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Legal Pluralism within a Transnational Network of Governance:
The Extraordinary Case of Rendition

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Abstract

The article illustrates how the Bush Administration has constructed, while maximizing the secrecy of its doing so, a transnational network of state executives, intelligence agencies, corporations (including private military firms and subsidiaries of the largest aerospace companies in the world), professional attorneys, psychologists, interpreters, and academics. It resists conceptually reducing to 'state action,' or analytically conflating with other branches of state action, the practices comprising the Bush Administration's Extraordinary Rendition Programme. Instead, the article introduces the concept of a *transnational network of governance* to describe the social field within which these actors have developed the relations, practices, and discourses (including legal discourse) that have sustained this Programme. The article describes and examines this transnational network of governance, and the transnational legal space that it is producing, as an inherently contested terrain of legal discourse and analyses the actors attempting to shape and "fix" the still contested legal meanings of the practices constituting the development of this transnational legal space, and that, at least for now, still sustain the Extraordinary Rendition Programme.

Keywords:

Legal Pluralism; Extraordinary rendition; state action; transnational networks of governance;

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1. Introduction

Nation states organise many functions of governance within transnational networks, and this complicates our understanding of the dynamics of legal pluralism as primarily functioning within national legal systems. Legal pluralists have frequently observed that law is not confined within the coercive power of sovereign states and the international system of states. (See, eg, de Sousa Santos 2003, 2005; Galanter 1981; Griffiths 1986; Merry 1988, 2007; Moore 1986; Rajagopal 2005; Sharafi 2008; Tamanaha 2007; and Teubner 1997)

Some legal pluralists have documented hybrid or transnational legal spaces, where more than one legal regime operate within the same social field (Moore 1973), and in which law and legal meaning are contested, elaborated, and constructed through the conflict between norm-generating communities (Cover 1992), as well as transnational advocacy networks (Keck and Sikkink 1998), and transnational social movements (Dale 2003, 2007, 2008, and forthcoming; Rajagopal 2005). Legal pluralists have also shown, as in the case of Sally Engle Merry's legal anthropological work over the past two decades, how multiple, overlapping, and interpenetrating legal systems create sites of contestation that can generate legal opportunities not only for resistance but also creative intervention and adaptation that significantly modify or transform legal meaning and practice within an existing plural legal system. (See, eg, Merry 1988)

Paul Berman has applied a similar framework to the global arena in his effort to make better sense of the hybrid legal spaces that are generated by what he calls the 'global legal system,' which he understands to be '...an interlocking web of jurisdictional assertions by the state, international, and non-state normative communities.' (Berman 2007, p. 1159) He argues that it is the overlapping jurisdictional assertions among these different types of actors within a global, yet multiscalar, legal system '...that creates a potentially hybrid legal space that is not easily eliminated.' (Berman 2007, p. 1159) He notes, '...[t]hese spaces of complex overlapping legal authority are, not surprisingly, sites of conflict and confusion. (Berman 2007, p. 1162)

Berman's global legal pluralism does not adequately specify why conflict should result from overlapping jurisdictional assertions. After all, these overlapping jurisdictional assertions could as easily result in the mutual reinforcement of all of these actors' authority and elaborate internormative development across these jurisdictions. Yet, as Brian Tamanaha (2007) explains, it is the *diversity* among these multiple jurisdictional assertions, not the multiplicity itself, that helps make this legal space a site of contestation.

What makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations. This potential conflict can generate uncertainty or jeopardy for individuals and groups in society who cannot be sure in advance which legal regime will be applied to their situation. (p. 375)

At the same time, Tamanaha (2007) points out, the *diversity* among these multiple jurisdictional assertions can create legal opportunities for challenging authorities themselves.

This state of conflict also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims. This state of conflict, moreover, poses a challenge to the legal authorities themselves, for it means that they have rivals. Law characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim. (p. 375)¹

For Tamanaha, legal pluralism is a social phenomenon that '...exists whenever social actors identify more than one source of "law" within a social arena.' (2007, p. 396) This begs the key question that has stumped legal pluralists for over three decades: what is law? Tamanaha offers a simple, yet practical, solution that substitutes the intersubjectivity of a social constructionist perspective for the ever-elusive objectivity of a positivist perspective: '...law is what people within social groups have come to see and label as law.' (2007, p. 396). Tamanaha argues that it is unnecessary to resolve these debates to come to grips with legal pluralism: 'For those interested in studying law and society, what matters most is framing

situations in ways that facilitate the observation and analyses of what appears to be interesting and important.’ (2007, p. 411)

From the perspective of international human rights law and United States Constitutional law, many of the practices comprising the Extraordinary Rendition Programme, which the US President George W. Bush’s Administration secretly initiated in preparing for its “war on terror” during the immediate aftermath of the September 11, 2001 attacks on the World Trade Centre and the Pentagon, are illegal. However, the Bush Administration has been able to effectively complicate the efforts of activists, journalists, lawmakers, judges, and a growing list of prosecuting attorneys in venues and jurisdictions around the world to hold accountable the Programme to such international and US Constitutional legal standards. This fact has led many commentators to assert that the Bush Administration is a “rogue state executive,” as we discuss below.

In this article, however, we do not attempt to assess the validity of the normative assertions and legal discourse that the Bush Administration has offered in defence of the Extraordinary Rendition Programme, or the validity of its opponents legal claims. Instead, we show how the Bush Administration has constructed, while maximizing the secrecy of it’s doing so, a transnational network of state executives, intelligence agencies, corporations (including private military firms and subsidiaries of the largest aerospace companies in the world), professional attorneys, psychologists, interpreters, and academics. We resist conceptually reducing to ‘state action,’ or analytically conflating with other branches of state action, the practices comprising the Bush Administration’s Extraordinary Rendition Programme. Instead, we introduce the concept of a *transnational network of governance* to describe the social field within which these actors have developed the relations, practices, and discourses (including legal discourse) that have sustained this Programme.

The concept of a transnational network of governance provides a useful way for thinking through these and related questions. This concept is distinct from Anne Marie Slaughter’s (2004) “transnational governmental networks” in that it is comprised not only of state entities but of non-state entities as well. Particularly since the work of Michel Foucault on governmentality, governance has come to denote forms of control, and of producing subjects, that are not limited to, though they may certainly include, the state (Burchell, Gordon & Miller 1991). Instead, governance increasingly, under conditions of globalization, works through a variety of networks, some relatively permanent, others more transitory, that can include, in addition to states, sub-state actors, corporations, professional organisations, and media. These networks of governance traverse the boundaries of the traditional nation-state. Although the state, or some component of it, is often central to these networks, this is not always the case. We use the phrase *transnational networks of governance* to refer to these governance networks.

