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To cite this article: Ross W. Bellaby (2017): Extraordinary rendition: expanding the circle of blame in international politics, The International Journal of Human Rights, DOI: [10.1080/13642987.2017.1397634](https://doi.org/10.1080/13642987.2017.1397634)

To link to this article: <https://doi.org/10.1080/13642987.2017.1397634>



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Published online: 30 Nov 2017.



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Extraordinary rendition: expanding the circle of blame in international politics

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ABSTRACT

The United States Central Intelligence Agency (CIA) has been abducting individuals from across the world and flying them to other states with the knowledge, and even intent, that they are tortured in order to collect intelligence. Placing blame on the USA, or at least the CIA, in this case is therefore unproblematic. The capture, transportation or housing of an individual with the intent to inflict harm means that the USA has placed itself as a key actor and so can be directly blamed. However, claims can also be made against other states who aided in these rendition programmes by sharing intelligence, by allowing the use of their facilities or simply by being aware and not acting. Ascribing blame to these states is difficult as their involvement is often unclear, unnecessary or far removed from the activity itself. To better understand their involvement this paper will argue that complicity, and therefore blame, should not be considered so strictly, and that instead it is better to think of a spectrum of involvement. This allows a more flexible understanding of blame, making it possible to evaluate those who are more removed from the torture and in doing so argue that more states should be implicated than originally thought.

ARTICLE HISTORY

Received 14 March 2017
Accepted 12 October 2017

KEYWORDS

Torture; ethics; international relations; complicity; blame

Introduction

It is important to start with the position that torture is prohibited absolutely. While there are many important arguments on both sides of the debate regarding whether or not torture should be allowed, the first position of this paper is that it is prohibited ethically as well as in international and domestic law.¹ The extraordinary rendition programme developed by the United States Central Intelligence Agency (CIA), which systematically abducted people from locations across the world and transferred them to other countries to be interrogated in ways too extreme to have been allowed under any American jurisdiction, is therefore also ethically prohibited.² In this instance the ethical blame levied at the USA, or at least at the CIA, should be clear. The capture, transportation or detainment of an individual with the intent to inflict extreme levels of physical, psychological and emotional pain to gain intelligence means that the USA placed itself as a key actor in

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the harm caused and so can be directly blamed as a result.³ However, claims have also been made against other states that they aided in these rendition programmes, raising questions regarding the extent to which we should condemn those who aid, assist or are just aware of the rendition programme. Indeed, Swiss Senator Dick Marty, author of the Council of Europe's report *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, identified a complex 'global spider web' used for 'targeting, apprehending and detaining terrorist suspects', detailing a number of different states that have been involved in the rendition process in a variety of different ways.⁴ Ascribing blame to these states, however, is difficult when their involvement is temporally or causally distant from the torture.

This paper will argue that involvement, and therefore blame, should not be considered as strictly as it often is, but that instead it is better to think of a spectrum of involvement and therefore a spectrum of blame. There is too much focus on trying to allocate as much blame as possible on those who are causally closest to the harmful enterprise, when effort should also be allowed for different levels of blame to be attributed to those with varying degrees of involvement – even those at the periphery. That is, by being a link in the chain – whether before or after, necessary or not, with or without direct intent – should still be seen as being sufficiently involved and these states should face the consequences of aiding torture. Moreover, it will be argued that claims of ignorance are not sufficient protections in these situations: the intelligence community and state leaders are highly specialised and informed entities that should be aware of how their actions contribute to causing others harm or violate domestic and international law, and a lack of being duly informed about their involvement makes them as culpable as those who knew. By expanding the circle of perpetrators the blame is not diminished, but rather increases the number of those who should face the consequences. By arguing for a more nuanced understanding of blame this paper will claim that more states and their leaders should be implicated for the harm caused than originally thought.⁵ It is only by understanding who is to blame, and the nature and level of that blame in this way, that those harmed can begin to seek redress, whether this is compensation from states that contributed or punishment for those political and intelligence leaders who failed to act.⁶

The aim of the paper is to highlight how we determine who – whether state, institution or individual – should be morally blamed for the harms done by other actors. A key aspect of moral blame is determining who is responsible for the harm done to another and deserving of the blame, often as a means of forming the basis for measuring out the necessary level of punishment.⁷ Placing moral blame outside the immediate instigator is about understanding what relationship one has to the harmer and the harmed and how one's (in)actions are featured. To this end, domestic legal precedent – notably tort law on how to govern responsibilities between people and determining who is culpable for the harm done to another – can offer a way forward. By examining the legal processes and precedents involved and drawing out the underlying ethical principles found in domestic law, a new ethical framework can be advanced for determining which and to what degree actors in the international sphere should be blamed.⁸ This will involve working through three key questions: first, on the relationship between actors and what duties of care they create; second, what knowledge those involved had, or should have had, in terms of how their actions would cause others harm; and finally, the nature of one's involvement

in the harm done. Together, answers to these questions give a detailed picture of who is to blame for harm befalling another.⁹

What is known and what is argued: extraordinary rendition and blame

What is currently known about the CIA's rendition programme is largely the result of the pivotal work of those involved in The Rendition Project – a collaborative research project pioneered by Ruth Blakeley and Sam Raphael – who have worked alongside the charity Reprieve, the Bureau of Investigative Journalism and the efforts of European Parliament and Council of Europe to provide a substantial database of work.¹⁰ The Rendition Project has systematically worked through 'testimony from detainees, Red Cross reports, courtroom evidence, flight records and invoices' to demonstrate that not only was the whole rendition programme much more extensive than originally thought but the involvement of other states such as the UK was much greater.¹¹ The database details the CIA's rendition flights that collected and transported individuals to secret locations for abusive interrogation and indefinite detention, containing over 11,000 flights that are mapped according to their role in the rendition circuit, including 119 prisoners and over 60 rendition flights. What abuse was actually suffered by those rendered has since been outlined in excruciating detail in the *Senate Torture Report*, including (but not limited to) the use of rectal rehydration, violent rape, induced hypothermia, stress positions for extensive periods of time resulting in broken limbs, waterboarding, sleep, sensory and food deprivation, mock executions and 'coffin' sized incarceration.¹² At the centre of this torture network was the use of 'black sites': 'secret prisons built and run by the CIA with the acquiescence of host governments, wherein prisoners were held secretly for months or years on end, without access to legal representation or other contact with the outside world'.¹³ Most notable in Europe were those located in Poland, Romania and Lithuania that detained the 'most high-profile of prisoners' for 'months or years in secret' carrying out the 'most egregious abuses'.¹⁴ The network also relied on the outsourcing of the interrogation to other states, Egypt and Jordan for example, that are known for their use of torture, with the CIA directly organising the collection, transportation and questions to be asked once there.¹⁵ These different detention sites were then linked up through the CIA's rendition flights, often using civilian aircraft chartered by the CIA through dummy companies to facilitate the collection and transportation of detainees.¹⁶ The rendition circuit itself could then consist of several legs, including flying through several states' airspace, landing to refuel or exchanging prisoners between planes mid-circuit.¹⁷

While this therefore gives good evidence for those directly involved in the renditions, understanding the role of those on the periphery is more difficult. Indeed, Amnesty International has petitioned the Irish government to launch an inquiry into their involvement and failure to 'address overflights or landings of planes on rendition circuits'.¹⁸ While the UK has long denied any involvement in the rendition programme¹⁹ it was careful to frame its denial so that 'there was an emphasis on the restraining effects of the Americans and the legality of the operations' and that in those instances where they did know they did not offer any 'active assistance'.²⁰

Such ambiguity makes ascribing blame difficult, even though the topic of blame is itself nothing new. Indeed, legal scholars have spent considerable time and energy

devising methods to aid in outlining exactly who should be blamed for what and the repercussions they should face as a result.²¹ At the international level Erskine successfully argues for the state and its institutions as being moral agents which should be responsible as separate entities for their actions, which works well in establishing the foundation that states and their intelligence agencies are morally culpable actors who should be evaluated for their involvement in the harm done by others and that they should be blamed and punished accordingly.²² However, beyond this foundation the various literatures on blame and complicity – whether it be legal, international relations or applied ethics – are fraught with debates on where to draw the necessary lines, why that position is the correct one and what the implications are likely to be. Indeed, Dressler argues that the application of complicity as a concept is essentially a ‘disgrace’ and has resulted in inconsistent usages by international legal bodies.²³ One key problem is that complicity is often reduced to questions of causation, and a form of causation that emphasises a strict chain of events. Courts, for example, have often examined physical engagement as the main determining factor for complicity.²⁴ This is problematic for a few reasons. First is that this type of causality is often too strict, meaning that those at the periphery or even mid-point are ignored.²⁵ For example, Gardner, Lombard and Rabin each place the accomplice’s role as being a counterfactual; that without the second’s input the action would not have been able to occur.²⁶ This, however, fails to take into account acts of omission where those who fail to intervene should also be considered as being complicit in the activity, as well as those who might not be depended upon for the resulting harm but have made the process an easier journey. A second problem is that causality is taken as the only measure used to determine who is to blame when there are other factors that need to be included, namely the types of the relationships that exist between those involved and the knowledge that those involved do, or should, have. Indeed, Jamie Gaskarth argues that ‘level of *knowledge* on the part of the secondary party about the actions they are undertaking and *intent* in terms of wanting to assist the criminal purpose of the principal’ should be included.²⁷ These are important factors to consider as he argues that even if someone is causally involved they are not necessarily complicit, whereby ‘the shopkeeper who lawfully sells a knife should not be liable as an accomplice if the customer goes on to use it in a mugging’.²⁸ Their role is mediated if they did not intend or know that their actions contribute to the harm. However, while recognising that intent and knowledge are important factors, this paper will go further and argue that a lack of intent or lack of knowledge in and of themselves are not complete protections. Rather, for those who did not intend the harm they should have acted to undermine the primary’s efforts; while for those who did not know, the question is whether they should have known and whether a lack of investigation can make them equally complicit in the harm done.

