

**The Scope of Third Party Responsibility for Serious Human Rights Abuses
under the European Convention on Human Rights: Wrongdoing in the
British Indian Ocean Territory**

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Unedited Version of Article published in (2016) 16(4) Human Rights Law Review (OUP)

ABSTRACT

This article examines the evolution of third party responsibility, under the European Convention on Human Rights, for the wrongful acts of foreign officials within a Contracting State's jurisdiction. It explores the limits of the complicity test endorsed by the Court in *El-Masri*, *Al Nashiri* and *Abu Zubaydah* – that a Contracting State's officials connived or acquiesced in such wrongdoing – in this context. It argues that, in accordance with the Convention's positive obligations, responsibility should be determined by what those officials ought to have known and done as a result of credible reports, alleging that serious human rights abuses were being committed, having entered the public domain by the material time. To this end, the article examines the potential significance of allegations that US officials ill-treated and arbitrarily detained individuals, pursuant to the CIA's Detention and Interrogation Programme, in the British Indian Ocean Territory.

KEYWORDS: Third Party Responsibility; European Convention of Human Rights; Ill-Treatment; Positive Obligations; Diego Garcia

1. Introduction

In *Al Nashiri v Poland* and *Abu Zubaydah v Poland* the Strasbourg Court built upon its momentous decision in *El-Masri v FYR Macedonia*, which held that Macedonia was responsible for serious human rights violations committed by US officials within its jurisdiction in contravention of the principles enshrined in the European Convention on

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Human Rights.¹ In *El-Masri*, the Court ruled that the Macedonian authorities were complicit in the Applicant's ill-treatment, contrary to Article 3 of the Convention, in two ways. First, by failing to prevent acts of torture, committed in their presence they had connived or acquiesced in such wrongdoing. Secondly, it held that Macedonian officials knew or ought to have known that by handing El-Masri over to CIA agents there was a serious risk of further ill-treatment. But while, in *Al Nashiri* and *Abu Zubaydah*, the Polish authorities also violated the non-refoulement principle, a key difference was that Polish officials did not possess full knowledge of the CIA's wrongdoing at the 'black-site' situated on Polish territory, despite the fact that they had facilitated the transfer of detainees to and from this secret detention centre. Nevertheless, the Court decided that these officials ought to have known about the full extent of the wrongdoing carried out by US officials within Poland's jurisdiction as a result of credible and detailed reports which had entered the public domain concerning the practices used in the CIA's Detention and Interrogation programme, by the material time.² Further, as in *El-Masri*, the Court decided that by failing to conduct proper investigations into each of the claims the Polish authorities violated the procedural requirements of Article 3 in these cases.

The *Polish cases* represent a significant advance in the Court's jurisprudence regarding the positive nature of the substantive and procedural aspects of the obligations contained in Article 3. From a substantive perspective, the Court emphasized that Contracting States are responsible for maintaining an environment

¹ *El-Masri v FYR Macedonia* (2013) 57 EHRR 25; *Al Nashiri v Poland* (2015) 60 EHRR 16 and *Husayn (Abu Zubaydah) v Poland* (2015) 60 EHRR 16.

² See the US Senate Intelligence Committee's Report on the CIA's Detention and Interrogation Programme. The report was approved by the Committee on 13 December 2012. However, it remained classified. On 3 April 2014 the Committee produced a revised version of the Executive Summary with a view to publication. On 9 December 2014 an agreed version of the Executive Summary (with redactions) was published. The full report remains classified.

in which all acts of ill-treatments are prohibited. Consequently, if a Contracting State's officials have access to credible information, which indicates that serious human rights violations are being committed, within its jurisdiction, they ought to take the necessary steps to prevent them from happening. In addition, the authorities are under a positive procedural obligation in such situations – they must investigate credible allegations of such wrongdoing effectively as, in the Court's own words, such official action is necessary for the maintenance of 'public confidence in [their] adherence to the rule of law and [for] preventing any appearance of impunity, collusion in or tolerance of unlawful acts'.³

Against this background, this article explores the scope of third party responsibility for wrongful acts committed by foreign officials within the jurisdiction of a Contracting State in situations where its officials did not necessarily know about the full extent of such wrongdoing. In particular, it will examine the limits of the requirements for a finding of complicity for the purpose of establishing third party responsibility under the European Convention by reference to another situation in which it has been alleged that US officials ill-treated and arbitrarily detained individuals pursuant to the CIA's Detention and Interrogation Programme, namely on (or near) the island of Diego Garcia in the remote British Indian Ocean Territory, a Territory over which the UK exercises sovereign authority. Specifically, it has been claimed that Diego Garcia, which hosts a substantial US military base, was used to effect the transfer of 'high-value detainees' ('HVDs') suspected of engaging in terrorism, by means of extraordinary rendition, and as a 'black-site' where such individuals were allegedly ill-treated and arbitrarily detained.⁴ The UK government has consistently

³ See *El-Masri* (n 1) at [192]; *Al Nashiri* (n 1) at [495] and *Abu Zubaydah* (n 1) at [489].

⁴ See references cited in section 3 below. The European Court has defined extraordinary rendition as: 'an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of

denied such allegations. However, the House of Commons Select Committee on Foreign Affairs and several international bodies charged with the task of investigating claims of ill-treatment, extraordinary rendition and arbitrary detention have taken them seriously.⁵

2. Third Responsibility under the ECHR

This section will analyse the key Strasbourg decisions concerning third party responsibility for the wrongful acts of foreign officials with the jurisdiction of a Contracting State under the European Convention on Human Rights. It will pay particular attention to the way in which the Court has sought to give effect to the substantive and procedural aspects of the positive obligations contained in Article 3 of the Convention and developments that have occurred regarding the notion of complicity in such situations.

2.1. Grounding Third Party Responsibility: *El-Masri v Macedonia* (2013)

El-Masri v Macedonia was a ground-breaking decision in respect of third party responsibility for wrongdoing committed by foreign officials within the jurisdiction of a Contracting State under the European Convention on Human Rights.⁶ El-Masri, a German national, was arrested by the Macedonian authorities on 31 December 2003.

detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment. See *Ahmad v UK* (2010) 51 EHRR SE6 at 113. Adopted in *El-Masri* (n 1) at [221]; *Al Nashiri* (n 1) at [454] and *Abu Zubaydah* (n 1) at [513].

⁵ See section 3 below. The question of whether the UK could be held responsible for the alleged wrongdoing of US officials in the BIOT is complicated by the question of whether the European Convention is applicable to this British Overseas Territory. The present author has argued, previously, that the UK's jurisdiction is engaged in relation to the BIOT in accordance with Article 1 of the ECHR. This issue is addressed in Stephen Allen, *The Chagos Islanders and International Law* (Hart, 2014) (ch. 2). Also see (n 121).

⁶ *El-Masri* (n 1). See Federico Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the fight Against Terrorism' (2014) 14 HRLR 85.

He was arbitrarily detained and ill-treated by his captors. On 23 January 2003, he was handed over to CIA agents at Skopje Airport whereupon he was tortured and transferred, by means of extraordinary rendition, to a CIA black-site in Afghanistan. There he was subjected to a further period of arbitrary detention and torture under the auspices of the CIA's Detention and Interrogation programme. On 28 May 2004, he was taken to Albania where he released. El-Masri complained about his ill-treatment by the Macedonia authorities. However, after launching an investigation his claims, the Macedonian government concluded that they were baseless. He then commenced proceedings against Macedonia at the European Court of Human Rights for its role in his alleged abduction, unlawful detention and ill-treatment.⁷

In relation to the alleged breaches of Article 3 of the Convention, the Court observed that where credible claims have been made that serious human rights violations have occurred it is incumbent upon State officials to undertake an effective and independent investigation into such allegations.⁸ In particular, the Court said that:

'The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to

⁷ He alleged violations of Articles 3, 5, 8 and 13 ECHR.

⁸ At [182]. This is also true of the obligations concerning liberty and security contained in Article 5. See *El-Masri* (n 1) at [224-243].

establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.’⁹

The Court concluded that Macedonia’s investigation into El-Masri’s claims was inadequate.¹⁰ Accordingly, it held that the procedural aspect of Article 3 had been violated.¹¹ More generally, it observed that:

‘an adequate response by the authorities in investigating allegations of serious human-rights violations [...] may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.’¹²

The Court held that the ill-treatment El-Masri had suffered while being unlawfully detained by the Macedonian authorities, amounted to ill-treatment in accordance with Article 3. Further, it decided that the Applicant was tortured by CIA agents at Skopje Airport.¹³ As such wrongdoing was committed within Macedonia’s jurisdiction, and in the presence of Macedonian officials,¹⁴ the Court decided that Macedonia was also

⁹ At [183]. This position was echoed in *Abu Zubaydah* (n 1) at [480] and *Al Nashiri* (n 1) at [486].

¹⁰ *El-Masri* (n 1) at [189].

¹¹ *ibid*, [193-4].

¹² *El-Masri* (n 1) [192]. This standpoint was echoed in *Al Nashiri* (n 1) at [495] and *Abu Zubaydah* (n 1) at [489].

