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## Introduction

This book is prompted by the disquieting discourse on the legal and moral justifiability of torture in extraordinary or so-called ‘ticking bomb’ situations. From the literature on this discourse, there are three representative academic positions concerned with the question of providing for an exception to the prohibition on torture in such ticking bomb situations that merit review. First, the qualified torture prohibition proposes that there should be a legally accommodated exception to the torture prohibition in ticking bomb situations. Second, the pragmatic absolute torture prohibition proposes that the absolute torture prohibition must be maintained whilst allowing for the extra-legal use of torture in ticking bomb situations.<sup>1</sup> Third, the absolute torture prohibition, in line with international law, proposes that there can be no exception to the torture prohibition in any situation because the torture prohibition is an archetype of the rule of law.<sup>2</sup> Significantly, each of these proposals has in common a concern for the preservation of the rule of law in a crisis situation. The first and second proposals diverge from the third in attempting to regulate or accommodate exceptional torture. These proposals to regulate or accommodate torture are motivated not by torture advocacy, but by the view that torture would, or should, be used in such an exceptional situation.<sup>3</sup>

I argue that the ticking bomb scenario, which frames this debate on torture, signals the innate tension between the rule of law and the state of

<sup>1</sup> This language is adopted from Oren Gross’ extra-legal model, which will be used to exemplify the pragmatic absolute position. See Oren Gross, ‘Chaos and Rules: Should Responses to Violence Crises Always Be Constitutional?’ (2003) 112 *Yale Law Journal* 1011, 1099.

<sup>2</sup> Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681, 1742.

<sup>3</sup> Alan M. Dershowitz, ‘Tortured Reasoning’ in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004), p. 266; Oren Gross, ‘Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience’ (2004) 88 *Minnesota Law Review* 1481, 1520.

exception in the liberal democratic<sup>4</sup> or constitutional state and, in addition, that this scenario and the torture debate bear little or no relation to real situations in which torture occurs. Giorgio Agamben's theory of the state of exception is, therefore, placed within this discourse in order, first, to tease out why the proposals to regulate or accommodate torture in ticking bomb situations fail, normatively and theoretically, to resolve or adequately address the question of the use of torture in exceptional situations and, second, to theorise the space in which torture is actually practised in the liberal democratic state. By theorising this space, it is possible to broaden the frame for thinking about torture and for thinking about what it means to debate the justifiability of torture. In order to achieve this objective of reframing how we think about torture, it is necessary to understand what it is about torture that the ticking bomb scenario fails to represent; in other words, it is necessary to reveal the 'fiction' of the ticking bomb scenario. Borrowing the question from Darius Rejali, the book, consequently, asks: 'if it is a fiction, how does it exercise the power of a black hole in modern memory? How does it bend all argument to its narrative, preventing light breaking beyond the edges to the realities of torture?'<sup>5</sup>

### A. What is torture?

The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment defines torture in Article 1(1) as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining for 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

<sup>4</sup> By 'liberal democratic' state, I am referring broadly to pluralistic states in which the governing party is elected (at regular intervals) with the consent of the people and in which there is a check on executive power, a free and independent judiciary and a constitution or statute protecting core human rights and/or civil liberties. On the meaning of liberal democracy, see Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* 2nd edn (Oxford: Hart Publishing, 2012), p. 3; On the development of the liberal and of the democratic state and on human rights in the liberal-democracy, see C. B. Macpherson, *The Real World of Democracy* (Oxford University Press, 1966), pp. 4–11 and p. 57.

<sup>5</sup> Darius Rejali, *Torture and Democracy* (Princeton University Press, 2007), p. 547.

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at the 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.<sup>6</sup>

Torture, according to this definition, contains four elements: first, the element of severity; second, the element of intent; third, the element of purpose; and fourth, the involvement of, or acquiescence by, a state official.<sup>7</sup>

The Convention against Torture also contains a state obligation ‘to prevent ... other acts of cruel, inhuman and degrading treatment or punishment *which do not amount to torture*’.<sup>8</sup> This suggests that torture is, to use the words of the former European Commission on Human Rights, ‘an aggravated form’ of cruel, inhuman and degrading treatment or punishment.<sup>9</sup> In the *Greek Case*<sup>10</sup> the European Commission elaborated on the formula contained in Article 3 of the European Convention on Human Rights. Article 3 states: ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’.<sup>11</sup> The Commission reasoned that the term torture ‘is often used to describe inhuman treatment, which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is often an aggravated form of inhuman treatment’.<sup>12</sup> The Commission did not specify in the *Greek Case* that the term ‘aggravated’ was intended to mean a more severe level of suffering than the level of severity required for the treatment to be considered as ‘inhuman’.<sup>13</sup>

<sup>6</sup> United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, 113 Article 1(1).