A spectrum of blame

This paper will therefore argue for a much more flexible understanding of involvement and therefore blame. By breaking each of the factors involved – relationship to the harm, knowledge, intent and duty of care – into different ranks, multiple levels of blame, and therefore subsequent punishment, can be understood. In order to make

this argument the paper will use those principles that underpin tort law to create a more rounded and flexible framework for understanding an actor's involvement – one that is able to account for different causal contributions while integrating the different relationships and knowledge that these actors can have. For causality this means understanding different role types: from being a causal contributor to a non-causal contributor or even a non-causal non-contributor. In terms of the relationship, those who have a formalised and specific duty to protect someone face a greater level of blame when they fail this bond than someone who is unrelated, with no formal connection. In terms of required knowledge and intent, those who are fully informed about a situation face a greater degree of blame when they fail to act than those who had no knowledge and there is no expectation for them to have any knowledge on how their actions might cause harm; and where those whose intent is not reflected in an appropriate counter-action should be considered to have failed to act against the harmful activities of the primary enough to remove themselves from the blame.

The blame framework proposed therefore makes some key contributions to the wider field of international politics as it offers a means of going outside those immediately responsible for the harmful action. This allows for a wider scope in bringing cases against those involved, such that not only are states denounced but political leaders and directors of intelligence organisations should be held personally responsible and punished for the harms caused under their watch.²⁹ Specific duties of care attributed to particular individuals, for example, will mean one can move away from blaming whole states for human rights abuses (and having the blame distributed across different state institutions, thus diminishing it to nothing), and start attributing blame to authorising individuals and demand an appropriate punishment (whether criminal or civil) of those in positions of power at the time.³⁰

By exploring some hard cases regarding Europe's involvement in the extraordinary rendition programme, it will be possible to understand the proposed spectrum of blame better while also giving detailed statements on the type of blame these states should face as a result of their (in)action. In order to achieve this the paper will systematically work through the same processes the courts do when tackling such questions, examining the tort law criteria of duty of care, foreseeable foreknowledge and proximity to the harm. The spectrum established will build upon these existing legal procedures in order to provide key tools for processing existing questions of blame.

Duty of care

The first step in determining whether someone, or indeed some organisation, is blameworthy for a harm caused to another is understanding what relationships are involved and whether they create a particular moral bond that then establishes a duty of care on those involved. This is important because some relationships or roles can carry with them a greater set of duties than others, and depending on the failure to fulfil these duties the level of blame can change. These relationships can be created and defined by the roles, ranks or professions those involved hold, often carrying varying additional standards of care.³¹

At the most general level, individuals have a duty to not cause others harm through their (in)actions, where all must take reasonable care in their actions or omissions so as not to cause harm to others proximate to them.³² Second, separate ‘professional negligence’ (the failure to fulfil one’s professional obligations) exists for those who belong to a specified profession that comes with its own set of ethical standards and whose members are expected to have higher than average abilities, knowledge or training. Indeed, in legal terms the Bolam Test, established in *Bolam v Friern Hospital*, sets down how those acting as professionals providing services – from surveyors and estate agents to doctors, solicitors, accountants, financial services providers, information technology professionals, patent agents, etc. – are to be judged by the standards of their profession as a whole and the duties of care they have towards particular individuals.³³ This means that they are placed under a separate, higher set of expectations. The duty of care also includes the more specific duties of professional rescuers – such as doctors or life-guards – to aid those in harm’s way or who have been harmed.³⁴ For example, emergency responders such as paramedics, firefighters and police officers have a duty to respond to and rescue those members of the public that require their assistance. A third type of duty to care is created when a ‘special relationship’ between the two actors exists, when one party takes on the responsibility for the other through a care-giving role or relationship of trust. For example, parents have a special relationship with their minor children, as do common carriers with their patrons, spouses with each other and property owners towards invitees.³⁵ Fourth, there is a particular duty to aid those harmed when the actor has himself created a hazardous condition that can harm others.³⁶ Finally, there is a duty of care when dangerous acts are committed by a third party on an actor’s property which he knew about, or should have known about, and did not take reasonable steps to prevent it.³⁷

Equally important are relationships established through a hierarchical structure. The chain of command, for example, details the responsibility that a senior individual has for the actions of those beneath. As Walzer notes, ‘officers take on immense responsibilities, unlike anything in civilian life ... the higher their rank, the greater their reach of their command, and larger their responsibility’.³⁸ As people are put in charge over others this creates a relationship where the superior has a moral obligation to protect the subordinate in return for fealty. Importantly, there is also an obligation for those higher up a chain of command to actively know and take responsibility for the actions of those beneath them, and to ensure that those individuals for whom they are responsible are behaving accordingly. That is, leaders have an obligation to ensure that those under them are suitably trained and informed and that they obey the rules, and to prevent or punish anyone who fails to meet the expected standards. Indeed, command responsibility as understood in international law and the International Criminal Court holds the commander culpable for the crimes of their subordinates.³⁹ For example, the command responsibility provisions of the International Criminal Tribunal for the former Yugoslavia and International Tribunal for Rwanda statutes, Articles 7(3) and 6(3), respectively, state

that a person possessing command authority, whether as a civilian or military leader, may also be responsible for crimes committed by his subordinates if the leader fails to prevent the crimes or fails to punish the crimes once they occur.⁴⁰

This means that those in positions of authority have a responsibility to prevent the harmful actions of and/or punish those within the realm of their authority for the harms that they cause.

In order to understand the type of relationships involved and the duty of care created, key questions can be asked, including how do actors relate to one another; what type of actor are they; what roles do they have in relation to each other and do these roles establish any special expectations. The answers to these questions can then detail the duties created and how they differ in their quality, ranging from very general relationships established through some implicit participation in a cultural, moral or legal norm, to specific relationships where obligations are clearly defined and codified.

What is important is that there is a relationship, a bond, between actors that creates a duty of care on one or both of them, and that when one fails in fulfilling the associated obligations one can be blamed for the harm that ensues. What this means for state activity is that it is necessary to understand how its activities, institutions and representatives relate to others: whether the individual harmed is a citizen and so has a duty of care afforded to them through the social contract whereby people give up their absolute freedoms in exchange for the protection of the state from harm; or if the state's own actions create a bond of care to those impacted by their conduct; or whether there is an obligation created through the physical control they exert over their territory and the obligation they take on as hosts. For state institutions and professionals – whether political, military or civil – the question is whether they are adhering to the standards and additional duties expected of their particular rank, position or role, guaranteeing that the actions of their organisation and those subordinate to them are correct, and preventing or punishing any shortfall that could cause others harm. From this, distinctions can be drawn between those professional leaders of the different intelligence organisations who have a duty to ensure that their own subordinates are acting accordingly, and political leaders who hold responsibility over these institutions, and the general duty that the state acts according to ethical and legal norms.

In terms of the spectrum of blame it can be argued, therefore, that at the weaker end of the spectrum, where the lowest level of blame would be ascribed, the type of bonds involved could include those created by broad relationships between all individuals to take care not to cause harm to others.⁴¹ Above this level are those relationships between more specific actors (both individuals and organisations) where clearer obligations are laid down for the one in a position of authority. In this middle part of the spectrum are those in a general position of authority or jurisdiction, with clear relationships but where the agreement might be entered into tacitly and/or delineated through some domestic or international law that can be applied in a variety of different situations – for example, the relationship between the state and its citizens where state institutions are obligated to protect civilians.⁴² Above this are those relationships that are then very specific, created by a contract that one or both sides enter into through their own action, often ascribing particular duties to specific people.⁴³ At this top end there are those who have a clear, direct and empowered relationship over another with a clear set of responsibilities and can, therefore, face a significant degree of blame when they fail to fulfil their role (see [Table 1](#)).

Table 1. Actor relationships and duties created.

Level of blame	Low	Low/medium	Medium/high	High
Relationship between actors	<ul style="list-style-type: none"> Bond between standard individual 	<ul style="list-style-type: none"> Low organisational position Duty towards those with whom one has a tacit/implicit agreement 	<ul style="list-style-type: none"> Role/professional responsibilities Explicit agreement 	<ul style="list-style-type: none"> Dependents Directed and specified duty to care for relationship Position of authority and power over another
Duty created	<ul style="list-style-type: none"> General interpersonal norms to not cause others harm 	<ul style="list-style-type: none"> Duty to act professionally towards 'clients' and 'co-workers' Broad legal obligations to classes of individuals defined by role 	<ul style="list-style-type: none"> Professional obligations and explicit duties Duty towards those within one's care/trust 	<ul style="list-style-type: none"> Ensure those within one's care are protected and act accordingly

Foreseeable foreknowledge

In order to ascribe blame to those involved it is also necessary that they were able to foresee, or should be expected to have foreseen, the harm. This relies on temporal awareness and relevant knowledge: that, first, in order for an individual to be blamed it must be assumed that the repercussions of his (in)actions are not so far in the future that it would be unreasonable for him to foresee the impact of the decisions he makes in the present. Quite simply, individuals are only capable of judging so far into the future, and so it is unreasonable to expect them to calculate the consequences of their actions *ad infinitum*. And, second, that the individual possesses the knowledge required to make the necessary calculation, including the physical capacity to make a rational choice as well as to retain the relevant facts.⁴⁴

Understanding the balance of blame therefore depends on what role or position an actor has and the responsibility to be informed that it creates. For example, those higher up the chain of command are bestowed with the responsibility to be aware of what happens beneath them. Ranks or positions in society can also delineate the additional resources and information that these individuals have as compared to the standard individual. For example, a low-ranked individual would be privy to a limited amount of information on what was occurring, and only within their direct realm, and so it would be unreasonable to expect them to know more, whereas someone with seniority has a greater responsibility to know what is going on, has greater resources to find out what occurring, and is more likely to have a wider understanding of events. Moreover, claiming a simple lack of knowledge is not sufficient. In *Francis v. United Jersey Bank*, a director was held personally liable for not reading the firm's financial statements as she had failed in her responsibility to have all the relevant information she would need to make a full and rational decision.⁴⁵ Essentially, those in a position of authority or responsibility are bound with the obligation to be informed and to investigate all of that which is within their care. Indeed, different state institutions have divided areas of responsibility and as such are charged with the requirement of ensuring that those areas are covered. Therefore, those on the bottom rung have no duty to investigate what is outside their direct realm or above them, whereas the leader of a group or organisation should ensure they are as informed as possible. What this means is that it is possible to highlight not only institutions that should be blamed, but also individuals within those institutions. Institution

Table 2. Position and expected knowledge and action.