This is an innovative feature of our analytic framework that poses a challenge to most international legal, as well as legal pluralist, approaches. Both of these general types of approaches typically treat the State (although not necessarily its national legal system) as a unified actor. However, to account for the empirical practices of a United States Executive branch of government that asserts normative claims and legal discourse that violate its own state laws and international obligations, but which also has forged a transnational network of foreign-state executive counterparts, we have adopted an understanding of states that does not take for granted their unity, but rather sees them as being capable, at times, of nationally dissembling and transnationally reassembling to pursue particular functions of governance, for example regulating terrorist activity, that are being challenged by newly emerging transnational relations and practices, like those of *Al Qaeda*.²

In a spirit of global legal pluralism, we attempt to describe and examine this transnational network of governance, and the transnational legal space that it is producing, as an inherently contested terrain of legal discourse. It is a complex transnational social field that also has generated a variety of oppositional legal and normative challenges from state and non-state, domestic and international, as well as local and transnational actors, all of whom now may be analysed as actors attempting to shape and “fix” the still contested legal meanings of the practices constituting the development of this transnational legal space, and that, at least for now, still sustain the Extraordinary Rendition Programme.

In this article, we examine three general dimensions of the Bush Administration’s practices that have prolonged its ability to sustain and develop the Programme. We should emphasize that we conceptualise these as *dimensions*, not reified, separate *spheres*, of their practices (including their discursive practices). (See, eg, Emirbayer and Goodwin 1994)

(1) Politically, the Bush Administration has attempted to use its executive power to build a network of governance that extends its pre-emptive counter-terrorist reach far beyond its territorial sovereignty. The lynchpin of its entire Programme is the political claim that the United States (and, indeed, “the Free World”) is in a ‘state of war’. It rests on the metaphor of war, ‘the War on Terror’, to influence public opinion and political will to permit the Executive to act as if we were, in a technical-legal sense, at war with terrorists, particularly *Al Qaeda* terrorists. It is this political claim that John Yoo, attorney for the Office of Legal Counsel, helped the White House to assert within a legal discourse that would serve to shape its policy and Extraordinary Rendition Programme. To provide a sense of how the legal discourse connects the political claim that we are in a ‘state of war’ with initial aspects of the policy on extraordinary rendition, it is worth quoting at considerable length Yoo’s argument in *War By Other Means: An Insider’s Account of the War on Terrorism*:

If 9/11 did not trigger a war, as these critics contend, then the United States is limited to fighting *Al Qaeda* with the law enforcement and the criminal justice system, with all of their protections and delays. ... If 9/11 started a war between the United States and *Al Qaeda*, the United States can employ its war powers to kill enemy operatives and their leaders, detain them without charge until the end of the conflict, interrogate them without lawyers or Miranda protections, and try them without civilian juries. No doubt these measures seem unusual, even draconian, but the rules of war provide nations with their most forceful tools to defend their people from attack. We are faced with the difficult task of adapting those rules for the unprecedented appearance on the world stage of an enemy that, while not a nation, can inflict violence at a level once only in the hands of nations. To make wise policy choices, it is essential to understand the difference between, and appropriate uses of, war as opposed to criminal prosecution. (2005, Pp. 2-3)

From the success of this political claim, the Administration was better positioned to overcome additional, critical political obstacles to its more ‘draconian’ Extraordinary Rendition Programme. The first obstacle was the potential resistance from other States of the International Community. The Bush Administration deliberately chose to work within a North Atlantic Treaty Organisation (NATO) security framework in order to maximize its power to sustain the secrecy of the Programme, and to legitimate its frequent and top-secret flights into foreign airspace without having to provide ‘classified’ details of the Programme’s operations. They also skilfully forged secret bilateral treaties with the Executives of States with whom they required greater cooperation, enabling the Administration to build covert transnational support or, at least, to transnationalise potential liability, for the Programme, and raise the political stakes of breaking the agreed silence about the Programme’s existence. Finally, with respect to potential challenges from the Judiciary and Legislature within the United States, as well as civil society within and beyond the United States, they were better positioned to invoke the discourse on ‘national security’ and necessary ‘state secrecy’. In short, a key political dimension of the Extraordinary Rendition Program has been the way in which the Bush Administration has struggled to ‘privatise’ its operations.

(2) Culturally, they have attempted to redefine within the context of their Extraordinary Rendition Programme the *meanings* of the practices that, from the perspective of international human rights law and US Constitutional law, we would typically define as kidnapping, human smuggling, torture, *refoulement*, as well as prolonged detention without charge and other violations of fundamental *habeus corpus* rights. They have also tried to redefine the individual legal subjects of these practices as “(illegal) enemy combatants,” rather than as prisoners of war, and the collective political enemy as a “transnational network of non-state agents of war,” rather than as state-based military soldiers of war, or even criminal (non-military) terrorist organisations. In short, we explain how the Bush Administration has attempted to produce subjects with legal identities that are devoid of civil or even human rights, at least while in the custody of their Programme. Ironically, in doing so, they also have drawn at times upon aspects of law itself to justify practices that undermine fundamental civil and human rights. We see a pattern in their legal discursive practices that suggests more than a disregard for human rights. It is a deliberate effort to construct an island of legal meaning -- or perhaps, archipelago of legal meaning in the case of their ‘CIA black sites’ -- that would authorise what we call “human rights-free zones.”

(3) Legally, the Bush Administration has not simply sought to privatise knowledge of its Programme’s operations, but rather to privatize ‘the rules of the playing field’ within which it has made policy choices regarding the Extraordinary Rendition Programme.³ It has relied, strategically and selectively, upon alternative, existing domestic and international laws in an effort to maintain the secrecy of the Programme and to prevent any straightforward judicial application of US Constitutional law or

international human rights law and standards to the practices comprising extraordinary rendition that likely would rule them to be illegal and, in effect, call for the Administration to dismantle the Programme. Not only has the Administration forged operational alliances with executive and intelligence branches of foreign states in the Middle East, northern Africa, central and southeast Asia, and throughout Europe, but it has done so within the legal framework of the North Atlantic Treaty Organisation, and through additional bi-lateral treaties. To date, it successfully has drawn upon domestic “state secrecy” laws to shield from suit any critical examination of evidence that could be used to determine within United States courts the illegality of extraordinary rendition.

We also will show how the Administration has attempted to carefully embed its Programme in areas of international aviation law that arguably also could render it immune from suits filed under the *United States Federal Alien Tort Claims Act* corporate actors who help sustain the Programme. The Bush Administration’s simultaneous effort to embed the Extraordinary Rendition Programme in these various aspects of law, and to obscure or obstruct any authoritative, definitive, ruling on the legal meaning of the practices comprising the Programme, has enabled it to effectively sustain, despite growing domestic and international condemnation of, this Programme. While it is not clear whether the Bush Administration would yield to the rulings of various international bodies and state courts (including its own) were they eventually to deliver them, it is nevertheless interesting to us that the Bush Administration continues striving to draw upon legal discourse and aspects of law to justify its Programme – and has been doing so even prior to the public’s knowledge of its existence. We see the Extraordinary Rendition Programme as more than evidence of a rogue state executive, but more threateningly as a transnational project to construct a new, privatised internormative order for addressing whatever it perceives to be terrorist threats to its national security and that of its allies.