¹³ *El-Masri* (n 1) at [211].

¹⁴ Article 1 ECHR provides that: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.

responsible for these substantive violations of Article 3 because they were conducted with the ‘acquiescence or connivance’ of its authorities.¹⁵ From a jurisdictional perspective, the Court noted that:

‘The obligation on Contracting Parties under art.1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with art.3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. *The state’s responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known.*¹⁶

On the facts, the Court concluded that Macedonia must bear responsibility for the violation of the Applicant’s rights under Article 3 for the CIA’s wrongdoing at Skopje Airport because: ‘its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring’.¹⁷

Further, in accordance with the non-refoulement principle,¹⁸ the Court decided that Macedonia was also accountable for El-Masri’s transfer to US custody and for his

¹⁵ *El-Masri* (n 1) at [206] relying upon *Illascu v Moldova* (2005) 40 EHRR 46 at [318].

¹⁶ At [198]. Emphasis added. The Court reaffirmed this standpoint in *Al Nashiri* (n 1) at [509] and *Abu Zubaydah* (n 1) at [502]. Also see *Mahmut Kaya v Turkey* (App no 22535/93), judgment of March 28 2000, at [115].

¹⁷ *El-Masri* (n 1) at [211].

¹⁸ Article 3(1) of the 1984 UN Convention Against Torture sets out a full description of the non-refoulement principle. It provides that: ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture* (OUP 2008).

extraordinary rendition to the CIA black-site in Afghanistan because, in so doing, they exposed him to the serious and foreseeable risk of further substantive breaches of Article 3.¹⁹ In this regard – in addition to having specific knowledge about the destination of the rendition flight in question – the Court noted that information concerning the practices used by the CIA in its Detention and Interrogation programme had entered the public domain by the material time.²⁰ As a result, it ruled that the Macedonian officials either knew or ought to have known that the Applicant was being exposed to a serious risk of further ill-treatment that would be contrary to Article 3 and they should have taken steps to avert such a risk.²¹ Accordingly, Macedonia was held to be responsible for this substantive violation of the Convention.

2.2. The Scope of Complicity: Al Nashiri and Abu Zubaydah (2014)

Before examining the way in which the Strasbourg Court addressed the notion of complicity in the Polish cases it is useful to set out the orthodox standpoint of general international law on the question of third party responsibility. Article 16 of the International Law Commission's 2001 Articles on State Responsibility addressed the question of State responsibility for the provision of assistance in connection with the commission of an internationally wrongful act by another State.²² It provides that:

‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

¹⁹ *El-Masri* (n 1) at [212].

²⁰ *ibid*, [217].

²¹ *ibid*, [218-220].

²² The International Law Commission adopted its draft Articles on Responsibility of States for Internationally Wrongful Acts at its 53rd session in 2001. They were submitted to the UN General Assembly as part of the Commission's annual report in the same year (A/56/10). They are widely viewed as representing customary international law in this area.

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.'

The International Law Commission's Commentary on the Articles on State Responsibility notes that the assisting State must have 'knowledge of the circumstances of the internationally wrongful act'.²³ If it remains unaware of the circumstances in which its assistance is intended to be used by the assisted State then the requirements for accessory responsibility will not be satisfied at the level of general international law. Moreover, in order for liability to arise, the assistance must be provided with a view to facilitating the wrongful behaviour in question and it must contribute materially to the assisted State's wrongdoing.²⁴ Notwithstanding the above, it is important to acknowledge that States do not owe positive obligations to other States as a matter of general international law. Such obligations are generated by the recognition, either by national constitutions,²⁵ or via an applicable treaty, such as the European Convention on Human Rights, of the existence of fundamental rights which belong to individuals who come within the jurisdiction of a qualifying State.

The Strasbourg Court reaffirmed the approach it had taken in *El-Masri* concerning the question of third party responsibility for the wrongful acts of foreign officials within the jurisdiction of a Contracting State in *Al Nashiri v Poland* and *Abu*

²³ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) at p 149 [4].

²⁴ *ibid*, at [5].

²⁵ See, for example, Dieter Grimm, 'The Protective Function of the State' in Georg Nolte (ed), *European and US Constitutionalism* (CUP 2005), at 137-155 (discussing Germany's approach to positive constitutional obligations).

Zubaydah v Poland.²⁶ In these cases, both Applicants alleged that the respondent State had violated the provisions of Articles 3 and 5 of the Convention by hosting a CIA black-site on its territory and by facilitating its Detention and Interrogation programme there.²⁷ Specifically, the Court ruled that the evidence showed that ‘enhanced interrogation techniques’ were used at the Polish black-site and that they amounted to torture under Article 3 of the Convention.²⁸ It acknowledged it was unlikely that the ill-treatment of detainees by CIA operatives had been witnessed by Polish officials and that they may not have known exactly what was going on inside the facility.²⁹ However, the Court decided that the Polish authorities had known about the general nature and purpose of the CIA’s activities at the black-site, at the material time, and they ought to have known what the CIA were doing there as a result of detailed publicly-available reports concerning the practices used by the CIA pursuant to its programme.³⁰ Moreover, the Court ruled that Poland had enabled the CIA to carry out such wrongdoing: by allowing the CIA to use Polish airspace and airport facilities; by disguising rendition flights; by providing logistical support for the CIA’s operations; and by permitting the CIA to use a Polish base as a black-site facility in the first place.³¹ Following *El-Masri*, the Court noted that, the interrelationship between Articles 1 and 3 meant that the Poland was under an obligation to take positive measures to ensure that all individuals within its jurisdiction were not exposed to torture, inhuman or degrading treatment.³² It concluded that Poland had taken no

²⁶ The essential facts of these cases are very similar. However, while Al Nashiri was ultimately detained in CIA black-site in Afghanistan Abu Zubaydah was held in Guantanamo Bay: it has been claimed that he was also detained in a facility on or near Diego Garcia. See the Foreign Affairs Committee’s Human Rights Annual Report 2008 (HC 2008-09, HC557) at [34].

²⁷ Each applicant also alleged violations of Articles 8 and 13 of the European Convention.

²⁸ *Al Nashiri* (n 1), at [517]; and *Abu Zubaydah* (n 1) at [512-13].

²⁹ *Al Nashiri*, *ibid*, at [441-2]; and *Abu Zubaydah*, *ibid*, at [443-4].

³⁰ *ibid*

³¹ *ibid*

³² *Al Nashiri*, *ibid*, at [443 and 485] and *Abu Zubaydah*, *ibid*, at [445 and 502].

steps to prevent such ill-treatment from occurring and it decided that, as a result of the authorities' acquiescence or connivance in the CIA's programme, Poland must bear responsibility for those Convention violations, which had occurred on its territory.³³

Regarding the procedural positive obligations generated for Contracting States by Article 3,³⁴ in *El-Masri*, the Court held that the lack of an effective investigation by State officials, in response to credible claims that serious human rights violations have occurred, may result in a Contracting State being held responsible for the wrongdoing committed by foreign officials within its jurisdiction. In *Al Nashiri, and Abu Zubaydah*, the Court took a step further by fully endorsing the existence of a right to the truth.³⁵ In the Court's view, this right was triggered in situations:

'... where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened...'³⁶

³³ See *Al Nashiri*, *ibid*, at [517] and *Abu Zubaydah*, *ibid*, at [512-3]. As well as for its violation of the non-refoulement principle.

³⁴ This is also true of the obligations concerning liberty and security contained in Article 5. See *Al Nashiri*, *ibid*, at [527-32] and *Abu Zubaydah*, *ibid*, at [515-26]. See generally Alastair Mowbray, 'Duties of Investigation Under the European Convention on Human Rights' (2001) 52 ICLQ 437.

³⁵ The Court's endorsement of the existence of a right to the truth in the Polish Cases is a significant development and it stands in contrast to the divergent positions adopted by the judges in *El-Masri*: see the joint Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller in support of such a development and the Joint Opinion of Judges Casadevall and Lopez-Guerra which argued against it. Regarding the normative origins of truth rights in international law see *Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights Series C No 4 (29 July 1988); and *Contreras et al v El Salvador* Inter-American Court of Human Rights Series C No 232 (31 August 2011). For further analysis see Fabbrini (n 6); and Thomas Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 MichJIntlL 977.

³⁶ See *Al Nashiri* (n 1) at [495] and *Abu Zubaydah* (n 1) at [489].

