**Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases**

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**Abstract**

This article examines how the European Court of Human Rights, in three ‘extraordinary rendition’ cases – *Al Nashiri*, *Husayn*, and *Nasr* – has defined the responsibility of complicit States for torture as a human rights violation, seeking to determine the points at which the European Court’s jurisprudence intersects with and diverges from other bodies of law, including the general law on State responsibility. Two issues that resonate outside the framework of the European Convention on Human Rights are discussed, namely the application of the subjective knowledge element in respect of the different forms of complicity, and the manner of addressing the role of States that may be considered primarily responsible for torture but that are not parties to the relevant proceedings.

1. **Introduction**

1. ‘So full of dismal terror was the time!’[[2]](#footnote-2) And yet, as the European Court of Human Rights (ECrtHR) has confirmed, the prohibition on torture contained in Article 3 of the European Convention on Human Rights (EConvHR) is absolute and not subject to derogation even in the difficult circumstances presented by an age of terrorism.[[3]](#footnote-3) When ‘extraordinary rendition’ spills the practice of torture across international boundaries, it disperses responsibility for the breach of the prohibition in its murky waters.[[4]](#footnote-4) The ECrtHR has defined the responsibility of complicit States for torture as a human rights violation in its three recent cases of *Al Nashiri*, *Husayn* and *Nasr*. These cases reveal points of both intersection and divergence when comparing the structurally distinct areas of international human rights law and international criminal law, and the separate responsibility frameworks for States and individuals.

2. In 2014, in its appearance before the United Nations Committee against Torture, a body that monitors the implementation of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘Convention against Torture’)[[5]](#footnote-5) by State parties, the United States (US) confirmed that it was finally closing the chapter on its detention and investigation methods implemented after the 11 September 2001 terrorist attacks (9/11).[[6]](#footnote-6) US President Obama had previously admitted that ‘any fair minded person’ would consider that some of the so-called ‘enhanced interrogation techniques’ employed against suspected terrorists constituted torture and that the US had ‘crossed a line’.[[7]](#footnote-7) In its Concluding Observations, the Committee against Torture expressed ‘grave concern’ over human rights violations, including torture, that had been committed as part of the ‘extraordinary rendition, secret detention and interrogation programme’ run by the US Central Intelligence Agency (CIA) between 2001 and 2008’, while noting the absence of detailed information on the extent of the use of techniques such as ‘water-boarding’.[[8]](#footnote-8) Although it welcomed the US acknowledgement that its international obligations relating to torture extended to areas beyond its territory, such as the Naval Base at Guantánamo Bay and its ships and aircraft, the Committee against Torture drew attention to the fact that ‘territory’ covers detention facilities abroad where the State party to the Convention against Torture exercises ‘directly or indirectly, in whole or in part, de jure or de facto effective control’.[[9]](#footnote-9) It was such facilities, operated by the CIA in Poland, which formed the factual backdrop to the *Al Nashiri* and *Husayn* cases.

3. It had been public knowledge for some time that international cooperation to counter the threat of terrorism resulted in human rights violations and that a number of States collaborated in the CIA’s rendition and interrogation activities.[[10]](#footnote-10) The ECrtHR had already addressed Macedonia’s responsibility for participating in the torture and rendition to a CIA base in Afghanistan of Khaled El-Masri, a German national.[[11]](#footnote-11) British involvement was exposed in domestic proceedings concerning Binyam Mohamed, Abdul Hakim Belhaj and Sami al-Saadi. Mohamed was arrested in Pakistan in 2002 and shuttled between prisons in Morocco and Afghanistan before ending up at Guantánamo Bay. He was finally released and returned to his home in the UK in 2009.[[12]](#footnote-12) In 2016, the Crown Prosecution Service decided there was insufficient evidence to bring charges against a public official allegedly involved in the rendition to Libya of Belhaj and Saadi and their families.[[13]](#footnote-13) However, in early 2017 the UK Supreme Court denied an appeal by the British government against a decision by the Court of Appeal to allow a civil case brought by Belhaj and others to proceed.[[14]](#footnote-14) The case concerns the alleged complicity of the UK authorities and officials in torts including unlawful rendition and torture allegedly committed by various other States on the territory of those States. Sweden was found by both the Committee against Torture[[15]](#footnote-15) and the United Nations Human Rights Committee[[16]](#footnote-16) to have breached its international obligations by expelling Egyptian terrorist suspects Ahmed Agiza and Mohammed Alzery, who passed through the hands of the CIA before facing torture in Egypt. Finally, an Italian court convicted and sentenced twenty-two CIA agents, an Air Force pilot and two Italian agents in absentia for participating in the kidnapping of the Imam Abu Omar. The sequence of events relating to Abu Omar’s capture became the subject of the ECrtHR case of *Nasr* against Italy. The consideration of torture cases in a variety of different fora, applying different legal bases, creates both a risk of fragmentation in terms of jurisprudential outcomes and an opportunity for cross-fertilization of underlying principles.

4. The *Al Nashiri* and *Husayn* cases are far-reaching in that the ECrtHR states in no uncertain terms that the applicants were subjected to torture by the CIA during their detention in Poland. The core question before the Court, however, was neither the responsibility of the US, which is not a member of the Council of Europe and therefore not subject to its human rights enforcement mechanisms, nor the responsibility of Poland under the general rules on State responsibility for assisting the US in the commission of the internationally wrongful act of torture. Rather, the core question was Poland’s direct breach of its obligations under Article 3 of the EConvHR, according to which: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Reading Article 3 together with Article 1 of the EConvHR, which states the general obligation of parties to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention, Poland was found to be responsible for torture committed on its territory through its ‘acquiescence and connivance’ in the CIA’s interrogation programme.[[17]](#footnote-17)

5. Two aspects of the decisions in the *Al Nashiri*, *Husayn* and *Nasr* cases resonate outside the EConvHR framework, namely the application of the subjective knowledge element in respect of the different forms of complicity under consideration, and the manner of addressing the role of States that may be considered primarily responsible for torture but that are not parties to the proceedings. Interpreting the ECrtHR’s approaches in these areas requires reference to related bodies of law and may in turn influence the development of the law outside the narrow confines of the EConvHR. First, it will be argued that there are gradations in the degree of State complicity in torture that ought to be reflected in the requisite subjective standard of knowledge. Secondly, it will be suggested that it is not legally necessary for a court to identify and determine the responsibility of the primary perpetrator of torture in order to make findings as to the responsibility of an accomplice. These arguments will be elaborated upon against the backdrop of the network of international legal instruments concerned with torture and participation in torture, and an analysis of the ECrtHR’s reasoning in *Al Nashiri*, *Husayn* and *Nasr*.

1. **Torture and Complicity in Torture in International Law**

6. Torture is not only a human rights violation,[[18]](#footnote-18) but also a breach of a peremptory norm of international law or *jus cogens*,[[19]](#footnote-19) an international crime entailing universal jurisdiction[[20]](#footnote-20) and in certain circumstances a war crime[[21]](#footnote-21) or even a ‘weapon of war’[[22]](#footnote-22), a crime against humanity,[[23]](#footnote-23) or an underlying act constituting genocide.[[24]](#footnote-24) As such it straddles the fluid boundaries between international human rights law, international humanitarian law and international criminal law. Despite its consistent appearance in treaty law and the mirroring of many of the treaty provisions in customary international law, the prohibition of torture is arguably one of the most persistently breached *jus cogens* norms. It is simultaneously one of the most extensively litigated in the human rights and international criminal justice contexts, where both State and individual responsibility for acts of torture have been confirmed. The majority of domestic legal systems prohibit torture and prosecutions frequently occur at the national level as well.[[25]](#footnote-25)

7. Torture is considered to be especially serious because, like slavery, ‘it aims at depriving human beings of their humanity’ by directly and deliberately attacking ‘the core of the human personality and dignity.[[26]](#footnote-26) The international community first recognized torture as a distinct human rights violation in the Universal Declaration of Human Rights adopted in 1948.[[27]](#footnote-27) The International Covenant on Civil and Political Rights (ICCPR) gave legally binding effect to the right not to be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and confirmed its non-derogable nature even in times of public emergency.[[28]](#footnote-28) The key principles of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[[29]](#footnote-29) were given further specificity in the 1984 Convention against Torture which requires State parties to ensure that all acts of torture, as well as attempts and any act ‘which constitutes complicity or participation in torture’ are criminalized under domestic law.[[30]](#footnote-30)

8. Developments at the international level were punctuated by the re-enforcement of the prohibition of torture in regional human rights treaties. The EConvHR was signed in 1950 and is now binding on 47 States that are members of the Council of Europe. A similar provision to Article 3 of the EConvHR appears in the 1969 American Convention on Human Rights.[[31]](#footnote-31) Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture defines torture broadly as ‘any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose’.[[32]](#footnote-32) According to Article 5 of the 1981 African Charter on Human and People’s Rights, ‘All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’[[33]](#footnote-33)

