

The Legal Obligation to Prosecute ‘Rendition to Torture’

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Abstract

The United States of America and Italy are currently in violation of binding legal obligations under the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment to investigate allegations of torture resulting from extraordinary rendition and to prosecute those individuals responsible. This article describes cases that aim to establish that (i) torture has occurred as a result of rendition, (ii) government officials made the decision to render individuals to countries with well-known histories of human rights abuses, violating the principle of *non-refoulement*, (iii) US and Italian intelligence agents participated directly in the act of abduction and rendition, and (iv) subcontractors working for the US Government enabled the Central Intelligence Agency to carry out rendition flights. In spite of substantial evidence suggesting government complicity in torture, the US and Italy have repeatedly moved to have these cases dismissed by the courts, primarily by invoking the state secrets privilege and political question doctrine. The national courts of a third country may still provide a forum for advancing victims’ claims regarding torture. While third country prosecutions may be viewed as a last resort following failures to prosecute at home, once initiated, they may compel serious efforts by domestic institutions to address accountability.

1. Introduction

Is it possible to achieve justice for victims of human rights crimes that result from a global program reportedly implemented to enable the United States to operate beyond the rule of law? This is the question confronting the legal community that has sought to prosecute individuals allegedly involved in ‘extraordinary rendition’, the practice of forcibly apprehending suspects and rendering them, without judicial review or formal procedures, to a third country for interrogation.

The US Government’s interrogation policies in the ‘war on terror’ have been, and continue to be, the subject of intense critical inquiry. As rendition victims emerged from the obscurity of secret detention to share their stories, human rights advocates investigated and publicised allegations of

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torture and abuse.¹ As investigations suggested the existence of a spider's web of secret detention facilities, advocates' inquiries broadened to consider the role of countries in Europe, Africa, and the Middle East in rendition.²

Despite volumes of information suggesting State complicity and individual responsibility, to date not a single US official has been held accountable for a practice now well-reported to be linked to torture.³ This article explores this lack of accountability by focusing on three lawsuits in the United States and Italy that have been brought against government officials, intelligence agents and subcontractors implicated in various parts of the rendition program. In response to this litigation, the Governments have invoked state secrets or the political question doctrine to urge the courts to dismiss the cases. This article argues that the use of these legal doctrines conflicts fundamentally with the Governments' obligations under international law.

The legal doctrines invoked in the rendition cases find no authority in international conventions or in the statutes of international criminal tribunals, which have regarded torture as a prosecutable offence from which no immunity may be claimed. Both the US and Italy have ratified the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT)⁴ and the International Covenant on Civil and Political Rights (ICCPR). These treaties strictly prohibit States from torturing or 'outsourcing' torture. Moreover, Article 5 of the UNCAT obliges State Parties to prosecute or extradite individuals who reside within their jurisdiction and who are alleged to have tortured. When coupled with a State's unwillingness to undertake independent criminal investigation of human rights crimes, the persistent invocation of state secrets constitutes a failure to meet the 'prosecute or extradite' provision of the UNCAT, and, thus, places States in violation of treaty obligations. In light of States' treaty obligations, legal and political doctrines should not be recognised as valid bars to the prosecution of individuals complicit in torture.

The first part of this article explores the development of rendition from its use as a problematic law enforcement measure to a practice that has become inextricably linked with torture. Rendition under the Bush administration has been labelled by human rights advocates, and at least one judicial authority, as 'outsourcing' torture. The second part of the article describes relevant domestic and international law. It also suggests that the failure of the US government to address allegations of torture committed as a result of extraordinary rendition places the Obama administration in violation of treaty obligations. The third part describes legal cases filed on behalf of rendition victims. It cites the claims made by victims and describes how the

¹ Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'* (New York: The Association of the Bar of the City of New York and New York University School of Law, 2004).

² Dick Marty, *Alleged Secret Detentions in Council of Europe Member States* (2006). Available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf, Last accessed 25 Oct. 2009; Amnesty International, Cageprisoners, Center for Constitutional Rights, Center for Human Rights and Global Justice, Human Rights Watch, and Reprieve, *Off the Record: U.S. Responsibility for Enforced Disappearances in the 'War on Terror'* (2007). Available at http://chrgj.org/docs/OffRecord/OFF_THE_RECORD_FINAL.pdf, Last accessed 25 Oct. 2009; Reprieve and Cageprisoners, *Mass Rendition, Incommunicado Detention and Possible Torture of Foreign Nationals in Kenya, Somalia, and Ethiopia* (2007). Available at http://www.reprieve.org.uk/static/downloads/2007_03_21_Rendition_Report.pdf. Last accessed 25 October 2009.

³ Amnesty International, 'Rendition, "Disappearances" and Secret Prisons,' 2009. Available at <http://www.amnestyusa.org/counter-terror-with-justice/extraordinary-rendition-disappearances-and-secret-prisons/page.do?id=1051263>. Last accessed 25 October 2009.

⁴ However, neither country has ratified the Optional Protocol to the UNCAT (OPCAT).

government involved has responded in each case. The article concludes by exploring what other recourse victims have to pursue justice, such as the principle of universal jurisdiction in foreign courts.

2. Extraordinary Rendition

2.1 *Rendition to justice*

The US practice of rendition can be traced back to a 1986 directive, authorised by President Ronald Reagan, that allowed for the abduction of suspected terrorists for the purpose of criminal prosecution in the United States.⁵ Suspects were seized and transported by the Central Intelligence Agency (CIA) from a foreign country to the United States in order to face trial in US courts, where they received the rights ‘extend[ed] to any criminal defendant, including the right to counsel, the presumption of innocence, the right to a public trial by jury, and the right to confront one’s accusers.’⁶ The practice, as it was implemented in this period, could be conceived as ‘renditions to justice.’⁷

Renditions not only infringed upon the territorial sovereignty of the state in which the suspect was captured, but also violated the rights of the individual, who was, throughout the period of abduction and transfer, outside any legal regime.⁸ Furthermore, while rendered persons ultimately appeared in a court of law and could, theoretically, confront their accusers, it has been the practice of the courts not to allow the unlawful circumstances of suspects’ abductions to be factored into judicial proceedings.⁹

US government officials have argued that rendition during this period was a necessary law enforcement measure for the apprehension of suspects when no practical alternative – namely, extradition – was available for gaining custody and, thus, jurisdiction over these individuals.¹⁰ However, the use of forcible abduction to apprehend suspects was not limited to countries lacking extradition treaties.¹¹ In numerous cases, states – the United States was not alone in using rendition – justified rendition on the grounds that existing treaties did not apply to certain crimes, such as political offences.¹² For example, since neither treason nor espionage were considered extraditable offences, Israel forcibly abducted Mordechai Vanunu from Italy.¹³ Other considerations, such as the lack of a provision requiring the extradition of a country’s nationals,

⁵ John Quigley, ‘Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists’ (1998) *Human Rights Quarterly* 10, p.193.

⁶ Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006), pp.188-189.

⁷ Margulies, *Guantánamo and the Abuse of Presidential Power*, pp.188-189. See fn.6.