In the Polish cases, the Court maintained that the existence of reliable, publicly available reports concerning alleged wrongdoing committed by foreign officials within the jurisdiction of a Contracting State activates those positive procedural obligations, contained in the Convention. Accordingly, in such situations, a Contracting State is required to conduct a proper investigation into such claims – even if they have not been made by the victims themselves – because such steps are vital to ‘maintaining public confidence’ in the rule of law and to ‘preventing any appearance of impunity, collusion in or tolerance of unlawful acts’.³⁷

Regarding the substantive obligations imposed by Article 3, the scope of the complicity test adopted by the Court regarding conduct, which violates the Convention, must be determined.³⁸ In particular, it is necessary to establish the specific levels of knowledge and participation that are required to underpin a finding of third-party responsibility. The Court’s jurisprudence regarding complicity shows that a scale of conduct exists for this purpose, which includes cases of active participation, where the officials of a Contracting State were directly engaged in acts of ill-treatment carried out by foreign officials within its jurisdiction. In addition, liability may arise in cases where a Contracting State’s officials witnessed wrongful acts being committed by foreign officials without taking steps to prevent them from happening.³⁹ In both situations, the Contracting State’s officials would have facilitated the wrongdoing of foreign officials in a way which suggests that they connived or acquiesced in behaviour that contravenes the terms of the Convention. However, it is suggested that the threshold for third-party responsibility under the Convention extends beyond situations where a Contracting State’s officials have actively participated in such wrongdoing.

³⁷ See *El-Masri* (n 1) at [191-2]; *Al Nashiri*, *ibid*, at [495]; and *Abu Zubaydah*, *ibid*, at [489], and [492-3].

³⁸ *El-Masri* (n 1), at [206]; *Al Nashiri* (n 1) at [517]; and *Abu Zubaydah* (n 1) at [512].

³⁹ See *El-Masri*, *ibid*, at [206].

'Connivance' may be equated with shutting one's eyes to an obvious set of facts and it assumes that the officials of the Contracting State possessed a degree of knowledge about a state of affairs which may be equated to tacit consent to the wrongful behaviour in question. Consequently, it is evident that a Contracting State's officials may connive with foreign officials while remaining entirely passive. Likewise 'acquiescence' indicates inactivity coupled with a sufficient level of knowledge concerning the existence of a certain state of affairs.⁴⁰

Accordingly, it is clear that the Court has not restricted liability to situations where a Contracting State's officials knew about the wrongdoing of foreign officials within its jurisdiction. In *El-Masri, Al Nashiri and Abu Zubaydah*, the Court relied upon a mix of actual and constructive knowledge in order to establish responsibility for wrongful acts committed by foreign officials within jurisdiction of the respondent States. In these cases, it identified the ways in which their officials facilitated the CIA's wrongdoing in their territories and how they acquired specific knowledge about the ill-treatment of detained suspects by CIA agents.⁴¹ In *Al Nashiri and Abu Zubaydah*, the Court acknowledged it was unlikely that such ill-treatment had been witnessed by Polish officials and that they may not have known exactly what was going on inside the facility.⁴² Nevertheless, the lack of direct knowledge about the particular interrogation practices that were being used in the CIA black-site did not mean that Poland could avoid responsibility under the Convention. Instead, the Court drew attention to the evidence which showed that Polish officials knew about the general nature and purposes of the CIA Detention and Interrogation programme at the material

⁴⁰ See Ian Sinclair, 'Estoppel and Acquiescence' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Grotius Publications 1996) 104.

⁴¹ *El-Masri* (n 1) [217-221], *Al Nashiri* (n 1) at [441-442] and *Abu Zubaydah* (n 1) at [443-4].

⁴² See *Al Nashiri*, *ibid*, at [441-2] and [517]; and *Abu Zubaydah*, *ibid*, at [440-44] and [512-3].

time, which indicated that the CIA's practices were manifestly contrary to the principles enshrined in the Convention.⁴³ In addition, it referred to the abundance of reliable and consistent reports of the CIA's ill-treatment of detained terrorist suspects in secret detention centres in other parts of the world, which had entered the public domain by the material time.⁴⁴ This led the Court to conclude that there were good reasons for the Polish authorities to believe that an individual in US custody, pursuant to the CIA's programme, would be exposed to a serious risk of treatment that would contravene Article 3 of the Convention.⁴⁵

While, in *Al Nashiri* and *Abu Zubaydah*, the Court held that the reliable information in the public domain could be imputed to Polish officials, and thus to the respondent State,⁴⁶ these cases do not appear to constitute authority for the proposition that constructive knowledge alone would be sufficient to establish State responsibility, under the Convention, in response to claims that serious human rights violations have been perpetrated within a Contracting State's jurisdiction. Although some form of knowledge is necessary for a Contracting State's responsibility to be engaged in such situations, it is not a sufficient requirement for this purpose. A Contracting State's officials must also have either participated in the wrongdoing or they must have failed to prevent such wrongdoing from happening.⁴⁷ In sum: if (a) at a substantive level, a Contracting State's officials knew or ought to have known about wrongdoing undertaken by foreign officials within its jurisdiction and they failed to take reasonable steps to prevent it from occurring; and/or (b) if, at a procedural level, those

⁴³ See *Al Nashiri*, *ibid.*, at [441]; and *Abu Zubaydah*, *ibid.*, at [443-4]. Also see *El-Masri* (n 1) at [217-8] in relation to Macedonia's violation of the non-refoulement principle.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *El-Masri*, *ibid.*, at [222-23] and *Al Nashiri* at [517-18] and *Abu Zubaydah* at [512-3].

⁴⁷ Regarding the Court's assessment of the Article 3 violation of the non-refoulement principle, see *El-Masri*, *ibid.*, at [218-220] and *Al Nashiri*, *ibid.*, at [442, 453-4 & 518]; and *Abu Zubaydah*, *ibid.*, at [450-56 and 512].

officials failed to investigate properly credible claims that such wrongdoing has occurred then the responsibility of the Contracting State may be engaged under the terms of the Convention.

3. The BIOT and the US military facility on Diego Garcia

This section will explore the limits of the European Court's jurisprudence regarding the notion of complicity for the purpose of a finding of third party responsibility under the ECHR by reference to allegations that US officials carried out wrongful acts in the BIOT – an Overseas Territory over which the UK exercises sovereign authority – which were in violation of Article 3. The section will begin with a brief overview of the BIOT's constitutional arrangements before setting out the UK/US treaties which govern the development and operation of the US military facility on Diego Garcia. It will then turn to consider the actual and alleged instances of the use of extraordinary rendition by US authorities in the BIOT and the claims that a CIA black-site existed on, or near, Diego Garcia. Throughout, it will examine the various institutional responses that have been made to these two related sets of allegations. In this context, the section will assess the way that the BIOT has been governed by UK officials during the relevant period with a view to providing the background by which the UK's responsibility for the alleged US wrongdoing may be determined.

3.1. The British Indian Ocean Territory: An Overview

The BIOT was created by the 1965 BIOT Order in Council,⁴⁸ which excised the Chagos Islands from the colony of Mauritius (and the atolls of Aldabra, Desroches and

⁴⁸ The BIOT Order in Council 1965 SI 1965/1920; amended by SI 1968/111; and the BIOT Order 1976 SI 1976/893.

Farquhar from the colony of Seychelles).⁴⁹ Through a bilateral treaty, concluded in 1966, the UK government allowed the US government to use the island of Diego Garcia for defensive purposes.⁵⁰ It was agreed that this treaty was to be effective for an initial period of 50 years and thereafter for a further 20 years, unless either party served notice to terminate the arrangement. The 1966 treaty was supplemented by a 1972 UK/US Agreement, which provided for the construction of a US 'limited naval communications' facility on Diego Garcia.⁵¹ In 1976, a further treaty – the 'Diego Garcia Agreement' – was concluded between the UK and US governments.⁵² It enabled the US government to upgrade the existing facility on the island into a fully-fledged US Navy base. This base was used extensively in connection with US naval operations and bombing missions in Iraq and Afghanistan between 1990 and 2006;⁵³ and it still 'facilitates Allied operations across the Middle East and South Asia' today.⁵⁴ In 2013, the UK government announced that the treaty arrangements concerning Diego Garcia were due to undergo a process of review and that bilateral substantive discussions would take place in 2014 with a view to reaching agreement on the treaty commitments concerning the use of Diego Garcia in late 2015.⁵⁵

⁴⁹ The remote Chagos Archipelago is made up of 56 coralline atolls with a total land mass of 60 square kilometres. Diego Garcia alone has a land mass of 44 square kilometres; however, it has a large lagoon which extends to 125 square kilometres which provides a natural harbour. Aldabra, Desroches and Farquhar were returned to Seychelles on its accession to independence on 29 June 1967.

⁵⁰ 'Exchange of Notes between the UK and US Governments concerning the Availability for Defence Purposes of the British Indian Ocean Territory', 30 December 1966, UKTS No 15 (1967) Cmnd 3231.

⁵¹ UK/US Exchange of Notes concerning a Limited US Naval Communications Facility on Diego Garcia, British Indian Ocean Territory, 24 October 1972, UKTS No 126 (1972) Cmnd 5160.

⁵² 1976 UK-US Exchange of Notes, 'Exchange of Notes between the UK and US Governments concerning a US Naval Support Facility on Diego Garcia, British Indian Ocean Territory', 25 February 1976 UKTS No 19 (1976) Cmnd 6413. The 1976 Agreement replaced the 1972 Agreement; however, the 1966 UK/US Exchange of Notes remained the foundational treaty.

⁵³ Peter Sand, 'British-American Legal Black Hole in the Indian Ocean?' (2009) 21 J Env L 113, at 114.