9. Torture during times of war was outlawed as early as 1863 in the Instructions for the Government of Armies of the United States in the Field (Lieber Code) [[34]](#footnote-34) which helped provide the impetus for subsequent international efforts to codify the laws of war. These efforts culminated in the adoption of the Geneva Conventions of 1949 and their Additional Protocols of 1977 which contain various provisions prohibiting torture in international and non-international armed conflicts, including the stipulation that torture may constitute a ‘grave breach’ of the Conventions and hence a war crime.[[35]](#footnote-35) In the meantime a number of post-Second World War trials addressed charges of ‘ill-treatment’ applying the laws and customs of war.[[36]](#footnote-36) All of the post-Nuremberg and Tokyo international or ‘hybrid’ ad hoc criminal tribunals, beginning with the International Criminal Tribunal for the former Yugoslavia whose Statute was adopted in 1993, have had jurisdiction over torture as a war crime and as an underlying act constituting a crime against humanity.[[37]](#footnote-37) The International Criminal Court similarly has jurisdiction over torture as both a crime against humanity and a war crime.[[38]](#footnote-38)

10. The ECrtHR has not defined the elements of torture in its jurisprudence and has tended to focus attention on the criteria for distinguishing torture from less serious forms of inhuman or degrading treatment. In *Ireland v. United Kingdom*, the Court held that ‘this distinction derives principally from a difference in the intensity of the suffering inflicted’, noting the EConvHR’s intention to ‘attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’.[[39]](#footnote-39) The Convention against Torture provided the first comprehensive definition of the crime to be made punishable under domestic law:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person 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, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[[40]](#footnote-40)

11. The ECrtHR has frequently referenced this definition and has expressly recognized the latter two elements, namely the ‘intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating’.[[41]](#footnote-41) For example, in *Aksoy v. Turkey* it found that the act of stripping the victim naked and suspending him by his arms, tied together behind his back, ‘was of such a serious and cruel nature that it can only be described as torture’ when ‘deliberately inflicted’ and aimed at ‘obtaining admissions or information’ from the victim.[[42]](#footnote-42) Most aspects of the conventional definition have also been accepted as the core elements of the war crime and crime against humanity of torture, subject to the contextual elements of those crimes also being satisfied. The jurisprudence of the ad hoc tribunals has endorsed the requirement of a prohibited purpose. Indeed, the ICTY Trial Chamber in *Mucić et al.* held that this element forms part of the customary definition of torture, although ‘the various listed purposes do not constitute an exhaustive list’ and that such a purpose ‘must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose’.[[43]](#footnote-43) The ICC Statute does not include the purposive element in its definition of torture as a crime against humanity,[[44]](#footnote-44) and the Elements of Crimes accompanying the Statute include it in respect of war crimes only.[[45]](#footnote-45) The ICC has also dropped the requirement of official involvement which was accepted in early ICTY and ICTR jurisprudence[[46]](#footnote-46) but abandoned in the *Kunarac* case on the basis of ‘two crucial structural differences’ between human rights law and international humanitarian law.[[47]](#footnote-47) The first of these differences related to the role and position of the State. In the view of the ICTY, human rights law was designed to protect citizens from ‘state-organised or state-sponsored violence’ and therefore placed States in the position of guarantor of the rights protected and the responsible party in the event of infringements. By contrast in the humanitarian law context, at least as it related to prosecutions for war crimes, the State had only a peripheral relevance.[[48]](#footnote-48) The second difference was that ‘human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences’, and the responsibility of a State for human rights violations is distinct from a penal law regime addressing individual culpability.[[49]](#footnote-49) This approach in international criminal law means that members of rebel or other non-State groups may be held liable for torture.[[50]](#footnote-50) At the same time, in order for an act of torture to amount to a crime against humanity under the ICC Statute, the attack against a civilian population of which it forms a part must be committed pursuant to or in furtherance of a State or organizational policy.[[51]](#footnote-51)

12. During the preparatory phase of the Convention against Torture, it was generally considered that torture committed by public officials (such as members of the police, army and prosecutorial bodies) was inherently more serious than torture committed by private individuals.[[52]](#footnote-52) The requirement of the involvement of public officials was deemed to reflect the view that only the actions of State actors incur accountability for human rights violations. Notably, the US and the UK favoured the traditional State-centred definition.[[53]](#footnote-53) Nevertheless, many of the negotiating States thought the acts of private individuals should also be covered, especially since the Convention was aimed at the enactment of domestic legislation criminalizing torture. Indeed, Barbados argued that since domestic legislation was also to cover complicity in torture – ordinarily constituting an act of a private citizen – the general definition should not be limited to public officials.[[54]](#footnote-54) The final compromise was to expand the definition so as to include the possibility of *acquiescence* as a modification of the draft wording ‘by or at the instigation of a public official’, in other words, acquiescence of the public official in the conduct of the private citizen.[[55]](#footnote-55) The concept of acquiescence was initially introduced by the US to emphasize the duty of a public official to act to prevent torture.[[56]](#footnote-56) It appears that a broader understanding was eventually adopted, an example of torture by acquiescence being ‘the outsourcing of interrogation methods to private contractors when the competent State officials knew or should know that such private security companies might resort to torture practices.’[[57]](#footnote-57)

13. The Convention against Torture does not address State complicity in torture in so many words, or indeed a State’s direct responsibility for torture, being aimed at ensuring that States’ domestic legislation covers all forms of participation by individual perpetrators.[[58]](#footnote-58) The Convention has not so far been deemed to include a State’s responsibility for complicity in torture in the same manner as Article III(e) of the Genocide Convention has been deemed by the ICJ to encompass a State’s responsibility for complicity in genocide.[[59]](#footnote-59) The US in fact proposed a more comprehensive definition of the various roles of a public official that might incur responsibility for the offence of torture, including (i) consenting to an act of torture, (ii) assisting, inciting, soliciting, commanding, or conspiring with others to commit torture, or (iii) failing to take appropriate measures to prevent or suppress torture when the public official has knowledge or should have knowledge that torture has been or is being committed and has authority or is in a position to take such measures.[[60]](#footnote-60) In the absence of such a detailed definition, in cases addressing individual criminal responsibility, the traditional modes of liability such as aiding and abetting will apply. In cases addressing State responsibility, the existence and degree of unlawful conduct will be determined by the relevant human rights regime and/or the residual rules on State responsibility contained in the International Law Commission’s Articles on State Responsibility and customary international law.[[61]](#footnote-61)

**The European Court of Human Rights Extraordinary Rendition Cases**

14. In the *Al Nashiri* and *Husayn* cases, the ECrtHR examined the entire history of the CIA’s interrogation and detention programme first instituted after 9/11, relying on the available evidence, much of which was already in the public domain.[[62]](#footnote-62) According to the Court’s findings, the establishment of secret detention facilities outside the US, with the cooperation of foreign governments, formed part of the extended competencies granted to the CIA by then President George W. Bush. This led to the setting up of a ‘High-Value Detainees Program’ (‘HVD Programme’).[[63]](#footnote-63) A legal opinion which guided policy in this area was provided to the CIA by the US Department of Justice indicating ten ‘Enhanced Interrogation Techniques’ to be applied to suspected terrorists, which, it was argued, would not violate the prohibition on torture.[[64]](#footnote-64) President Bush announced the closure of the HVD Programme in September 2006, whereupon detainees held by the CIA were transferred to Guantànamo Bay.

15. Husayn was suspected of being a top member of the terrorist group, Al Qaeda, who had helped to plan 9/11. He was forcibly seized in Pakistan in 2002, becoming the first HVD to be detained by the CIA during the so-called ‘war on terror’, and held in secret detention facilities run by the CIA around the world, including Thailand and Poland. Al Nashiri, a Saudi Arabian national of Yemeni descent, believed to be a senior figure in Al Qaeda, was suspected of masterminding and orchestrating the bombing of the USS Cole in 2000 and of playing a role in the bombing of the MV Limburg in 2002. He was captured in Dubai and transferred to the CIA, then taken to secret CIA prisons in Afghanistan and Thailand, before being transferred to Poland. In 2003 he was moved to Guantánamo Bay and then sent via Morocco to a CIA secret detention facility in Romania. Both Husayn and Al Nashiri were returned to Guantánamo Bay in 2006 where they remained at the time of the ECrtHR judgments. Applications before the Court have also been lodged by Husayn against Lithuania and by Al Nashiri against Romania.

16. The basis for Al Nashiri’s complaint before the ECrtHR was first that Poland was in breach of Articles 3, 5 and 8 of the EConvHR in that it had enabled the CIA to detain, torture and hold him incommunicado at the ‘Stare Kiejkuty’ detention facility located on Polish territory. Second, it was claimed that Poland had breached Articles 2, 3, 5 and 6 of the Convention, and Article 1 of Protocol No. 6 to the Convention by facilitating his transfer to CIA-run detention facilities in other countries where he faced a further real risk of torture. Finally, it was asserted that Articles 3 and 13 of the Convention had been breached in that Poland had failed to conduct an effective and thorough investigation into allegations of serious human rights violations. Husayn’s complaint was similarly framed.