⁸ Quigley, ‘Government Vigilantes at Large’, see fn.5; Gary Bass, ‘The Adolf Eichmann Case’, in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Pennsylvania: University of Pennsylvania Press, 2004), pp.86-90.

⁹ Quigley, ‘Government Vigilantes at Large’, p.197. See fn.5.

¹⁰ Quigley, ‘Government Vigilantes at Large’, p.195. See fn.5.

¹¹ John Quigley, ‘Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on *United States v. Alvarez-Machain*’, (1992-1993) 68 *Notre Dame Law Review*, p.728.

¹² Quigley, ‘Our Men in Guadalajara and the Abduction of Suspects Abroad’, pp.195-196. See fn.11.

¹³ Quigley, ‘Our Men in Guadalajara and the Abduction of Suspects Abroad’, p.726. See fn.11.

have also been seen to provide justification for rendition.¹⁴ Such was the rationale used to justify the abduction of Dr Alvarez-Machain from Mexico to the United States in 1990.¹⁵

Rendition has also been used to gain jurisdiction over war criminals. Israel's abduction of high-ranking Nazi official Adolf Eichmann from Argentina enabled Israel's Supreme Court to try him for war crimes and crimes against humanity.¹⁶ Margaret Satterthwaite, professor of law at New York University, concedes that there are certain grave crimes for which the use of rendition to justice may be an 'acceptable policy option.'¹⁷ Renditions to justice appear to present the international legal community with a dilemma: on the one hand, there is prospect of impunity for perpetrators of universally condemned crimes and, on the other, there is the prospect of prosecution, albeit using procedures that compromise the suspects' civil rights.

Yet, long-term interests are best served by developing enforcement mechanisms that comport both with international law and principles of justice. Gary Bass suggests 'that kind of stark choice between abduction or impunity' can be eliminated.¹⁸ He envisions that 'intermediate solutions' can be strengthened 'by entrenching a norm of extradition, by regularizing such transfers, by punishing those states that will not extradite, by stigmatizing those states that harbor war criminals, by strengthening international tribunals, and by legitimizing international law.' Lori Damrosch, professor at Columbia Law School, similarly argues that 'abduction from another state's territory is not a proper means of achieving jurisdiction,' even for *jus cogens* crimes.¹⁹

2.2 Rendition to torture

The legal problems associated with rendition to justice have, over time, become overshadowed by those attached to the practice developed under Presidents Bill Clinton and George W. Bush. The purpose of rendition shifted dramatically under these presidents.²⁰ President Clinton gave the CIA authority to send prisoners to foreign countries to "get them off the street" when a criminal conviction was not feasible.²¹ Each transfer of a prisoner to a third country was subject to review by the Justice Department, National Security Council, CIA, and the White House.²²

¹⁴ Quigley, 'Our Men in Guadalajara and the Abduction of Suspects Abroad', p.728. See fn.11.

¹⁵ Quigley, 'Our Men in Guadalajara and the Abduction of Suspects Abroad', p.728. See fn.11.

¹⁶ Nicholas Kittrie, 'A Post Mortem of the Eichmann Case: the Lessons for International Law', (1964) *The Journal of Criminal Law, Criminology, and Police Science*, p.55.

¹⁷ Margaret Satterthwaite, 'From Rendition to Justice to Rendition to Torture: Informal Transfer under International Law and the Prospects of Enforcement in U.S. Courts', abstract, 9 July 2008. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157583. Last accessed 24 June 2009.

¹⁸ Gary J. Bass, 'The Adolf Eichmann Case: Universal and National Jurisdiction,' in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (Philadelphia: University of Pennsylvania Press, 2004), p.88.

¹⁹ Lori Damrosch, 'Connecting the Threads in the Fabric of International Law', in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Pennsylvania: University of Pennsylvania Press, 2004), p.96.

²⁰ Margulies, *Guantánamo and the Abuse of Presidential Power*, p.189. See fn.6.

²¹ Margulies, *Guantánamo and the Abuse of Presidential Power*, p.189. See fn.6.

²² Margulies, *Guantánamo and the Abuse of Presidential Power*, p.189. See fn.6.

Under President Bush, the purpose of rendition changed again, and the program expanded substantially with even more tenuous legal restraints.²³ In an order signed in September 2001, President Bush empowered the CIA with ‘unilateral authority ... to render prisoners solely for the purpose of detention and interrogation.’²⁴ Thus, the order precluded the interagency review that existed under the Clinton administration. With criminal prosecution no longer the impetus behind the abductions, the practice is now referred to as ‘rendition to torture’ or ‘extraordinary rendition’.

The US government instituted a policy of removing prisoners to places where they could not enjoy the protections of domestic law. Rendered to countries with well-documented records of human rights abuses, the prisoners were, thus, likely to face torture.²⁵ The Bush administration maintained that the Geneva Conventions did not apply to these persons and that prisoners could be held indefinitely, with no right to counsel, without being charged, and without any communication to their families concerning their whereabouts.²⁶

Reports of the existence of the extraordinary rendition program first began to emerge in the mainstream US press in late 2002.²⁷ Confronted by the media, government officials offered justifications for the existence of the program. Secretary of State Condoleezza Rice’s statements, for example, tracked the rationale used by the Clinton administration: she insisted that ‘renditions take terrorists out of action and save lives.’²⁸ Government officials and advisors, such as Philip D. Zelikow, publicly cited examples of renditions conducted by earlier administrations and European allies. They attempted to thwart international condemnation of the practice by locating the rendition policy within historical and international efforts to combat terrorism.²⁹ Administration officials consistently ignored crucial differences between European renditions (of the rendition to justice type) and US practice following September 11.

Although the Bush administration did not deny the existence of the program in general terms, it consistently refused to take responsibility for the rendition of any specific individual.³⁰ Then, on 6 September 2006, President Bush made his first direct acknowledgment of the existence of secret prisons around the world.³¹ He explained that 14 ‘high-value detainees’ were being transferred from secret facilities to Guantánamo Bay. He credited this belated public admission about the program to the US Supreme Court’s ruling in *Hamdan v. Rumsfeld*, which declared that Article 3 of the Geneva Conventions established a minimum standard of protection for

²³ Margulies, *Guantánamo and the Abuse of Presidential Power*, p.189. See fn.6.

²⁴ Margulies, *Guantánamo and the Abuse of Presidential Power*, p.189. See fn.6.

²⁵ Margulies, *Guantánamo and the Abuse of Presidential Power*, p.189. See fn.6.

²⁶ Margulies, *Guantánamo and the Abuse of Presidential Power*, p.4. See fn.6.

²⁷ Dana Priest and Barton Gellman, ‘U.S. Decries Abuse but Defends Interrogations’, *Washington Post*, 26 December 2002; Anthony DePalma, ‘Canadian Immigrant Arrested at JFK is Deported to Syria’, *New York Times*, 12 October 2002.

²⁸ ‘Remarks Upon Her Departure for Europe’, transcript, 5 December 2005. Available at <http://2001-2009.state.gov/secretary/rm/2005/57602.htm>. Last accessed 24 June 2009.

²⁹ Philip Zelikow, ‘Legal Policy in a Twilight War’, (2006) *National Security Law Report* 28.