Level of blame	Low	Low/medium	Medium/high	High
Role, position, rank	Standard individual	Lower level employee	Middle management	Leadership, representatives, authority
Knowledge expected	<ul style="list-style-type: none"> • Standard knowledge of facilities/capabilities • Aware of how their actions impact others 	<ul style="list-style-type: none"> • Standard professional training • Aware of the impact of own actions on others • Aware of subordinate actions 	<ul style="list-style-type: none"> • Aware of subordinate actions • Aware of how the professional decisions made can impact those outside the organisation 	<ul style="list-style-type: none"> • Aware of subordinate actions • Aware of the whole organisation's activities and potential harm to those within and outside the organisation

leaders have a duty to ensure that their organisation is acting ethically, and when it fails they can be held personally liable. This would allow for a greater understanding of how to actually ascribe blame: that senior management or indeed political leaders who authorise such operations (or fail to prevent them) should face personal liability and therefore punishment for the harm caused.

What this criterion does, therefore, is to again highlight the obligation of those in positions of authority to ensure that they are suitably informed and trained. For the state and its institutions this means that those in a leadership position or rank have an obligation to be informed on what their subordinates are doing and to be aware of how the actions of either the state generally or their own organisation specifically can cause others harm. Again, it can be seen that intelligence agency leaders should be informed on their own subordinates and the impact of their own organisation's activities, while political leaders should be informed on how the activities of the state as a whole can cause harm. Political leaders cannot claim plausible deniability whereby the intelligence community protects the executive from blame by withholding information and politicians ask no questions; there is a duty to be informed and failure to be so still makes them blameworthy (see [Table 2](#)).

Relationship to the harm

Finally, understanding how one's (in)activity is connected to the harm caused is also of vital importance. The relationship between actors and the harm caused is important as it details 'in both criminal law and in ordinary ethical thought ... ways one person can be liable ... for bad things ... done through the agency of another'; it gives details on how one's (in)actions feature while illustrating whether and how an actor was living up to their duty of care.⁴⁶ This is, however, a difficult topic, made more so by a rather diverse taxonomy used throughout the literature, with terms sometimes used interchangeably and without care to delineate the different levels of blame that each contribution would represent.⁴⁷ Indeed, 'aiding and abetting', the mainstay of legal terminology, is too broad to cover the necessarily different forms of procuring, causing, inducing, failing to prevent, permitting, enabling, persuading, allowing, participating, being an accessory, being a dependant, contributing and sanctioning. It can be argued that each of these terms offers a morally distinct role and so can be used to delineate a spectrum of complicity

that can outline different levels of blame. Depending on the nature of one's involvement one can be held more or less to blame, or even excused from moral blame. For example, the nature of the blame they face would be different if they were the person pulling the trigger, or were a witness to someone else pulling a trigger, or were forced to pull the trigger by a threat to their own life. Thus, the complicity criteria detail not only the nature of the level of blame but also who should not be blamed. However, the traditional understandings of one's relationship to the harm done by others relies too heavily on strict causal conceptions of complicity whereby one should have either a causal or a contributory involvement. Instead, it will be argued here that even those who have a non-causal, non-contributory relationship should face some degree of blame.

At the top end of the spectrum are those actions that have a direct contributory role, close either temporally or by an uninterrupted chain of events; this is Gardner's strict causal links or what Goodin and Lepora refer to as co-principles.⁴⁸ Gardner, for example, argued that someone leaving a baby locked up in a house with no food for a month killed the child by failing to feed her. However, if an individual fails to prevent someone else from poisoning a child then Gardner argues the causal link is mediated by someone else's act of killing.⁴⁹ This strict understanding of complicity requires a situation where the principal 'would not have committed her wrong but for the accomplice's intervention'.⁵⁰

A section down, but still facing a significant degree of blame, are what Lombard refers to as 'enabling acts', or necessary but not on their own sufficient factors: 'setting the circumstances necessary for someone else to cause the harm ... leaving the key in the ignition',⁵¹ or a 'match being dry is a condition that makes it possible for it to light when struck, but it was not the cause of the flame'.⁵² This would include direct aid, persuasion, facilitating or directly contributing within the chain of events.

A step below this includes Kutz's causal influences, whereby one's role is not necessary but plays a not unimportant step within the chain of events. The situation Kutz presents is,

If a criminally-minded acquaintance is debating whether to burgle a house, [and] I tell him I know of a fence who can help dispose of the loot, and this consideration is dispositive in his deliberations, then I causally contribute to his act.⁵³

The accomplice's role is not necessary, yet its contribution increases the likelihood or makes easier the harmful end and so should be seen as playing an important role. This section includes advice, persuasion, sanctioning and promoting, whether through direct encouragement, permitting the activity or failing to prevent the activity when it is within one's clear ability to do so. Both of these types of involvement are non-causal contributing factors because while they are not the reason for the harm done they are directly contributing to it being achieved.

However, this paper will push the concept of complicity further by arguing that non-causal non-contributions should also be included. Non-causal non-contributions are those (in)actions that are connected to the harm yet could not be considered to be a cause, participation or contribution. These non-causal non-contributions argued for here are designed to capture those acts where the actor has failed to act, and while the failure did not make the causing of the harm easier, neither did it make it harder. Not-acting is not necessarily the absence of action, but the active prevention of acting; the decision not to act. For example, watching someone drown, or being drowned, and not

jumping in to save them does not make them drown any more quickly nor does it prevent others from jumping in and saving them; one's non-action does not make the drowning more likely – but nor does it make the harm done less likely. This is a deviation from the Anglo-American legal tradition where someone cannot be held liable for watching some else drown and not acting: 'law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him'.⁵⁴ Rather, it moves towards the European continental position that failure to rescue someone from imminent death is blameworthy: by Article 222-6 of the French Code Pénal, liability is imposed on 'anyone who wilfully refrains from helping and assisting a person in danger, when he could have done so or caused others to do so without risk to himself or third parties'.⁵⁵ The argument therefore is that by not making the road harder when one reasonably could, the road is in fact made easier, meaning that one thus becomes involved and is therefore complicit. This includes acts such as unnecessary aiding after the fact, remaining passively neutral and failing to protest, where all such (in)actions would have no real bearing on the realisation of the end result, but where action could, at least minimally, have forestalled it. In the case of unnecessary aiding after the fact, for example, when the aid could be equally sourced elsewhere and so lack of aid would have no real impact, the individual still makes themselves personally morally culpable by being involved. They are still in the chain of events, even though they come after, and have made the process easier overall by failing to make it harder. Equally, staying neutral makes the process easier for the perpetrators because there is no resistance to their actions, an ease which makes those who should have protested culpable. This means we can distinguish between non-involvement and inaction. Non-involvement is where the actor, due to a lack of knowledge or the expectation of knowledge, or lack of a bond that creates a direct duty of care, is not involved and so their non-involvement is not related to the harm because they were not aware that their action was required; whereas inaction is where the actor is actively making their non-involvement clear by actively not-acting. Therefore, passive awareness can be a form of assent or support for an act, which means that the actor's non-action's assent is contributing to the harm done. Falling at the bottom of the spectrum, this means staying neutral can be connected; that failure to act or protest is an instance where the actor's inaction means they have failed to prevent the harm and, even though their action would not have contributed to the avoidance of that harm, in doing so they are still connected to the event and so should be blamed.

In order for one to not be seen as facilitating the harm done one must act counter to the intentions of the harmer. Each actor still has an obligation to ensure that their own actions are, at least, not connected to the harm, and, moreover, have the minimum requirement to raise awareness of the harm by protesting or actively disentangling oneself. There are two aspects to this. The first is the prospect that public disentanglement might possibly diminish the likelihood of the harmful end being realised. This would be a contribution to the avoidance of the harm. However, even if this is not possible or even if public denouncement is not likely to have any effect, then the actor should still actively disentangle themselves to ensure that they are not included and so do not suffer from the moral taint. Therefore, if the situation is such that actors are involved by being aware of the harm or by there being some relationship, then they should actively move to separate themselves from the event even if that separation will have no effect. Otherwise they will become morally tainted by the connection, no matter how thin.

Table 3. Activity types and the relationship to harm.

Level of blame	Low	Low/medium	Medium/high	High
Relationship to harm caused	Non-causal non-contributors	Non-causal contributors	Non-causal contributors	Causal contributors
Activity examples	<ul style="list-style-type: none"> • Failure to protest • Passive assent • Unnecessary aid after the fact 	<ul style="list-style-type: none"> • Causal influencers • Sanctioning • Unnecessary contributions 	<ul style="list-style-type: none"> • Enabling acts • Necessary but not sufficient 	<ul style="list-style-type: none"> • Direct causal links • Co-principles • Necessary and sufficient

Finally, a connected question is what intent there was behind the contribution.⁵⁶ While Kadish argues this intent can be vague⁵⁷ and David Luban struggles with distinguishing between the actually innocent, those who purposefully hide their heads in the sand like an ostrich, and those who set up plausible deniability like a fox,⁵⁸ it will be argued here that although intent is important, it must be actively reflected in the activities of the individual. I argue that claiming a lack of intent or maintaining a neutral stance is insufficient, and if one intends that no harm should be caused one must demonstrate this through actions that physically challenge the efforts of the primary actor. Therefore, given that even non-causal involvement can be seen as a connection to the harm-doer, in order to ensure that one's (in)actions are a reflection of one's desire to cause no harm then an actor must go in the opposite direction: they must undermine the efforts of the harm-giver, whether physically or symbolically. This effectively raises the bar significantly, and means that as long as it does not endanger them there is a duty for people to act lest they become complicit in the harm done by another.

Using these understandings of the duty of care, foreknowledge and proximity to the harm, it is possible to create a spectrum of interweaving factors that distributes the blame along it. For example, those whose actions have a high proximity to the harm caused, where someone has a specific duty to ensure those harmed were protected and knew how their actions would contribute, should face a greater degree of blame than those who were a contributory but non-causal factor and were only vaguely aware or in a general position of responsibility; but those at the latter level would still face a greater level of blame than those who were on the bottom rung of the institutional ladder with little knowledge, impact or opportunity to protest (see Table 3).