In the following section, Section 2, we describe the process of extraordinary rendition and the legally and morally contestable practices comprising it that now are institutionalized in the Extraordinary Rendition Programme. We then examine one innovative response to it – an *US Alien Tort Claims Act* suit filed by the American Civil Liberties Union (ACLU) against Jeppesen Dataplan, Inc., a subsidiary of Boeing Corporation (Mohamed et al v. Jeppesen Dataplan, Inc.). We argue that relying solely upon a litigation strategy for challenging the construction of this transnational legal space and for dismantling the extraordinary rendition program may serve only to bolster the program’s legitimacy. We highlight the political difficulties of relying upon a legal discourse that could be derailed either by the Defendant’s drawing upon international aviation law in ways that could provide it immunity from suit, or by invoking the “state secrecy” defence to prevent evidence from going to trial. Either of these defenses, or both, combined with weak judicial political will to allow the case to proceed, could derail suits of this kind. Although such an outcome does not mean that the Court finds the Extraordinary Rendition Programme to be legal, it does authorise the use of law and judicial rules pertaining to standing and evidence in the Court and render the public effect of lending credence to the notion that the Programme is necessary to the Nation’s security and that it is ‘legal enough’. To be clear, we applaud the legal efforts of the ACLU and others for attempting to challenge the Extraordinary Rendition Programme in the courts. However, we argue that legal arguments alone do not have the necessary power to influence the political will of judicial (or legislative) bodies within the United States in the current moment. Yet, we do think that such legal strategies in the courts, when combined with powerful moral discourses by activists outside the courts, can have an effective conjunctural influence on the political will of the next Administration that takes office in January, 2009.

After demonstrating how the Administration is effectively using aspects of international and domestic law to obstruct challenges to the Programme, we then show how it has embedded the Programme within a NATO framework to allow itself to secretly activate trans-governmental networks of sub-state actors through which detainees are hidden from the public, as well as from the legislative branches of the national governments involved. Taken together, these examples in Section 2 show how the concept of a transnational network of governance can help us to illuminate potential difficulties in effectively challenging the Programme under international human rights law and international customary law – especially as they have become institutionalized in the legal system of the United States.

In the final section, Section 3, we conclude with a discussion of a transnational social movement that has emerged in opposition to this transnational network of governance that sustains extraordinary rendition to illustrate what a more robust and dynamic movement to end extraordinary rendition might look like. We show how the actors sustaining this movement creatively combine legal, political, moral, and empirical discourses while organizing transnationally with other groups and movement networks

throughout the United Kingdom and Germany to target corporate and state partners outside the reach of the US Constitution.

We argue that focusing on the extraordinary rendition program's *extra*-legality lends insufficient attention to the *moral* and *ethical* dimensions of a rendition program consisting of practices that typically would be uncontestedly represented as forms of state-sponsored abduction, transnational human smuggling, and violations of *Habeus Corpus* rights, *refoulement* and torture. We argue that the fight to end extraordinary rendition through the courts alone risks squandering the powerful moral outrage spawned by the CIA's once-covert program by reducing it to a question solely of legality. The distinction between legality and morality is necessary for challenging the unjust or immoral practices of states -- particularly when these states have (at least technically) used law to circumscribe the meaning of the relationships within which these practices are embedded in order to isolate these contestable practices from legal scrutiny. Further, such a distinction allows us to engage the underlying issue of conflicting understandings of legality and, by extension, definitions of law. Analysis of the Programme and responses to it reveal distinct normative claims and meanings which underlie competing claims to legality within this transnational arena. What appear as competing legal claims are, at least in this case, competing moral-normative claims by different groups of social actors. This provides useful insight into conflict on the developing terrain of global legal pluralism that is sure to grow in what is increasingly a multipolar and multiscalar transnational order.

2. Extraordinary Rendition and Transnational Networks of Governance

Extraordinary rendition refers to "the transfer of terrorist suspects to locations where it is likely that that they might be subjected to waterboarding and other 'enhanced interrogation techniques'. This process, entailing the transfer of an individual by a State from one foreign jurisdiction to another for the purpose of interrogation in a situation where there is a risk of torture, has come to be known as 'extraordinary rendition' (International Human Rights Clinic, 2006, P. 11). The process of extraordinary rendition differs from extradition in that the latter involves the formal transfer of a suspect from one jurisdiction to another in a way that is intended to safeguard human rights and state sovereignty, for example through bilateral treaties (ibid, p 4). Extraordinary rendition also differs from other processes involving informal transfers, such as renditions to justice, "a practice of using abduction, luring and forcible transfer to gain criminal jurisdiction over an individual." (International Human Rights Clinic, P. 11) Renditions to justice, as the International Human Rights Clinic points out, involve the violation of state sovereignty, but are still meant to bring individuals to trial, or to justice. Extraordinary rendition, on the other hand, constitutes a form of rendition from justice. It is not intended to deliver suspects into the arms of the law, but to suspend them in a legal limbo. This is one of the key reasons many human rights lawyers and activists believe the program is legally vulnerable.

State officials, attorneys and legal academics, and even amateur jet-spotters have through painstaking work unearthed irrefutable evidence of front companies, phony identities, forged signatures, falsely registered flight records, secret prisons, ghost detainees and enhanced interrogation techniques that most people consider torture, all linked to the Extraordinary Rendition Program. Thanks to the work of international non-governmental organisations like Amnesty International and Human Rights Watch, and investigative journalists like Stephen Grey (author of *Ghost Plane*), Trevor Paglen and A.C. Thompson (co-authors of *Torture Taxi*) and the *New Yorker's* Jane Mayer and Seymour Hersh, as well as that of the many anonymous state, CIA, and military actors embedded in the process who turned whistleblower or informant, most of us have at least heard of this once-secretive program.

The steady stream of revelations about the rendition program and its associated abuses have fuelled a moral outrage around the world about a US presidency out-of-control, operating at the edges of constitutional and international law in some instances, and disregarding law altogether in others. The "rogue state executive" has become the chief antagonist in a spate of lawsuits, exposés and former insider tell-alls. President of the National Lawyer's Guild Marjorie Cohn has nicely captured perhaps the most common representation by critics of the Bush Administration's relationship to the program of extraordinary rendition (and to the so-called "War On Terror" more generally) in the title of her new book, *Cowboy Republic: Six Ways the Bush Gang Has Defied the Law*.