³⁰ ‘3,000 Published Flight Logs Expose New CIA Rendition Activities’, *Democracy Now*, 6 December 2006. Available at www.democracynow.org/article.pl?sid=06/12/06/1429257. Last accessed 23 June 2009.

³¹ ‘President Discusses Creation of Military Commissions to Try Suspected Terrorists’, 6 September 2006. Available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>. Last accessed 23 June 2009.

Salim Ahmed Hamdan, a Yemeni national detained at Guantánamo Bay.³² President Bush explained that *Hamdan v. Rumsfeld* ‘has put in question the future of the CIA program.’ He stated that the Court’s decision put military and intelligence personnel at ‘unacceptable’ risk of prosecution under the War Crimes Act.³³ Additionally, he stressed that he was looking to Congress to remedy the situation, which it promptly did through passage of the Military Commissions Act of 2006.³⁴

The Military Commissions Act granted retrospective immunity from criminal prosecution to officials regarding actions that occurred between 11 September 2001 and 30 December 2005.³⁵ It also amended the War Crimes Act in such a way as to limit non-citizens’ access to courts to challenge their detention and treatment by US officials.³⁶ The Military Commissions Act asserted a narrow definition of violations that constitute war crimes and vested the President with the power to interpret violations of the Geneva Conventions.³⁷

2.3 *Managing rendition after the Bush administration*

On his second day in office, President Obama issued two executive orders that promised a departure from the policies of the previous administration. The first ordered the closing of Guantánamo Bay within a year, while the second restored provisions of international humanitarian law applicable to prisoners of war.³⁸ The closing of CIA prisons abroad has also been viewed as evidence of a break from the practices of the Bush administration.³⁹

Despite the signs suggesting a shift in policy, in its first few months the Obama administration was conservative in its views on whether criminal investigations constitute a necessary part of ‘moving forward’. Public statements and legal positions asserted in federal court suggest that the Obama administration’s support for accountability efforts is uneven at best. The statements of nominees during confirmation hearings suggested that incoming members of the Obama administration had a less than critical view of the rendition program and that prosecutions for rights violations committed during the Bush administration would be unlikely.⁴⁰ In April 2009, President Obama declared outright that CIA officers who relied on legal memos authorising

³² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³³ 18 United States Code § 2441: War Crimes.

³⁴ Military Commissions Act of 2006, Public Law 109-366, 120 Statute 2600, Section 8.

³⁵ Center for Constitutional Rights (CCR), ‘CCR Files First New Challenges to Military Commissions Act’, October 2006. Available at <http://ccrjustice.org/newsroom/press-releases/ccr-files-first-new-challenges-military-commissions-act>. Last accessed 23 June 2009.

³⁶ ‘CCR Files First New Challenges to Military Commissions Act’. See fn.35.

³⁷ ‘CCR Files First New Challenges to Military Commissions Act’. See fn.35.

³⁸ ‘President Obama Signs Executive Orders on Detention and Interrogation Policy’, *The White House: President Barack Obama*, 22 January 2009. Available at http://www.whitehouse.gov/the_press_office/BACKGROUNDPresidentObamasignsExecutiveOrdersonDetentionandInterrogationPolicy/. Last accessed 23 June 2009.

³⁹ Scott Shane, ‘CIA to Close Secret Prisons for Terror Suspects’, *New York Times*, 9 April 2009.

⁴⁰ Charlie Savage, ‘Obama’s War on Terror May Resemble Bush’s in Some Areas’, *New York Times*, 17 February 2009.

techniques amounting to torture would neither be investigated nor prosecuted.⁴¹ In essence, the administration has decoupled the legal obligation to prohibit torture from the legal obligation to prosecute torturers.

Looking beyond the public statements of government officials to the arguments recently set forth by the Justice Department in US courts, it is clear that the Obama administration intends to maintain some of the legal positions asserted by its predecessor. In one of the rendition cases described below (*Mohamed v. Jepps*), the Obama administration has argued that it is entitled to claim the states secret privilege and that the case should be dismissed on that basis. The actions of the new administration, thus far, have provided an unsettling backdrop against which to assess the government's compliance with international treaty obligations.

3. International Law and the Duty to Prosecute

Extraordinary rendition involves the abrogation of a host of rights, including the right to personal liberty, the right to security of person, the right to not be arbitrarily detained, the right to be protected against torture and abuse, the right to counsel, and the right to be charged in a court of law. This section describes the law relevant to the practice of rendering persons to facilities where they would likely be tortured. It thus provides the background of the conflict between states' obligations under international law and the legal arguments invoked in the courts.

3.1 *The right not to be rendered and tortured*

A comprehensive legal framework has been established, through the UNCAT and the ICCPR, to prohibit and prevent torture, whether committed directly by the State or indirectly through transfer, expulsion, or extradition to a state where torture is likely.⁴² The prohibition on torture is not limited to legal instruments; indeed, the prohibition is viewed as absolute, belonging to a category of norms known as *jus cogens*, which means that the prohibition cannot be superseded by any other law, and that 'there can be no immunity from criminal liability for violation of a *jus cogens* prohibition.'⁴³

⁴¹ 'Statement on Release of Office of Legal Counsel (OLC) Memos', 16 April 2009. Available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/. Last accessed 23 June 2009.

⁴² Margaret Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', (2007) *The George Washington Law Review* 75, pp.1351-1420. Article 2 of the UNCAT calls on States' Parties to take legislative, administrative, and judicial measures to prevent torture. Article 3 declares that 'No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Article 4 declares that 'Each State Party shall ensure that all acts of torture are offences under its criminal law. Article 5 requires that each State Party take measures 'to establish its jurisdiction over the offences referred to in article 4' and shall 'take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.' Article 14 calls on States' Parties to protect victims' right to compensation for their injuries and to ensure that there are mechanisms for obtaining legal redress. Article 7 of the ICCPR prohibits torture, and cruel, inhuman or degrading treatment or punishment.

⁴³ Marjorie Cohn, testimony before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties Committee on the Judiciary, US House of Representatives, *From the Department of Justice to Guantánamo Bay*:

Recent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) reaffirms the absolute nature of the prohibition on torture:

[T]he prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.⁴⁴

Not only do states have a duty to prevent torture, international law also ‘prohibits the *refoulement*, or transfer, of an individual to another State where that individual faces the risk of torture, and in some cases, cruel, inhuman, or degrading treatment.’⁴⁵ The principle of *non-refoulement* appears in the UNCAT, the Convention Relating to the Status of Refugees,⁴⁶ and the International Convention for the Protection of All Persons from Enforced Disappearances. In addition, the Human Rights Committee, which is charged with monitoring compliance with the ICCPR, has interpreted Article 7 of the ICCPR as prohibiting *refoulement*.⁴⁷

International law has evolved beyond the prevention paradigm to create a duty upon states to prosecute alleged perpetrators of *jus cogens* crimes who are found within their jurisdiction, or to extradite these individuals to states that will prosecute.⁴⁸ Diane Orentlicher, an expert on international law recently appointed to the US State Department’s Office of War Crimes, explains that the UNCAT ‘imposes an unambiguous duty to prosecute the acts it defines as criminal.’⁴⁹ As a matter of law, it is inappropriate for governments to take actions that close off the possibility of investigations, or to bar judicial proceedings that aim to address allegations of torture and other cruel, inhuman, or degrading treatment.