Aiding the transfer: fly-bys, stopping-off points and watching posts

Compared to those easy cases where an actor has directly involved himself in the renditions process – the apprehension, transfer or end point, for example⁵⁹ – the cases discussed here are where the duty of care, expectation of knowledge or relationship to the harm is unclear. The first set of cases examined include states that allowed the use of their airspace or airports to facilitate the rendition process – whether before, during or after the actual torture – or those who were aware but failed to act. This includes, firstly, ‘stopover points’ used after or before the rendition has occurred (where the plane would set down, on its way out or on its way home, to refuel), which were reported to include airports in the UK, Ireland, Portugal and Greece.⁶⁰ For example, *The Guardian* reports that flight records from the US Federal Aviation Administration specify that the UK was acting as a refuelling station for the CIA's rendition programme. In 2013, *The Guardian* informed

on a report by the Open Society Justice Initiative that named 54 foreign governments that participated in the CIA programme. This included Finland, Ireland and Denmark allowing the use of their facilities to transport suspects; while Sweden arranged for suspects to be flown directly to Egypt; and also the CIA had carried out operations through the UK numbering 'at least 210 times since 9/11' involving '19 British airports and RAF [Royal Air Force] bases, including Heathrow, Gatwick, Birmingham, Luton, Bournemouth and Belfast'.⁶¹

Secondly, 'staging points' are places from which operations were launched, and include Spain, Turkey, Germany and Cyprus. This includes cases involving Martin Mubanga in April 2002, Abu al-Kassem Britel in May 2002, Mohammed Slahi and Binyam Mohamed in July 2002, and Adduh Ali Shaqawi and Hassan bin Attash in January 2004.⁶² Thirdly, 'one-off pick-up points' are those places from which the target is captured, though not necessarily with the host state's consent or as part of a systematic occurrence. For example, judge Chiara Nobili of Milan signed the arrest warrants for 13 CIA operatives who are suspected of seizing an imam named Hassan Mustafa Osama Nasr, also known as Abu Omar, as he walked to his mosque for noon prayers on 17 February 2003.⁶³ Other examples include the picking up of detainees in Sweden, Gambia, Macedonia, Italy and Bosnia and Herzegovina for rendition or unlawful transfer.⁶⁴ In each of these cases it has been reported that torture was used on those involved.

In order to determine the extent to which these additional legs of the rendition circuit were culpable for the harm that was caused in the middle, it is important to understand whether there is a duty of care placed on the host state creating a duty to act, especially in those cases where the target was not actually on board. The answer is one of jurisdiction. Jurisdiction as a concept can simply be understood as the sphere over which one has control, a position that establishes a particular relationship between those within the bounded area and those who are bestowed with authority over it. Indeed, the Convention Against Torture makes it explicit that it expects states to ensure that their territories are free from any implication of torture:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences ... (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State.⁶⁵

For those instances, therefore, when the individual was on board, it can be argued that the state had a duty to act and protect him from any subsequent torture. This duty falls well within the Convention Against Torture's Article Three, which states 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'.⁶⁶ The level of care expected in this instance is therefore significant: as host the state has an explicit and general duty of care towards those individuals on the plane that they will not be harmed or go on to be harmed; there is a relationship of trust that individuals who fall within the state's jurisdictional boundaries will be afforded the state's protections. Furthermore, this is specifically the duty of the intelligence community as a specialised and directed profession whose role is to protect the state and its security interests.

Furthermore, it can be argued that in those cases where the plane was on the way to or returning from a rendition operation, the state had an obligation to detain those involved:

'Each State Party shall likewise 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'.⁶⁷ States have an obligation to ensure that those who are within their jurisdiction, no matter how fleetingly, are subjected to their rules and norms. Moreover, it can be argued that states have an international jurisdiction through their actions on the international stage. That is, when states operate on the international stage, regardless of whether this is viewed in terms of being part of an international society or as an archaic free-for-all, when their interactions impact on others this creates a form of relationship. Indeed, in *Donoghue v Stevenson* in 1932, a key case establishing the duty of care in questions of liability, Lord Atkin writing for the majority argued that relationships can include any

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁶⁸

This means that when one's actions impact on another, a relationship is created and from this a duty of care that is quite significant. Therefore, in all three instances of facility use – 'stopover points', 'staging points' and 'one-off pick-up points' – the duty of care features at the high end of the spectrum given the state's duty towards those individuals on board the plane as hosts, and even when the plane is empty a duty of care is created when their decision to not intervene will negatively impact others.

Next, being able to foresee the harm caused in cases of extraordinary rendition breaks down to a set of questions regarding, first, whether those who should have known knew; second, if not, should they have asked; third, if they did indeed ask, should they have believed the answer; and fourth, do their actions reflect their claims of intention. From looking at the UK's own government report, it was claimed that they did not know that their airspace or airports were being used. The Director General of the Security Service told the Rendition committee that 'We have no knowledge of any detainees being subject to rendition through British territory since 9/11; nor have we helped any "Extraordinary Renditions" via UK airspace or territory'.⁶⁹ Moreover, given the routine sharing of resources between the two states (the US and the UK), the Director General continues that this would mean there was no clear moment when permission was sought and therefore rejected by the UK.⁷⁰ If this is the case then an argument can be made that given the fleeting time on British soil, there would be no real reason for the UK government to be aware of what was going on and so could not necessarily be held liable for their role in the harm that was caused. The Secretary of State for Transport told the Intelligence and Security Committee that because each of these flights was registered as a civilian aircraft there was no direct need for a request on how the facilities were to be used: 'The UK grants a block approval to many countries and, in the case of the US, arrangements for a standing block approval [for state aircraft] to land in the UK have been in place since at least 1949'.⁷¹

A simple lack of knowledge, however, is not sufficient. The intelligence community is not a layperson, but a highly specialised branch of the government whose job it is to collect information and act as a repository of expertise for all threats that face the state, regardless of their form. It is both highly knowledgeable and informed. Moreover, not only can we expect a greater level of awareness from the organisation as a whole, but its trained officials should be held to a higher standard as a clearly distinguished set of professionals, acting on

behalf of the state with specific and specialised knowledge and training. Indeed, states are obliged to 'ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel'.⁷² Therefore, as a profession they have a greater obligation to carry out due diligence regarding their area of expertise. This means there is a duty on behalf of the intelligence community to inquire about how other states are using their sovereign territory in order to make sure that this use is aligned with the principles they are charged to protect.

The question, therefore, is whether it is reasonable to check each plane that flies through one's land. Indeed, the Director General of the Security Service highlighted that 'Unless you say you are going to search every aircraft to check the truth of what you are told, it is a difficult issue ... and frankly I doubt the police have the resources to do this'.⁷³ This is, on one level, reasonable, as information provided by someone else – especially someone with a longstanding cordial relationship – is assumed to be legitimate, and it is not expected that one must corroborate all sources of information presented. However, this good faith must have a limit in order to prevent it becoming simple blind faith.⁷⁴ The Prime Minister told the Intelligence and Security Committee that 'the Government has not sought to establish whether aircraft that may have previously or subsequently been involved in rendition operations have transited UK territory (including Overseas Territories) or airspace', which indicates that there was no effort to ascertain the nature of the activities being carried out by the CIA. This raises concerns, especially given what the British intelligence community itself refers to as unsettling language coming from the USA post-9/11. They noted a growing awareness that there had been 'a real shift in the US approach, and in the nature of the rendition programme'.⁷⁵ Indeed, immediately after 9/11 there were systematic moves by the USA to make torture a more viable option. First it was claimed that the Geneva Conventions did not apply to al Qaeda suspects, and that neither they nor the Taliban would be eligible for 'prisoner of war' status;⁷⁶ second, on 13 November 2001, orders were given that allowed for the detention of all Al-Qaeda suspects and denied them access to any civilian court, thus relegating them to military tribunals;⁷⁷ and, third, in August 2002, a Justice Department memorandum redefined a narrower account of 'torture' under US law than the Geneva Conventions allowed, and limited it to abuses causing physical pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'.⁷⁸ Each of these actions demonstrates an exerted effort to make extreme forms of interrogation more readily accessible.⁷⁹ Although these events arguably led the British Secret Intelligence Service (SIS but also known as MI6) to follow a more cautious approach,⁸⁰ what is not clear is why no real assurances were ascertained. These should have acted as clear signs to the UK that it was not business as usual. Indeed, the Detainee Inquiry noted that as early as January 2002 the UK's SIS were aware that individuals were being rendered to third-party states that they were not nationals of for interrogation.⁸¹ The directors of the intelligence organisations must not simply 'sit back and wait for management to bring the matter to the board's attention', but should investigate how their partners plan to use their facilities.⁸² In reality this reflects, at best, Luban's ostrich burying its head, or at worst his fox seeking deniability. Ambiguity regarding what is known, rather than acting as a protection, indicts them further as their intent is not reflected in their actions. If their intent was to avoid contributing to the harm of another then they have a duty to ensure that their actions work

against the CIA's efforts, rather than maintaining the status quo or by taking a position of neutrality. It can be argued, therefore, that in combination this should have prompted increased scrutiny regarding the purpose for the use of the facilities in all three types of cooperation, and that therefore this features at the higher end of the spectrum. This means that there is a clear need to be informed and failure to be so does not remove the blame.

Next, in order to ascribe moral blame, it is necessary that there is some relationship to the harm caused. For 'one-off pick-up points' where a state allows or actively authorises the detainment of individuals from within their space – including warrant signing by judge Chiara Nobili for the arrest of Abu Omar – the involvement features at one of the highest points on the spectrum of blame. These contributions are necessary and irreplaceable causal contributions, and are akin to Lombard's enabling acts. For cases involving stopovers that come before and staging points from which the rendition is launched it can be argued that the state's involvement is a necessary – though not irreplaceable – role in the chain of events. The state's involvement in these cases would feature relatively high on the spectrum of blame, because rendition is making the process much easier than if it refused to cooperate and arguably makes a causal contribution to the whole programme. Whereas for those stopovers that come afterwards, the involvement is less clear because the involvement is unrequired and its impact is uncertain. So, initially, it could be argued that the act of allowing one's airspace or territory to be used after the extraordinary rendition process falls at the lower end of the complicity spectrum. From the taxonomy outlined, the role of the UK government was not a dependent one. The use of the airspace was not, in these cases, a necessary factor for the torture to take place. They did not set the conditions required for the operation to go ahead, nor was the end counterfactually dependent on UK involvement, and so they are not enablers. Indeed, it could be argued that the overall extraordinary rendition programme would have continued regardless of the (in)actions taken by the UK government at this stage. The UK's failure to act comes at the end. The damage is done. However, this does not mean that their involvement was nil. At a minimum, it could be considered aiding after the fact.⁸³ As noted in the previous section, this means that the UK government should act to separate itself from the chain of events even if it feels this would not alter the outcome. Moreover, it can be argued that it even has a duty to publicly condemn or protest the programme; again, even though this might have no real impact it should be done in order to separate the UK government from the moral taint and the subsequent blame.