Here, however, we demonstrate some of the ways that the Bush Administration has embedded the Extraordinary Rendition Programme in law. To be clear, we are not arguing on behalf of its legality, or that its legality is unassailable. Rather, we show how the Administration has embedded the practice in various legal frameworks that complicate efforts to confront the program on legal and constitutional grounds alone. But again, extraordinary rendition is a process comprised of many practices, all of which are essential to sustaining it. The argument that we are making is not that the laws in which the Administration has embedded its Programme are somehow sufficient to validate extraordinary rendition. Rather, it is that, the absence of any formal ruling on one of following of its practices as it has represented them, has facilitated the Administration in sustaining its transnational Programme:

(1) waterboarding (as “torture”); (2) and the legal rights of “enemy combatants” (or even the legitimacy of the term instead of ‘prisoners of war’ (POW)); (3) as applied to the capture (‘kidnapping’); and (4) coercively transporting across state territorial boundaries (‘human smuggling’); and (5) denial of a fair and timely trial in which evidence against the enemy combatant is made available to him (‘*Habeas Corpus* rights’ violations against ‘non-citizens indefinitely detained in a foreign state’); or (5) dropping off the enemy combatant in a third state (likely to ‘torture’ the ‘POW’ and thus amounting to ‘refoulement’); or (6) the claim that the US is “at war,” (as opposed to fighting ‘criminals’ suspected of deploying terrorist tactics).

At its core, extraordinary rendition is embedded in a discourse of war that has the potential to significantly alter the legal landscape. There has been much discussion of this Administration’s zeal in expanding executive powers. Numerous commentators, legal scholars and anti-war critics have noted the extent to which this expansion is regularly couched in the language of war. By invoking a condition of war, the White House has been able to both activate and expand presidential war powers. They have used this power to embed the Extraordinary Rendition Programme in legal frameworks beyond United States Constitutional law. The Extraordinary Rendition Programme is in fact embedded in a plurality of legal frameworks, from innovative, if troubling, interpretations and applications of existing law, to creative manipulations of legal gray areas. Extraordinary rendition is also embedded in networks of legal and academic professionals and corporations, as well as bilateral, multilateral and transnational sub-state agreements with governments representing some of the most critical voices against United States policy. More specifically, the Bush Administration has grounded extraordinary rendition within various sources of international law that can complicate the claim that it contravenes United States Constitutional or international human rights law. International aviation law and North Atlantic Treaty Organisation Agreements in particular may provide the Bush Administration, at least in some cases, with the legal resources that it needs to thwart (essentially by protecting them from a full-throated prosecution) challenges that have been grounded in United States Constitutional and international human rights law.

Although we are developing a database of more comprehensive examples that include legal suits and campaigns being initiated within international bodies and the national legal systems and civil societies of other States, we examine in the sections below only a few of the initial efforts originating within the civil society of the United States to challenge the Extraordinary Rendition Programme. Although the results of these efforts are still unclear, we have been impressed with their strategies. At any rate, they help us to illustrate our point about the hybrid transnational legal space within which the legal meaning of the Extraordinary Rendition Programme is unfolding.

The case of extraordinary rendition illustrates many of the analytical challenges that have recently pushed legal pluralists to extend their framework to the global arena: how do we determine the boundaries distinguishing “inside” from “outside” the law when the meaning of the practice, or the identity of the subject, is rendered contradictorily polysemous by its simultaneous positionality within multiple, overlapping, and unharmonised legal structures – both within and beyond the nation-state? And who has the jurisdictional authority (or influence over that authority) to make this determination? A simple answer may be that a whole host of actors have simultaneous jurisdictional authority to weigh in on extraordinary rendition. But, at least so far, it is not clear that these authorities are in agreement and, at least some, are not even politically willing to deliver a ruling. Thus, conflict continues over the legal status of extraordinary rendition.

The Bush Administration has embedded the Extraordinary Rendition Programme within a transnational network of governance. Initially, it was able to produce not only a global network for the abduction, transportation and interrogation of terror suspects cloaked in secrecy, but also to produce, or at least, attempt to produce, subjects to whom human rights and customary laws do not apply. Although, as we have explained above, this effort to construct a transnational internormative order produces a hybrid

transnational legal space that is not immune to challenges from outside the intended boundaries of its initial organizers. This space of governance is very much under construction and will be shaped by the conflict of competing contestants wielding, multiple, diverse, intersecting, and overlapping legal and normative discourses.

What this effort has accomplished, however, is the creation of a legal armour that has, thus far, protected the Programme and the individuals and institutions involved with it, from international human rights law and United States Constitutional law. When we consider the Programme from the perspective of its gross violation of human rights, this achievement is considerable. For scholars of law, as well as for human rights activists, it is crucial that we fully understand how this Programme has been constructed, how it has been sustained, and how it is being challenged.

In May of 2007, the American Civil Liberties Union (ACLU) filed a suit on behalf of three non-US citizens against Jeppesen. The ACLU alleges that the CIA abducted the plaintiffs off the street and flew them to prisons in Morocco, Egypt, and Afghanistan, where intelligence officers from Morocco, Egypt and the United States held them without charges and tortured them. Allegedly, the CIA paid Jeppesen to make the complex and clandestine logistical arrangements necessary for the trips. Jeppesen arranged the landing clearances, flight plans, ground crews, and even hotel rooms, as these “ghost planes” flew between Washington, DC, Stockholm, Rabat, Cairo, and other far-flung destinations. Although Jeppesen’s employees did not physically touch the plaintiffs, nor even fly the planes that carried them, the ACLU is claiming that by participating in the government’s extraordinary rendition program, Jeppesen knowingly aided and abetted the torturing of the plaintiffs.

The ACLU filed the Jeppesen suit under the Alien Tort Claims Act (“ATCA”). ATCA is a powerful transnational legal mechanism that can provide a US federal court venue to the victim of a tort or a *Jus Cogens* human rights violation (like torture, slavery, war crimes, or genocide) that occurs outside the United States. Originally part of the 1789 US Judiciary Act, ATCA was used mostly to target pirates on the high seas, but fell into disuse for nearly two centuries. Twelve peasants from Burma and their US attorneys resuscitated it and, in 1996, became the first to use it to successfully file suit against a corporation. (Dale 2007) They filed suit against Unocal Oil Corporation for its complicity in using slave labor to construct a natural gas pipeline in Burma. (Dale 2003; 2007; and 2008) Human rights activists have since hailed this statute as a critical tool that arguably is transnational in its legal scope for reining in the power of rogue corporations that commit or facilitate human rights abuses. (Dale 2003; and Forthcoming)

Jus Cogens norms (literally meaning “the compelling law”) hold the highest hierarchical position among all other norms and principles (Bassiouni 1996: 67). In 1969, the Vienna Convention on the Law of Treaties first defined *Jus Cogens* norms as principles “accepted and recognised by the international community of States as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention of the Law on Treaties, 1155 U.N.T.S. 331, 344, art. 53.