Decades-long efforts to criminalise abduction and disappearances culminated in the International Convention for the Protection of All Persons from Enforced Disappearances. Although the US and Italy have neither signed nor ratified the Convention, it serves as an authoritative testament to current human rights principles and to the international community’s commitment to ensuring that there are no gaps in the legal framework which might prove inimical to safeguarding human rights.⁵⁰ Directly challenged by this Convention is the notion that a state can remove an

Administration Lawyers and Administration Interrogation Rules, Part I, 110th Congress, 2nd session, 6 May 2008, http://www.fas.org/irp/congress/2008_hr/gtmo.pdf. Last accessed 23 June 2009.

⁴⁴ *Prosecutor v. Furundzija*, ICTY, No IT-95-17/1 (Trial Chamber), 10 December 1998, para.144.

⁴⁵ Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States* (New York: New York University, School of Law, 2006), p.9.

⁴⁶ Satterthwaite, ‘Rendered Meaningless’, pp.1355, 1367. See fn.42.

⁴⁷ Satterthwaite, ‘Rendered Meaningless’, pp.1357-1367. See fn.42.

⁴⁸ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (New York: Oxford University Press, 2008), p.256.

⁴⁹ Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, (1991) *The Yale Law Journal* 100, p.2566.

⁵⁰ International Coalition against Enforced Disappearances (ICAED), ‘Need for the Convention and Key Provisions.’ Available at <http://www.icaed.org/the-convention/need-for-the-convention-and-key-provisions/>. Last accessed 23 June 2009; ICAED, ‘Manifest of the ICAED.’ Available at http://www.icaed.org/fileadmin/user_upload/Manifest_of_ICAED.pdf. Last accessed 23 June 2009.

individual to a place beyond the harbour of law. In 2009, the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights concluded that

When a rendered person is held in secret detention, or held for interrogation by authorities of other States, with no information supplied to family members or others regarding that detention, this constitutes an enforced disappearance – a crime under international law. Where renditions are part of a widespread and systematic government policy, they may also amount to crimes against humanity.⁵¹

Though extraordinary rendition as enforced disappearance has not yet come before an international criminal court, such statements by international legal experts demonstrate a willingness to view the elements of rendition (i.e. secret detention amounting to enforced disappearance) as prohibited offences under international law. Manfred Nowak, the UN Special Rapporteur on Torture, and Elizabeth McArthur write that extraordinary rendition is illegal under international law and that it violates the *non-refoulement* principle contained in the UNCAT.⁵²

3.2 *Legal obligations*

The UNCAT and the ICCPR are binding on the United States and Italy. However, the US tends to narrowly interpret its obligations under various international treaties. For example, the US State Department has rejected the Human Rights Committee's interpretation that Article 7 of the ICCPR prohibits *refoulement*.⁵³ Similarly, following ratification of the UNCAT, the US Senate declared that Articles 1 through 16 of the UNCAT are not self-executing.⁵⁴ The Senate also issued 'understandings' that described its interpretations of individual provisions of the UNCAT.⁵⁵

Nevertheless, Congress subsequently gave legal effect to various provisions of the UNCAT by enacting the Foreign Affairs Reform and Restructuring Act of 1998, which implemented Article 3 of the UNCAT.⁵⁶ It also enacted 18 USC §§ 2340 and 2340A, which implemented Articles 4 and 5.⁵⁷ Under 18 USC 2340A, federal courts have jurisdiction over the crimes of torture, death by torture, and conspiracy to torture when those crimes are committed outside US territory and the offender is a US national or is found in the United States.

Additional federal statutes proscribe torture and enable victims to pursue legal action against their abusers. The Torture Victim Protection Act, enacted by Congress in 1992, provides a

⁵¹ Eminent Jurists Panel of the International Commission of Jurists, *Assessing Damage, Urging Action* (Geneva, 2009), p.81.

⁵² Nowak and McArthur, *The United Nations Convention Against Torture*, p.196. See fn.48.

⁵³ Satterthwaite, 'Rendered Meaningless', p.1358. See fn.42.

⁵⁴ Beth Henderson, 'From Justice to Torture: The Dramatic Evolution of US-Sponsored Renditions', (2006) *Temple International & Comparative Law Journal* 20(1), pp.198, 203.

⁵⁵ Nowak and McArthur, *The United Nations Convention Against Torture*. See fn.48.

⁵⁶ Human Rights Watch, 'Summary of International and US Law Prohibiting Torture and Other Ill-Treatment of Persons in Custody.' Available at <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>. Last accessed 23 June 2009; Satterthwaite, 'Rendered Meaningless', pp.1366-67. See fn.42.

⁵⁷ Human Rights Watch, 'Summary of International and US Law Prohibiting Torture and Other Ill-Treatment of Persons in Custody.' Available at <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>. Last accessed 23 June 2009; Satterthwaite, 'Rendered Meaningless', pp.1366-67. See fn.42.

‘federal cause of action against any individual who, under apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing.’⁵⁸ Michael Swan explains that, by enacting the Torture Victim Protection Act, the US Congress ‘gave its blessing’ to a line of cases brought on behalf of ‘victims of violations of international law.’⁵⁹ Specifically, the Torture Victim Protection Act extended to US citizens the protections that had previously been limited to non-citizens pursuant to the Alien Tort Claims Act.⁶⁰ The Alien Tort Claims Act grants jurisdiction to district courts for ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’⁶¹ The War Crimes Act prohibits grave breaches of international law and violations of common Article 3 of the four Geneva Conventions.⁶² Additionally, the US Army Field Manual and the Uniform Code of Military Justice strictly prohibit mistreatment of persons in military custody.⁶³

3.3 Assessing compliance

The US government has failed to live up to its obligations (i) to prevent torture, (ii) to investigate and to prosecute allegations of torture, and (iii) to provide redress. Humanitarian aid and human rights organisations have gathered ample evidence to illustrate that torture has been committed not only against rendition victims, but also against other individuals detained in the ‘war on terror’. For example, in 2008, Physicians for Human Rights assembled objective medico-legal evidence that torture had been committed against prisoners at detention facilities in Iraq, Afghanistan, and Guantánamo Bay.⁶⁴ A report by the International Committee of the Red Cross that discusses 14 ‘high-value’ detainees transferred to Guantánamo Bay found that their treatment in CIA detention amounted to torture.⁶⁵ In early 2009, some of the allegations that were publicised by human rights advocates regarding the torture of Guantánamo Bay prisoners were confirmed when Military Commission Convening Authority Susan Crawford conceded that the interrogation of Mohammed al Qahtani amounted to torture.⁶⁶

Both the Bush and Obama administrations have failed to investigate torture allegations and seek justice for torture victims. International law experts have criticised the US government’s position on investigations and trials. In response to Obama’s decision not to prosecute CIA officers, Nowak explained that it is a ‘clear violation of the obligation’ under the UNCAT to issue ‘any kind of amnesty law, or executive order to say that nobody would be prosecuted’ for torture.⁶⁷

⁵⁸ Torture Victim Protection Act of 1991, Public Law 102-256, 106 Statute 73 (enacted 12 March 1992), codified as note to 28 USC § 1350; 102nd Congress, 1991, Senate Report No 102-249.

