

NATIONAL UNIVERSITY OF IRELAND, GALWAY

European Master's Degree in Human Rights and Democratisation
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*"But they told us they would not torture them..."**

vs.

*"If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt."***

A legal, political and philosophical analysis of US extraordinary renditions and European involvement therein.



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* Fictional quote of the author's own making inspired by a quote of US Attorney General Gonzales stating that it is not US policy to send persons "to countries where we believe or we know that they're going to be tortured". *Source*: Garcia, Michael John, "Renditions: Constraints Imposed by Laws on Torture", Congressional Research Service, 22 January 2009, <https://archive.org/details/RL32890RenditionsConstraintsImposedbyLawsonTorture-crs> (last visited 14 July 2016), n. 30, referring to Smith, R. Jeffrey, "Gonzales Defends Transfers of Detainees", Washington Post, 8 March 2005, <http://www.washingtonpost.com/wp-dyn/articles/A15130-2005Mar7.html> (last visited 14 July 2016). Nevertheless, a large number of prisoners have been sent to for example Egypt, a country with a considerable track record when it comes to torturing prisoners, with the excuse that the country (here: Egypt) gave the US a diplomatic assurance that they would not torture the prisoners.

** Former CIA official Robert Baer, in Grey, Stephen, "America's gulag," *The New Statesman*, 17 May 2004, <http://www.newstatesman.com/node/159775> (last visited 14 July 2016).

*** Image of a Gulfstream IV, one of the preferred private jets used by the US for its extraordinary renditions. Aircraft N977GA stayed at Copenhagen Airport for five days (allegedly) waiting to fly to Moscow and abduct the American whistle-blower Edward Snowden in case he was not granted asylum in Russia. This situation is explained in more detail in Section 2.3.1 below.

ABSTRACT

The purpose of this paper is to examine the US extraordinary renditions to torture and the European involvement therein from a legal, political and moral point of view. I am advancing my analysis through a comparative case study approach, comparing Denmark and Ireland. Both are small countries and both have been accused of facilitating the US renditions, however, not necessarily for the same reasons. In the paper, I set out to examine and compare the involvement of the two countries in the renditions. However, Denmark and Ireland cannot be regarded in isolation from the US. Thus, the analysis of the legal, political and moral aspects of the extraordinary renditions is necessarily centered around the US. In this analysis I expect to establish that the US or US officials have committed several crimes under international law by running the CIA Rendition, Detention and Interrogation programme and that by assisting the US, several European countries, including Denmark and Ireland, have become accomplices to these crimes. I further expect to establish that, unfortunately, the international conventions that the US was (and in part still is) violating are rather "toothless", in that the UN cannot force the US to comply with them, nor can the UN punish the US or US officials for non-compliance, however, that those very same international conventions may be invoked against some of the European accomplices - and if not, the ECHR can. Moreover, it is my thesis that a case could be brought against the US (or US officials) by other signatories to said conventions, including the European signatories - but that this is not happening. However, there might be a case for a conviction of the US or US officials by the International Criminal Court. I then set out to discuss the reasons why smaller European countries like Denmark and Ireland do not bring a case against the US - which I expect might be linked to the reasons why they assisted the US in the renditions in the first place. Here it is my thesis that this generally has to do with the US' position as a hegemon, but that Denmark and Ireland may also have their own particular reasons for not bringing a case/assisting in the renditions. Moreover, I contend that it cannot be excluded that at least part of the leadership in these two countries – along with the US administration in fact thought that torture could be morally justified in some of the rendition cases - but argue that this belief is flawed and that torture should never be allowed. Finally, I make the case that extraordinary renditions to torture do not produce any useful results, rather quite the contrary.

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1. INTRODUCTION

“Here is my story. On December 31, 2003, I boarded a bus in Ulm, Germany for a holiday in Skopje, Macedonia. When the bus crossed the border into Macedonia, Macedonian officials confiscated my passport and detained me for several hours. Eventually, I was transferred to a hotel where I was held for 23 days. I was guarded at all times, the curtains were always drawn, I was never permitted to leave the room, I was threatened with guns, and I was not allowed to contact anyone. At the hotel, I was repeatedly questioned about my activities in Ulm, my associates, my mosque, meetings with people that had never occurred, or associations with people I had never met. I answered all of their questions truthfully, emphatically denying their accusations. After 13 days I went on a hunger strike to protest my confinement.

On January 23, 2004, seven or eight men entered the hotel room and forced me to record a video saying I had been treated well and would soon be flown back to Germany. I was handcuffed, blindfolded, and placed in a car. The car eventually stopped and I heard airplanes. I was taken from the car, and led to a building where I was severely beaten by people's fists and what felt like a thick stick. Someone sliced the clothes off my body, and when I would not remove my underwear, I was beaten again until someone forcibly removed them from me. I was thrown on the floor, my hands were pulled behind me, and someone's boot was placed on my back. Then I felt something firm being forced inside my anus.

I was dragged across the floor and my blindfold was removed. I saw seven or eight men dressed in black and wearing black ski masks. One of the men placed me in a diaper and a track suit. I was put in a belt with chains that attached to my wrists and ankles, earmuffs were placed over my ears, eye pads over my eyes, and then I was blindfolded and hooded. After being marched to a plane, I was thrown to the floor face down and my legs and arms were spread-eagled and secured to the sides of the plane. I felt two injections, and I was rendered nearly unconscious. At some point, I felt the plane land and take off again. When it landed again, I was unchained and taken off the plane. It felt very warm outside, and so I knew I had not been returned to Germany. I learned later that I was in Afghanistan. Once off the plane, I was shoved into the back of a vehicle. After a short drive, I was dragged out of the car, pushed roughly into a building, thrown to the floor, and kicked and beaten on the head, the soles of my feet, and the small of my back. I was left in a small,

dirty, cold concrete cell. There was no bed and one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. I was extremely thirsty, but there was only a bottle of putrid water in [the] cell. I was refused fresh water.

That first night I was interrogated by six or eight men dressed in the same black clothing and ski masks, as well as a masked American doctor and a translator. They stripped me of my clothes, photographed me, and took blood and urine samples. I was returned to my cell, where I would remain in solitary confinement, with no reading or writing materials, and without once being permitted outside to breathe fresh air, for more than four months.

Ultimately, I was interrogated three or four times, always by the same man, with others who were dressed in black clothing and ski masks, and always at night. The man who interrogated me threatened me, insulted me, and shoved me. He interrogated me about whether I had taken a trip to Jalalabad using a false passport; whether I had attended Palestinian training camps; and whether I knew September 11 conspirators or other alleged extremists. As in Macedonia, I truthfully denied their accusations. Two men who participated in my interrogations identified themselves as Americans. My requests to meet with a representative of the German government, a lawyer, or to be brought before a court, were repeatedly ignored.

In March, I, along with several other inmates, commenced a hunger strike to protest our confinement without charges. After 27 days without food, I was allowed to meet with two unmasked Americans, one of whom was the prison director and the second an even higher official whom other inmates referred to as "the Boss." I pleaded with them to either release me or bring me to court, but the American prison director replied that he could not release me without permission from Washington. He also said that I should not be detained in the prison. On day 37 of my hunger strike I was dragged into an interrogation room, tied to a chair, and a feeding tube was forced through my nose to my stomach. After the force-feeding, I became extremely ill and suffered the worst pain of my life.

Near the beginning of May, I was brought into the interrogation room to meet an American who identified himself as a psychologist. He told me he had traveled from Washington D.C. to check on me, and promised I would soon be released. Soon thereafter, I was interrogated again by a native German speaker named "Sam," the American prison director, and an American translator. I was warned that as a condition of my release, I was never to mention what had happened to me, because the Americans were determined to keep the affair a secret.

On May 28, I was led out of my cell, blindfolded and handcuffed. I was put on a plane and chained to the seat. I was accompanied by Sam and also heard the voices of two or three Americans. Sam informed me that the plane would land in a European country other than Germany, because the Americans did not want to leave clear traces of their involvement in my ordeal, but that I would eventually continue on to Germany. I believed I would be executed rather than returned home.

When the plane landed, I was placed in a car, still blindfolded, and driven up and down mountains for hours. Eventually, I was removed from the car and my blindfold removed. My captors gave me my passport and belongings, sliced off my handcuffs, and told me to walk down a dark, deserted road and not to look back. I believed I would be shot in the back and left to die, but when I turned the bend, there were armed men who asked me why I was in Albania and took my passport. The Albanians took me to the airport, and only when the plane took off did I believe I was actually returning to Germany. When I returned I had long hair and beard, and had lost 40 pounds. My wife and children had left our house in Ulm, believing I had left them and was not coming back. Now we are together again in Germany.”¹

The above is the story of Khaled El-Masri: a seemingly ordinary German citizen, working as a car-salesman in Bavaria where he lived with his wife and children, on his way to a short holiday in the Balkans. But El-Masri is also a Muslim with an Arabic name and middle-Eastern looks due to his Lebanese origins – all attributes that would turn what was to be an otherwise relaxing holiday into a trip to hell. El-Masri was a victim of what one may best describe as an “extraordinary rendition to torture”. “Extraordinary” because his transfer to the US forces was carried out in secret and flouting international procedures for extradition; and “to torture” because Macedonia knew or ought to have known that handing him over to US forces with a view to transporting him to Afghanistan implied the risk that he would be tortured - , which the European Court of Human Rights later found had been the case. To make matters worse, El-Masri was in fact not even the man his wrongdoers were looking for. El-Masri’s case would prove to be one of mistaken identity and to date he has not received

¹ American Civil Liberties Union, “Statement: Khaled El-Masri”, <https://www.aclu.org/statement-khaled-el-masri> (last visited 14 July 2016).

even as much as an apology from the US Government. El-Masri's case of mistaken identity, extraordinary rendition and torture is by no means unique. The CIA has been found to torture rendition victims in a large number of cases – or to have sent them to places where they were tortured – and a considerable number of these were, like El-Masri, cases of mistaken identity.² Mistaken identity or not, torture in itself is strongly condemned by Western societies, including the United States. Nevertheless, a number of European states have facilitated the US' extraordinary renditions and consequent torture to a greater or lesser extent. Some have done so in a direct manner, allowing the US to run secret prisons in their territories or handing the suspects over to the US. Others have facilitated the US more implicitly, by allowing it to use their airspace for rendition flights or to stop-over to refuel in their territory - or rather, by not prohibiting them to do so.

Much has already been said on whether the CIA's treatment of the victims amounts to torture. According to the US Senate³ and President Obama⁴ it does. Considerable attention has also been paid to European countries' more direct involvement in renditions and torture. According to the European Court of Human Rights, the handing over of El-Masri to the CIA amounted to a violation of the European Convention on Human Rights because the Macedonian authorities knowingly exposed him to the risk of torture when doing so. However, not so much has yet been said about the more indirect involvement of some European countries in the US renditions to torture – and about the ways in which to deal with this, including in terms of potential accountability towards the victims.

This paper will examine more closely two smaller contributors to the US rendition programme, namely Denmark and Ireland. It will seek to assess what role they played, how much they knew about the US rendition activities in their territories, and what

² For a selection of examples of the CIA's and its foreign colleagues' activities, *see* Grey, Stephen, "America's gulag", *The New Statesman*, 17 May 2004, <http://www.newstatesman.com/node/159775> (last visited 14 July 2016).

³ *See* the so-called "Feinstein report": Senate Select Committee on Intelligence, "Committee Study of the CIA's Detention and Interrogation Program. Findings and conclusions", 3 December 2014 (declassified version), <http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program> (last visited 14 July 2016).

⁴ CNN panel debate, "Obama: 'We tortured some folks'", published on 1 August, 2014, <https://www.youtube.com/watch?v=QBLNohquRk> (last visited 14 July 2016).

action they took once it emerged that such activities were taking place. It should be said from the outset that, much like other European countries, neither Denmark nor Ireland appears to have made great efforts to stop their future involvement in US renditions - nor have they sought to hold the US accountable for the maltreatment of the rendition victims. This paper will seek to determine the underlying reasons for this. Although a particular emphasis will be placed on Denmark and Ireland, the analysis will not be limited to these two countries. Such analysis will take a legal, political and philosophical angle, asking first: *what* are the legal mechanisms, if any, facilitating US accountability? Then, if there are any such mechanisms: *why* have Denmark, Ireland and other states not taken legal action against the US? Could it perhaps be because the US is the super-hegemon, as some have labeled it? Or is it rather that the US and other states believe that in some extreme cases, torture can be morally justified and that since 9/11 the world has been in such a state of emergency that there is a case for torture – even at the risk of potentially torturing innocent people. However, before addressing these issues of unquestionable importance in Sections 3 to 5, it is worth recalling some key legal definitions and providing a brief account of the US/CIA programme and the Danish and Irish involvement in it (in Section 2).

2. EXTRAORDINARY RENDITIONS, THEORY AND PRACTICE

2.1 Theory: some definitions

2.1.1 “renditions”, “extraditions” and “extraordinary renditions (to torture)”

In the above introduction, El-Masri was described as a victim of “extraordinary rendition to torture”: “extraordinary” because his transfer to the US forces was done in secret, not following international procedures for extradition; and “to torture” because Macedonia knew or ought to have known that handing him over to US forces intending to transport him to Afghanistan implied a risk that he would be tortured. Now, what more precisely is to be understood by a “rendition”? “Rendition” is generally understood as being the situation in which a person suspected of a criminal activity, including that of terrorism, is transferred from one country to another with a view to standing trial in the requesting country. Normally, there are well-established legal procedures for this, typically laid down in treaties, and the request for transfer and the transfer itself fully comply with these procedures. In such cases, the transfer is called an “extradition”. Persons being transferred in this manner are fortunate in the sense that they usually have access to the judicial system of the sending state and can, thus, challenge their extradition.

