provides that:¹²⁹

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court[.]

Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

The practice of extraordinary rendition involves the deprivation of fundamental human rights such as the right not to be tortured and the right to a fair trial. Moreover, the victims of extraordinary rendition are individuals of Arabic decent who belong to the Islamic religion.

However, trying to fit elements of extraordinary rendition under the heading of “persecution” may not be the most suitable option. The Elements of Crimes require that

¹²⁹ Rome Statute of the International Criminal Court, art 7(1)(h).

the “perpetrator targeted such person or persons by reason of the identity of [the] group or collectivity or targeted the group or collectivity as such”.¹³⁰ Such targeting must be done on the basis of “political, racial, national, ethnic, cultural, religious, gender... grounds”.¹³¹ The objective of extraordinary rendition however is not discriminatory deprivation of fundamental rights as such but combating terrorism by capturing and interrogating suspected terrorists. Although this objective does not justify the practice, it does not reflect the discriminatory nature required by the Elements of Crimes. There are many Muslim Arabs that do not become victims of extraordinary rendition. Indeed after September 11 airport security has been tightened and many individuals of Arabic origin are subjected to prolonged questioning particularly at United States airports. However, many individuals who are not of Arabic origins but have been visiting or are about to visit a Middle Eastern country may be subjected to extensive questioning.

An argument could be made that terrorist groups are associated by certain political views they hold about western countries and thus they are being targeted on the basis of political grounds. However, due to the criminal activities of terrorist groups it is unlikely this argument will sit in favor with the ICC.

For these reasons it will be rather difficult to establish that United States perpetrators have committed persecution against any individual group or collective.

¹³⁰ Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(h), element 2.

¹³¹ Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(h) element 3.

3 Torture

The effect of extraordinary rendition is to bring individuals outside the protection of the law where they could be interrogated. The methods used for interrogation may constitute acts of torture.

Torture is defined in the Rome Statute as meaning:¹³²

[I]ntentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

President George W Bush has denied allegations that the United States practices torture and allegations that the United States transfers individuals to States where they could be subjected to torture. However, as indicated above, the United States adopts an interpretation of its international obligations which distinguishes between specific and general intent. Thus, United States' officials argue that there must be a specific intent to cause severe pain or suffering. If this is not the main objective of the defendant then the defendant has not committed torture. However, article 30(2) of the Rome statute provides that a person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Under this provision any arguments on distinction between specific and general intent will fail and United States perpetrators will be held to have had the intent to commit torture.

¹³² Rome Statute of the International Criminal Court, Art 7(2)(e).

Another interpretation argument made by United States' officials in their attempt to show their actions are in compliance with international obligation is to interpret "severe pain or suffering" as meaning "the pain accompanying serious physical injury, such as organ failure, impairment or bodily function, or even death".¹³³ Although the memorandum which contained this definition has been since then repudiated, it is arguable whether the threshold of "severe pain or suffering" has been lowered much. However, the case law in this area demonstrates that the threshold is not as high as the United States interprets it to be. In the case of *Selmouni v France*, the applicant alleged that he had been subjected to torture. The European Court of Human Rights held in this case that "the Convention is a 'living instrument which must be interpreted in the light of present-day conditions'" and that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in [the] future".¹³⁴ In that case it was decided that the conduct amounted to torture.¹³⁵ This decision implies that this conduct would have been considered in the past to amount only to inhumane treatment, however, in the present context it amounts to torture.

Victims of extraordinary rendition have made serious allegations that interrogation techniques used had amounted to torture. Some of these acts include:

¹³³ United States Department of Justice *Standards of Conduct for Interrogation under 18 USC §§2340-2340A* (submitted to the Office of the Assistance Attorney General, US Department of Justice, Washington, 2002) 1. - Although this memorandum has been revised it is arguable whether the standard require by US has lowered.

¹³⁴ 25803/94 *Selmouni v France* [2000] 29 EHRR 403, par 101.