However, while this could mean that the involvement features at the lower end of the spectrum, it can also be argued that for those states that allowed the use of their facilities even after the event their involvement goes further than this, as allowing such use represents a sanctioning of the act. As outlined, sanctioning harm through one's own (in)action does play an important role featuring in the middle of the spectrum, where, even though one is not necessarily the instigator, such actions act as non-necessary contributions that promote the act by making it both easier and more likely, adding legitimacy to the act. It can be interpreted that these states, by not acting either physically or symbolically at any stage of the process, passively sanctioned the activities taken by the US forces. For example, as a close ally it can be argued that the opinion of the UK government regarding the American Administration is not an unimportant one; that their long-

term intelligence cooperation means that the UK has influence with those in power. Equally, in the case of Germany as a staging-post and Italy for allowing individuals to be kidnapped from its territory, their role at the beginning and middle of the process means that they are in a place where their (in)activity makes the rendition more likely and so actively promotes the harm caused. There was a clear obligation to either protect those who fall within one's jurisdiction or to take custody of those who had carried out the operation or were planning to do so. Importantly, given the role that these states played – alongside a duty to be informed on how their actions might cause harm to others – they should have sought to undermine the CIA, and failing to do so makes them complicit in the harm done, and therefore blameworthy and punishable. This places them in the middle of the spectrum of blame, below the main actors but occupying a clear position that demonstrates that their failure to act. That is, they had a duty to detain those who were refuelling, to demand that those who were in their airspace landed and to detain those inside, and to publicly denounce the USA for its extraordinary rendition programme. What this means is that in actual fact all three aiding methods – stop-over, staging and pick-ups – even when the individual was not on board – are located at least at a mid-point on the spectrum of blame.

Importantly, the actions of the UK are more involved again. In the case of Binyam Mohamed, the Security Service (MI5) continued to receive reports from CIA interrogations and even declared itself 'grateful for the opportunity to provide material to be used in the current debriefing' after it began channelling questions through the CIA.⁸⁴ This level of involvement places the UK's Security Service as an enabler in the harm suffered and so it is located at the top levels of the spectrum of blame. Therefore, significant blame should have been levied at those intelligence officers who authorised such aid or failed to prevent the use of state facilities. Importantly, however, this also means that those executive members in charge of these intelligence agencies – in the UK namely the Secretary of State for the Home Department for Security Service and the Foreign Secretary for MI6, and, finally, the Prime Minister – face ultimate blame for the UK's involvement and its failure to protest or forestall the harm.

Finally, for those states that had no role in the actual rendition process it can be argued that they still had a duty to act. For those states which did not know, and it would be unreasonable to expect them to have known, they can claim they cannot be held responsible for failing to act. However, those who are aware or should have been aware must ensure that they not contributing and are actively undermining the USA's programme most broadly. Allowing the use of one's airspace or failing to lodge a protest only serves to make the process easier, and by doing so one becomes complicit in the harm done. Those individuals who are responsible for authorising their state's or organisation's (non)involvement in the extraordinary rendition programmes have a direct duty of care as a result of their organisational position, and by not acting against the programme are directly responsible for the harm caused and should be punished according to the level of their involvement. Actions that aid the state causing the harm create complicity, and if states wish to show that their intent is not to aid then they must demonstrate how they are undermining the efforts of the extraordinary rendition programme. This could be related to extraordinary rendition specifically by preventing any US aircraft travelling through their space, engaging in lengthy searches or issuing high financial costs to fly through their space, or it could try and undermine the CIA's efforts most broadly by

Table 4. Aiding the transfer and the level of blame.

Extradition stage	Complicity	Duty of care	Knowledge
<i>Stopover point:</i> <ul style="list-style-type: none"> With target on board 	<i>Middle high:</i> <ul style="list-style-type: none"> Necessary step Causally contributing 	<i>High:</i> <ul style="list-style-type: none"> Duty of care to those within one's jurisdiction Duty of care towards those whose own (in)actions will impact 	<i>Intelligence – high:</i> <ul style="list-style-type: none"> Duty to be aware how security facilities are being used Agency leaders should investigate international cooperation after reports of torture <i>Political – high:</i> <ul style="list-style-type: none"> Expectation to be informed on how state infrastructure and international cooperation is being used; reports of torture by others increases the duty to investigate
<i>Stopover point:</i> <ul style="list-style-type: none"> Before/after; no target on board 	<i>Middle:</i> <ul style="list-style-type: none"> Sanctioning act Non-causally contributing 		
<i>Staging point:</i> <ul style="list-style-type: none"> Launching point 	<i>Middle high:</i> <ul style="list-style-type: none"> Necessary step Causally contributing 		
<i>One-off pick-up point</i> <ul style="list-style-type: none"> Warrant for arrest 	<i>Very high:</i> <ul style="list-style-type: none"> Necessary, enabling act; causally contributory 		
<i>Use of airspace/ awareness with no response</i>	<i>Low:</i> <ul style="list-style-type: none"> Failure to protest Limit passive cooperation No hindering activity 		

making the cost of doing business for the US as a whole high, by issuing sanctions – whether financial, political or social. The failure to protest or refuse to provide even this minimal assistance means they are complicit, though minimally in comparison to other forms of involvement, and so rest at the lower end of the spectrum. What this means is states that even only allow the use of their airspace are tacitly easing the process, encouraging it, and so also face a degree of blame. Public condemnation, even after the fact, of the actions would make it clear that these states are not a part of the harm caused and so could play an important role in forestalling the programme overall. Indeed, retributions, embargos on travel or at least increased searches would indicate an effort to condemn the extraordinary rendition programme in general. Not acting can be seen as tacit consent. On balance, therefore, what this means is that there is a clear duty not to be involved in the harm caused, even when one's non-involvement would not change the outcome (see Table 4).

Intelligence cooperation: sharing resources, sharing intelligence

The second set of cases examined includes those instances where an intelligence agency shared information that then initiated or led to the rendition of an individual. Intelligence sharing between allies such as the UK and the USA is a regular practice that serves to create a greater wealth of knowledge and acts to protect both states. In the *Rendition* report by the British Intelligence and Security Committee, all three Heads of British intelligence argued that information sharing was a vital aspect of protecting state interests, especially in terms of fighting international terrorism: 'It is neither practical, desirable,

nor is it in the national interest, for UK Agencies to carry out [counter-terrorism] work independently of the US effort'.⁸⁵ However, despite this being a common feature of inter-state relations, the question is whether one can be blamed for the harm done by others as a result of the knowledge one has shared. This is what Dick Marty referred to in his report as 'passing on information or intelligence to the United States where it was foreseeable that such material would be relied upon directly to carry out a "rendition" operation or to hold a person in secret detention'.⁸⁶

One example is that of Mohammed Zammar, a German of Syrian origin who was arrested when he left Morocco to return home for Germany. The case has received extensive press coverage, and there have been allegations that Mr Zammar was tortured by Syrian services.⁸⁷ Dick Marty's report outlines how 'Mr Zammar's arrest in Morocco was objectively facilitated by exchanges of information between the German services and their Dutch, Moroccan and also American counterparts',⁸⁸ and 'that he was questioned in Syria by German officials'.⁸⁹ Another example is that of Binyam Mohamed al Habashi, an Ethiopian citizen who has held status in the United Kingdom, who was detained and transported to Guantanamo Bay where he claims he was subjected to torture.⁹⁰ Arrested by Pakistani officials at Karachi Airport on 10 April 2002, Binyam reports that the initial interrogation involved British and American agents.⁹¹ It has been reported that 'During his illegal interrogations, he has been confronted with allegations that could only have arisen from intelligence provided by the United Kingdom'⁹² and it became clear that British intelligence was cooperating with the interrogation as 'Much of the personal information – including details of his education, his friendships in London and even his kickboxing trainer – could only have originated from collusion in this interrogation process by UK intelligence services'.⁹³ For each of these cases the question is whether intelligence cooperation is in itself enough to warrant blame, raising questions regarding the extent it is reasonable to foresee such harms as well as how far from the eventual torture one is in the chain of events.

In terms of the duty of care, from the cases mentioned there are two distinct instances involved. First are cases where the individual is a national of the state sharing the information, meaning there is arguably a special relationship between the state and its own citizens. However, slightly more problematic are those cases where the individual is not a national nor is there necessarily any geographical jurisdictional relationship as seen in the first set of cases. Again, following the precedence outlined in *Donoghue v Stevenson* it can still be argued that there is a duty of care. This means that the intelligence agency creates a relationship with those it shares intelligence on when that cooperation causes an impact on the target's life.

Understanding the ability to foresee the impact of sharing information, however, is less clear. Its routine nature, much like the flights, means that it would be unreasonable to inquire into every case of intelligence sharing. Moreover, intelligence rarely works like this. Intelligence is a piecemeal activity of gathering bits of information from many different sources, with intelligence often being as 'sparse as a telephone number or an address to check'.⁹⁴ This therefore reduces the ability to track down the future implications of how any singular bit of information might be used. Furthermore, the British, German and Dutch governments all claim that they did not know, nor could have expected, that the Americans would end up subjecting these individuals to torture: 'These exchanges of information about the travel plans of a person suspected of terrorist activities (the

German government's report contains detailed information which seem to justify such suspicion) are part of normal international co-operation in the fight against terrorism'.⁹⁵ It cannot, for example, be deduced from the fact that the German services informed their colleagues of the dates on which Mr Zammar had flight reservations that it was their intention that he would be arrested and held in violation of normal procedures. Also, in the case of Bisher and Jamil, the UK's position is that 'It is possible that the Gambian police or border authorities at Banjul airport decided to search the men based on a "hunch" – something that happens routinely at customs and immigration points around the world'.⁹⁶ The claim is the intelligence community simply did not know, nor could they have reasonably been expected to know, that this was how their intelligence would be used: 'We are talking about the Americans, our closest ally'.⁹⁷

However, there are reports that indicate otherwise: that the British intelligence community was aware of the extraordinary rendition programme much earlier than they have since indicated. A report released in *The Guardian* claims that 'Within days of the 9/11 attacks on the US, the CIA told British intelligence officers of its plans to abduct al-Qaida suspects and fly them to secret prisons where they would be systematically abused'.⁹⁸ It is reported that Cofer Black, co-ordinator for Counter-Terrorism under President George W. Bush, met with his MI6 counterpart, Mark Allen – to outline their rendition plans.⁹⁹ If this is true then it would increase the knowledge of the British intelligence community and therefore increase the degree to which they are blameworthy for their part in the rendition process. However, even ignoring this claim it has already been noted that the strong rhetoric and actions taken by the Bush Administration following the 9/11 terrorist attacks should have left the intelligence community doubting American intentions. This means that given the change in laws relating to the treatment of those suspected of terrorism, and the tone of the US, any cooperating state should have sought better assurances. This establishes an obligation on the intelligence community to check, with explicit assurances, on how the intelligence is being received and therefore will be used. If there are suspicions that the intelligence could be used to an unethical end then the relationship is abused and future sharing must come under greater scrutiny as well as raise the prospect of ending the relationship completely. This means there is a strong expectation that intelligence professionals were informed on how their information was being used, making them specifically blameworthy.