As a consequence of this standing within the law of nations, most courts around the world (including US courts) deem *Jus Cogens* norms to be “peremptory” and “non-derogable.” In other words, *Jus Cogens* norms are norms of international law from which derogation by States, including between treaties bilaterally, are not permissible. Any international agreement that would violate them would be void (Vienna Convention of the Law on Treaties, 1155 U.N.T.S. 331, 347, art. 64). In the summer of 2004, the United States Supreme Court held in the case of *Sosa v. Alvarez-Machain* that only a human rights violation of the highest and most agreed upon magnitude qualifies for consideration under ATCA. In other words, only ATCA claims based on violations of *Jus Cogens* norms qualify (*Sosa v. Alvarez-Machain*, 542 US 692 (2004)).

In what has become a pattern in cases challenging the legality of extraordinary rendition, the United States District Court for the Northern District of California granted in February, 2008, the Administration’s request for dismissal on the grounds that to allow the suit forward would require it to reveal state secrets. To the disappointment of many legal and human rights experts, the Court permitted national security claims to trump due process. The ACLU is appealing the case.

Should the ACLU win its lawsuit, the extraordinary rendition program could come to a crashing end. Other aviation companies may be hesitant to fill the void created by Jeppesen’s forced exit if the courts

signal that the CIA cannot shield them from liability. However, depending on how the program is depicted in the court, losing this case, worse still, could serve only to reinforce its legitimacy. Indeed, as we show here, the rendition program is embedded in various legal frameworks in ways that may weaken or at least obstruct legal challenges to it. Potentially, these suits could strengthen the claims of the Administration, allowing it to claim that its conduct in the “War on Terror” has been properly vetted through the (domestic) judicial process and not ruled illegal. Given the Bush Administration’s frequent deployment of a sovereigntist position on matters of international law, their deployment of such a discourse could further serve to glean support in some legal circles for its legitimacy.⁴

Still, this strategy must overcome substantial, political, cultural, and legal challenges. On September 12, 2001, NATO invoked for the first time in its 52-year existence Article 5 of the North Atlantic Treaty, the common defence clause. This meant that NATO could now act to defend the United States in its ‘War on Terror.’ Three weeks later, President Bush signed a classified Presidential Finding, used to authorise covert activities with limited Congressional oversight, as a means of granting the CIA important new competences relating to its covert actions. (Intelligence Authorization Act 1991) In this case, President Bush gave wide latitude to the CIA to engage in paramilitary activity, with a broad rather than narrow scope; for example, the authority to set up a secret prisons program. (Marty Report 2007 §58-59) The expansion of CIA powers, however, while necessary for the creation of the rendition program, was not sufficient for its actual implementation. Successful execution of the rendition program and keeping the Jeppesen flights as well as their human cargo secret would require significant cooperation from certain actors within European states. Article 5 of the NATO treaty provided the opening for this cooperation. Once NATO authorised action in the common defence, the Bush Administration rushed to secure specific agreements from NATO states for access to airfields and ‘blanket overflight clearances’ for military flights related to operations against terrorism. This is where the question of whether the Bush Administration was in fact acting on its own, as a rogue executive outside of the law, gets interesting. Less than a month after September 11, 2001, the countries who agreed to allow the CIA to use its airspace and airfields extended well beyond the NATO member states, to a total of forty. (Marty Report 2007 §105)

These authorisations were vital to the CIA’s clandestine operations through the airspace and on the territory of a broad range of foreign states. (Marty Report 2007 § 91) Commissioner on Legal Affairs and Human Rights of the Council of Europe, Dick Marty explains why the blanket overflight clearances were especially significant. ‘In the NATO public statement,’ Marty writes in his June 2007 report, ‘the clearances were said to apply to “military flights related to operations against terrorism” but, even without sight of the classified parts of the authorization, this characterization is misleadingly narrow’. (Marty Report 2007 § 100) As he explains,

“Military flights” is a term relating to the *function* of the flight, not the type of aircraft used. In international aviation law, the status of an aircraft is determined by the function it is performing at any given time – and flights performing “military” functions would necessarily fall into the category of “state aircraft”.

“State aircraft” enjoy precisely the type of immunity from the jurisdiction of other states that the US Government sought to achieve for aircraft operating on behalf of the CIA: “they cannot be boarded, searched, or inspected by foreign authorities, including host State’s authorities”. (Marty Report 2007 § 101 and 102)

It is worth noting that this characterisation of the flights as ‘military’ has clear implications for the Jeppesen suit. Should the case go forward, overcoming the lower court’s ‘state secrets’ ruling, the appellate court may well invoke international aviation law to construct as ‘state aircraft’ what the ACLU has understood to be civilian aircraft, and thus grant Jeppesen immunity from the ATCA suit.

The ACLU is trying to use this federal statute to identify Jeppesen Dataplan as a subject over which United States federal courts have jurisdiction, and one who is liable for complicity in acts of torture that were committed outside the United States.⁵ In this case, ATCA could enable the ACLU to target the State’s abuse of human rights via its corporate partnerships. That the ACLU is adopting this legal strategy indicates firstly, that they are asserting that the Extraordinary Rendition Programme violates *Jus Cogens* human rights norms, in this case, through the practice of torture; and secondly, that they recognise how extraordinary rendition is embedded in a transnational network of state and corporate actors who have forged a legal partnership. It seeks to exploit the Bush Administration’s dependency upon this network, seeing it as a vulnerability. However, this strategy itself has some important

vulnerabilities that illustrate how a transnational politics of legal representation, shaping the meaning of extraordinary rendition in the context of this suit, enables Jeppesen's legal team to reposition the corporation's flights as *military* rather than *civilian*, and reposition the subject of the suit as a *state* rather than *corporate* entity.

As a result of this repositioning, the Jeppesen plaintiffs could lose in US Federal Court. Because the Extraordinary Rendition Programme is embedded in a hybrid transnational legal space, the legal meanings affecting standing in the Court, and rules of immunity from suit, are all highly unsettled. Invoking violations of international norms as the basis for their suit does not necessarily trump the ways that international aviation law combined with laws on state sovereign immunity can undermine the ACLU's construction of the kind of legal context that would be necessary to prosecute Jeppesen Dataplan under the Alien Tort Claims Act. It therefore would be politically naïve for us to depend solely upon a legal discourse that could be derailed by questions regarding what happens when different international laws, like the Geneva Conventions and international aviation law, are brought into conflict before the Court. Should the suit go forward on appeal, Jeppesen may attempt to claim that it was immune from suit because it was operating military, not civilian, flights.