¹³⁵ The applicant had a large number of blows inflicted on his body; he was dragged along by his hair; he was made to run along a corridor with police officers positioned on either side to trip him up; he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; one police officer then showed him his penis, saying "Here, suck this", before urinating over him; he was threatened with a blowlamp and then a syringe.

making incisions with a scalpel all over a person's body including that person's genitals and suspending the person from walls or ceilings and brutally beating them.¹³⁶

4 *Other inhumane acts of similar character*

Any acts that do not reach the threshold of "severe pain or suffering" may nevertheless amount to other inhumane acts of similar character. Under this heading of crimes against humanity the requisite threshold is "great suffering, or serious injury to body or to mental or physical health". Thus, inhumane acts which did not amount to torture but did satisfy this requirement will be considered as crimes against humanity. In the context of extraordinary rendition these may be acts such as the "security check" carried out before a rendition flight as well as the treatment of the person during the flight.

Reporteur Dick Marty's European Final Report recognises that detention conditions in certain prisons *per se* amount to inhumane treatment.¹³⁷

5 *Widespread or systematic attack on a civilian population*

In order to constitute crimes against humanity these acts have to be committed "as part of a widespread or systematic attack directed against any civilian population"¹³⁸ In regards to this, the same arguments apply as the ones made in Part IV dealing with enforced disappearance.

¹³⁶ Committee on Legal Affairs and Human Rights Report, above n4, par 206.

¹³⁷ Committee on Legal Affairs and Human Rights Report, above n4, par 210.

¹³⁸ Rome Statute of the International Criminal Court, art 7(1).

B Evaluation of this Approach

This approach divides extraordinary rendition into components and assesses whether any of its components fit within the crimes against humanity identified in the Rome Statute. Approaching the issue this way, however, does not recognise the seriousness of the violations caused by extraordinary rendition. It fails to recognise the main effect of extraordinary rendition, namely making a person legally non-existent.

Furthermore, this approach may influence the sentencing process. For example, where perpetrators are being prosecuted for cases of extraordinary rendition that fit within the definition of "enforced disappearance", additionally they can be prosecuted for imprisonment, torture and inhumane acts. Where a perpetrator is prosecuted for extraordinary rendition cases which do not fall within the definition of "enforced disappearance", the perpetrator can only be prosecuted for imprisonment, torture and inhumane treatment. Only one of the acts listed in Article 7 committed as part of a widespread or systematic attack is necessary to establish the perpetrator has committed crimes against humanity. However, the commission of multiple acts of crimes against humanity may contribute to the gravity of the crime and thus indicate a tougher sentence for the perpetrator.¹³⁹

VI OTHER INHUMANE ACTS OF A SIMILAR CHARACTER

Another way to seek criminal responsibility for perpetrators of extraordinary rendition is to argue that the practice of extraordinary rendition as a whole constitutes

¹³⁹ Rome Statute of the International Criminal Court, art 78(1).

“other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.¹⁴⁰

At the negotiations of the Rome Statute it was recognised that it is impossible to list all acts which deserve a punishment as crimes against humanity.¹⁴¹ The phrase “other inhumane acts” was inserted to provide a residual category. In this part of the paper it will be considered whether the practice of extraordinary rendition can be considered, a crime against humanity under this heading.

A Elements of the Crime

1 Inhumane acts of similar character

The Elements of Crimes provide that the acts must be an inhumane act “of a character similar to any other act referred to in article 7, paragraph 1, of the Statute”.¹⁴²

As illustrated above, extraordinary rendition emerged in a different context to enforced disappearance. Enforced disappearance became known as a tool used by corrupt governments to oppress the population and eliminate opposition in the country. Extraordinary rendition has become a translational practice used as a tool to fight terrorism. The different context in which extraordinary rendition emerged has made it difficult in certain instances to fit the practice within the strict definition of “enforced disappearance”. However, the two practices have the same material characteristics and thus the consequences they lead to are of a similar nature.

The effect of extraordinary rendition, like enforced disappearance, is to remove a person from the protection of the law for a prolonged amount of time. Both practices

¹⁴⁰ Rome Statute of the International Criminal Court, art 7(1)(k).

¹⁴¹ *The Prosecutor v Kuprekic* (Judgment) (14 January 2000) IT-95-16 par 563 (Trial Chamber, ICTY).

¹⁴² Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(k), element 2.

involve multiple breaches of fundamental human rights such as the right not to be arbitrary arrested or detained the right to a fair trial, the right to liberty and security of the person. Moreover, extraordinary rendition, like enforced disappearance, presents the opportunity for commission of torture or other inhumane acts.

