Corporate Torture in the ‘War on Terrorism’: Regulating in the Gap between Security and Rights

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The privatisation of state functions is not a new phenomenon; in fact, since the 1960s in particular governments have acted upon their privatisation impulse in order to out-source (or corporatise) the provision of services, previously supplied by the state, to ostensibly private entities.1 The ‘War on Terrorism’ has, however, seen the privatisation not only of traditionally public functions within the state itself (such as health care, postal services and electricity supply) but also traditionally sovereign, transnational activities connected with security.2 Perhaps one of the most interesting and problematic examples of this is the use by the United States of private companies in the course of ‘extraordinary rendition’. There are now various authoritative sources documenting the use of private chartered aircraft and of logistics companies to facilitate and operationalise the United States’ policies of irregularly transferring individuals for the purposes of (almost always coercive and tortuous) interrogation in other jurisdictions.3 While privatisation of state functions has traditionally been explained (to a not


2 This is not suggest that the ‘outsourcing of sovereignty’ is a new phenomenon; in fact it has a long history and, in the United States (on which the example in this paper is focused), can be traced particularly to the Iran-Contra controversy. For an excellent overview and critique of this trend in the (primarily) military context see Pasul Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What we can do About it (2007; Cambridge University Press).

insubstantial degree) by an efficiency/cost narrative, the acceleration of this kind of corporatisation exacerbates the kinds of rights-related difficulties that have long been presented by privatisation.

In this paper I explore the extent to which the involvement of such private entities in the practice of extraordinary rendition causes us to reassess our focus in the context of human rights protection on the state/individual axis and to consider the possible, rights-related, motivations for such privatisation. I argue that in both the domestic and the international context human rights law tends primarily to focus on this axis, imagining the world of state action as existing within a sharply divided public v. private space. The reality of such privatisation, however, reinforces to us that in fact the space within which state force can be imposed on the individual is not so simply captured. There is the potential for the force of a state to be imposed on an individual within what we consider to be a private sphere of operation. In fact, our conceptualisation of that space as private is, I argue, premised on our tendency to conflate the nature of the actor with the nature of the action itself. The privatisation of sovereign activity such as security and the imposition of force can more properly be conceptualised as what I term the destatification of power, which itself raises questions for our mechanisms of imposing constitutionalist limitations on state power by means of human rights law.

I will argue that this movement towards destatification of power requires us to question our focus on the public in the context of rights protection and enforcement and instead to combine our public law protections and innovations with a response focused on the private sphere. In particular, the

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5 For an insightful overview see, e.g., Alfred Aman Jr, “Privatization and the Democracy Problem in Globalization: Making Markets More Accountable through Administrative Law” (2000-2001) 18 Fordham Urban Law Journal 1477-1506 (arguing that privatisation of state functions can be seen as a form of de-regulation, which is itself is “the price government is willing to pay to remain economically competitive on behalf of the residents already living and investing within its jurisdiction, as well as to be attractive to new investors of all kinds” (at p. 1481)).
The article will consider the extent to which private regulatory approaches have the capacity, combined with continuing efforts within the public sphere, to reign in the state and protect individual rights.

The Traditional Structure of Human Rights Law

In both domestic and international law, the protection of individual rights—whether they are termed ‘civil rights’, ‘fundamental rights’, or ‘human rights’—has largely been designed and implemented within a state-individual structure. By this I mean that human rights are generally conceived of as claims of the individual (or in some limited cases the group) as against the state. To this extent human rights law has tended to be concerned with what we would consider to be ‘public’ action. In this sense the term ‘public’ has three meanings: (1) the act is done by a public actor; (2) the act is public in nature; and (3) the act engages with the individual in the public sphere. The third of these concepts has had particularly damaging effects on those who tend to experience particular levels of vulnerability and rights abuses in the private sphere, or at least in that (such as the family) which is deemed private in spite of its intensely public functions. Over time, however, international human rights law has attempted to break down that strict divide between the public sphere and the private sphere as it relates to individual activity and similar trends can be observed in domestic constitutional structures. Indeed, for human rights scholars and activists, the shifting of traditional functions to the private sphere by means of the destatification of power “necessitate[s] new

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6 While these differences in terminology are not entirely without relevance, I have previously argued that their commonalities are more important than their distinctions. These commonalities are centred on the essentially dignitary core of the concept of rights protection within a constitutionalist system: Fiona de Londras, “International Human Rights Law and Constitutional Rights: In Favour of Synergy” (2009) 9(2) International Review of Constitutionalism 307-328.

7 For the classical argument that the family—conceived of as private—is in fact the location of intensely public, welfare work see, e.g., Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies (1995; Routledge), esp. Chapter 7; Martha Albertson Fineman, “Cracking the Foundational Myths: Independence, Autonomy and Self Sufficiency” (2000) 8 American University Journal of Gender, Social Policy and Law 13-30.
approaches for determining where the public/private line might be and whether we should draw such a line in the first place”. However, the other two senses in which the ‘public’ nature of rights protection has played itself out (i.e. the concept of public actors and public acts) have largely remained rather rigidly in place in both the international and the domestic sphere.

International human rights law does not generally have the capacity to govern the actions of private actors directly as, as part of general public international law, its constituents are primarily states (and increasingly international institutions and organisations). Indeed, no lesser authority than Rosalyn Higgins has written that “[p]rivate conduct is not in principle attributable to the state”. However, in some ways international human rights law has attempted to ensure that states are required to put in place structures, standards and laws that would—to the extent considered possible—protect individuals from rights violations by non-public actors. So, for example, the European Court of Human Rights has found the United Kingdom in violation of Art.3 (the prohibition on torture, inhuman and

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9 This is, of course, based on the classical Westphalian conception of the international community and is not intended to exclude or deny the role that non-state actors can and do (increasingly) play in the generation, shaping and implementation of international law. That said, however, state consent and sovereignty remain foundational precepts of international law. On the continuing evolution of international law see, e.g., Tomer Broude and Yuval Shany (eds), The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity (2008; Hart Publishing); Alan Boyle and Christine Chinkin, The Making of International Law, (2006; Oxford University Press).

10 This is even more the case now that numerous international institutions are becoming signatories to international human rights law regime. See, e.g., the accession of the European Union to the European Convention on Human Rights in the light of ratification of the Lisbon Treaty.