17. The standard of proof ‘beyond reasonable doubt’ was applied by the Court with the caveat that it would not borrow the meaning of this standard from national legal systems as its ‘role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention’.[[65]](#footnote-65) Noting the absence of procedural barriers to the admissibility of evidence or fixed rules for its assessment, the Court indicated that it would adopt conclusions that are ‘supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions’ and a government’s failure to disclose essential documents.[[66]](#footnote-66) The Court stated its awareness of the serious impact of a judgment that a Contracting State has violated fundamental rights.[[67]](#footnote-67) While Poland claimed to have subsequently opened internal investigations into allegations of participation in torture by public officials on its soil, only limited information on these confidential internal inquiries was made available to the Court.[[68]](#footnote-68)

18. Although hampered by the inability of the applicants to appear, with regard to their first claim the Court found the fact of their arrival in Poland on a CIA rendition aircraft, detention in a CIA facility at Stare Kiejkuty and their subjection to enhanced interrogation techniques, to be established beyond reasonable doubt.[[69]](#footnote-69) According to the Court, Poland’s ‘knowledge of and complicity in the HVD Programme’ had to be ‘established with reference to the elements that it knew or ought to have known at or closely around the relevant time’ about events relating to the detention cites on its territory. The relevant time period in the two cases was from December 2002 to around mid-2003.[[70]](#footnote-70) Despite noting that much of the relevant evidence post-dated the actual events, the Court found Poland’s knowledge of the CIA rendition operations to be established, especially having regard to the fact that it would be inconceivable for rendition aircraft to cross Polish airspace and land on its territory without the authorities being informed. However, the Court accepted expert opinion to the effect that this did not necessarily mean that all the details of what went on inside the ‘black site’ were known.[[71]](#footnote-71) Consequently, Poland’s direct knowledge of the treatment to which the applicants were subjected could not be established. Guided by circumstantial evidence, the Court concluded that ‘Poland knew of the nature and purposes of the CIA’s activities on its territory at the material time’ and that by enabling the use of its airport by the CIA and helping to disguise the movement of rendition aircraft and the provision of related logistics and services, ‘Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory’.[[72]](#footnote-72) Further, ‘given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, Poland *ought to have known* that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention’.[[73]](#footnote-73) Poland’s Article 1 responsibilities to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention were therefore engaged.

19. The Court then turned to consider Poland’s responsibility under the Convention for complicity in the HVD programme. Regarding a State’s responsibility for an applicant’s treatment and detention by foreign officials on its territory, the Court first reiterated its previous case law to the effect that a State is responsible under the Convention ‘for acts performed by foreign officials on its territory with the *acquiescence or connivance* of its authorities’.[[74]](#footnote-74) The Court relied, in particular, on the *El-Masri* case, where the inhuman and degrading treatment, and torture, to which the applicant was subjected during his detention in a hotel and at Skopje Airport, as well as by virtue of his transfer into the custody of the US authorities, was attributed to Macedonian agents who actively facilitated and failed to take any measures to prevent the resultant breaches of Article 3 of the EConvHR.[[75]](#footnote-75) Drawing a distinction between torture and inhuman or degrading treatment as established in its prior jurisprudence, the Court in *Al Nashiri* and *Husayn* proceeded to find that the treatment to which the applicants were subjected by the CIA during their detention in Poland at the relevant time amounted to torture within the meaning of Article 3 of the Convention. Far from taking measures to ensure that individuals within its jurisdiction were not subjected to torture by officials or private individuals, or attempting to prevent torture from occurring, Poland was found to have facilitated the whole process and created the conditions for it to happen contrary to Article 1 of the EConvHR read with Article 3.[[76]](#footnote-76) The Court found that Poland’s knowledge of the CIA’s unlawful activities derived from its own active ‘complicity in the HVD Programme’ as well as from publically available information as to the treatment applied to terrorist suspects ‘even if [Poland] did not witness or participate in the specific acts of ill-treatment and abuse endured by the applicant’.[[77]](#footnote-77) Therefore Poland ‘must have been aware of the serious risk’ of torture occurring on its territory and was responsible for a violation of the applicant’s rights under Article 3 of the EConvHR on account of its ‘acquiescence and connivance’ in the HVD Programme.[[78]](#footnote-78)

20. The Court held in relation to the applicants’ second claim that Poland was additionally in breach of Article 3 by enabling the CIA to transfer them to its other secret detention facilities, thereby exposing them to a ‘foreseeable serious risk of further ill-treatment’.[[79]](#footnote-79) A violation of Article 3 in its procedural aspect was also found in relation to the applicants’ third claim since there had been no prompt, thorough and effective investigation into the allegations of ill-treatment on the part of Poland.[[80]](#footnote-80)

21. A review of the CIA’s activities in connection with the HVD Programme was initiated by the US Senate Select Committee on Intelligence in 2009 and concluded in 2012, with the declassification of the report’s executive summary and key findings and conclusions occurring in December 2014, just after the ECrtHR’s judgments in *Al Nashiri* and *Husayn*.[[81]](#footnote-81) The European Parliament issued a resolution in February 2015 in which it noted the report’s revelation of ‘new facts that reinforce allegations that a number of EU Member States, their authorities and officials and agents of their security and intelligence services were complicit in the CIA’s secret detention and extraordinary rendition programme.[[82]](#footnote-82) Consequently, by the time the *Nasr* case was decided, the ECrtHR was able to make reference to the published extracts of the report. In *Nasr* the Court also noted the resolution of the European Parliament and its observation that the Senate Committee had refuted the CIA’s claim that the use of torture had allowed information to be obtained that was not obtainable through traditional interrogation methods.[[83]](#footnote-83)

22. The facts of *Nasr* differed from the two earlier cases as the alleged torture was not carried out on Italian territory. Osama Mustafa Nasr, also known as Imam Abu Omar, who had been granted political refugee status in Italy in 2001, was abducted in Milan in 2003 and forcibly transferred to Egypt where he was secretly detained for many months before being released and re-arrested by the Egyptian authorities who detained him until 2007. He has since been prohibited from leaving Egypt. In determining the case, the ECrtHR relied primarily on its previous jurisprudence, including the *El Masri*, *Al Nashiri* and *Husayn* cases, establishing that a State may be in breach of Article 3 of the EConvHR by expelling a person to another country in circumstances in which there are substantial grounds for believing the person could face a real risk of torture in the destination country.[[84]](#footnote-84) The possibility of a breach of Article 3 was viewed as being particularly strong and ‘intrinsic in the transfer’ where the sending State ‘knew, or ought to have known at the relevant time, that a person removed from its territory was subjected to “extraordinary rendition”’.[[85]](#footnote-85) In the *Nasr* case, the element of knowledge on the part of the Italian authorities was considered to be established and Italy was held to be responsible for violating Article 3.

1. **The Knowledge Requirement for State Complicity in Torture**

23. The EConvHR does not itself distinguish between different degrees of involvement in torture, from (i) a State’s officials committing torture on that State’s territory; to (ii) a State actively facilitating torture by foreign State agents or private actors on its territory; to (iii) a State failing to prevent torture by anyone at all within its territory; to (iv) a State sending a person to another State where that person risks being tortured. All of these suggested categories except the first one, which concerns a State official’s direct and deliberate infliction of torture, constitute ‘complicity’ in one form or another. The second category might be described as ‘principal complicity’ while the third and fourth are forms of ‘passive complicity’.[[86]](#footnote-86) In all three instances of complicity the responsibility of the State is based on a subjective requirement of knowledge.

24. The *Al Nashiri*, *Husayn* and *Nasr* cases reaffirmed established case law concerning the fourth category to the effect that responsibility under Article 3 of the EConvHR could be engaged by any rendition accompanied by *substantial grounds for believing* the person being removed could face a *real risk* of torture in the destination country. Further, the inference of a breach of Article 3 would be almost irresistible if it could be shown that the State *knew, or ought to have known* *at the relevant time*, that the rendition was ‘extraordinary’. The Committee against Torture had conducted a similar analysis in *Agiza v. Sweden*. The main issue in that case was whether the removal of Agiza – a terrorist suspect – to his country of origin where he faced torture, constituted a breach of Article 3 of the Convention against Torture. Unlike the EConvHR, Article 3 of the Convention against Torture contains a specific provision on non-refoulement, providing that: ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. According to the Committee’s interpretation of Article 3, the issue had to be decided ‘in the light of the information that was *known, or ought to have been known*, to the State party’s authorities at the time of the removal’ and that subsequent events could be relevant to the assessment of the State party’s actual or constructive knowledge at the time of removal.[[87]](#footnote-87) The Human Rights Committee (HRC) has addressed the same issue in *Alzery v. Sweden*, the question in that case being whether the removal of a terrorist suspect to his country of origin where he risked being tortured constituted a breach of Article 7 of the ICCPR. The HRC noted the parallel findings that had been made by the Committee against Torture in the related case of *Agiza* as well as various concessions made by Sweden on the basis of the latter case. These concessions were not determinative of the issue, however, and the HRC found independently that the diplomatic assurances procured by Sweden in respect of Alzery’s return were insufficient to eliminate the risk of ill-treatment to a level consistent with the requirements of Article 7.[[88]](#footnote-88)

25. The case law on non-refoulement in the context of torture is relatively well-developed, and actual or constructive knowledge of a rendition being ‘extraordinary’ will normally allow the inference to be drawn that the State had substantial grounds for believing the person being removed could face a real risk of torture. Similarly, the element of ‘substantial grounds for believing’ can be satisfied by proof of actual or constructive knowledge of the risk of torture. This category of participation in torture is closely related to the third one mentioned above in the sense that non-refoulement, by protecting an individual from being exposed to the risk of torture abroad, encapsulates the goal of preventing torture. A State’s responsibility for its failure to take measures to prevent torture on its own territory is based on actual or constructive knowledge of the risk of torture occurring. As the ECrtHR has found, ‘State responsibility may […] be engaged where the framework of law fails to provide adequate protection […] or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known’.[[89]](#footnote-89) This has also been the approach of the ICJ in relation to the State’s obligation to prevent genocide. In the case concerning the *Application of the* *Genocide Convention*, in which the ICJ was called upon, inter alia, to determine whether Serbia had violated its obligation under the 1948 Genocide Convention to prevent the Srebrenica genocide in such a manner as to engage its international responsibility, the Court found that the Belgrade authorities ‘could hardly have been unaware of the serious risk of [genocide] once the VRS forces had decided to occupy the Srebrenica enclave’.[[90]](#footnote-90) Awareness of the serious risk of genocide was therefore sufficient in terms of the subjective element to establish Serbia’s responsibility for the failure to prevent genocide.