⁵⁴ See the Foreign & Commonwealth Office's 2012 *Report on Overseas Territories* at 22 – quoted in the Foreign Affairs Committee's Report, *The Use of Diego Garcia by the United States* (HC 2014-15, HC377) at [3].

⁵⁵ See the FAC's 2014 Diego Garcia Report, *ibid*, at [4].

3.1. Diego Garcia and Extraordinary Rendition

The practice of transferring individuals between jurisdictions, by means of extraordinary rendition,⁵⁶ is invariably used to avoid the constraints imposed by the non-refoulement principle. Further, it is clear that the practice of effecting transfers by means of extraordinary rendition invariably involves the ill-treatment and arbitrary detention of individuals in ways that manifestly contravene the terms of the European Convention.⁵⁷

On 20 January 2006, the Foreign Secretary, Jack Straw, informed the House of Commons that investigations into the alleged use of UK sovereign airspace by US authorities in connection with the practice of effecting transfers by means of extraordinary rendition revealed that: 'no evidence of detainees being rendered through the UK or Overseas Territories since 1997 where there were substantial grounds to believe there was real risk of torture'.⁵⁸ However, in 2008, his successor, David Miliband, admitted that – despite previous assurances to the contrary – Diego Garcia had been used by the US authorities for two extraordinary rendition flights in 2002, without the permission of the UK government. He reported that each flight carried a single detainee neither of whom was a UK national.⁵⁹ The Foreign Secretary sought to reassure Parliament that this information had only just come to light and that the government had made it clear to the US government that permission would be required before any such renditions could occur in the future. Further, he confirmed that 'US investigations show no record of any other rendition through Diego Garcia

⁵⁶ For the definition of Extraordinary Rendition, see n 4.

⁵⁷ Detailed information concerning the techniques used by the CIA in conducting transfers by way of extraordinary rendition was included in the Strasbourg Court's decisions in *El-Masri, Al Nashiri and Abu Zubaydah* (n 1).

⁵⁸ Hansard HC Deb, 20 January 2006, col 38WS.

⁵⁹ 21 February 2008, Hansard, HC Debs cols 547-548.

since then'.⁶⁰ In addition, the Foreign Secretary promised that the Foreign and Commonwealth Office ('FCO') would compile a list of those flights which had used the airspace of the UK or its Overseas Territories where concerns about rendition activities had been raised with a view to seeking specific assurances from the US authorities that each and every flight had not been used for the purpose of transferring individuals by means of extraordinary rendition.⁶¹ Subsequently, the Foreign Secretary informed the House of Commons that the US government had confirmed that no other US intelligence flights had landed in the UK, or in a British Overseas Territory, since 9/11.⁶²

Nevertheless, the UK government conceded that it was unable to establish the identity of the two individuals who were transferred through Diego Garcia by the US authorities on the two known rendition flights in 2002.⁶³ The failure to investigate these cases effectively drew sharp criticism from the House of Commons Select Committee on Foreign Affairs.⁶⁴ In this context, the Committee reiterated the concerns previously expressed by another House of Commons Select Committee – the Committee on Intelligence and Security – regarding the UK government's poor record keeping in relation to requests from other governments to conduct rendition flights through UK sovereign airspace.⁶⁵ Against this background, on 6 November 2008, the UK government admitted that the flight records, relating to the period when extraordinary

⁶⁰ *ibid.*

⁶¹ A list of 391 such flights was subsequently compiled was passed to the US government on 15 May 2008 see FAC's Human Rights Annual Report 2008 (n 26), at [25].

⁶² HC Deb 3 July 2008, col 58WS.

⁶³ See 2008 FAC Annual Report on Human Rights (n 26) at [26] published on 9 August 2009. Hansard HC Deb 28 Feb 2009 col 948W.

⁶⁴ See [26 and 28] of 2008 FAC Annual Report on Human Rights, *ibid.* In 2008, the NGO Reprieve stated that it had identified one of the two individuals, who was transported on one of the flights that landed on Diego Garcia in 2002, as Mohammed Saad Iqbal Madni and it believed that the other was Shaikh Ibn Al-Libi. See FAC Annual Human Rights Report 2008, *ibid* at [27].

⁶⁵ See 2007 Report on Rendition Cmnd 7171, July 2007, at page 17 – quoted by the FAC in its Human Rights Annual Report 2008, *ibid*, at [31].

rendition flights involving Diego Garcia were known to have occurred, had been destroyed.⁶⁶ This admission prompted the Foreign Affairs Committee to conclude that: ‘the lack of historical flight data makes it very difficult to test allegations that the two flights in 2002 do not represent the full extent of Diego Garcia’s involvement in the rendition circuit’.⁶⁷ More generally, the Committee took the view that:

‘the use of Diego Garcia for US rendition flights without the knowledge or consent of the British Government raises disquieting questions about the effectiveness of the Government’s exercise of its responsibilities in relation to this territory.’⁶⁸

Recent requests for the disclosure of daily flight and immigration records relating to Diego Garcia from 2002 onwards have been met with resistance from the UK government.⁶⁹ For instance, in response to a question concerning the keeping of flight

⁶⁶ In November 2008, the Minister of State stated that he had no direct information on the whereabouts of the reports in issue but he explained that any such records would only have been retained for a limited period in accordance with established practice. HC Deb 6 November 2008, col 688W – see the FAC’s Human Rights Annual Report 2008, *ibid*.

⁶⁷ [33 and 34], *ibid*. In February 2008, Margaret Beckett, who was Foreign Secretary between 2006 and 2007, conceded that deficiencies existed in the UK government’s record keeping regarding Diego Garcia. See ‘Beckett Attacks Rendition Records’ *BBC* (London, 24 February 2008) <http://news.bbc.co.uk/1/hi/uk_politics/7261641.stm> accessed 18 May 2015. The NGO Redress subsequently claimed that these administrative shortcomings contributed to the UK government’s failure to monitor US activities in the BIOT effectively. See the FAC’s Human Rights Annual Report 2008, *ibid*, at [46].

⁶⁸ *ibid*, [30]. It has been alleged that Diego Garcia has been used by the US authorities in connection with the extraordinary rendition of Abdel Hakim Belhadj and Fatima Boudchar, political opponents of the Gaddafi regime, who were kidnapped and taken to Libya in March 2004 where they were subsequently detained by the Libyan authorities, *The Guardian* (London, 11 July 2014). On 12 April 2012, the *Guardian* published a letter from a UK official which appears to confirm the UK government’s involvement in the extraordinary rendition of Abdel Hakim Belhadj and Fatima Boudchar, *The Guardian* (London, 11 July 2014). More generally, see the Court of Appeal’s judgment in the *Belhadj and Boudchar v Jack Straw & Others* Case [2014] EWCA Civ 1394. The case is currently the subject of an appeal to the Supreme Court.

⁶⁹ *The Guardian* (London, 9 July 2014 and 11 July 2014).

records relating to Diego Garcia between January 2002 and January 2009, the Minister of State replied, on 8 July 2014, that:

'Records on flight departures and arrivals on Diego Garcia are held by the British Indian Ocean Territory immigration authorities. Daily occurrence logs, which record the flights landing and taking off, cover the period since 2003. Though there are some limited records from 2002, I understand they are incomplete due to water damage.'⁷⁰

However, in response to a subsequent written question, asked on 10 July 2014, the Minister replied that, contrary to his previous Parliamentary statement, the records which were thought to have been irretrievably damaged had dried out and that no flight records had been lost after all.⁷¹

3.3. US Diplomatic Assurances

The Foreign Affairs Committee has questioned the wisdom of the UK government's practice of relying on diplomatic assurances from the US government instead of undertaking a full investigation of its own into continuing allegations that Diego Garcia was used in connection with the CIA's Detention and Interrogation programme.⁷² In this context, the Committee endorsed the criticism, expressed in the Second Report into Secret Detentions and Illegal Transfers of Detainees involving Council of Europe

⁷⁰ HC Deb 8 July 2014, col 172W.

⁷¹ Question 205172: answered 15 July 2014: <<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-07-10/205172>> accessed 15 May 2015. However, media reports have indicated that the government remains reluctant to release this information. The Guardian reported that, while giving evidence to the FAC regarding its inquiry into the use of Diego Garcia by the US authorities, the FCO reverted to its previous position saying that the relevant records had been damaged and were no longer useful, *The Guardian* (London, 30 January 2015).

⁷² See [38 and 41] of the FAC's Annual Report on Human Rights 2008 (n 26).