Finally, in terms of proximity to the harm caused in these cases, rather than being an accessory after the torture, the question is to what extent providing information before the rendition places the intelligence agency as a key figure towards that particular end. Applying the taxonomy outlined, it can be seen that sharing intelligence falls in the top half of the spectrum. Indeed, it can be argued that providing intelligence is a necessary factor, an enabling act on which the rendition is dependent. Without the information the rendition would never have happened. The information outlined who was a supposed threat, where they would be and why they were suspected of being a threat. Given that the rendition is dependent on – though not caused by – the information being offered, it can be argued that the providing intelligence agency is in close proximity to the harm caused. So, while the UK's involvement was not a cause this involvement placed it as a key actor in events, meaning that its failure to seek greater information about how the information was to be used places it as a key actor in being blamed for the harm that then followed.

This therefore sets a rigorous bar for intelligence sharing, though still with different degrees of involvement. In those cases where British intelligence was in the room there is essentially no claim of plausible deniability that can be made. The evidence before them meant they should have investigated further as to how the individual was being treated, why they were in that condition and who else was involved. If it is physically dangerous for the intelligence officer present to speak out, once home and free of danger they have a duty to reveal what it is they saw. If they do not physically and publicly reveal what they saw, the harm done can be directly tied to them and they can be personally blamed and punished for the harm caused. In those cases where questions were supplied but the officers were not present, there is still a direct connection and a duty of care as the questions create a bond to the victim. Indeed, providing questions comes with the expectation that some form of interrogation will occur (though not necessarily torturous interrogation) and so should come with extra, physical reassurances that the interrogation was performed humanely. In instances where general information about someone is provided, while claims could be made that it is unreasonable to know exactly how others will use that information, it is necessary to actively ensure correct conduct. However, while Gaskarth claims that the inclusion of caveats reflects a desire to limit the UK's involvement in torture, it could also indicate an attempt to be Luban's fox with plausible deniability. Therefore, given the clear possibility of misconduct, actions should be taken that reflect the intent not to aid in causing others harm and to demand that there are physical reassurances on how the information is being used. Without such proof the caveats themselves are worthless. What this means is that the bar set for information sharing is high. Once the harmful practices became known, or even were hinted at being a possibility, the UK should have not have maintained the status quo but should have actively undermined the US extraordinary rendition programme by withholding intelligence support across the board. Any support given, even in other areas, makes the whole CIA process easier, and by withholding intelligence support in other areas the UK would not only have shown an intent to not support a state carrying out torture but would also have made the costs of doing so higher.

Therefore, it can be argued that these states should receive a significant degree of blame. In the case of Abdul-Hakim Belhaj who sued the UK government for colluding in his rendition in Tripoli in 2011, it can be argued that British intelligence faces one of the highest levels of blame given the long history of Libyan human rights abuses and the direct link highlighted between the intelligence sharing and the detention of Belhaj. In comparison, the case of Bisher Al-Rawi and Jamil El-Banna features slightly lower given that the intelligence agency did seek to place important caveats on how their information should be used, prohibiting 'overt, covert or executive action'.¹⁰⁰ However, these caveats do not release them from all blame as it has been demonstrated that there should have been a greater understanding of how one's intelligence might be received given the political climate, the expressed concerns of abuse, and the possibility of harmful repercussions. This case demonstrates a need to be sure about the validity of any intelligence or indeed judgements shared, especially with states that have a record of lower human rights standards. Finally, in the case of Binyam Mohamed al Habashi, if British intelligence were present at any interrogation stage as claimed then this would place them very near the top of the spectrum given their close proximity to the harm being caused and their increased awareness. However, if British involvement provided information on

Table 5. Intelligence sharing and the level of blame.

Intelligence sharing	Complicity	Duty of care	Knowledge
<ul style="list-style-type: none"> • Potential threat level • Recent activities and acquaintances 	<i>High</i> <ul style="list-style-type: none"> • Necessary enabling act; • Causally contributory • Forms basis of decision to act 	<i>High:</i> <ul style="list-style-type: none"> • Duty of care towards those whose own actions will impact 	Intelligence professionals: <ul style="list-style-type: none"> • Explicitly aware of how their information is being used • Any concerns or possibility of misuse information should not be shared <i>Political:</i> <ul style="list-style-type: none"> • Aware of how their intelligence leaders are acting • Duty to inquire
<ul style="list-style-type: none"> • Personal information • Information only available through intelligence operations 	<i>Medium</i> <ul style="list-style-type: none"> • <i>Sharing necessary</i> • <i>Used against the target</i> 		
<ul style="list-style-type: none"> • General, public information 	<i>Medium/low</i> <ul style="list-style-type: none"> • <i>Non-causal role</i> • <i>Not necessarily needing to have come from intelligence partnership</i> 		

Binyam's lifestyle then this would feature at the middle end of the spectrum as it did not instigate the rendition, or promote it, but the sharing of the information did feature in the torture and could not have be sourced elsewhere. The impact of these findings is that these individuals subjected to torture as a result of the rendition process have recourse to retributions from each of these states, meaning that each state must now act to redress the balance of its own contribution (see Table 5).

Conclusion

It can be argued, therefore, that there should be a wider understanding of what it means to be involved in human rights abuses at the international level; that states, institutions and individuals can all be held equally liable for the harm done; and that all three levels should both be punished for their involvement and give appropriate compensation. What this means is that, first, there is a clear need that those harmed are provided with an avenue to demand recompense not just from one state but from all those involved. There should be a structure that is able to take multiple actors to task and demand appropriate recompense from everyone, rather than expecting an individual to suffer through different legal systems where multiple actors are dismissed on claims of limited involvement or liability. Furthermore, while it is difficult to hold states to account for human rights abuses, highlighting those who are specifically responsible because of the position they held means that there is an individual or set of individuals who should be made to stand accountable. Second, there should be a more clearly established chain of command. Indeed, the Detainee Inquiry noted that 'it is not clear how complete a picture of the Agencies' growing awareness of the new scope of US rendition practice was communicated to Ministers' throughout the renditions.¹⁰¹ Ministers should have been aware of the programme, raising concerns that they were either being purposefully left out or that they were choosing to be uniformed to avoid liability. Either way, they are responsible for ensuring the ethical conduct of the intelligence community, and failure to be informed therefore makes them personally liable for the harm done; therefore, they should face punishment as such. Finally, claims that it 'could not in any way amount to complicity in any

unlawful activity ... unless [they] had full knowledge' and that involvement should include a physical involvement with 'the detainee on board' sets the bar too high.¹⁰² States have an active duty to seek out full information, which must then be interrogated and that states must actively distance themselves from the wrongdoing of others lest their passive inaction be seen as involvement.

Notes

1. See A.J. Bellamy, 'No Pain No Gain? Torture and Ethics in the War on Terror', *International Affairs* 82, no. 1 (2006): 121–48; R. Blakeley, 'Why Torture?' *Review of International Studies* 33, no. 3 (2007): 373–94; C. González Castresana, 'Torture as a Greater Evil', *South Central Review* 24, no. 1 (2007): 119–30; G. Hunsinger, 'Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails', *A Journal of Theology* 47, no. 3 (2008): 228–39; D. Luban, 'Liberalism, Torture, and the Ticking Bomb', 1425–61; D. McCready, 'When is Torture Right?' *Studies in Christian Ethics* 20, no. 3 (2007): 383–98; E. Scarry, 'Five Errors in the Reasoning of Alan Dershowitz', in *Torture: A Collection*, ed. S. Levinson (Oxford; New York: Oxford University Press, 2004), 281–90; J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House', *California Law Review* 106, no. 6 (2005): 1681–750.
2. For more on the evolution of the rendition see M. Satterthwaite and A. Fisher, 'Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law', *The Long Term View* 6, no. 4 (2006): 52–71.
3. Indeed, even under President in Obama and President Trump the programme has not slowed down. See C. Whitlock, 'Renditions Continue under Obama, Despite Due-Process Concerns', *The Washington Post*, January 1, 2013, https://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html (accessed 1 February 2015).
4. Council of Europe, Parliamentary Assembly, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States' Report by Rapporteur Dick Marty, Doc. 11302, 2007, http://assembly.coe.int/committeeDocs/2007/Emarty_20070608_noEmbargo.pdf, 7, §29.
5. Judge Weinstein's opinion in the Agent Orange litigation was that the courts should try and establish some idea of proportional causation, while candidly admitting that 'it is doubtful whether the legal system is ready'. This case involved multiple companies producing the same harmful chemical, meaning it was difficult to claim any single one was the cause of the damage. Judge Weinstein opined that the total amount of damages suffered should be portioned out to each manufacturer that was responsible (for example 10% each assuming there are 10 manufacturers who distributed the toxin in equal amounts). See *In re Agent Orange Prods. Liab. Litig.*, 597 F. Supp. 740 (EDNY 1984).
6. Retributive justice, for example, seeks to punish those who 'deserve' it, and locating the moral blame is therefore the first step in this process. See P. Robinson, 'Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical', *Cambridge Law Journal* 67, no. 1 (2008): 148; M. Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press, 1997); M. Berman, 'Rehabilitating Retributivism', *Law and Philosophy* 32 (2013): 83–108.
7. M. Braham and M. van Hees, 'An Anatomy of Moral Responsibility', *Mind* 121, no. 483 (2012): 601–34; E. Sankowski, 'Blame and Autonomy', *American Philosophical Quarterly* 29, no. 3 (1992): 291; G. Williams, 'Blame and Responsibility', *Ethical Thought and Moral Practice* 6 (2003): 427–45; J.E.R. Squires, 'Blame', *The Philosophical Quarterly* 18, no. 70 (1968): 54–60.
8. International criminal law scholarship does explore the substantive nature of crimes against humanity, most prominently the case of genocide, the effectiveness and formation of