26. Another way of engaging the responsibility of a State that has been recognised in ECrtHR case law is through ‘the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction’.[[91]](#footnote-91) The use of this language harks back to the discussion over complicity during the preparatory phase of the Convention against Torture where it was agreed that acquiescence of a public official in the conduct of a private citizen could satisfy the official involvement requirement that forms part of the definition of torture in the Convention. ‘Acquiescence or connivance’ is the more active form of participation raised by the *Al Nashiri* and *Husayn* cases and represented by the notion of ‘principal complicity’. The Human Rights Council used similar language in a resolution issued in 2008 condemning torture and ‘in particular any action or attempt by States or public officials to legalize, authorize or *acquiesce* *in torture under any circumstances*, including on grounds of national security or through judicial decisions.’[[92]](#footnote-92) The potentially more controversial nature of this form of participation as compared to ‘passive complicity’ can be illustrated by an interview in the *Gazeta Wyborcza* on 30 April 2012 with Aleksander Kwaśniewski, President of Poland from 2000-2005, relating to the alleged CIA ‘black site’ in Poland. In the interview, Mr. Kwaśniewski reportedly admitted that in terms of intelligence cooperation with the US, as required by the national interest, ‘everything took place with my knowledge’. However, he denied knowledge of torture, explaining that while a decision to cooperate with the CIA carried a risk of legally impermissible methods of interrogation by the US, it was the US that should be accountable for any use of such methods. He put forward a classic hypothetical example which highlights the difficulty of determining where to draw the line: ‘if a CIA agent brutally treated a prisoner in the Warsaw Mariott Hotel, would you charge the management of that hotel for the actions of that agent?’[[93]](#footnote-93) The question turns on the requisite degree of knowledge and, in particular, whether constructive knowledge is sufficient.

27. The allegation and eventual finding in the *Al Nashiri* and *Husayn* cases was that Poland ‘acquiesced and connived’ in another State’s torture programme rather than in the act of a private individual such as a hotel manager. Poland’s conduct was clearly a form of practical aid or assistance to another State (the US) in the commission of an internationally wrongful act (torture). In their sections on the relevant international law, the *Al Nashiri* and *Husayn* judgments set out various provisions contained in the Articles on State Responsibility prepared by the International Law Commission, including Article 16 which is considered to reflect a rule of customary international law.[[94]](#footnote-94) Article 16 provides:

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.

28. It is difficult to glean whether, or to what extent, Article 16 provided guidance to the ECrtHR in the relevant rendition cases as this provision was not woven into the Court’s factual analysis and findings. The ICJ drew on Article 16 in its discussion of complicity in genocide in the case concerning the *Application of the* *Genocide Convention* even though that case concerned aid or assistance to an armed group rather than a State. The conclusion reached by the ICJ in respect of genocide – a crime of specific intent like torture – was that the assisting State must *at least* haveacted knowingly in the sense of being aware of the direct perpetrator’s specific genocidal intent.[[95]](#footnote-95) The ICJ also drew a clear distinction between the level of knowledge required in respect of the failure to prevent genocide and the level of knowledge required for complicity in genocide, the latter being regarded exclusively as a positive act. Leaving aside the question whether the ICJ was correct to find that aid or assistance for the purposes of Article 16 could not encompass omissions,[[96]](#footnote-96) the Court’s explanation as to why it did not uphold Serbia’s responsibility for complicity is informative. Namely, it was unable to find that ‘the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent’.[[97]](#footnote-97) By contrast, at the point at which those authorities ‘could hardly have been unaware of the serious risk’ of genocide, preventative steps ought to have been taken.[[98]](#footnote-98)

29. Other definitions of the knowledge element have been put forward. For example, according to the UK Parliamentary Joint Committee on Human Rights, complicity in torture for the purposes of State responsibility means ‘one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.’[[99]](#footnote-99) This definition interprets ‘knowledge’ according to the ‘knew or ought to have known’ standard, and reflects the ECrtHR jurisprudence on non-refoulement, although the knowledge must relate to the full circumstances of the torture rather than merely the risk. The proceedings of a conference that contributed to an independent investigation known as the Detainee Inquiry into whether the UK Government was involved in the torture of detainees held by third States in the aftermath of 9/11 drew parallels between the legal principles governing the responsibility of States and those governing the responsibility of individuals.[[100]](#footnote-100) The *mens rea* of aiding and abetting in the context of individual criminal responsibility generally requires ‘knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal’[[101]](#footnote-101) and awareness of ‘the essential elements of the crime which was ultimately committed by the principal.’[[102]](#footnote-102) In the *Taylor* case, the Appeals Chamber of the Special Court for Sierra Leone confirmed after a comprehensive review of relevant authorities that ‘an accused’s knowledge of the consequence of his acts or conduct – that is, an accused’s knowing participation in the crimes – is a culpable *mens rea* standard for individual criminal liability’.[[103]](#footnote-103) The Appeals Chamber considered that the Trial Chamber had found beyond a reasonable doubt that Taylor *knew* that his acts assisted the commission of the crimes.[[104]](#footnote-104) According to the Trial Chamber, the requisite knowledge could be inferred from the circumstances.[[105]](#footnote-105)

30. In the *Al Nashiri* and *Husayn* cases, the ECrtHR had insufficient direct evidence that Poland knew (as a matter of certainty) about torture occurring at the ‘black site’ on its territory. It has been suggested that: ‘The nesting of the idea of complicity in a human rights context led the [ECrtHR] to soften the required knowledge, by relying on a concept of constructed knowledge.’[[106]](#footnote-106) Another possible interpretation is that when the Court used phrases such as ‘ought to have known’ and ‘must have been aware’ in connection with Poland’s acquiescence and connivance in the CIA’s activities, it was explaining its approach to the use of circumstantial evidence rather than describing a legal standard.[[107]](#footnote-107) In other words, the Court’s reasoning may be interpreted as indicating that the judges were satisfied beyond reasonable doubt that Poland actually knew that torture was being committed, based on the available circumstantial evidence. Article 16 of the ASR and the majority of judicial and academic opinion on torture in its various legal contexts support the notion that (at least) actual knowledge is required in order to hold a State responsible for complicity (by positive conduct) in a human rights violation that amounts to an international crime.[[108]](#footnote-108)

31. Acquiescence alone suggests something passive – the absence of opposition – which explains why it might be regarded as a version of the failure to prevent. But the acquiescing party can only realistically give its assent with full knowledge of the conduct to which it is assenting. When coupled with connivance and the idea contained in that word of a covert understanding with another party, this category of participation takes on a rather different character from a ‘mere’ failure to prevent at least in terms of the subjective element. Certainly the moral culpability of the responsible State, associated stigma and quantity and nature of reparations appear to vary according to whether the State is found to have ‘acquiesced or connived’ in torture, or failed to take proper steps to prevent it.[[109]](#footnote-109) This is true even if the outcome within the ECrtHR framework – a violation of Article 3 of the EConvHR – is the same in both situations.

32. The ECrtHR could have afforded to be more overt about the extent to which other bodies of law influenced its findings and more visibly aware of the possible impact of its own assessment on related legal frameworks. The elements of aiding and abetting in the context of individual criminal responsibility and aiding or assisting in the context of State responsibility are themselves still developing with both the objective and subjective aspects being susceptible to fragmentation within and between systems. The ECrtHR judgments at least confirm that knowledge is a correct standard for judging States who aid or assist in the commission of torture, consistent with the approach in international criminal law. Though not expressly articulated by the Court within the context of the all-encompassing Article 3, the *Al Nashiri* and *Husayn* judgments also tend to confirm a gradation of responsibility from active participation to the failure to prevent. As the ECrtHR highlighted, a finding that a State has violated fundamental rights has a serious impact. The determination that a State had ‘acquiesced and connived’ in the systematic perpetration of a human rights violation, amounting to an international crime under related treaties, was clearly not lightly made.

1. **The Primary Responsibility of Absent Third States**

33. Principal complicity in torture assumes the existence of a perpetrator bearing primary responsibility who may or may not be a party to the relevant proceedings or even expressly identified. The *Al Nashiri* and *Husayn* cases raise two connected questions concerning the absent or unidentified perpetrator: first, whether it is permissible for the ECrtHR to determine the responsibility of a third State for torture as defined under the EConvHR,[[110]](#footnote-110) and secondly, to what extent it is necessary to identify the main violator of the prohibition on torture in order to determine the responsibility of an accomplice.

