Ever Challenged Union: Exploring Ways Out of the Crises

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‘The Happy Hunting Ground of Europe?’

A New Framework to Hold European Union Member States Accountable for Human Rights Violations Committed in the Counterterrorism Operation of ‘Extraordinary Rendition’

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Abstract: *The European Union is experiencing a crisis of legitimacy. While on the one hand it (increasingly) portrays itself as a beacon of human rights, on the other it has repeatedly demonstrated an unwillingness or inability to demand the same standards of its Member States. A topical example of this hypocrisy is the case of ‘extraordinary rendition.’ A 2013 report would document the involvement of 18 Member States in the counterterrorism operation, and its resultant human rights violations. Yet, despite the urging of the European Parliament, to date no Member State has been held to account by the EU.*

It is proposed to develop a new framework of accountability within the EU for human rights violations committed by its Member States. Using existing Union mechanisms (two legal and one political), these are applied to the practice of extraordinary rendition and it is hypothesised that this is a method by which to seek accountability from Member States that have hereto not been held responsible. This, it is proposed, could rectify the EU’s legitimacy crisis, as it is finally seen to practice what it preaches.

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1. Introduction

> The Union is founded on the values of … [*inter alia*] respect for human rights …

So goes the familiar refrain of Article 2 Treaty on European Union (TEU). Yet, in 1957 when the European Economic Community was established, it was not originally envisaged as encompassing a human rights policy; with no mention of fundamental rights included in the foundational Treaties. Instead the Community was charged with facilitating economic integration to prevent the repeat of the horrors of two World Wars and human rights were remitted primarily to national systems and to the newly minted Council of Europe, author of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

In the six decades since – and for what some view as instrumental rather than altruistic reasons[1] – there has been an exponential growth in the European Union's ('EU' or 'Union') allusions to, and competence in, the field of fundamental rights, culminating in the 2009 Treaty of Lisbon which elevated the Charter of Fundamental Rights of the European Union ('Charter') to the same legal status as the Treaties[2] and which mandated accession of the Union to the ECHR.[3]

Running in parallel with this reorientation of the Union as a self-styled human rights beacon however have been grumblings, growingly increasingly louder, that the EU, while extolling the virtues of human rights and demanding them of others, has been reticent

[1] Craig and de Búrca opine that this direction towards the protection of fundamental rights was 'widely accepted to be … [a bid] to maintain the autonomy and supremacy of … [EU] law.' Paul Craig & Gráinne de Búrca, *The Evolution of EU Law* (2nd edn, Oxford University Press 2011) 478.

[2] Article 6(1) TEU.

[3] Article 6(2) TEU.

about enforcing the same standards against its own Member States.[4] A topical example of this hypocrisy is the case of extraordinary rendition.

Operating covertly since the 1970s, following the United States of America's ('US') mainland attacks of 11 September 2001 the programme of extraordinary rendition has exploded both in terms of its use and its reach, including across the Atlantic to European (Union) shores. Nevertheless, and in spite of the urging of the European Parliament,[5] action taken at the EU level towards accountability has been virtually non-existent.

At a time of great constitutional crisis for the Union, as it is being challenged on any number of fronts, to have any hope of salvaging its legitimacy and of shaking off claims of double-standards, it is imperative that the Union seek accountability of those Member States found in violation of fundamental human rights.

After briefly outlining the background to, and Member State involvement in, the practice of extraordinary rendition, a new framework for holding Member States accountable for human rights violations at the European Union level will be proposed. Using existing mechanisms – two legal and one political – these will be applied to the CIA-led programme, before being critically analysed. In concluding, it is hypothesised that this new framework could rectify the EU's legitimacy crisis, as it is finally seen to practice what it preaches.

2. Extraordinary Rendition and European Union Member States

Defined by the European Court of Human Rights ('ECtHR') as:

[4] See, for example, Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004).

[5] See, for example, European Parliament, *Resolution on Presumed Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, P6_TA(2005)0529 (15 December 2005).