11 Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994; Clarendon), p. 153. She does go on, in the same passage, to outline a number of ways in which “private conduct may still come to involve the responsibility of the state” (p. 153) including cases where the state “encouraged” acts of individuals “and if the individuals effectively act as agents in the performance of these acts, and if [the state] endorses as its own the acts of the individuals” (p. 154). The final phrase from this passage, of course, raises particular difficulties where the rationale for privatisation may be concealment of action and denial of responsibility as, as I consider below, appear to be significant motivating factors in the context of extraordinary rendition.
degrading treatment or punishment) in respect of corporal punishment by a step-father of his step-son because the defence of ‘reasonable chastisement’ did not adequately protect children from such physical punishment.\(^\text{12}\) The same court has also found Turkey to be in breach of the Convention for failing to respond adequately at a policing level to complaints of domestic abuse in a case where the victim of that abuse was in fact killed by her husband.\(^\text{13}\) Furthermore the Strasbourg Court has resisted the suggestion that mere privatisation of a function could exclude Convention-based responsibility, although its focus remained on the responsibility of the state flowing through the privatisation nexus.\(^\text{14}\) The United Nations Convention on the Elimination of All Forms of Discrimination against Women obliges states to take all reasonable steps to ensure that discrimination does not take place in the public or the private sphere, but that responsibility lies squarely on states and not on private actors.\(^\text{15}\) Similarly the relatively new Convention on the Rights of People with Disabilities sharply rebukes state attempts to regulate only actions within

\(^{12}\) A v United Kingdom (1998) 27 EHRR 611.

\(^{13}\) Opuz v Turkey (2009) ECHR 33401/22 (9 June 2009).

\(^{14}\) Wos v Poland (2005), App. No. 22860/02 (admissibility decision), para. 72 DA: the “exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility” even where those powers have been privatised. (This case concerned the administration of a compensation scheme under an international agreement with Germany).

\(^{15}\) This is most clearly contained in Article 2 of the Convention, which provides (in relevant part):

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

...  
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

Article 2 is, however, one of the most reserved provisions of the CEDAW, generating a great deal of scholarship on (among other things) the compatibility of reservations against this provision with the Vienna Convention on the Law of Treaties. See, e.g., Belinda Clark, “The Vienna Convention Reservations Regime and the Convention on Discrimination against Women” (1991) 85 American Journal of International Law 281-321; Siobhán Mullally, Gender, Culture and Human Rights: Reclaiming Universalism (2006; Hart Publishing), esp. Chapter 6.
the public sphere and, instead, insists upon at least some piercing of the public/private dichotomy in that sense.\footnote{16} The concept of the public actor and the public act have tended in many senses to become conflated resulting in both circularity of argument and easily circumvented rights protections. The argument has in many jurisdictions been ‘that which is done by the public actor is a public act’ so that, in the mode of typical deontological reasoning, that which is not done by the public actor is not a public act.\footnote{17} Very few jurisdictions have managed successfully to recognise that in reality the relationship between the actor and the act is not that clear cut. In the United Kingdom, for example, public acts by private bodies (or ‘hybrid authorities’ in the parlance of the Human Rights Act 1998) can be judged under the ‘public law’ standards of the Human Rights Act.\footnote{18} In other jurisdictions, however, that is not the case. In the United States the concept of actor and act are very clearly linked and the ‘state action’ doctrine—the doctrine that

\footnote{16} Article 4(1) of the Convention provides, in relevant part,

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

\[\ldots\]

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

\footnote{17} This is the approach adopted in, for example, Ireland’s European Convention on Human Rights Act 2003, s. 3. For commentary on the difficulties of this from a practical, rights-protection, perspective see Fiona de Londras and Cliona Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (2010; Roundhall/Thomson Reuters), paras [5-11] to [5-20].

\footnote{18} Human Rights Act 1998, s.s. 6-7. Although the HRA did not create full ‘horizontal effect’ (i.e. full applicability as between private actors) it did create clear applicability between the individual and ‘public authorities’, the individual and ‘hybrid authorities’ when acting as public actors, and (though judicial intervention), between individuals and private authorities by the means of existing actions (indirect horizontal effect). For thorough explanation and commentary see Helen Fenwick, *Civil Liberties and Human Rights*, 4th Edition, (2007; Routledge), p.p. 215-256.
identifies when a ‘private actor’ can be required to comply with federal constitutional law—is muddied and increasingly limited.19

The corporatisation of transnational and international state functions, then, potentially has serious effects for the individual and the protection of individual rights. As long as the actor and the act are conflated in legal theory, and as long as international human rights law’s structure remains resolutely one that is concerned primarily with state actions, the ‘private’ entity undertaking these governmental functions can escape many of the limitations placed on states. This reflects the problematic nature of the public/private divide in international law. In Paul Verkuil’s words, “the public-private distinction is like a dysfunctional spouse—you can’t live with it and you can’t live without it”.20 As a corollary it appears clear that states can themselves (at least attempt to) avoid limitations and obligations by simply ‘contracting out’ their functions (although the contracting itself may be subject to public law limitations). Domestic legal systems have grappled with the implications of privatisation from a rights-protection perspective for some time. As transnational and international state action now becomes increasingly privatised, however, the international system must consider how it can respond in a manner that makes individual rights meaningful and not easily circumscribed by privatisation.

The Extraordinary Rendition Example

Although the term ‘extraordinary rendition’ may be an all too familiar part

19 See, e.g., Daphne Barak-Erez, “A State Action Doctrine for an Age of Privatization” (1994) 45 Syracuse Law Review 1169-1192 (arguing that the traditional structure of the state action doctrine in the United States is not fit for purpose for the “new realities” (p. 1185) of privatisation and, particularly, that constitutional protection ought not to depend on the form and terms of a contract (p. 1185)). For some scholars, privatisation actually presents an opportunity for the extension of constitutionalist, public law norms to private entities—a “mechanism for expanding government’s reach into realms traditionally thought private” (Jody Freeman, “Extending Public Law Norms Through Privatization” (2002-2003) 116 Harvard Law Review 1285, p. 1285). Such a view, however, does not fully recognise that one motivation for privatisation may well the minimisation of constitutionalist norms and protections, including human rights protections, as considered below.

20 Verkuil, above n. ___, p. 78.
of our common vernacular now, it is important to clearly define the nature of this practice and the implications that it has for international human rights law. The term ‘rendition’ was previously used to describe extradition-type processes, however it is now used exclusively in relation to trans-jurisdictional transfers that do not offer the normal processes of challenge, due process and so on to the transferred individual. In fact, the very use of the term ‘rendition’ in describing these practices is controversial with William Weaver and Robert Pallito claiming that it “falsely clothes them with reference to a legal and processual history, implying that somewhat they are actions recognised in and sanctioned from law”. William Weaver and Robert Pallito, “The Law, ‘Extraordinary Rendition’ and Presidential Fiat” (2006) 36 Presidential Studies Quarterly 102-116, p. 103. In a similar vein Louis Fisher has written that “[p]utting ‘extraordinary’ in front of rendition changes the meaning fundamentally. A process formerly bound by statutory and treaty law—reinforced by procedural safeguards in court—now entered the realm of the independent and arbitrary executive law”—Louis Fisher, “Extraordinary Rendition: The Price of Secrecy” (1007-2008) 57 American University Law Review 1405-1452, p. 1416.

Margaret Satterthwaite has expressed this shift from rendition to trial to extraordinary rendition as the move from “a practice purportedly developed to uphold the rule of law against lawless terrorists” to “a lawless practice which perverts the rule of law”. Margaret Satterthwaite, “Rendered Meaningless: Extraordinary Rendition and the Rule of Law” (2006-2007) 75 George Washington Law Review 1333, p. 1333.