34. Referring to its settled case-law to the effect that the responsibility of a State under Article 3 of the EConvHR could be engaged by the act of removing a person to a location where that person faced a real risk of torture, the ECrtHR in *El-Masri* stated:

The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[[111]](#footnote-111)

This statement was repeated in the *Al Nashiri* and *Husayn* cases.[[112]](#footnote-112) The Committee against Torture adopted the same approach in *Agiza v. Sweden*. In that case the question whether torture had in fact taken place in Egypt could not be considered, as the complaint was against Sweden. The Committee was therefore precluded from complying with the complainant’s request for a declaration that torture had occurred following his removal to Egypt since this ‘would amount to a conclusion that Egypt, a State party to the [Convention against Torture], had breached its obligations under the Convention without it having had an opportunity to present its position.’[[113]](#footnote-113) The approach of the ECrtHR and the Committee against Torture is consistent with the general principle of international law, reinforced in the *Monetary Gold* case, that a court may not determine the rights and responsibilities of a State that is not a party to the proceedings.[[114]](#footnote-114) Consequently, the ICJ may lack jurisdiction if it is required to determine legal questions concerning the conduct of an absent third party in order to adjudicate the case between the parties who have consented to appear.[[115]](#footnote-115) In *Monetary Gold*, the legal interests of Albania, the third party, ‘would not only be affected by a decision, but would form the very subject-matter of the decision’.[[116]](#footnote-116)

35. In spite of its acceptance of this doctrine, the ECrtHR held in *Al Nashiri* and *Husayn* that ‘the treatment to which the applicant was subjected by the CIA […] amounted to torture within the meaning of Article 3’, suggesting a legal finding against the US.[[117]](#footnote-117) The two judgments set out the definition of torture in the Convention against Torture in their sections on relevant international law as well as in their reasoning on the facts, and highlighted the purposive element recognized in that Convention.[[118]](#footnote-118) This definition may therefore have provided some guidance as to whether the CIA’s actions could be characterized as torture, but the relationship between the definition in the Convention against Torture and the more open-ended notion of torture in Article 3 of the EConvHR was not fully explored. Therefore, despite the ECrtHR’s finding that the CIA’s actions constituted torture, it is not possible to conclude on the basis of the Court’s assessment alone that the US was considered to have violated Article 1 of the Convention against Torture and was additionally considered responsible for the international crime of torture. In this respect the ECrtHR appeared mindful of the limits of its own human rights-focused jurisdiction

36. The availability of admissions made publically by the US concerning the CIA’s activities might have reduced any concerns about straying into the arena of determining the responsibility of a non-party to the proceedings. Arguably, the ECrtHR was simply affirming that the standards of Article 3 of the EConvHR had not been met in order to judge Poland’s complicity as opposed to independently measuring the evidence of the third State’s conduct against those standards. Perhaps the ECrtHR felt it had more latitude to comment on the conduct of a non-State party to the EConvHR as such a State could never be directly affected, even less bound by, its judgment. It may be indicative of a trend that both the UK Court of Appeal and Supreme Court allowed Belhaj’s case to proceed even though it could involve a consideration of the conduct of US officials.[[119]](#footnote-119) The UK Supreme Court found that the legal position of the US and the other involved States, which included Malaysia, Thailand and Libya, was not affected ‘either directly or indirectly’ by Belhaj’s claims in tort against the UK authorities.[[120]](#footnote-120) The judges explained that while establishing the UK’s liability ‘would involve establishing that various foreign states through their officials were the prime actors in respect of the alleged torts’, it would have no ‘second order legal consequences’ for those prime actors. The Court distinguished legal consequences from ‘reputational or like disadvantage’ to third States that might arise from a case concerning complicity in torture.[[121]](#footnote-121) It may be deduced that the ECrtHR was unconcerned by reputational damage to the US.

37. It has been suggested that it follows from the ECrtHR’s assessment of attribution that ‘territorial state complicity in acts of torture by agents of a foreign state is sufficient to attribute the conduct of those agents to the complicit state’. [[122]](#footnote-122) However, it is questionable whether the Court intended to impute the acts of the absent primary perpetrator to the accomplice, contrary to the ordinary rules of attribution under the law of State responsibility.[[123]](#footnote-123) The Court stated in *Al Nashiri* that it was ‘*on account of* its “acquiescence and connivance” in the HVD Programme’ that Poland had to be regarded as ‘responsible for the violation of the applicant’s rights under Article 3 of the Convention committed on its territory’.[[124]](#footnote-124) According to Article 16 of the ASR, the State providing aid or assistance ‘is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound’, and ‘is not responsible, as such, for the act of the assisted State’.[[125]](#footnote-125) In cases of principal complicity, it would seem appropriate to regard the conduct constituting acquiescence and connivance as establishing the violation of Article 3 of the EConvHR. Indeed, the UK Parliamentary Joint Committee on Human Rights described assisting another State to commit torture and acquiescing in such torture as alternative forms of conduct. Article 3 upholds a right not to be tortured by stating a general prohibition on torture. Poland, through its own conduct constituted by ‘acquiescence and connivance’ violated that prohibition by deliberately and knowingly surrendering control of territory which was used by another State to carry out acts of torture.

38. Even if it is correct that the ECrtHR takes a distinctively broad view of attribution, it does not follow that the establishment of acts of torture by a *particular* foreign State is necessary for the establishment of territorial State complicity. While the ECrtHR might have found it desirable to allocate primary responsibility for torture to CIA agents and consequently to the US, it would not seem essential to do so in order to find that Poland had breached Article 3 of the Convention through its acquiescence and connivance. To make it a requirement would risk limiting the scope of the Court’s findings in other cases where the third State has not confessed to its conduct or even been clearly identified, for example where there is more than one State alleged to be primarily responsible. Parallels may be drawn with international criminal proceedings against individuals, where it must be proved that the crime was committed, but it is not necessary to identify the principal perpetrator in order to establish the guilt of the accomplice.[[126]](#footnote-126) The aider or abettor is separately responsible for his or her contribution to the crime. It must be recalled that the international criminal tribunals have dispensed with the official capacity requirement for torture, but since the ECrtHR has accepted that a State’s acquiescence and connivance in torture carried out by private as well as State actors can engage the State’s responsibility under Article 3, there is no need to establish the official capacity of those being assisted. It is, however, clearly necessary to be convinced of the fact of torture since the wrongful act has to be committed in order for the question of principal complicity to arise.[[127]](#footnote-127)

39. In *Al Nashiri*, *Husayn* and *Nasr*, the ECrtHR was presented with a large amount of material regarding the conduct of the ‘prime actor’, perhaps making it difficult to isolate the conduct of the accomplice. The Court has been explicit that it is not concerned with criminal guilt or civil liability but only with *responsibility* under the EConvHR. Quite what this means in terms of the relationship between the accomplice and the prime actor is something the ECrtHR has not yet fully clarified.

1. **Conclusion**

40. In view of the comprehensive nature of the prohibition on torture that binds all States through the consent-based development of international law, it may seem remarkable that the question of a ‘ticking time bomb’ exception ever arose, despite the enormity of the 9/11 attack. The theory that innocent lives would be saved if the information needed to defuse the bomb before it detonated could be obtained by any means has been disproved by the US’s own admission. But that was only after the floodgates opened to systematic torture in which many States lent a hand.[[128]](#footnote-128) The British Prime Minister David Cameron observed perhaps too late that ‘we won’t succeed (against extremism) if we lose our moral authority.’[[129]](#footnote-129) The assertion of their rights by the ‘ghost prisoners’[[130]](#footnote-130) of this period before the ECrtHR in particular has focused attention on the role of complicit States and the interrelationship between the legal frameworks for ensuring accountability.

41. The European Parliament recently noted that ‘despite their particular nature, policies of national security and counterterrorism are not exempt from the principle of accountability, and there can be no impunity for violations of international law and human rights.’[[131]](#footnote-131) This highlights the importance of clarity and consistency in the law to ensure that States can identify in advance when the line will be crossed between lawful and often necessary cooperation in the collective pursuit of political aspirations and participation in unlawful conduct that amounts to a gross violation of international law.

42. Interpreting the ECrtHR’s findings in *Al Nashiri*, *Husayn* and *Nasr* with reference to the broader context of the prohibition on torture allows some light to be thrown on the distinctive notion of responsibility under the EConvHR as it pertains to complicity. In view of the seriousness of an allegation of torture and the associated stigma accompanying a finding of acquiescence and connivance in such conduct, it seems appropriate to distinguish principal complicity and passive complicity in terms of the requisite standard of knowledge. The ECrtHR has demonstrated that these distinctions may be subtle. However, applying the threshold for passive complicity across the board would tend to dilute the prohibition on torture in the human rights context and bring developments out of line with parallel developments in the general law on State responsibility and international criminal law. The reinforcement of an accusation of responsibility against the US – a third State in the ECrtHR proceedings – at a minimum increases the likelihood that in time a type of judicial notice may be taken of the facts concerning the conduct of the main perpetrator of torture.[[132]](#footnote-132) It would not be right for the complicit States to bear full responsibility for the torture carried out by the third State. At the same time, further defining the contours of complicity under the broad human rights provisions allows the conduct of the accomplice to be brought out from under the shadow cast by the prime actor and exposed.

