

## THE TREATMENT OF HIGH VALUE DETAINEES UNDER THE UNITED STATES' EXTRAORDINARY RENDITION PROGRAM: A CASE OF CRIMES AGAINST HUMANITY FOR THE INTERNATIONAL CRIMINAL COURT

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I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values.<sup>1</sup>

President Barack Obama (2014)

### I INTRODUCTION

The United States' ('US') treatment of suspected terrorists during its self-proclaimed 'global war on terror' ('GWOT') since the atrocities of 11 September 2001 ('9/11') has been scrutinised from a human rights perspective for over a decade. One such practice adopted by the government of the US as a response to the 9/11 attacks is the use of extraordinary rendition against suspects captured in the GWOT. This practice includes secret Central Intelligence Agency ('CIA') action in co-operation with other states targeting 'high value detainees' ('HVDs') for their alleged illegal use of force, or to detain them for the purpose of collecting 'actionable intelligence' on al-Qaeda and associates.<sup>2</sup> While 'extraordinary rendition' is not a legal term, it generally involves the abduction of a person from either US or foreign territory, and his or her transportation to a US or foreign detention facility.<sup>3</sup> The abductions generally take place covertly and are executed outside official legal frameworks, such as deportation or criminal proceedings. These individuals are generally held incommunicado, and are deprived of procedures to challenge their arrest, conditions of transfer and treatment in detention.<sup>4</sup> These abuses have been monitored by the United Nations

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1 President Barack Obama, 'Press Conference by the President' (Press Conference, 1 August 2014) <<https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>>.

2 Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2015) 778–9.

3 Leila Nadya Sadat, 'Shattering the Nuremberg Consensus: US Rendition Policy and International Criminal Law' (2008) 3(1) *Yale Journal of International Affairs* 65, 65.

4 *Ibid.*

(‘UN’) Committee against Torture,<sup>5</sup> the UN Working Group on Enforced or Involuntary Disappearances,<sup>6</sup> the UN Human Rights Committee,<sup>7</sup> regional bodies such as the Council of Europe<sup>8</sup> and other non-governmental organisations.<sup>9</sup>

There is no doubt that the extraordinary rendition program of the US entails a range of human rights abuses such as arbitrary arrest; lack of due process; torture or cruel, inhumane or degrading treatment; and deprivation of life and liberty. The international law focus on the extraordinary rendition program of the US to date has largely been through a human rights lens and from the perspective of the law of state responsibility – especially regarding complicit European states, as recent jurisprudence shows.<sup>10</sup> In the current context, the findings for state

5 Committee against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5 (19 December 2014) [11] (‘*CAT Concluding Observations*’). The Committee has called on the US to ‘[e]nsure that no one is held in secret detention anywhere under its de facto effective control’ and stated that it should ‘[a]dopt effective measures to ensure, in law and in practice, that all detainees are afforded all legal safeguards from the very outset of their deprivation of liberty’. Furthermore, the Committee called for ‘the declassification and prompt public release of the Senate Select Committee on Intelligence’s report on the CIA’s secret detention and interrogation programme with minimal redactions’. See also Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Conclusions and Recommendations of the Committee against Torture: United States of America*, UN Doc CAT/C/USA/CO/2 (25 July 2006).

6 See Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, 10<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/10/9 (25 February 2009) 11–88 [32]–[444].

7 Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, 100<sup>th</sup> sess, UN Doc CCPR/C/USA/CO/4 (23 April 2014) 3 [5] (‘*HRC Concluding Observations*’). The Committee notes with concern that ‘many details of the CIA programmes remain secret, thereby creating barriers to accountability and redress for victims’. See also Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America*, 87<sup>th</sup> sess, UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006) 3–5 [12]–[14].

8 See, eg, Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report* (Explanatory Memorandum II, 7 June 2007) 22–4 [112]–[122] <[http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf)>.

9 See, eg, Amnesty International, ‘USA: Crimes and Impunity – Full Senate Committee Report on CIA Secret Detentions Must Be Released, and Accountability for Crimes under International Law Ensured’ (Report, April 2015) <<https://www.amnesty.org/en/documents/amr51/1432/2015/en/>> (‘*Amnesty International Report Responding to the Senate Report*’); Amnesty International, ‘Breaking the Conspiracy of Silence: USA’s European “Partners in Crime” Must Act after Senate Torture Report’ (Report, January 2015) <<https://www.amnesty.org/en/documents/eur01/002/2015/en/>> (‘*Amnesty International Report on European States*’); Human Rights Watch, ‘World Report 2015’ (Report, 2015) 12–13 <<https://www.hrw.org/world-report/2015/>>; Open Society Justice Initiative, ‘Globalizing Torture: CIA Secret Detention and Extraordinary Rendition’ (Report, Open Society Foundations, 2013) <<http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>>; Human Rights Council, *Joint Written Statement Submitted by the American Civil Liberties Union, Centro de Estudios Legales y Sociales (CELS) Asociación Civil, Conectas Direitos Humanos, Washington Office on Latin America, Amnesty International, Human Rights Watch, International Federation for Human Rights Leagues, World Organisation against Torture, Nongovernmental Organizations in Special Consultative Status*, 29<sup>th</sup> sess, Agenda Item 4, UN Doc A/HRC/29/NGO/119 (29 June 2015).

10 See *Amnesty International Report on European States*, above n 9. There has only been limited domestic criminal prosecution of those involved in the extraordinary rendition program. See, eg, the *Abu Omar* case in Italy which resulted in the conviction of 23 Americans and two Italian intelligence agents on 4 November 2009 for Omar’s extraordinary rendition. Such prosecution of individuals for criminal

responsibility were initiated by the European Court of Human Rights in its landmark findings in *Husayn v Poland*,<sup>11</sup> *Al Nashiri v Poland*,<sup>12</sup> *El-Masri v The Former Yugoslav Republic of Macedonia*<sup>13</sup> and *Nasr v Italy*.<sup>14</sup> While there has been some recognition that the extraordinary rendition program may entail individual criminal responsibility under international criminal law as potential crimes against humanity or as war crimes,<sup>15</sup> to date this form of criminal responsibility has not received the amount of consideration and analysis it deserves.

On 9 December 2014, the US Senate Select Committee on Intelligence released a 500-page document<sup>16</sup> (a summary of the Committee's full report ('*SSCI Report*') is approximately 13 times longer), detailing the program of secret detention operated by the CIA from 2002 to 2009 pursuant to presidential authorisation given six days after the 9/11 attacks on the US. This heavily redacted report sheds more light on the extraordinary rendition program of the US, but does not portray the whole picture. In light of this additional piece of the puzzle, the question of whether these human rights abuses may also qualify as crimes – especially a case of crimes against humanity for the International

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responsibility remains the exception and not the norm. See Francesco Messineo, "Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* Case in Italy" (2009) 7 *Journal of International Criminal Justice* 1023. See also Rachael Donadio, 'Italy Convicts 23 Americans for CIA Renditions', *The New York Times* (online), 4 November 2009 <<http://www.nytimes.com/2009/11/05/world/europe/05italy.html?ref=hassanmustafaosamanasr>>.

- 11 (European Court of Human Rights, Chamber, Application No 7511/13, 24 July 2014). For a press release from the complainants' counsel, see Helen Duffy, '*Abu Zubaydah v Poland*: Historic ECtHR Judgement Condemns Poland for Its Role in the Extraordinary Rendition, Torture and Secret Detention of Guantanamo Detainee' (Press Release) <[http://www.rightsinpractice.org/new\\_detail2.php?new\\_id=26](http://www.rightsinpractice.org/new_detail2.php?new_id=26)>. The complainant is known as Abu Zubaydah.
- 12 (European Court of Human Rights, Chamber, Application No 28761/11, 24 July 2014).
- 13 [2012] VI Eur Court HR 263. However, enforcement of the judgment regarding individual measures at a domestic level remains an issue, as noted by the Council of Europe under its 'enhanced supervision' of the case. See Council of Europe, *Pending Cases: Current State of Execution* <[http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=el-masri&StateCode=MKD&SectionCode](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=el-masri&StateCode=MKD&SectionCode)>.
- 14 (European Court of Human Rights, Chamber, Application No 44883/09, 23 February 2016). The case is only available in French and Italian (with French being the official version). Information on the case is available in English through the Court's press release: see Registrar, European Court of Human Rights, 'The CIA's Abduction and Extrajudicial Transfer to Egypt of the Imam Abu Omar Infringing the Applicants' Rights under the Convention' (Press Release, ECHR 070 (2016), 23 February 2016) <<http://hudoc.echr.coe.int/eng-press?i=003-5307169-6607369>>.
- 15 See, eg, Manfred Nowak, United Nations Special Rapporteur on Torture, 'CIA: Extraordinary Rendition, Flights, Torture and Accountability: A European Approach' (Report, European Centre for Constitutional and Human Rights, January 2009) 9 <<https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports/articles/publications.html>>. Nowak briefly mentions in the Preface to the report that the extraordinary rendition program's 'gross and systematic human rights violations ... may even be considered crimes against humanity' (emphasis added): at 9; Jordan Paust, 'The US and the ICC: No More Excuses' (2013) 12 *Washington University Global Studies Law Review* 563, 572; Duffy, above n 2, 819; Patricio Galella and Carlos Espósito, 'Extraordinary Renditions in the Fight against Terrorism. Forced Disappearances?' (2012) 9(16) *Sur International Journal on Human Rights* 7.
- 16 Senate Select Committee on Intelligence, United States Senate, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (2014) <<http://www.intelligence.senate.gov/publications/committee-study-central-intelligence-agencys-detention-and-interrogation-program>> ('*SSCI Executive Summary*').

Criminal Court ('ICC') – merits a more thorough consideration. It is argued that, with the limited exception of those alleged terrorists captured in Afghanistan, or in connection with this situation, where the majority of scholars agree there is a non-international armed conflict in existence,<sup>17</sup> the GWOT cannot be categorised as an armed conflict. It would therefore not be legally sound to rely on charges of war crimes regarding the extraordinary rendition program. In the limited situation of Afghanistan, it may be feasible to bring charges of war crimes.<sup>18</sup> Nonetheless, charges of crimes against humanity in this context remain important as 'enforced disappearances of persons', a typical characteristic of the extraordinary rendition program, is not an option under articles 8(2)(c) and 8(2)(e) of the war crimes provisions relevant to non-international armed conflicts.<sup>19</sup> This article will analyse the extraordinary rendition program of the US and its authorised policy regarding the treatment of suspected terrorists deemed to be HVDs through their systematic abduction, transfer to 'black sites' for detention, and the subsequent use of coercive interrogation techniques – euphemistically called 'enhanced interrogation techniques' ('EITs'). This program has been assisted by various states, either willingly, or following strong encouragement by the US to participate in this secret network.<sup>20</sup> After outlining the relevant aspects of the CIA's detention and interrogation policy for so-called HVDs in Part II, Parts III and IV will examine the jurisdiction of the ICC over the US and the limits to this jurisdiction. Part V will consider the contextual elements required for crimes against humanity. Finally, Part VI will analyse the extraordinary rendition policy through specific charges of crimes against humanity under the *Rome Statute* – more specifically the charges of imprisonment or severe deprivation of liberty, torture and inhumane acts, and enforced disappearance of persons. This Part will also examine modes of liability.

The situation of the extraordinary rendition program of the US, in partnership with various states, merits examination by the ICC.<sup>21</sup> This global network of cooperating states requires a broad territorial scope to be applied to the situation,

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17 See Office of the Prosecutor, 'Report on Preliminary Examination Activities 2014' (Report, 2 December 2014) 19 [79] ('*Preliminary Examination Report*').

18 The *Preliminary Examination Report*, above n 17, notes that pursuant to the Presidential Directive of 7 February 2002, 'Taliban detainees were denied the status of prisoner of war under article 4 of the *Third Geneva Convention* but were required to be treated humanely': at 22 [94].

19 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 8(2)(c), 8(2)(e) ('*Rome Statute*').

20 The CIA has confirmed that 'to encourage governments to clandestinely host detention sites, CIA provided cash payments to foreign government officials ... CIA has independent authority to make subsidy payments', and there was 'nothing improper about such payments': *SSCI Executive Summary*, above n 16, 16–17.