<sup>7</sup> Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008), p. 28.

<sup>8</sup> Convention against Torture, Article 16(1), (emphasis added). As Nowak and McArthur have pointed out, the Convention against Torture does not contain a specific human right not to be subjected to torture or to other forms of ill-treatment. It is clear from the language of Article 16(1) that the Convention ‘only creates a State obligation to prevent cruel, inhuman or degrading treatment or punishment’. See Nowak and McArthur, *The United Nations Convention against Torture*, p. 540.

<sup>9</sup> *Denmark et al. v. Greece (The Greek Case)* (1969) 12 Yearbook of the European Convention on Human Rights, p. 186.

<sup>10</sup> *Ibid.*

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 3.

<sup>12</sup> *The Greek Case*, p. 186.

<sup>13</sup> *Ibid.* According to the Commission, ‘inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical.’

The European Court of Human Rights has, since the *Greek Case*, developed a rich jurisprudence on Article 3 of the Convention.<sup>14</sup> In deciding whether acts fall within the scope of prohibited treatment or punishment under Article 3, the Court requires ill-treatment to attain ‘a minimum level of severity’, the assessment of which is ‘relative’; ‘it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’<sup>15</sup> The three categories of prohibited ill-treatment – ‘torture’, ‘inhuman’ and ‘degrading’ – have been interpreted by the Court as overlapping but distinct.<sup>16</sup> The Court tends to distinguish torture from inhuman treatment in two ways. The Court attaches ‘a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’.<sup>17</sup> In addition, it follows the reasoning of the *Greek Case* and endorses the Convention against Torture’s definition of torture by emphasising the purposive element of torture.<sup>18</sup> However, although it is not uniformly the case, the Court does tend to rely on the severity of suffering as the decisive criterion.<sup>19</sup>

Reliance on the element of severity to differentiate torture from inhuman treatment obfuscates their distinction. Following Nigel Rodley’s approach,<sup>20</sup> it will be argued that purpose ought to be the distinguishing element.<sup>21</sup> Manfred Nowak, who also adopted this approach, further

<sup>14</sup> Fionnuala Ní Aoláin, ‘The European Convention on Human Rights and Its Prohibition on Torture’ in Sanford Levinson (ed.), *Torture: A Collection* (Oxford University Press, 2004), p. 213.

<sup>15</sup> *Ireland v. United Kingdom* (App. No. 5310/71) ECHR 18 January 1978, para. 162. See also Ní Aoláin, ‘The European Convention’, p. 217.

<sup>16</sup> Michael K. Addo and Nicholas Grief, ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights’ (1998) 9 *European Journal of International Law* 510, 511.

<sup>17</sup> See *Ireland v. United Kingdom* (1978), para. 167.

<sup>18</sup> See, for example, *Selmouni v. France* (App. No. 25803/94) ECHR 28 July 1999, para. 98; *İhlán v. Turkey* (App. No. 22277/93) ECHR 27 June 2000, para. 85; *Kişmir v. Turkey* (App. No. 27306/95) ECHR 31 May 2005, para. 129.

<sup>19</sup> See, for example, *Gäfgen v. Germany* (App. No. 22978/05) ECHR 1 June 2010, para. 108. See also, Nigel S. Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law* 3rd edn (Oxford University Press, 2010), p. 87; Steven Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law* (Antwerp: Intersentia, 2011), p. 199.

<sup>20</sup> Nigel Rodley served as United Nations Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment from 1993 to 2001.

<sup>21</sup> Nigel S. Rodley, ‘The Definition(s) of Torture in International Law’ (2002) 55 *Current Legal Problems* 467, 489. See also, Rodley and Pollard, *The Treatment of Prisoners*, p. 123. Rodley and Pollard take the position that ‘the purposive element is the sole or dominant element distinguishing torture from cruel or inhuman treatment’.

maintained that the powerlessness of the victim, in addition to the purposive element, is essential to understanding the distinction between torture and other ill-treatment.<sup>22</sup> Nowak has, consequently, asserted:

the decisive criteria for distinguishing torture from [cruel, inhuman and degrading treatment or punishment] may best be understood to be the purpose of the conduct and the powerlessness of the victim rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.<sup>23</sup>