Thus, rendition differs from extradition inasmuch as it entails a deliberate exclusion of the individual transferee from all normal processes of review, challenge and rights protection in the sending state. In addition, extraordinary rendition is normally carried out in a manner that in itself entails the infliction of extreme trauma and, in some cases, physical abuse on the individual transferees. Like vignettes from a mediocre spy novel, individuals who have been released and the families of individuals who remain in detention or otherwise have disappeared report men breaking into their homes and taking individuals from their beds never to be seen again; of individuals being hooded and snatched from the streets of European cities only to be bundled into a vehicle and transferred to an airport and consequently to another jurisdiction for the purposes of interrogation. Extraordinary rendition is what Weissbrodt and Bergquist describe as a “hybrid human rights violation, combining elements of
arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals”.  

It is the fact that these individuals are transferred expressly for the purposes of interrogation and intelligence gathering that distinguishes extraordinary rendition from what might be called ‘rendition to trial’, which had happened in some limited although high-profile circumstances in the past (such as in the case of Adolf Eichmann captured in Argentina by Mossad and Shabak, transferred irregularly to Israel, tried and convicted and ultimately executed for his involvement in the Shoah).  

Rendition to trial itself, in fact, was prone to causing major diplomatic fall outs and in the light of the capture and rendition of Eichmann the UN Security Council actually mandated that Israel was obliged to make reparations to Argentina for the breach of its sovereignty.  

It was however also regulated within American domestic law. Extraordinary rendition, however, does not even offer the rendered individual the prospect of a trial at the other side; rather what awaits him is interrogation at the hands of the intelligence services of the receiving state either with or without the active or passive involvement of the agents of the sending state. It is also less clearly regulated by the domestic law of the United States (which tends to be the instigating and rendering state) and, although captured to some extent by international human rights law, is not per se the subject of any international legal norms.

23 Weissbrodt and Bergquist, above n. ___, p. 127.


25 SC Resolution 138 (1960)

26 For a detailed account see Louis Fisher, above n. ____


Although there is some indication that extraordinary renditions had been carried out prior to the United States’ initiation of the ‘War on Terrorism’ in 2001, the rate of rendition appears to have greatly escalated in the past eight years. Although the secrecy that surrounds the practice of extraordinary rendition makes it very difficult to ‘count’ cases with absolute certainty and accuracy, there is a consensus that there has been something along the lines of 117 cases of extraordinary rendition since September 2001 with some 53 of those cases concerning the transfer of individuals to a country or base not under the control of the United States i.e. not Guantánamo Bay, Bagram Air Base, or a ‘black site’ CIA prison.

While there are some cases in which (sometimes disguised) military aircraft are known to have been used in the extraordinary rendition programme, one striking feature of the post-2001 extraordinary rendition programme has been the use of non-state/private chartered aircraft for the transfer of individuals, together with the use of privately contracted companies to carry out the logistical planning for individual cases of extraordinary rendition. In a working document preliminary to a report prepared for the European Parliament by Giovani Fava,²⁹ it was reported that there is a clear pattern of shell companies being established for the purposes of leasing aircraft to the United States governments, those aircraft being used in extraordinary rendition to go to places where military aircraft would be suspicious and to avoid the provision of information to transit states that is normally required in relation to military aircraft, and that after the flights concerned these aircraft are routinely reregistered in order to have their details changed and try to avoid detection or tracing. Although the Fava Working Document deals only with companies involved in the use of European countries in extraordinary rendition, it gives an excellent picture of the range and extent of private enterprises involved in the process of extraordinary rendition.

²⁹ Giovani Fava, Working Document No. 8 on the Companies linked to the CIA, aircraft used by the CIA, and the European counties in which CIA aircraft have made stopovers (2006, European Parliament, DT\641333EN.doc).
extraordinary rendition as used by the United States in the ‘War on Terrorism’ and highlights the centrality of the use of private aircraft within the extraordinary rendition programme itself.

In addition to the use of chartered private aircraft, private companies have been heavily involved in the logistics of the extraordinary rendition programme. In particular, the firm Jeppesen Data (a.k.a. Jeppesen Dataplan and Jeppesen International Trip Planning)—a wholly owned subsidiary of Boeing—is alleged to have been deeply involved in the planning, formation and logistics of the programme from weather planning to refuelling to communications with involved third parties. As will be discussed shortly, the use of private corporations and of non-state aircraft in this way seems at first to be illogical on the basis of the searchability of non-state aircraft and the framework of regulation that applies to civilian aircraft. In reality, however, the potential for concealment as well as the possible limitation of liability that arise from the use of these aircraft offers a potential rationale. Understanding the use of private entities for the purposes of extraordinary rendition as a mechanism of concealment and liability limitation on the part of the sending state requires us to explore the paradoxes of such privatisation. This also enables us to appreciate properly the extent to which privatisation in this context is a deliberate strategy for the avoidance of state responsibility, recognising that not only can it be a means of trying to conceal state action but also that private companies operate in a less constrained regulatory framework from a human rights perspective than do states or—at the least—that they are perceived as so doing. The destatification of power to corporations, then, becomes a mechanism of shifting power and all of the rights-related dangers it entails from the heavily regulated state, to the less regulated corporation operating on an international plane in which that corporation is concurrently (and paradoxically) the disembodied holder of rights, the exerciser of significant power, and a relatively unregulated entity from a rights-based perspective.

Theorising the Corporatisation of Torture and Destatification of
Sovereign Power

Involving third party private entities in the business of torture appears initially to be somewhat nonsensical on two bases: firstly because of the greater degree of inspection to which civilian airplanes are subject in comparison to military airplanes, and secondly because the imposition of tortuous violence is such an extreme exercise of sovereignty. Both of these paradoxes require some consideration.

The Convention on International Civil Aviation (the Chicago Convention) provides that civilian aircraft are obliged to comply with a number of requirements such as the pre-reporting of flight plans and adherence to consistent identificatory call signs and numbers. In addition, there is no prohibition on the random searching of civilian aircraft by the relevant law enforcement agencies such as the police, customs officials, immigration officials etc… Civilian aircraft, therefore, are subject to both reporting regimes and the potential for search that would not seem at first blush to be compatible with a programme of extraordinary rendition. That said, however, one must bear in mind that chartered or rented civilian airlines can carry out activities on behalf of the state that are not immediately conspicuous. Military aircraft, in contrast, are not susceptible to search. Nor is there any requirement that military aircrafts’ flight plans would be submitted in advance to air traffic controllers, although special permissions for over-flight and some information as to mission must be provided. Thus, military airplanes arguably have a number of advantages over civilian aircraft in an ‘extraordinary rendition’ programme. Their main disadvantage, for the sending state, is the easy identification of military aircraft by standard markings. However, if a state engaging in extraordinary rendition is concerned with concealment of their activities then the use of private airplanes is in fact a more sensible option. The Fava Report\textsuperscript{30} and

Working Document conclude that in fact concealment of the extraordinary rendition programme is the main motivation for the use of civilian airplanes and there does not appear to be any contrary explanation. This of course rests on the assumption that these aircraft would in fact be defined as civilian aircraft—a matter that is by no means certain.