21 It should be noted that the *Rome Statute* does not define a 'situation' or a 'case'. The Office of the Prosecutor has indicated that a 'situation' may be 'defined in terms of temporal, territorial or personal parameters'. Meanwhile, a 'case' is a narrower concept which 'comprise [of] specific incidents within a given "situation" during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute': Office of the Prosecutor, 'Draft Policy Paper on Case Selection and Prioritisation' (Report, 2016) 3. It is beyond the scope of this article to specifically identify individuals for prosecution. This article focuses on the application of international criminal law to broader classes of individuals thought to be responsible.

also resulting in the problem of fragmented jurisdiction. More specifically, there should be a case against the responsible individuals in the principal intelligence agency of the US – the CIA – from on or around 2002 to on or around 2009, regarding the 28 HVDs. Charges of crimes against humanity including imprisonment or severe deprivation of liberty; torture and inhumane acts; and the enforced disappearance of persons, should be identified due to the presidential authority given for the program of secret detention to be operated by participating individuals from this agency.<sup>22</sup> Further, additional cases arising from this situation should be brought against the nationals of various complicit states who have either directly or indirectly participated, aided and abetted, or contributed in some way to this extraordinary rendition program, and without which the program would not be operative. Those involved in this secret network should be held individually responsible – whether they be members of intelligence agencies, prison guards, medical personnel, state officials of various governments and private actors such as airport personnel or contractors. While information relating to complicit states remains limited,<sup>23</sup> there are some states which may be identified through strong circumstantial evidence,<sup>24</sup> restricting their claim of lack of knowledge. The very same factual findings on state responsibility should be used to bring separate cases of individual criminal responsibility at the ICC.<sup>25</sup>

## II THE US' PROGRAM AND POLICY FOR 'HIGH VALUE DETAINEES'

### A Developing the Practice of Extraordinary Rendition

The extraordinary rendition program of the US, as an investigative strategy for suspected terrorists, has been developed and refined over a series of US administrations. Numerous countries were known to participate in this program with the knowledge of hindsight.<sup>26</sup> Over the years, especially with the advent of

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22 *Presidential Memorandum of Notice* (17 September 2001).

23 Unless and until there is a full declassification of the entire *SSCI Report*, factual impediments are likely to become an obstacle to effective prosecution. This impediment has been recognised by those calling for a full declassification: see, eg, *CAT Concluding Observations*, above n 5. The Committee called for 'the declassification and prompt public release of the Senate Select Committee on Intelligence's report on the CIA's secret detention and interrogation programme with minimal redactions': at [11].

24 See *Husayn v Poland* (European Court of Human Rights, Chamber, Application No 7511/13, 24 July 2014) 195 [512], where the Court held that the weight of circumstantial evidence against Poland's alleged lack of knowledge of the black sites and illegal activity on its territory rendered its lack of knowledge implausible.

25 While an observation is made on the difference between state and individual responsibility, this article will only focus on the ICC's jurisdiction over individuals. It should be recalled that the ICC is not empowered to officially indict states or decide on issues of state responsibility as per *Rome Statute* art 25(4), which provides: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.

26 David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123, 124. It is worthwhile noting that due to secrecy, the program may still be occurring, but further facts are required to confirm or deny this.

the GWOT, extraordinary rendition practices have been developed and implemented.<sup>27</sup> Under the Clinton administration, it was reported that most extraordinary renditions were subject to strict procedures. The receiving country first needed an outstanding arrest warrant for the suspect.<sup>28</sup> Secondly, each extraordinary rendition was to undergo thorough administrative scrutiny prior to being authorised by senior government officials.<sup>29</sup> Thirdly, the local government would be notified.<sup>30</sup> Lastly, the CIA was required to seek an assurance from the receiving government that the individual rendered would not be ill-treated.<sup>31</sup> Due to the secretive nature of extraordinary renditions, the total number of cases at any point in time is difficult to determine<sup>32</sup> – yet there is broad agreement that the program significantly expanded since 9/11.<sup>33</sup> In part, the greater use of this practice can be credited to the expedited procedures authorised by President George Bush to grant greater flexibility to the CIA's activities. For example, in some cases, charges are only sometimes brought after the CIA has captured the suspect and requested co-operation.<sup>34</sup> More significantly, the presidential authorisation of 17 September 2001<sup>35</sup> gave the CIA approval to develop and experiment with a set of 'enhanced interrogation techniques' for the sole purpose of obtaining information from a group of detainees classified as HVDs.<sup>36</sup> Subsequently, on 1 August 2002, these oral authorisations were concretised in writing by the US Department of Justice Office of Legal Counsel ('OLC') and a memorandum was issued approving of the use of 10 identified EITs that served

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27 Sadat, 'Shattering the Nuremberg Consensus', above n 3, 66.

28 Jane Mayer, 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program', *New Yorker* (online), 14 February 2005 <<http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture>>.

29 See Stephen P Cutler, 'Building International Cases' (1999) 68(12) *FBI Law Enforcement Bulletin* 1, 5: 'Forcible return, known as extraordinary rendition, also may be an option but poses special considerations. ... The US Department of Justice prohibits forcible returns without prior approval by senior US government officials'.

30 See Mayer, above n 28, which details US co-operation with the Albanian intelligence service in 1998 to collect intelligence on five individuals suspected of being part of the Egyptian Islamic Jihad, followed by a transfer of those individuals to Egypt.

31 Tracy Wilkinson and Bob Drogin, 'Missing Imam's Trail Said to Lead from Italy to CIA', *LA Times* (online), 3 March 2005, 2 <<http://articles.latimes.com/2005/mar/03/world/fg-vanished3>>:

'Each one had to be built almost as if it's a court case in the United States', said [Michael] Scheuer, who from January 1996 to July 1999 ran the [CIA's] clandestine unit searching for Osama bin Laden. 'I always assumed if I had 15 lawyers' signatures, it was probably fine'.

32 See Mayer, above n 28. Mayer notes that Representative Markey complained that after repeated requests directed at CIA officials to provide an accurate count of the number of people transferred, '[t]hey refuse to answer. All they will say is that they're in compliance with the law'.

33 See Wilkinson and Drogin, above n 31; Sadat, 'Shattering the Nuremberg Consensus', above n 3, 66.

34 Dana Priest and Barton Gellman, 'US Decries Abuse but Defends Interrogations', *Washington Post* (online), 26 December 2002 <[http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356\\_4.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356_4.html)>. According to Priest and Gellman, 'five officials acknowledged, as one of them put it, "that sometimes a friendly country can be invited to "want" someone we grab". Then, other officials said, the foreign government will charge him [or her] with a crime of some sort'.

35 *Presidential Memorandum of Notice* (17 September 2001).

36 Committee on Armed Services, United States Senate, *Inquiry into the Treatment of Detainees in US Custody* (2008) <[http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final\\_April-22-2009.pdf](http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf)>.

as general guidelines for the determination of the legality of any additional EITs.<sup>37</sup> These EITs, a core practice of the extraordinary rendition program, were first implemented on Abu Zubaydah, who was labelled a HVD.

## B The Case of Abu Zubaydah and the Interrogation Techniques

The US government initially deemed Abu Zubaydah as a threat due to his alleged high ranking in al-Qaeda at the time of his capture in 2002, and his role in every significant al-Qaeda terrorist operation, including 9/11.<sup>38</sup> However, the government subsequently admitted that Abu Zubaydah did not hold the high position in al-Qaeda as initially alleged,<sup>39</sup> but continues to detain him without any charges. Abu Zubaydah was first abducted in Pakistan, transferred to a secret prison in Thailand, then to a secret prison in Poland, and from Poland to secret detention believed to be in Afghanistan, and finally to Guantanamo Bay.<sup>40</sup> In July 2002, Abu Zubaydah was in his fourth month of CIA custody when the CIA was preparing to subject him to an 'aggressive' phase of interrogation. This phase included, amongst other things, being subjected to more than 80 applications of a technique known as 'waterboarding' which had the effect of a mock execution by interrupted drowning.<sup>41</sup> The OLC at the US Department of Justice gave legal approval for this and nine other 'enhanced' techniques.<sup>42</sup> The 10 techniques authorised in this memorandum were: 'attention grasp'; 'walling'; 'facial hold'; 'facial slap (insult slap)'; 'cramped confinement'; 'wall standing'; 'stress positions'; 'sleep deprivation'; 'insects placed in a confinement box'; and 'the waterboard'.<sup>43</sup>

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37 Office of Legal Counsel, US Department of Justice, *Memorandum for Alberto R Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A* (Memorandum, 1 August 2002) <[www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf](http://www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf)>. This memorandum has been widely known as the 'torture memos' by the media and various non-governmental organisations such as Amnesty International and Human Rights Watch.

38 President Bush, *Remarks by the President at Thaddeus McCotter for Congress Dinner* (14 October 2002) <<https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html>>. President Bush describes Abu Zubaydah as 'one of the top three leaders' of al-Qaeda.

39 Robert Gates, United States Secretary of Defense, 'Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Discovery and Petitioner's Motion for Sanctions', Submission in *Husayn v Gates*, Civil Action No 08-cv-1360 (RWR), September 2009, 35-6. The US government 'does not contend that Petitioner [Abu Zbaydah] was a "member" of al-Qaida in the sense of having sworn bayat (allegiance) or having otherwise satisfied any formal criteria that either Petitioner or al-Qaida may have considered necessary for inclusion in al-Qaida. Nor is the Government detaining Petitioner based on any allegation that Petitioner views himself as part of al-Qaida as a matter of subjective personal conscience, ideology, or worldview': at 36. 'The Government has not contended in this proceeding that [Abu Zubaydah] had any direct role in or advance knowledge of the terrorist attacks of September 11, 2001': at 9.

40 *SSCI Executive Summary*, above n 16, 387–9 n 2190; *Amnesty International Report Responding to the Senate Report*, above n 9, 74–5.

41 *SSCI Executive Summary*, above n 16, 387–9 n 2190.

42 Office of Legal Counsel, US Department of Justice, *Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency Re: Interrogation of al Qaeda Operative* (1 August 2002) <<http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>>. See *SSCI Executive Summary*, above n 16, 409.

43 *SSCI Executive Summary*, above n 16, 409

On or around 8 July 2002, a member of the CIA Counter-Terrorism Centre's legal office drafted a letter to then Attorney-General John Ashcroft asking for a formal declination of prosecution, in advance, for any employees of the United States, as well as any other personnel acting on behalf of the United States, who may employ methods in the interrogation of Abu Zubaydah that otherwise might subject those individuals to prosecution.<sup>44</sup>

The letter acknowledged that the 'aggressive methods' put forward would be prohibited by the US's anti-torture law, with the possible exception of 'reliance upon the doctrines of necessity or of self-defense'.<sup>45</sup>

Abu Zubaydah, as at date of writing, is still held without charge in Guantanamo Bay since being detained on 28 March 2002.<sup>46</sup>

### C The Bush Administration and the *Rome Statute*

In May 2002, the Bush administration unsigned the *Rome Statute*. Commentators have asserted that the US feared the possibility of the ICC exercising jurisdiction over its nationals<sup>47</sup> – indeed, the timing of the unsigned coincided with plans of the US to commence interrogations using EITs.<sup>48</sup> Secretary of Defense Donald Rumsfeld stated that the ICC's 'flaws' were 'particularly troubling in the midst of a difficult, dangerous war on terrorism' as '[t]here is the risk that the ICC could attempt to assert jurisdiction over US servicemembers, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow'.<sup>49</sup> On 1 August 2002, three days before Abu Zubaydah was to face the 'aggressive' phase of his interrogation, the US Department of Justice advised the White House that the US' withdrawal of its signature to the *Rome Statute* meant that US interrogators could not be exposed to criminal investigation and prosecution with respect to the 'interrogations of al Qaeda operatives'.<sup>50</sup>

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44 Ibid 33.

45 Ibid.

46 *Amnesty International Report Responding to Senate Report*, above n 9, 74–5.

47 See, eg, Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003) 163–4.

48 On 6 May 2002, less than a month after the 60<sup>th</sup> ratification of the *Rome Statute*, which meant that the *Rome Statute* would come into force soon, the Bush administration notified the UN Secretary General that the US would not ratify the treaty. Subsequently, the US considered that it had 'no legal obligations' arising from having signed the treaty on 31 December 2000 under the Clinton administration: *ibid* 178–81. The *Rome Statute* came into force on 1 July 2002 – precisely one month before the Office of Legal Counsel's memorandum granting legal authorisation for the 10 EITs against Abu Zubaydah on 1 August 2002.

49 US Department of Defense, 'Secretary Rumsfeld Statement on the ICC Treaty' (News Release, 6 May 2002) <<http://archive.defense.gov/Releases/Release.aspx?ReleaseID=3337>>.