Member States for the Parliamentary Assembly of the Council of Europe (the 2007 'Marty Inquiry' report), regarding the UK government's policy of accepting US diplomatic assurances in relation to its activities on and around Diego Garcia, 'without ever independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner'.⁷³

In its 2008 Report on British Overseas Territories, the Foreign Affairs Committee concluded that: 'it is deplorable that previous US assurances about rendition flights [in relation to Diego Garcia] have turned out to be false'.⁷⁴ In addition, in its 2008 Report on Human Rights, the Committee expressed the view that: 'the basis of trust in subsequent US assurances about the use of BIOT has been undermined'.⁷⁵ Further, in its 2014 Report on Diego Garcia,⁷⁶ the Committee referred to the UK government's annual practice of reaffirming its policy on the use of rendition flights with regard to the BIOT with the US government, in turn, providing reassurance that it has not used the island in connection with any programme involving the use of extraordinary rendition.⁷⁷ Despite being informed of the existence of this annual ritual, the Committee reiterated its view that the admission that Diego Garcia has been used in connection with the CIA's practice of transferring terrorist suspects by means of extraordinary rendition, in 2002, had 'dented public confidence in the UK's ability to exercise control over its sovereign territory' with the effect that the 'credibility of US assurances [have been] severely damaged' as a result.⁷⁸

⁷³ *ibid* at [38] and Council of Europe Member States for the Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Second Report into Secret Detentions and Illegal Transfers of Detainees, 2007, at [70].

⁷⁴ See the Foreign Affairs Committee's Report on Overseas Territories (HC 2007-08, HC147-I) at [4 and 70].

⁷⁵ See n 26, at [41].

⁷⁶ See n 54.

⁷⁷ See the FCO's evidence and the FAC's 2014 Report on Diego Garcia, *ibid*, at [11].

⁷⁸ *ibid*, at [13].

3.4. The UK Government's Oversight of US Activities in the BIOT

In its 2008 Inquiry into British Overseas Territories, the Foreign Affairs Committee asked the FCO about the level of supervision that the UK government exercised over US activities in the BIOT. In response, the FCO stated that there were 'a very limited number of British military personnel' on the Diego Garcia.⁷⁹ It added that:

'A wide range of activities are conducted by US personnel on Diego Garcia which are routine in nature and are covered by entries in the Exchange of Notes. These activities are not normally supervised by UK personnel, nor at 42 personnel is there capacity to do so...'⁸⁰

In its 2014 Report on Diego Garcia, the Committee noted that the UK government refuted the concerns expressed in its 2008 Report on Human Rights regarding the effectiveness of the exercise of its responsibilities in respect of Diego Garcia.⁸¹ The Committee alluded to the statement, quoted above, and added that it had received confirmation, from the UK government, that there had been no material change in the staffing arrangements concerning Diego Garcia since that time.⁸² Further, it chose to quote from the rest of that passage of the evidence given to its 2008 Inquiry into Overseas Territories by the FCO, which went on:

⁷⁹ The 1976 Diego Garcia Agreement provides that: 'The United Kingdom Service element on Diego Garcia shall be under the Command of a Royal Navy Officer [...]' at [11]. The Commanding Officer acts as the BIOT Commissioner's local representative and magistrate. The BIOT Commissioner and the BIOT Administrator are based in Whitehall. See Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart 2011) at 178-9.

⁸⁰ See the FAC's Report on Overseas Territories (n 74) at [59].

⁸¹ See FAC's Human Rights Annual Report 2008 (n 26) at [16].

⁸² See the FAC's 2014 Report on Diego Garcia (n 54) at [2].

‘...Any extraordinary use of the US base or facilities, such as combat operations or any other politically sensitive activity, requires prior approval from Her Majesty’s Government and would attract a greater level of involvement by UK personnel both on Diego Garcia and in the UK.’⁸³

In 2013, the FCO maintained that the combined policies of relying on US diplomatic assurances and of US/UK consultation, in cases where doubt exists as to whether a particular activity falls within the terms of the treaties governing the use of Diego Garcia, was sufficiently robust to ensure that the UK could discharge its responsibilities with regard to the BIOT.⁸⁴ However, the Committee did not share this view. After considering the various provisions of the applicable treaties governing the use of Diego Garcia, it reached the conclusion that the UK government has consistently overstated the legal requirements imposed on the US government concerning its activities on Diego Garcia.⁸⁵ Consequently, it concluded that any practice of US/UK consultation remains entirely informal in nature and that such a state of affairs was highly unsatisfactory, from a governance perspective.

The Foreign Affairs Committee had previously raised concerns about the extent of the UK government’s entitlement to monitor US activities on and around Diego Garcia in its 2008 Human Rights Report. It is worth examining these concerns in detail, in the light of the view, subsequently expressed by the Committee in 2014, that the terms of the 1976 Diego Garcia Agreement were inadequate for the purpose of discharging the UK’s obligations in respect of the BIOT. In particular, in its 2008

⁸³ Quoted, *ibid*, at [16] – originally published in Evidence published with the Seventh Report from the Committee (HC 2007-08, HC 147-II), Ev. 346.

⁸⁴ FAC’s 2014 Report, *ibid*, at [11].

⁸⁵ It noted that ‘they do not impose a clear requirement upon the US to seek permission for highly sensitive activity such as rendition, or even to support combat operations’, *ibid*, at [16].

Report, the Committee was particularly troubled by allegations that US ships, stationed in Diego Garcia's 'territorial' waters, had been used to supply prison ships located on the high seas.⁸⁶ In response, the Foreign Secretary told the Committee that the UK government had no information about such ships being used for the purpose of effecting extraordinary rendition or for the supply of ships beyond the BIOT's 'territorial' waters.⁸⁷ Further, he indicated that, under the 1976 Agreement, the US government was only required to inform the UK government about ship movements in the BIOT in 'normal circumstances'.⁸⁸ The Committee concluded that this arrangement was 'unsatisfactory' and it advised the UK government to ask the US authorities to supply information relating to all ship movements involving Diego Garcia's territorial waters, since 2002.⁸⁹

In order to determine the UK government's treaty commitments in relation to Diego Garcia it is helpful to examine the relevant text of the 1976 UK/US Diego Garcia Agreement. On the issue of bilateral consultation, paragraph 3 of the Agreement provides that:

'Both Governments shall consult periodically on joint objectives, policies and activities in the area. As regards the use of the facility in normal circumstances, the [US] Commanding Officer and the Officer in Charge of the United Kingdom Service element shall inform each other of intended movements of ships and aircraft. In other circumstances the use of the facility shall be a matter of the joint decision of the two Governments.'

⁸⁶ The Guardian (London, 19 October 2007) reported that Manfred Nowak, the UN Special Rapporteur on Torture, saying that he had heard, from reliable sources that the US had held detainees on prison ships in the Indian Ocean.

⁸⁷ See FAC Human Rights Annual Report 2008 (n 26), at [36].

⁸⁸ *ibid*, at [36].

⁸⁹ *ibid*, at [37].

This provision confirms that the UK government should have been informed about the movement of US ships and/or aircraft involving Diego Garcia in normal circumstances. However, it also makes it clear that, in exceptional circumstances, the UK government must be jointly involved in any decisions about the use of the facility, including the intended movements of any such ships or aircraft that involve the use of Diego Garcia. Thus, according to the terms of the governing treaty, the Foreign Secretary's 2008 statement is inaccurate. In addition, the same holds true for the conclusion reached by the Foreign Affairs Committee, in its 2014 Report on Diego Garcia, which concluded that US/UK consultations regarding US activities involving Diego Garcia were conducted on an informal basis. Conversely, the interpretation offered by the FCO, in its evidence to the Committee's 2008 Inquiry into British Overseas Territories, seems to represent an accurate interpretation of the terms of the 1976 Agreement.

Nevertheless, while, according to the text of the 1976 treaty, any exceptional use of Diego Garcia by the US authorities would require the joint decision of the US and UK governments the contrasting interpretations offered by the Foreign Secretary and the FCO to the Foreign Affairs Committee at different points in 2008 is suggestive of either the existence of a degree of confusion within the UK government as to the correct interpretation of the applicable treaty at that time or a lack of candour about the extent to which UK officials were instructed to monitor US operations in the BIOT. In any event, the apparent inconsistencies in the UK government's position on this issue say much about the effectiveness of its supervision of US activities in respect of Diego Garcia during the relevant period.⁹⁰ Clearly, under the governing treaty, the UK government should have been jointly involved in any decisions concerning the

⁹⁰ See n 68.

exceptional use of Diego Garcia by the US authorities including: the alleged use of US ships and/or aircraft for the purpose of transferring detainees by means of extraordinary rendition; the claimed use of US vessels as prison ships within the BIOT's internal waters; and any reputed supply of prison ships located on the high seas. The US government may have been untroubled by the lack of joint decision-making in these alleged situations but the absence of British involvement in any such processes reveals much about the UK government's approach to the governance of the BIOT in general.