If you are less fortunate, however, you become the subject of an “extrajudicial transfer”, also called an “extraordinary rendition”. Such a transfer happens outside the realm of the law; persons typically have no access to judicial review of the transfer decision – let alone judicial review of whatever they may be subjected to before, during and after the transfer. This appears, at least, to be the description of an extraordinary transfer orchestrated by the US – like that of El-Masri and of many, many others. In such cases there will be no judicial review of the legal basis for your detention, you will not be allowed to contact your embassy or a lawyer, there will be no judicial control as to whether the interrogation techniques applied to your mind and body border or even amount to torture, and in between the interrogation sessions you are typically left in a small, dark cell not knowing if this place is going to be your “final destination”. This is what extraordinary renditions have looked like in many cases – at least in many of the

US-orchestrated ones. And one should be naïve to believe that this is not still going on – at least to some extent⁵ – because the so-called “war on terror” is still going strong. As mentioned, the US extraordinary renditions have been seen to involve torture, at least according to the European Court of Human Rights and several international bodies, including the UN. The US Senate would agree to this, as does President Obama - the CIA, which invented the interrogation techniques applied to the rendition victims, not so much. It insists that what it euphemistically labels as “enhanced interrogation techniques” do not amount to torture – at least not when the CIA itself applies them.⁶ The question of what constitutes torture is not just relevant for potential US accountability for renditions, but also for the potential responsibility of European states involved in renditions. Thus, if a European state knew or should have known that handing a person over to US forces (or any other state forces) implied a risk that the person would be tortured or there were substantial grounds for believing that the person would be in danger of being subjected to torture, then we are not just dealing with an extraordinary rendition but rather an “extraordinary rendition to torture” which will trigger responsibility for that European state.⁷ Therefore, before moving on, it is essential to have a definition of torture. Indeed, what exactly is considered “torture” and do the CIA enhanced interrogation techniques fit this definition?

2.1.2 “Torture”, “other cruel, inhuman or degrading treatment or punishment” and “the “CIA enhanced interrogation techniques”

A – or one might actually say THE – internationally recognised definition of “torture” is to be found in the UN Convention against Torture and Other Cruel, Inhuman or

⁵ Renditions have continued under President Obama. See Whitlock, Craig, “Renditions continue under Obama, despite due-process concerns”, The Washington Post, 1 January 2013, https://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html (last visited 14 July 2016). In fairness, the renditions referred to in the article appear to be “only” “renditions to trial” and not “renditions to torture”. The difference between these two terms will be explained in the following.

⁶ I will say more about this divergence in Section 4 below.

⁷ The legalities of this aspect are dealt with in Section 3 below.

Degrading Treatment or Punishment (the “CAT”).⁸ According to Article 1 of that convention, torture is (1) “any act by which severe pain or suffering, whether physical or mental, is” (2) “intentionally inflicted on a person” (3) “for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,” (4) “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. [...]”⁹

In the case of extraordinary renditions, torture is typically applied to obtain information, for example about planned terrorist attacks or the whereabouts of a terrorist leader. However, it is also said to have been applied to intimidate or “break” prisoners, i.e. to make them psychologically incapable of committing crimes, including crimes of a terrorist nature.¹⁰

Now, when does an act reach the threshold of inflicting “severe pain or suffering, whether physical or mental”? To pick up the example of El-Masri again, when he was handed over to the CIA at Skopje airport he was, according to the factual account of the European Court of Human Rights, “beaten severely by several disguised men dressed in black. He was stripped and sodomised with an object. He was placed in an adult nappy and dressed in a dark blue short-sleeved tracksuit. Shackled and hooded, and subjected to total sensory deprivation, the applicant was forcibly marched to a CIA aircraft [...]”

⁸ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS, Vol. 660, p. 195, 21 December 1984, entered into force on 26 June 1987.

⁹ CAT, Article 1.

¹⁰ Thus, to “break” the persons is alleged to have been one of the purposes of the treatment of the prisoners at the US detention facility in Guantanamo Bay. The main problem with this is that detainees become so “broken” that they are ultimately incapable of leading a normal life. One such case would be Lotfi Bin Ali, who was portrayed in a recent documentary by VICE News called “Life After Guantanamo: Exiled in Kazakhstan”, 16 October 2015, <https://news.vice.com/video/life-after-guantanamoexiled-in-kazakhstan> (last visited 14 July 2016). In addition to a very severe heart condition, Lotfi Bin Ali suffers from such post-traumatic stress and anxiety that he is basically unable to get by without outside help. It does not help his condition that after his release from Guantanamo, the US deported him to rural Kazakhstan where he is living isolated from his family and subject to nearly constant surveillance by the local Red Crescent. El-Masri was also “broken” and, despite finally being reunited with his family, is reported to suffer from trauma and post-traumatic stress and has not been able to go back to work. On the psychiatric aspects of (indefinite) detention, *see also* Robbins, Ian, et.al., “Psychiatric problems of detainees under the 2001 anti-terrorism crime and security act”, *Psychiatric Bulletin*, Vol. 29, 2005, pp. 407-409.

When on the plane, he was thrown to the floor, chained down and forcibly tranquillised.”¹¹

On the basis of this account, the Court concluded that El-Masri had been subjected to torture in violation of Article 3 of the European Convention on Human Rights.¹²

Torture, though, can be many more things than what El-Masri was subjected to. It may occur in the form of "waterboarding", a technique whereby the prisoner's head is submerged in water to the stage of near drowning. Subjecting prisoners to stress positions, forced standing and/or forced nudity are other examples of torture. The same goes for threats of harm to a person or the person's family, as well as sleep deprivation and the continuous subjection to loud music. Further examples are prolonged solitary confinement and confinement in a small space. The above are just a handful out of the many different practices that have been found to constitute torture. And not just have they been found to constitute torture – they have been found to do so by the US Government. Thus, the US State Department in its Human Rights Reports has classified all of the above interrogation methods as torture and condemned these practices in other countries, including those to which the US has sent prisoners by way of extraordinary renditions. Conversely, when the CIA has applied the very same practices, these did not, according to the CIA, constitute torture, but were merely “enhanced interrogation techniques”. These seemingly double standards will be developed further in Section 4. For now, suffice to say that the above-mentioned practices have been deemed to constitute torture – both by the US and the international community, including the UN.¹³

¹¹ European Court of Human Rights, Grand Chamber, “Case of El-Masri v. the Former Yugoslav Republic of Macedonia”, Judgment of 13 December 2012, para. 205.

¹² *Ibid.*, para. 223. It should be noted that it was not the CIA that was found guilty of a violation of the ECHR, since as already the name suggests the US is not a signatory to the ECHR. Macedonia, however, was found guilty of a violation of Article 3 because Macedonian officials had actively facilitated to torture and been present during it without intervening. The judgment will be analysed in more detail in Section 3.2.2 below.

¹³ In particular the UN Committee against torture, “Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment”, <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx> (last visited 14 July 2016). For a good account of definitions of torture and cruel, inhuman and degrading treatment, see Weissbrodt, David and Heilman, Cheryl, “Defining Torture and Cruel, Inhuman, and Degrading Treatment”, *Law & Ineq.*, Vol. 29, 2011, p. 343-394, available at http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1370&context=faculty_articles (last visited 14 July 2016).

It should be noted that in some cases a person's treatment is not considered to be of such a grave nature as to qualify as torture. Such lesser severe treatment is labelled “other cruel, inhuman or degrading treatment or punishment”¹⁴. The distinction between this kind of treatment and “proper” torture can be blurred. Whether treatment amounts to torture or “other cruel, inhuman or degrading treatment or punishment” will depend on an appreciation of all of the circumstances of a case. For instance, several “smaller” incidences of maltreatment may not, in isolation, qualify as torture, but may do so when taken together. Also, it makes a difference if the victim is in detention or not.¹⁵

It is important to settle on whether a treatment amounts to actual torture or not, because it is easier to make a legal case for illegal extraordinary rendition that should trigger responsibility for the sending state – and not just for the receiving state conducting the treatment – where there has been actual torture involved. A lot more will be said about the legal requirements of accountability in Section 3 and the focus of that section will be on cases where it is found that actual torture has occurred. Before moving on to the legal analysis, however, it is worth giving a brief account of the US rendition system affecting European states and the involvement of two smaller European countries – Denmark and Ireland.

¹⁴ Cf. CAT, Article 16.

¹⁵ *See for example* UNVFVT, “Interpretation of torture in the light of the practice and jurisprudence of international bodies”, 2011, http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (last visited 14 July 2016), p. 2, where it says: “It should be recalled that usually in legal dispositions, torture is linked with cruel, inhuman and degrading treatment or punishment or ill-treatment. Torture is not an act in itself, or specific type of acts, but it is the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour. Therefore, the difference between these different qualifications, torture, cruel, inhuman and degrading treatment or punishment or ill-treatment depends on the specific circumstances of each case and is not always obvious. It is clear that, because of the specific intensity or nature of certain acts, the qualification of torture may be easily granted in certain cases. However, in some others, the vulnerability of the victim (age, gender, status, etc), as well as the environment and the cumulative effect of various factors, should be taken into account to determine whether this case amounts to torture or whether it does not reach this ultimate threshold and should be considered as cruel, inhuman or degrading treatment or punishment.” Manfred Nowak finds that “the distinction is primarily linked to the question of personal liberty” and applies the following distinction with regard to detainees: “Any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment and any infliction of severe pain or suffering for a specific purpose as expressed in Art.1 CAT amounts to torture.” (emphasis added) *See* Nowak, Manfred, “The distinction between torture and cruel, inhuman or degrading treatment”, *Torture*, 2006, Vol. 16, no. 3, p. 147.

2.2 Practice: What did the United States / CIA do? – The CIA renditions

The whole rendition circus, if one may call it that, most of all reads like a – scary – plot for a movie in which one surely would not want to play some of the characters. We have the family father of six with Middle-Eastern looks who is mistaken for somebody else and severely beaten, frightened and humiliated by a team of men in black wearing ski masks to hide their identity. We have the private airline charter company renting out a considerable number of luxury jets and a number of smaller airfields experiencing a sudden boom in activity. We have in fact a whole fleet of luxury jets circling the skies, stopping over in European airports on their way from the US to, for instance, the Middle East. At those pit stops the planes are stocked with fruit and wine – and petrol. We have airport authorities that believe the planes are flying diplomats because of US State Department letters providing diplomatic cover for those flights. In reality, on one of those planes is our family father with the middle-Eastern looks and the Arabic name lying face-down and chained spread-eagle to the walls of the aircraft. The airport personnel cannot hear him because he has been forcefully tranquilised – he might even have a gag in his mouth. After 20-30 minutes, the sleek private aircraft takes off again without having raised any suspicion whatsoever. To play it absolutely safe, the CIA has made sure to have private and sometimes fictitious intermediaries renting the jets on its behalf.

This could probably have gone on and on without any European government having a clue if it had not been for..... meet our next character: the flight tracker! Let me introduce you to a group of persons without whom this paper would probably not have been written and – far more importantly – without whom the world would not know much about the US rendition activities nor of European involvement in them. Flight trackers are private individuals, spread all over their world, who have made it their hobby to monitor flight activities in their vicinity. They like to share their findings on a common online database, which allows them to track an aircraft's movements – be it big or small – around the globe. At one point, some of these passionate fellows began detecting a pattern of what looked like a fleet of similar, small, private luxury jets flying an awful lot to places one would not normally associate with leisure trips – or even business – for example, Afghanistan at the peak of the war there and a provincial town

in Poland. And a US naval base in Cuba called Guantanamo. What happens now is that some human rights organisations representing people like our middle-Eastern looking father of 6 catch wind of this and start matching the flight data with the information they have received from their clients. Say our father of 6 knows that he was at Skopje airport and from there he was taken to some place where the aircraft just stopped and then took off again. The next time the aircraft landed it was in a place warmer than Skopje so he figured out it could not be Germany. Later he found out that it was Afghanistan. When his defenders held his information up against the flight records they had received, there was a match. And this process has been replicated in a number of other cases.

Now, the human rights organisations manage to make enough noise about the involvement of European states in the rendition circus for both the European Parliament and the Council of Europe to start their own examinations of the matter – and make some rather shocking discoveries. These shall be looked at below, when discussing the involvement of European states. Before that, there is a nice little twist to the story: as explained, the renditions were performed by means of private luxury jets hired from private contractors with seemingly no connection to the US or the CIA. By avoiding to use US military aircraft, it was possible to keep the extraordinary renditions secret from the general public – and, it was presumed, from foreign governments. Ironically, it would be two facilitators of this private hide-away that eventually gave away a lot about the US' extraordinary renditions, as well as the role of various European airports, including the Irish Shannon airport. Indeed, in a lawsuit between two of the private US contractors, the court files revealed the paper trail from the CIA to the contractors, the routes of the chartered aircraft and the considerable sums the contractors were awarded for their services. Thus, a clear line was drawn connecting the CIA and, thus, the US, to the renditions.

So this is not a movie. This is real. There has been a rendition network transporting people in this way and it has involved several European states. Let us now have a look at the role of those states.

2.3 Practice: What did Denmark and Ireland do – or not do? – Danish and Irish contributions to the renditions

According to the report by Open Society Foundations entitled “Globalizing torture. CIA secret detention and extraordinary rendition”¹⁶, 54 countries assisted the US in its rendition programme - some to a greater and others to a lesser degree. Thus, it has turned out that Poland, Romania and Lithuania hosted actual prisons on their grounds, the so-called “black sites”. Further, Italian officials actively participated in the CIA abduction of an imam in Milan. Those are the examples of direct European involvement in the renditions to torture. Other states, including Denmark and Ireland, have contributed more indirectly by letting the rendition aircraft use their airspace and airports. How much those countries actually knew about the mission of such aircraft remains, however, somewhat of a mystery. Let us first have a look at Denmark, then Ireland.

2.3.1 Denmark

According to Open Society Foundations' report, “Denmark allowed the use of its airspace and airports for flights associated with CIA extraordinary rendition operations”.¹⁷ Despite admiration for Open Society Foundation’s work in the field of human rights, this statement might be a little too far-reaching. Yes – aircraft associated with CIA extraordinary rendition operations used Danish airspace and airports. However, did Denmark positively know at the time that those private aircraft, which were accompanied by letters from the US State Department providing diplomatic cover for them, were in fact rendition flights? To date there is no proof of that. Should Denmark have suspected they were part of the CIA rendition circuit? Maybe. Should Denmark have taken active measures to prevent future rendition flights from using Danish airspace and airports once it found out that it had been part of the circuit? Definitely. Did Denmark investigate the earlier incidents properly? Seemingly not.