50 Letter from John C Yoo, Deputy Assistant Attorney-General, Office of Legal Counsel, US Department of Justice, to Alberto Gonzales, Counsel to the President, 1 August 2002 <<http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf>> ('*Legal Advice from Yoo*'). However, it is noteworthy that to the extent the crimes committed by the US in Afghanistan fall under the jurisdiction of the ICC, the Court will have territorial jurisdiction over such crimes as Afghanistan is a state party to the *Rome Statute*. This situation is currently being analysed by the Office of the Prosecutor for admissibility: see *Preliminary Examination Report*, above n 17, 18–24 [75]–[102].



## D Armed Conflict or Fight against Terrorism?

For present purposes, it is significant that the majority of academic opinion does not support the notion that the US is engaged in an armed conflict, either international<sup>51</sup> or non-international,<sup>52</sup> with alleged terrorists. For this reason, it is more feasible to argue that the policy of extraordinary rendition should be charged as a crime against humanity as there is no nexus requirement to any type of armed conflict.<sup>53</sup> To argue that there is a case for war crimes would require the existence of an armed conflict – currently not supported by the majority of legal opinion regarding the fight against terrorism. An argument could be made, however, that those HVDs captured in the context of the US-led invasion in Afghanistan, a situation widely considered as an armed conflict of a non-international character between the Afghan government supported by the pro-government forces of the International Security Assistance Force and US forces on the one hand, and the non-state armed groups of the Taliban and other non-state actors on the other, could suffice as potential cases of war crimes.<sup>54</sup>

## E The US' Attempts to Justify Secret Detention

On 6 September 2006, President Bush publicly admitted that the US government was detaining unspecified alleged terrorist 'enemy combatants' in secret detention centres in different locations of the world as part of the GWOT.<sup>55</sup> The President also announced on the same day that '[t]he United States does not torture', and referred to the signing into law of the *Detainee Treatment Act of 2005*,<sup>56</sup> which 'established the legal standards for treatment of detainees wherever they are held'.<sup>57</sup> However, this Act also contained a 'good faith impunity clause'.<sup>58</sup> The President explained that he was confirming the existence of the program as he wanted legislation to allow it to continue.

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51 See, eg. Duffy, above n 2, 394.

52 See, eg. Phillip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, UN Doc A/HRC/14/24/Add.6 (28 May 2010) 18–19 [53]–[56].

53 See Part V for more detail on the contextual elements for crimes against humanity.

54 *Preliminary Examination Report*, above n 17, 19.

55 President George W Bush, 'President Discusses Creation of Military Commissions to Try Suspected Terrorists' (Media Release, 6 September 2006) <<https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>>.

56 42 USC §§ 2000dd–200dd-2 (2006).

57 *Ibid.*

58 See *Amnesty International Report Responding to the Senate Report*, above n 9, 138 n 783:

Section 1004 of the *DTA* provides that in any civil or criminal case against any US agent 'engaging in specific operational practices, that involved detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted,' such an agent can offer as a defence that they 'did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful'. 'Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful'.

In June 2006, the US Supreme Court in *Hamdan v Rumsfeld*<sup>59</sup> held that among other things, common article 3 to the four *Geneva Conventions*<sup>60</sup> which had been incorporated into US law by the *Uniform Code of Military Justice*<sup>61</sup> applied to all detainees. Common article 3 has provisions that prohibit ‘outrages upon personal dignity’ and ‘humiliating and degrading treatment’, as well as torture and other cruelty. This applied to the situation of those detained under the extraordinary rendition program in question.

The Bush administration reacted to this judgment by having the federal *War Crimes Act of 1996*<sup>62</sup> amended retroactively to limit its scope of application through passing the *Military Commissions Act of 2006* (‘MCA’).<sup>63</sup> The MCA had the effect of not criminalising those who had committed offences under previous law, as President Bush had explained that ‘our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the *War Crimes Act*; simply for doing their jobs in a thorough and professional way. This is unacceptable’.<sup>64</sup>

The MCA was signed into law on 17 October 2006. It does not criminalise outrages upon personal dignity, including humiliating and degrading treatment as prohibited by common article 3.<sup>65</sup> The MCA also removes from federal courts the right to adjudicate habeas corpus reviews, rendering those detained indefinitely without charge no opportunity to challenge the lawfulness of their detention.<sup>66</sup> As President Bush emphasised, in his support of the MCA, ‘[t]his bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives’,<sup>67</sup> effectively approving the CIA’s secret detention program.

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59 548 US 557 (2006).

60 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (‘*First Geneva Convention*’); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (‘*Second Geneva Convention*’); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘*Third Geneva Convention*’); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Fourth Geneva Convention*’). The four conventions are collectively referred to as the ‘*Geneva Conventions*’.

61 10 USC §§ 801–946 (2006).

62 18 USC § 2441 (2006).

63 Pub L No 109-366, 120 Stat 2600 (2006).

64 Bush, ‘President Discusses Creation of Military Commissions to Try Suspected Terrorists’, above n 55.

65 MCA, Pub L No 109-366, § 6(b)(2), 120 Stat 2600, 2635 (2006). It has been noted by some that if these amendments are determined to be amnesty provisions, they may be inconsistent with international law due to the status of certain war crimes which includes grave breaches, torture and cruel, inhumane and degrading treatment as *ius cogens* norms. See Leila Nadya Sadat, ‘Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror’ (2007) 75 *George Washington Law Review* 1200, 1203 n 15.

66 MCA s 7(a).

67 Office of the Press Secretary, The White House, ‘President Bush Signs *Military Commissions Act of 2006*’ (Media Release, 17 October 2006) <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1.html>>.

## F Change of Administration Does Not Equate to Meaningful Changes

When President Obama took office on 20 January 2009, on his second day he signed Executive Orders to end secret detention and to ensure 'lawful interrogations' would take place.<sup>68</sup> The President ordered that torture be ended as a US practice by withdrawing the infamous 'torture memos' authorised by the Bush administration, and that CIA detention sites be closed.<sup>69</sup> Regretfully, the closure of CIA detention sites was accompanied by the qualification that 'short-term' or 'transitory' detentions are not covered by the order.<sup>70</sup> This appears to reserve the right to use rendition in future circumstances in certain undefined settings.<sup>71</sup>

On 16 April 2009, President Obama wrote to CIA employees notifying them that anyone who followed Department of Justice advice in using EITs would not face prosecution.<sup>72</sup> President Obama further noted that 'nothing will be gained by spending our time and energy laying blame for the past'.<sup>73</sup>

The policy of extraordinary rendition, as it has evolved through the different US administrations, provides an important background to determining whether the conduct undertaken by the US amounts to crimes against humanity.

## III THE JURISDICTION OF THE ICC OVER INDIVIDUALS OF THE US

This Part examines the ICC's competence to exercise jurisdiction over nationals of the US. The US is not a state party to the *Rome Statute* – but as will be explained, this does not prevent the ICC from exercising jurisdiction over nationals of the US where they have committed a crime under the Court's jurisdiction in certain circumstances. There are, however, limits to the exercise of such jurisdiction.

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68 See Barack Obama, *Ensuring Lawful Interrogations* (Executive Order No 13491, 22 January 2009) <[https://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations](https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations)>.

69 Ibid.

70 Ibid s 2(g): 'The terms "detention facilities" and "detention facility" in ... this order do not refer to facilities used only to hold people on a short-term, transitory basis'.

71 Office of Public Affairs, Department of Justice, 'Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President' (Media Release, 24 August 2009) <<http://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president>>.

72 'The men and women of the CIA have assurances from both myself, and from Attorney-General Holder, that we will protect all who acted reasonably and relied upon legal advice from the Department of Justice that their actions were lawful. The Attorney-General has assured me that these individuals will not be prosecuted and that the Government will stand by them': see Leon E Panetta, Director of the Central Intelligence Agency, 'Message from the Director: Release of Department of Justice Opinions' (Press Release, 16 April 2009) <<https://www.cia.gov/news-information/press-releases-statements/release-of-doj-opinions.html>>, quoting Letter from Barack Obama to Men and Women of CIA, 16 April 2009.

73 Ibid. For more detail regarding this aspect of the President's policy for not initiating prosecutions, see also *Amnesty International Report Responding to the Senate Report*, above n 9, 19.

### A ICC Jurisdiction over Nationals of Non-parties

Under the *Rome Statute*, the ICC has jurisdiction over nationals of non-parties in three situations. First, the ICC may prosecute such nationals where the UN Security Council refers such a situation to the ICC Prosecutor.<sup>74</sup> Secondly, where non-party nationals have committed a crime on the territory of a state that is a party to the *Rome Statute*, or has accepted the Court's jurisdiction for that particular crime, the non-party nationals will fall under the ICC's jurisdiction.<sup>75</sup> Thirdly, nationals of a non-party will be subject to ICC jurisdiction where the non-party has given consent to the exercise of jurisdiction with respect to a specific crime.<sup>76</sup> In the first two scenarios, the consent of the state of nationality is not a condition to the exercise of ICC jurisdiction.<sup>77</sup>

### B The ICC's Preliminary Jurisdictional Issues over the Extraordinary Rendition Program

In the situation of the extraordinary rendition program for HVDs, it should be noted that several of the US' complicit partner states as identified by Amnesty International<sup>78</sup> – whether they be the state in which the arrest and abduction took place, the state facilitating transfer between detention sites via aircraft, or the state of custody – are parties to the *Rome Statute*. Although the US is not a state party, according to article 12(2)(a), the ICC can exercise its jurisdiction in relation to the conduct of non-party state nationals alleged to have committed *Rome Statute* crimes on the territory of, or on board an aircraft registered in an ICC state party. According to Amnesty International, the states currently identified as involved in different stages of the situation, and are parties to the *Rome Statute*, include Poland, Lithuania, Djibouti, Romania, the United Kingdom ('UK'), Macedonia, Germany, Afghanistan, Georgia and Jordan.<sup>79</sup> The Court therefore has jurisdiction<sup>80</sup> over *Rome Statute* crimes committed on the territory of Poland or by its nationals as of 1 July 2002; on the territory of Lithuania or by its nationals as of 4 August 2003; on the territory of Djibouti or by its nationals as of 28 January 2003; on the territory of Romania or by its nationals as of 1 July 2002; on the territory of the UK or by its nationals as of 1 July 2002; on the territory of Macedonia or by its nationals as of 1 July 2002; on the territory of Germany or by its nationals as of 1 July 2002; on the territory of Afghanistan or by its nationals as of 1 May 2003; on the territory of Georgia or

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74 *Rome Statute* art 13.

75 *Rome Statute* arts 12(2)(a), (3).

76 *Rome Statute* arts 12(2)(a), (3).

77 Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618, 619.

78 *Amnesty International Report Responding to Senate Report*, above n 9, 74–9.

79 *Ibid.* There is some uncertainty about the identity of Jordan as a participating state.

80 This jurisdiction will also be qualified by the temporal jurisdiction specific to each state party's date of depositing its instrument of ratification, relative to the date of entry into force of the *Rome Statute* on 1 July 2002. See *Rome Statute* art 126; Coalition for the International Criminal Court, 'The Rome Statute in the World' (Fact Sheet, 10 November 2011) <[www.iccnw.org/documents/signatory\\_chart\\_Nov\\_2011\\_EN.pdf](http://www.iccnw.org/documents/signatory_chart_Nov_2011_EN.pdf)>.

by its nationals as of 1 December 2003; and on the territory of Jordan or by its nationals as of 1 July 2002. The remaining complicit states, as identified by Amnesty International, are unfortunately not parties to the *Rome Statute* and include: Thailand, Morocco, Pakistan, Iran, Egypt and the United Arab Emirates.<sup>81</sup> The Court therefore does not have jurisdiction over crimes committed on the territory of these states.<sup>82</sup> However, pursuant to the above analysis, the ICC has jurisdiction over the nationals of the US and those of complicit states not party to the *Rome Statute*, such as nationals of Thailand, Morocco and Pakistan, where they are found on state party territory having committed a *Rome Statute* crime.

Indeed, the fragmentation of the jurisdictional reach of this situation creates additional difficulties for prosecution. This is exacerbated by a concerted cover up of the network of perpetrators. The Office of the Prosecutor's recent statement in its current strategic plan, that '[a] lack of coordination of efforts from all actors makes it difficult to close the impunity gap for ICC crimes and related crimes, including transnational and organized crime and acts of terrorism',<sup>83</sup> certainly applies to this situation.