> An extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture, or cruel, inhuman or degrading treatment,[6]

the extraordinary rendition programme divided terror suspects captured in the 'War on Terror' into two categories: those with limited intelligence value would be delivered by the US's Central Intelligence Agency ('CIA') to the intelligence services of Middle Eastern and North African countries for interrogation; while those with the highest intelligence potential would be held as 'ghost prisoners' at 'black sites,' operated and financed by the CIA. The locations of such 'black sites,' are said to have included three Eastern European countries.

Despite the US being the programme's chief architect however, an Open Society Justice Initiative report released in 2013 revealed collusion of over a quarter of the world's countries in extraordinary rendition to varying extents.[7] Of these, Member States of the European Union constituted the largest contingent, representing 18 out of the 54 States, or 23 if candidate and potential candidate Member States are included.

Member State involvement in the programme can be divided into different categories of assistance, reflecting varying degrees of collusion and accountability for human rights violations. These are, namely: apprehending and turning over an individual to be transferred to a US detention facility (as demonstrated in the case of the 'Algerian Six' who, on 17 January 2002, were handed over to American military forces by Bosnia-Herzegovina, for rendition to Guantánamo Bay), or sharing intelligence with the US in the knowledge that this would be used for purposes of a rendition (as, for example, the British Government, after promising him asylum in the United Kingdom ('UK'), is alleged to have done in facilitating the return of former deputy leader of the Libyan

[6] *Babar Ahmad and Others v United Kingdom,* Application Nos 24027/07, 11949/08 and 36742/08, *Partial Decision as to Admissibility* (6 July 2010), para 113.

[7] Open Society Justice Initiative, 'Globalising Torture: CIA Secret Detention and Extraordinary Rendition' (2013).

Islamic Fighting Group, Sami al-Saadi, from Hong Kong to Libya, with his wife and four children, where he was detained and tortured for six years). Several (mostly Eastern European) Member States are moreover accused of secretly detaining a person on their territory, where they were held incommunicado and subjected to (the euphemistically named) 'Enhanced Interrogation Techniques;' while others, including Germany, Turkey and the UK are accused of directly interrogating an individual rendered or held in secret detention, or accepting the information gathered in such interrogational sessions. All accused Member States moreover, at a minimum, are suspected of permitting use of their airspace and airports for use in 'rendition circuits.' Lastly, the concomitant positive human rights obligations which accompany the infringements committed in the above acts, including to effectively investigate the allegations, were implicated when, for example, Member States consistently refused to cooperate with, *inter alia*, an investigation undertaken by the European Parliament into Member State complicity in the CIA-led programme[8] or when they attempted to shield themselves from domestic accountability by arguing that pertinent information was protected as a 'State secret,' as the Berlusconi and Prodi Governments maintained in Italy.

Designed to allow third States to utilise interrogation methods otherwise illegal under US and European law, allegations of widespread and systematic detainee abuse, both in the CIA 'black sites' and in those of their foreign partners, abound and, to date, the European Court of Human Rights (ECtHR) has examined the issue of extraordinary rendition on three separate occasions, in relation to two High Contracting Parties.[9] In each case the Court found against the State. Multiple human rights obligations were determined to be violated.

[8] European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, A6-0020/2007 (30 January 2007).

[9] *El-Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25; and *Al Nashiri v Poland and Husayn (Abu Zubaydah) v Poland* (2015) 60 EHRR 16. Two further cases are currently pending before the Court against Lithuania and Romania: *Abu Zubaydah v Lithuania*, App No 46454/11 (lodged 14 July 2011); and *Al Nashiri v Romania*, App No 33234/12 (lodged 1 June 2012).

These included Articles 3 (the prohibition of torture and inhuman or degrading treatment); 5 (the right to liberty and security); 6(1) (right to a fair trial); and 8 (respect for private and family life). Moreover, failure to effectively investigate the applicants' allegations left the States in further violation of Articles 13, in conjunction with Articles 3, 5 and 8.