Further, the shortcomings in the way that the UK government has compiled and maintained flight and immigration records in relation to Diego Garcia since 2002 is glaringly apparent from the inconsistent Parliamentary statements given by Ministers in response to requests for the disclosure of such records between 2008 and 2014. Such statements constitute evidence of inadequate administrative practices and a general lack of effective governmental oversight. As discussed above, deep concerns have been expressed about the UK government's failure to monitor those instances where extraordinary rendition flights have been known to involve Diego Garcia. The UK government's failure to investigate these cases properly once they came to light and its ongoing willingness to rely on US diplomatic assurances regarding the uses to which Diego Garcia has been put, despite the fact that they have already proved to be unreliable, are troubling. These concerns are heightened by the FCO's admission that it maintains a very small official presence on Diego Garcia and that, as a result, it has limited capability to monitor the activities of the US authorities there. Moreover, it appears that the UK government has cultivated a particular attitude concerning the extent of its responsibilities to the BIOT at the level of international law. For example, in response to the alleged stockpiling of landmines on US naval vessels in Diego

Garcia's lagoon, the UK government has argued that as long as such activities take place on US ships then they have not occurred on territory over which the UK exercises sovereign authority – which would otherwise have been contrary to the UK's obligations under the terms of the 1997 Ottawa Landmine Convention.⁹¹ However, as the lagoon qualifies as part of the BIOT's 'territorial waters' it falls under the UK's sovereign authority, this argument is far from convincing.⁹² In sum, it is clear that the UK government is failing to satisfy the responsibilities that it owes in respect of this Overseas Territory.

3.5. The Diego Garcia 'Black-site' Allegations

In addition to claims that Diego Garcia was used in connection with the transfer of HVDs, by means of extraordinary rendition, it has been alleged that a secret detention facility existed either on the island, or on US vessels anchored in the BIOT's territorial waters, and that it was used as a black-site by the US authorities pursuant to the CIA's Detention and Interrogation programme. This sub-section will examine these allegations and the way that domestic and international institutions – including the UK government – have responded to such claims.

In its 2008 Report on British Overseas Territories, the Foreign Affairs Committee stated that it had received evidence from the All Party Parliamentary Group on Extraordinary Rendition and from the NGO Reprieve regarding claims that Diego Garcia had been used in connection with the secret detention of terrorist suspects.⁹³ Specifically, it was alleged that 'ships in or near its territorial waters had also been

⁹¹ See the Ottawa Convention on Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997) 2056 UNTS 211. The UK has ratified the Convention and it was extended to the BIOT on 31 July 1998.

⁹² See Sand (n 53), at 115.

⁹³ The FAC's 2008 Report on British Overseas Territories (n 74), at [54].

used to hold detainees or otherwise facilitate the United States' renditions programme'.⁹⁴ The issue of the holding of detainees in facilities on (or near) Diego Garcia was addressed more fully in the Committee's 2008 Report on Human Rights. It identified a number of reports that had entered the public domain, since 2002, concerning allegations that Diego Garcia had been used as a black-site in connection with the CIA's Detention and Interrogation programme,⁹⁵ including: (i) statements made to the media, in May 2004 and December 2006, by Barry McCaffrey, a retired US Army General saying that the US authorities had held detainees on Diego Garcia;⁹⁶ (ii) *Time* magazine reported, in October 2003, that 'Hambali', a member of Al-Qaeda, had been interrogated on Diego Garcia; (iii) in July 2008, a former Senior US official told *Time* that a terrorist suspect (or suspects) had been held and interrogated on Diego Garcia;⁹⁷ (iv) in August 2008, the *Observer* newspaper reported that former CIA operatives had told Judge Baltasar Garzon, a Spanish magistrate, that Mustafa Setmariam was transferred to Diego Garcia in 2005 and detained there for a number of months;⁹⁸ (v) in August 2008, the *Observer* newspaper reported that Manfred Nowak, the UN Special Rapporteur on Torture, had spoken to detainees who had been held on the island in 2002;⁹⁹ and (vi) the Committee also referred to claims, made by Reprieve, that Abu Zubaydah and Khaled Skeikh Mohammed had both been held on the island.¹⁰⁰

⁹⁴ *ibid.*

⁹⁵ See the FAC's 2008 Annual Report on Human Rights (n 26), at [34].

⁹⁶ Also see *The Guardian* (London, 19 October 2007).

⁹⁷ *Time Magazine* (5 October 2003).

⁹⁸ *The Observer* (3 August 2008)

⁹⁹ *ibid.*

¹⁰⁰ These individuals were subsequently transferred to Guantanamo Bay.

As noted above, the Committee expressed the view that the lack of historical flight data relating to Diego Garcia meant that it was hard to test the veracity of such allegations.¹⁰¹ However, the UK government responded to such claims by stating that:

‘The US government denies having interrogated any terrorist suspect or terrorism-related detainee on Diego Garcia since 11 September 2001. They have also informed us that no detainees have been held on ships within Diego Garcia’s territorial waters over that period, and that they do not operate detention facilities for terrorist suspects on board ships.’¹⁰²

Despite such denials, it is clear that the Foreign Affairs Committee is still disturbed by the UK government’s ongoing reliance on US diplomatic assurances and it remains sceptical about claims that the US authorities have not engaged in wrongdoing in the BIOT, other than in those cases in which it has been admitted.

Other reliable sources concerning the black-site allegations not cited by the Foreign Affairs Committee, in its 2008 Human Rights Report, include: in December 2002, the *Washington Post* reported that US authorities were implementing the CIA’s Detention and Interrogation programme at a number of secret overseas sites, including Diego Garcia.¹⁰³ Further, the 2007 Marty Inquiry Report stated that it had received information which was sufficiently serious to warrant further investigation concerning the use of Diego Garcia by the US authorities for the purpose of ‘processing’ HVDs.¹⁰⁴ Further, in his judgment in the House of Lords in *Bancoult 2*,

¹⁰¹ See [34 and 37] of FAC’s 2008 Annual Report on Human Rights (n 27).

¹⁰² *ibid*, at [35].

¹⁰³ The *Washington Post* (26 December 2002). This source was cited by the European Court of Human Rights in the cases of *Al Nashiri* (n 1), at [232] and *Abu Zubaydah* (n 1), at [226].

¹⁰⁴ 2007 Marty Report (n 73) at [70].

Lord Hoffmann felt able to allude to allegations that ‘Diego Garcia or a ship in the waters around it have been used as a prison in which suspects have been tortured’.¹⁰⁵ The Executive Summary of the US Senate Intelligence Committee’s Report on the CIA’s Programme was published in December 2014.¹⁰⁶ This Summary did not refer to the CIA’s use of Diego Garcia. Nonetheless, it is widely believed that the full (classified) report addresses the role that the island played in the CIA’s programme.¹⁰⁷ It has been reported that the UK government lobbied members of the US Senate Committee on Intelligence in order to exclude any possible references in the Executive Summary to any CIA activities that involved the use of Diego Garcia.¹⁰⁸ Moreover, in January 2015, the *Guardian* newspaper reported that Lawrence Wilkerson, Colin Powell’s Chief of Staff at the US State Department between 2002-2005, had recently confirmed in a media interview that Diego Garcia was used as a black-site by the CIA for certain ‘nefarious activities’, including instances of extraordinary rendition and the secret detention and interrogation of terrorist suspects.¹⁰⁹

Despite the existence of such credible and consistent reports, in a statement made to the House of Commons, in June 2014, the UK government maintained that: ‘There are no detainees on Diego Garcia and the British Government is aware of no evidence that US detainees have been held on Diego Garcia since September 2001’.¹¹⁰ Nevertheless, in its 2014 Report, the Foreign Affairs Committee observed that:

¹⁰⁵ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (‘*Bancoult 2*’) [2008] 3 WLR 955 at [35].

¹⁰⁶ See the Senate Committee’s Report (n 2).

¹⁰⁷ *The Guardian* (London, 16 August 2014).

¹⁰⁸ The Foreign Secretary, William Hague, explained that: ‘We have made representations to seek assurances that ordinary procedures for clearance of UK material will be followed in the event that UK material provide[d] to the Senate committee were to be disclosed’, *The Guardian* (London, 16 August 2014).

¹⁰⁹ *The Guardian* (London, 30 Jan 2015)

¹¹⁰ HC Deb 10 June 2014, col 91W – quoted at para 11 of the 2014 FAC Report on Diego Garca (n 55).

‘Recent developments have once again brought into question the validity of assurances by the US about its use of Diego Garcia. In April 2014, it was reported that the US Senate Select Committee on Intelligence had found – as a result of its four-year inquiry into the CIA’s post-2001 torture and rendition programme – that the CIA had detained “high-value suspects” on Diego Garcia and that the ‘black site’ arrangement on the island was made with the “full cooperation” of the British Government [...]’¹¹¹

In July 2010, the British Prime Minister announced that he would set up an independent judge-led Inquiry into the allegations that UK officials have been involved in the secret detention and ill-treatment of terrorist suspects overseas. It has been suggested that the ‘Detainee Inquiry’ would address claims made in respect of British Overseas Territories.¹¹² However, in January 2012, the UK government announced that this Inquiry would be wound up, and its work would be passed to the House of Commons Select Committee on Intelligence and Security instead.¹¹³ Accordingly, it is evident that the UK government has not ensured that the claims about the misuse of Diego Garcia by the US authorities have been investigated by an independent body in a thorough and transparent manner. It is difficult to reconcile the UK government’s actions in this context with the requirements articulated by the Strasbourg Court for the effective investigation of credible allegations of serious human rights violations, which are needed for the maintenance of ‘public confidence in [the authorities] adherence to the rule of law and [for] preventing any appearance of impunity, collusion in or tolerance of unlawful acts’.¹¹⁴

¹¹¹ *ibid.*, [15].