¹⁶ The Open Society Justice Initiative, “Globalizing Torture: CIA Secret Detention and Extraordinary Rendition”, 2013, <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (last visited 14 July 2016).

¹⁷ *Ibid.*, p. 72.

There have been two official investigations into the matter: one in 2008, which was triggered by a 2006 Amnesty International report, and was carried out by a group of 48 members of parliament, that, in its conclusions was unable to either confirm or deny extraordinary rendition flights having used Danish airspace or airports (or the airspace/airports of Greenland and the Faroe Islands). After heavy criticism of that first investigation and a wiki-leaked memo giving the impression that it was not in the interest of the Danish government to investigate the case any further, but rather to “make it disappear as quickly and quietly as possible”¹⁸, the then new centre left Danish government initiated a second – this time independent – investigation by the Danish Institute for International Studies (DIIS). This report, which acquitted Denmark and Danish officials, was, however, criticised for being limited to alleged extraordinary rendition flights over Greenland and to a review of the documents obtained in the course of the 2008 investigation. Hence, it did not quite shed as much light over Danish involvement in the US renditions, as some might have hoped for.

However, what we do know is the following: 1) there is no positive evidence that the Danish authorities actually knew that the private luxury jets accompanied by US diplomatic letters were, in fact, rendition flights; 2) Denmark has not yet done its homework when it comes to investigating the permitted – and the prohibited – use of its airspace and airports for rendition flights; and 3) the Danish government should at the latest in 2008 – after the first investigation into the US rendition flights and landings on Danish territory – have had a suspicion about US registered aircraft seeking permission to use Danish airspace and airports – in particular the US aircraft carrying the tail numbers that Denmark and the world knew were linked to US rendition flights.

What we also know is that on 25 June 2013, a privately registered Gulfstream aircraft with the aircraft number N977GA was spotted by Scottish flight trackers. The aircraft was flying at a very high altitude where it would not normally be spotted – but it was. It was tracked to Copenhagen Airport where it remained ready for departure for five days.

¹⁸ Magnussen, Tue and Sørensen, Bent, “Vi skal til bunds i Danmarks rolle i fangeflyvninger”, Information, 13 August 2014, <https://www.information.dk/debat/2014/08/bunds-danmarks-rolle-fangeflyvninger> (last visited 14 July 2016).

Aircraft N977GA is believed to have been previously used for US renditions.¹⁹ Aircraft N977GA landed in Copenhagen on the very same day Edward Snowden was reported to have arrived to Moscow with a view to obtaining asylum. Snowden, it is recalled, is the American whistle blower that provided Denmark and the rest of Europe (and the rest of the world for that matter) with vital information about US and other nations' intelligence activities. Subsequently it would be revealed through requests under the Danish Public Information Act and parliamentary questions that the Danish Government had information that Gulfstream N977GA was allegedly stationed at Copenhagen airport with a view to picking up Edward Snowden and transporting him to the US should he not be granted asylum in Russia.²⁰ So extraordinary renditions are still going strong, although this case was not a “rendition to torture” – at least not on the face of it. However, a planned rendition to what could potentially involve capital punishment, which would have constituted a violation of Denmark’s international obligations. I will get back to the possible motivations of the Danish authorities for letting the US use Copenhagen Airport as a launching pad for the “Snowden aircraft” in section 4.2.1 below. Let me now turn to Ireland and the Irish rendition story.

2.3.2 Ireland

If you say “Ireland” and you say “the US” then, if you are from the West of Ireland at least, you are also likely to say “Shannon” – Shannon airport to be more precise. Shannon airport is strategically well located between the US and the rest the world and has a long history as a preferred stopover for US military aircraft and their troops on the way from the US to, for instance, the Middle East. However, it is also a prominent stop-over destination for military aircraft and troops from other nations, including Russia, because Ireland, unlike Denmark and the majority of other European countries, is a neutral state.

¹⁹ The Register, “CIA rendition jet was waiting in Europe to snatch Snowden”, 13 June 2014, http://www.theregister.co.uk/2014/06/13/cia_rendition_jet_was_waiting_in_europe_to_snatch_snowden/ (last visited 14 July 2016).

²⁰ *Ibid.* See also Kofod, Peter, “USA sendte fly til Danmark for at hapse Snowden”, Den Fri, 24 January 2016, <https://www.denfri.dk/2016/01/usa-sendte-fly-til-danmark-for-at-hapse-snowden/> (last visited 14 July 2016).

At this stage the focus is on the question of whether Ireland/Shannon airport played a role in the US rendition circuit - and the answer is “Yes”. According to the Open Society Foundations report referred to above, Ireland – like Denmark – allowed its airspace and airports to be used for flights associated with CIA extraordinary rendition operations.²¹ As is the case with Denmark, it has not been established with any degree of certainty if the Irish government knew that the US aircraft in question were, in fact, rendition flights. Like Denmark, Ireland cannot be said to have done its homework when it comes to investigating the use of its airspace and airports for rendition flights. We further know that the Irish Government in 2007 had a concrete suspicion about Shannon Airport being used for extraordinary renditions. This follows from a leaked memo by the then US ambassador to Ireland, Thomas C. Foley, on a meeting between him and the then Irish Foreign Minister Dermot Ahern.²² In the memo it says that Ahern “seemed quite convinced that at least three flights involving renditions had refuelled at Shannon Airport before or after conducting renditions elsewhere”²³. Despite this strong suspicion, Ireland rejected the recommendation of the Irish Human Rights Commission that the Irish government inspect aircraft landing in Ireland that were allegedly involved in the US renditions.²⁴ In Ireland’s defence, however, it follows from that same leaked memo that several alleged rendition aircraft had been inspected and fully cleared, including one carrying six golfers.²⁵

Whether Ireland – and Denmark – can be said to have done enough to avoid involvement in the US renditions and, thus, accountability, shall be examined in the section 3.4. Thus, the time is ripe to look at the law applicable to extraordinary rendition – and to complicity therein.

²¹ The Open Society Justice Initiative, “Globalizing Torture: CIA Secret Detention and Extraordinary Rendition”, 2013, <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (last visited 14 July 2016). p. 72.

²² TheJournal.ie, “Ireland suspected Shannon had carried prisoners: the WikiLeaks in full”, <http://www.thejournal.ie/ireland-suspected-shannon-had-carried-prisoners-the-wikileaks-in-full-59183-Dec2010/> (last visited 14 July 2016).

²³ *Ibid.*, point 3.

²⁴ *Ibid.*, point 2.

²⁵ *Ibid.*, point 2.

3. EXTRAORDINARY RENDITIONS AND THE LAW: INTERNATIONAL AND REGIONAL LAW APPLICABLE TO EXTRAORDINARY RENDITIONS AND COMPLICITY THEREIN

The focus of the current paper is on the CIA's rendition, detention and interrogation (RDI) programme, which involves three different crimes under international law²⁶:

- 1) enforced disappearances (the transfer of the person)
- 2) arbitrary detention
- 3) right to a fair trial
- 4) torture (the "enhanced interrogation techniques")

This being said, the renditions forming part of the CIA RDI-programme make up only a fraction of the total number of renditions to torture performed by, or in the name of, the United States. Thus, renditions to torture have been a long-standing US practice, going back decades before 9/11.2001²⁷ – and also continuing after the end of the Bush administration.²⁸ However, for the sake of simplicity the discourse in the following will mainly deal with the renditions to torture forming part of the RDI-programme. I deliberately refer to "renditions to torture"²⁹ and not simply to "renditions" because the treatment of the two phenomena is different from an international law perspective. Thus, the renditions undertaken by US administrations prior to the Bush Jr. administration were predominantly for the purpose of bringing suspects to trial, as opposed to renditions for the purpose of coercive interrogation that would at times – or most of the time – involve torture. Whereas the "simple" renditions may have violated international extradition rules and possibly the UN Convention on Enforced

²⁶ Blakeley, Ruth and Raphael, Sam, "Dirty Little Secrets. Mapping State and Corporate Complicity in the Global Rendition System: The Case of the UK", Paper presented at the British International Studies Association Annual Conference, 20 June 2013, p. 5.

²⁷ De Londras, Fiona "Remembering 2001: extraordinary rendition", Human Rights in Ireland, 12 September 2010, <http://humanrights.ie/civil-liberties/remembering-2001-extraordinary-rendition/> (last visited 14 July 2016).

²⁸ *See op. cit.* n. 5.

²⁹ As mentioned above in section 2.1, "renditions to torture" are extraordinary renditions the outcome of which the rendering state knows or ought to know will be torture or there are substantial grounds for believing that the person would be in danger of being subjected to torture.

Disappearances³⁰, renditions to torture trigger a number of other treaties and conventions, including most notably the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”). The role of the CAT amongst other conventions/treaties with regard to renditions to torture will be examined below in section 3.1. It can already be stated from the outset that renditions to torture are illegal under international law. International treaties that the US has not just signed but also ratified³¹ – and concerning which the US is very observant to monitor the compliance of other ratifying states, such as Egypt and Yemen – clearly prohibit the US renditions to torture. The big question - or perhaps, rather, the problem - is whether the violations by the US of these international treaties is going to have any consequences for the US. In other words: are all those grand international conventions with all their good intentions actually “toothless”? This issue I shall deal with in Section 3.1. A further question is what legal consequences the US renditions to torture may have for the European states, in particular Denmark and Ireland. This will be discussed in Section 3.2.

3.1 International law applicable to the US renditions

3.1.1 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)

The CAT contains an absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment – and the rendering of persons to places where they are likely to be subjected to such treatment. The full definition of torture as set out in CAT, Article 1, was quoted above in Section 2.1.2. Here, suffice to say that it involves severe pain or suffering, whether physical or mental, intentionally inflicted by, or on behalf of, public officials. Article 2 of the CAT underlines that there can be no

³⁰ See below in Section 3.1.1.

³¹ Signing a treaty is not the same as ratifying it. The German Institute for Human Rights explains the distinction as follows: “By signing a human rights treaty a state declares that it has agreed upon the content of the treaty, and intends to work towards its implementation. But only the ensuing ratification leads to a legally binding obligation under international law.” *Source*: German Institute for Human Rights, “What is the difference between signing and ratifying a treaty?”, <http://www.institut-fuer-menschenrechte.de/en/topics/development/frequently-asked-questions/3-what-does-signature-of-a-treaty-entail-and-what-is-the-difference-to-ratification/> (last visited 14 July 2016).

derogation whatsoever made from the prohibition against torture –not even in the event of a state of war or threat of war. Finally, and of particular relevance to extraordinary renditions, Article 3 of the CAT states that state parties cannot hand over a person to another state if there is are good reasons to believe that the person will be at risk of being subjected to torture. When assessing such risk regard should be had to whether the receiving state has a history of violations of human rights – or to use the wording of the CAT: “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

On the face of it, it would seem that US officials clearly violated both Articles 1 and 3 by torturing people directly and/or sending them to places where there was a likelihood that they would be tortured. In those cases, the US was under an obligation under the CAT to prosecute the offenders and their superiors, including perhaps even former US President George W. Bush. Thus, the so-called Feinstein Report³² provides extensive evidence of what President Barack Obama has himself defined as “torture”. Further, read in conjunction with the investigative reports of the European Parliament and the Council of Europe,³³ the report provides evidence that renditions to torture indeed took place: identified individuals were rendered to locations where they were subjected to torture, be it in an area controlled by the US, like the detention facility at Guantanamo Bay, or one of the CIA’s “black sites”, or in a third country like, for instance, Jordan, Syria or Egypt - the latter two being notorious for using torture during interrogations. That there is an obligation on the US to prosecute the perpetrators has been made very explicit by, among others, the UN: after the publication of the summary of the Feinstein report³⁴, the UN Special Rapporteur on counter terrorism and human rights, Ben Emmerson, made a statement calling for the prosecution of relevant CIA officers and

³² Senate Select Committee on Intelligence, “Committee Study of the CIA’s Detention and Interrogation Program. Findings and conclusions”, 3 December 2014 (declassified version).

³³ See European Parliament, “A Quest for Accountability? EU and Member State Inquiries into the CIA Rendition and Secret Detention Programme”, [http://www.europarl.europa.eu/thinktank/da/document.html?reference=IPOL_STU\(2015\)536449](http://www.europarl.europa.eu/thinktank/da/document.html?reference=IPOL_STU(2015)536449) (last visited 14 July 2016).

³⁴ See *op cit.* n. 31. So far only the summary, which is approximately 500 pages long, has been declassified for publication.

other US Government officials involved.³⁵ He said that the summary of the Feinstein report confirmed “there was a clear policy orchestrated at a high level within the Bush administration, which allowed to commit systematic crimes and gross violations of international human rights law.”³⁶ Emmerson called for the criminal trials of “[t]he individuals responsible for the criminal conspiracy revealed [in the report]”³⁷ and for criminal penalties reflecting the gravity of their crimes. The report's finding that the policies to torture had been authorised at a high level within the US Government led Emmerson to call for the prosecution not only of the actual perpetrators (i.e. the officers executing the torture) but also of “those senior officials within the US Government who devised, planned and authorised these crimes”.³⁸ He stated that “[a]s a matter of international law, the US [was] legally obliged to bring those responsible to justice” in that “[t]he UN Convention Against Torture and the UN Convention on Enforced Disappearances require States to prosecute acts of torture and enforced disappearance where there is sufficient evidence to provide a reasonable prospect of conviction.”³⁹ As for the officials who physically committed acts of torture, these “bear individual criminal responsibility for their conduct, and cannot hide behind the authorisation they were given by their superiors.”⁴⁰ Emmerson found, however, that “the heaviest penalties should be reserved for those most seriously implicated in the planning and purported authorisation of these crimes” and that, thus “[f]ormer Bush Administration officials who have admitted their involvement in the programme should also face criminal prosecution for their acts.”⁴¹ He further noted that torture is a crime of universal jurisdiction and that this means that “the perpetrators may be prosecuted by

³⁵ OHCHR, “Feinstein report: UN expert calls for prosecution of CIA officers and other US Government officials. GENEVA (9 December 2014) – Statement by United Nations Special Rapporteur on counter terrorism and human rights, Ben Emmerson, concerning the publication of the summary of the Feinstein report on crimes committed by the Bush-era CIA”, <http://www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=15397&langid=e> (last visited on 14 July 2016).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

any other country they may travel to” but that “the primary responsibility for bringing them to justice rests with the US Department of Justice and the Attorney General.”⁴²

The above reads fairly convincing but it is actually correct? Is the US Department of Justice and the Attorney General under a legal duty to bring criminal charges against those responsible? And may the perpetrators in fact be prosecuted by any other country they may travel to? And if so – to what extent is this happening – or NOT happening – and if not, why not? The question as to whether the perpetrators may be prosecuted by any other country they may travel to is a matter of universal jurisdiction, which I shall deal with below in Section 3.1.3.