Member States allegedly complicit in extraordinary rendition to the extent described above accordingly are acting, or have acted, in contravention of multiple human rights obligations, in violation of both the ECHR (protected as a general principle of EU law)[10] and the Union's own Charter which contains many of the same fundamental rights and which in Article 52(3) specifies that 'in so far as this Charter contains rights which correspond to rights guaranteed by the … [ECHR], the meaning … of those rights shall be the same as those laid down by the said Convention.'

The following sections will demonstrate how those Member States could be held to account within the EU legal system for human rights violations perpetrated via their involvement in the extraordinary rendition programme.

3. Holding European Union Member States to Account: Public Means

3.1. Law

The oldest of the Union's accountability methods, Article 258 TFEU permits the Commission, should it consider 'that a Member State has failed to fulfill an obligation under the Treaties,' to deliver a reasoned opinion on the matter. Should the State at issue not comply with the opinion in the period specified the latter may bring the matter before the CJEU.

[10] Article 6(3) TEU.

An almost identical (yet much lesser used) provision governing the application for infringement proceedings against a Member State brought by a second Member State is included in Article 259 TFEU.

If the Court agrees with the Commission (or with the complainant Member State), the respondent State, under Article 260(1) TFEU, is 'required to take the necessary measures to comply with the judgment of the Court.' Failure to comply can lead to the Member State again being brought before the Court, this time to be sued under Article 260(2) TFEU for a breach of Article 260(1) TFEU.

In consequence of the determination of a further finding of fault, Article 260(2) TEFU provides for the possibility of an award of a 'lump sum or penalty payment' (although both can be imposed simultaneously).[11]

3.2. Application

3.2.1. Failure to Fulfil a Treaty Obligation

Any violation of Union law, whether occurred via an act or omission,[12] can trigger enforcement proceedings.

As demonstrated in the ECtHR cases,[13] extraordinary rendition is a multifaceted human rights violation. In the EU system, such rights are protected via the general principles of Article 6(3) TEU (which includes fundamental rights as guaranteed by the ECHR) and in the Union's own Charter of Fundamental Rights.

[11] Case C-304/02 *Commission v France* [2005] ECR I-6263.

[12] Case 167/73 *Commission v France* [1974] ECR 359.

[13] See Section 2.

Nonetheless, as regards general principles, the CJEU has limited its jurisdiction to only those occasions where Member States act within the scope of EU law.[14] Application of the Charter is similarly restricted.[15] It is not contended that Member States, in participating in extraordinary rendition, are following a direction of Union law, or otherwise acting within the scope of the Treaties. It is therefore prudent to focus on an additional or substitutable Treaty obligation which the Member State had failed to fulfil to increase the chances of a successful verdict under Article 258 TFEU.

The solidarity clause in Article 4(3) TEU may offer this alternative route. Mandating that Member States cooperate fully with the institutions of the Union, this Article was indisputably breached as regards the incomplete and inadequate replies given to the European Parliament in undertaking its inquiry into Member State involvement in extraordinary rendition.[16] More importantly however, the Court has held on the basis of Article 4(3) TEU that the lack of effective protection by a Member State of an individual's Union rights constituted an infringement of the Treaties.[17]

By participating in the extraordinary rendition programme Member States did not effectively protect the human rights provisions conferred on individuals by the Treaties. Accordingly, Member States failed to fulfil a Treaty obligation for the purposes of Article 258 (and 259) TFEU.

3.2.2. Member State

For purposes of Article 258 TFEU, the CJEU has clarified that 'State' encompasses even 'constitutionally independent' institutions,[18] such as the legislature, the executive and the

[14] Case C-159/90 *Society for the Protection of the Unborn Child v Grogan* [1991] ECR I-4685.

[15] Article 51(1) Charter.

[16] Case C-137/91 *Commission v Greece* [1992] ECR I-4023.