⁵⁹ Michael Swan, ‘International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes, and Doctrines’, in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives of the Development of Transnational Human Rights Litigation* (Portland: Hart Publishing, 2001), p.74.

⁶⁰ 28 USC § 1350.

⁶¹ Swan, ‘International Human Rights Tort Claims’, p.74. See fn.59.

⁶² Cohn. See fn.43.

⁶³ Cohn. See fn.43.

⁶⁴ Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact* (2008).

⁶⁵ International Committee of the Red Cross, *Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (2007).

⁶⁶ William Glaberson, ‘Torture Acknowledgement Highlights Detainee Issue’, *New York Times*, 15 January 2009.

⁶⁷ Glenn Greenwald, ‘Interview with UN Torture Official Manfred Nowak’, 25 April 2009, <http://www.salon.com/opinion/greenwald/2009/04/25/nowak/index.html>. Last accessed 23 June 2009.

The arguments articulated by the US and Italy in legal cases also reflect a failure to satisfy international legal obligations. Persistent invocation of the political question doctrine or state secrets arguments to bar judicial proceedings against individuals complicit in torture constitutes a failure to meet the ‘prosecute or extradite’ provision of the UNCAT. Coupled with a state’s unwillingness to undertake independent criminal investigation of human rights crimes, such legal arguments place states in clear violation of treaty obligations.

William G. Weaver and Robert M. Pallito are among the scholars who argue that the US Government’s reliance on, and the court’s acceptance of, the state secrets privilege constitutes a misuse of that privilege and amounts to the judiciary’s capitulation to the executive branch.⁶⁸ They explain that the proper function of the privilege, as articulated by the Supreme Court in *United States v. Reynolds*,⁶⁹ is to bar disclosure of information in court proceedings that might damage national security. However, in recent years, the government’s invocation of the state secrets privilege has resulted in the wholesale dismissal of cases.⁷⁰ The privilege is no longer applied in a restrained way to questions concerning classified information, even in cases involving constitutional claims. Weaver and Pallito argue that, given the nature of the US legal system, this is highly problematic.⁷¹ In US law, the Constitution is the supreme ‘law of the land’, while the state secrets privilege is merely a judicially created rule.⁷² For Weaver and Pallito, the fact that the state secrets privilege prevails whenever pitted against constitutional claims is a sign that the legal system is not functioning properly.⁷³

In February 2009, the Obama administration urged an appeals court to dismiss a rendition case on the basis of the state secrets privilege.⁷⁴ Like its predecessor, the Obama administration appears to be using the state secrets privilege to prevent cases from advancing through the courts. The Italian Government has also argued that state secrets necessitate the dismissal of cases against US and Italian intelligence agents. By continuing to rely on these doctrines, the US and Italian Governments are not only failing to meet their obligations under Article 5 of the UNCAT, they are also failing to fulfil their duties under Article 14 of the UNCAT to enable victims to obtain redress.

Chris Ingelse suggests that Article 14 of the UNCAT can be interpreted as providing an implicit right to the prosecution of perpetrators of torture.⁷⁵ Ingelse draws this conclusion by referencing the US Senate’s statement of ‘understanding’, following the US ratification of the UNCAT, which noted:

⁶⁸ William Weaver and Robert Pallito, ‘State Secrets and Executive Power’, (2005) *Political Science Quarterly* 120(1).

⁶⁹ *United States v. Reynolds*, 345 U.S. 1 (1953).

⁷⁰ Weaver and Pallito, ‘State Secrets and Executive Power’, pp.87, 92. See fn.68.

⁷¹ Weaver and Pallito, ‘State Secrets and Executive Power’, pp.86-87, 92. See fn.68.

⁷² Weaver and Pallito, ‘State Secrets and Executive Power’, pp.87, 92. See fn.68.

⁷³ Weaver and Pallito, ‘State Secrets and Executive Power’, pp.87, 92. See fn.68.

⁷⁴ Dan Glaister, ‘Obama Administration Maintains Bush’s “State Secrets” Policy’, *Guardian.co.uk*, 9 February 2009. Available at <http://www.guardian.co.uk/world/2009/feb/09/barack-obama-torture-rendition-policy>. Last accessed 25 October 2009.

⁷⁵ Chris Ingelse, *The UN Committee against Torture: An Assessment* (Boston: Kluwer Law International, 2001), pp. 362-363.

it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.⁷⁶

The reference to a ‘private right of action’ suggests that the US government has contemplated the idea that judicial remedies are contained within the right of redress, as required by Article 14.⁷⁷ For the US, the applicability of Article 14 depends on whether the torture occurs within the jurisdiction of that State. However, as described below in the case of Maher Arar, a compelling argument can be made for extending legal protection when a victim is rendered from the jurisdiction to suffer ‘outsourced’ torture.

4. *Rendition cases*

This section examines how states have responded to legal actions directed at holding individuals accountable for rendition. It is beyond the scope of this article to provide an exhaustive account of all proceedings initiated on behalf of rendition victims. Therefore, this section examines three cases: a criminal case on behalf of Osama Mustafa Hassan Nasr in Italy; *Arar v. Ashcroft*, a civil case on appeal (as of the time of writing) in the Second Circuit; and *Mohamed v. Jeppesen*, a civil case that was reinstated by an appeals court in the Ninth Circuit in April 2009. It sets out the victims’ allegations and describes the procedural history of the cases, focusing on the Governments’ attempts to have the cases dismissed through the invocation of the state secrets privilege.

Each case is directed at US government officials, agents of the CIA, or subcontractors who have been implicated in rendition, either through direct participation or command responsibility. Although the language varies, the essential claim in each case is that the defendants have incurred responsibility for aiding and abetting the commission of torture. In *Arar v. Ashcroft*, officials are alleged to have participated in a ‘conspiracy to torture’. The corporation at the centre of the *Jeppesen* case is alleged to have enabled the forcible transportation of individuals to locations where they were tortured. In the Italian case, CIA agents, along with agents of the Italian intelligence services, are alleged to have planned and executed the kidnapping and rendition of Nasr.

The critical inquiry in these cases would seem to revolve around establishing that torture has occurred and that the defendants aided and abetted torture through unlawful abduction and transfer when they reasonably should have known that ‘pain or suffering is a likely and logical consequence of [that] conduct.’⁷⁸ The analysis provided by the ICTY may be useful for a comparative analysis of how an international court might adjudicate the crime of torture. According to the jurisprudence of the ICTY, torture is defined by three elements:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must be

⁷⁶ Ingelse, *The UN Committee against Torture*, p. 362. See fn.75.

⁷⁷ Ingelse, *The UN Committee against Torture*, p. 362. See fn.75.