Now, where does it say that the US Attorney General has a legal duty to bring criminal charges against those responsible? According to Emmerson above, this duty follows from the CAT and the UN Convention on Enforced Disappearances. However, if we first look at the UN Convention on Enforced Disappearances, there seems to be one fundamental catch: the US has not ratified the convention. It has only signed it. Without ratification, the US is not bound by its provisions. Even though this situation raises the interesting question whether the states that *have* ratified the convention are under a legal obligation to bring criminal charges against their nationals responsible for enforced disappearances, this question is a moot given that in this paper I seek to determine whether there was a duty on the *US* to prosecute its officials. Thus, the UN Convention on Enforced Disappearances will at most be dealt with sporadically in the rest of this paper.

But what about the CAT – which on the face of it seems to be relevant to the US renditions to torture and the US torture? The good news is that this convention is one that the US *has* ratified. The US is, therefore, bound by its rules, including those providing that states parties to the CAT are under an obligation to prosecute their officials for violations of the convention. Or not? Unfortunately, the US is actually not really bound by the CAT. The possibilities of enforcing the CAT against the US are at best limited and at worst non-existent. This is because the US did not ratify the part of the CAT, which gives the UN authority to make decisions in cases brought by

⁴² *Ibid.*

individuals against signatory states.⁴³ And the UN itself has no power to bring a case against the US *ex officio*. The only real obligation the US has under the CAT is to submit reports to the UN Committee against Torture regarding its compliance with the CAT.⁴⁴ Thus, the Committee has declaratory but not binding authority concerning interpretation of the CAT.⁴⁵ The only way the CAT could be enforced against the US would be if one of the other state parties⁴⁶ decided to bring a case against the US. The US has indeed made a declaration accepting the inter-state complaint procedure set up under Article 21 of the CAT. The only snag is that no such procedure has ever been launched against the US.⁴⁷ The issue of why this might be so – at least with respect to Denmark and Ireland – will be dealt with below in Section 4.2.

In conclusion, in relation to the US, the CAT appears to be rather “toothless”. This is also the case with regard to a number of other international treaties and statutes applicable to the issue of renditions, which I shall briefly discuss below.

3.1.2 Other international law relevant to the US renditions

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits the state parties from subjecting persons “to torture or to cruel, inhuman, or degrading treatment or punishment”⁴⁸. The Human Rights Committee, which is the monitoring body of the ICCPR, has interpreted this prohibition as preventing state parties from

⁴³ CAT, Article 22.

⁴⁴ See Montavon-McKilip, Andrea, “CAT among Pigeons: The Convention against Torture, A Precarious Intersection Among International Human Rights Law and U.S. Immigration Law”, *Ariz. L. Rev.*, Vol. 44, 2002, p. 259.

⁴⁵ Garcia, Michael John, “Renditions: Constraints Imposed by Laws on Torture”, Congressional Research Service, 22 January 2009, <https://www.fas.org/sgp/crs/natsec/RL32890.pdf> (last visited 14 July 2016).

⁴⁶ There are 159 state parties to the CAT, including Denmark and Ireland, but also for example states in the Middle East. See United Nations, “Treaty Collection”, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited on 14 July 2016).

⁴⁷ In fact, according to IJRC (International Justice Resource Center) the Article 21 procedure has never been applied: “Article 21 of the Convention against Torture provides a mechanism for States to complain about violations of the Convention made by another State. See CAT, art. 21. This procedure for inter-State complaints, however, has never been used.” Source: IJRC, “Committee Against Torture”, http://www.ijrcenter.org/un-treaty-bodies/committee-against-torture/#Inter-State_Complaints (last visited 14 July 2016).

⁴⁸ The International Covenant on Civil and Political Rights, UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976.

exposing “individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁴⁹

However, this provides little help because the recommendations of the Human Rights Committee are not legally binding. Hence, like the CAT, the ICCPR is ineffective if a state party - here the US - simply wishes to disregard it.

The situation is no better with regard to the Universal Declaration of Human Rights⁵⁰ which prohibits, *inter alia*, the arbitrary arrest, detention, or exile of persons,⁵¹ as well as torture and cruel, inhuman, or degrading treatment.⁵² The Declaration is not a treaty and, thus, is not technically binding upon the US. In addition, it has no enforcement provision, so cannot be used to bring the US perpetrators to justice.⁵³

3.1.3 *The Rome Statute and the International Criminal Court*

One source of international law, which deserves particular mention with regard to the US renditions, is the Rome Statute⁵⁴, which governs the International Criminal Court (the “ICC”). Torture and ill-treatment are also prohibited under the Rome Statute and the ICC's Office of the Prosecutor (OTP) is currently looking into the potential prosecution of US personnel for ill-treatment/torture of detainees in Afghanistan. This is happening as a result of the US being reluctant to prosecute its own nationals, in particular those of more senior rank.⁵⁵ On the face of it this seems very promising: the

⁴⁹ Human Rights Committee, “General Comment 20, Article 7”, UN Doc. A/47/40, 1992, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30, 1994. It is interesting to note that the ICCPR does not only apply to renditions exposing persons to the danger of torture but also to renditions exposing persons to the danger of other cruel, inhuman or degrading treatment or punishment.

⁵⁰ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, 1948.

⁵¹ *Ibid.*, Article 9.

⁵² *Ibid.*, article 5.

⁵³ It should be noted, though, that many of the relevant provisions of the UDHR are now part of customary international law and are, thus, binding in that respect and may be enforced against the US by way of universal jurisdiction. Universal jurisdiction is elaborated upon below in Section 3.1.4.

⁵⁴ Rome Statute of the International Criminal Court. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

⁵⁵ *See* International Criminal Court, The Office of the Prosecutor, “Report on Preliminary Examination Activities (2015)”, paras. 128-130. The publication can be accessed at: <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (last visited 14 July 2016).

ICC prosecuting US officials and, thus, ensuring accountability for at least the treatment of the victims of extraordinary rendition that were detained in Afghanistan. However, here too there are hurdles on the path towards accountability.

First of all, the ICC examination regarding Afghanistan is only at its preliminary stage, meaning that in principle the case could still potentially be closed. Secondly, and more importantly, there are critical voices claiming that the ICC does not have jurisdiction over US personnel for crimes committed in Afghanistan. The reasoning for this is two-fold: 1) as is the case with, for instance, the UN Convention on Enforced Disappearances, the US has signed the Rome Statute but has not *ratified* it. This means that the US cannot be prosecuted directly under the Rome Statute. 2) the OTP is instead trying to prosecute the US on the basis of US crimes that are claimed to have taken place on Afghan territory. Since Afghanistan has ratified the Rome Statute and is thus a treaty party, the OTP can – at least in principle – prosecute nationals of non-state parties for crimes committed on Afghan territory.⁵⁶ I say “in principle” because the particular situation with regard to the US gives rise to a “maybe”. Thus, Michael Newton claims that before Afghanistan ratified the Rome Statute, it had already concluded a bilateral agreement with the US under which US forces are subject to exclusive US criminal jurisdiction for offences committed on Afghan territory.⁵⁷ In other words, from the time that bilateral agreement entered into force Afghanistan had no jurisdiction over US forces for offences they commit on Afghan territory. Newton argues that when ratifying the Rome Statute and conveying jurisdiction to the ICC, Afghanistan could not convey jurisdiction that it did not possess - in this case jurisdiction over US nationals on its territory.⁵⁸ Newton further argues that permitting the ICC to override preexisting, binding treaty-based constraints between sovereign states would be in conflict with the Law of Treaties as well as the core object and purpose of the Rome Statute.⁵⁹ These are all pertinent legal arguments that shed doubt over the OTP's success in pursuing this case before the ICC. However, an argument can be made that the bilateral agreement

⁵⁶ Thus, upon entry into the ICC Assembly of States Parties (ASP), Afghanistan conveyed territorial jurisdiction to the ICC within the meaning of Article 12(2)(a) of the Rome Statute.

⁵⁷ Newton, Michael A., “How the International Criminal Court Threatens Treaty Norms”, *Vanderbilt Journal of Transnational Law*, Vol. 49, 2016, p. 407-408.

⁵⁸ *Ibid.*, p. 373.

⁵⁹ *Ibid.*, p. 379.

between the US and Afghanistan was, in fact, not binding at the time Afghanistan ratified the Rome Statute (10 February 2003) and at the time the Rome Statute entered into force with regard to Afghanistan (1 May 2003). Thus, the bilateral treaty Newton is referring to was only ratified by Afghanistan on 28 May 2003.⁶⁰ Newton argues that “the treaty [...] took the form of an exchange of diplomatic notes”⁶¹ one of them being from 12 December 2012 where Afghanistan “declared its “concurrence” with the curtailed scope of sovereign criminal jurisdiction.”⁶² Basing himself on the views of a German court in 1925, Newton contends that “[t]he United States arguably had exclusive jurisdiction over any U.S. national alleged to have committed any cognizable criminal offense within Afghanistan as early as the December 12 “concurrence”.”⁶³ It goes beyond the scope of the present paper to pursue this issue into further detail. Suffice to say that Newton puts forward pertinent legal arguments that might, however, be met with legal arguments concerning the above-mentioned timing-issue.

3.1.4 The principle of universal jurisdiction

One last resort in the efforts to achieve justice may be the principle of universal jurisdiction. Since torture is a crime of universal jurisdiction, the US officials responsible may be prosecuted by any other country they may travel to. The Center for Constitutional Rights (CCR), a US non-profit organisation,⁶⁴ explains the principle as follows: “The principle of universal jurisdiction allows the national authorities of any state to investigate and prosecute people for serious international crimes even if they

⁶⁰ *Ibid.*, note 155.

⁶¹ *Ibid.*, p. 407.

⁶² *Ibid.*, p. 408.

⁶³ *Ibid.*, p. 408. Note 157 on the German court decision reads as follows: “Arié E. David, *Faits Accomplis in Treaty Conflicts*, 6 INT’L L. 88, 98 n.13 (1972) (citing the example of the Soviet government that renounced the Treaty of Brest-Litovsk in 1918 through a radio proclamation “addressed to everybody” which was in due course regarded in 1925 by a German court as “sufficient expression” that the Soviet government regarded the treaty as abrogated and invalid).”

⁶⁴ The Center for Constitutional Rights is a non-profit organization. On its webpage it describes itself as follows: “The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.” *Source*: Center for Constitutional Rights, “Mission and History”, <http://ccrjustice.org/home/who-we-are/mission-and-history> (last visited 14 July 2016).

were committed in another country. For example, this means that the German government could, if it chose to do so, prosecute U.S. officials for crimes committed in Iraq and Afghanistan.”⁶⁵ Using this principle, the CCR and its partners have initiated cases in Canada, France, Germany, Spain and Switzerland “seeking to investigate and prosecute those Bush Administration officials who authorized, designed and implemented the U.S. torture program in absence of the political will to do so at home”.⁶⁶ Regrettably, however, they have not, as yet, had much success in convincing the governments of the states in question to commence prosecution. So even the principle of universal jurisdiction seems – at least for now – to be futile in the efforts to secure US accountability for its renditions to torture.

3.2 International and regional law applicable to the European states involved in the US renditions

Now that it would seem that the CAT and its fellow treaties and conventions are not able to catch “the big fish” – the US – the question arises as to whether the CAT and other treaties can catch some of the smaller fish: the European states that have in one way or another been involved in the US renditions, to a greater or lesser extent and with or without knowledge of the renditions. And since we are now dealing with European states, the European Convention on Human Rights may also prove to be a powerful tool. These issues shall be examined below – first in a more general fashion and then with specific regard to the two focal subjects of this paper, namely Denmark and Ireland.

3.2.1 Application of the CAT to the alleged European accomplices to the US renditions

According to the Open Society Foundations' report on “Globalizing torture. CIA secret detention and extraordinary rendition”⁶⁷ 54 countries assisted the US in its rendition

⁶⁵ Center for Constitutional Rights, “Factsheet: Universal Jurisdiction”, <http://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction> (last visited 14 July 2016).

⁶⁶ *Ibid.*

⁶⁷ The Open Society Justice Initiative, “Globalizing Torture: CIA Secret Detention and Extraordinary Rendition”, 2013, <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (last visited 14 July 2016).

programme. These include, but are not limited to: Austria, Belgium, Bosnia-Herzegovina, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Macedonia, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom.⁶⁸ All of these countries except for Bosnia-Herzegovina⁶⁹ have made a declaration accepting the inter-state complaint procedure set up by CAT Article 21.⁷⁰ And all of these countries except for the United Kingdom⁷¹ have made a declaration accepting the individual complaint procedure set up by CAT Article 22. Therefore, these countries would be a potential target for inter-state or individual complaints under the CAT. As mentioned above in Section 3.1, the inter-state complaint procedure has so far not been used and in the opinion of the author it is unlikely that this is going to change anytime soon.⁷²

However, the individual complaint procedure has been used on several occasions, including in a case involving the expulsion of a suspected terrorist on national security grounds from Sweden to Egypt: *Agiza vs. Sweden*⁷³. Curiously enough, US special forces were involved in the expulsion. It does not seem unlikely that other, similar, individual complaints may be brought against states that have accepted the individual complaint procedure. These complaints could result in similar, condemning, decisions provided of course that the states in question are held to have contributed to the US renditions to a degree that would make them liable under the CAT.