## IV LIMITS TO THE JURISDICTION OF THE ICC OVER US INDIVIDUALS

### A Immunity of State Officials

When it comes to official acts of the state, issues of immunity will arise.<sup>84</sup> It is beyond the scope of this article to discuss immunities in length, but for present purposes, it suffices to note that due to the development of the principle of universal jurisdiction with respect to the enforcement of international criminal law, the ICC may request the arrest and surrender of serving state officials with no entitlement to immunity *ratione personae*, and former officials where the alleged crime is one of universal jurisdiction.<sup>85</sup> Immunities could be a potential defence raised by those in the upper echelons of the Bush administration.

### B Article 98(2) Agreements

Apart from certain immunities under customary international law, particular international agreements may prevent the surrender of some non-party nationals present on the territory of ICC parties to the Court.

Article 98(2) of the *Rome Statute* states:

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81 *Amnesty International Report Responding to Senate Report*, above n 9, 74–9.

82 Regarding the possibility of war crimes, should extraordinary rendition cases arise in the context of Afghanistan, due to the UK's involvement in the US-led war in Afghanistan, the ICC will have jurisdiction over UK nationals or on UK territory as of 1 July 2002.

83 Office of the Prosecutor, 'Strategic Plan 2016–2018' (6 July 2015) 6.

84 For detail on immunity *ratione materiae* and immunity *ratione personae*, see Akande, above n 77, 637–42.

85 *Ibid* 642.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

This clause effectively allows parties, where a person on their territory is wanted by the ICC, to adhere to their obligations under bilateral international agreements to prevent the transfer of such persons to the ICC.<sup>86</sup> It is beyond the scope of this article to examine the controversies associated with article 98(2) agreements, such as the conflicting obligations of state parties under the ICC who have entered into such agreements with the US.<sup>87</sup> It suffices to note that article 98(2) agreements will potentially restrict the Court's ability to obtain custody of non-party nationals from the territory of certain state parties. As the ICC has no right to request the non-party to transfer the accused to the Court, article 98(2) agreements have the potential to limit the jurisdiction of the ICC over nationals of non-parties.<sup>88</sup>

## V WHETHER THE CONTEXTUAL ELEMENTS ARE MET IN THE EXTRAORDINARY RENDITION PROGRAM

### A The Context Element

A crime against humanity requires an unlawful act to be committed within a wider setting of particular circumstances. Article 7(1) of the *Rome Statute* prohibits particular acts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. According to Judge Kaul, the context is the critical element that brings the relevant acts within the jurisdiction of the Court.<sup>89</sup> Indeed, a victim who is attacked in the wider context of a widespread or systematic attack is likely to be much more vulnerable.<sup>90</sup> The victim cannot resort to 'ordinary social correctives' as they no longer function properly; nor does public disapproval of this criminal behaviour, ordinarily a robust tool against criminal conduct, become available.<sup>91</sup> Another reason supporting the elevated danger of an individual perpetrator's conduct in this context, as highlighted by Judge Cassese, is that an offender perpetrating a crime against humanity may not be concerned about punishment.<sup>92</sup>

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86 Ibid.

87 Ibid 642–6.

88 Ibid 645.

89 *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-19, 31 March 2010) [18] (Dissenting Opinion of Judge Hans-Peter Kaul) ('*Situation in the Republic of Kenya Decision*').

90 Kai Ambos and Steffen Wirth, 'The Current Law of Crimes against Humanity: An Analysis of *UNTAET Regulation 15/2000*' (2002) 13 *Criminal Law Forum* 1, 14.

91 Ibid.

92 *Prosecutor v Tadić (Judgment in Sentencing Appeals)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A and IT-94-1-A bis, 26 January 2000) [14] (Separate Opinion of Judge Cassese).

As such, the principle that there be a context element can be equated to the protection of human rights against the most heinous and dangerous violations.<sup>93</sup>

Applied to the extraordinary rendition program, it certainly is true that victims of this crime are much more vulnerable. Abu Zubaydah, for example, is a case in point: the first HVD to be subjected to all the EITs, including waterboarding, he has been detained incommunicado for over a decade and cannot resort to the ordinary justice system for assistance.<sup>94</sup> The secrecy of this program, coupled with the heightened public tension surrounding the need for counter-terrorism measures post-9/11 (also fuelled by political rhetoric to gain the public's approval), has significantly diminished the effect of public disapproval on such criminal conduct, providing a fertile context for crimes against humanity. Further, the CIA and senior officials involved appear undeterred by punishment due to the tactics their legal officers have deliberately crafted to legalise such conduct from their perspective.<sup>95</sup>

The definition of crimes against humanity also does not require a nexus with an armed conflict<sup>96</sup> or a discriminatory motive under customary international law.<sup>97</sup> More relevantly, it is articulated to include acts perpetrated against persons during peacetime. This is particularly relevant for present purposes as it is highly disputed whether the US is involved in an armed conflict.<sup>98</sup> The following analysis illustrates that establishing most of the contextual elements, with the exception of the 'population' requirement, would be relatively uncontroversial in the case of the treatment undertaken by the US of suspected terrorists pursuant to their policy of extraordinary rendition.

### B An 'Attack' Pursuant to a 'Policy'

Under article 7(2) of the *Rome Statute*, an attack is defined as 'a course of conduct involving the multiple commission' of prohibited acts, 'pursuant to or in furtherance of a State or organisational policy to commit such attack'. The acts are not required to constitute a military attack and can comprise of all forms of

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93 '[Crimes against humanity] are intended to safeguard basic human values by banning atrocities directed against human dignity': *Prosecutor v Kupreškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [547] ('*Kupreškić Judgment*').

94 Duffy, above n 2, 676–7. Duffy, part of Abu Zubaydah's legal team before the European Court of Human Rights in the currently pending *Abu Zubaydah v Lithuania* Application No 46454/11 notes that 'simple affidavits to bring legal action', such as habeas corpus petitions, are routinely denied.

95 See Part II(E).

96 However, note the singular instance of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, UN SCOR, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), which requires a nexus between crimes against humanity and armed conflict, and are for reasons particular to the situation in the Former Yugoslavia. See *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) [86] ('*Kunarac Appeals Judgment*').

97 Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3<sup>rd</sup> ed, 2014) 233–4; Ambos and Wirth, above n 90, 29.

98 See Part II(D). In the alternative, as noted above, where some terrorist suspects are legitimately captured in an armed conflict, for example in Afghanistan, and are put through the extraordinary rendition program, it could be an arguable case of war crimes under art 8 of the *Rome Statute*.

violence perpetrated against a civilian population.<sup>99</sup> Likewise, the jurisprudence of the ad hoc tribunals has also determined that an attack is not confined to the use of armed force, but can also include mistreatment of the civilian population.<sup>100</sup> Meanwhile, the policy element requires the state or organisation to actively promote or encourage the attack against the civilian population.<sup>101</sup> There can be no doubt that the US' secret abduction, detention and transfer of suspected individuals deemed to be 'high value detainees' to covert facilities around the world, on the one hand, and their subsequent interrogation using 'enhanced interrogation techniques', on the other, amounts to a course of conduct involving multiple commissions of acts pursuant to a state policy. Evidence of these commissions is available in the US government's publicly-acknowledged past conduct, and to the extent that is known through leaked documents,<sup>102</sup> the investigative work of non-governmental organisations, in addition to the recent *SSCI Executive Summary*. Indeed, it is difficult to envisage a clearer example of a course of conduct perpetrated under the approval of a specific policy – that is, the policy and conduct go hand in hand.

### C The Policy and the Form of Its Adoption

While the policy element of crimes against humanity has in the past generated much debate about whether it is necessary for this crime,<sup>103</sup> the author's view is that it is required as explicitly codified in the *Rome Statute*<sup>104</sup> and supported by customary law.<sup>105</sup> The current debate on the policy element focuses on the evidentiary threshold that is required for proof of this element. Early ICC jurisprudence has raised significant concerns regarding the Court's questionable tendencies to incorporate stringent new requirements in interpreting the policy element.<sup>106</sup> For example, the majority of the Pre-Trial Chamber in the *Gbagbo Adjournment Decision* requested direct proof of formal adoption of the

99 International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B) (adopted 9 September 2002) art 7 ('*Elements of Crimes*'). See also at General Introduction [3]. See also *Prosecutor v Katanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436, 7 March 2014) [1101] ('*Katanga Judgment*').

100 *Kunarac Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) [86].

101 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), art 7.

102 See, eg, International Committee of the Red Cross, 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' (Report, February 2007) ('*ICRC Report*').

103 For both sides of the argument, see Cryer et al, above n 97, 236–40. Also, for arguments against the element, see Guenael Mettraux, 'Crimes against Humanity and the Question of a "Policy" Element' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press, 2011) 142; Matt Halling, 'Push the Envelope – Watch It Bend: Removing the Policy Element and Extending Crimes against Humanity' (2010) 23 *Leiden Journal of International Law* 827, 840–1. For arguments in favour, see Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855; William Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law and Criminology* 953.

104 *Rome Statute* art 7(2)(a).

105 See Darryl Robinson, 'Crimes against Humanity: A Better Policy on "Policy"' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 705, 707–8.

106 *Ibid* 705; Cryer et al, above n 97, 239.



policy, such as dates of relevant meetings.<sup>107</sup> Previous jurisprudence, however, has constantly held that the deliberate adoption of a policy is not required, and that a policy may be inferred from events.<sup>108</sup> Opinions of jurists,<sup>109</sup> and decisions subsequent<sup>110</sup> to the *Gbagbo Adjournment Decision* on this matter appear to return to the approach of the original jurisprudence – that is, there is no need for a formal adoption of the policy. Robinson has asserted that the policy element does not require evidence of internal meetings and communications – it is fulfilled where the circumstances ‘render implausible the alternative hypothesis that the crimes against civilians were coincidental, unprompted acts of individuals on their own criminal initiatives’.<sup>111</sup>

Returning to the present case, the oratory of the Bush administration’s insistence that there is a GWOT, coupled with formal presidential authorisation to use EITs on certain individuals in this context, and the subsequent legal strategies to ensure those involved in the operations would not be punished, can leave no doubt about the Bush administration’s formal adoption of the extraordinary rendition policy.<sup>112</sup> Given the current trend in ICC jurisprudence that no formal adoption of the policy is required,<sup>113</sup> it is nonetheless a relevant factor that strengthens the evidentiary basis regarding the policy element in the context of the Bush administration. Although the policy was at its strongest during the Bush administration, the Obama administration’s subsequent reluctance to effectively investigate and punish those responsible also implicates his administration, and suggests that his government also had a policy of maintaining the extraordinary rendition program, given numerous HVDs are still in detention without charge in questionable conditions. This claim can be

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107 *Prosecutor v Gbagbo (Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-432, 3 June 2013) [44] (*‘Gbagbo Adjournment Decision’*). See Robinson, ‘Crimes against Humanity’, above n 105, 716–17. See also the strict approach applied in *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10-465-Red, 16 December 2011) [242]–[267]. Pre-Trial Chamber I declined to find a policy despite documentary evidence, oral testimony and circumstantial evidence.

108 Robinson, ‘Crimes against Humanity’, above n 105, 717; Cryer et al, above n 97, 240.

109 See, eg, Leila Nadya Sadat, ‘Crimes against Humanity in the Modern Age’ (2013) 107 *American Journal of International Law* 334; *Prosecutor v Gbagbo (Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer)* (International Criminal Court, Appeals Chamber, Case No ICC-02/11-01/11-534, 9 October 2013).

110 *Katanga Judgment* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436, 7 March 2014). See especially at [1094]–[1116]. This decision, subsequent to the controversial *Gbagbo Adjournment Decision*, notes that policy does not need to be formalised and can be inferred from circumstances. Furthermore, the Pre-Trial Chamber, in its confirmation of the charges, has held that proof of planning is relevant but not necessary, and that the policy does not need to reflect a consolidated purpose or motive: *Prosecutor v Gbagbo (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) (*‘Gbagbo Confirmation of Charges’*).

111 Robinson, ‘Crimes against Humanity’, above n 105, 720.

112 *Gbagbo Adjournment Decision* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-432, 3 June 2013) [44] indicated that evidence of the specific manner in which the policy was adopted is a requirement.

113 See above n 108–10.

inferred from the Obama administration's conduct<sup>114</sup> if the current trend in ICC jurisprudence regarding the evidentiary burden for proof of policy is continued. Furthermore, it is implausible that the extraordinary rendition of specific individuals deemed to be HVDs were coincidental, haphazard and sporadic acts of abduction, detention and interrogation so as to be categorised as ordinary crimes in light of the political context focusing on combating terrorism.