For these reasons, extraordinary rendition is an inhumane act of similar character to the inhumane act of enforced disappearance.

2 *Great suffering or serious injury to body or mental or physical health*

The Elements of Crimes provide that the “perpetrator inflicted great suffering, or serious injury to body or mental or physical health, by means of an inhumane act”.¹⁴³ Although extraordinary rendition is associated with torture, which causes severe injury to mental and physical health, it is more appropriate to argue that the act of extraordinary rendition of itself causes great suffering.

Extraordinary rendition deprives an individual of fundamental human rights and denies that individual the protection of the law. Once the individual is in the detention of the authorities, he becomes legally non-existent. That person is transferred to different detention centres around the world for interrogation while being treated inhumanly and subjected to torture. The unspecified term of the detention, fear of the unknown and concerns about the fate of relatives and loved ones contributes to the suffering experienced by victims of extraordinary rendition.

A number of victims have spoken of their experience. Binyam Mohamed al Habashi, who had been subjected to extraordinary rendition on two separate occasions

¹⁴³Rome statute of the international Criminal Court, Elements of Crimes, art 7(1)(k), element 1.

and is currently detained at Guantanamo Bay, said while talking about his treatment in detention:¹⁴⁴

I'm sorry I have no emotion when talking about the past, 'cause I have closed. You have to figure out all the emotional part; I'm kind of dead in the head.

Maher Arar, a Canadian citizen whose name has been cleared since his release has spoken to the media about his "year in hell". He told CBS News:¹⁴⁵

They arrested me. They never told me what they had against me...I was a disappeared person. My family did not know where I was. I knew I was sent to Syria to be tortured...I have waited a long time to have my name cleared. I was tortured and lost a year of my life. I will never be the same.

As these statements demonstrate, extraordinary rendition is an inhumane act which causes great suffering to those who become its victims.

3 *Mental Element*

The Elements of Crimes require that the perpetrator is aware of the factual circumstances that establish the character of the act.¹⁴⁶ The presence of this element is not hard to demonstrate. Cases of extraordinary rendition involve perpetrators of the highest levels who are aware of the procedure the United States adopts in its treatment of suspected terrorists.

¹⁴⁴ Committee on Legal Affairs and Human Rights Report, above n4, par 214.

¹⁴⁵ CBS News <<http://www.cbsnews.com> > (last accessed on 28 September 2006).

¹⁴⁶ Rome Statute of the International Criminal Court, Elements of Crimes, art 7(1)(k), element 3.

Intention by the perpetrator to commit the act is also required. This requirement is not hard to satisfy as perpetrators are aware that extraordinary rendition will cause great suffering.

4 *Widespread or systematic attack on a civilian population*

In order to constitute crimes against humanity these acts have to be committed “as part of a widespread or systematic attack directed against any civilian population”.¹⁴⁷ In regards to this, the same arguments apply as the ones made in Part IV dealing with enforced disappearance.

B *Evaluation*

“Other inhumane acts” was included in article 7 of the Rome Statute as a residual category so as to address any acts similar to the ones already included but not quite fitting within their definitions.¹⁴⁸ Extraordinary rendition is one such act. Although in certain circumstances it may fall within the definition of “enforced disappearance” this may not be so in all cases.

The best way to approach extraordinary rendition in front of the ICC will be to argue that the perpetrators committed enforced disappearances, imprisonment, torture and inhumane acts. The above analysis has indicated that any of these acts may be successfully argued.

¹⁴⁷ Rome Statute of the International Criminal Court, art 7(1).

¹⁴⁸ Gerhard Werle *Principles of International Criminal Law* (T.M.C Asser Press, Netherlands, 2005) 264.

VII THE MISSING FROM THE BATTLEFIELD

Many of the detainees in Guantanamo Bay are individuals who took part in the organized fighting that took place in Afghanistan. Any of these individuals who have been taken in United States' custody from Afghanistan before June 2002 are protected under international humanitarian law. Although the focus of this paper is not on international humanitarian law, it is important to recognize that the problem of people going missing while fighting in an armed conflict is becoming an increasing focus of international humanitarian law. Article 33(1) of the Additional Protocol I to the Geneva Conventions provides:¹⁴⁹

As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

This article is applicable in respect to Prisoners of War. If the individuals taking part in the organized fighting in Afghanistan have the status of Prisoners of War, then the United States has acted in breach of Article 33(1) of the additional Protocol I to the Geneva Conventions. The United States did not release a list with the names of those detained in Guantanamo Bay until 2006, four years since the armed conflict in Afghanistan.