⁷⁸ *Prosecutor v. Kunarac, Kovac, and Vokovic*, ICTY Case No IT-96-23 (Appeals Chamber), 12 June 2002, para. 153, quoted in J. Trahan, *Genocide, War Crimes, Crimes Against Humanity* (New York: Human Rights Watch, 2006), p.262.

aimed at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.⁷⁹

Since the defendants in the cases described below are not charged with committing the actual torture, the challenge before the plaintiffs' attorneys and the Italian prosecutors is to establish the link between the actions of the defendants and the torture itself, as well as to establish intent. The ICTY has provided an explanation of the 'intentional' element of torture that, this article argues, can be applied to the rendition cases:

[E]ven if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.⁸⁰

Drawing on the ICTY's analysis, it would appear that the required element of intent would be found if the facts of the case establish that the defendants intended a course of action (i.e. the rendering/transferring of suspects), when they reasonably should have known that, as a result of those actions, it would be likely that an individual would be tortured. As for the final element of torture, the US government does not dispute that suspects were rendered for the purposes of interrogation.

4.1 *The case of Osama Mustafa Hassan Nasr ('Abu Omar')*

Italian prosecutors were the first to initiate proceedings in a foreign jurisdiction against CIA agents for their alleged participation in the rendition of Osama Mustafa Hassan Nasr ('Abu Omar'), an Egyptian national living as a legal resident, with refugee status, in Italy. On 17 February 2003, Abu Omar was abducted off a street in Milan and taken to an Italian-American airbase in Aviano.⁸¹ Bound, gagged, and beaten, he was placed on a jet and flown to Ramstein Airbase (a NATO installation) in Germany. From there, he was transferred to a CIA-chartered jet that flew him to Cairo, Egypt. He was detained for 14 months and was released in April 2004.

Abu Omar has alleged that he was tortured throughout his detention. He claims that, in addition to physical and sexual violence, he endured conditions calculated to produce suffering, including exposure to extreme temperatures, sleep deprivation, subjection to unbearably loud noise, and deprivation of basic hygienic necessities and natural light. In Egypt, his alleged tormentors informed him that his rendition occurred with the consent of the Italian Government.⁸²

⁷⁹ *Prosecutor v. Kunarac, Kovac, and Vokovic*, p.258, para. 142. See fn.78.

⁸⁰ *Prosecutor v. Kunarac, Kovac, and Vokovic*, p.262, para. 153. See fn.78.

⁸¹ Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St Martin's Press, 2006) pp.190-213; Denise Bentele et al., 'Pending Investigation and Court Cases', in European Center for Constitutional and Human Rights, *CIA Extraordinary Rendition: Flights, Torture, and Accountability* (Germany, 2009), pp.80-87.

⁸² Paolo Biondani and Gianni Santucci, 'Il Memoriale di Abu Omar 'Rapito e Picchiato da Italiani' *Corriere della Sera*, 9 November 2006.

Using mobile phone records, credit card information, witness testimony, and flight data, Italian prosecutors pieced together the events leading to Abu Omar's abduction.⁸³ For some time prior to his rendition, Abu Omar had been the subject of an ongoing criminal investigation by Italian judicial authorities for suspected involvement in militant activities. His disappearance was thus of interest to the authorities, because it interfered with their ongoing work.

Initial inquiries into Abu Omar's sudden disappearance did not take prosecutors very far due, at least in part, to a 'secret' intelligence report stating that Abu Omar was living in the Balkans.⁸⁴ This report, transmitted by a CIA agent in Rome, was later found to be baseless and 'manifestly misleading.'⁸⁵ In the prosecutors' view, the goal of the report was to obstruct the investigation into Abu Omar's whereabouts and, for this reason, 'must be seen as an operative step in the CIA's broader criminal strategy to deceive the Italian authorities [who were] unaware of the plan.'⁸⁶ This case has drawn significant public attention as it demonstrates the ways in which rendition violates not only the rights of the person but also, through violation of a state's sovereignty, has a significant impact on the legal processes of the territorial state.

In June 2005, an Italian judge issued an arrest warrant for 13 CIA agents who were suspected of being involved in the rendition of Abu Omar.⁸⁷ By February 2007, prosecutors had formally indicted 26 US citizens, as well as 7 Italians, including Nicolo Pollari, the Director of the Italian military intelligence service, and Pollari's deputy minister.⁸⁸

The arrest warrant declares that Abu Omar's kidnapping was 'tantamount to an utterly unlawful form of "extradition," running against all notions of international law and respect for a country's sovereignty.'⁸⁹ It charges that Italian officials failed to prevent the commission of the crime and 'directly and actively contributed to ordering' actions to set up the abduction.⁹⁰ The Italian prosecutors maintain that the CIA 'would have hardly been able to operate in Milan throughout the preliminary and executive stages of the abduction without the complicity of Italian citizens.'⁹¹

The Italian government has not only refused to assist in the case, but has tried to impede its progress. Although prosecutors formally requested the extradition of the CIA agents, the Italian Minister of Justice refused to submit the request to the US, despite an extradition treaty allowing for the extradition of American citizens.⁹² In early 2007, the Italian government petitioned the Constitutional Court to dismiss the case on the basis that prosecutors had overstepped their bounds by using classified information from intelligence agents.⁹³ The case went to trial in June

⁸³ Grey, *Ghost Plane*, pp.194-210. See fn.81.

⁸⁴ Grey, *Ghost Plane*, pp.194-210. See fn.81.

⁸⁵ Decree for the Application of Coercive Measures, no 10838/05 R.G.N.R., issued by Judge Enrico Manzi, 3 July 2006, p.122.

⁸⁶ Decree for the Application of Coercive Measures, p.122.

⁸⁷ Stephen Grey and Don Van Natta, 'Thirteen with the CIA Sought by Italy in a Kidnapping', *New York Times*, 25 June 2005.

⁸⁸ Bentele et al., 'Pending Investigation and Court Cases', p.84. See fn.81.

⁸⁹ Decree for the Application of Coercive Measures, p.142. See fn.85.

⁹⁰ Decree for the Application of Coercive Measures, p.142. See fn.85.

⁹¹ Decree for the Application of Coercive Measures, p.18. See fn.85.

⁹² Bentele et al., 'Pending Investigation and Court Cases', p.84. See fn.81.

⁹³ Bentele et al., 'Pending Investigation and Court Cases', p.85. See fn.81.

2007, with the CIA agents being tried *in absentia*, but was postponed, pending a decision by the Constitutional Court about whether the prosecutors' investigations and the examining judge had violated state secrets protections.

At the request of prosecutors, the trial was reopened by Judge Oscar Magi in March 2008.⁹⁴ A year later, the Constitutional Court announced its decision and, siding with the government, ruled that prosecutors had violated state secrecy by using evidence seized from intelligence operatives.⁹⁵ It deemed inadmissible files of an Italian operative, and testimony by an Italian police officer, which implicated the CIA in the execution of Abu Omar's rendition. Despite the ruling, the Judge announced, in May 2009, that the criminal case would go forward.