As will be further considered below, the Convention does provide that military aircraft are not within its scope but does not, however, define “military use”. Michael Milde advocates a functional approach to the definition of military use that seems sensible, particularly since it would accept that an aircraft could be civilian on Monday (taking a CEO to a meeting in New York, for example) and military on Thursday (taking a suspected terrorist to a CIA black site in Afghanistan, for example). This would, of course, come with its own problems: how could a state be sure whether an aircraft was civilian or military on any given day? Given the fact that different legal regimes apply depending on the aircraft’s status this could certainly result in some difficulties in the absence of bona fide self identification which has not been in evidence thus far. However, arguably the current uncertainty relating to military use and the distinction in law between civilian and military airplanes, which can be taken advantage of for the purposes of concealment of unlawful activity such as extraordinary rendition, militates in favour of definitional clarity even taking the operational difficulties that might subsequently arise into account.

Such a development is likely to go some way towards making the use of civilian aircraft less useful from a concealment perspective. States’ concealment motivation is relevant here to identifying the paradoxes inherent in the United States’ extraordinary rendition programme. The United States’ determination to maintain an air of secrecy around its extraordinary rendition programme does not appear to be motivated by a security need. Even if some arguments can be made that the specific types

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31 Above n. ___
32 Michael Milde, “‘Rendition Flights’ and International Air Law”, (2008, Redress)
of interrogation methods used ought not to be publically disclosed as such
information may enable prospective detainees to ‘prepare to resist’ such
techniques, the same could not be said in relation to the general
information confirming that the United States engaged in extraordinary
rendition. The motivation for this secrecy, then, appears to have been that
the United States did not want the world at large to be aware of the fact
that it was in fact sending people not only to its own controlled although
concealed sites throughout the world but also into the custody of states who
are well known to engage in prisoner torture and inhuman and degrading
treatment and punishment.

Even when enterprising human rights activists and subsequently Dick Marty
of the Council of Europe had gathered sufficient evidence to show that
planes chartered and used by the CIA were regularly flying between and to
locations where torture was a frequent occurrence,\(^33\) the United States
insisted repeatedly and in the strongest possible terms that it did not
condone, encourage, engage in, or ask others to engage in torture. In fact,
the Bush Administration repeatedly reasserted international human rights
law’s \textit{absolute} prohibition of torture. This ought not to be held out as
evidence that the United States was not \textit{in fact} engaging in torture or
threatening the international prohibition of torture, of course. At the same
time as it was \textit{saying} that torture was unlawful and not authorised in the
‘War on Terrorism’ the United States was arguing (wrongly, under
international law) that the Convention against Torture did not apply to the
US’ activities outside of its own territory,\(^34\) preparing and acting on the basis
of Department of Justice memoranda that defined torture and inhuman and
degrading treatment or punishment in a far more limited way than does

\(^{33}\) Dick Marty, \textit{Alleged Secret Detentions and Unlawful Inter-State Transfers Involving
Council of Europe Member States} (2006, Council of Europe).

\(^{34}\) It is quite clear that international human rights law instruments, although primarily
territorial, have an extra-territorial effect where, \textit{inter alia}, the acts complained of occur
in situations under the effective control of the contracting state. For an analysis of extra-
territoriality in the context of the ‘War on Terrorism’ see, \textit{e.g.}, Fiona de Londras, “What
Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law
international law, engaging itself in interrogation techniques that it had previously determined to be unlawful such as water-boarding, and either allowing or mandating the infliction of torture on its detainees in Abu Ghraib prison. The United States’ words and actions did not correlate. However, the words are not unimportant or insignificant here.

The United States continued to engage with the UN Committee on Torture, continued to reiterate the absolute prohibition on torture, and continued to remain involved in the relevant international legal frameworks. Although the United States may have been attempting to narrow our understandings of what constitutes torture through this involvement, the important point for my purposes is that it did not simply reject international legal frameworks and machinery or decide to act in a typically hegemonic manner by simply turning away from international law. Rather, the United States attempted to engage in a transformative process that although attempting to reconstitute standards downwards also signified a commitment to the international legal machinery in which states and states’ practice help to shape and define rules and norms. The United States, in other words, did not walk away from international law’s absolute prohibition on torture; it may have intentionally breached it but its behaviours nevertheless displayed a base level ontological acceptance of its validity and importance as a

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35 For a detailed analysis see, e.g., Michael Scharf and Paul Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the Staten Department Legal Adviser*, (2010; Cambridge University Press), Chapter 16.


Using these private companies, including logistics companies, is arguably also an attempt to displace liability from the state to the private company—or at least to share that liability in some way. Where a state is engaged in activities that it claims are required for the purposes of national security, making that state accountable in law and particularly in damages is a notoriously difficult exercise. This is a result of both the traditional deference of the courts to the Executive in times of crisis and the capacity of the state to avail of public law shields against discovery or limitations of power in such litigation. A preparedness to take on a share of the liability by private entities such as limited companies may seem at first a risk-laden strategy. However, as ongoing litigation in the United States discussed further below shows, these companies can rely in the first instance on their contractor governments trying to avail of public law shields to prevent, frustrate or render ineffective any litigative attempts at accountability. In the second instance, these companies can attempt at any rate to use private law mechanisms of limiting their own liability through corporate veils and the creation of subsidiary companies so that even if a claimant can ‘reach’ the private entity in litigation, the remedy they receive may not be commensurate with the wrong done. Certainly, these private law shields can be effectively pierced, but doing so places a heavy evidentiary burden on the litigant that can be very difficult to satisfy or displace where the activities complained are, by their very nature, lurking in the shadows and usually only minimally recorded in official and discoverable documents. Thirdly, these entities are relatively unregulated by international human rights law, certainly in comparison to states themselves.

Thus, the use of private airlines and logistics companies to facilitate extraordinary rendition and the ensuing torture has a number of paradoxes.

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within it: it constitutes the privatisation and corporatisation of an inherently sovereign and demonstrative act (the infliction of tortuous violence) in a manner that theoretically exposes the state because of the regulatory requirements placed on civil aviation by public international law. As considered further below, however, the private regulatory frameworks that govern and apply to the aviation industry tend not to have a human rights/rule of law focus and are themselves problematic from the perspective of rights protection. At the same time, the decision to proceed in this manner has a concealment function that, combined with the public statements of the United States, points towards a concern with asserting the absolute prohibition on torture and remaining engaged in the international legal community. This concealment function, and the possible limitation of exposure to liability that arises from the use of private entities, jars with the deeply sovereign nature of torture.