¹⁴⁹ Additional Protocol I of the Geneva Conventions, art 33(1).

American officials may be found guilty for the commission of war crimes identified in the Rome Statute as well as the Geneva Conventions.¹⁵⁰ Therefore, extraordinary rendition does not only constitute a crime against humanity but, in the context of an armed conflict extraordinary rendition, may fall under a number of war crimes. However, the focus of this paper is not on international humanitarian law and for this reason the issue will not be discussed any further.

IIX ASSISTING STATES AND CRIMES AGAINST HUMANITY

A Perpetrators from other Countries

Extraordinary rendition is an organised practice which is carried out in the territories of different states. Although the United States is the State directly responsible for carrying out the acts of extraordinary rendition and the formation of the "spider web" network that facilitates the practice, the responsibility does not lie solely with the United States. The success of extraordinary rendition is largely owed to the cooperation of other States. By allowing or simply ignoring the use of their territories for extraordinary rendition operations or special detention centres, other States have helped facilitate the practice and thus should share the responsibility for the violations committed. The intelligence services across a number of States have been known to closely collaborate with the CIA by sharing information as well as arresting or detaining individuals and carrying out interrogations closely supervised by American agents. Members of these intelligence services may be held criminally responsible under international law. Moreover, high level officials in States that have assisted in the programme may also

¹⁵⁰ Rome Statute of International Criminal Court, art 8; Geneva Conventions.

attract criminal responsibility if they have authorised or ignored the use of the State's territories in the commission of extraordinary rendition.

Most of the States the territories of which have been used in any of the operations of extraordinary rendition have signed and ratified the Rome Statute.¹⁵¹ Thus, the ICC has jurisdiction over any of their citizens who may have committed crimes within the jurisdiction of the Court.

However, a case to the ICC will be inadmissible where the State had undertaken an investigation.¹⁵² As the allegations of European States participating in CIA extraordinary rendition emerged, pressure was put by the Council of Europe on European parliaments to question their governments and make inquiries. A number of Council of Europe States undertook investigation in the allegations. However, considering the seriousness of the allegations, the standard of some of these investigations was unsatisfactory. For example, a parliamentary inquiry in Poland was carried out into the allegations that Poland operated a secret detention centre. At a press conference it was announced that the inquiry "had not found anything untoward".¹⁵³ The inquiry was carried out in private and according to reporter Dick Marty was "insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations".¹⁵⁴ In Germany, initially the Government had attempted to avoid setting up a commission of inquiry by sending members of the parliament a

¹⁵¹Rome Statute of the International Criminal Court < www.untreaty.un.org > (last accessed on 28 September 2006); – Azerbaijan, Cuba and Iraq are not parties to the Rome Statute. The Czech Republic, Egypt, Bangladesh, Uzbekistan and Algeria have signed but have not ratified the Rome Statute.

¹⁵² Rome Statute of the International Criminal Court, art 17(1).

¹⁵³ Committee on Legal Affairs and Human Rights Report, above n4, par 252.

¹⁵⁴ Committee on Legal Affairs and Human Rights Report, above n4, par 252.

classified report. However, on the insistence of the three opposition parties, a committee of inquiry was later set to investigate the allegations.¹⁵⁵

Although, some countries have set out to investigate the allegations, it does not necessarily mean that a case for the prosecution of any of their citizens in front of the ICC is deemed inadmissible. A case is still admissible where the State is “unwilling or unable to carry out the investigation or prosecution”.¹⁵⁶ If the case has already been investigated and the State has decided not to prosecute, the case will be admissible if the decision not to prosecute resulted “from the unwillingness or inability of the State genuinely to prosecute”.¹⁵⁷ Thus, perpetrators of States Parties involved in extraordinary rendition operations cannot hide behind insufficient investigations carried out by the State.

The States that have assisted in the commission of extraordinary rendition can be divided into two groups. The first group consists of states that have been used as starting points and stopover points and the second group consists of states which have been used as drop-off points and one-off pick-up points.