[17] Case C-265/95 *Commission v France* [1997] ECR I-6959.

[18] Case 77/69 *Commission v Belgium* [1970] ECR 237, 243.

judiciary.[19] Actions undertaken by territorially autonomous regions can also engage the Member State's liability.[20]

Involved most directly in instances of Member State complicity in extraordinary rendition, through apprehension, interrogation and in securing the safety and security of a European 'black site,' national police services, intelligence agencies and the military can undoubtedly be equated with the 'State.' The responsibility of the executive moreover can be demonstrated through, *inter alia*, the provision of intelligence which led to the apprehension, or was used in the interrogation of, a suspected terrorist; in the negotiation of deals with the US to make available its airspace and territory for purposes of extraordinary rendition and secret detention; and in not satisfactorily complying with its positive obligations to investigate, prosecute and compensate anyone involved in the resultant human rights breaches. There is even a case to be made that the judiciary of certain Member States could be held accountable under Article 258 TFEU in accepting claims of 'State secrecy' to not fully explore a case brought before it. The equation of the actions of territorially autonomous regions with the Member State finally is especially important given that a number of the airports and locations used in the CIA-led operation were in fact US military bases; that this was so is irrelevant for purposes of EU Member State accountability.

There is no disputing therefore that the failure to fulfil a Treaty obligation was committed by a 'State,' as defined by the CJEU.

3.2.3. Defences

Other than for procedural defects, the CJEU is loathe to accept defences advanced by Member States in infringement proceedings.

[19] Case C-129/00 *Commission v Italy* [2003] ECR I-14637.

[20] Case C-383/00 *Commission v Germany* [2002] ECR I-4219.

Given the stock response that it was not involved in, or at least was unaware of, its contribution to the extraordinary rendition programme, it is unlikely that a Member State would offer a defence so as to justify its actions.

Nonetheless, if it should do so, no defence would excuse the human rights Treaty obligations not fulfilled via the counterterrorism operation. One can imagine the most common defences in this scenario to include *force majeure* or necessity given today's omnipresent threat of terrorism, however both of these have already been considered, and dismissed by, the CJEU.[21]

Accordingly, an arguable case can be made that Member States of the European Union, through their alleged involvement in extraordinary rendition, have failed to fulfil a Treaty obligation so as to be found legally accountable under Article 260(1) TFEU.

4. Holding European Union Member States to Account: Private Means

4.1. Law

'Inherent in the system of the Treat[ies],'[22] the second potential way of holding Member States accountable for human rights violations committed in the extraordinary rendition programme - the principle of State liability - permits an individual to claim damages before a national court for breaches of EU law for which that Member State is responsible.

Three conditions must first be fulfilled before liability of the State can arise. These are, namely: that the EU law at issue must have been intended to confer rights on individuals;

[21] Case 101/84 *Commission v Italy* [1985] ECR 2629; and Case 7/61 *Commission v Italy* [1961] ECR 317.

[22] Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, para 35.

that the breach be sufficiently serious; and that a causal link exists between the State's breach and the damage suffered by the individual.[23]

If the national court determines all three criteria satisfied, the Member State is 'obliged to make good loss and damage caused to individuals.'[24]

4.2. Application

4.2.1. Member State

In parallel with the understanding of 'Member State' under Commission enforcement proceedings,[25] State liability will apply 'whatever be the organ of the State whose act or omission was responsible for the breach,'[26] whether this branch be legislative,[27] executive[28] or judicial,[29] in addition to all other emanations of the State.

Accordingly, for the same reasons, this criterion for State liability proceedings can be deemed satisfied.

4.2.2. Conferral of Rights

[23] ibid para 40; Cases C-46 and C-48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for Transport, ex p Factortame Ltd (No 3)* [1996] ECR I-1029, para 51.

[24] *Francovich* (n 21) para 37.

[25] See Section 3.2.2.

[26] *Brasserie du Pêcheur* (n 22) para 32.