Paul Kahn has recently written that both historically and conceptually the act of torture was an act by which the state would reconstitute and reassert its sovereignty; a show of power in which the spectacle was particularly important. Torture was a deeply demonstrative act—one through which an endangered and vulnerable state could show to all those who threatened it that it was and remained powerful. Kahn does not claim that there has been any change in the function of state torture. While some—including State officers such as Donald Rumsfeld—might claim that the purpose of inflicting torture (although they would not label it as such) was to gather information that would further protect the United States and ‘the people’, the general unreliability of torture evidence is well known. The function of torture is as much, if not more, that of showmanship and demonstration; a type of state-like strutting and swagger that shows a defiance against those who would try to undermine the state’s existence or threaten its sovereignty.

The difficulty, of course, for the modern state is that its strut and swagger

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by means of torture places it in the position of pariah. It can not be revealed, or at least not fully admitted, to the world at large for—as a community of states and of peoples—we have developed basic constitutionalist norms that all ‘civilised’ nations are supposed to adhere to. Primary among these norms is the absolute prohibition on torture. For the United States—the City on the Hill—to be seen to undermine those norms, brazenly and without any attempt at concealment, would be for the United States to risk relegation to the normative position of pariah, reputationally damaged beyond repair.\footnote{It must, of course, be acknowledged that some law and economics analyses of international law suggest that a state with the power capital of the United States is unlikely to be so reputationally damaged by its breach of an international human rights norm as to outweigh the perceived benefits (rhetorical, evidentiary and intelligence-related) of engaging in such activities.} By claiming documented cases of torture, such as happened in Abu Ghraib, to be the work of ‘bad apples’ and publicly expressing abhorrence for torture, while simultaneously operating a web of torture flights that it tried to conceal by the use of private entities, the United States could attempt at once to present a normatively sound anti-torture face to the world at large and the institutions of international law it helped to establish while expressing and demonstrating its power and ruthless sovereignty to those it believed to be Al Qaeda and its associated organisations. The United States did not succeed in this mission of concealing its torture-related activities. But what matters from a normative perspective is that it tried to. That it went to the extent of privatising—or at least quasi-privatising—this intensely sovereign activity in spite of its demonstrative function.

Thus, I argue that the United States’ actions reveal an underlying acceptance that being seen to torture—even being seen to torture those who are described as “the worst of the worst”—or to facilitate or encourage torture by other states would be damaging to the United States and would potentially open the government, military and maybe even individual military and other leaders to criminal and/or tort liability. The use of private entities in extraordinary rendition, therefore, revealed a position of intentional breach: ontological acceptance that suggests that not only is
the normative core of the absolute prohibition of torture relatively secure in
spite of all that has happened but also that international law’s status as law
is not contested although its enforceability in domestic legal systems may be.

This poses serious difficulties for those of us who are concerned with trying
to ensure that the absolute prohibition on torture in international law would
be made as effective as possible in practical terms. In the context of the
use of private entities in extraordinary rendition, we can see that this move
indicates a willingness on the part of the United States to manipulate the
public/private dichotomy that simultaneously manipulates the weaknesses
and ambiguities in public law (e.g. extra-territoriality principles in
international human rights law; ambiguity regarding the definition of
civilian and military aircraft in public aviation law) and takes advantage of
the commercially-oriented protective mechanisms extant within private law
(divisions between parent and subsidiary companies; corporate shield;
liability limitation devices) and the transnational sphere within which
aviation operates, which lacks a regulatory approach that is deeply rooted
in rule of law of rights protections (or at least is conceived as such).

This also requires us to theorise more deeply the reasons for such
privatisation or corporatisation of torture from the perspective of the
private sphere. As mentioned above, there is a private regulatory
framework that governs the aviation industry but that framework is not
generally based in, or saturated with, conceptions of a rights-based rule of
law. This framework can be broadly broken down into three categories on
the international/transnational plane: international trade organisations
and associations with regulatory roles or capacities; international non-trade
organisations with regulatory roles and capacities; regional institutional
organisations with regulatory roles and capacities.

\[43\] There will also generally be domestic regulatory agencies and/or provisions applying to
airlines.
There are various industry/trade organisations on an international level with a focus on regulating the airline industry and on feeding into institutional regulatory bodies and organisations. In general, these organisations have a trade focus, i.e. concentrating on ensuring that regulation as it exists in the public sphere does not overly impinge upon competitiveness and profitability and on ensuring harmonisation of regulatory requirements across the industry. In addition, these organisations often have a quasi lobbying role to play. Their memberships are generally corporations with some organisations having a mixed membership of organisations and individuals with professional interests in the aviation industry. Common to all of these organisations is a distinct lack of focus on traditional rule of law concerns including on the rights of those who may be impacted by industry operations outside of tangential concern therewith through environmental regulation. In general terms these organisations deal with individuals qua consumers of their products and services rather than qua subjects thereof (as is generally the case in extraordinary rendition where the individuals who are ‘rendered’ are not the clients/consumers of the company involved; rather the ‘rendering state’ is).

The primary international (i.e. non-regional) organisation with regulatory capacity is the International Civil Aviation Organisation, which was established by the Convention on International Civil Aviation of 1944 (a.k.a. the Chicago Convention) and is an organ of the United Nations. Unlike the trade/industry organisations considered above, the ICAO does list ‘Rule of Law’ as one of its strategic objectives, but its own organisational description expands thereon thus: “Strengthen law governing international civil aviation”. This is a clearly ambiguous statement and, while it does not necessarily include or omit human rights considerations on its own terms, it does little to suggest that human rights protection or the rights-based governance of state-agency contracts is a primary concern of the organisation. However, given its nature as a specialised organ of the UN, the

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44 International Air Transport Association; International Business Aviation Council; International Society of Air Safety Investigators; International Air Carrier Association; International Air Cargo Association.
work of the ICAO must be seen in the context of the broader concerns and capacities of the United Nations, including its rights-related competencies and work.

The European Union has a number of regional and associated organisations that have some regulatory capacity in the aviation context. As above, none of these organisations have a specific human-rights related orientation of the type we are concerned with in this case study, however once more those that are clearly tethered to the European Union must be seen within the context of the EU’s broader work and rule of law concerns, including fundamental rights protection under EU law and—since accession to the ECHR—Council of Europe law.

As an industry area, then, the realm within which the aviation industry (and most particularly aviation corporations without state ownership) operates can be imagined as being a relatively ungoverned or unregulated plane from the perspective of rights-based rule of law concerns. This is not to say that these corporations and this industry do not have the same general corporate social responsibility concerns as other industries or corporations (and there seems likely to be a particular resonance in relation to workplace CSR (implications for employees of being involved in activities such as extraordinary rendition), marketplace CSR (ethical practice and anti-corruption), and community-related CSR in this connection). However, it is possible that the aviation industry could be conceived of by the contracting state as operating within a realm where the transaction cost of rights protection (for that is precisely what rights have traditionally become considered as in the context of national security: costs) are reduced, or perhaps even negated, by the relative lack of regulation within that space conceived of as private.