By introducing the notion of powerlessness,<sup>24</sup> Nowak aimed to convey the point that subjection to torture presupposes a situation in which the victim 'is under the total control of another person'.<sup>25</sup> The purposive element approach to defining torture does not dispense with the element of 'severe pain or suffering, whether physical or mental'. It does dispense with the notion that torture constitutes a calibrated level of suffering, degrees beyond that of inhuman treatment.<sup>26</sup> Moreover, it emphasises that it is not the defined level of 'pain or suffering' that determines the paradigm of torture, rather that the paradigm of torture is different from inhuman or degrading treatment or punishment because of the context in which such pain or suffering is endured.<sup>27</sup> As such, the purposive element approach

<sup>22</sup> Nowak, who served as United Nations Special Rapporteur on Torture from 2004 to 2010, endorsed this position in his capacity as Special Rapporteur. See UNCHR, 'Report of the Special Rapporteur on the Question of Torture, Manfred Nowak' (2005) UN Doc. E/CN.4/2006/6, para. 39. See also Manfred Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 *Human Rights Quarterly* 809, 833; Manfred Nowak and Elizabeth McArthur, 'The Distinction between Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 16 *Torture* 147.

<sup>23</sup> UNCHR, 'Report of the Special Rapporteur: Manfred Nowak', para. 39.

<sup>24</sup> As Rodley and Pollard have observed, the concept of 'powerlessness' introduced by Nowak is not an element of the definition of torture and should not be understood as such. It is best understood rather as a 'factual description of the situation in which torture typically occurs', that is, when the victim is deprived of personal liberty or is under the effective physical control of the authorities. See Rodley and Pollard, *The Treatment of Prisoners*, p. 119, n. 192.

<sup>25</sup> UNCHR, 'Report of the Special Rapporteur: Manfred Nowak', para. 39. Similar to Nowak, David Sussman has argued that torture is distinguishable by its situational impact upon the victim. He described this not as powerlessness but as 'the experience of a kind of forced passivity in a context of urgent need, a context in which such passivity is experienced as a kind of open-ended exposure, vulnerability and impotence'. See David Sussman, 'Defining Torture' (2006) 37 *Case Western Reserve Journal of International Law* 225, 227.

<sup>26</sup> Rodley and Pollard, *The Treatment of Prisoners*, p. 124.

<sup>27</sup> In this regard, Marnia Lazreg has argued: '[i]t is the totality of the torture situation that needs to be grasped in order to understand that torture is not definable in terms of bodily

to the definition of torture provides a more accurate account of the phenomenon of torture.

## B. Torture and counterterrorism

The prohibition of torture is a fixture of international law that cannot easily be unravelled. The prohibition is one of only a few human rights provisions that permit of no limitation or restriction and no derogation even in times of war or other public emergency.<sup>28</sup> In addition, the prohibition on torture is widely recognised as a peremptory norm of international law or *jus cogens*.<sup>29</sup> The prohibition on torture is, by and large, uncontested; that is to say, no state argues that the use of torture ought to be generally permissible. The near-universal consensus in favour of the prohibition, reflected in its status as a peremptory norm of international law, a norm of customary international law and in numerous international and regional human rights treaties, shows a commitment to the normative rejection of torture. In spite of this commitment, however, the practice of torture persists; its prevalence is a conspicuous reminder of the gap between the norm and its realisation. In a report on the phenomena of torture, cruel, inhuman and degrading treatment or punishment as assessed in the five years of his mandate as Special Rapporteur, Nowak described the reality as ‘alarming’.<sup>30</sup> According to Nowak, the practice of torture and ill-treatment is widespread ‘in the majority of the countries on our

harm or psychological torment alone’. See Marnia Lazreg, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton University Press, 2008), p. 6.

<sup>28</sup> Nowak and McArthur, *The United Nations Convention against Torture*, p. v.

<sup>29</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* Judgment [2012] ICJ Reports 2012, para. 99; *Prosecutor v. Anto Furundzija* (Trial Judgment), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para. 144. See also Lauri Hannaken, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Lakimiesliiton Kustannus Finnish Lawyer’s Publishing Company, 1988), p. 508; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), p. 31; Erika de Wet, ‘The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law’ (2004) 15 *European Journal of International Law* 97; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006), p. 43.

<sup>30</sup> UNHRC, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Manfred Nowak: Study on the Phenomena of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention’ (2010) UN Doc. A/HRC/13/39/Add. 5, para. 9.

planet’.<sup>31</sup> Regarding the practice of torture specifically, Nowak concluded that, for the most part, torture victims are ‘ordinary persons suspected of having committed ordinary crimes’ and that ‘the major structural reason for the widespread practice of torture in many countries is the malfunctioning of the administration of justice and, consequently the lack of respect for safeguards’.<sup>32</sup> The pervasiveness of the practice is, according to Nowak, also due to it being used in ‘combating terrorism, extremism or similar politically motivated offences’.<sup>33</sup> This widespread practice of torture does not call into question the rationale of the universal norm; rather it emphasises the precise need for a blanket ban on torture, for widespread implementation and enforcement of the prohibition on torture and the Convention against Torture and for effective oversight and accountability mechanisms.