#### D 'Attack'

In addition to the above requirements, to establish an 'attack', it is not necessary to prove the existence of additional acts beyond those articulated in article 7(1) of the *Rome Statute*.<sup>115</sup> Although in some cases the prosecution may depend on additional acts beyond those charged to prove that an attack occurred,<sup>116</sup> this is not strictly required. The prohibited acts may in themselves constitute the broader attack,<sup>117</sup> on the condition that the other contextual elements are fulfilled. In the present situation, the multiple acts of abducting individuals deemed to be HVDs and transferring them to secret detention facilities around the world<sup>118</sup> (in addition to the US' very own Guantanamo Bay), coupled with the use of EITs as an interrogation technique, should suffice to constitute the attack. The consideration of whether or not the relevant acts constitute the prohibited acts of mistreatment is relatively uncontroversial and will be considered below in Part VI.

#### I *The Disjunctive: 'Widespread or Systematic'*

Similar to the approach taken to the term 'any civilian population', the drafters of the *Rome Statute* also did not define the terms 'widespread' or 'systematic' attacks.<sup>119</sup> The International Criminal Tribunal for Rwanda ('ICTR')

114 When the Obama administration initially came to power, there seemed to be a shift in approach where the 'war on terror' concept was abandoned. However, on 21 May 2009, President Obama stated: 'Now let me be clear: We are indeed at war with al Qaeda and its affiliates': Barack Obama, The White House Office of the Press Secretary, 'Remarks by the President on National Security' (Press Release, 21 May 2009) <<https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>>. This position was subsequently affirmed by the US government's legal position in later litigation and public speeches. See, eg, Harold Koh, Legal Adviser to the Department of State, 'The Obama Administration and International Law' (Speech delivered at the Annual Meeting of the American Society of International Law, 25 March 2010) <<http://www.state.gov/s/l/releases/remarks/139119.htm>>. See also Duffy, above n 2, 389–90.

115 *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [75] ('*Bemba Decision*').

116 See, eg, *Prosecutor v Ntaganda (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/04-02/06-309, 9 June 2014) [23].

117 Cryer et al, above n 97, 242.

118 Some known secret detention facilities include Detention Site Blue (Poland), Detention Site Green (Thailand) and Detention Site Violet (Lithuania): see *Amnesty International Report Responding to Senate Report*, above n 9, 23–6.

119 Darryl Robinson, 'The Elements of Crimes against Humanity' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 57, 77–8.

and the International Criminal Tribunal for the Former Yugoslavia ('ICTY') have both repeated on numerous occasions that an attack is not required to be widespread *and* systematic, rather, only *either* widespread *or* systematic.<sup>120</sup> Drafters of the *Rome Statute* agreed that a stringent threshold test was necessary for the requirement that the attack be 'widespread or systematic' to ensure that not every inhumane act amounts to a crime against humanity.<sup>121</sup>

(a) *Systematic Attack*

Pursuant to the *Tadić Judgment*, a systematic attack requires the existence of a 'pattern or methodical plan'.<sup>122</sup> The *Akayesu Judgment* defined a systematic attack as 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.<sup>123</sup> This added to the *Tadić Judgment* definition requirements that the organisation of the attack be 'thorough' and that 'substantial resources' be utilised.<sup>124</sup> It has been noted that it is unclear from where these terms have been imported, and thus, they should not be regarded as strict requirements of a systematic attack, but instead, as an illustration of the representative situations in which an attack exists.<sup>125</sup> Under the jurisprudence followed by the ICC, 'systematic' refers to the 'organised nature' of the acts and the 'improbability of their random occurrence'.<sup>126</sup> It has also been proposed that the systematic nature of the attack is constituted by the *guidance* given to the individual perpetrators as to the planned object of attack, that is, the group of victims.<sup>127</sup>

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- 120 See *Prosecutor v Tadić (Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [646]–[648] ('*Tadić Judgment*'); *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [579] ('*Akayesu Judgment*'); *Prosecutor v Kayishema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 12 May 1999) [123]; *Prosecutor v Rutaganda (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, 6 December 1999) [67]–[68]; *Prosecutor v Blaskić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [207] ('*Blaškić Judgment*'); *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23 and IT-96-23/1, 22 February 2001) [427] ('*Kunarac Judgment*'); *Prosecutor v Kordić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [178] ('*Kordić Judgment*'); *Prosecutor v Bagilishema, (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) [77].
- 121 Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43, 47.
- 122 *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [648].
- 123 *Akayesu Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [580].
- 124 Ambos and Wirth, above n 90, 18.
- 125 *Ibid.*
- 126 *Kunarac Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) [94]. This formulation was later used by the ICC in *Prosecutor v Harun (Decision on Prosecution Application under Article 58(7) of the Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07-1, 27 April 2007) [62].
- 127 Ambos and Wirth, above n 90, 20.

*(b) Widespread Attack*

The majority of the decisions from the ad hoc tribunals concentrate on the scale of the attack or on the number of victims.<sup>128</sup> The *Tadić Judgment* Trial Chamber defined widespread attack as referring ‘to the number of victims’.<sup>129</sup> Likewise, the *Blaškić Judgment* explained that ‘[a] crime may be widespread or committed on a large-scale by “the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude”’.<sup>130</sup> The *Akayesu Judgment* formulated a longer and more complicated definition, requiring a ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’.<sup>131</sup> It can be concluded that a widespread attack only requires a large number of victims, which, as highlighted in the *Blaškić Judgment*, can also be attacked by a single act ‘of extraordinary magnitude’.<sup>132</sup> The extra elements to this basic definition in the *Akayesu Judgment* do not make a significant contribution and may be said to be merely descriptive.<sup>133</sup> Regarding the number of victims, the ad hoc tribunals’ jurisprudence suggest that a *larger* number of victims is required for a widespread attack than for a systematic attack.<sup>134</sup>

*(c) The Extraordinary Rendition Program: A ‘Systematic Attack’*

Although the two conditions are phrased disjunctively, some commentators contend that the extended notion of ‘attack’ under article 7(2) of the *Rome Statute* essentially requires at least some minimal aspect of each requirement.<sup>135</sup> If this interpretation is followed, the current case of extraordinary rendition may not fulfil these elements, as the 28 HVDs may not reach the quantitative requirement of ‘widespread’ that is to be minimally incorporated into the notion of ‘attack’. On the other hand, if the much more widely accepted disjunctive interpretation of ‘widespread attack’ or ‘systematic attack’ is adopted, while the situation of the 28 HVDs may not be a clear case of a ‘widespread attack’, there is a strong case that it is a ‘systematic attack’. Prominent reports have detailed the extraordinary rendition program of the CIA as a ‘systematic cover-up’ due to the highly organised nature of this program.<sup>136</sup> Indeed, it is difficult to deny that the attacks

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128 Ibid.

129 *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [648].

130 *Blaškić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [206], quoting ‘Report of the International Law Commission to the General Assembly on the Work of Its Forty-Eighth Session (6 May – 26 July 1996)’ [1996] II(2) *Yearbook International Law Commission* 15, 95.

131 *Akayesu Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [580].

132 Ambos and Wirth, above n 90, 21.

133 Ibid.

134 Ibid.

135 *Rome Statute* art 7(2) requires ‘multiple commission of acts ... pursuant to or in furtherance of a state or organizational policy’ (emphasis added). See Cryer et al, above n 97, 234–5; Halling, above n 103, 836; Clare Henderson, ‘Australia’s Treatment of Asylum Seekers: From Human Rights Violations to Crimes against Humanity’ (2014) 12 *Journal of International Criminal Justice* 1161, 1168.

136 See Marty, above n 8.

were carried out pursuant to a preconceived policy with substantial resources to detain the HVDs for the purpose of intelligence gathering via certain coercive interrogation techniques through a network of complicit states. Moreover, far from occurring randomly, such conduct was the product of implementing the policy previously detailed, and comprehensive guidance was given to those on the ground as to the target of the attack – that is, carefully identified terrorist suspects with alleged intelligence value classified as HVDs.

Interpreted in this manner, while there are some controversies regarding the sufficiency of 28 HVDs fulfilling the quantitative requirement of the number of victims, and therefore the ‘population’ requirement to satisfy the seriousness aspect of a crime against humanity, it is arguable that the fulfilment of the ‘systematic attack’ aspect mitigates this concern. This, in itself, is arguably sufficient to fulfil the underlying seriousness or gravity concern that distinguishes an ordinary crime from a crime against humanity. While an arguable position, whether this argument is strong enough to persuade judges of the ICC is still uncertain.

### E ‘Any Civilian Population’

The drafters of the *Rome Statute* did not define the meaning of ‘civilian population’ and preferred the definition, interpretation and application of this term to be developed by the Court’s jurisprudence.<sup>137</sup> Nevertheless, an attack against a ‘population’ is held to imply some element of scale and reflects the collective nature of the object of the attack.<sup>138</sup> While the reference to ‘population’ implies that the attack must be of a collective nature, there is no requirement that all members of the population must be targeted,<sup>139</sup> or that the victims are targeted because they represent a particular population.<sup>140</sup> According to the ICTY,

[i]t is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals.<sup>141</sup>

In other words, an attack against a civilian population encompasses ‘targeting individuals on a non-individualised or collective basis’.<sup>142</sup> An outbreak of similar crimes that are merely temporally and geographically linked will not meet the

137 Robinson, ‘Elements of Crimes against Humanity’, above n 119, 78. Robinson notes: ‘[m]ost delegations quickly agreed that this was too complex a subject and an evolving area in the law, better left for resolution in case-law’.

138 *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [644]: ‘the emphasis is not on the individual victim but rather on the collective’.

139 *Ibid*; *Kunarac Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23 and IT-96-23/1, 22 February 2001) [424].

140 Simon Chesterman, ‘An Altogether Different Order: Defining the Elements of Crimes against Humanity’ (2000) 10 *Duke Journal of Comparative and International Law* 307, 325; *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-93-1-A, 15 July 1999) [305] (*‘Tadić Appeals Judgment’*).

141 *Kunarac Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) [90].

142 David Luban, ‘A Theory of Crimes against Humanity’ (2004) 29 *Yale Journal of International Law* 85, 104.

threshold for a crime against humanity.<sup>143</sup> The ICC has held in *Situation in the Republic of Kenya Decision* that the potential victims are ‘groups distinguished by nationality, ethnicity or other distinguishing features’.<sup>144</sup> Notwithstanding this, there does not seem to be a discriminatory intent requirement.<sup>145</sup> Rather, there appears to be a narrower characterisation of the ICC’s previous rulings that potential civilians ‘could be of any nationality, ethnicity or other distinguishing features’,<sup>146</sup> and additionally, protection is provided ‘regardless of their nationality, ethnicity or other distinguishing feature’.<sup>147</sup>

Under the policy of the US government, especially the Bush administration, all suspected terrorists affiliated with al-Qaeda in the GWOT, and classified as a HVD are subject to abduction, transfer to secret prisons in clandestine locations around the world with incommunicado detention, and exposed to the different combinations of EITs during interrogation. These common characteristics indicate that the HVDs are a specifically targeted group. Even with the application of the potentially narrower characterisation articulated in the *Situation in the Republic of Kenya Decision*, there are strong grounds to conclude that the US government’s classification of suspected terrorists as HVDs, and their subsequent treatment, amounts to a ‘distinguishing feature’ that specifically targets this group of individuals. As previously discussed, the GWOT does not constitute an armed conflict. Where there is no armed conflict, there can only be ‘civilians’. As noted by Robinson, the ‘law on the status of combatants as victims of crimes against humanity [is still developing], and ... that all persons are “civilian” when there is no armed conflict’.<sup>148</sup> Under this analysis, contrary to the legal advice given by Yoo that the conduct of the US in this regard against al-Qaeda is ‘an attack on a non-state terrorist organization, [and] not a civilian population’,<sup>149</sup> there is no doubt that the individuals classified as HVDs, and forcefully put through the extraordinary rendition program due to this classification, are of a civilian nature. The controversial issue is whether these HVDs are sufficient in number to constitute a ‘population’ – an issue discussed above in Part V(D)(1).

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143 Most jurists agree that the ‘high crime rate’ scenario, that is, a state with high crime such as the South Africa of today with thousands of murders each year, is not a crime against humanity. This is because assuming no state or organisation is encouraging the crimes, either passively or actively, it is merely a case of ‘elevated domestic crime’: Robinson, ‘Crimes against Humanity’, above n 105, 707–8.