4.2 *Arar v. Ashcroft*

The rendition of Canadian citizen Maher Arar is notable because he was on US soil when government officials made the decision to render him. In September 2002, Arar was detained at John F. Kennedy International Airport in New York, while making his way to a connecting flight to Canada.⁹⁶ He was searched without consent, denied the ability to speak to a lawyer, and interrogated by FBI agents and immigration authorities. Chained and shackled, he was transported to another building at the airport and held in solitary confinement overnight. Asked to 'volunteer' to be sent to Syria, Arar repeatedly refused out of fear that he would be tortured there. He was then taken to the Metropolitan Detention Center in Brooklyn, where he was interrogated further.

Arar was told that he was officially declared inadmissible to the country due to his alleged membership in a terrorist organisation, but he was not given the opportunity to contest this designation. After eleven days of detention, during which government officials repeatedly interfered with his ability to seek the advice of a lawyer whom his family had retained, Arar was chained again and flown to Jordan. There, he alleges, Jordanian authorities beat and interrogated him before handing him over to Syrian authorities.

Arar alleges that Syrian authorities subjected him to severe physical and psychological torture. He alleges that he was beaten all over his body with an electric cable and repeatedly threatened with further physical harm. Arar reports that he could also hear the screams of other prisoners being tortured. Arar describes being held in an underground grave-like cell that was cold and damp, lit only by a small opening in the ceiling, and frequently visited by rats. According to Arar, interrogations would last for up to 18 hours with his interrogators asking questions that strongly resembled those asked by US agents. By his account, the interrogations and torture stopped only when, in October 2002, Canadian officials inquired into whether Syria was holding him. A full year later, he was released and returned to his family in Canada.

⁹⁴ In May 2008, the government brought new proceedings before the Constitutional Court, this time suing Judge Magi, reportedly in an effort to halt the trial. Bentele et al., 'Pending Investigation and Court Cases', p.84. See fn.81.

⁹⁵ Rachel Donadio, 'Italian Court Upends Trial Involving CIA Links', *New York Times* 12 March 2009.

⁹⁶ Complaint and Demand for Jury Trial, *Arar v. Ashcroft*, 414 F. Supplement 2d 250 (Eastern District of New York, 22 January 2004). Available at http://ccrjustice.org/files/Arar%20Complaint_FINAL.pdf. Last accessed 23 June 2009. This section largely reproduces the description of Arar's experience presented in the legal filing.

In January 2004, the Center for Constitutional Rights filed a lawsuit pursuant to the Torture Victim Protection Act and the Fifth Amendment to the US Constitution, charging that former Attorney General John Ashcroft, and other government officials, conspired to torture Arar in violation of his constitutional right to due process and his right to be protected from torture under the UNCAT.⁹⁷ The Judge dismissed the case, stating that, even if wrongs were committed against Arar, he could not hold officials accountable, because he had to defer to national security and foreign policy considerations.⁹⁸ The case was appealed and argued on 9 November 2007.

In their brief to the appeals court, Arar's attorneys argued that, by sending Arar to Syria,⁹⁹ the US government had violated Arar's substantive due process rights under the Fifth Amendment not to be tortured, coercively interrogated, and arbitrarily detained in Syria, a country that, as the State Department acknowledges, has a long record of torturing prisoners.¹⁰⁰ In response, individual government officials argued that the case should be dismissed on the basis of the state secrets privilege.¹⁰¹ The Government argued, in its brief, that the lower court was correct in dismissing the case. It insisted that, 'as an alien outside the United States', Arar was not entitled to the due process protected by the Fifth Amendment 'regarding alleged injuries suffered in a foreign country.'¹⁰²

At the oral argument, the Government's lawyer argued that the 'constitutionally relevant harm' occurred outside the US and, therefore, the Constitution did not apply. Judge Robert D. Sack interrupted the lawyer with a terse reply: 'this is a form of outsourcing.' The Government's interpretation of the US officials' role in the abuses suffered by Arar runs counter to the UNCAT, the ICCPR, and the Refugee Convention. These treaties prohibit *refoulement* when there is a risk that the individual may face torture. Furthermore, according to international jurisprudence, individuals incur responsibility when they engage in actions that aid and abet a crime.

Nevertheless, in June 2008, the court ruled two to one to dismiss the case. The majority based its decision on its review of the statutory and constitutional claims and, thus, did not address the Government's assertion of the state secrets privilege. However, judicial deference on national security issues figured prominently in the court's opinion. The court's reasoning tracked the political question doctrine:

⁹⁷ Complaint and Demand for Jury Trial, *Arar v. Ashcroft*. See fn.96.

⁹⁸ Center for Constitutional Rights, *Arar v. Ashcroft* Synopsis. Available at <http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft>. Last accessed 23 June 2009.

⁹⁹ *Arar v. Ashcroft*, 532 F.3d 157, 181 (2d Cir. 2008), pp.196-197. The fact that Arar was detained for a period in Jordan, prior to being sent to Syria, did not appear to specially undermine Arar's claims. The court noted that Arar's transfer to Syria via Jordan was based on an agreement between the US and Syria, evidenced by a removal notice signed by the US Commissioner of the Immigration and Naturalization Service. The court did not appear to take issue with the fact that Arar was not sent directly to Syria.

¹⁰⁰ Brief for Plaintiff-Appellant, *Arar v. Ashcroft*, 06-4216-CV (2d Circuit, 12 December 2006) pp.3-4, 10-11. Available at <http://ccrjustice.org/files/Appellant's%20Brief,%2006-4216-cv.pdf>. Last accessed 23 June 2009.

¹⁰¹ Memorandum and Order, *Arar v. Ashcroft*, CV-04-0249 (Eastern District of New York, 16 February 2006), p.109. Available at <http://ccrjustice.org/files/EDNY%20Opinion%202.06.pdf>. Last accessed 23 June 2009.

¹⁰² Brief for the Official Capacity Defendants-Appellees and United States as *Amicus Curiae*, 06-4216-CV (2d Circuit, 22 February 2007), p.27. Available at <http://ccrjustice.org/files/US%20Appellee%20Brief%202.22.07.pdf>. Last accessed 23 June 2009.

we are compelled to defer to the determination of Congress as to the availability of a damages remedy in circumstances where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers.¹⁰³

Just two months after issuing its decision, the court announced *sua sponte* that the case would be reheard *en banc*.¹⁰⁴ At the rehearing in December 2008, remarks by the Judges reflected an awareness of the changing political climate. One Judge on the panel questioned the Government's lawyer about whether he might foresee a shift in the legal position maintained by the Justice Department once the new administration took office. The lawyer responded that he could not be sure and urged the court to decide the case, presumably because a reversal of some legal positions seemed likely. A few months later, however, at the oral argument for *Mohamed v. Jeppesen*, it became clear that a shift under the Obama administration was not in any way assured.