The contemporary discourse on torture is less concerned with the ordinary and everyday perpetration of torture and the struggle for its elimination. The torture discourse is fixated on the *exception* to the prohibition in *exceptional* circumstances. Frank Ledwidge and Lucas Oppenheim have pointed out that ‘much ink has been spilled on the question of whether torture is ever justified’ and, as a result, inadequate attention is currently paid to the practice of torture in many of the world’s criminal justice systems.<sup>34</sup> The question of whether torture is ever justified, to which Ledwidge and Oppenheim refer, is generally posed in the form of the ticking bomb scenario, the contemporary framework for thinking about torture.<sup>35</sup> There are countless variations on this ticking bomb scenario.<sup>36</sup> The construct posits a hypothetical situation in which an individual (or suspected ‘terrorist’) is in custody, and the authorities are certain this individual has the necessary information to prevent an impending attack that will claim the lives of many people. This individual

<sup>31</sup> *Ibid.*

<sup>32</sup> UNHRC ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Manfred Nowak’ (2010) A/HRC/13/39, paras. 69 and 71.

<sup>33</sup> UNHRC ‘Report of the Special Rapporteur: Manfred Nowak’ A/HRC/13/39/Add. 5, para. 9.

<sup>34</sup> Frank Ledwidge and Lucas Oppenheim, ‘Preventing Torture: Realities and Perceptions’ (2006) 30 *The Fletcher Forum for World Affairs* 165.

<sup>35</sup> UNHRC ‘Report of the Special Rapporteur: Manfred Nowak’ A/HRC/13/39/Add. 5, para. 43.

<sup>36</sup> For a collection of the various ticking bomb scenarios that have been proffered in the literature, see Yuval Ginbar, *Why Not Torture Terrorists? Moral, Practical, and Legal Aspects of the ‘Ticking Bomb’ Justification for Torture* (Oxford University Press, 2008), pp. 379–86.



is unwilling to talk, but the authorities believe – or are certain – that the information can be extracted under torture. The question that the hypothetical situation poses, therefore, is whether or not it is justifiable, excusable or otherwise legitimate to torture the individual. Within this ticking bomb framework, the appropriateness of the *absolute, non-derogable* torture prohibition in *all circumstances* is a matter of debate. This ticking bomb scenario is, on the one hand, a thought experiment presented in order to elicit an intuitive response to the question of whether or not torture ought to be applied. It may also be conceived as a rhetorical device presented in order to persuade the listener of the necessity for torture. On the other hand, the ticking bomb scenario is the touchstone used by states, in practice, for describing a set of circumstances in which the prohibition on torture is presented as unreasonably impeding the possibility of saving lives.<sup>37</sup> In essence, however, the ticking bomb scenario is a signal of the fundamental ‘tension’ between the rule of law and the exception.<sup>38</sup>

Since the events of 11 September 2001, in the context of counterterrorism, the torture prohibition has been called into question at a rhetorical level and defied in practice by a number of governments through their counterterrorism policies. The absolute and non-derogable character of the prohibition on torture, the definition of torture, the principle of non-refoulement and the non-admissibility of evidence extracted by torture are amongst the elements of the prohibition that have been undermined by the practices and policies of a number of states. Nowak has summarised the ways in which states have, since the events of 11 September, abrogated the prohibition on torture:

Even democratic governments contributed to the erosion of this fundamental principle of the international rule of law by adopting an extremely limited definition of torture, by openly advocating torture and/or ill-treatment as a legitimate measure of saving the lives of innocent people in the ‘ticking bomb’ scenario, by outsourcing torture to private companies and detention centres outside their own territory, such as Guantánamo Bay, by creating secret places of detention for suspected terrorists, by sending these individuals for interrogation purposes to countries known for their systematic practice of torture, sometimes on the basis of diplomatic

<sup>37</sup> Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/Knowledge’ (2006) 96 *Annals of the Association of American Geographers* 622, 623.