¹¹² See ‘Breaking the Conspiracy of Silence’, Amnesty International, (January 2015) at 19-20.

¹¹³ *ibid.*

¹¹⁴ See *El-Masri* (n 1), at [192]; *Al Nashiri* (n 1), at [495]; and *Abu Zubaydah* (n 1), at [489].

4. The Applicability of Human Rights Treaties to the BIOT

This section will consider the extent to which those human rights treaties most closely associated with the prevention of ill-treatment and arbitrary detention are applicable to the BIOT. It will pay particular attention to arguments concerning the jurisdictional scope of such treaties before exploring the issue of the substantive application of the ECHR to the BIOT.

4.1. The Territorial Reach of Human Rights Treaties

Article 29 of the Vienna Convention on the Law of Treaties provides that ‘unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’.¹¹⁵ Hendry and Dickson argue that the UK government has adopted a general practice of not extending treaty commitments to its Overseas Territories. They claim that it has established a ‘different intention’ for the purpose of determining the jurisdictional scope of multilateral treaties. Accordingly, they assert that such treaties concluded by the UK do not automatically apply to British Overseas Territories.¹¹⁶ Specifically, in 1976, when the UK ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR),¹¹⁷ it issued a declaration, which purported to extend the Covenants only to those British Overseas Territories identified therein; however, the BIOT was not identified as an applicable Territory for

¹¹⁵ (1969) 1155 UNTS 331. Also see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011) at 13-17.

¹¹⁶ See Hendry and Dickson (n 79), at 255-256.

¹¹⁷ 993 UNNTS 3 and 999 UNTS 171 respectively.

this purpose.¹¹⁸ Further, the UK government ratified the UN Convention Against Torture in 1988; it extended the Convention's application to a number of British Overseas Territories, by declaration in 1992, but the BIOT was not included in this process of extension.¹¹⁹ Further, while the UK ratified the European Convention on the Prevention of Torture in 1988 it too has not been extended to the BIOT.¹²⁰ Finally, the extent to which the European Convention on Human Rights is applicable to the BIOT remains a controversial issue given the UK government's decision not to extend the Convention's application to the Territory pursuant to the 'colonial application clause' contained in Article 56(63).¹²¹

It should be acknowledged that the responsible treaty monitoring bodies have not necessarily accepted the UK government's claims that their treaties are not applicable to the BIOT. For instance, the UN Human Rights Committee rejected the UK government's claim that the ICCPR does not apply to the BIOT.¹²² Moreover, despite the UK's stance regarding the territorial application of human rights treaties to its Overseas Territories, it is clear that the UN Torture Convention is applicable to the

¹¹⁸ Article 2(1), ICCPR provides that: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...' The UK's instruments of ratification for the International Covenants, dated 20 May 1976, were accompanied by a declaration stating that the Covenants were ratified in respect of the specifically identified territories: Letter of the Director of General Legal Division, Office of Legal Affairs, 29 June 1976, C.N.193.1976. Treaties-6.

¹¹⁹ 1465 UNTS 85. Ratified by the UK on 6 December 1988.

¹²⁰ 151 UNTS 363.

¹²¹ See Allen (n 5) (which argues that a Contracting State's jurisdiction may be engaged, in exceptional cases, in relation to an Overseas Territory for which it internationally responsible, even in the absence of an Article 56(63) declaration). See *Al-Skeini and Others v UK* (2011) 53 EHRR 18 at [140]; and *Chagos Islanders v UK* (2013) 56 EHRR SE15 at [74-75]. Also see L Moor and AWB Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights' (2005) 76 *BYIL* 121.

¹²² See the Summary Record of the First Part of the 1963rd Meeting: United Kingdom, 23 October 2001, CCPR/C/SR.1963. See also General Comment 31(80), 26 May 2004, CCPR/C/21/ rev.1/Add.13, para. 10 provides: 'State Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights of all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone in their power or effective control.' Also see Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, 10 December 2003, CERD/C/63/CO/11; and its 78th Session, Concluding Observations, CERD/D/GBR/Co/18-20, 14 September 2011.

BIOT as a result of the Convention's broad jurisdictional scope, as determined by the Committee on Torture.¹²³ Notwithstanding the apparent weaknesses in the UK government's interpretation of the territorial reach of the human rights treaties, it has endeavoured to maintain the façade that the BIOT's represents a 'black-hole', as far international human rights law is concerned.¹²⁴ The difficulty with challenging this strategy is in finding a way to enforce the UK's treaty obligations directly. The European Convention on Human Rights has particular salience in this context given its capacity to be enforced against Contracting States by individuals through the Strasbourg Court.

4.2. The ECHR's Substantive Application to the BIOT

A major problem in establishing: (i) whether the CIA conducted its Detention and Interrogation programme in the US military facility on Diego Garcia – or on US ships anchored in the BIOT's territorial waters – and; (ii) determining what UK officials knew about such alleged activities at the material time, flows from the fact that much of the information concerning US activities in the BIOT remains in the exclusive preserve of the US and UK authorities. The Strasbourg Court addressed the issue of restricted

¹²³ Article 2 of the Convention provides:

- (1) 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
- (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

On 24 October 2008, the Committee Against Torture adopted General Comment 2, which concerned the jurisdictional scope of the Convention. In the section which addressed the absolute nature of the prohibition on torture, the Committee stated, at paragraph 7, that it: '...understands that the concept of "any territory under its jurisdiction," linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party...' UN Committee against Torture, (24 January 2008) CAT/C/GC/2.

¹²⁴ See generally Ralph Wilde, 'Legal "Black Hole" Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004-2005) 26 *MichJIntlL* 739. Also see Kal Raustiala, *Does the Constitution Follow the Flag?* (OUP 2009)

access to relevant information held by public authorities in *El-Masri v Macedonia*. In particular, it observed that:

‘to the effect that, where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government.’¹²⁵

In that case, the Court found itself in the unusual situation of not having a merits decision by a competent national court upon which to rely for the purpose of reconstructing the material facts.¹²⁶ Nevertheless, it took the view that it was capable of evaluating the evidence placed before it and of drawing the appropriate inferences regarding the conduct of the authorities from the available information.¹²⁷

Although *El Masri* confirmed that there is nothing to stop Contracting States from pleading secrecy privileges in litigation before the Strasbourg Court, it showed the Court’s willingness to adjust its approach to the available evidence in the face of such special pleading, in terms of the sources of evidence upon which it was prepared to rely; in its assessment of the probative value of any such evidence; and by reversing

¹²⁵ *El-Masri* (n 1) at [152]. This position was reiterated in *Al Nashiri* (n 1) at [396] and *Abu Zubaydah* (n 1) at [396].

¹²⁶ See the discussion of this point in *Fabbrini* (n 7), at page 91.

¹²⁷ The Court ruled that ‘there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment’ at [151]. This point was also made in *Al Nashiri*, *ibid*, at [394] and *Abu Zubaydah*, *ibid*, at [394].

the burden of proof in such exceptional cases.¹²⁸ The Court's preparedness to vary its methodological approach to the evidential considerations to fit the circumstances of a case involving claims of serious human rights violations is significant given the allegations regarding the misuse of Diego Garcia by the US authorities and the UK government's apparent inertia in response to such claims that violations of the Convention have occurred in the BIOT.

A US military detention facility is known to exist on Diego Garcia.¹²⁹ Further, as noted above, it has been claimed that terrorist suspects may have been secretly detained and interrogated by US authorities on US naval ships anchored in Diego Garcia's large harbour.¹³⁰ Clearly, any activities carried out in the BIOT's territorial waters would be subject to the UK's sovereign authority. As discussed above, the UK government has remained tight-lipped about what it knew about the CIA's use of Diego Garcia in connection with its Detention and Interrogation programme and when it acquired any such information. However, it is unlikely that UK officials witnessed or actively participated in any alleged wrongdoing carried out by US officials in the BIOT, pursuant to the CIA's programme.

A major difference between the cases of *El-Masri*, *Al Nashiri* and *Abu Zubaydah* and situation concerning the prospective responsibility for the UK under the European Convention for the CIA's reputed activities on, or near, Diego Garcia, is that the former cases involved actions that occurred on the respondent State's national territory and, as a result, the issue of State jurisdiction proved to be unproblematic. In contrast, the latter situation concerns allegations about the existence of a CIA black-site located in

¹²⁸ See *Imakayeva v Russia* (2008) 47 EHRR 4, at [114-5]. See *El-Masri* (n 1) at [152]; *Al Nashiri*, *ibid*, at [396]; and *Abu Zubaydah*, *ibid*, at [396].

¹²⁹ See Peter Sand, *United States and Britain in Diego Garcia: The Future of a Controversial Base* (Palgrave 2009) at 46.