43. The prohibition on torture was well-established when the CIA’s HVD programme was introduced. US President Barak Obama held his successors to their international obligations when he said at a press conference following the release of the Senate Committee’s Report that ‘we have to, as a country, take responsibility for that so that, hopefully, we don’t do it again in the future.’[[133]](#footnote-133) It may be hoped as well that the ECrtHR judgments of *Al Nashiri*, *Husayn* and *Nasr*, despite the occasional absence of a roadmap in the reasoning, have the effect of enhancing, complementing and fueling the options for accountability, and that they can contribute towards putting the ghosts of the 21st Century’s ‘torturable class’ to rest.[[134]](#footnote-134)

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2. Shakespeare’s Richard III, Act 1, Scene IV. [↑](#footnote-ref-2)
3. See e.g. Soering v. United Kingdom, Judgment (Merits and Just Satisfaction), 7 July 1989, para. 88: ‘Article 3…enshrines one of the fundamental values of the democratic societies making up the Council of Europe’; Chahal v. the United Kingdom, Judgment (Merits and Just Satisfaction), 15 November 1996, para. 79. [↑](#footnote-ref-3)
4. Extraordinary rendition has been described as ‘a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals.’ D. Weissbrodt and A. Bergquist, ‘Extraordinary Rendition: A Human Rights Analysis’, (2006) 19 Harvard Human Rights Journal, Vol. 19, 123-160, 127. [↑](#footnote-ref-4)
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 39/46, 10 December 1984, in force 26 June 1987 (‘Convention against Torture’). [↑](#footnote-ref-5)
6. See Opening Statements by the US Delegation to the Committee against Torture, available at: <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_STA_USA_18815_E.pdf>. [↑](#footnote-ref-6)
7. Press conference by President Barack Obama, 1 August 2014, available at: <http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>. [↑](#footnote-ref-7)
8. Committee against Torture, CAT/C/USA/CO/3-5, ‘Concluding observations on the third to fifth periodic reports of United States of America’, released 28 November 2014, para. 11, available at: <http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_COC_USA_18893_E.pdf>. Due to its delayed public release, the report of an investigation by the Senate Select Committee on Intelligence into the CIA’s operations during the relevant period could not be considered by the Committee against Torture. UN News Centre, ‘UN rights experts urge US President Obama to release report on CIA torture allegations,’ 26 November 2014, available at: <http://www.un.org/apps/news/story.asp?NewsID=49451#.VHuGC9F0w3E> [↑](#footnote-ref-8)
9. ‘Concluding observations on the third to fifth periodic reports of United States of America’, ibid, para. 10, referring to General Comment No. 2, CAT/C/GC/2, ‘Implementation of article 2 by States parties’, 24 January 2008, para. 16. [↑](#footnote-ref-9)
10. In 2006, Dick Marty presented a report to the Committee on Legal Affairs and Human Rights of the Council of Europe’s Parliamentary Assembly alleging secret detentions and unlawful inter-State transfers involving more than 20 Council of Europe member States. Report dated 7 June 2006, available at:

    <http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf>. A subsequent report following an inquiry set up by the European Parliament and led by Claudio Fava concluded that the CIA operated over 1000 flights through European airspace between 2001 and 2005. See Press Release dated 14 February 2007, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20070209IPR02947&language=EN>. See also Crofton Black, ‘European Court finds CIA Tortured Prisoners at Polish Black Site’, Aljazeera America Opinion, 24 July 2014, available at: <http://america.aljazeera.com/opinions/2014/7/poland-cia-blacksiteeuropeancourthumanrightstorture.html>: ‘The judgment is remarkable and unprecedented, but the facts underlying it have long been in the public domain.’ [↑](#footnote-ref-10)
11. El-Masri v. The Former Yugoslav Republic of Macedonia, Judgment (Merits and Just Satisfaction), 13 December 2012 (‘El-Masri Judgment’). See also M. A. Orpiszewska, ‘El Masri v. Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program’, (2014) North Carolina Journal of International Law and Commercial Regulation, Vol. 39(4), 1165-1194. On proceedings in Germany, see P. Wilkitzki, ‘German Government Not Obliged to Seek Extradition of CIA Agents for ‘Extraordinary Rendition’: Comments on the El-Masri Judgment of the Cologne Administrative Court’, (2011) Journal of International Criminal Justice, Vol. 9(5), 1117-1127; L. T. Kagel, ‘Germany’s Involvement in Extraordinary Renditions and Its Responsibility under International Law’, (2007) German Politics & Society, Vol. 25, No. 4 (85), pp. 1-30. [↑](#footnote-ref-11)
12. The Court of Appeal eventually ordered the publication of information that included an admission that: ‘The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is not necessary for us to categorise the treatment reported, it could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities.’ The Queen on the application of Binyam Mohamed Respondent and The Secretary of State for Foreign and Commonwealth Affairs, Case No: T1/2009/2331, Court of Appeal (Civil Division), 10 February 2010. See also Alan W. Clarke, Rendition to Torture, Rutgers University Press, 2012, 94-103 and 167-169. [↑](#footnote-ref-12)
13. O. Bowcott and I. Cobain, ‘Ex-MI6 officer will not face charges over Libyan renditions’, The Guardian, 9 June 2016, available at: <https://www.theguardian.com/world/2016/jun/09/mi6-officers-not-charges-rendition-of-libyan-families-abdel-hakim-belhaj>. [↑](#footnote-ref-13)
14. Belhaj and another (Respondents) v. Straw and others (Appellants); Rahmatullah (No 1) (Respondent) v. Ministry of Defence and another (Appellants), Judgment (Supreme Court), 17 January 2017, [2017] UKSC 3. [↑](#footnote-ref-14)
15. Agiza v. Sweden, Merits, Committee against Torture, UN Doc CAT/C/34/D/233/2003, 20 May 2005. [↑](#footnote-ref-15)
16. Alzery v. Sweden, Merits, United Nations Human Rights Committee, Communication No 1416/2005, UN Doc CCPR/C/88/D/1416/2005, 25 October 2006, available at: <http://hrlibrary.umn.edu/undocs/1416-2005.html>. [↑](#footnote-ref-16)
17. Al Nashiri v. Poland, Judgment (Merits and Just Satisfaction), 24 July 2014 (‘Al Nashiri Judgment’), para. 517; Husayn (Abu Zubaydah) v. Poland, Judgment (Merits and Just Satisfaction), 24 July 2014 (‘Husayn Judgment), para. 512. [↑](#footnote-ref-17)
18. See e.g. Article 5 of the Universal Declaration of Human Rights, General Assembly resolution 217 A (III), 10 December 1948: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ [↑](#footnote-ref-18)
19. See e.g. Committee against Torture, General Comment No. 2, n. 8 above, para. 1; Prosecutor v. Mucić et al., IT-96-21, Judgment, Trial Chamber, 16 November 1998, para. 454: ‘the prohibition on torture is a norm of customary law. It further constitutes a norm of jus cogens, as has been confirmed by the United Nations Special Rapporteur for Torture. It should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances.’ Prosecutor v. Mucić et al., IT-96-21-A, Judgment, Appeals Chamber, note 225: ‘in human rights law the violation of rights which have reached the level of jus cogens, such as torture, may constitute international crimes.’ Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, para. 144: ‘the prohibition on torture is a peremptory norm or jus cogens. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.’ See further Erika de Wet, ‘The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law’, (2004) European Journal of International Law, vol. 15, no. 1, 97-121. [↑](#footnote-ref-19)
20. The Convention Against Torture had 161 parties as of 25 February 2017. Article 5(2) of the Convention provides: ‘Each State Party shall […] take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article. [↑](#footnote-ref-20)
21. See e.g. Article 8(2)(a)(ii) of the Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 (‘Rome Statute’). [↑](#footnote-ref-21)
22. For example, there is extensive evidence that torture has been used as a ‘weapon of war’ in Syria. Human Rights Council, A/HRC/31/CRP.1, ‘Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic’, 3 February 2016. [↑](#footnote-ref-22)
23. See e.g. Article 7(1)(f) of the Rome Statute (n. 20 above). [↑](#footnote-ref-23)
24. Article 2(b) of the Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III), 9 December 1948, includes ‘causing serious bodily or mental harm to members of the group’. [↑](#footnote-ref-24)
25. For example, on 21 November 2014, former Chilean air force colonels, Ramon Caceres Jorquera and Edgar Ceballos Jones were sentenced by a Chilean court for torturing General Alberto Bachelet in 1973, after he had opposed the military coup led by General Augusto Pinochet. See: <http://www.bbc.com/news/world-latin-america-30153086>. [↑](#footnote-ref-25)
26. M. Nowak and E. McArthur, The United Nations Convention against Torture, A Commentary, Oxford University Press, 2008, 1, 76. [↑](#footnote-ref-26)
27. General Assembly resolution 217A (III), 10 December 1948. [↑](#footnote-ref-27)
28. General Assembly resolution 2200A (XXI), 16 December 1966, in force 23 March 1976. Article 7 provides: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’. Implementation of the ICCPR is monitored by the Human Rights Committee. [↑](#footnote-ref-28)
29. General Assembly resolution 3452 (XXX)), 9 December 1975. [↑](#footnote-ref-29)
30. Article 4, Convention against Torture (n. 4 above). [↑](#footnote-ref-30)
31. Organization of American States, American Convention on Human Rights, Costa Rica, 22 November 1969, in force 18 July 1978. Article 5(2) provides: ‘No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. […]’ [↑](#footnote-ref-31)
32. Organization of American States, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67, in force 28 February 1987. [↑](#footnote-ref-32)
33. African Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), in force 21 October 1986. [↑](#footnote-ref-33)
34. Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863. Article 16 provides: ‘Military necessity does not admit of cruelty -- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.’ The International Committee of the Red Cross notes: ‘Although they were binding only on the forces of the United States, they correspond to a great extend [sic] to the laws and customs of war existing at that time.’ See Introduction on ICRC website, available at: <https://www.icrc.org/ihl/INTRO/110?OpenDocument>. [↑](#footnote-ref-34)
35. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, 21 October 1950, Article 147. [↑](#footnote-ref-35)
36. See e.g. Judgment of the International Military Tribunal at Nuremberg, [1946] 22 IMT 203, 261: ‘Prisoners of war were ill-treated, tortured, and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity’. [↑](#footnote-ref-36)
37. Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), 25 May 1993: Article 2(b) (grave breach), Article 5(f) (crime against humanity); Statute of the International Criminal Tribunal for Rwanda (as amended), 8 November 1994: Article 3(f) (crime against humanity), Article 4(a) (violation of Common Article 3 and Additional Protocol II); Statute of the Special Court for Sierra Leone, 16 January 2002: Article 2(f) (crime against humanity), Article 3(a) (violation of Common Article 3 and Additional Protocol II); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, 27 October 2004: Article 3(new) (breach of 1956 Penal Code), Article 5 (crime against humanity), Article 6 (grave breach). [↑](#footnote-ref-37)
38. Rome Statute (n. 20 above), Article 7(1)(f) (crime against humanity), Article 8(2)(a)(ii) (war crime in international armed conflict, Article 8(2)(c)(i) (war crime in non-international armed conflict). [↑](#footnote-ref-38)
39. Ireland v. the United Kingdom, Judgment (Merits and Just Satisfaction), 18 January 1978, para. 167; Akkoç v. Turkey, Judgment (Merits and Just Satisfaction), 10 October 2000, para. 115; Salman v. Turkey, Judgment (Merits and Just Satisfaction), Grand Chamber, 27 June 2000, para. 114; Ilaşcu and Others v. Moldova and Russia, Judgment (Merits and Just Satisfaction), 8 July 2004, paras 425-428. [↑](#footnote-ref-39)
40. Article 1(1), Convention against Torture (n. 4 above). The definition has four main elements: the involvement of a public official; the infliction of severe pain or suffering; an intention; and a prohibited purpose. See Nowak and McArthur, The United Nations Convention against Torture (n. 25 above), 75. [↑](#footnote-ref-40)
41. Akkoç v. Turkey (n. 38 above), para. 115. See also A. Reidy, ‘The Prohibition on Torture, A guide to the implementation of Article 3 of the European Convention on Human Rights’, Human Rights Handbooks, No. 6, Council of Europe, 2002, pp. 11-12, available at: <http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-06(2003).pdf>. [↑](#footnote-ref-41)
42. Aksoy v. Turkey, Judgment (Merits and Just Satisfaction), 18 December 1996, para. 64. [↑](#footnote-ref-42)
43. Prosecutor v. Mucić et al., Trial Judgment (n. 18 above), para. 470. Prosecutor v. Ntagerura et al., ICTR-96-46-T, Judgement and Sentence, 25 February 2004, para. 703: ‘Torture as a crime against humanity is the intentional infliction of severe physical or mental pain or suffering for prohibited purposes including: obtaining information or a confession; punishing, intimidating, or coercing the victim or a third person; or discriminating against the victim or a third person.’ [↑](#footnote-ref-43)
44. Article 7(2)(e), Rome Statute (n. 20 above): ‘Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.’ [↑](#footnote-ref-44)
45. Cryer et al., An Introduction to International Criminal Law and Procedure, Cambridge University Press, 2010, 252, comments that the ‘divergent treatment in the Elements must either be given a principled explanation or else regarded as an anomaly’. [↑](#footnote-ref-45)
46. See e.g. Prosecutor v. Mucić et al., Trial Judgment (n. 18 above), 473-474; Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, para. 594. [↑](#footnote-ref-46)
47. Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 470. [↑](#footnote-ref-47)
48. Ibid, para. 470(i). [↑](#footnote-ref-48)
49. Ibid, para. 470(ii). [↑](#footnote-ref-49)
50. See also Cryer et al., An Introduction to International Criminal Law and Procedure (n. 44 above), 252. [↑](#footnote-ref-50)
51. Article 7(2)(a), Rome Statute (n. 20 above). [↑](#footnote-ref-51)
52. Nowak and McArthur, The United Nations Convention against Torture (n. 25 above), 41. [↑](#footnote-ref-52)
53. Ibid, 77. [↑](#footnote-ref-53)
54. Ibid, 42-43. [↑](#footnote-ref-54)
55. Ibid, 44. [↑](#footnote-ref-55)
56. Ibid, 39. [↑](#footnote-ref-56)
57. Ibid, 78. [↑](#footnote-ref-57)
58. Ibid, 61. [↑](#footnote-ref-58)
59. Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 2007 ICJ Rep. 43, para. 167. Article 4(1) of the Convention against Torture (n. 4 above) mentions ‘complicity’, but, in contrast to the Genocide Convention, only in the context of a State’s obligation to criminalize participation in torture by individuals. [↑](#footnote-ref-59)
60. Nowak and McArthur, The United Nations Convention against Torture (n. 25 above), 42. [↑](#footnote-ref-60)
61. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission (2001), vol. II, Part Two, Ch IV. [↑](#footnote-ref-61)
62. See Al Nashiri Judgment (n. 16 above), paras. 213-240, listing ‘selected public sources concerning general knowledge of the HVD programme and highlighting concerns as to human rights violations allegedly occurring in US-run detention facilities in the aftermath of 11 September 2001’. Amnesty International and the International Commission of Jurists, which provided third-party comments, argued that by 2003 any State would have known of breaches of human rights by the United States as part of its rendition activities. Al Nashiri Judgment, ibid, para. 389. [↑](#footnote-ref-62)
63. It is sometimes also called the ‘Rendition Detention Interrogation Program’, ‘CIA secret detention programme’ or ‘extraordinary rendition programme’. Al Nashiri Judgment, ibid, para. 48. [↑](#footnote-ref-63)
64. Al Nashiri Judgment, ibid, para. 53. [↑](#footnote-ref-64)
65. Al Nashiri Judgment, ibid, para. 394. This is the established approach of the ECrtHR, see e.g. Ireland v. the United Kingdom (n. 38 above), para. 161; El-Masri Judgment (n. 10 above), para. 124. [↑](#footnote-ref-65)
66. Al Nashiri Judgment, ibid, para. 394. [↑](#footnote-ref-66)
67. Al Nashiri Judgment, ibid. [↑](#footnote-ref-67)
68. Al Nashiri Judgment, ibid, para. 161. The Court also found that Poland’s failure to provide requested evidence constituted a breach of Article 38 of the EConvHR. [↑](#footnote-ref-68)
69. Al Nashiri Judgment, ibid, para. 417; Husayn Judgment (n. 16 above), para. 419. [↑](#footnote-ref-69)
70. Al Nashiri Judgment, ibid, para. 440; Husayn Judgment, ibid, para. 442. [↑](#footnote-ref-70)
71. Al Nashiri Judgment, ibid, para. 441. [↑](#footnote-ref-71)
72. Al Nashiri Judgment, ibid, para. 442. [↑](#footnote-ref-72)
73. Al Nashiri Judgment, ibid, para. 442 (emphasis added). [↑](#footnote-ref-73)
74. Al Nashiri Judgment, ibid, para. 452. [↑](#footnote-ref-74)
75. El-Masri Judgment, (n. 10 above), paras 204, 211, and 222-223. [↑](#footnote-ref-75)
76. Al Nashiri Judgment (n. 16 above), para. 517. [↑](#footnote-ref-76)
77. Al Nashiri Judgment, ibid. [↑](#footnote-ref-77)
78. Al Nashiri Judgment, ibid. [↑](#footnote-ref-78)
79. Al Nashiri Judgment, ibid, para. 518. [↑](#footnote-ref-79)
80. Al Nashiri Judgment, ibid, para. 499. [↑](#footnote-ref-80)
81. Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Findings and Conclusions, Executive Summary, 3 April 2014, available at: <http://www.feinstein.senate.gov/public/index.cfm/senate-intelligence-committee-study-on-cia-detention-and-interrogation-program>. [↑](#footnote-ref-81)
82. P8\_TA(2015)0031, US Senate report on the use of torture by the CIA, European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA (2014/2997(RSP)), para. G. Broad measures were proposed such as a Parliamentary fact-finding mission involving all interested political groups to the EU Member States where CIA secret detention sites allegedly existed. A ‘Follow-up to the Resolution on the US Senate report on use of torture by the CIA’ (2016/2573(RSP)) was issued on 8 June 2016, calling for accountability in the aftermath of the release of the US Senate study in even stronger terms. [↑](#footnote-ref-82)
83. Nasr and Ghali v. Italy, Judgment (Merits and Just Satisfaction), 23 February 2016, (‘Nasr Judgment’), para. 175. [↑](#footnote-ref-83)
84. Nasr Judgment, ibid, para. 242; Al Nashiri Judgment (n. 16 above), para. 454. [↑](#footnote-ref-84)
85. Al Nashiri Judgment, ibid, para. 454. Extraordinary rendition was defined as ‘an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment’. [↑](#footnote-ref-85)
86. The language is borrowed from views expressed by Morocco during negotiations on the Convention against Torture. See Nowak and McArthur, The United Nations Convention against Torture (n. 25 above), 44. Another variation that has not so far been addressed by the ECrtHR has been proposed, namely ‘extraterritorial complicity’ involving the facilitation of acts of torture by another State in that other State. See M. Jackson, ‘Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction’, (2016) European Journal of International Law, vol. 27, no. 3, 817-830. [↑](#footnote-ref-86)
87. Agiza v. Sweden (n. 14 above), para. 13.2. [↑](#footnote-ref-87)
88. Alzery v. Sweden (n. 15 above), para. 11.2. [↑](#footnote-ref-88)
89. Mahmut Kaya v. Turkey, Judgment (Merits and Just Satisfaction), 28 March 2000, para. 115. [↑](#footnote-ref-89)
90. Case concerning the Application of the Genocide Convention (n. 58 above), para. 436. [↑](#footnote-ref-90)
91. Ilaşcu and Others v. Moldova and Russia (n. 38 above), para. 318. [↑](#footnote-ref-91)
92. Human Rights Council resolution 8/8, Torture and other cruel, inhuman or degrading treatment or punishment, 18 June 2008, http://ap.ohchr.org/Documents/E/HRC/resolutions/A\_HRC\_RES\_8\_8.pdf. [↑](#footnote-ref-92)
93. Cited in Al Nashiri Judgment (n. 16 above), para. 240. [↑](#footnote-ref-93)
94. Case concerning the Application of the Genocide Convention (n. 58 above), para. 420. See further Georg Nolte and Helmut Philipp Aust, Equivocal Helpers – Complicit States, Mixed Messages and International Law, (2009) 58 International and Comparative Law Quarterly 1-30, 7-10. [↑](#footnote-ref-94)
95. Case concerning the Application of Genocide Convention, ibid, para. 422. [↑](#footnote-ref-95)
96. See further N.H.B. Jørgensen, ‘Complicity in Genocide and the Duality of Responsibility’ in A. Zahar, B. Swart, G. Sluiter (eds), The Legacy of the International Criminal Tribunal for the Former Yugoslavia, Oxford University Press, 2011, 247-274, 268-270. [↑](#footnote-ref-96)
97. Case concerning the Application of Genocide Convention (n. 58 above), para. 436. [↑](#footnote-ref-97)
98. Ibid. [↑](#footnote-ref-98)
99. Parliamentary Joint Committee on Human Rights, Allegations of UK Complicity in Torture, 23rd Report of Session 2008-2009, 21 July 2009, para. 35, available at:

    <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm>. [↑](#footnote-ref-99)
100. The Report of the Detainee Inquiry, December 2013, Annex B: The Detainee Inquiry seminar on international and domestic law on torture, other ill-treatment, and complicity, para. 18, available at: http://www.detaineeinquiry.org.uk/2013/12/report-of-the-detainee-inquiry/. [↑](#footnote-ref-100)
101. See e.g. Prosecutor v. Tadić, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 229(iv); Prosecutor v. Ntagerura, ICTR-99-46-A, Judgment, Appeals Chamber, 7 July 2006, para. 370. [↑](#footnote-ref-101)
102. Prosecutor v. Mrkšić, Appeal Judgment (n. 18 above), para. 159. Article 25(3)(c) of the Rome Statute (n. 20 above) is arguably more stringent in providing that an individual may be liable for the crimes enumerated in the Statute if he or she ‘for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission’. It has been suggested in the limited ICC jurisprudence so far on aiding and abetting that knowledge of the criminal intent of others is insufficient for responsibility to be established. Prosecutor v. Mbarushimana, ICC-01/04-01/10, Confirmation of Charges, 16 December 2011, para. 274. See further on the relationship between aid or assistance for the purposes of State responsibility and aiding and abetting under international criminal law in the context of the arms trade: N.H.B. Jørgensen, ‘State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty’, American Journal of International Law, vol. 108, no. 4, 2014, 722-749. [↑](#footnote-ref-102)
103. Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-A, Judgment, Appeals Chamber, 26 September 2013, para. 436. [↑](#footnote-ref-103)
104. Ibid, para. 438, emphasis in original. [↑](#footnote-ref-104)
105. Ibid, para. 487. [↑](#footnote-ref-105)
106. A. Nollkaemper, ‘Complicity in International Law: Some Lessons from the U.S. Rendition Program’, (2015) Proceedings of the Annual Meeting (American Society of International Law), Vol. 109, Adapting to a Rapidly Changing World, 177-181, 180. [↑](#footnote-ref-106)
107. The Court noted that its ‘establishment of the facts is to a great extent based on circumstantial evidence, including a large amount of evidence obtained through the international inquiries, considerably redacted documents released by the CIA, other public sources and evidence from the experts and the witness.’ Al Nashiri Judgment (n. 16 above), para. 400. [↑](#footnote-ref-107)
108. C.f. Jackson, ‘Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction’ (n. 85 above), 829, who suggests that for the ECrtHR to apply the standard of substantial grounds for believing that there is a real risk of exposure to treatment contrary to Article 3 in relation to all forms of complicity would be ‘normatively preferable in its recognition of the gravity of the principal wrong’. [↑](#footnote-ref-108)
109. Poland was ordered by the ECrtHR to pay EUR 100,000 to Al-Nashiri and EUR 130,000 to Husayn. [↑](#footnote-ref-109)
110. See further Nollkaemper, ‘Complicity in International Law: Some Lessons from the U.S. Rendition Program’ (n. 105 above), 179, who states that although the ECrtHR seemed unimpeded, ‘[T]he question whether courts can adjudicate complicity allegations in the absence of the United States and other states involved is controversial’. [↑](#footnote-ref-110)
111. El-Masri Judgment (n. 10 above), para. 212. [↑](#footnote-ref-111)
112. Al Nashiri Judgment (n. 16 above), para. 457. [↑](#footnote-ref-112)
113. Agiza v. Sweden (n. 14 above), para. 9.4 [↑](#footnote-ref-113)
114. Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment, 15 June 1954, I.C. J. Reports 1954, 19. [↑](#footnote-ref-114)
115. As the Court found: ‘Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.’ Ibid, 33. [↑](#footnote-ref-115)
116. Ibid, 32. [↑](#footnote-ref-116)
117. See M. Scheinin, ‘The ECtHR Finds the US Guilty of Torture – As an Indispensable Third Party?’ EJIL Talk, 28 July 2014, available at: http://www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/. [↑](#footnote-ref-117)
118. Al Nashiri Judgment (n. 16 above), para. 508. [↑](#footnote-ref-118)
119. Abdul-Hakim Belhaj and The Rt. Hon, Jack Straw MP et al., Case No: A2/2014/0596, Court of Appeal, (Civil Division), 30 October 2014; Belhaj and another v. Straw and others, Supreme Court (n. 13 above). [↑](#footnote-ref-119)
120. Belhaj and another v. Straw and others, Supreme Court (n. 13 above), para. 11(i). [↑](#footnote-ref-120)
121. Ibid, para. 29. [↑](#footnote-ref-121)
122. Jackson, ‘Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction’ (n. 85 above), 820, citing El Masri Judgment, para. 206. The same author criticizes this approach in M. Jackson, Complicity in International Law, Oxford University Press, 2015, pp. 176-200. See also A. Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’, EJIL Talk, 24 December 2012, available at: <http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>: ‘the Court’s approach may allow us to say that if a state hands over a person to another state in the knowledge that the person is tortured, and stands by when that torture happens, it bears responsibility for the torture itself.’ [↑](#footnote-ref-122)
123. See also Jackson, Complicity in International Law, ibid, 132, arguing that complicity ‘articulates and condemns a common way that states and individuals participate in the principal wrongs of others’ and therefore it is ‘not a judgment that the individual or state committed the wrong, itself or through its agents’. [↑](#footnote-ref-123)
124. Al Nashiri Judgment (n. 16 above), para. 517 (emphasis added). [↑](#footnote-ref-124)
125. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (n. 60 above), Commentary to Article 16, para. 10. [↑](#footnote-ref-125)
126. Prosecutor v. Milutinović et al, Judgment, IT-05-87-T, Trial Chamber, 26 February 2009, Vol. I, para. 92. [↑](#footnote-ref-126)
127. Helmut Philipp Aust, Complicity and the Law of State Responsibility, Cambridge University Press, 2011, p. 396. [↑](#footnote-ref-127)
128. See further, Clarke, Rendition to Torture (n. 11 above). [↑](#footnote-ref-128)
129. C. Hope, ‘US risked losing its “moral authority” by using torture, says David Cameron’, The Telegraph, 9 December 2014, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11283835/US-risked-losing-its-moral-authority-by-using-torture-says-David-Cameron.html. [↑](#footnote-ref-129)
130. Human Rights Watch published a ‘List of Ghost Prisoners Possibly in CIA Custody’, see Al Nashiri Judgment (n. 16 above), para. 228. [↑](#footnote-ref-130)
131. P8\_TA(2015)0031, US Senate report on the use of torture by the CIA, European Parliament resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA (2014/2997(RSP)). [↑](#footnote-ref-131)
132. On the prospects for a truth commission, see F. Fabbrini, ‘The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Violations Committed in the Fight Against Terrorism’, (2014) Human Rights Law Review, Vol. 14, 85-106. [↑](#footnote-ref-132)
133. Press conference by President Barack Obama (n. 6 above). [↑](#footnote-ref-133)
134. See Graham Greene, Our Man in Havana, Heinemann, 1958: ‘Did you torture him? Captain Segura laughed. ‘No. He doesn’t belong to the torturable class.’ [↑](#footnote-ref-134)