[27] ibid.

[28] Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas* [1996] ECR I-2553.

[29] Where this is a 'court adjudicating at last instance' and only where 'the court has manifestly infringed the applicable law.' Case C-224/01 *Köbler* v *Republik Osterreich* [2003] ECR I-10239, paras 34 and 53.

Conferral of rights mandates that the Union law allegedly breached was clearly meant to confer rights upon a distinct class of beneficiaries; that the content of such rights is readily identifiable; as is the legal body charged with protecting them.[30]

Applied to extraordinary rendition and the resulting alleged breaches of human rights protected by the EU, '[t]here could hardly be any argument against the "individuality" of such claims; that is the very purpose of the protection demanded by codes of human rights.'[31] As to the category of individuals protected, Article 1 ECHR extends its protection to 'everyone within … [the High Contracting Parties'] jurisdiction.' The Charter is not so explicit as to who it benefits however Article 52(3) specifies that 'in so far as this Charter contains rights which correspond to rights guaranteed by the … [ECHR], the meaning and *scope* of those rights shall be the same as those laid down by the said Convention.' For those rights protected under both the Charter and the Convention therefore, which in the case of extraordinary rendition includes them all, the scope of the former should be equivalent to that of the latter. This is bolstered by the second sentence of that same Article, that: '[t]his provision shall not prevent Union law providing more extensive protection [but, note, not less]' and Article 53 which similarly prohibits the Charter from being interpreted so as to restrict the rights recognised under, *inter alia*, the ECHR. Victims of the extraordinary rendition programme within the jurisdiction of the Member States therefore are protected by the human rights obligations guaranteed under Union law.

Next, the rights at issue in extraordinary rendition are clearly identifiable from the wording of the Charter and Convention. For example, '[e]veryone has the right to life,'[32] is unambiguous. Even where the provisions impose a prohibition on the Member State, rather than a positive right for the individual – for example Article 4 of the Charter: '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment' –

[30] *Francovich* (n 21) para 12.

[31] Malcolm Ross, 'Beyond *Francovich*' (1993) 56 Modern Law Review 55, 67.

[32] Article 2 Charter; and Article 2 ECHR.

'it nevertheless gives rise to rights for individuals which the national courts must protect.'[33]

Lastly, the guarantor of rights is recognised explicitly in the text of the respective instruments. Article 1 ECHR binds application of the Convention to the 'High Contracting Parties' (which includes all Member States); while the 'horizontal clauses' of the Charter constrain the actions of '… the Member States only when they are implementing Union law.'[34] Under Commission enforcement proceedings, it has already been analysed whether and how Member States 'implement[ed] Union law' through involvement in extraordinary rendition;[35] suffice to call this third condition of the first prong test of State liability satisfied.

4.2.3 Sufficiently Serious Violation

The CJEU left the assessment as to whether a breach is 'sufficiently serious,' that is whether the Member State 'manifestly and gravely disregarded the limits on its discretion,'[36] to the national courts. Nevertheless it set out several factors indicative of what a domestic court should take into account.[37] These include the clarity and precision of the rule breached; [38] the level of discretion provided to the Member State in implementing the provision;[39] whether the infringement was accidental or voluntary; whether the act was excusable or inexcusable; the position taken by an EU institution, if any, on the matter; and the adoption or preservation of a national measure or practice in violation of EU law. Moreover a breach will be sufficiently serious if a preliminary ruling

[33] *Brasserie du Pêcheur* (n 22) para 54.

[34] Article 51(1) Charter.

[35] See Section 3.2.1.

[36] *Brasserie du Pêcheur* (n 22) para 55.

[37] ibid para 56.

[38] Case C-392/93 *R* v *HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631.