¹³⁰ See section 3 above.

a British Overseas Territory that is lawfully occupied by the US military authorities. Accordingly, given the extent to which the US authorities control Diego Garcia, it is doubtful that they would need an equivalent level of assistance from the UK authorities, in order to enable them to carry out the alleged wrongdoing, as that which was required from the Polish officials in the cases of *Al Nashiri* and *Abu Zubaydah*. This raises the question of whether a less exacting test should be applied to UK officials regarding their oversight of the activities reputedly conducted by US authorities in the BIOT for the purpose of determining whether the UK's responsibility should be engaged under the European Convention. It is suggested that it would be a mistake to concentrate upon the extent to which a Contracting State's officials facilitated wrongdoing by foreign officials within its jurisdiction: instead it is suggested that the main focus should be on the positive duties of preventing wrongful acts from occurring and investigating credible allegations of such wrongdoing effectively, in such cases.

As discussed in section 2, in *El-Masri*, *Al Nashir* and *Abu Zubaydah*, the officials of the respondent States had direct knowledge of the CIA's wrongdoing within their jurisdiction. However, the extent to which the UK authorities knew about the reputed activities of US authorities in respect of the BIOT has not been substantiated. This raises the question of whether the responsibility of a Contracting State could be engaged for wrongful acts undertaken by foreign officials, within its jurisdiction in the absence of direct knowledge, on the part of the relevant officials. The Court's jurisprudence indicates that State responsibility might arise in the absence of direct knowledge of wrongdoing by foreign officials within the jurisdiction of a Contracting State as reliable publicly available reports may be imputed to the officials of that State, if they have entered the public domain by the material time. Such a conclusion is based

on the assumption that such reports should have alerted the responsible officials to the alleged wrongdoing and prompted them to take the necessary steps to prevent it from occurring. Moreover, if the wrongdoing had stopped by the time allegations were made then the responsible authorities are still under a duty to investigate (effectively) whether serious human rights violations have, in fact, occurred.

Against this background, it is clear that the procedural and substantive aspects of Article 3 of the European Convention come together in cases where the officials of a Contracting State do not have actual knowledge of the wrongful acts of foreign agents within its jurisdiction. The substantive aspect addresses what the responsible officials ought to have known – by reference to: (i) the level of oversight that they should have exercised over foreign officials acting within their jurisdiction; and (ii) the credible information available in the public domain at the material time regarding the activities of such foreign officials in such a setting. Accordingly, if the level of oversight exercised by State officials was inadequate: specifically, if they failed to act on reliable, publicly available reports and thereby failed to prevent serious human rights violations from occurring then the issue of third party responsibility for substantive violations of Article 3 of the European Convention may arise. In any event, if, in such a situation, the authorities did not properly investigate credible allegations about such wrongdoing they would be failing to satisfy the procedural measures required by that provision.

More broadly, the above discussion prompts reflection on the question of the extent to which Contracting States are required to take positive measures to satisfy the obligations enshrined in the European Convention. In particular, the extent to which they are responsible for preventing instances of ill-treatment and arbitrary detention from occurring within their jurisdiction and for investigating cases properly where such wrongdoing has been alleged. As the Strasbourg Court's jurisprudence

makes clear, an effective official response is required in order to maintain public confidence in the rule of law and to prevent 'any appearance of impunity, collusion in or tolerance of unlawful acts'.¹³¹ In the circumstances, the notion of complicity for third party responsibility – that the officials of a Contracting State have connived or acquiesced in wrongful acts committed by foreign officials within its jurisdiction – must be determined not just by what those officials actually knew but also by what they ought to have known at the relevant time.

Regarding the allegations that the US authorities committed wrongful acts in the BIOT, acts which, if proven, would violate the terms of the European Convention, it is apparent that the prospect of the UK's responsibility being engaged for such alleged wrongdoing is conceivable, when measured against the requirements for a finding of complicity in accordance with the spirit of the Strasbourg Court's jurisprudence in this area. As discussed in section 3, numerous credible and publicly-available reports alleging that individuals have been ill-treated and arbitrarily detained, either in a US military detention facility on Diego Garcia or on US ships stationed in the BIOT's territorial waters, have entered the public domain since 2002.

Further, it is apparent that the UK government has failed to govern the BIOT properly. In particular, it has failed to maintain an official presence on Diego Garcia that is adequate to the task of overseeing the activities of US authorities on and around the island. This conclusion is evidenced by the failure of UK officials to detect the two admitted US rendition flights that landed on Diego Garcia in 2002; and the poor keeping of flight and immigration record by those UK officials based on Diego Garcia within the relevant period. It is also supported by the UK government's failure to satisfy its treaty commitments in respect of Diego Garcia. According to the terms of the 1976

¹³¹ See *El Masri* (n 1) at [191-2]; *Al Nashiri* (n 1) at [495]; and *Abu Zubaydah* (n 1) at [489], and [492-3].

UK/US Diego Garcia Agreement, the UK was supposed to be jointly involved in decisions concerning the use of Diego Garcia by US aircraft and ships in exceptional circumstances. As noted above, in 2008, the Foreign Secretary appeared to be labouring under the misapprehension that the US authorities were only under a duty to inform UK officials of the movement of US ships in the BIOT in normal circumstances;¹³² and others in the UK government were under the impression that what happened on US ships in Diego Garcia's territorial waters was of no concern to the UK authorities.¹³³ However, if the UK government has insisted on the need for joint decisions regarding the exceptional use of Diego Garcia by the US authorities then it would have been in a position to know about the actual and alleged instances of ill-treatment and arbitrary detention of individuals by US officials in the BIOT during the period in question.

The UK authorities failed to act on the credible publicly available allegations that individuals were being ill-treated and arbitrary detained by US officials in the BIOT. Consequently, the UK failed to satisfy the positive measures required by the substantive aspect of Articles 3 and 5 of the European Convention. Even if UK officials did not know about the alleged wrongdoing by the US authorities within the BIOT, those credible reports about the CIA's programme which had entered the public domain, by the material time, could be imputed to them. Those reports may, therefore, be taken into consideration for the purpose of establishing what the officials ought to have done to prevent any such wrongdoing within the relevant period. Regarding the procedural requirements of the positive obligations contained in Article 3, in relation to the allegations of wrongdoing in the BIOT, the available evidence indicates that the

¹³² See section 3.4.

¹³³ See section 3.4.

UK government has not investigated these claims in a meaningful way: instead, it has preferred to rely on diplomatic assurances given by the US government, despite the fact that they have proved to be unreliable in the past. In particular, the UK government should have conducted an effective investigation into concerns raised about how the US authorities used Diego Garcia in connection with the CIA's Detention and Interrogation programme – including a full investigation into the two publicly admitted rendition flights, which landed on Diego Garcia in 2002 – in accordance with the positive obligations enshrined in the European Convention.

5. Conclusion

This article examined the way that the Strasbourg Court's jurisprudence regarding findings of third party responsibility for the wrongful acts of foreign officials within the jurisdiction of a Contracting State, pursuant to the terms of the European Convention, has evolved. To this end, it paid particular attention to the key decisions of *El-Masri v Macedonia*, *Al Nashiri v Poland*, and *Abu Zubaydah v Poland* with a view to exploring the limits of the test for complicity endorsed by the Court in this context – that a Contracting State's officials connived or acquiesced in such wrongdoing. It is clear from these cases that liability cannot be restricted to instances in which the authorities knew about wrongdoing committed by foreign officials within their State's jurisdiction and where they actively facilitated it in some way. Instead a Contracting State's responsibility may be engaged in cases where its authorities ought to have known about such wrongdoing as a result of credible and consistent reports, which allege that such serious human rights abuses are being committed, having entered the public domain by the material time. This approach is based on the assumption that such reports should have prompted them to take the necessary steps to investigate such

allegations and to prevent serious abuses from happening in accordance with the positive substantive obligations contained in Article 3 of the Convention. Further, and in any event, if the authorities do not investigate properly reliable claims that wrongdoing may have occurred then they have failed to satisfy the positive procedural measures required by the Convention. The article suggested that, if the positive aspects of the obligations contained in the Convention are taken seriously then the test of complicity for third party responsibility must be determined by what those officials ought to have known and ought to have done rather than by reference to what they actually knew at the relevant time and the extent to which they actively facilitated the wrongdoing in issue.

This article harnessed allegations that US officials ill-treated and arbitrarily detained individuals on, or near, Diego Garcia, in the BIOT as a case study through which to assess the parameters of third party responsibility under the terms of the European Convention. It showed that the requisite level of knowledge, on the part of the relevant officials, can be constructed by reference to reliable, publicly-available reports, which draw attention to allegations of serious human rights abuses. If the authorities fail to take the necessary steps to investigate such claims and to prevent such wrongdoing from occurring then it is suggested that the threshold for a finding of third party responsibility should be satisfied. Poor standards of governance facilitate and compound wrongdoing carried out by foreign officials in overseas locations. Moreover, as the case of Diego Garcia demonstrates, maladministration may, inadvertently, foster a culture of impunity and unaccountability. The risks created by the emergence and maintenance of such human rights 'blind-spots' underscores the significance of the function performed by positive obligations in contemporary human rights jurisprudence.