4.3 *Mohamed v. Jeppesen*¹⁰⁵

In 2007, the American Civil Liberties Union filed a lawsuit against Jeppesen Dataplan Inc., a corporation providing 'aviation logistical and travel service[s]'¹⁰⁶ to the CIA. The lawsuit was brought pursuant to the Alien Tort Statute on behalf of five individuals subjected to rendition. The lawsuit called attention to both the passive and wilful complicity of company employees in the rendition program. The complaint alleged that publicly available flight data implicated Jeppesen in more than seventy rendition flights and thus served as evidence that Jeppesen 'enable[d] the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they are placed beyond the reach of the law and subjected to torture and other forms of cruel, inhuman, or degrading treatment.'¹⁰⁷ The lawsuit charged that Jeppesen provided crucial services to the CIA to carry out the renditions, including providing a crew, filing flight plans with civil aviation authorities for 'dummy flights' so that real flights could avoid detection, and facilitating customs clearances with foreign countries.¹⁰⁸

In response to the lawsuit, the Government asked the federal court to dismiss the case, invoking the state secrets privilege and arguing that the subject matter of the case was a state secret.¹⁰⁹ In reply, attorneys for the rendition victims stressed that information readily available in the public domain undermined the Government's argument.¹¹⁰ Additionally, the attorneys argued that the

¹⁰³ *Arar v. Ashcroft*, 532 F.3d 157, 181 (2d Circuit 2008).

¹⁰⁴ Press Release for the Center for Constitutional Rights, 'In Extremely Rare Occurrence, Court Moves to Rehear Case of Canadian Rendition Victim Maher Arar', 14 August 2008. Available at <http://ccrjustice.org/newsroom/press-releases/extremely-rare-occurrence-court-moves-rehear-case-canadian-rendition-victim-m>. Last accessed 23 June 2009.

¹⁰⁵ *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (Northern District of California, 2009).

¹⁰⁶ First Amended Complaint, *Mohammed v. Jeppesen*, No 5:07-CV-02798-JW, 1 August 2007, p.7. Available at http://www.chrgj.org/docs/Amended_Jeppesen_Complaint_-_Final080107.pdf. Last accessed 23 June 2009.

¹⁰⁷ First Amended Complaint, *Mohammed v. Jeppesen*. See fn.106.

¹⁰⁸ First Amended Complaint, *Mohammed v. Jeppesen*. See fn.106.

¹⁰⁹ Reply Brief of Plaintiffs-Appellants, *Mohamed v. Jeppesen*, No 5:07-CV-02798-JW, 26 Sept. 2008. Available at http://www.aclu.org/pdfs/safefree/jeppesen_replybrief.pdf. Last accessed 23 June 2009.

¹¹⁰ Memorandum of Plaintiffs in Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mohamed v. Jeppesen*, No 5:07-CV-02798-JW, p.1. Available at

court was competent to hear the case and pointed to the extensive experience of federal courts in handling national security issues.¹¹¹ The court dismissed the case in February 2008.¹¹² The plaintiffs' attorneys filed a brief with the Court of Appeals in order to have the district court's dismissal of the case reversed.¹¹³ The case was reheard in February 2009.

At the rehearing, the Government lawyer continued the line of argumentation advanced by the Bush administration, invoking state secrets as a reason to dismiss the case against Jeppesen. In April, the court rejected the Government's reasoning and reinstated the case. It reasoned that dismissing the case on the basis of state secrets would effectively leave the state secret inquiry to the executive branch, concentrating power there. Dissatisfied with the ruling, the Government petitioned the court for a rehearing.¹¹⁴

5. Conclusion

This article argues that the US and Italy are currently in violation of binding legal obligations under the UNCAT to investigate allegations of torture resulting from extraordinary rendition and to prosecute those individuals responsible. The claims made in the cases described in this article aim to establish that (i) torture has occurred, (ii) Government officials made the decision to render individuals to countries with well-known histories of human rights violations, (iii) US and Italian intelligence agents participated directly in the act of abduction and rendition, and (iv) subcontractors working for the US Government enabled the CIA to carry out rendition flights. In spite of substantial documentation, objective evidence, and serious allegations of criminal conduct, the US and Italy have repeatedly moved to have these cases dismissed by the courts. These actions constitute a failure to satisfy the States' legal obligations under the 'prosecute or extradite' provision of the UNCAT.

In view of both the lack of political will for prosecutions and the use of state secrets and other doctrinal challenges in US and Italian courts, avenues by which rendition victims might obtain legal redress appear to be closed off. Nonetheless, the national courts of a third country may still provide a forum for advancing victims' claims regarding torture.

Much legal scholarship has analysed the potential of these courts to serve a vital role in implementing and enforcing human rights through the principle of universal jurisdiction.¹¹⁵ This long-standing principle received renewed attention following the efforts of Judge Baltazar Garzon to use it as the basis for prosecutions against Chilean dictator Augusto Pinochet in Spain. Naomi Roht-Arriaza, a professor of law at the University of California, Hastings College of Law,

http://www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_oppositionto_motiontodismiss.pdf. Last accessed 23 June 2009.

¹¹¹ Memorandum of Plaintiffs in Opposition to the United States' Motion to Dismiss, pp.46-48. See fn.110.

¹¹² American Civil Liberties Union, 'Court Decision Denies Extraordinary Rendition Victims Their Day in Court', 14 February 2008. Available at <http://www.aclu.org/safefree/rendition/34121prs20080214.html>. Last accessed 30 June 2009.

¹¹³ Brief of Plaintiffs-Appellants, *Mohamed v. Jeppesen*, No 5:07-CV-02798-JW, 30 June 2008. Available at http://www.aclu.org/images/torture/asset_upload_file274_35861.pdf. Last accessed 23 June 2009.

¹¹⁴ Petition for Rehearing or Rehearing *En Banc*, *Mohamed v. Jeppesen*, No 08-15693, 12 June 2009. Available at <http://washingtonindependent.com/wp-content/uploads/2009/06/petition-for-rehearing-en-banc-final.pdf>. Last accessed 22 June 2009.

¹¹⁵ Macedo (ed.), *Universal Jurisdiction*. See fn.8.

agrees that the parameters of universal jurisdiction need further definition, particularly in light of recent legislative and judicial decisions in countries, such as Spain and Belgium, that have effectively narrowed the scope of universal jurisdiction, arguably in ways that contradict the very essence of this principle.¹¹⁶ Nevertheless, national courts of third countries serve as important ‘backup institutions’ when domestic courts fail to prosecute perpetrators or when international criminal courts lack jurisdiction.¹¹⁷

The value of third country prosecutions lies not only in holding perpetrators of grave human rights crimes accountable, but also in the domestic impact of such efforts.¹¹⁸ In a dynamic process, described in both legal and social science literature, the threat of prosecution abroad has been seen to propel or to give renewed strength to efforts to investigate and prosecute perpetrators in their home countries.¹¹⁹ While third country prosecutions may be viewed as a last resort following failures to prosecute at home, once initiated they may, in turn, compel serious efforts by domestic institutions to address accountability.

¹¹⁶ Naomi Roht-Arriaza, ‘Universal Jurisdiction: Steps Forward, Steps Back’, (2004) *Leiden Journal of International Law* 17.

¹¹⁷ Kathryn Sikkink, ‘From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations’, Annual Meeting of American Political Science Association, August 2008, pp.10-11.

¹¹⁸ Sikkink, ‘From State Responsibility to Individual Criminal Accountability’, p.115; Roht-Arriaza, ‘Universal Jurisdiction’, see fn.116.

¹¹⁹ Roht-Arriaza, ‘Universal Jurisdiction’. See fn.116.