- appropriate international institutions, and the role the prosecution of these crimes has on reconciliation and new political development. See M.C. Bassiouni, *Introduction to International Criminal Law* (Ardsey, NY: Transnational Publishers, 2003); B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and Rule of Law* (Oxford: Oxford University Press, 2004); L.N. Sadat, *The International Criminal Court and the Transformation of the International Law: Justice for the New Millennium* (Boston: Brill, 2002); W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000); E. Posner and J. Yoo, 'Judicial Independence in International Tribunals', *California Law Review* 93, no. 1 (2005): 1–74; L. Helfer and A. Slaughter, 'Why States Create International Tribunals – A Response to Professors Posner and Yoo', *California Law Review* 93, no. 3 (2005): 899–956. However, contributory harm becomes increasingly difficult due to the challenges posed by collective/individualist responsibility, primacy of state sovereignty and executive immunity. See M. Weber, *Economy and Society* (Berkeley: University of California Press, 1978) and H.D. Lewis, 'Collective Responsibility', *Philosophy* 23, no. 84 (1948): 3–18, for their respective rejections of collective responsibility. Also see S. Sverdlík, 'Collective Responsibility', *Philosophical Studies* 51, no. 1 (1987): 61–76; J.A. Corlett, 'Collective Moral Responsibility', *Journal of Social Philosophy* 32, no. 4 (2001): 573–84; and J. Narveson, 'Collective Responsibility', *Journal of Ethics* 6, no. 2 (2002): 179–98.
9. *Caparo Industries v Dickman* 1990 UKHL.
 10. While the summation of this work is probably best captured within the Rendition Projects' own pages, the collective efforts that each contribute to the body of knowledge are extensive. For more detail on this wider collection see S. Raphael et al., 'Tracking Rendition Aircraft as a Way to Understand CIA Secret Detention and Torture in Europe', *The International Journal of Human Rights* 20, no. 1 (2016): 5–8.
 11. I. Cobain and J. Ball, 'UK Provided More Support for CIA Rendition Flights than Thought – Study', *The Guardian*, 22 May 2013, <https://www.theguardian.com/world/2013/may/22/uk-support-cia-rendition-flights> (accessed 1 June 2016).
 12. US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 3 December 2014, http://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf (accessed 1 February 2015).
 13. Raphael et al., 'Tracking Rendition Aircraft', 2.
 14. *Ibid.*
 15. J. Mayer, 'Outsourcing Torture', *The New Yorker*, 14 February 2005, <http://www.kuwaitifreedom.org/media/pdf/Outsourcing%20Torture.pdf>.
 16. Raphael et al., 'Tracking Rendition Aircraft', 3, 6.
 17. P. Gibson, *The Report of the Detainee Inquiry*, December 2013, http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf (accessed 1 June 2016), 40; I. Cobain, 'New Light Shed on US Government's Extraordinary Rendition Programme', *The Guardian*, 22 May 2013, <https://www.theguardian.com/world/2013/may/22/us-extraordinary-rendition-programme> (accessed 1 June 2016).
 18. Amnesty International, 'Breaking the Chain: Ending Ireland's Role in Renditions', 2009, <https://archive.amnesty.ie/reports/breaking-chain-ending-ireland%E2%80%99s-role-renditions> (accessed 1 June 2016), 8.
 19. See BBC, 'Rendition: Blair in Quotes', *BBC News Online*, 19 January 2006, http://news.bbc.co.uk/1/hi/uk_politics/4627360.stm; Intelligence and Security Committee, *Rendition* (July 2007) cm. 7171, <http://www.fas.org/irp/world/uk/rendition.pdf>, 16–17 §46; J. Straw, 'Examination of Witnesses', House of Commons Select Committee on Foreign Affairs, 13 December 2005, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmaff/uc768-i/uc76802.htm>. Though outside the realm of this paper, for instances where the UK military has been directly the cause of torture see W. Gage, *The Baha Mousa Public Inquiry Report*, 8 September 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf (accessed 1 June 2016).
 20. R. Blakeley and S. Raphael, 'British Torture in the War on Terror', *European Journal of International Relations* 23, no. 2 (2016): 243–66, 248.

21. Braham and van Hees, 'Anatomy of Moral Responsibility', 601–33; C. Fabre, 'Guns, Food and Liability to Attack in War', *Ethics* 120 (2009): 36–63; D. Javeline, 'The Role of Blame in Collective Action: Evidence from Russia', *The American Political Science Review* 97, no. 1 (2003): 107–21; A.R. Mele, 'Fischer and Ravizza on Moral Responsibility', *The Journal of Ethics* 10, no. 3 (2006): 283–94; J.E.R. Squires, 'Blame'; Williams, 'Blame and Responsibility'; M.J. Zimmerman, 'Moral Responsibility and Ignorance', *Ethics* 107, no. 3 (1997): 410–26.
22. T. Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics and International Affairs* 15, no. 2 (2001): 67–85.
23. J. Dressler, 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence', *Ohio State Journal of Criminal Law* 5 (2008): 427.
24. J. Gaskarth, 'Entangling Alliances? The UK's Complicity in Torture in the Global War on Terrorism', *International Affairs* 87, no. 4 (2011): 496.
25. R.L. Rabin, 'Enabling Torts', *De Paul Law Review* 49 (1999): 435–54; R.W. Wright, 'Causation in Tort Law', *California Law Review* 73, no. 6 (1985): 1735–828.
26. J. Gardner, 'Complicity and Causality', *Criminal Law and Philosophy* 1 (2007): 127–41; L.B. Lombard, 'Causes, Enablers and the Counterfactual Analysis', *Philosophical Studies: A International Journal for Philosophy in the Atlantic Tradition* 59, no. 2 (1991); Rabin, 'Enabling Torts', 435–54.
27. Gaskarth, 'Entangling Alliances?', 947. Emphasis in original.
28. *Ibid.*, 950, 951.
29. For more on the role and importance of 'moral blame' see Squires, 'Blame'.
30. E. Borchar, 'Government Liability in Tort', *Yale Law Journal* 34, no. 1 (1924): 1–45.
31. H.R. Horsey, 'The Duty of Care Component of The Delaware Business Judgment Rule', *Delaware Journal of Corporate Law* 19, no. 3 (1994), 974, quoting *hun v Cary*, 82 N.Y. 65, 71 (1880).
32. Lord Atkin, *Donoghue v Stevenson [1932] UKHL 100 (26 May 1932)*.
33. *Bolam v Friern Hospital* (1957) 1 WLR 583.
34. *Lowns v Woods* (1996) Aust Torts Reports 81-376 (NSW Court of Appeal).
35. *Horsley v Maclaren (The Ogoopogo)* (1971) 22 DLR (3d) 545 (SCC).
36. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 478-9 per Brennan J.; *Ticehurst v Skeen* (1986) 3 MVR 307 (NSW SC).
37. Occupiers Liability Act 1957; The Occupiers Liability Act 1984 introduced a duty of care to non-invited visitors.
38. M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: BasicBooks, 2000), 316.
39. Additional Protocol to the Geneva Conventions of August 1949, art. 86(2), art. 87 (1–3). Also see UK HM Government, 'Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees', 2010, https://www.reprive.org.uk/wp-content/uploads/2014/10/2010_07_06_PUB_New_Government_Guidelines_on_Torture.pdf; T. Wu and Y. Kang, 'Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law', *Harvard International Law Journal* 38 (1997): 272, 290.
40. There are those who argue that the blame levied at the commander is not one of being liable for the harm done because there could very well be a lack of causal link between the non-actions of the commander and that harm done by their subordinates, but that they face charges of dereliction of duty as a separate offense in that they have failed to monitor their subordinates' actions. Though this would offer some degree of blame, it would be separate in its ethical nature to the actual harm done by the subordinates. B. Sander, 'Unravelling the Confusion Concerning Superior Responsibility in the ICTY Jurisprudence', *Leiden Journal of International Law* 23 (2010): 122; R. Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake', in *Judicial Creativity at the International Criminal Tribunals*, eds. Shane Darcy and Joseph Powderly (Oxford: Oxford University Press, 2010), 182. For a full review of the different justifications associated with