The question as to which degree of involvement is needed to trigger liability is relevant not only for the application of the CAT, but also for the application of the European Convention on Human Rights. This issue will be discussed further in Section 3.3 below.

⁶⁸ *Ibid.*

⁶⁹ United Nations, "UN Treaty collection", https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec (last visited 14 July).

⁷⁰ *Ibid.* The UK with the following reservation: "The Government of the United Kingdom declares under article 21 of the said Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications submitted by another State Party, provided that such other State Party has, not less than twelve months prior to the submission by it of a communication in regard to the United Kingdom, made a declaration under article 21 recognizing the competence of the Committee to receive and consider communications in regard to itself."

⁷¹ *Ibid.*

⁷² Possible reasons for why this is so will be set out in Section 4 below.

⁷³ Committee against Torture, "*Agiza v. Sweden*", Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

First, I shall provide a short account of cases relating to the US renditions before the European Court of Human Rights.

3.2.2 *The European Convention on Human Rights*

Article 3 of the European Convention of Human Rights (hereinafter “the ECHR”) prohibits torture. It provides that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” In the case law of the European Court of Human Rights (hereinafter “the ECtHR”) complicity in US renditions constitutes a breach of this provision.

The first case in this regard is the one outlined in the introduction of this paper, *El-Masri v. The former Yugoslav Republic of Macedonia*⁷⁴. As discussed, the case concerned a German citizen of Lebanese origin. While on holidays in Macedonia he was abducted by Macedonian police, held in custody for 23 days where he was subjected to inhuman and degrading treatment and then handed over to a CIA rendition team who tortured him and flew him to Afghanistan where he was again tortured. The ECtHR found that Macedonia had violated Article 3 ECHR when rendering El Masri to the US authorities, thus exposing him to the risk of treatment contrary to Article 3. The ECtHR based its finding on the following premises:

- 1) The rendition was an extraordinary rendition (not carried out pursuant to a legitimate extradition request).⁷⁵
- 2) The evidence suggested that the Macedonian authorities knew that El-Masri would be taken to Afghanistan from Skopje.⁷⁶
- 3) Several reliable sources had reported on interrogation methods resorted to or tolerated by US authorities in Afghanistan that were manifestly contrary to the ECHR. These sources were in the public domain before El-Masri’s transfer and the material was “capable of proving that there were serious reasons to believe that if [El-Masri] was to be transferred into US custody under the “rendition” programme, he would be

⁷⁴ European Court of Human Rights, Grand Chamber, “Case of El-Masri v. the Former Yugoslav Republic of Macedonia”, Judgment of 13 December 2012.

⁷⁵ *Ibid.*, para. 216.

⁷⁶ *Ibid.*, para. 217.

exposed to a real risk of being subjected to treatment contrary to Article 3.”⁷⁷ The Macedonian authorities therefore knew or ought to have known about this real risk.⁷⁸

4) Macedonia did not seek any assurances from the US that El-Masri would not be ill-treated.⁷⁹

On this basis, the ECtHR concluded “that by transferring [El-Masri] into the custody of the US authorities, the Macedonian authorities knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention.”⁸⁰

The ECtHR confirmed its stance on renditions in *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*⁸¹ (where Poland, among others, allowed the CIA to use its airports to transfer the applicants to secret detention sites) and *Nasr and Ghali v. Italy*⁸² (concerning the abduction by CIA agents – with the cooperation of Italian nationals – of an Egyptian imam, Abu Omar, and his transfer to Egypt).

It should be noted that both *El Masri v. ‘The former Yugoslav Republic of Macedonia’* and *Nasr and Ghali v. Italy* involved a positive act of assistance to the United States: in one case the handing over of a person to CIA personnel, in the other cooperation with the CIA in catching a person. As regards *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* permission to use airports for renditions to secret detention sites was given to the CIA by Poland in the knowledge that the flights were indeed rendition flights headed for secret detention sites.

But what about cases where there has been no positive act of assistance from the European state? For instance, where “assistance” merely consists in allowing rendition aircraft to stop-over and refuel in national airports - or even less, when it involves allowing rendition aircraft to cross national airspace? What if the aircraft was not

⁷⁷ *Ibid.*, para. 218.

⁷⁸ *Ibid.*, para. 218.

⁷⁹ *Ibid.*, para. 219. It should be noted in this regard that the diplomatic assurances, which the ECtHR is hinting at here, are by some scholars considered not worth the paper they are written on. See for example Margaret Satterthwaite in “What’s Wrong With Rendition?”, *American Bar Association National Security Law Report*, Vol. 29, No. 4, 2007, p. 1.

⁸⁰ *Ibid.*, para. 220. The ECtHR also found a violation of Article 3 on account of Macedonia’s failure to carry out an effective investigation into El-Masri’s allegations of ill-treatment.

⁸¹ European Court of Human Rights, “Case of Al Nashiri v. Poland”, Judgment of 24 July 2014 (final as of 16 February 2015) and European Court of Human Rights, “Case of Husayn (Abu Zubaydah) v. Poland”, Judgment of 24 July 2014 (final as of 16 February 2015).

⁸² European Court of Human Rights, “Case of Nasr and Ghali v. Italy”, Judgment of 23 February 2016 (final as of 23 May 2016).

actually carrying a prisoner when stopping over? And what if the national authorities were not at all aware that those small private luxury jets were in fact rendition aircraft? Can the state in question be held to be complicit in the US crime of rendition to torture in such cases? These issues shall be examined in the following section.

3.2.3 *The regulation of complicity in international law*

The Irish Human Rights Commission (IHRC) is clearly of the view that a state allowing “rendition aircraft” to land and refuel (be it with or without prisoners) becomes complicit in the rendition crime. This becomes apparent, *inter alia*, in a response to the Irish Minister for Foreign Affairs⁸³ where the ICHR expresses the view “that Ireland’s legal and human rights obligations are engaged where US aircraft landing at Irish airports are not actually carrying prisoners but are on their way to collect prisoners for “rendition” to Guantanamo Bay or to third countries where they run the risk of being tortured or subjected to inhuman or degrading treatment, or where they are returning after “rendering” such prisoners.”⁸⁴ The IHRC points to a reply by the Irish Government to the Council of Europe that “confirmed that aiding or abetting unlawful detention or ill-treatment also constitute offences”⁸⁵ and suggests “that re-fuelling aircraft clearly fitted out to transport prisoners in inhumane conditions and whose flight itinerary indicates that they are en route to pick up prisoners for “rendition” or have just “rendered” them, constitutes aiding and abetting prohibited conduct.”⁸⁶

The stance that facilitating renditions is a crime no matter what part of the rendition process the state facilitates appears to be sound. As Reprieve, a UK human rights NGO, has put it in relation to the role of Scottish airports in US renditions “this refuelling stop was an integral component of the rendition circuit, enabling [the] later mistreatment.”⁸⁷

⁸³ Irish Human Rights Commission, “Text of response sent to Minister for Foreign Affairs on 24th May 2006 on the subject of ‘rendition’”, <http://www.ihrec.ie/publications/list/response-sent-to-minister-for-foreign-affairs-on-t/> (last visited 14 July 2016), p. 9-10.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Reprieve, “Scottish involvement in Extraordinary Rendition”, November 9, 2009, http://www.reprieve.org.uk/press/2009_11_09scottishrendition/ (last visited 14 July 2016), p. 8.

However, what if the Scottish, Irish, Danish authorities – or any other European state’s authorities – did not positively know about the US renditions and, first and foremost, did not know and could not be expected to know that random private luxury jets operated by private US companies landing and refuelling at their airports and using their airspace were in fact carrying prisoners as part of the US rendition programme? Can Denmark and Ireland, amongst others, be regarded as accomplices to the rendition crimes of the US under such circumstances?

The Venice Commission, a Commission under the Council of Europe, delivered an opinion⁸⁸ in 2006 on the international legal obligations of Council of Europe member states arising from extraordinary renditions. In the report it examines the issue of complicity under international law and states that a state may breach its obligations under the ECHR by “merely but knowingly letting its territory be used by a third State in order to commit a breach of international law.”⁸⁹ This also applies to the situation where an aircraft merely crosses a members state's airspace. Member states should thus “refuse to allow transit of prisoners in circumstances where there is such a risk [of ill-treatment]”.⁹⁰ The member states’ responsibility under the ECHR “is engaged if they do not take the preventive measures which are within their powers”.⁹¹

⁸⁸ Council of Europe, European Commission For Democracy Through Law (Venice Commission), “Opinion no. 363 / 2005. Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners”, March 2006.

⁸⁹ *Ibid.*, para. 44. This point is further elaborated in para. 45, which reads as follows: “45. For a State knowingly to provide transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is aware of the wrongful character of the act concerned. Under general international law (see Article 16 ILC Articles on State Responsibility) “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: (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.”

⁹⁰ *Ibid.*, para. 143.

⁹¹ *Ibid.*, para. 143. This point is further elaborated in paras. 144-145, where it says: “144. The situation may arise that a Council of Europe member State has serious reasons to believe that the mission of an airplane crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.

145. If such an airplane does not require landing, as long as the plane is in the air, all persons on board are subject to the jurisdiction of both the flag State and the territorial State. In the Commission’s view, Council of Europe member States’ responsibility under the European Convention on Human Rights is engaged if they do not take the preventive measures which are within their powers. In addition, their responsibility for aiding another State to commit an unlawful act would be at issue. It follows, in the Commission’s view, that the territorial State is entitled to, and must take all possible measures in order to prevent the commission of human rights violations in its territory, including in its air space.”

From the above, it can be inferred that if a Council of Europe member state, say Denmark or Ireland, did not know that the US private luxury jets that stopped over and refuelled at its airports and/or used its airspace were in fact rendition aircraft, then that state did not become complicit to the rendition crime. However, both in the case of stop-overs and “fly-overs”, if the state whose territory was being used had serious reasons to believe that the aircraft was a rendition (to torture) aircraft then that state had a duty to take all possible preventive measures. Failing to do so would trigger responsibility under the ECHR.

3.4 The law applied to Denmark and Ireland

Unlike the case of e.g. Poland, Macedonia, Romania, Lithuania, Italy or Sweden, there is – at least so far – no evidence that Denmark and Ireland have been directly involved in the US renditions. “Directly” in the sense of there being a positive act of assistance to the US: the handing over of a person to CIA personnel or the assistance of the CIA in catching a person, for example. The Danish and Irish authorities have merely given US privately operated jets permission to land and re-fuel on their territories and to cross their airspace. In addition, there is no evidence that would suggest that the Danish and Irish authorities knew, or ought to have known, that the aircraft were rendition aircraft. Under these circumstances, and lacking such evidence, it would seem somewhat far-fetched to find Denmark and Ireland complicit in the US renditions.

However, from the moment Denmark and Ireland came to know about rendition aircraft stopping-over on their territory, and flying over their airspace, they should have been fully aware that US renditions were a reality and that they were susceptible to becoming involved – and potentially complicit – in them if they did not take measures in order to avoid such involvement or prevent the US renditions. The Irish Human Rights Committee (IHRC) has suggested a monitoring and inspection regime to this effect. As they put it, “the only effective way of ensuring that we do not become complicit in despatching people to be tortured or ill-treated is through establishing an effective

regime of monitoring and inspection.”⁹² The IHRC finds that such regime should be applied to all aircraft that have already been linked to the rendition programme⁹³ if they land at Irish airports. Furthermore, the Irish authorities should “monitor closely the movements of any aircraft owned or operated by any of the companies named in the recent Amnesty Report as linked to the CIA, and which seek to use Irish airports, so that, if necessary, the proposed regime of inspection and examination of flight documents may apply to them as well.”⁹⁴

I find this recommendation of the Irish Human Rights Committee to be well in line with the rules of international law on complicity (as set out above) and I consider that the same considerations should apply to Denmark, the Danish and Irish roles in the US renditions being of a similar nature. Sadly, the recommendation does not seem to have been implemented by the Irish Government. Thus, in its 2014 submission to the UN Human Rights Committee on the Examination of Ireland’s Forth Periodic Report under the ICCPR⁹⁵, the IHRC notes that it “has sought further information on the specific and concrete steps taken, beyond official assurances, to ensure that aircrafts used for the purpose of extraordinary rendition, whether they carry prisoners [...] on board, or not, do not pass through the territory of [Ireland] and what measures are taken to investigate past allegations concerning the use of [Ireland’s] territory for the purpose of extraordinary rendition flights.”⁹⁶ It would appear that the current practice in Ireland is still a complaint-reactive mechanism, which the IHRC finds insufficient to discharge Ireland’s human rights obligations.⁹⁷ Thus, Ireland – and perhaps even more so

⁹² Irish Human Rights Commission, “Text of response sent to Minister for Foreign Affairs on 24th May 2006 on the subject of ‘rendition’”, <http://www.ihrec.ie/publications/list/response-sent-to-minister-for-foreign-affairs-on-t/> (last visited 14 July 2016), p. 10.

⁹³ *Ibid.*, p. 10. More specifically, the IHRC says that “This regime should be applied to any of aircraft listed in Appendix One if they land at Irish airports, and also to those included on the list circulated to national delegations to the Council of Europe by Senator Dick Marty as part of his investigation.” The aircraft listed in Appendix One are aircraft identified by Amnesty International as involved in specific CIA renditions.

⁹⁴ *Ibid.*, p. 10.

⁹⁵ Irish Human Rights Commission, “Submission to the UN Human Rights Committee on the Examination of Ireland’s Forth Periodic Report under the International Covenant on Civil and Political Rights”, June 2014, p. 44.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Denmark⁹⁸ – still appear to be a far cry from taking effective measures to prevent US renditions and their own complicity therein.

⁹⁸ As mentioned *supra* in Section 2.3.1, in 2013 Denmark allowed a US aircraft to land and stay in Copenhagen airport for five days, even though the Danish authorities had information that the aircraft was (allegedly) staying there with a view to picking up Edward Snowden and transporting him to the US in the event he would not be granted asylum in Russia. In the same place it was stated that this was not a “rendition to torture” – at least not on the face of it. However, it was a planned rendition to what could potentially have involved capital punishment, and Denmark’s facilitation of such would have constituted a violation of Denmark’s international obligations.