B Starting Points and Stopover Points

Starting points are places where the crew meets and prepares the aircraft for the performance of the extraordinary rendition operation. Stopover points are where the aircraft lands to refuel, mostly on the way home. What the two types have in common is

¹⁵⁵ Committee on Legal Affairs and Human Rights Report, above n4, par 247.

¹⁵⁶ Rome Statute of the International Criminal Court, art 17(1)(a).

¹⁵⁷ Rome Statute of the International Criminal Court, art 17(1)(b).

that the detainees are no longer on board of the aircraft. Thus, no crimes against humanity are committed.

However, the Rome Statute provides that a person is criminally responsible and liable for punishment when “[f]or the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission”.¹⁵⁸ The International Law Commission Draft Code of Crimes implicitly includes assisting, aiding or abetting *ex post facto*.¹⁵⁹ However, at the time of drafting of the Rome Statute this was questioned. The opinion was that in the context of the ICC if aiding, abetting or assisting *ex post facto* was intended to be criminalised then an express provision to that effect would have been needed.¹⁶⁰ Therefore, where the territory of a State had been used as a stop-over point on a return flight, then the assistance occurs after the extraordinary rendition had been committed. In these cases officials who had authorised or turned a blind eye to the CIA’s aircraft stop-over are unlikely to attract liability under this provision.

The position is different with States the territory of which had been used for starting points of the extraordinary rendition operations. The assistance to commit the crime does not have to be at the location or at the time the main crime is committed.¹⁶¹ It is enough that the assistance facilitates the crime.¹⁶² Taking into consideration the organised trans-national nature of extraordinary rendition operations, States that

¹⁵⁸ Rome Statute of the International Criminal Court, art 25(2)(c).

¹⁵⁹ ILC Draft Code of Crimes (A/51/10) par 12; M C Bassiouni *The Legislative History of the International Criminal Court Volume 2* (Transnational Publishers, US, 2005) 197 fn179.

¹⁶⁰ ILC Draft Code of Crimes (A/51/10) par 12; M C Bassiouni *The Legislative History of the International Criminal Court Volume 2* (Transnational Publishers, US, 2005) 197 fn179.

¹⁶¹ *The Prosecutor v Blaskic* (Judgment) (3 March 2000) IT-95-14 par 285 (Trial Chamber , ICTY); Gerhard Werle *Principles of International Criminal Law* (T.M.C Asser Press, Netherlands, 2005) 126.

¹⁶² Rome Statute of the International Criminal Law, art 25(2)(c).

authorise¹⁶³ the use of their territories as points where the crew meets and prepares the aircraft for the illegal operation, play an important role in the practice as a whole. Thus officials of these States have assisted in the commission of the crimes against humanity United States perpetrators have committed or attempted to commit.

C Drop-Off Points and One-Off Pick Up Points

The common factor of States the territory of which has been used to drop off detainees and States the territory of which has been used to pick-up a detainee, is the presence of the detainees within their territories.

1 Drop-Off Points

The location of drop-off points is either "close to a site of a known detention facility or a prima facie case can be made to indicate a detention facility in their vicinity".¹⁶⁴ Any citizens of that State involved in the activities that take place in these detention centres may attract criminal liability for committing crimes against humanity such as torture, inhumane treatment and imprisonment. Any officials that authorise the existence of these prisons on the territory of the State may be held criminally responsible in front of the ICC.¹⁶⁵

Moreover, the acts may fall within the definition of enforced disappearance if the prisons were one of the secret detention centres operated by the CIA. However, this will be so only if there exist allegations that a secret detention centre is operated within the territories of that State. If no such allegations exist, then no request about information on

¹⁶³ "Authorise" includes choosing to ignore the fact that the State's territories are being used in extraordinary rendition operations.

¹⁶⁴ Committee on Legal Affairs and Human Rights Report, above n4, par 43.

¹⁶⁵ Rome Statute of the International Criminal Court, arts 25(3)(b) & 28(b).

the whereabouts or fate of the detainees can be made and thus no refusal by that State will be made. Nevertheless, in instances where commission of enforced disappearance cannot be shown, assisting the commission of enforced disappearance may be argued. The detention centres operated around the world constitute a key component in the extraordinary rendition programme. The detention centres are the "legal black holes" where detainees are placed so as to be kept outside the reach of any legal system. Thus, officials that authorised or chose to ignore the existence of these detention centres on their territory may attract criminal responsibility.