**Conceptualising a Regulatory Response**

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45 European Civil Aviation Conference; European Aviation Safety Agency; EUROCONTROL
If my theorisation of the corporatisation of torture within the extraordinary rendition context of the Global War of Terrorism is right (or at least partially right) then this suggests a number of spheres within which we must respond if we are to endeavour successfully to close apparent ‘gaps’ within the human rights paradigms that have been proposed: (a) resisting the public/private dichotomy of international human rights law; (b) responsibilisation of the state for contracted out activities in breach of human rights protection; (c) responsibilisation of corporations for their contracted activities; (d) resistance to ‘national security’ defences within domestic courts and a reduction of security-related judicial deference.

(a) Resisting the public/private dichotomy of international human rights law

One of the most difficult conundrums posed by the privatisation of torture in the context of extraordinary rendition is the fact that, while companies are considered to have rights themselves in numerous contexts, human rights law and human rights obligations are primarily directed towards states. In other words, it is states who have the obligation to prevent and punish torture, inhuman or degrading treatment or punishment against individuals and those international human rights law obligations—and domestic obligations when they are incorporated—are generally not enforceable against companies. This development by which rights become progressively disembodied, rights-based obligations adhere primarily to states, and power becomes progressively destatified reinforces the division between public and private regulation of behaviours that has long frustrated attempts to effectively protect individual rights where those rights are made vulnerable by both public and private action.

As considered above, there are some limited circumstances in which human

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rights law has discarded the shackles of a public/private divide and obliged states to govern private behaviour in respect of individual rights. Although this does not constitute the direct responsibilisation of the private individual or entity concerned, it is a starting point. A similar approach towards recognising the relationships between public and private activity in relation to torture might be an effective manner of creating a public law environment in which any attempt to limit a state’s liability by means of the use of private enterprise in behaviours that are normally prohibited would be obstructed. The UN Convention against Torture already provides that states have an obligation to Article 2(1) to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. This obligation ought to be interpreted so as to ensure that domestic company law allows for the piercing of the corporate veil where a subsidiary company has been shown to be engaged in activities that constitute aiding, abetting or colluding in torture, inhuman or degrading treatment or punishment. As considered above, these activities are generally carried out by means of shelf companies—subsidiary companies established usually with only one or two employees and normally for the sole purpose of carrying out extraordinary rendition contracts and immunising the parent company from liability. Such subsidiaries are, essentially, sham companies and ought to be treated as such within domestic law. This is already the case in a number of jurisdictions, but where it is not so then the Article 2(1) obligation of the UNCAT should be interpreted so as to place that domestic legislative obligation on states.

It must be acknowledged that there are some limited instances in which domestic jurisdictions have already ensured that private entities and individuals can be liable for activities that took place outside of its jurisdiction and in violation of international law. The United States’ Alien Torts Statute is perhaps the most notorious of these and is indeed the basis
upon which the *Mohammed v Jeppesen Dataplan* litigation is proceeding.⁴⁷ The success of such litigation when taken against private entities engaged by the state will, however, depend to a large extent on the manner in which the state itself approaches the litigation and the manner in which the courts decide to receive security-based state arguments aimed at preventing the litigation from progressing. It ought also to be noted that, in spite of its auspicious beginnings in the well-known *Filartiga* case,⁴⁸ the ATS has not proved a generally successful basis for the responsibilisation of corporations for rights infringements.⁴⁹

(b) Responsibilisation of the state for contracted out activities in breach of human rights protection

As considered above, one of the most pervasive difficulties from a doctrinal perspective in relation to these privately contracted planes is to determine their status: is an airplane owned by Company X and normally a civilian or private airplane to be considered civilian when it is contracted to do government work? Does it matter what kind of work it is doing—is there, for example, a definitional distinction between a chartered airplane that is transporting a Minister of State to Kabul for a meeting and the same chartered airplane transporting a suspected terrorist to Baghram (just outside Kabul) for interrogation that may involve torture? The Convention on International Civil Aviation (i.e. the Chicago Convention) governs civilian aviation but is unfortunately not particularly clear in terms of definitional issues. The Convention is applicable to civilian aircraft only, but unfortunately the Convention itself defines civilian aircraft in only a negative way. In other words, those aircraft determined to be civilian are ones that are *not state aircraft*. Article 3(b) defines state aircraft thus:

⁴⁷ *Alien Tort Statute*, 28 U.S.C. 1350 (providing “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

⁴⁸ *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁴⁹ As an example of the extensive scholarship on the ATS see Peter Henner, *Human Rights and the Alien Tort Statute: Law, History and Analysis* (2009; ABA).
Aircraft used in military, customs and police services shall be deemed to be state aircraft.

Although this appears on its face to be a relatively uncontroversial and straightforward definition, the difficulty in this context arises with the lack of a clear definition of what counts as ‘military...services’. In addition, there is no clarity as to whether an aircraft can change its status from a civilian airline to a state airline (therefore not bound by the Chicago Convention). This difficulty is exacerbated by the potential in this context for chartered aircraft to be occasionally used for military services. Unless the usage is clearly communicated and exposed by the charter company or the state involved, how is an air traffic controller supposed to know that the aircraft that was civilian last week is now military and therefore that specific permissions are required for that aircraft to pass through or stop in the state’s territory? Although amending the Convention may seem an overly doctrinal or even pedantic activity, there is now a clear movement—led to a good extent by the Irish government—for the reform of the Chicago Convention to make its remit clear.

It is possible that, in some cases at least, the actions of a private company involved in the conduct of extraordinary rendition might be attributed to the contracting (i.e. rendering) and/or receiving states (less likely) by means of the attribution clause of the Articles of State Responsibility. This might mean that—rather than focusing solely (or primarily) on the private entity involved, the nature of the action (public) and the quasi primary-agent relationship between the actor (ostensibly private) and the contractor (public) would result in the state being conceived of as having responsibility for the actions involved. This is an interesting approach to take but requires a number of caveats by means of caution: (a) the attributive nexus must generally be found by a court in the course of litigation and, in general,

states will use strong public law defences (e.g. state secrets defences) to prevent the adjudicating authority acquiring sufficient information to establish this nexus; and (b) focusing on an approach that responsibilises states alone does not confront the regulatory challenges within the ‘private sphere’ that companies’ involvement in the commission of clearly unlawful state action such as extraordinary rendition draw attention to; and (c) even the Articles of State Responsibility still focus to a large (although not an exclusive) extent on the internal categorisation of a body, organ or action as public as opposed to private.\(^{51}\)

(c) Responsibilisation of corporations for their contracted activities

A second way of attempting to disincentivise private airlines’ engagement with such activities is to develop industry specific regulatory standards that make it clear that where a company knows or ought to know that aircraft rented, leased or chartered by them are likely to be involved in unlawful activity of this kind, or that logistical measures organised by the company might facilitate such activity, then all reasonable steps—including, if necessary, declining to engage in such contracts—should be taken to prevent same. As mentioned above, the aviation industry already has a public international regulatory body: the International Civil Aviation Organisation. The Organisation has six strategic objectives centring around safety standards, environmental responsibility, enhancing the security of global aviation, enhancing efficiencies, maintaining airline operation continuity, and ensuring the rule of law in relation to international aviation.