4. EXTRAORDINARY RENDITIONS AND JUSTIFICATION OF TORTURE

4.1 WHY? How could the United States do this?

Now that it has been established that there has been a considerable number of instances of US torture and US renditions to torture, that these constitute violations of several international treaties and conventions signed and in part ratified by the US and that unfortunately no country, neither the US itself nor other state parties to those treaties, is willing to prosecute the perpetrators, this raises the question as to “why”? Why do neither the US nor other states, including Denmark and Ireland, want the US to be held accountable for the torture which is clearly documented to have taken place? I shall deal with the possible motivations of Denmark and Ireland below in Section 4.2 but first I would like to reflect more on President Obama’s motivation for not wanting to prosecute those allegedly responsible, be they the CIA officers performing the torture or the members of the Bush administration asking them to do so. To this end I shall first give a brief account of the strong dedication to human rights, including the prohibition of torture, for which the US is - or at least used to be - so well known. Then I shall look further into the possible reasons the US may have for departing from its ideals.

The US has prided itself in its dedication to the protection of human rights, including the right not to be tortured. In many ways it should indeed be proud, because the United States' Constitution, along with its Bill of Rights, constitutes a landmark document of the Western world when it comes to the protection of fundamental freedoms.⁹⁹ Thus, the Bill of Rights of the US Constitution protects basic freedoms of US citizens and prohibits, among others, cruel and unusual punishment and compelled self-incrimination – all elements of interrogational torture. Moreover, the US played a significant role in the drafting of the Universal Declaration on Human Rights. Yet now the US seems to be walking all over the prohibition against torture when the mirror is turned towards it. At the same time, the US appears rather judgmental when it comes to torture or the suspicion of torture in other states, including the states to which the US itself sends prisoners as part of its rendition programme. Thus, the US has officially

⁹⁹ United for Human Rights, “A Brief History of Human Rights”, <http://www.humanrights.com/what-are-human-rights/brief-history/declaration-of-independence.html> (last visited 14 July 2016).

criticised the use of waterboarding¹⁰⁰ in Sri Lanka and Tunisia and classified this interrogation method as torture.¹⁰¹ It has criticised Jordan, Iran, Sri Lanka, North Korea and Egypt for subjecting prisoners to stress positions, forced standing, forced nudity and deemed this to be torture.¹⁰² The same goes for threats of harm to a person or the person's family where the US has accused Turkey, Jordan and Iraq of torture.¹⁰³ Similarly, with regard to the use of sleep deprivation and of loud music, the US has accused Indonesia, Iran, Jordan, Libya, Saudi Arabia, Turkey and Pakistan of torture.¹⁰⁴ The US has also classified prolonged solitary confinement and confinement in small spaces as torture and condemned these practices with regard to Jordan, Iraq, North Korea and China.¹⁰⁵ All of these practices have been applied by CIA personnel¹⁰⁶ and several of the US renditions have involved sending prisoners to, for example, Jordan, Libya and Egypt, even though, as can be seen, the US was perfectly aware that prisoners were being subjected to torture in those places.

These double standards have led Human Rights Watch, among others, to label the US as hypocritical. It is difficult to dispute this point. The international conventions referred to in this paper were not created in order to allow their main drafters - here the US - to blatantly flout them and even gravely breach them (torture being one of the most grave breaches), while at the same time demanding that other nations abide by them. And the hypocrisy becomes even more flagrant when it is the US itself that sends prisoners to those very same countries for the purpose of coercive interrogation.

Why is it that the US is taking these liberties? My best assumptions would be that: 1) the US is, or considers itself to be, such a great power that it simply does not have the obligation to act according to the laws it has itself drafted – while everyone else has to; 2) the US is still in a state of shock after the 9/11 attacks – albeit they took place back in 2001 - and seemingly is short of alternative, less humanly degrading methods to deal with the global terrorist threat - in other words, the US is in a state of despair; or 3) the

¹⁰⁰ A torture method whereby the detainees head is submerged in water to the stage of near-drowning.

¹⁰¹ Human Rights Watch, "USA and Torture: A History of Hypocrisy", <https://www.hrw.org/news/2014/12/09/usa-and-torture-history-hypocrisy> (last visited 14 July 2016).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

US finds that it is morally justified to torture people with a view to preventing future terrorist attacks. The first reason (superiority/hubris) will be discussed below in section 4.1.1. The second and third reasons (state of despair and possible moral justifications for torture) will be discussed in section 4.1.2.

4.1.1 Because WE CAN (the hegemon speaking)

Hegemon means ‘leader’.¹⁰⁷ If one looks up the word in the dictionary¹⁰⁸ a simple definition of hegemony is “influence or control over another country, a group of people, etc.”¹⁰⁹ A more refined definition is “preponderant influence or authority over others: domination”, whereas ‘domination’ is defined as “supremacy or preeminence over another”, “exercise of mastery or ruling power”, or “exercise of preponderant, governing, or controlling influence”.¹¹⁰ Other dictionaries again define hegemony as “the position of being the strongest and most powerful and therefore able to control others”¹¹¹ and as “[l]eadership or dominance, especially by one state or social group over others”¹¹². These definitions all boil down to ‘strength’, ‘power’, ‘control’, ‘leadership’ and ultimately ‘domination’.

The United States is a ‘leader’ and a ‘dominant leader’ at that.¹¹³ Thus, the definition of ‘hegemon’ fits very well. Some commentators even go a bit further and characterise the US as a ‘super-hegemon’ and not just as a superpower, as a ‘hyperpower’.¹¹⁴ Whether

¹⁰⁷ For academic definitions of hegemony and hegemons *see* for example Martin Griffiths, “Beyond the Bush Doctrine: American Hegemony and World Order”, *Australasian Journal of American Studies*, Vol. 23, no. 1, 2004, p. 63, where it says that “[i]n international relations, a hegemon is the ‘leader’ or ‘leading state’ of a group of states.”

¹⁰⁸ In this case Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/hegemony> (last visited 14 July 2016).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Cambridge Dictionaries Online, <http://dictionary.cambridge.org/dictionary/english/hegemony> (last visited 14 July 2016).

¹¹² Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/hegemony> (last visited 14 July 2016).

¹¹³ The US’ dominance shows not only economically and military-wise but also politically when it comes to negotiating international treaties and – curiously enough – demanding from other treaty parties that they abide by those very same rules that the US is violating, including the prohibition on torture. Examples of these double standards with regard to torture were provided above in Section 4.1.

¹¹⁴ *See hereto* Campbell, Colm, “‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict”, *International and Comparative Law Quarterly*, Vol. 54, 2005, p. 321.

the US is indeed a ‘hyperpower’, a ‘super-hegemon’ or “just” a hegemon, what is clear is that with the fall of the Soviet Union the US became a hitherto unprecedented power on the global stage: Whereas the power of the US was still somewhat curtailed during the bipolar period of the Cold War, this was followed by unprecedented US predominance in the economic, military and political field.¹¹⁵ This domination has had effects on international law – not the least after the 9/11 attacks.¹¹⁶ The commentators disagree as to the gravity of these effects.¹¹⁷ However, what appears to be undeniable is the large extent to which the US in its negotiations of international treaties has been able to curtail the effects of those treaties on its own nation. This phenomenon became apparent above in Section 3 where I examined the international law applicable to the US renditions – and it turned out that the vast majority of the applicable treaties are in fact “toothless” when it comes to the US, the CAT and the Rome Statute (at least in principle) being perhaps the most prominent examples.

Speaking of the CAT, the US is not the first hegemon to disregard this convention and the recommendations of the UN Committee against Torture: meet the UK during the Northern Ireland conflict. Admittedly, the UK was no longer a hegemon at the time, but according to Campbell, the UK still had quite some international standing – it was not a negligible actor in international affairs – which meant that it was more likely to be heard before the UN Security Council and General Assembly than Ireland was. And at least during the earlier phases of the Northern Ireland this is what happened.¹¹⁸ With particular regard to the CAT, somewhat mirroring the current situation with the US, the

¹¹⁵ *Ibid.*, p. 321. See also Knowles, Robert, “American Hegemony and the Foreign Affairs Constitution”, *Arizona State Law Journal*, Vol. 41, 2009, p. 138: “During the Cold War, the respective hegemonies of the Soviet Union and the United States maintained a balance of power. But since the fall of the Soviet Union, the United States has lacked balancing rivals and is the only nation capable of projecting military power anywhere in the world.”

¹¹⁶ *Ibid.*, p. 321.

¹¹⁷ See *ibid.*, p. 322, where Campbell points out how commentators disagree as to the gravity of the effects: “Contrast the tone at least, of Cassese’s assertion that the 9/11 attacks produced ‘shattering consequences for international law’, with Aquilino Skorda’s view that: ‘More than a decade after the end of the Cold War, the primary rules of customary international law do not seem to have undergone a radical change as a consequence of the dominant position of the United States.’” See also Knowles, Robert, “American Hegemony and the Foreign Affairs Constitution”, *Arizona State Law Journal*, Vol. 41, 2009, p. 142, who claims that the US “exercises a dominant influence on the definition of international law because it is the largest “consumer” of such law and the only nation capable of enforcing it on a global scale.”

¹¹⁸ *Ibid.*, p. 326 and p. 330.

Committee against Torture “subjected the [British interrogation] regime and particularly the safeguards in the interrogation centres to scathing criticism, with the Country Rapporteur asserting that the ‘implementation of the Convention in Northern Ireland is far from satisfactory’.”¹¹⁹ On top of that the UK – like the US – had made itself untouchable to individual complaints under the CAT, and thus the CAT was rather “toothless” towards the UK – which still remains the case today.¹²⁰

So does this mean that the US is forever going to go on disregarding international law? Referring to Toope, Campbell argues that “even in the case of a hegemon, there may be key imperatives pushing against non-compliance.”¹²¹

All this being said, is the US subjecting and sending people to torture – “just because it can”? Apart from some black sheep (and some of these at high level) I sincerely doubt that. I am more inclined to believe that what has happened (and is possibly still happening) is the result of a super-hegemon not knowing what to do in its fight against a seemingly intangible enemy. This leads the hegemon to take desperate measures, including one of the most desperate measures: recourse to torture. And this in turn raises the question, which is the subject of the next section: Can torture be morally justified in certain instances?

4.1.2 Because torture can be morally justified in certain instances (?)

Former Vice President Cheney has made it very clear that he thinks that torture – and even the torture of perfectly innocent people – can be justified. Thus, in a Meet The Press episode he explains that he has “no problem [applying the CIA “enhanced interrogation techniques” even to innocent people] as long as we achieve our objective. And our objective is to get the guys who did 9/11 and it is to avoid another attack

¹¹⁹ *Ibid.*, p. 338.

¹²⁰ This is set out in more detail *supra* in Section 3.2.1.

¹²¹ Campbell, Colm, “‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict”, *International and Comparative Law Quarterly*, Vol. 54, 2005, p. 355, referring to Toope, Stephen, “Powerful but unpersuasive? The role of the United States in the evolution of customary international law” in “United States Hegemony and the Foundations of International Law”, *Cambridge University Press*, 2003, pp. 287-316.

against the United States. [...] I'd do it again in a minute".¹²² The ordinary American would seem to largely agree with him. Thus, in an opinion poll following the Feinstein Report 58 per cent said that "the torture of suspected terrorists can be justified "often" or "sometimes." ¹²³

Brian Anderson, a British, and one may perhaps say slightly controversial, journalist, at least when it comes to his view on torture, goes even further in that he expresses the opinion that "[w]e not only have a right to use torture. We have a duty".¹²⁴ This is already a rather bombastic statement but where his view really departs from the views of even strong proponents of torture is when he says that it should be perfectly legitimate to even torture the family of the detainee who is being subjected to torture, including his perfectly innocent children, if he is a hard case that does not respond to the torture inflicted on his own body and mind.¹²⁵ Thus, when faced with the following – up until now luckily, hypothetical – question in a debate with what he describes as "some serious lawyers": "Let's take your hypothesis a bit further. We have captured a terrorist, but he is a hardened character. We cannot be certain that he will crack in time. We have also captured his wife and children" ... Anderson replied: "Torture the wife and children. It is a disgusting idea. It is almost a tragedy that we even have to discuss it, let alone think of acting upon it. But there is nothing to be gained from refusing to face facts [...] There is a threat not only to individual lives, which is of minor importance, but to our way of life and our civilisation."¹²⁶ I have hereby set the stage for a brief discussion in the following of whether torture can ever be morally justified.

¹²² Meet the Press, "Cheney on Interrogation Tactics: 'I Would Do It Again in a Minute'", 14 December 2014, <http://www.nbcnews.com/meet-the-press/cheney-interrogation-tactics-i-would-do-it-again-minute-n268041> (last visited 14 July).

¹²³ Goldman, Adam and Craighill, Peyton, "New poll finds majority of Americans think torture was justified after 9/11 attacks", The Washington Post, 16 December 2014, https://www.washingtonpost.com/world/national-security/new-poll-finds-majority-of-americans-believe-torture-justified-after-911-attacks/2014/12/16/f6ee1208-847c-11e4-9534-f79a23c40e6c_story.html (last visited 14 July 2016).