2 *One-Off Pick-Up Points*

States which have been identified as drop-off points are usually places where the authorities of the State have arrested or detained a suspected terrorist.¹⁶⁶ These are the places from where the suspects are taken onboard of aircrafts for extraordinary rendition. Although the authorities of these states may have committed acts of imprisonment, inhumane acts or in some circumstances torture, it will be hard to argue that these constitute crimes against humanity. As these were one-off cases, it will be difficult to establish that the acts were committed as part of a widespread or systematic attack directed against any civilian population and were committed "pursuant to or in furtherance of a State... policy".¹⁶⁷ The existence of only one case will not be sufficient evidence to establish this. In the case of *Prosecutor v Tadic*, the Trial Chamber of the ICTY held that:¹⁶⁸

¹⁶⁶ For example Macedonia was the place where authorities arrested and detained El-Masri and Bisher Al-Rawi and Jamil El-Banna were arrested in Gambia.

¹⁶⁷ Rome Statute of the International Criminal Court, art7(2)(a).

¹⁶⁸ *Prosecutor v Tadic* (Judgment) (11 November 1999) IT-94-1 par 664 (Trial Chamber ICTY).

[It] does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, ... do not rise to the level of crimes against humanity. [T]he requirement... ensures that what is to be alleged will not be one particular act but, instead course of conduct...

Although it could be argued that if more opportunities present themselves, the authorities of States would have acted in the same way so as to constitute course of conduct, at present the occurrence of one cases within the jurisdiction of the particular State is not enough.

However, authorities of these States may attract criminal liability under article 25(3)(c) for assisting the United States perpetrators in committing crimes against humanity. By handing over individuals to the CIA for extraordinary rendition, authorities of States play an important role in the programme. States' authorities are aware of the techniques used by the United States in treating suspected terrorists. If States chose to bring suspected terrorists found on their territories in front of appropriate legal body instead of handing the suspected terrorists to the United States then the success of extraordinary rendition will be seriously undermined. Thus authorities in these States can be considered to have assisted in the commission of the crimes against humanity for the purpose of facilitating the commission of these crimes.

IX WAR AGAINST TERROR

A *Is it a Justification?*

Extraordinary rendition emerged in the context of a fight against terrorism. However, this objective does not justify the practice. As it is demonstrated in this paper, extraordinary rendition amongst a number of human rights violations breaches the most fundamental human rights, such as the right to a fair trial and the right not to be tortured. Moreover, the lack of any legal safeguards in the practice is particularly concerning as it denies the right to be presumed innocent until proven guilty. Cases have come to light which demonstrate that due to the absence of these safeguards innocent people have fallen victims to the practice. The Council of Europe's Assembly has announced in a draft resolution that:¹⁶⁹

[The Assembly] considers that such violations play into the hands of the terrorists and ultimately serve to strengthen those who aim to destroy the established political, legal and social order.

The inhumane nature of terrorism has led to its international condemnation. However, it is particularly concerning that those who try to seek accountability for the inhumane acts do not themselves comply with the human rights standards they seek to impose.

The effectiveness of extraordinary rendition to combat terrorism is doubtful. The secretive nature of the practice makes it harder to measure its success. Moreover, it is arguable that it undermines the efforts of other States that have chosen to fight terrorism within a legal framework. One such example is the one in Italy, where the CIA abduction

¹⁶⁹ Committee on Legal Affairs and Human Rights Report, above n4, Draft Resolution, par 3.

of suspected terrorist Abu Omar destroyed the investigation carried by the local police force.¹⁷⁰

Considering the serious violations of fundamental human rights caused by extraordinary rendition, the danger of detaining innocent people and its questionable effectiveness in the fight against terrorism, the practice could not be justified in any context. The most effective way to combat terrorism is to bring suspected terrorists in front of recognised legal bodies in countries where human rights are respected.