144 (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-19, 31 March 2010) [81].

145 See Sadat, ‘Crimes against Humanity’, above n 109, 360.

146 *Bemba Decision* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [76] (emphasis added).

147 *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-717, 30 September 2008) [399] (emphasis added).

148 Robinson, ‘Elements of Crimes against Humanity’, above n 119, 78 (emphasis added).

149 *Legal Advice from Yoo*, above n 50. However, even if detainees were captured in the context of a non-international armed conflict, and as per the Presidential Directive of 7 February 2002, denying all Taliban detainees the status of prisoner of war under art 4 of the *Third Geneva Convention*, there is still the requirement that they be treated humanely under common article 3 to the four *Geneva Conventions*.

### 1 Determining the 'Population' in the Extraordinary Rendition Program

The findings of the *SSCI Executive Summary* confirm that since 9/11, as at 27 June 2013, the CIA had detained at least 112 individuals in the Agency's detention and interrogation program.<sup>150</sup> But for present purposes, on 1 January 2006, it was determined that there were 28 HVDs in CIA custody.<sup>151</sup> The Report also establishes that, on 5 May 2011, the CIA identified 25 'mid-value and high-value detainees' which are divided into two categories.<sup>152</sup> It appears that while there were approximately 112 detainees involved in the entirety of the CIA's detention and interrogation program, a much more select group of individuals out of this already exclusive group of detained individuals were targeted for the application of the different combinations of the EITs due to their perceived knowledge on al-Qaeda operations. The difficulty of determining the exact number of overall detainees involved in this program, as evidenced by the clandestine nature of the program (equally reflected in the *SSCI Executive Summary*, in which unredacted parts illustrate the CIA's reluctance to conclusively establish the specific number of overall detainees at any given point in time), also gives reason to question the Report's determination of the specific number of HVDs at any given point in time. The *ICRC Report* documents its questioning of 14 HVDs located at Guantanamo Bay as at 2007 – a numerical fact confirmed by President Bush's public announcement on 6 September 2006.<sup>153</sup> This public announcement coincided with the *SSCI Executive Summary's* disclosure that in early January 2006, there were high-level discussions regarding the transfer of some of the HVDs to Guantanamo Bay due to 'DETENTION SITE VIOLET in Country [redacted] would be closed in [redacted] 2006'.<sup>154</sup> Unless and until there is full disclosure of the entire SSCI Committee Study of the CIA's Detention and Interrogation Program, coupled with an effective investigation of those involved,<sup>155</sup> this article will base its ongoing analysis on the fact that there are 28 HVDs.

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150 See *SSCI Executive Summary*, above n 16, 14. When the CIA provided its response to the *SSCI Executive Summary*, the CIA had not made a determination of the number of individuals it had detained, other than to assert that the discrepancy between past CIA representations that there were fewer than 100 detainees and the Committee's determination that there were at least 119 CIA detainees 'does not impact the previously known scale of the program', and that '[i]t remains true that approximately 100 detainees were part of the program; not 10 and not 200': at 14 n 28.

151 Ibid 156 n 954.

152 Ibid 390. According to the *SSCI Executive Summary*, above n 16, 12 detainees were labelled as the most important due to their perceived intimate knowledge of Abu Ahmad's link to Bin Ladin (Tier 1), of which nine of them would be subjected to the CIA's enhanced interrogation techniques. Two of these nine were subjected to the waterboard interrogation technique in addition to other EITs. The other 13 detainees were perceived as only possessing 'general information on Abu Ahmad' (Tier 2) and were subjected to the CIA's other enhanced interrogation techniques.

153 *ICRC Report*, above n 102, 3.

154 *SSCI Executive Summary*, above n 16, 156 n 954.

155 A call echoed by the UN Human Rights Committee, in which it recently recommended that the US 'declassify and make public the report of the [SSCI] into the CIA secret detention programme', and many NGOs such as Amnesty International. See *HRC Concluding Observations*, above n 7, 3 [5]; *Amnesty International Report Responding to the Senate Report*, above n 9. See also Mads Andenas et al, *Open Letter by Special Procedures Mandate-Holders of the United Nations Human Rights Council to the*

## F Mens Rea

Article 7(1) of the *Rome Statute* requires the acts to be committed ‘with knowledge of the attack’. The General Introduction to the *Elements of Crimes* for the ICC explains that ‘[w]here no reference is made in the *Elements of Crimes* to a mental element ... it is understood that the relevant mental element ... set out in article 30 [of the *Rome Statute*] applies’.<sup>156</sup> However, knowledge of the attack is mentioned individually in the *Elements of Crimes* for each of the listed prohibited acts forming crimes against humanity. Accordingly, it seems that the drafters of the *Elements of Crimes* considered knowledge of the attack to be a requirement independent of the general provision in article 30 of the *Rome Statute*.<sup>157</sup> This means that the knowledge requirement must be interpreted according to the customary international law standard of knowledge.<sup>158</sup> The ad hoc tribunals have come to the consensus that the perpetrator must know that the attacks were related to the civilian population.<sup>159</sup> As the *Tadić Judgment* has held: ‘the perpetrator must know that there is an attack on the civilian population, [and] know that his [or her] act fits in with the attack’.<sup>160</sup> This wording, confirmed by other decisions,<sup>161</sup> implies that the perpetrator is not required to have detailed knowledge of the specifics of the attack, but only needs to be aware of the risk that such an attack exists.<sup>162</sup> Furthermore, the *Elements of Crimes* states that no proof is required ‘that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization’.<sup>163</sup> This interpretation of the knowledge requirement is also consistent with the rationale of the offence of crimes against humanity – the destructive nature peculiar to this crime should only require that the perpetrator know of the context related to the attack which increases the danger of their conduct, or makes their

*President of the United States of America* (Open Letter, 26 November 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15347&LangID=E>>.

156 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), General Introduction [2].

157 Ambos and Wirth, above n 90, 40. Article 30 of the *Rome Statute* states that, unless otherwise provided, the mental elements required for individual criminal responsibility are ‘intent and knowledge’. More relevantly, ‘knowledge’ means ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’.

158 Ambos and Wirth, above n 90, 40.

159 *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [659]; *Kupreškić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [557]; *Blaškić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [244]; *Kunarac Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23 and IT-96-23/1, 22 February 2001) [434]; *Kordić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [185].

160 *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [659].

161 *Kunarac Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23 and IT-96-23/1, 22 February 2001) [434]. It notes that the knowledge requirement does not ‘entail knowledge of the details of the attack’.

162 Ambos and Wirth, above n 90, 41.

163 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), Introduction to art 7.



conduct a part of the crimes of others.<sup>164</sup> For example, it will be sufficient if the perpetrator is aware that their conduct is part of a collective criminal conduct which makes the victims more vulnerable.<sup>165</sup>

It would be extremely difficult for the US government and its complicit partner states to deny knowing that the individual acts of abduction, transfer, detention and interrogation constituted part of the broader attack. These acts manifested the implementation of the broader policy. It is also arguable that nationals of complicit states had knowledge, at some point in time either before or during the attack, of the facts related to the attack so that they understood their conduct was part of a larger collective criminal conduct (ie, the extraordinary rendition program). While complicit state officials initially denied any knowledge of wrongdoing or knowledge of the facts surrounding the program, it is increasingly difficult for them to deny any knowledge given the large amounts of public information available regarding the extraordinary rendition program.<sup>166</sup> Furthermore, former state officials of some complicit states have now come out confessing their knowledge of the wider facts underpinning individual acts of abduction, transfer, detention and interrogation which ultimately formed part of the broader attack.<sup>167</sup> For example, Ioan Talpes, former head of the Romanian intelligence service (1992–97) and national security adviser to then President Ion Iliescu (2000–04), has acknowledged co-operation with the CIA regarding the operation of ‘one or two’ detention facilities in Romania where people were ‘probably’ detained between 2003 and 2006, and suffered inhumane treatment.<sup>168</sup>

The above analysis illustrates that most of the contextual elements of a crime against humanity under article 7 of the *Rome Statute* can be fulfilled relatively uncontroversially. However, satisfying the requirement of ‘population’, though not impossible, may prove more difficult to accomplish. The following Part will consider the specific charges of crimes against humanity that should be brought in this situation.

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164 Ambos and Wirth, above n 90, 41.

165 Ibid.

166 The European Court of Human Rights has

found that, given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, [Poland] ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the *Convention*.

*Husayn v Poland* (European Court of Human Rights, Chamber, Application No 7511/13, 24 July 2014) [512].

167 See *Amnesty International Report on European States*, above n 9.

168 Ibid 13 n 37. After years of official denials, Talpes confirmed to *Der Spiegel* that there was indeed co-operation with the CIA regarding the operation of detention facilities: see Kate Connolly, ‘Romanian Ex-Spy Chief Acknowledges CIA Had “Black Prisons” in Country’, *The Guardian* (online), 14 December 2014 <<https://www.theguardian.com/world/2014/dec/14/romania-cia-black-prisons-ioan-talpes>>.

## VI POLICY ANALYSIS, CORRESPONDING CHARGES AND MODES OF LIABILITY

The extraordinary rendition program, as explained above, generally comprised of four distinct types of conduct – (i) forced abduction of the identified HVD; (ii) detention in a secret facility generally operated by the CIA in co-operation with a foreign partner state where not in Guantanamo Bay; (iii) transfer to other detention facilities on CIA or foreign partner state operated aircraft; and (iv) interrogation to obtain intelligence deemed important in the GWOT through harsh interrogation methods including the use of EITs. Such a program has long been characterised by human rights bodies as violating various human rights protections, such as against arbitrary deprivation of liberty, torture, and cruel, degrading and inhumane treatment. It has also been linked as a situation of enforced disappearances.<sup>169</sup> There is no doubt that such a program entails flagrant abuses of human rights, and fulfilling the requirements for charges of crimes against humanity for imprisonment or severe deprivation of liberty;<sup>170</sup> torture;<sup>171</sup> inhumane acts;<sup>172</sup> and enforced disappearance of persons<sup>173</sup> would seem likely to succeed.

### A ‘Imprisonment or Other Severe Deprivations of Physical Liberty’

The imprisonment must be arbitrary to amount to a crime against humanity.<sup>174</sup> Violations of the provisions on arbitrary detention in the *International Covenant on Civil and Political Rights*<sup>175</sup> do not automatically mean that elements of article 7(1) of the *Rome Statute* will be fulfilled.<sup>176</sup> Article 7(1)(e) of the *Rome Statute* prohibits ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’. The requirement of ‘arbitrary’ still requires certain thresholds to be fulfilled, such that minor procedural defects would not expose those responsible to international prosecutions.<sup>177</sup> Consequently, element 2 of Article 7(1)(e) in the *Elements of Crimes* require the gravity of conduct to amount to a violation of fundamental rules of international law. Where the initial detention was justified, it will subsequently become arbitrary where the legal basis no longer remains valid yet the individual remains imprisoned.<sup>178</sup> The *Elements of Crimes* also require the

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169 See, eg, Nikolas Kyriakou, ‘The *International Convention for the Protection of All Persons from Enforced Disappearance* and its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition’ (2012) 13 *Melbourne Journal of International Law* 424, 450–4.

170 *Rome Statute* art 7(1)(e).

171 *Rome Statute* art 7(1)(f).

172 *Rome Statute* art 7(1)(k).

173 *Rome Statute* art 7(1)(i).

174 Cryer et al, above n 97, 249.

175 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’).