¹²⁴ Anderson, Bruce, "Bruce Anderson: We not only have a right to use torture. We have a duty", The Independent, 15 February 2010, <http://www.independent.co.uk/voices/commentators/bruce-anderson/bruce-anderson-we-not-only-have-a-right-to-use-torture-we-have-a-duty-1899555.html> (last visited 14 July 2016).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

However, before we move on to the theory and discussion I would like to quickly outline how and to what effect torture has been applied during the CIA's RDI program: In the program torture has been used not just to extract confessions, but also to terrorise the victims and punish them for crimes despite there being no proof for their involvement therein. In some of the cases described in the Feinstein Report the treatment of the victims would even seem to have served the purpose of amusing sadists and bullies amongst the CIA agents effecting the torture.¹²⁷ Thus, we are dealing with three different scenarios: 1) torture is used to gain important information; 2) torture is used as a punishment of a presumed wrongdoer; 3) torture serves a sadistic purpose. Clearly, where the motive for torture is sadistic, it cannot be morally justified (scenario 3).¹²⁸ Also, torture used as a punishment for a crime where there is no or not sufficient evidence linking the victim to that crime, cannot be morally justified (scenario 2).¹²⁹ And also, even if there were sufficient evidence, torture should never be used as a punishment. This belongs in the middle ages and not in today's developed, democratic societies of which the United States is (at least on paper) one. The situation that has essentially given rise to arguments that torture might – under very exceptional circumstances – be morally justified is the one where torture is “merely” applied to gain important information (scenario 1). Try to follow me on these – fictitious but by no means unrealistic – variations of scenario 1: Torture is being applied in carefully adjusted doses with a view to gaining critical information from e.g. a kidnapper about where he is hiding his victim or from, for example, a terrorist about where he has hidden a bomb that will go off unless the interrogators get him to reveal the location and the code for the bomb. Is torture “ok” in such situations? Add to the latter example that the terrorist's bomb is not just any bomb, it is one of the increasingly heard of “dirty

¹²⁷ Thus, the Feinstein Report for example revealed that the CIA in several cases would continue waterboarding of detainees for a considerable period of time after the CIA's psychologists had assessed that nothing more would come from this in terms of gaining information, only pointless suffering and the risk of death and, therefore, urged the CIA agents to stop the waterboarding, however, to no avail. See Senate Select Committee on Intelligence, “Committee Study of the CIA's Detention and Interrogation Program. Findings and conclusions”, 3 December 2014 (declassified version), <http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program> (last visited 14 July 2016).

¹²⁸ Gutting, Gary and McMahan, Jeff, “Can Torture Ever Be Moral?”, The New York Times, 26 January 2015, <http://opinionator.blogs.nytimes.com/2015/01/26/can-torture-ever-be-moral/> (last visited 14 July 2016).

¹²⁹ *Ibid.*

bombs”, i.e. a regular explosive containing radioactive material¹³⁰ or even worse, we are talking about an actual nuclear bomb with the ability to kill say a million people and injure even more... Can torture in such a situation be moral? This we shall seek to answer in the following looking at the philosophical underpinnings of a possible moral defence of torture, and thus, a possible moral defence of what the US has subjected a considerable amount of – for a large part – perfectly innocent people to.

When discussing the morality of torture, there is one scholar whom it is impossible to get around and that is Henry Shue and his notorious “ticking-bomb scenario”.¹³¹ My thought example above was also inspired by that very ticking-bomb scenario, which goes like this: Interrogational¹³² torture may be morally permissible if A) we are dealing with a fanatic who is perfectly willing to die rather than collaborate in the destruction of his own project; B) the fanatic has placed a nuclear bomb to explode somewhere in the heart of Paris; and C) there is no time to evacuate the innocent people present in the heart of Paris and possibly moveable art treasures. Where all three of these factors are

¹³⁰ For a more technical explanation of what constitutes a “dirty bomb” see for example the United States Nuclear Regulatory Commission: “A “dirty bomb” is one type of a radiological dispersal device (RDD) that combines conventional explosives, such as dynamite, with radioactive material. The terms dirty bomb and RDD are often used interchangeably in the media. Most RDDs would not release enough radiation to kill people or cause severe illness - the conventional explosive itself would be more harmful to individuals than the radioactive material. However, depending on the situation, an RDD explosion could create fear and panic, contaminate property, and require potentially costly cleanup. Making prompt, accurate information available to the public may prevent the panic sought by terrorists. A dirty bomb is in no way similar to a nuclear weapon or nuclear bomb. A nuclear bomb creates an explosion that is millions of times more powerful than that of a dirty bomb. The cloud of radiation from a nuclear bomb could spread tens to hundreds of square miles, whereas a dirty bomb’s radiation could be dispersed within a few blocks or miles of the explosion. A dirty bomb is not a “Weapon of Mass Destruction” but a “Weapon of Mass Disruption,” where contamination and anxiety are the terrorists’ major objectives.” Source: United States Nuclear Regulatory Commission, “Fact Sheet on Dirty Bombs”, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-dirty-bombs.html> (last visited 14 July 2016).

¹³¹ Shue, Henry, “Torture”, *Philosophy and Public Affairs*, Vol. 7, no. 2, 1978, p. 124.

¹³² I deliberately say interrogational torture because Shue’s theoretical case of “moral” torture is limited to torture which exclusively serves the purpose of obtaining information and works on the hypothesis that the torture stops as soon as the victim has provided the necessary information. By contrast, Shue did not think that any theoretical case could be made for other types of torture to be moral, including terroristic torture where a victim is tortured with a view to intimidating others. One major problem with this hypothetical case is that there will seldom be a clear-cut case of “merely” interrogational torture. Often the motive of gaining information will be accompanied by sadistic motives and in some cases the torture will also at least to some degree serve the purpose of intimidating the compatriots of the victim. This just being one short-coming of Shue’s theoretical case. Other short-comings will be set out in the following.

present, the only hope of preventing the catastrophe is, according to Shue, to torture the fanatic in order to find the bomb and deactivate it.¹³³

Shue's ticking bomb scenario would prove to become very popular with proponents of torture and has been used – or one might actually say abused – by for example US agents to justify torture.¹³⁴ In a 2006 essay Shue made it very clear that the ticking bomb scenario is indeed an artificial case that cannot be applied to reality.¹³⁵ And he did so with clear indications to the CIA's RDI programme. His observations can be summed up as follows: First, in the real world we do not know for sure if the person we are torturing is indeed a – or rather *the* – terrorist. In Shue's words this is for example not the case where the "Central Intelligence Agency has kidnapped 100 people, some of whose names sound like the name of the bomber, which luckily, they somehow happen to know."¹³⁶ And it is not the case where "agents have arrested a Navajo who, they thought, "looked like an Arab".¹³⁷ Secondly, in the real world the torture victim does not promptly deliver the desired information giving the authorities time to find the bomb and prevent it from exploding. In the real world there is a likelihood that the torture victim has a heart attack and passes out; that he vomits on himself and has a psychotic break; and that he tells "a plausible diversionary lie that wastes the time available".¹³⁸ Thirdly, in the real world torture is not a rare, isolated case. It continues to happen. In the real world, once the interrogators cannot get any more coherent information out of whom they believed to be the "right man" they move on to the second-best "right man".¹³⁹ And in the real world the torturers "operating on the

¹³³ Shue, Henry, "Torture in Dreamland: Disposing of the Ticking Bomb", *Case W. Res. J. Int'l L.*, Vol. 37, 2005-2006, p. 233.

¹³⁴ See Gutting, Gary and McMahan, Jeff, "Can Torture Ever Be Moral?", *The New York Times*, 26 January 2015, <http://opinionator.blogs.nytimes.com/2015/01/26/can-torture-ever-be-moral/> (last visited 14 July 2016) where it says that Shue was thanked for his 1978 article on torture by two US agents who had tortured people. The small – hypothetical – window for torture that Shue left open in his article, the agents decided to interpret as that "they could engage in torture without doing wrong".

¹³⁵ Shue, Henry, "Torture in Dreamland: Disposing of the Ticking Bomb", *Case W. Res. J. Int'l L.*, Vol. 37, 2005-2006.

¹³⁶ *Ibid.*, p. 233.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, where Shue puts it the other way round, saying that in an idealised world torture is a rare, isolated case and incidents of torture "do not continue to happen. Once the original 'right man' becomes too hysterical to provide coherent information, the torturers do not simply move on to, as it were, the second-best 'right man'."

principle that practice makes perfect, circulate from, say, Guantanamo to Bagram to Abu Ghraib to Romania to Poland.”¹⁴⁰ Shue is clearly hinting at the CIA’s RDI programme and he clearly does not find that it meets the criteria of the – artificial – ticking-bomb test. That Shue has the CIA programme and the “war on terror” in mind becomes further apparent when he elaborates on his third point that in the real world torture is not a rare isolated case. Comparing governments to alcoholics he claims that “history does not present us with a government that used torture selectively and judiciously”.¹⁴¹ Just like there is no such thing as an alcoholic who drinks only two beers a night, there is, he argues, no such thing as a government that only applies torture in the “rare, albeit real” cases.¹⁴² Here Shue gets quite political in that he says that this “is virtually impossible given the kind of people who rise to the top in politics” and that “[w]hat would be “utopian or naïve” would be to believe that the kind of people who are running the so-called “War on Terrorism” would, if they had discretion about using torture in secret – against “ghost detainees” in “black sites” say – choose to restrain themselves in spite of the impossibility of accountability.”¹⁴³ Comparing the Bush administration – and potentially also other, future US governments – to alcoholics may seem a bit far-fetched. However, at least when it comes to the Bush administration, statements like “after 9/11 the gloves come off”¹⁴⁴, “[w]e also have to work, though, sort of the dark side”¹⁴⁵ and “I have no problem [applying the CIA “enhanced interrogation techniques” even to innocent people] as long as we achieve our objective. [...] I’d do it again in a minute”¹⁴⁶ do create the impression of a government that is unlikely to practise much self-restraint when it comes to interrogational torture. And this being so, Shue is right in dismantling his very own “ticking-bomb” scenario, or perhaps one should rather say making it very explicit that it is not applicable to the real world and can, thus, not be used as a justification for the US renditions to torture.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, p. 234.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Otterman, Michael, “American Torture: From the Cold War to Abu Ghraib and Beyond”, *Melbourne University Press*, 2007, p. 118.

¹⁴⁵ *Ibid.*, p. 117.

¹⁴⁶ Meet the Press, “Cheney on Interrogation Tactics: ‘I Would Do It Again in a Minute’”, 14 December 2014, <http://www.nbcnews.com/meet-the-press/cheney-interrogation-tactics-i-would-do-it-again-minute-n268041> (last visited 14 July).

Shue's 2006 article came as a reaction to two articles by Oren Gross where Gross, *inter alia*, argued that ticking-bomb cases were not artificial, they were "real, albeit rare", and that ignoring them completely "is utopian or naïve, at best"¹⁴⁷. Gross made the case for an absolute legal ban on torture while at the same time suggesting that "in catastrophic cases public officials may choose to act outside the legal order, at times even violate the otherwise entrenched absolute prohibition on torture"¹⁴⁸. This is an approach I simply cannot agree with. Rules are not made to be broken. Especially not broken by the government making the rules. And that there is even less of a case for the government to be violating those very same rules that they are telling everyone else to abide by.

However, this is more of a political discussion and I shall now return to the last round of this little philosophical discourse: by introducing Marcy Strauss.

Many scholars – and non-scholars alike – have been fascinated by Shue's ticking-bomb scenario and the amount of literature on the subject is fairly impressive. When I choose to concentrate on Strauss in particular it is because she takes an explicit stance on the issue of torturing family members of the torture victim. Remember that part of my introduction to this section was a quote by a British journalist saying to "[t]orture the wife and children"¹⁴⁹? Like Shue, Strauss finds that the ticking bomb scenario does not stand a reality check – or at least that it is highly unlikely to occur and that even so torture should not be applied. Thus, even if the victim is indeed a terrorist she is sceptical that he will have the needed information and be willing to divulge it even under torture. She further argues, *inter alia*, that if a nation is going to engage in torture it will have to establish rules governing the use of torture but that those very rules "would, undoubtedly, lead to an expanding role for torture as officials explore the outer boundaries of the law"¹⁵⁰. That such behaviour on the part of officials is not an

¹⁴⁷ Gross, Oren, "The Prohibition on Torture and the Limits of the Law", in "Torture: A Collection", *Sanford Levinson ed.*, 2004, p. 239.

¹⁴⁸ Gross, Oren "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience", *Minn. L. Rev.*, Vol. 88, 2004, p. 1553. On the subject of torture warrants, *see also* Dershowitz, Alan, "Why Terrorism Works: Understanding the Threat, Responding to the Challenge," *Yale University Press*, 2002.

¹⁴⁹ Anderson, Bruce, "Bruce Anderson: We not only have a right to use torture. We have a duty", *The Independent*, 15 February 2010, <http://www.independent.co.uk/voices/commentators/bruce-anderson/bruce-anderson-we-not-only-have-a-right-to-use-torture-we-have-a-duty-1899555.html> (last visited 14 July 2016).

¹⁵⁰ Strauss, Marcy, "Torture", *N. Y. L. Sch. L. Rev.*, Vol. 48, 2003-2004, pp. 269-271.

unrealistic fear I believe the Feinstein Report has illustrated in abundance. However, what really makes Strauss advocate in favour of no exceptions to the ban on torture is the following – hopefully forever just – fictional case:

*“The police in New York have, in custody, a suspect known to be a terrorist. He is adjudged perfectly lucid and rational. He admits to planting a nuclear weapon in the heart of the city and informs the officers that the bomb will go off within five hours. Other evidence obtained by the police makes the threat totally credible. There is no possibility of evacuation, no possibility of finding the bomb, except by the most amazing stroke of luck, during this time. The state tortures this suspect – physically mutilating him until he is near death, all to no avail. The suspect is a fanatic and no amount of pain inflicted upon him will cause him to thwart his mission. So, the police turn to the only option they have available. They bring into the interrogation room the suspect’s beloved four-year-old son. And they start to torture the child. As they strip the child naked, the suspect says nothing. They strike the child. The suspect reacts; he is obviously tormented by the treatment of his child. The police apply electrodes to the child’s genitals. After the child is shocked several times, the suspect caves and tells the police the location of the bomb.”*¹⁵¹

Given the possibility of such a situation occurring if allowing oneself to apply torture makes Strauss advocate against torture – under any circumstances. And I have to agree with her: this is a slippery slope to the huge detriment of not just innocent children but also to the reputation of the nation applying the torture – in this case the United States. And it is not just the United States’ reputation that is at stake here. It is also the reputation of the countries that support the US that suffers, including that of Denmark and Ireland. And in the broader perspective it is the reputation and very existence of Western civilisation, as we know it today, that is at stake.