Although, the question of available defences is not within the main focus of this paper, it is important to briefly mention the issue. Perpetrators in front of the ICC may raise the defence of necessity and the defence of self defence in the context of the war against terror.¹⁷¹ Although it is unlikely that the elements of the defences will be satisfied, it is debatable whether the defences will be available at all in respect of crimes against humanity. Under international human rights law the right not to be tortured cannot be derogated from. Article 2 of CAT provides that not even exceptional circumstances, such as a public emergency, can be invoked to justify torture. Article 4 of the ICCPR similarly provides that the right not to be subject to torture or to cruel, inhuman or derogating treatment and the right that “[e]veryone shall have the right to recognition everywhere as a person before the law” cannot be derogated from. Article 21(3) of the Rome Statute provides that the interpretation of the Rome statute must be consistent with internationally recognised human rights. It is arguable that this article establishes a specific rule of interpretation. Therefore a restrictive interpretation of the

¹⁷⁰ Committee on Legal Affairs and Human Rights Report, above n4, par 162.

¹⁷¹ Rome Statute of the International Criminal Law, art 31.

grounds for excluding criminal responsibility consistent with the strict prohibition of derogation from these fundamental rights should be adopted.¹⁷² Under such interpretation, the defences would not be available where the conduct is strictly prohibited by recognised human rights law.

X CONCLUSION

“Extraordinary rendition” can be defined as the arrest or detention of a person or the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation, thereby placing that person outside the protection of the law.

This practice carried out by the CIA in the fight against terrorism violates a number of fundamental human rights such as the right not to be arbitrary arrested, the right to a fair trial, the right to be recognized before the law, the right not to be arbitrary detained, the right not to be tortured and the right not to be subjected to inhumane and degrading treatment. Considering the seriousness of these violations it is necessary to seek criminal responsibility from the perpetrators of the practice by bringing them in front of the ICC. This paper examined extraordinary rendition as a crime against humanity. Although the practice of extraordinary rendition is similar to that of enforced disappearance not all cases of extraordinary rendition will fall within the definition of “enforced disappearance”. A reason behind this may be the difference in the context in which the two practices arose. One was to oppress people and crash opposition of the

¹⁷² Florain Jessberger “Bad Torture- Good Torture?” (2005) *Journal of Int. Crim. Just.* 1059, 1071.

government and the other emerged in the context of a global war on terror. Nevertheless, it was demonstrated in this paper that cases that do not fall within the definition of “enforced disappearance” constitute crimes against humanity because they include acts of imprisonment, torture and other inhumane acts. Moreover, the practice of extraordinary rendition in itself is an inhumane act.

Extraordinary rendition is a trans-national practice that owes its success to the cooperation of the authorities of other States. Thus authorities of these states may be criminally liable in assisting the CIA in committing crimes against humanity.

Although, extraordinary rendition is used as an instrument in the war against terror, the severe violations of fundamental human rights associated with its practice and the uncertainty of its effect render extraordinary rendition inexcusable. In the words of the President of the Council of Europe Parliamentary Assembly René van der Linden, “[k]idnapping people and torturing them in secret - however tempting the short-term gain may appear to be - is what criminals do, not democratic governments”.¹⁷³

¹⁷³ Council of Europe <www.coe.int> (last accessed on 28 September 2006)

BIBLIOGRAPHY

Primary Sources

Cases

25803/94 *Selmouni v France* [2000] 29 EHRR 403

Hamdan v. Rumsfeld (2006) US Lexis 5184, SC

The Prosecutor v Blaskic (Judgment) (3 March 2000) IT-95-14 (Trial Chamber, ICTY)

The Prosecutor v Kordic and Cerkez (Judgment) (26 February 2001) IT-95-14/2 (Trial Chamber, ICTY)

The Prosecutor v Kuprekcic (Judgment) (14 January 2000) IT-95-16 (Trial Chamber, ICTY)

The Prosecutor v Tadic (Judgment) (11 November 1999) IT-94-1 (Trial Chamber ICTY)

Velasquez Rodriguez Case (1988), Inter-Am Ct H R (Ser. C) No. 4 (1988)

International Agreements

Additional Protocol I of the Geneva Conventions

European Convention for the Protection of Human Rights and Fundamental Freedoms

European Convention on the Protection of Human Rights and Fundamental Freedoms

European Convention on Extradition

Inter-American Convention on Forced Disappearance of Persons

International Covenant on Cultural and Political Rights

Rome Statute of International Criminal Law

Rome Statute of the International Criminal Court's Elements of Crimes

UNGA Declaration on the Protection of All Persons from Enforced Disappearance (III L) (18 December 1992) A/RES/47.