176 Henderson, above n 135, 1170.

177 Cryer et al, above n 97, 249.

178 *Ibid.*

perpetrator to be aware of the factual circumstances that established the gravity of the conduct.<sup>179</sup>

It is evident that the extraordinary rendition program involves 'severe deprivation of physical liberty' and 'imprisonment'. The wording of article 7(1)(e) suggests that imprisonment is a severe deprivation of liberty, in which the severity threshold may be fulfilled by either the duration or conditions of detention.<sup>180</sup> For the majority of HVDs, their deprivation of liberty commenced when forcibly abducted and put into CIA custody. Although there *may* have been initial lawful grounds to detain such individuals, once it had been determined that such individuals are not criminals affiliated with terrorist organisations, they ought to be released. The legal basis for detaining an individual to obtain actionable intelligence information is also highly questionable as this basis is easily subject to abuse.<sup>181</sup>

The problem with this program is that deemed HVDs are detained for long periods of time (often indefinitely) without charge, or the right to challenge the lawfulness of their detention.<sup>182</sup> In this context, the Committee against Torture has reiterated that 'indefinite detention without charge constitutes, per se, a violation of the [Torture] *Convention*', and that it 'remains concerned about the secrecy surrounding conditions of confinement, especially in Camp 7, where high-value detainees are housed'.<sup>183</sup> Furthermore, the conditions of detention, in which 14 of the HVDs were held in Guantanamo Bay in 2006, has been documented by the International Committee of the Red Cross ('ICRC'). Such conditions of detention formed an essential part of the interrogation process and the HVDs' overall treatment which included the 'use of continuous solitary confinement and incommunicado detention, lack of contact with family members and third parties, prolonged nudity, deprivation/restricted provision of solid food and prolonged shackling', in addition to deprivation of access to open air, exercise and appropriate hygiene facilities.<sup>184</sup> It follows that there are strong grounds for a *prima facie* case for the crime against humanity of severe deprivation of physical liberty and imprisonment.

However, as noted above in Part III, some complicit states, including Pakistan, are not parties to the *Rome Statute*, and issues of jurisdiction will arise where the ICC has neither territorial jurisdiction nor jurisdiction over the nationals of both American and Pakistani individuals. This is particularly problematic as a majority of abductions documented occurred on the territory of Pakistan, in addition to cases of Pakistani custody.<sup>185</sup>

179 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), art 7(1)(e).

180 Ambos and Wirth, above n 90, 65.

181 See Duffy, above n 2, 711–12. Luban has argued that torture cannot be used in the GWOT against al-Qaeda even if there is a 'ticking bomb' scenario, as this makes it difficult to draw the line for when torture is permissible: see David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1425.

182 *HRC Concluding Observations*, above n 7, 9 [21].

183 *CAT Concluding Observations*, above n 5, 6–7 [14].

184 *ICRC Report*, above n 102, 19.

185 *Amnesty International Report Responding to the Senate Report*, above n 9, 74–9, documents that a majority of abductions occurred in Pakistan.

## B ‘Torture’ and ‘Other Inhumane Acts of a Similar Character’

The prohibition against torture is well established in numerous conventions,<sup>186</sup> and is recognised as a norm of customary law with *ius cogens* status.<sup>187</sup> Article 7(2)(e) of the *Rome Statute* provides that “[t]orture” means the intentional 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’.<sup>188</sup>

Meanwhile, article 7(1)(k) of the *Rome Statute* which governs ‘other inhumane acts’, is the catch-all provision regarding individual criminal conduct.<sup>189</sup> This provision has been held necessary as ‘one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes’.<sup>190</sup> The *Rome Statute* regulates the scope of ‘other inhumane acts’ in a more detailed manner than the statutes of the ad hoc tribunals.<sup>191</sup> Article 7(1)(k) of the *Rome Statute* describes inhumane acts as ‘acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’. The *Elements of Crimes* for article 7(1)(k) require the perpetrator to have ‘inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act’; and this act was ‘of a character similar to any other act referred to in article 7, paragraph 1, of the *Statute*’.<sup>192</sup> A footnote clarifies that ‘character’ refers to the ‘nature and gravity of the act’.<sup>193</sup> As crimes against humanity protect human rights, acts of a similar nature to the listed acts would constitute other violations of human rights – for example, the right not to be exposed to inhumane or degrading treatment under

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186 See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 5; *ICCPR* art 7; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 3; *American Convention on Human Rights*, signed 22 November 1969, 1144 UNTS 144 (entered into force 18 July 1978) art 5; *African Charter on Human and Peoples’ Rights*, signed 27 June 1981 21 ILM 58 (entered into force 21 October 1986) art 5; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*Convention against Torture*’); *Inter-American Convention to Prevent and Punish Torture*, signed 9 December 1985, 25 ILM 519 (entered into force 28 February 1987); *Geneva Conventions* and their *Additional Protocols*.

187 *Prosecutor v Čelebići (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [454].

188 While much of the definition in the *Convention against Torture* art 1 has been accepted as the core definition for torture as a crime against humanity – that is, the intentional infliction of severe pain or suffering, whether physical or mental, upon a person – there are some differences between this definition and the one articulated in *Rome Statute* art 7(2)(e). See Cryer et al, above n 97, 250–1.

189 Ambos and Wirth, above n 90, 83.

190 *Blaškić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [237], quoting Jean Pictet, *Commentary on the First Geneva Convention of 12 August 1949* (International Committee of the Red Cross, 1952) 54.

191 Ambos and Wirth, above n 90, 83.

192 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), art 7(k) elements 1–2.

193 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), art 7(k) element 2 n 30.

article 7(1) of the *ICCPR*, such as beatings.<sup>194</sup> Regarding the possible forms of inhumane acts, it has been held that these include mutilation, severe bodily harm, beatings, serious physical and mental injury, inhumane or degrading treatment not reaching the threshold definition of torture, imposing inhumane conditions in concentration camps and forced nudity.<sup>195</sup>

Allegations of torture in Guantanamo Bay of the HVDs have been substantiated by multiple sources, including NGO reports,<sup>196</sup> the ICRC,<sup>197</sup> international human rights bodies<sup>198</sup> and official documents such as the *SSCI Executive Summary*. Dianne Feinstein, Chairman of the Senate Select Committee on Intelligence has stated:

While the Office of Legal Counsel found otherwise between 2002 and 2007, it is my personal conclusion that, under any common meaning of the term, CIA detainees were tortured. I also believe that the conditions of confinement and the use of authorized and unauthorized interrogation and conditioning techniques were cruel, inhuman, and degrading. I believe the evidence of this is overwhelming and incontrovertible.<sup>199</sup>

President Obama has also qualified some of the so-called EITs as acts of torture in his public statement on 1 August 2014.<sup>200</sup> It would be beyond doubt that the interrogation techniques previously described would amount to torture and ill-treatment under human rights law. Given the definition in the *Rome Statute* has core similarities to the definition under the *Convention against Torture*, there are strong grounds to conclude that there are prima facie charges of torture and other inhumane acts as crimes against humanity under the *Rome Statute*.

### C 'Enforced Disappearance of Persons'

The *Rome Statute* expressly recognises the 'enforced disappearance of persons' as a crime against humanity in article 7(1)(i). It is further defined in article 7(2)(i) as the

arrest, detention or abduction of persons by, or with the authorisation, 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.

Enforced disappearance has previously been recognised as an international crime against humanity in the 'Night and Fog Decree' rendered by the Nazis to

194 Ambos and Wirth, above n 90, 84.

195 *Akayesu Judgment* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [685]–[97]; *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [730]; *Blaškić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [239].

196 See, eg, Human Rights Watch, 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees' (July 2012) <<http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf>>.

197 *ICRC Report*, above n 102.

198 See, eg, *CAT Concluding Observations*, above n 5; *HRC Concluding Observations*, above n 7, 3 [5].

199 *SSCI Executive Summary*, above n 16, Foreword 4.

200 Obama, above n 1.

execute individuals and to preclude their families from knowing their fate.<sup>201</sup> It also predominately characterised the practice of Latin American totalitarian military regimes in the 1980s.<sup>202</sup> Enforced disappearance is enumerated as a crime against humanity in the 1992 *Declaration on the Protection of All Persons from Enforced Disappearance*,<sup>203</sup> the 1994 *Inter-American Convention on the Forced Disappearance of Persons*<sup>204</sup> and in the 2006 *International Convention for the Protection of All Persons from Enforced Disappearance*.<sup>205</sup>

The *Rome Statute* definition is based on the *UN Declaration* and the *Inter-American Convention*.<sup>206</sup> Significantly, the *Elements of Crimes* recognise that enforced disappearance commonly involves many different actors,<sup>207</sup> providing that the crime may be committed by (i) arresting, detaining or abducting a person, with knowledge that a refusal to acknowledge or give information is likely to follow in the ordinary course of events; or (ii) by refusing to acknowledge the deprivation of freedom, or to supply information on the fate of the individual, with knowledge that deprivation had indeed occurred.<sup>208</sup> Furthermore, the crime requires a specific intention to remove a person from the protection of the law, and may coincide with other crimes such as killing, torture or arbitrary imprisonment.<sup>209</sup>

It is difficult to deny that extraordinary rendition and enforced disappearance share the same political and historical rationale as a method for state officials to ignore human rights.<sup>210</sup> There is broad consensus that the extraordinary rendition program constitutes a case of enforced disappearance.<sup>211</sup> Indeed, prior to recent years in which much more information concerning the extraordinary rendition program has reached the public domain, there was a vacuum of information regarding the precise fate and whereabouts of certain individuals suspected to have been abducted. Even as information was disclosed, it is evident that there was a reluctance to admit such persons had their liberty deprived, as numerous legal justifications were put forward to 'legalise' their secret detention on the basis of state secrecy and security reasons related to counter-terrorism measures. Furthermore, as demonstrated by the subsequent conduct of the US to place

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201 See International Military Tribunal (Nuremberg), 'Judgment and Sentences: October 1 1946' (1947) 41 *American Journal of International Law* 172, 229–30.

202 See, eg, J Patrice McSherry, *Predatory States, Operation Condor and Covert War in Latin America* (Rowman & Littlefield Publishers, 2005).

203 GA Res 47/133, UN GAOR, 47<sup>th</sup> sess, Agenda Item 97(b), UN Doc A/RES/47/133 (12 February 1993) Preamble para 4 ('*UN Declaration*').

204 Signed 6 September 1994, 33 ILM 1429 (entered into force 28 March 1996) Preamble para 5, art 5 ('*Inter-American Convention*').

205 Opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010) Preamble para 6.

206 *UN Declaration*, UN Doc A/RES/47/133, Preamble para 3; *Inter-American Convention* art 2.

207 *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B), art 7(1)(i) n 23.

208 Georg Witschel and Weibke Ruckert, 'Crime against Humanity of Enforced Disappearance of Persons', in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 98–103.

209 Cryer et al, above n 97, 260.

210 Kyriakou, above n 169, 428.

211 See, eg, *ICRC Report*, above n 102, 24; Sadat, 'Shattering the Nuremberg Consensus', above n 3, 76 n 1; Paust, 'The US and the ICC', above n 15, 572.

HVDs outside the normal legal system, there has been a tremendous effort to cover up relevant facts and information, culminating in a call from human rights bodies for the truth of this program to be revealed – beginning with the full declassification of the *SSCI Report*. The gravity of this situation has seen Condoleezza Rice, National Security Advisor to the US (2001–05), admit in her 2011 memoirs that by 2006, as Secretary of State, ‘the time had come to acknowledge that we were holding ... notorious terrorists. We couldn’t allow them to remain “disappeared” and outside the reach of any justice system’.<sup>212</sup>

#### D Modes of Liability

This section examines the potential modes of liability under article 25 of the *Rome Statute* that may apply to the charges of crimes against humanity discussed above. The perpetration of crimes against humanity typically requires the cooperation of a large number of individuals. This is commonly achieved through an established network of persons, generally coming from part of the state or the military.<sup>213</sup> Despite this collective nature of international crimes, the issue of individual responsibility is a prominent issue, as such crimes would not happen if specific individuals did not work together.<sup>214</sup> The ICTY has aptly summarised the problem:

Most of these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act ... the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.<sup>215</sup>

The jurisprudence of the ad hoc tribunals is integral to the development of the modes of participation as they distinguished between committing, planning, ordering, instigating and aiding and abetting.<sup>216</sup> While this article does not examine modes of liability in detail,<sup>217</sup> it suffices to note that according to the ad hoc tribunals, modes of participation can be delineated into principal or primary liability which includes commission and participation in a joint criminal enterprise; and modes of secondary or accessory liability such as planning, ordering, instigating and aiding and abetting.<sup>218</sup> This distinction was given importance by the ad hoc tribunals in both clarifying individual criminal

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212 Condoleezza Rice, *No Higher Honor. A Memoir of My Years in Washington* (Crown Publishing, 2011) 501–2.

213 Gerhard Werle, ‘Individual Criminal Responsibility in Article 25 *ICC Statute*’ (2007) 5 *Journal of International Criminal Justice* 953, 953.

214 *Ibid.*

215 *Tadić Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-93-1-A, 15 July 1999) [191].

216 Werle, above n 213, 955.

217 See also Werle, above n 213; Bert Swart, ‘Modes of International Criminal Liability’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 82.