These objectives, then, are clearly focused on ensuring particular industry standards relating mostly to infrastructural matters. The rule of law objective might give some cause for optimism among human rights advocates; however in reality this objective has to date been one that is concerned with ensuring that the standards laid down are complied with

throughout the industry. This does not, however, preclude the expansion of the Organisation’s rule of law objective into the space of human rights protection and enforcement inasmuch as the industry might be said to be at all involved in these matters. Standard setting within the many trade/industries associations and organisations that exist for the aviation industry in its many guises is also an option that might be fruitfully explored.

There has in recent years been a growth in investigating the potential relationships between regulation and human rights and a growing recognition that such a development may require a reorientation, to at least some extent, of regulatory theory’s traditional conceptualisation of “‘better regulation’ [as being] almost invariably conceived in terms of efficiency—seeking the most impact for the lease imposition of regulatory burden”. 52 This would dovetail well with a growing recognition of corporate social responsibility and companies’ obligations beyond the economic in order to usher in rights-related regulation. The current process of re-regulating private industry (especially, but not exclusively, the financial industry) offers an opportunity to human rights scholars and activists to try to embed human rights as an important value within regulatory governance of private industry and of states’ relationships with private entities. It is important to remember that liberal principles (in the sense of ‘l’ rather than ‘L’ liberalism) were at one time embedded within the market—after World War II there was an emergence not only of a body of human rights law but also of a globalised market, which was based to at least some extent on the principle that what “markets that societies do not recognize as legitimate cannot last”. 53 According to Abdelal and Ruggie, who advocate a return to embedded liberalism within the re-regulated global marketplace (following the failure of deregulation), “[t]he core principle of embedded liberalism is


the need to legitimize international markets by reconciling them to social values and shared institutional practices". These authors may not have had directly in mind compliance with human rights law, but they do expressly advocate the continued development of corporate social responsibility and governments resisting the temptation to allow companies to ‘opt out’ of standards in order to attract them into their domestic marketplace. If one of our contemporary “social values” and “shared institutional practices” is, as is surely the case, the protection and promotion of human rights, then recognising the capacity of private entities to endanger those rights and placing rights-based regulatory obligations upon them must form a part of the re-regulation process.

Instead of conceiving of regulation as being a process of regulating the market and human rights advocacy as being a process of adjudicating and promoting individual rights a conception of rights and regulation as being mutually compatible notions can result in a regulatory framework that simultaneously improves efficiencies, lays down safety standards, ensures continuity of service and protects individual rights. In the context of international civilian aviation, this could take the form of industry standards requiring companies to satisfy themselves that their aircraft will not be involved in any way in activities that jeopardise individuals’ absolute right to be free from torture, inhuman or degrading treatment or punishment.

The pragmatists—or, indeed, realists—among us will justifiably question the capacity of such soft industry standards to have a real impact on airline companies’ likelihood to participate in such activities, particularly in a context where governments seem willing to provide very lucrative contractual incentives to such companies. Certainly, economic gain has the capacity to override compliance with soft industry standards or, at least, to make compliance quite minimalistic. However, the combination of such

54 Ibid, p. 153
standards with exposition to market sanctions might well be an effective means of rights-based regulation. The move towards ethical consumerism has been well documented—be it consumers’ decision to buy fair trade coffee over other coffee, or to choose organic food with low air miles over non-organic food that has a high air-mile count—where consumers can afford to do so there is a strong and continuing trend towards making more ethical consumer choices. What is considered to be ethical or not is, of course, frequently a matter of some controversy, however it has long been the case that consumers are considered to be capable of shaping the market and market behaviour in a manner analogous to how voters can shape politics and political behaviour.

One of the earliest expressions of this is found in the work of Frank Fetter who wrote “Every buyer...determines to some degree the direction of industry. The market is a democracy where every penny gives the right to vote”.\(^56\) Leaving to one side, for a moment, the obvious inequalities in market power between those with resources and those without, this basic conception of market power and ethical consumption potentially offers human rights advocates a technique for challenging private airlines’ involvement in extraordinary rendition in a manner analogous to that adopted with some significant success by those involved in the Fair Trade movement. Imagine, for a moment, the capacity of Boeing to be affected by the activities of its subsidiary Jeppesen Dataplan—actions ranging from managers of the increasingly popular ethical wealth management funds not share trading in the company right down to ordinary consumers of air travel services selecting to fly with carriers who do not use Boeing airplanes, for example.

Time, perhaps, for a reality check at this point. The airline industry and the market in aircraft companies, airlines, and air traffic logistics can not reasonably be compared—in terms of consumer choice—to the market in coffee, sneakers, or chocolate. It is a far more restricted market in which

consumers have less choice and in which price differentials are likely to be a great deal larger for the ‘ethical’ product that in the case with a cup of fair trade coffee or a recycled writing pad. However, the arguable lack of consumer choice does not necessarily correlate with a lack of consumer power in this context. Consumers can make decisions as to where to invest their funds, if they are private investors, or attempt to put pressure on their fund managers (such as pension funds) to ensure that investments are not made in companies that are implicated in such activities. When ethical consumerism has a ‘bottom line’ impact it is likely to have a behavioural impact as well.

In this relation there is also an appreciable potential for civil society to play an interesting and effective regulatory role in ensuring—at the least—transparency in corporate activities on behalf of states. The movement toward a civil society response to what has been termed ‘state crimes’ continues to grow, but as with so many other traditional conceptions of rights-based regulation (even if it has not traditionally been so named), the focus is on the actions of states. There is certainly a potential for civil society to cast a harsh light on the actions on private entities—to ‘name and shame’ to borrow a euphemism—in order to at the very least create a transparency paradigm that, combined with a policy of ethical consumerism (as a stock market investor if not a ‘consumer’ of services), could have an appreciable impact on corporations’ decision relating to clearly unlawful activity undertaken pursuant to state contracts.

(d) Resistance to ‘national security’ defences within domestic courts and a reduction of security-related judicial deference

As mentioned above, Jeppesen Dataplan (aka Jeppesen International Trip Planning) is a wholly owned subsidiary of Boeing which, unlike many of the other companies involved in extraordinary rendition, is fully staffed and operational as opposed to simply being a shell or shelf company. Jeppesen Dataplan’s involvement in the CIA’s extraordinary rendition programme was
exposed in a *New Yorker* article published in 2006 and entitled ‘Outsourcing: The CIA’s Travel Agent’ (Mayer, 2006). Jane Mayer based this article on (among other sources) conversations with a former Jeppesen employee who gave this account:

A former Jeppesen employee, who asked not to be identified, said recently that he had been startled to learn, during an internal corporate meeting, about the company’s involvement with the rendition flights. At the meeting, he recalled, Bob Overby, the managing director of Jeppesen International Trip Planning, said, “We do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these flights end up that way.” The former employee said that another executive told him,

“We do the spook flights.” He was told that two of the company’s trip planners were specially designated to handle renditions. He was deeply troubled by the rendition program, he said, and eventually quit his job. He recalled Overby saying, “It certainly pays well. They”—the C.I.A.—“spare no expense. They have absolutely no worry about costs. What they have to get done, they get done.”