4.2 How could Denmark and Ireland co-operate with the United States on this?

As described above in Section 4.1.1, the US is a hegemon in the meaning of a dominant leader. Hegemons tend to have a controlling influence over other states and I dare to

¹⁵¹ *Ibid.*, p. 273-274.

say: in particular over very small states like Denmark and Ireland. Denmark has a population of roughly 5.7 million¹⁵², Ireland of roughly 4.7 million¹⁵³. The current US population as I am writing this is roughly 324 million¹⁵⁴. Both countries are heavily dependent on exports to the US. However, here the similarities pretty much stop. Below I shall set out the particular reasons, which the two countries have for aiding the US, or perhaps just keeping their eyes shut – and for not bringing a case against the US regarding the renditions.

4.2.1 Denmark

Denmark and the US are 'comrades' as in 'war comrades'. Thus, Denmark has been fighting alongside the US in "its" wars both in Afghanistan and Iraq. I am putting "its" in citation marks because while it was the US initiating those wars, other countries decided to follow, including Denmark, so in effect it is also Denmark's and the other coalition partners' wars.

With particular regard to the war in Iraq it deserves mention that the Danish participation in the US-initiated "Coalition of the Willing" was decided with the tiniest possible parliamentary majority based on a misinformation about the Iraq being in possession of weapons of mass destruction. That there was in fact a misinformation as to Iraq's possession of weapons of mass destruction became apparent only last week with the publication of the conclusions of the UK Iraq Inquiry according to which "The judgements about the severity of the threat posed by Iraq's weapons of mass destruction – WMD – were presented with a certainty that was not justified."¹⁵⁵ Curiously, a similar Danish commission was set down in 2011 after a centre left government came into

¹⁵² The precise figure for 2016Q2 is 5,717,014 persons. *Source*: Statistics Denmark, <http://www.statbank.dk/statbank5a/SelectVarVal/saveselections.asp> (last visited 14 July 2016).

¹⁵³ The precise figure as of 14 July 2016 is 4,757,976 persons. *Source*: Central Statistics Office, "Preliminary Report for Census 2016", <http://www.cso.ie/en/census/census2016reports/census2016preliminaryreport/> (last visited 14 July 2016).

¹⁵⁴ The precise figure as of 14 July 2016 is 323,990,383 persons. *Source*: United States Census Bureau, "U.S. and World Population Clock", http://www.census.gov/popclock/?intemp=home_pop (last visited 14 July 2016).

¹⁵⁵ The Iraq Inquiry, "Statement by Sir John Chilcot", 6 July 2016, <http://www.iraqinquiry.org.uk/media/247010/2016-09-06-sir-john-chilcots-public-statement.pdf> (last visited 14 July 2016).

power. The Danish commission was also supposed to look into the Danish participation in the war in Afghanistan. One of the very first decisions of the current right wing government, whose party ‘comrades’ had initially paved the road for Danish participation in the Iraq war (and in the war in Afghanistan), was to close down the Danish Iraq-Afghanistan Commission. Luckily for all of us, a similar thing did not happen in the UK.

The Danish participation on the side of the US in the wars in Afghanistan and Iraq has brought the US and Denmark (and other Nordic countries) closer. Denmark is awarded a lot of positive attention by the US. This was recently confirmed at a Nordic state leaders’ dinner at the White House where Obama reiterated what he had already said six years before, namely that the Danish (and along with them the other Nordic countries) are “punching above their weight”.¹⁵⁶ While this is perceived by the current Danish Prime Minister as a great compliment, it does also somewhat remind oneself of the cartoon of the “ant and the elephant”, or “mouse and the elephant” – depending on where you come from but usually involving a tiny animal and an elephant standing on a bridge and the tiny one saying something along the lines of “look how we are bouncing” to the elephant. So there is definitely flattery involved in Denmark’s US engagement – and possibly also a grain of hubris on the Danish side – and essentially this boils down to the hegemon status of the US. However, with regard to Denmark there is also one more thing: Need for intelligence.

If I say ‘the Mohammad drawings’, most of you, I believe, are likely to know what I am referring to: In 2005 a Danish newspaper, Jyllands-Posten, decided to publish a series of ironic/satiric drawings of the prophet Mohammad. Not everyone across the globe found these drawings to be funny, especially not a drawing picturing the prophet with a bomb in his turban. The drawings spread like a spitfire across the globe and Denmark has in a way never been the same again – not to speak of France after Charlie Hebdo decided to reprint those very same drawings. In 2009 the Danish intelligence agencies in cooperation with, among others, the Swedish and the US intelligence agencies, managed to prevent an attack on Jyllands-Posten, the newspaper that published the

¹⁵⁶ McCarthy, Ellen, “Leaders of Iceland, Denmark get big laughs at state dinner”, <https://www.washingtonpost.com/news/reliable-source/wp/2016/05/13/leaders-of-iceland-denmark-get-big-laughs-at-state-dinner/> (last visited 14 July 2016).

Mohammad cartoons. David Coleman Headley, a US Pakistani who participated in terrorist attacks in Mumbai in 2008 where 164 people were killed and at least 308 people wounded, had a boarding card for Copenhagen in his hand luggage when he was arrested by the FBI at Chicago Airport. In 2010 there was an attempted axe murder at the maker of the drawing of Mohammad with a bomb in his turban. In February 2015 a Danish film instructor and a security guard of the synagogue in Copenhagen were assassinated in one and the same evening by one and the same person. It is claimed that the film instructor was not the actual target. The actual target was the Swedish artist Lars Vilks – another of the Mohammad cartoonists. In general, the terrorist threat in Denmark is high¹⁵⁷ and pretty constant and thus it is not surprising that the Danish are being co-operative towards the holder of the globally largest intelligence network: the US.¹⁵⁸

4.2.2 Ireland

Let us now move a bit further west, to Ireland. Ireland is not a “war comrade” of the US since Ireland is a neutral state that does not go to war and has never joined the NATO. Nevertheless, Ireland does seem to have its reasons for helping the US fight its wars, including the “War on Terror”.

Ireland would seem to have two major reasons for allowing its airspace and airports to be used for extraordinary renditions. As discussed above, it still remains unsure – both with regard to Denmark and Ireland – if the governments actually knew what was going on in their territory. That being said, like Denmark, Ireland has not exactly launched a campaign to inspect suspicious-looking US aircraft in its territory.

¹⁵⁷ By way of comparison, the threat level in Ireland is “Moderate: An attack is possible, but not likely”. Source: O’Keeffe, Cormac, Irish Examiner, “What is the reality of the threat posed by Islamic extremists in Ireland?”, 2 May 2016, <http://www.irishexaminer.com/viewpoints/analysis/what-is-the-reality-of-the-threat-posed-by-islamic-extremists-in-ireland-396021.html> (last visited 14 July 2016).

¹⁵⁸ The Danish need for intelligence has also been said to have been “the” reason for the Danish authorities allowing Aircraft N977GA to remain at Copenhagen Airport for five days (allegedly) waiting to set off for Moscow and abduct Snowden in case he would not be accorded Russian asylum. See Kofod, Peter, “USA sendte fly til Danmark for at hapse Snowden”, Den Fri, 24 January 2016, <https://www.denfri.dk/2016/01/usa-sendte-fly-til-danmark-for-at-hapse-snowden/> (last visited 14 July 2016).

So why? The first possible reason goes all the way back to the Irish potato famine and the huge emigration wave to the US as a result of this.¹⁵⁹ According to the US Department of State, “U.S. relations with Ireland have long been based on common ancestral ties and shared values, and emigration has been a foundation of the U.S.-Irish relationship.” Ireland and the US simply feel connected – by blood.

The second possible reason is specifically linked to Shannon Airport and its surrounding area. The US, and in particular the US military, has been a very frequent user of Shannon Airport since the 9/11 attacks and this has generated significant revenue not only for the airport but also for the surrounding area – at least if you ask former US ambassador to Ireland, James C. Kenny: “For Ireland, U.S. military transits not only demonstrate bilateral cooperation in support of U.S. objectives in the Gulf/Middle East, but also generate significant revenue for Shannon Airport and the regional economy. In 2005, the airport turned a euro 2.9 million profit after earning roughly euro 10.3 million from services for transit flights, including landing, parking, catering, and fuel. The economic gains for the Shannon area are less easily calculated, but would include, at a minimum, payments for hotels, food/beverages, transportation, and cultural activities that come with 8-10 overnight stops per year for roughly 200 soldiers each time.”¹⁶⁰

So, what on the face of it perhaps looked like two fairly similar, small countries – Denmark and Ireland – turn out to be quite different when it comes to their relations with the US: Denmark is a ‘war comrade’ in need of intelligence information. Ireland is a ‘blood-brother’ in need of money.

¹⁵⁹ Between 1845 and 1855 approximately 1.5 million Irish left to seek refuge in the US. *Source*: Constitutional Rights Foundation, “The Potato Famine and Irish Immigration to America”, *Bill of Rights in Action*, Volume 26, No. 2, <http://www.crf-usa.org/bill-of-rights-in-action/bria-26-2-the-potato-famine-and-irish-immigration-to-america.html> (last visited 14 July 2016).

¹⁶⁰ *Source*: TheJournal.ie, “The first Irish WikiLeaks: the full contents”, <http://www.thejournal.ie/the-first-irish-wikileaks-the-full-contents-52747-Dec2010/> (last visited 14 July 2016).

5. CONCLUSION

As I am writing this I have just received the news that France is experiencing yet another attack on civilians and on the fundamental – human – rights on which our Western civilisation is based: a mass killing happened in Nice during the celebration of ‘la Bastille’. La Bastille is the French national day but on top of that it is the celebration of a revolution that led to the very introduction of human rights. It is, in essence, the basis for my most fundamental beliefs and for those of the US, at least from a reading of their constitution as discussed above in Section 3. The world – and most of all France – is again faced with the reality of a person simply wanting to destroy other people. Does this lead me to rethink my stance on torture and extraordinary renditions? No. Is France now going to start up their own rendition circuit and establish their own Guantanamo on one of “their” Pacific islands or atolls? I don’t think so. The thing is that it should by now be obvious that torture is not working. There is no ticking bomb scenario in real life. The bomb can explode anywhere at any time and the chances of torturing the right person at the right time and getting the needed information are basically null. Instead, huge efforts should be made in terms of properly integrating the ticking bombs into society.

I once had a boyfriend who was an officer in the US army and he had this book with quotes, one of them saying that “war is the continuation of politics by other means”¹⁶¹. I did not pay much attention to it at the time (in 1999 where I was merely 19). In fact, I was more concerned about him possibly going to go to war in the Balkans.

Nevertheless, that quote has stayed with me and that is clearly what the US has been doing ever since 9/11: War. I am missing the politics element of the argument here. I am missing the dialogue part with the opponent at least before but also after the 9/11 attacks. I am concerned about the Middle East, which is in Europe’s backyard and not in that of the US, having been turned into a cesspool. I am concerned about this leading to a huge immigration wave making otherwise welcoming societies hostile to foreigners. And I am really wondering: how could it get this far?

¹⁶¹ Source: Clausewitz, Carl von, “On War, trans. Col. J.J. Graham. New and Revised edition with Introduction and Notes by Col. F.N. Maude, in Three Volumes”, *Kegan Paul, Trench, Trubner & C.*, Vol. 1, 1918, chapter 1.

One of the answers is definitely “extraordinary renditions to torture”. It has been reported that quite a few of the detainees that have been acquitted from Guantanamo due to lack of evidence – despite them having been subjected to the CIA’s “enhanced interrogation techniques” – have afterwards joined the “terrorist track”.¹⁶² The only “success stories” reported are of people who have been treated so badly that they have been “broken” so that they could not do any damage – and then sent to, for instance, the outskirts of Kazakhstan where they can definitely not do any damage¹⁶³.

I do not think France is going to react that way. Not even after three major attacks within the last year: Charlie Hebdo, Bataclan and now Nice. I think France – and Europe – is stronger than that. At least, I sincerely hope so. Which again leads me back to the conclusion of this paper on the US extraordinary renditions to torture and the European complicity therein.

To sum up: there is clear evidence that US extraordinary renditions to torture have taken place; there is clear evidence that some European countries – and this does not include France – have contributed directly to those renditions, even facilitated the torture in connection with some renditions. There is clear evidence that the airspace and even airports of European countries have been used for the renditions. Whether the affected countries knew that they were facilitating extraordinary renditions to torture remains to date unclear. What is clear is that the affected countries, at least Denmark and Ireland, have done little to investigate their own role in the renditions and to prevent future rendition activities from taking place on their territory. The Danish government, in fact, allowed the US to have an aircraft staying for five days at Copenhagen airport ready for take-off even though the government knew that the purpose of the aircraft was (allegedly) to catch Edward Snowden in case he was not awarded asylum in Russia. What we can also conclude from the above is that the US seems to have gone to extraordinary lengths to preclude any attempt at prosecuting it under international law

¹⁶² See scoreboard of the US Director of National Intelligence, https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_GTMO_Ma%20_2016.pdf (last visited 14 July 2016).

¹⁶³ The area those ex-prisoners were sent to was previously used for the Soviet testing of nuclear bombs and is very scarcely populated. See Vice News, “Life After Guantanamo: Exiled in Kazakhstan”, 16 October 2015, <https://news.vice.com/video/life-after-guantanamo-exiled-in-kazakhstan> (last visited 14 July 2016).

and that this probably has to do with the US being today's (super-)hegemon, but that even if you are a (super-) hegemon torture can never be justified. And then finally, we can conclude that both Denmark and Ireland each may have their own reasons for keeping their eyes shut, but that this behavior does not belong in an enlightened world, which is what the French Revolution introduced with the storming of the Bastille on 14 July 1789 – at a time where the United States was merely existent – and now 247 years after the introduction of human rights a dysfunctional person fired up by anti-Western, pseudo-Islamic rhetorics (and possibly Guantanamo and the US renditions) decides to murder 80+ innocent civilians, amongst those a considerable number of children.

My final message is: stop the use of extraordinary rendition and of the “enhanced interrogation techniques”. They are doing more harm than good and are despicable from a moral stance. They are also illegal, however, in terms of the law we seem to be in a no mans land when it comes to the United States.

We as Europeans need to find our own stance and take our own measures in order to avoid further attacks – without violating international law.

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