<sup>38</sup> Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan, 2003), p. 2. Hussain describes his study as engaging with the ‘tension between ... the requirements of the sovereign emergency and the constraints of the rule of law’.



assurances provided by such governments, by closely cooperating with intelligence agencies in other countries which apply torture to extract information from suspected terrorists and by various other means.<sup>39</sup>

Whilst Nowak acknowledged that *even* democratic governments have contributed to the erosion of the norm prohibiting torture, it is, in fact, from within liberal democratic states that arguments that contest the logic of the prohibition on torture have emerged. In particular, by advocating for a restrictive definition of torture, by approving the legality of lists of coercive interrogation techniques and by invoking the logic of the ticking bomb, attorneys for the United States government under the Bush administration attempted to carve out a space wherein practices that contravene the prohibition on torture could be considered acceptable.<sup>40</sup> The actual practice of torture and other ill-treatment, which, it is suggested, stemmed from this official discourse of arguing ‘away the rules of torture’, was brought into sharp focus by the conditions in the Guantánamo Bay detention facility and, in particular, following the publication of the Abu Ghraib photographs documenting apparent detainee abuse.<sup>41</sup> It is now well known that the United States, under the Bush administration, also made use of a system of secret detention and so-called extraordinary rendition; a system that Dick Marty has described as a global ‘spider’s web’.<sup>42</sup> Extraordinary rendition is contemporaneously commonly understood to refer to the extra- or non-judicial transfer of an individual from one state to another for the purpose of interrogation, where such interrogation is likely to be conducted through the use of unlawfully coercive methods, including torture, whilst the individual is in *incommunicado* detention.<sup>43</sup> The fact that this form of extraordinary rendition features

<sup>39</sup> Nowak and McArthur, *The United Nations Convention against Torture*, p. v.

<sup>40</sup> John T. Parry, ‘The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees’ (2005) 6 *Melbourne Journal of International Law* 516, 522. See also, Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor: University of Michigan Press, 2008), p. 5. The Bush administration’s policy with respect to the use of treatment that concerns the prohibition on torture, inhuman and degrading treatment or punishment can be traced in the declassified memoranda that have come to light since 2004. For a collection of the memos released up to 2005, see Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005).

<sup>41</sup> Greenberg and Dratel, *The Torture Papers*, p. xiii.

<sup>42</sup> Dick Marty, ‘Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States’, Council of Europe Doc. 10957 (12 June 2006), p. 9.

<sup>43</sup> See UNHRC, ‘Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and

the use of unlawful interrogation techniques for the ostensible purpose of intelligence-gathering distinguishes it from the preceding understanding of the term.<sup>44</sup> These practices of secret detention and extraordinary rendition were tolerated, and thus legitimised, by numerous other states. In June 2007, in a report submitted to the Council of Europe, Rapporteur Dick Marty found that the practice of secret detention and unlawful transfer was made possible because of the collaboration of a number of states, including several members of the Council of Europe.<sup>45</sup> Marty also confirmed that he had enough ‘evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and in Romania’.<sup>46</sup> According to Marty, his sources confirmed that Abu Zubaydah and Khalid Sheikh Mohamed were amongst the high value detainees held in secret detention and subjected to ‘enhanced interrogation techniques’ in Poland.<sup>47</sup> The United Kingdom continues to be

Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice Chair, Shadeen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin (19 February 2010) A/HRC/14/42, p. 3; David Weissbrodt and Amy Bergquist, ‘Extraordinary Rendition and the Torture Convention’ (2006) 46 *Virginia Journal of International Law* 585, 588 (describing extraordinary rendition as a euphemism for ‘abduction of terror suspects not in order to bring them to justice in the United States but rather to transfer them to a third country’); The Committee on International Human Rights of the Bar of the City of New York and The Center for Human Rights and Global Justice, ‘Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”’ (New York: NYU School of Law, 2004), p. 4 (defining extraordinary rendition as the ‘transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman or degrading treatment’).

<sup>44</sup> Extraordinary rendition originally referred to the covert practice of ‘obtaining’ individuals from other countries in order to stand trial in the United States. Parry, ‘The Shape of Modern Torture’ 529; Weissbrodt and Bergquist, ‘Extraordinary Rendition’ 586.

<sup>45</sup> Dick Marty, ‘Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report’, Council of Europe Doc. 11302 (7 June 2007), p. 3. In his original report Marty had found that Sweden, Bosnia–Herzegovina, the United Kingdom, Italy, the former Yugoslav Republic of Macedonia, Germany and Turkey ‘could be held responsible to varying degrees’ for violations of the rights of specific individuals who were victims of the extraordinary rendition programme. He also found that these and a number of other countries ‘could be held responsible for collusion – active or passive – involving secret detention and unlawful inter-state transfers of a non-specified number of persons whose identity so far remains unknown’. See, Marty, ‘Alleged Secret Detentions’, pp. 59–60.

<sup>46</sup> Marty, ‘Alleged Secret Detentions’, p. 4.

<sup>47</sup> *Ibid.*, p. 24.