Following on from these revelations the American Civil Liberties Union initiated litigation on behalf of five individuals who it was claimed had been subjected to extraordinary rendition and tortured in their destination country (or in some cases countries), arguing that Jeppesen Dataplan knew or ought to have known that the services they provided to the CIA would result in the torture of the applicants and, as a result, that Jeppesen was liable in damages to them under the Alien Tort Statute (28 USC § 1350). The original complaint details the ACLU’s claim as to the extent of Jeppesen’s
involvement thus:

In return for undisclosed fees, Jeppesen has played a critical role in the successful implementation of the extraordinary rendition program. It has furnished essential flight and logistical support to aircraft used by the CIA to transfer terror suspects to secret detention and interrogation facilities in countries such as Morocco and Egypt where, according to the U.S. Department of State, the use of torture is “routine,” as well as to U.S.-run detention facilities overseas, where the United States government maintains that the safeguards of U.S. law do not apply. ³

The United States government applied for the status of intervener and claimed that the Court ought to dismiss the petition on the basis of the state secrets privilege relating to the nature and extent of the alleged activities, which it invoked on behalf of both itself and Jeppesen. The Court originally acceded to the application of the United States government although, on appeal, this was reversed with the Appeal Court holding that the state secrets privilege could be invoked in relation only to particular pieces of evidence and not to the running of a case in its entirety and could only be used to dismiss cases in their entirety at the commencement of proceedings in suits arising out of a plaintiff’s alleged espionage relationship with the Government.

Following that decision the US government submitted a petition for the rehearing of the application en banc once more arguing that, should the case proceed, information essential to the maintenance of national security would be liable to be exposed thereby jeopardising national security generally. ⁴ Jeppesen itself also submitted a petition for rehearing en banc, claiming that discovery in the case is impossible as a result of the government’s assertion of the state secrets privilege and, secondly, that Jeppesen would be unable to properly and effectively challenge the
plaintiffs’ assertions on remand as all information on the basis of which they might so challenge the assertions would be information that the government would claim is subject to state secrets privilege. In response, the plaintiffs have argued that if the government succeeds in its action it will effectively prevent anyone from taking an action for damages in respect of torture or inhuman or degrading treatment arising from being subjected to extraordinary rendition and, potentially, even more broadly than that. In addition, plaintiffs argued against allowing the Director of the CIA—a position that clearly involved both policy and practical decision-making in respect of the programme of extraordinary rendition—from being the source of information on which a state secrets privilege was successfully based that resulted in the dismissal of an entire suit in which that same state actor’s agency was heavily implicated.

The litigation so far in *Jeppesen* clearly demonstrates the paradox inherent in the government’s use of private entities for the purposes of extraordinary rendition. On the one hand, the Bush administration used Jeppesen Dataplan to undertake all of the logistical arrangements relating to extraordinary rendition in an attempt to conceal their activities and, arguably, to limit the government’s own liability. On the other hand, the government (including the current Obama Administration) is attempting to avail of a public law doctrine that is inherently connected to the nature and security of the state to protect both itself and by implication that private entity thus frustrating any attempts to achieve accountability either through public law litigation (targeting the government or state agents) or private law litigation (targeting the relevant private entities). Even if the plaintiffs succeed in having the case heard, much of the substantive evidence might be excluded as a result of further invocation of the state secrets privilege and Jeppesen Dataplan itself may well try to take advantage of its two private law shields (the veil of incorporation and the insulation of parent company (Boeing) from subsidiary (Jeppesen)) to limit the restitution available to the individual litigants.

As demonstrated by the *Jeppesen Dataplan* litigation, states are likely to
respond to litigative claims regarding torture or other kinds of ‘intelligence’ operations in times of emergencies by claiming some kind of privilege in relation to the information concerned. States might claim—as the United States government does in Jeppesen—that discovery would endanger national security by exposing state secrets, or that executive privilege somehow overrides normal constitutional concerns in a particular case. These sorts of arguments are usually directed towards excluding judges and courts from an adjudicative role in relation to activities said to be done in pursuance of important national security goals: an area which is said to lie exclusively within the Executive domain with occasional and usually limited legislative involvement.

While judges have traditionally been deferential towards such claims, considering themselves to be institutionally incompetent in this relation, I have previously argued that in the course of the ‘War on Terrorism’ there has been an increased judicial willingness to take a muscular approach to such claims and to assert jurisdiction in order to submit executive action to meaningful scrutiny. To effectively enable individuals to assert their right to be free from torture, inhuman or degrading treatment or punishment it is important that courts would continue to act in a muscular manner that recognises that there are some state activities that are so anathema to the rule of law, constitutional norms and democratic principles that their consideration can be not be removed from the jurisdiction of the court.

This is not to say that the real practical difficulties concerning the security implications of discovery and so on ought to be ignored. To be sure there are cases in which the information that would be revealed as evidence would endanger military forces acting abroad or expose information to the ‘enemy’ in a manner that would make completely open litigation ill advised. However, there are mechanisms by which such evidence can be

considered by *in camera* courts, redacted judgments, and with the use of security cleared counsel that allows for the appropriate level of judicial oversight to be applied while striking an appropriate balance with national security concerns. This might be followed by the release of this information once the threat has passed or by subsequent investigations which, as Oren Gross has convincingly argued,\(^{58}\) may minimise the potential for normalisation of such activities however such *ex post facto* investigations and mechanisms must, in my view, be combined with effective judicial proceedings in order to take the normative acceptance of the prohibition of torture to a position of effective enforcement in the moment.

In such litigation it is important that the domestic courts and those who argue the cases before them would not limit themselves to a consideration of domestic law. This is simply because of the malleability of domestic standards in times of panic. Sociological, criminological and increasingly national security law scholarship recognise that situations of panic or emergency can result in law-making that too easily allows for fundamental standards to be brushed aside either expressly or by implication (through, for example, limiting courts’ jurisdiction or limiting individuals’ capacity to assert their rights). In such scenarios, looking to international legal standards can help domestic courts to remain grounded in the fundamental principles of liberal legalism that form the centre point of the rule of law—accountability of all to the law, being perhaps primary among them in these cases. This can bolster domestic courts’ capacity to act effectively in asserting and protecting the right of individuals to be free from torture, no matter what the perceived exigencies of the prevailing security circumstances might be.

**Conclusions**

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If we are to effectively regulate in the ‘gap’ between rights and security that is exposed by the destatification of sovereign power through the contracting out of torture and related activities, it is vital that we recognise that this gap exists both in imagination and reality, in public and private law, in domestic and international law, and in ‘hard’ and ‘soft’ regulatory approaches. Only a holistic (and therefore difficult) approach that fully understands the motivations for such destatification and corporatisation of power can enable effective responsibilisation of actors and protection of individual rights.