[39] *Hedley Lomas* (n 27).

or a judgement or settled case law confirmed or made clear the existence of the violation.[40]

Applying the illustrative list to extraordinary rendition, it is to be noted that the Commission has, to date, not instigated any Article 258-260 TFEU proceedings against a Member State for involvement in the CIA-led programme. Such inaction was considered by the CJEU to contribute towards the finding of no 'sufficiently serious' breach in *British Telecommunications*.[41]

Furthermore, the CJEU has not ruled on the compatibility of the practice, nor have there been many national legal proceedings on this question. With sparse jurisprudential clarification for guidance, the accused Member States could argue that the law in this area is not sufficiently clear. Given the volume of Member States implicated in the process moreover, it could be contended that this is an interpretation shared by others.[42]

Moreover, when one considers that the Charter,[43] and the ECHR in respect of some Articles,[44] allow for derogation in certain situations, this may call into question the discretion afforded to the Member States. Indeed Member States may proffer the 'War on Terror' as exactly the 'time of war or other public emergency threatening the life of the nation'[45] envisaged by the Treaties in permitting derogation.

Nonetheless, not all ECHR articles are subject to derogation. Among those excluded include the right to life[46] and the prohibition of torture;[47] rights implicated by extraordinary rendition. Again, as the Charter dictates that '[i]n so far as … [it] contains

[40] *Brasserie du Pêcheur* (n 22) para 57.

[41] *British Telecommunications* (n 37) para 44.

[42] ibid para 43.

[43] Article 52(1) Charter.

[44] Article 15(1) ECHR.

[45] ibid.

[46] Article 2 ECHR.

[47] Article 3 ECHR.

rights which correspond to rights guaranteed by the … [ECHR] the meaning and scope of those rights shall be the same,' it is to be expected that these same rights (at a minimum) will also be outside the scope of any legitimate derogation. For those which can be so limited, including the right to liberty and security[48] and to a fair trial,[49] it should be borne in mind that once the applicability of the Article 36 TFEU derogation was dismissed in *Hedley Lomas*, the breach of Article 34 TFEU by the United Kingdom was considered automatically 'sufficiently serious.'[50] This is a risk the Member States may take should they choose to rely on the derogations available under EU law.

It is also questionable whether, despite the clarification of the CJEU, the wording of the provisions is sufficiently imprecise to escape liability. To give as an example Article 2 of the Charter: '[e]veryone has the right to life,' it is difficult to see what room this stipulation leaves for (mistaken) interpretation. It would perhaps go too far to argue that any understanding, other than full respect for the right to life, would be undertaken in good faith[51] and instead would be 'manifestly contrary to the wording … or to the objective pursued by [Article 2].'[52] A further argument that would have to be dismissed at the off-set is that Member State involvement in extraordinary rendition was anything but voluntary. All of the categories of alleged involvement (other than potentially failing to act) would require positive action on the part of the Member State.

Lastly, although the Commission has taken no (known) moves towards enforcement proceedings, another EU institution has taken a position on the matter. The European Parliament, via its Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, has repeatedly denounced Member States for involvement in extraordinary rendition.[53]

[48] Article 5 ECHR; and Article 6 Charter.

[49] Article 6 ECHR; and Article 47 Charter.

[50] *Hedley Lomas* (n 27) para 21.

[51] *British Telecommunications* (n 37) para 43.

[52] ibid.

[53] See Section 2.

As can be seen above, both parties to State liability proceedings have an arguable case to make concerning whether the EU law breach satisfies the 'sufficiently serious' criterion. Ultimately however, this is a question left to the national courts; although the CJEU, if privy to all the facts, may indicate what it thinks the result should be.

4.2.4 Causal Connection

As with the 'sufficiently serious' criterion, the CJEU left to the national court the issue of causation in State liability proceedings.[54] A question of fact, the national court must answer whether, but for the illegal act, would the individual have suffered loss.

Applied to extraordinary rendition, this third criterion of the test of State liability is perhaps the most difficult to satisfy. Undoubtedly legitimate victims of the CIA-led programme suffered, sometime irreparable, loss of a physical, emotional and even economic nature. Nonetheless, as Member States were not the instigators, that being the United States, but 'merely' accomplices in this counterterrorism operation, the causation issue revolves around whether the question is 'but for the involvement of the Member State at issue the individual would not have suffered *any* harm' or if it in fact is 'but for the involvement of the Member State at issue the individual would not have suffered *that particular* harm.'