218 Werle, above n 213, 955.

responsibility and in sentencing.<sup>219</sup> In *Prosecutor v Vasiljević*, the ICTY Appeals Chamber stated that ‘aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator’.<sup>220</sup> Subsequent jurisprudence of the ad hoc tribunals have also confirmed this interpretation.<sup>221</sup> The difference between modes of participation therefore indicates the weight of individual responsibility with respect to each charge of an international crime.

Article 25 of the *Rome Statute* is the relevant section regulating individual criminal responsibility before the ICC. Article 25(1) stipulates that the Court ‘shall have jurisdiction over natural persons’, and not states or organisations. Relevantly, articles 25(3)(a)–(d) deal with the modes of individual criminal participation applicable to charging the US’s extraordinary rendition as various charges of crimes against humanity.<sup>222</sup> Article 25(3) articulates four levels of criminal responsibility<sup>223</sup> – the first being commission or perpetration of a crime;<sup>224</sup> the second as ordering, soliciting and inducing;<sup>225</sup> the third as assistance;<sup>226</sup> and the fourth as contribution to a group crime.<sup>227</sup> A consideration of the possible modes of liability applicable to each charge of crime against humanity will now follow.

### **1 ‘Imprisonment or Other Severe Deprivations of Physical Liberty’**

The charge of imprisonment or other severe deprivations of physical liberty as a crime against humanity under article 7(1)(e) would apply to all the secret detention facilities outside of US territory – yet within their de facto control – due to the CIA’s co-operation with foreign states and the different modes of liability available under article 25 of the *Rome Statute*. For example, the secret detention facility in Poland, called ‘Detention Site Blue’,<sup>228</sup> and in Romania called ‘Detention Site Black’,<sup>229</sup> have either: (i) been jointly operated by the

219 Ibid.

220 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32, 25 February 2004) [182] (*‘Vasiljević Appeals Judgment’*).

221 See, eg, *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [268]; *Prosecutor v Semanza (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005) [355] ff.

222 Note that art 25(4) of the *Rome Statute* states: ‘No provision in this *Statute* relating to individual criminal responsibility shall affect the responsibility of States under international law’.

223 Werle, above n 213, 957.

224 Regarding art 25(3)(a) of the *Rome Statute*, the ICC has determined three forms of perpetration: (i) direct perpetration where the defendant physically carries out all elements of the offence; (ii) co-perpetration where the defendant, together with others, has control over the offence by reason of the essential tasks assigned to him or her; or (iii) indirect co-perpetration where the defendant has control over the will of those who carry out the objective elements of the offence. See *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 30 September 2008) [488].

225 *Rome Statute* art 25(3)(b).

226 *Rome Statute* art 25(3)(c).

227 *Rome Statute* art 25(3)(d).

228 *Amnesty International Report on European States*, above n 9, 9.

229 Ibid 13.



respective foreign governments and the CIA; (ii) been operated by the CIA pursuant to authorisation from the respective foreign government (either expressly or implicitly); or (iii) been operated by the respective foreign state under the strong influence of the US government. State responsibility aside, the individuals involved in these operations will accrue an applicable mode of liability depending on their level of involvement. Regarding the individual criminal responsibility accruing to individual foreigners involved in participating foreign states, this may give rise to indirect perpetration under article 25(3)(a), accessory liability under article 25(3)(b), or aiding and abetting under article 25(3)(c)<sup>230</sup> of the *Rome Statute*, depending on the operational arrangements of each specific secret detention facility.

With respect to the responsibility of participating US nationals, those individuals with more direct involvement, such as CIA officers, would be liable for direct perpetration under article 25(3)(a) or common purpose contribution under article 25(3)(d) of the *Rome Statute*. Similarly, liability for direct perpetration or common purpose contribution is likely to arise for both local police and CIA agents co-operating at the moment of abduction in foreign countries such as Pakistan.<sup>231</sup> However, as noted in Part III(B), Pakistan is not a party to the *Rome Statute* so any abductions occurring on its territory do not fall within the territorial jurisdiction of the ICC.

## 2 'Torture' and 'Other Inhumane Acts'

A range of individuals could be found responsible pursuant to article 7(1)(f) for the charge of torture or inhuman acts as a crime against humanity. The full range of modes of liability under article 25(3) of the *Rome Statute* could be invoked for those involved in EITs due to the different levels of participation involved. For example, medical practitioners and psychologists were heavily involved in monitoring and administering the EITs. The *SSCI Executive Report* documents the names of two psychologists contracted by the CIA to work on the development of the interrogation program, who subsequently became central to the interrogation program as contract interrogators.<sup>232</sup> These two men formed a company that was contracted by the CIA to provide interrogators and 'operational psychologists, debriefers, and security personnel on CIA detention

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230 International tribunals have held, among other things, that standing near victims while armed to prevent them from absconding amounts to aiding: *Vasiljević Appeals Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32, 25 February 2004) [134]; providing resources to a person who is responsible for crimes may suffice: *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-T, 19 April 2004) [137]; omissions may suffice for aiding and abetting if there is a legal obligation on the accused to prevent the crime and if there is the ability to intervene: *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68, 30 June 2006) [283]; the 'lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime or underlying offence occurs': *Prosecutor v Milutinović (Judgment)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber III, Case No IT-05-87-T, 26 February 2009) [91].

231 *Amnesty International Report Responding to the Senate Report*, above n 9, 74–9, documents that a majority of abductions occurred in Pakistan.

232 *SSCI Executive Summary*, above n 16, 168–9.

sites'. Furthermore, 'on behalf of the CIA', personnel from the company would participate in interrogations of 'detainees held in foreign government custody and served as intermediaries between entities of those governments and the CIA'. This type of participation in the interrogation program is likely to give rise to direct perpetration under article 25(3)(a) of the *Rome Statute*. Such direct perpetration is strongly supported by the fact that the company's chief operating officer was the former chief of the 'division of the CIA supervising the Renditions and Detentions Group',<sup>233</sup> subsequently strengthening the mens rea element of knowledge of the broader context.

### 3 'Enforced Disappearances of Persons'

With regard to the charge of enforced disappearance as a crime against humanity under article 7(1)(i) of the *Rome Statute*, a variety of perpetrators participated in this 'systematic attack' as part of a common criminal purpose directed at obtaining 'actionable intelligence' for counter-terrorism measures when the HVDs were forcefully 'disappeared'. For the same reasons given in the preceding two charges relating to imprisonment and severe deprivations of liberty, and torture or inhumane treatment as a crime against humanity, the full range of article 25 modes of liability under the *Rome Statute* could apply due to the different levels of participation involved.

### 4 Command Responsibility

Some commentators have asserted that command responsibility is an applicable mode of liability for the US' extraordinary rendition program. Command responsibility invokes the criminal liability of a superior due to his or her failure to prevent their subordinates from committing international crimes, or from a failure on his or her part to punish subordinates where they have committed offences.<sup>234</sup> This principle is enshrined in article 28 of the *Rome Statute*.<sup>235</sup> Presidential authority was granted in September 2001 to operate the CIA detention program. Paust has claimed that '[l]eaders who issue orders or authorizations to commit international crimes [such as forced disappearance of persons as part of the President's "program" of secret detention] can also be prosecuted as direct perpetrators'.<sup>236</sup> Consequently, senior legal officials and other prominent officials involved with the approval of this authorisation could be held liable. The specific identification of individuals for prosecution is beyond the scope of this article – though it is relevant to mention the Human Rights Committee has recommended that the 'responsibility of those who provided legal pretexts for manifestly illegal behaviour' should be established, and the US should 'consider the full incorporation of the doctrine of "command responsibility" in its criminal law'.<sup>237</sup> A challenge to prosecuting leaders and

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233 Ibid.

234 Swart, above n 217, 88.

235 For more information on command responsibility, see Cryer et al, above n 97, 384–97.

236 Jordan J Paust, 'Serial War Crimes in Response to Terrorism Can Pose Threats to National Security' (2009) 35 *William Mitchell Law Review* 5201, 5205.

237 *HRC Concluding Observations*, above n 7, 3 [5].

senior officials most responsible for such crimes would occur if they invoked their immunity.<sup>238</sup> For present purposes, it is adequate to note that individuals are not required to have personally participated in the multiple acts constituting the attack,<sup>239</sup> and that pursuant to the ICC's policy, proceedings should only be commenced against 'the most senior leaders suspected of being the most responsible for the crimes'.<sup>240</sup>

## VII CONCLUSION

This article has argued that the US' extraordinary rendition program regarding its treatment of HVDs is likely to fulfil the elements in the crimes of deprivation of liberty, torture and other inhumane acts and enforced disappearances of persons, as crimes against humanity. However, it may prove difficult to convince the judges of the ICC that *all* the contextual elements required for a crime against humanity have been fulfilled – especially the element regarding the HVDs as a 'population'. Further, the cumulative effect of the politicised nature of the GWOT, and the fact that the ICC can only function properly with political support from states and institutions, in combination with the fact that the US is a powerful state, and the currently continuing secrecy of the extraordinary rendition program – makes it possible that the ICC may be hesitant to take on this situation as these practical obstacles potentially set the Court up for failure.<sup>241</sup> The factual allegations in this assessment would also need to be tried in court and meet the required criminal standard of proof beyond reasonable doubt. This may be a difficult exercise unless there is more transparency surrounding the extraordinary rendition program. Other obstacles that may affect the possibility of prosecutions include limits to the ICC's jurisdiction – especially where the US and key complicit states such as Pakistan are not parties to the *Rome Statute*. This is in addition to issues of the immunity of state officials and article 98(2) agreements. The fragmentation of the Court's territorial jurisdiction, due to the global network of complicit states will also complicate prosecutions. Given the limited resources of the ICC,<sup>242</sup> these obstacles, coupled with potential gravity issues,<sup>243</sup> and the requirement of admissibility,<sup>244</sup> factors the Prosecutor shall take into account when deciding to initiate an investigation, may impact on the Prosecutor's case selectivity.

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238 See Part IV(A).

239 Timothy L H McCormack, 'Crimes against Humanity' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004) 179, 189.

240 *Prosecutor v Lubanga (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 24 February 2006) [50].

241 See David Luban, 'Palestine and the ICC – Some Legal Questions' on *Just Security* (2 January 2015) <<http://justsecurity.org/18817/palestine-icc-legal-questions/>>.

242 Office of the Prosecutor, 'Strategic Plan', above n 83, 1 [1].

243 *Rome Statute* art 53(1)(c).

244 *Rome Statute* art 17(1)(d).

However, this is not to say that prosecution is not a possibility. Since the recent release of the *SSCI Executive Summary*, numerous calls have been made for the release of the full *SSCI Report* with minimal redactions. This is in addition to the increasing calls for holding individuals criminally responsible, especially those in senior government that planned and authorised this program.<sup>245</sup> To ignore such a systematic attack on human rights would be to grant de facto amnesty for these widespread abuses.<sup>246</sup> For the most part, the contextual elements for crimes against humanity can be sufficiently justified by the facts of this situation – though the justification of the more controversial element of ‘population’ may be difficult – a position that is arguable but problematic in terms of its success. The sheer number of 28 individuals classified as HVDs and subjected to the unlawful ‘enhanced interrogation techniques’ amongst other breaches of their fundamental rights, even if it shocks the conscience of humanity, may not be sufficient enough to satisfy the ‘population’ element. Nonetheless, even if the situation is not investigated by the Court in the near future, as more information comes to light, there should be stronger justifications to open an investigation into this program.

Crimes against humanity characterise the ultimate state crime.<sup>247</sup> As the US Military Tribunal has identified at Nuremberg, the rationale for crimes against humanity is that ‘the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals’.<sup>248</sup> The numerous individuals in the US and those belonging to complicit partner states that have participated in the extraordinary rendition program – a typical case of crimes against humanity in which collective governments have refused to prosecute flagrant human rights violations arising from this program – only strengthens the Court’s case to open a preliminary examination, with the ultimate aim to initiate prosecutions and prevent impunity in the extraordinary rendition program of the US.

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245 See, eg. Robert Chalmers, ‘Former International Court of Justice Judge: Dick Cheney Should Face Prosecution’, *Newsweek* (online), 7 July 2015 <<http://europe.newsweek.com/former-international-criminal-court-lawyer-dick-cheney-should-face-prosecution-329569>>.

246 *Amnesty International Report Responding to the Senate Report*, above n 9, 14.

247 Henderson, above n 135, 1181.

248 ‘*United States v Ohlendorf* (Case 9)’ in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10* (Nuremberg, 1949) vol 4, 3, 498.