Embedding the Programme in multiple areas of international and domestic law is one means through which rendition is kept both secret and legally protected, particularly with regard to the transport of suspects across various national borders. In the context of international aviation law, having military status for the Jeppesen flights, meant that the company's planes could traverse European borders based on the overflight clearances granted by NATO in the days following the attacks of 11 September, 2001. This NATO framework also proved vital for secretly detaining rendered suspects on European soil, as it allowed the Administration to activate trans-governmental networks of sub-state actors through which detainees could be hidden not only from the public, but from the legislative branches of the national governments involved. The detaining of suspects was based upon a particular transnational network of legal relationships between highly specific political actors in Europe and the United States. The case of Poland is illustrative. Poland is one of two European countries, the other being Romania, where the Council of Europe has confirmed the existence of secret CIA detention facilities for suspected terrorists. (Marty Report 2007)

To cloak the CIA flights into Poland, where the CIA kept its highest value detainees, a branch of the Polish armed forces, the Military Information Services (MIS), working directly under the Minister of Defence and the Polish president, secretly positioned its agents within civilian Polish agencies, notably the aviation authority (Polish Air Navigation Services Agency), the border authority (Polish Border Guard) and the customs authority (Customs Office). Other important players included the Chief of the National Security Bureau (an intelligence service housed in the Office of the President), the Minister of National Defence, and the Head of Military Intelligence.

The significance of these partners lies in their ability to facilitate the secrecy of the program. Indeed, this secrecy is explicitly protected by the NATO framework and the military status it confers on operations. The sub-state actors involved are the Polish equivalents of the US President, the CIA and the Department of Defence. In representing the campaign against terrorism as a military operation and subsequently invoking the NATO defence clause, the Bush Administration was able to bring front and centre the military and national security agencies associated with the military, while sidelining civilian agencies. One military intelligence source, when asked whether the civilian intelligence agencies were informed about the high-value detainee program replied, 'Even the [Internal Security Agency and the Foreign Intelligence Agency] do not have access to all of our materials. Forget the Prime Minister; it operated directly under the President'. (Marty Report 2007 § 176)

The Polish Military Information Service enjoys 'military status' in defence agreements under the NATO framework. The MIS was, thus, able to maintain far higher levels of secrecy than the two civilian agencies, the Internal Security Agency and the Foreign Intelligence Agency, both of which are answerable to the Prime Minister and Parliament. (Marty Report 2007 § 167) Once established, the CIA-initiated partnerships could then carry out their work covertly through a NATO framework that gives great latitude for secrecy. NATO security policy says very explicitly, '[i]ndividuals in NATO nations ... shall only have access to NATO classified information for which they have a need-to-know. No individual is entitled solely by virtue of rank or appointment or PSC [Personnel Security Clearance] to have access to NATO classified information'. (CM(2002)49, 'Security within the North Atlantic Treaty Organisation (NATO)', p.2 §6. Cited in Marty Report 2007 § 161) The compliance under NATO

thus made it easier for the CIA to handpick who would know about the program, while simultaneously lending legitimacy to the process under the treaty framework. In this sense, compliance with the law proved more valuable than operating extra-legally. Marty writes that, 'The NATO Security Policy and its supporting Directive on the Security of Information are among the most formidable barriers to disclosure of information that one might ever come across. It is easy to understand why an institution or state agency wishing to carry out clandestine operations would opt to bring them under the *protections* of the NATO model'. (Marty Report 2007 § 109 emphasis added)

Also central to providing the organisational and regulatory infrastructure for the Extraordinary Rendition Programme are bilateral agreements between the US and partner states. According to Marty, in general the agreements are grounded in the NATO framework and NATO Security Policy in particular, and they have proven especially useful for making key arrangements related to the high value detainee program. (Marty Report 2007 § 10, 112, 160) The classified bilateral agreements include 'deep' forms of cooperation that include, among other things, operational security for CIA covert programs. These were described to Marty's investigators as, '...the intelligence sector equivalent of "host nation" defence agreements – whereby one country is conducting operations it perceives as being vital to its own national security on another country's territory'. (Marty Report 2007 § 115) Although Marty's team was unable to obtain copies of these agreements, Polish authorities provided one example indicating that the agreements are at least in part related to intelligence work; this, and the fact that they are classified in the first place, strongly supports the Marty's contention that the agreements play a central role in the rendition and detention program. (Marty Report 2007 § 140)

The choice of Poland as partners in covert operations, and as a site for the secret detention facility for rendered suspects in particular was not arbitrary. It also sheds further light on the nature of the networks constructed or activated to carry out the rendition program. The United Nations' Committee Against Torture has long criticised Poland for the country's reluctance to enact domestic legislation defining and establishing clear punishments for torture. These national laws are requirements of the United Nations' Convention Against Torture, and Other Cruel, Inhuman, Degrading Treatment or Punishment, which Poland ratified on July 26, 1989. Indeed, as early as 2000, a decade after Poland had ratified the Convention, the United Nations' Committee Against Torture made the following remarks:

The Committee is concerned that the amendments to domestic legislation do not contain any provisions for the prosecution and punishment of those guilty of the crime of torture, as required by articles 1 and 4 of the Convention [against Torture]. The Committee is also concerned that the new Penal Code does not introduce any substantial change regarding orders of superiors when they are invoked as justification of torture. According to existing legislation, criminal responsibility of the recipient of an order is based on his awareness of the criminal nature of the command. The new Penal Code does not include the "danger of exposure to torture" as one of the grounds for the refusal of extradition as is required by article 3 of the Convention. (Report of the Committee Against Torture 1999/2000 § 87-89)

Further, the Committee notes, '[I]n the Polish legal system there are no provisions for making charges relating to, nor penalties applicable to, the crime of torture'. (Report of the Committee Against Torture 1999/2000 § 92)

This does not entirely explain the choice of Poland, as the Committee makes similar observations about the relative weakness of national legislation concerning torture in other Western European nations in the report, namely Finland and Austria. It should be noted, however, that the critique of Poland is more far reaching than that of the other two. Further insight into the choice of Poland is provided by Marty's report, where it is noted that in the cases of both Poland and Romania, the US chose partners that were economically vulnerable, emerging from difficult transitions, and dependent on the US for strategic development (Marty Report 2007 § 123). Significantly, the desire by both nations to join NATO had led them to harmonise military and intelligence laws and structures with the NATO framework (Marty Report 2007 § 138), effectively opening themselves up to precisely the kind of penetration we see with the Extraordinary Rendition Programme. In both cases material incentives played a role as well. In the case of Poland, for example, the US provided what the Marty Report describes as 'staunch support' for locating the lucrative NATO Integrated Air Defence System in the country. (Marty Report 2007 § 125)

Beyond strategic calculations, Poland and Romania were logical choices for another important reason. A high-ranking Eastern European politician involved in the detention programme said of the two in