Universal Declaration of Human Rights

Reports

Amnesty International AMR 51/051/2006 Below the Radar: Secret Flights to Torture and Disappearance [2006] AI.

Committee on Legal Affairs and Human Rights Report ajdoc 16 Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States [2006] AS/Jur.

European Commission for Democracy Through Law 363/2005 Opinion on the International Legal Obligations of Council of Europe Member States in Respect of secret Detention Facilities and Inter-State Transport of Prisoners [2006] CDL-AD.

The U.N. Sub-Commission on the Promotion and Protection of Human E/CN.4/Sub.2/2005/L.12 Resolution on Transfer of Persons [2005] UN Doc

United Kingdom Joint Committee on Human Rights *The UN Convention Against Torture* (HL 185 I, UK, 2006)

United States Department of Justice *Standards of Conduct for Interrogation under 18 USC §§2340-2340A* (submitted to the Office of the Assistant Attorney General, US Department of Justice, Washington, 2002)

Newspaper Articles

"Bush Admits secret CIA Jails" (8 September 2006) *The Dominion Post* Wellington B1

Dana Priest "Wrongful Imprisonment: Anatomy of a CIA Mistake" (4 December 2005) *Washington Post* Washington A01

Websites

Coalition for the International Criminal Court <www.iccnw.org> (last accessed 28 September 2006)

Council of Europe <http://www.coe.int> (last accessed 28 September 2006)

CBS News < www.cbsnews.com > (last accessed on 28 September 2006)

CNN < www.cnn.com > (last accessed on 28 September)

Human Rights Watch <www.hrw.org> (last accessed 28 September 2006)

Rome Statute of International Criminal Law <www.un.org/icc> (last accessed on 28 September 2006)

Washington Post < www.washingtonpost.com > (last accessed on 28 September 2006)

Secondary Sources

Texts

Maria Fernanda Perez Solla *Enforced Disappearances in International Human Rights* (McFarland & Company Inc, USA, 2006)

Mark Lattimer & Philippe Sands (ed) *Justice for Crimes Against Humanity* (Oxford, Portland, 2003)

M C Bassiouni *Crimes Against Humanity in International Criminal Law* (2ed, Kluwer Law International, Boston, 1999)

M C Bassiouni *The Legislative History of the International Criminal Court Volume 2* (Transnational Publishers, US, 2005)

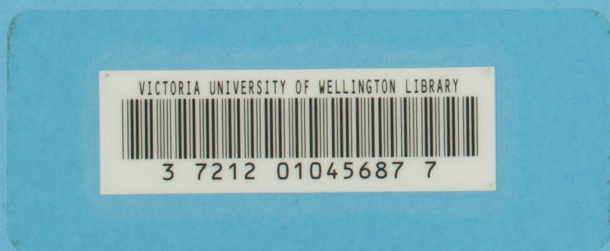
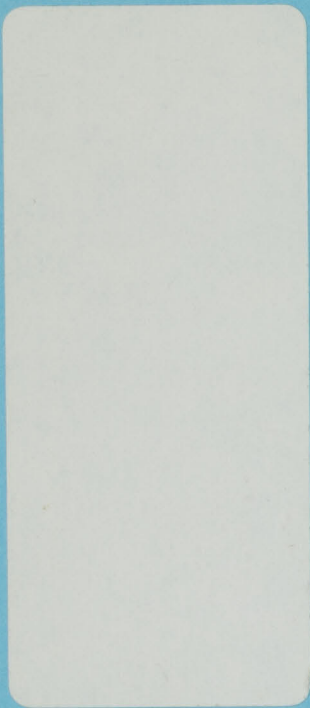
Gerhard Werle *Principles of International Criminal Law* (T.M.C Asser Press, Netherlands, 2005)

Legal Journals

Darryl Robinson "Developments in International Criminal Law: Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93 AJIL 43

D Weissbrodt & A Bergguist "Extraordinary Rendition: A Human Rights Analysis" (2006) 19 Harv Hum Rts J 123

Lisa Avery "A Return to Life: The Right to Identify and the Right to Identify Argentina's "Living Disappeared" (2004) 27 Harv Women's L J 235



VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 01045687 7