- how a command creates a culpability in the wrongs of one's subordinates see D. Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, its Obfuscation and a Simple Solution', *Melbourne Journal of International Law* 13 (2012): 36. However, in *Prosecutor v Krnojelac*, defendant Krnojelac was charged with 'crimes against humanity and violations of the laws and customs of war', including torture, murder, persecution, imprisonment, enslavement – i.e. the core crimes that were carried out by his subordinates'. *Prosecutor v Krnojelac* (Judgement) (ICTY, Appeals Chamber, Case No IT-97-25-A, 17 September 2003), 108–498.
41. J. Feinberg, *Moral Limits of the Criminal Law. Vol. 1: Harm to Others* (Oxford: Oxford University Press, 1984); A. Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (Cambridge: Cambridge University Press, 2011); G.J. Warnock, *The Object of Morality* (London: Methuen, 1971), 21, 79, 80, 150; B. Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1998), 87–8.
 42. M. Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, MA: Harvard, 1970).
 43. M. Hardimon, 'Role Obligations', *The Journal of Philosophy* 91, no. 7 (1994): 333.
 44. The physical capacity requirement is fundamental but relatively unproblematic in this case. Matthew Braham and Martin van Hees argue that in order to ascribe any moral responsibility this criteria, which they call the 'Agency Condition', it is essential to ensure that the 'person is an autonomous agent who performed his or her action intentionally'. This rules out those who do not possess the capacity to intellectually reflect on their actions and the repercussions. Braham and van Hees, 'Anatomy of Moral Responsibility', 605.
 45. M. Bradley and C.A. Schipani, 'The Relevance of the Duty of Care Standard in Corporate Governance', *Iowa Law Review* 75, no. 1 (1989): 19.
 46. C. Kutz, 'Causeless Complicity', *Criminal Law and Philosophy* 1, no. 2 (2007): 289; L. Hertzberg, 'Blame and Causality', *Mind* 84, no. 336 (1975): 500–15.
 47. C. Lepora and R.E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013), 5.
 48. *Ibid.*, 8.
 49. Gardner, 'Complicity and Causality', 135.
 50. *Ibid.*, 137.
 51. L. Solan and J. Darley, 'Causation, Contribution, And Legal Liability: An Empirical Study', *Law and Contemporary Problems* 64, no. 4 (2001): 270.
 52. Lombard, 'Causes, Enablers and the Counterfactual Analysis', 201–03. Rabin has responded to this line of thought calling for a set of 'enabling torts' to be established, making people legally liable if their actions 'set the stage' for the wrong to occur, though they are not necessarily acting as the cause of the crime. Rabin, 'Enabling Torts', 435–54. Also see Wright, 'Causation in Tort Law', 1735–828.
 53. Kutz, 'Causeless Complicity', 294.
 54. *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J.; *Jaensch v Coffey* (1984) 155 CLR 549 at 578 per Deane J; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 477–81 per Brennan J.
 55. Under the Danish penal code, all persons must provide aid to the best of their ability to any person who appears to be lifeless or in mortal danger: 'Bekendtgørelse af straffeloven' [Promulgation of the penal code], retsinformation.dk (in Danish). The Danish Ministry of Justice, 2015-07-09, § 253; in Germany, *unterlassene Hilfeleistung* (failure to provide assistance) is a crime under section 323(c) of the German Criminal Code; while in Spain, a citizen is required by law to provide help to or seek help for anyone in need as long as providing help does not endanger them personally. Not doing so is a criminal offence under Article 195 of the Spanish Criminal Code.
 56. Gaskarth, 'Entangling Alliances?', 947.
 57. S. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine', *California Law Review* 73, no. 2 (1985): 350.

58. See R. Weisberg, 'Reappraising Complicity', *Buffalo Criminal Law Review* 4, no. 1 (2000): 269.
59. 'Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas Territories', *Reprieve*, 2007, <http://www.statewatch.org/news/2008/feb/uk-usa-reprieve-submission-FASC.pdf>
60. Council of Europe Parliamentary Assembly, 'Alleged Secret Detentions and Unlawful Interstate Transfers of Detainees Involving Council of Europe Member States', Report by Rapporteur Dick Marty, Doc. 10957. http://assembly.coe.int/committeedocs/2006/20060606_ejdoc162006partii-final.pdf (hereinafter 'Marty First Report 2006') p.13 §43.
61. T. McCarthy, 'Report on CIA Rendition Reveals Massive Scale of European Assistance', *The Guardian*, 5 February 2013, <https://www.theguardian.com/world/2013/feb/05/cia-rendition-help-european-leaders>; Open Society Justice Initiative, *Globalising Torture: CIA Secret Detention and Extraordinary Rendition*, 2013, <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>; also see I. Cobain and J. Ball, 'UK Provided More Support for CIA Rendition Flights than Thought – Study', *The Guardian*, 22 May 2013, <https://www.theguardian.com/world/2013/may/22/uk-support-cia-rendition-flights> (accessed 1 June 2016). In the case of Mohammed Saad Iqbal Madni, it claimed that after being picked up in Indonesia and being flown to Egypt for the 'enhanced interrogation', the plane then flew on to Prestwick in Scotland for refuelling before returning to Washington. The British Intelligence and Security Committee noted that 'varying numbers have been reported – from around 200 to 400 – for the number of flights that have used UK airspace' though there are only 'four flights where it is alleged that a plane involved a rendition operation'. These four flights refer to the return trip of CIA planes refuelling at Prestwick after the renditions of Jamil Qasim Saeed Mohammed from Pakistan to Jordan on 23 October 2001; Ahmed Agiza and Mohammed al-Zery from Sweden to Egypt on 18 December 2001; Mohammed Saad Iqbal Madni from Indonesia to Egypt on 11 January 2002; and Saifulla Paracha from Thailand to Afghanistan on 22 July 2003. I. Cobain, S. Grey, and R. Norton-Taylor, 'Destination Cairo: Human Rights Fears Over CIA Flights', *The Guardian*, 12 September 2005, <http://www.theguardian.com/uk/2005/sep/12/usa.politics>; *Rendition*, 2007, 57 §186, 187; D. Milliband, 'Letter to Clive Stafford Smith', *London: Foreign and Commonwealth Office*, 21 February 2008; I. Cobain, S. Grey, and R. Norton-Taylor, 'Britain's Role in War on Terror Revealed', *The Guardian*, December 2005, 6, <https://www.theguardian.com/uk/2005/dec/06/politics.terrorism> (accessed 1 June 2016); *Amnesty International*, 'Human Rights: A Broken Promise', 23 February 2006, <http://www.amnesty.org/en/library/asset/EUR45/004/2006/en/cc167867-d45b-11dd-8743-d305bea2b2c7/eur450042006en.pdf>.
62. S. Grey, *Ghost Plane: The Inside Story of the CIA's Secret Rendition Program* (London: Hurst, 2006), 23.
63. For a detailed account of the abduction of the Egyptian citizen Hassan Osama Mustafa Nasr (known as Abu Omar) in Milan, see Marty First Report 2006, *supra* note 6, p. 37, §162. For an analysis of this case based on extensive contact with insider sources in the CIA, see the recent article by Matthew Cole, 'Blowback', *GQ Magazine*, March 2007, <http://www.matthewacole.com/2007/03/01/blowback/>.
64. Intelligence and Security Committee, *Rendition* (2007) 13–14 §43.
65. Article 2.1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
66. Article 3.1 of the 1984 Convention Against Torture.
67. Article 5.2 of the 1984 Convention Against Torture.
68. *Donoghue v Stevenson*, 1932 SC (HL) 31 (UKHL 26 May 1932), <http://www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson-report.html>.
69. Intelligence and Security Committee, *Rendition* (2007), 60 §193.
70. *Ibid.*, 64 §193.
71. *Ibid.*, 58 §188.
72. Article 10.1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.

73. Intelligence and Security Committee, *Rendition* (2007), 60 §193.
74. Bradley and Schipani, 'Relevance of the Duty of Care', 21.
75. Intelligence and Security Committee, *Rendition* (2007), 28 §70.
76. G.W. Bush, 'Humane Treatment of al Qaeda and Taliban Detainee', *White House Memorandum*, 7 February 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.
77. G.W. Bush, 'Notice: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism', *White House*, 13 November 2001, Federal Register 22 no. 2, 57833; available in *The Torture Papers: The Road to Abu Ghraib* eds. K.J. Greenberg and J.L. Dratel (Cambridge: Cambridge University Press, 2005), 25–8. See Department of Justice, Office of Legal Counsel, Memorandum for William J. Haynes, General Counsel, Department of Defense, From: John Yoo, Deputy Assistant Attorney General, 'Application of Treaties and Laws to Detainees', available in *The Torture Papers: The Road to Abu Ghraib*, 38–9, 43–4, 47, 57, 79.
78. J.S. Bybee, 'Memorandum for Alberto R. Gonzales Counsel to the President', *US Department Justice Office of Legal Counsel*, 1 August 2002, 38, <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.
79. The Parliamentary Assembly of the Council of Europe report criticised the UK for too readily accepting US assurances. Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, June 2007.
80. Intelligence and Security Committee, *Rendition* (2007), 30 §79, §81; 31 §84.
81. Gibson, *Report of the Detainee Inquiry*, 33.
82. M. Eisenberg, 'The Duty of Care of Corporate Directors and Officers', *University of Pittsburgh Law Review* 51 (1990): 956.
83. 18 US Code § 3, *Accessory After the Fact*.
84. Blakeley and Raphael, 'British Torture in the War on Terror', 260.
85. Intelligence and Security Committee, *Rendition* (2007) 11 §25.
86. Marty First Report 2006, 5 §10.4.
87. Examples include in the *Washington Post* on 12 and 19 June 2002 and 31 January 2003, in *Der Spiegel* in July 2002 and November 2005, and in *Focus* of 20 September 2002, and shown on Kalla Fakta (the fourth Swedish TV channel) on 22 November 2004.
88. Marty First Report 2006, 43 §189.
89. *Ibid.*, 43 §187.
90. *Ibid.*, 44 §196.
91. *Ibid.*, 44 §201.
92. *Ibid.*, 44 §198.
93. *Ibid.*, 45 §204. A similar case includes that of Abdul-Hakim Belhaj who sued the UK government for colluding in his rendition, after papers were discovered in Tripoli in 2011 implicating British security intelligence as the means by which he was discovered and subjected to extraordinary rendition. Although the case itself could not be settled for national security concerns, the judge stated that it was a 'potentially well-founded claim that the UK authorities were directly implicated in the extra-ordinary rendition of the claimants'. *Belhaj & Anor v Straw & Ors* [2013] EWHC 4111 (QB), 20 December 2013, §151. Or the case of Bisher Al-Rawi and Jamil El-Banna, two UK residents who were arrested in Gambia and later transferred to Afghanistan and then Guantanamo Bay. The arrests were made based on a series of telegrams that the British Security Service had shared with their American allies. See Intelligence and Security Committee, *Rendition* (2007), 48 §164.
94. D. Omand, 'The Dilemmas of Using Secret Intelligence for Public Security', in *New Protective State: Government, Intelligence and Terrorism*, ed. P. Hennessy (London: Continuum, 2007), 155.
95. Marty First Report 2006, 43 §189.
96. Intelligence and Security Committee, *Rendition* (2007) 41 §129.
97. *Ibid.*, 28 §72.

98. R. Norton-Taylor, 'UK Intelligence Officers Knew of CIA's Rendition Plans within Days of 9/11', *The Guardian*, 22 October 2012, <http://www.theguardian.com/world/2012/oct/22/british-cia-rendition-9-11>.
99. Ibid.
100. Intelligence and Security Committee, *Rendition* (2007), 39 §124.
101. Gibson, *Report of the Detainee Inquiry*, 33.
102. Gibson, *Report of the Detainee Inquiry*, 41.

Disclosure statement

No potential conflict of interest was reported by the author.

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