European partners, ‘Poland and Romania; you don’t know why? [It is] because we are the only two countries [in Eastern Europe] who are truly pro-Occident’. (Marty Report 2007 § 137) This view was reiterated by a CIA officer interviewed by Marty’s team. Commenting on the general mistrust in the former Eastern Bloc intelligence services of the US, he observed that, ‘I think Poland is the main exception; we have an extraordinary relationship with Poland. My experience is that if the Poles can help us they will. Whether it’s intelligence, or economics, or politics or diplomacy – they are our allies’. (Marty Report 2007 § 124)

Drawing out the influences behind the choice of Poland for the location of one of the two known European secret detention facilities sheds light on the environment in which this transnational network took shape. It’s relationship with the United States, particularly between the respective intelligence and security agencies, economic dependency, and a desire to join NATO, provided an opportunity which the United States was able to exploit following 11 September, 2001. Manipulating the legal spaces created by the NATO framework and bilateral agreements, the United States was able to establish a network that effectively deployed the law to hide detainees, at least for a time, from the public, national legislatures, and the courts. Specifically, the Polish case reveals that the harmonisation of relevant intelligence, military and security law with NATO has created a body of national law allowing for a high degree of secrecy, and with more institutional weight than laws regulating torture, and other cruel, unusual and degrading punishment. Subsequently, detainees in Poland were constituted as non-subjects (ghost detainees) governed by secretive military law, rather than as subjects protected by institutionally weak human rights law.

As the Jeppesen and Poland cases demonstrate, extraordinary rendition is a transnationally organised programme, carried out either directly by or with the complicity of numerous countries and corporations, in addition to the United States Government. Depictions of it as driven entirely by Bush and his cadre of advisors, in crucial respects, miss the point. The rogue state executive discourse overemphasizes a *unitary* United States executive, while neglecting the Administration’s skilful organisation of extraordinary rendition through a complex *network of transnational governmental relationships*. Even though the Bush Administration initially drove the program, they have effectively dispersed liability and accountability for the program throughout a network of legal partnerships in ways that facilitate a high level of secrecy and complicate efforts at bringing the responsible parties to justice.

The issue is not, therefore, simply whether the Extraordinary Rendition Programme is legal. The point is that the Administration has in fact engaged in a practice of using the law and a transnational network of partnerships to produce conceptual spaces in which human rights are rendered *meaningless*. What is most significant about the legal discourse that attorneys working for the Office of Legal Counsel to the White House have produced is the way in which they have drawn upon military and international aviation law rather than criminal law; a North Atlantic Treaty Organisation (NATO) framework rather than United States Constitutional law; and how the civilian corporate partners who have facilitated this practice of extraordinary rendition are quite possibly shielded under international aviation law from suits based on ATCA. ATCA suits are arguably the strongest legal weapon for holding accountable United States corporations operating outside the United States that aid and abet the *Jus Cogens* Human Rights Violations of the Extraordinary Rendition Programme. Yet, *United States Federal Alien Tort* claims, which are based in part on international human rights law and international customary law, may nevertheless prove legally vulnerable to the extent that they assume a particular legal subject, and a particular legal space that well may not extend to corporate aircraft serving military functions for the Extraordinary Rendition Programme.

3. Stop Torture Now and the Moral Question

There has been significant grassroots movement activism directed at ending the practice of extraordinary rendition, ranging from direct action protest to formal legal suits. However, most of these efforts will not succeed unless they account for the extent to which the Bush Administration has grounded its practice of extraordinary rendition in law – in particular, aviation law, a multilateral NATO framework, and international bilateral agreements.

In short, focusing solely on questions of the extraordinary rendition program’s *extra-legality* -- like those recently centred on the concept of a “rogue state executive” -- is problematic because the program’s legal designers have created and seized opportunities made possible by legal pluralism – both within the nation-state and beyond. But the narrow focus on the program’s *extra-legality* is also problematic for

another reason: it lends insufficient attention to the *moral* and *ethical* dimensions of a rendition program. In the fight to end extraordinary rendition through the courts alone, we represent and reduce the practices comprising it to its legal dimensions. Not addressed through such discursive legal strategies are the (im)moral dimensions of the program. To avoid squandering the powerful and growing moral outrage that has been spawned by the CIA's once-covert program, legal activists will have to begin working with anti-torture and other human rights activists *outside* the courts as well, activists who are not only challenging the legality of the programme, but also its morality. Their challenges constitute perhaps the most important intervention in the global space of legal pluralism because they directly address the issue of competing normative claims that lies behind conflicting sources of law and authority.

Addressing the Bush Administration's breathtaking will to power is vital. However, efforts to challenge the legality of the Extraordinary Rendition Programme must fall under broader strategies that fully understand the complex web of relationships that make these abuses possible and the role of the moral dimension in providing a critical vantage point from which to oppose the Programme on legal as well as extra-legal grounds. Activists must create multi-faceted, integrated, and flexible approaches that are capable of outmaneuvering the web of states and corporations involved in them.

What exactly does this mean? The North Carolina Stop Torture Now (NCSTN) coalition shows what a robust and dynamic movement might look like. NCSTN is a grassroots coalition of individuals representing themselves and a diversity of faith, human rights, peace, veteran, and student groups based in the state of North Carolina, that has been central to exposing and opposing the Extraordinary Rendition Programme. The name alone reveals a moral, rather than legal, demand: legal or not, torture must stop. Or, as NCSTN argues, 'Opposing torture is not a partisan political issue; it is a cause for all people of good will'. (North Carolina Stop Torture Now n.d.) They use a combination of legal, political, and moral discourses and tactics; and while their tactics are peaceful, they are not afraid to engage in civil disobedience to make their point.

In November, 2005, Forty members of NCSTN delivered a "peoples' indictment" to Aero Contractors, a CIA aviation front company headquartered in Johnston County, that the ACLU alleges aids and abets torture. Although the federal court dismissed the ACLU's ATCA claims against Aero, granting immunity from suit to the CIA's front company, NCSTN did not give up the fight. Fourteen members of the group were arrested for non-violent trespassing when they delivered citizens' indictments to Johnston County Commissioners, the county manager the county attorney, Johnston County Airport Authority, and Aero Contractors' Board members. Media covered the event widely.

Since then they have been holding monthly vigils at the Johnston County airport, a nearby shopping mall, and the Governor's Mansion, spreading the message that North Carolina is a 'link in the torture chain.' They have built alliances with North Carolina's community colleges and Council of Churches, and together have convinced their US representatives to sponsor H.R. 1352, the 'Torture Outsourcing Prevention Act.' In March, 2007, they held a press conference at the North Carolina General Assembly to announce a letter of petition from seventy-five allied non-profit organisations requesting an investigation of Aero Contractors, delivered to the Governor, Attorney General, State Bureau of Investigation Director, US Attorney for Eastern District of North Carolina, Johnston County Board of Commissioners, Global TransPark Authority Board members, and North Carolina General Assembly members. They made it clear that they were standing ready to assist the US Federal Bureau of Investigation (FBI).

Beyond the legal, political, and moral dimensions of NCSTN's work to end extraordinary rendition is also an empirical dimension. They publicly denounce torture as being not only immoral and illegal, but also ineffective. They spend significant time gathering empirical evidence to support their position that the local airport is being used as a headquarters for the extraordinary rendition program, and that local residents do not want to be associated with it, and want it to end. For example, they have conducted the 'Listening Project,' over 250 local surveys with residents to gather data on what they think about torture. NCSTN has also been conducting local training in 'jet-spotting,' the techniques of monitoring ground traffic and radio communications at Johnston County Airport, to build a database of the comings and goings of what they understand to be 'torture taxis.'

Just as importantly, NCSTN has not been simply 'thinking globally and acting locally.' They have been thinking transnationally, simultaneously targeting corporate and state partners outside the reach of the US Constitution. They have seen how a company – even a company run by agents of the state -- that is

located in their own backyard in North Carolina, can still operate outside the reach of the US Constitution. They have forged transnational networks to document and monitor the continuance of the program with other concerned-citizen jet-spotters in Ireland (the Irish Peace and Neutrality Alliance) and Scotland (Scotland against Criminalizing Communities), where the US has also gained authorised access to airports for the extraordinary rendition program.

NCSTN also worked this past August with Germany's chapter of Action by Christians to Abolish Torture (ACAT – Germany) to simultaneously appeal to German Chancellor Angela Merkel, US Secretary of State Condoleezza Rice, and then-US Attorney General Alberto Gonzales, urging the nations to cooperate in bringing to trial in Germany the alleged CIA-backed kidnapers of Lebanese-born German citizen Mr. Khaled El-Masri. This is the same El-Masri whose case a US federal appellate court dismissed on grounds of "state secrecy." The US Supreme Court subsequently let the dismissal stand.

The architects of the Extraordinary Rendition Programme have attempted to protect it in international treaties and agreements at the highest levels of government and militaries. This is not to say that it is legal, much less morally or ethically, right. Rather it is to recognise that the legal meaning of extraordinary rendition is embedded in multiple, interpenetrating, overlapping, and sometimes contradictory legal and cultural structures. Therefore, and contrary to how the broader discourse on the 'rogue state executive' would have us think about the Extraordinary Rendition Programme, there are three tendencies that we must avoid: first, we must not conflate the legal and the moral dimensions of this struggle; second, we must not believe that successful campaigns to stop immoral practices rest solely on successful challenges to their legality; and third, we must not forget that while the Bush Administration has grabbed power wherever it could find it, it does not act alone.

Instead, we would do well to recognize that the practice exists in a contested transnational legal space where competing legal and moral discourses are at play. Successfully opposing the Programme requires that we understand this multidimensionality and create appropriate strategies. By the time this article is published, there will be a new administration in the White House. This may well offer a political opportunity for activists who are striving to end the Extraordinary Rendition Programme. At the very least, we think that the moral discourse of this movement has the potential to influence political society to alter the interventionist tactics that the United States' Executive Branch has been using to prevent the courts, in the name of 'state secrets' and 'national security,' from allowing evidence of the Extraordinary Rendition Programme to go to trial.

More broadly, our argument suggests that we need to return to the question, 'what is law?' But we need to do so while recognising that contemporary conditions characterised by global legal pluralism further undermine positivist approaches to human rights and international law. Instead, as the case of extraordinary rendition shows, we will need to engage more deeply the moral and political dimensions of legal struggles, and fully acknowledge that "the law" is a social construct created in social arenas by diverse groups of social actors. Doing so may force us to forfeit the security that objectivism provides, but it also, we think, better equips us to compete in legal struggles involving powerful states and transnational networks of governance. Our distinction between the moral and the legal is not without precedent. Slavery and racial segregation, for example, were at one time considered legal, and were successfully opposed by transnational networks of activists on moral grounds that, in turn, transformed the legal terrain. (Keck and Sikkink 1998, Pp. 41-51) Similar efforts are required again today. While it is unlikely, and perhaps undesirable, that multiple and diverse bodies of law will ever be harmonised once and for all, bearing in mind the moral aspects of law may provide guidance as we seek to mediate and resolve the competing, conflicting and, as in the case of extraordinary rendition, unemancipatory, legal discourses which constitute contemporary transnational legal spaces.

Endnotes:

¹ For Tanahana, legal pluralism is a social phenomenon that '...exists whenever social actors identify more than one source of "law" within a social arena.' (2007, p. 396) This begs the key question that has stumped legal pluralists for over three decades: what is law? Tanahana offers a simple, yet practical, solution that substitutes the intersubjectivity of a social constructionist perspective for the ever-evasive scientific objectivity of legal positivism: '...law is what people within social groups have come to see and label as law.' (2007, p. 396). Tanahana argues that it is unnecessary to resolve these debates to come

to grips with legal pluralism: 'For those interested in studying law and society, what matters most is framing situations in ways that facilitate the observation and analyses of what appears to be interesting and important.' (2007, p. 411)

² On the changing nature of states, see Slaughter (2005), but also Sassen (2006a), and especially Sassen (2006b), where she describes her concept of the denationalization of the state:

With the notion of denationalization I try to capture and make visible a mix of dynamics that is also altering sovereignty but is doing so from the inside out, and on the ground, so to speak – the multiple micro-processes that are reorienting the historic national project towards the new global project. National state policies may still be couched in the language of the national, but at least some of them no longer are: they are now oriented towards building global systems inside the national state. From there, then, the term denationalization.

On *Al Qaeda* as a 'transnational revolutionary social movement' that selectively employs terrorist tactics, see Goodwin (2006).

³ By 'rules of the playing field', we mean to allude to John Yoo's claim (without endorsing his position) that, 'Law is critically important to our society generally, and to the war on terrorism. But law is not the end of the matter; indeed it is often the beginning. Sometimes people look to the law as if it were a religion or a fully articulated ethical code that will make these decisions for us, relieving us of the difficultly job of making a choice. The law sets the rules of the playing field, but it does not set policy within that field.' (2006, Pp.xii)

⁴ The legal academic writing of John R. Bolton (see, eg, Bolton 2000), former United States Ambassador to the United Nations (under George W. Bush's Administration), reflects this sovereigntist discourse dismissing international obligations as law having coercive force in the United States, especially when it contradicts United States' domestic law

⁵ Telephone interview with Steven Watt, lead counsel for the ACLU in the suit against Jeppesen Dataplan, Inc. 21 March, 2008.

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