With 54 of the world's countries implicated in the process in,[55] it is likely that extraordinary rendition would have continued with or without the cooperation of EU Member States: if Member States would not allow use of their airports and airspace a rendered individual would be transferred via another route; or if Member States did not submit questions to be asked of, visit their nationals in, or accept the intelligence obtained at CIA 'black sites' and proxy jails, those individuals would still be secretly detained

[54] *Francovich* (n 21) para 45.

[55] 'Globalising Torture' (n 7).

(and tortured). Perhaps less problematic are examples of Member State involvement entailing the apprehension and transfer of an individual to a US detention facility or the sharing of intelligence with the US in the knowledge that this would be used for purposes of a rendition (yet such individuals may have already been on the radar of the US). More direct still is the secret detention of a person on EU territory, (although there were many other locations scattered throughout the globe where they could also have been held). Indeed the only breach of Union law for which the Member State is undoubtedly *directly* responsible is in the concomitant human rights obligations proceeding the original human rights breach: to effectively investigate the allegations.

Pursuant to the new human rights focus of the European Union it is proposed that the latter question should be preferred: that is whether the Member State was responsible for *that particular* harm, in *that particular* place, at *that particular* date, as this tenders a more effective protection of individuals' rights. Yet even within this there are differing degrees of Member State involvement. It may therefore be that for those categories of contribution where there in fact exists a causal connection, the involvement of the Member State may not prove 'sufficiently serious.'

Accordingly, an arguable case can be made that Member States of the European Union, through their alleged involvement in extraordinary rendition, are responsible for a breach of EU law so as to be found legally accountable under State liability.

5. Holding European Union Member States to Account: Political Means

5.1. Law

Lastly, Article 7 TEU contains the Union's political sanction mechanism. In cases of a 'serious and persistent breach' by a Member State of the values protected by Article 2

TEU,[56] or a 'clear risk' thereof,[57] it allows for the suspension of certain rights attaching to Union membership.[58]

Whether there has been a breach will be determined by the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament.

5.2. Application

5.2.1. Article 2 TEU Values

Article 2 TEU lists the values on which the Union is founded as encompassing 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of minorities.'

Importantly, and as noted by the European Commission, 'the scope of Article 7 TEU is not confined to areas covered by Union law,'[59] but instead is 'horizontal and general [in] scope.'[60] Unlike in Commission enforcement actions and State liability,[61] there is no need to show that the Member State is implementing Union law before liability under Article 7 TEU can be activated. An Article 2 TEU violation in any sphere of Member State activity is enough.

[56] Article 7(2) TEU.

[57] With ample evidence of alleged Member State complicity in extraordinary rendition, it is unnecessary to consider the preventative mechanism of Article 7(1) TEU.

[58] Article 7(3) TEU.

[59] European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and Promotion of the Values on which the Union is Based*, COM(2003)606 final (15 October 2003) para 1(1).

[60] ibid.

[61] See Sections 3.2.1 and 4.2.2.

As demonstrated in the ECtHR cases,[62] extraordinary rendition is a multifaceted human rights violation. Such disregard for human rights moreover is connected with, and additional to, other Article 2 TEU contraventions. The torture of an individual, for example, encroaches upon their respect for human dignity, while their freedom is restricted through arbitrary arrest and secret detention. Likewise, by circumventing the judicial process of extradition and criminal and civil trials, the rule of law is devalued.

Extraordinary rendition unquestionably breaches Article 2 TEU values.

5.2.2. Serious Breach

In guidance on the application of Article 7 TEU, the Commission opines that the criterion of seriousness comprises various elements, including both 'purpose' and 'result.'[63] Purpose can be demonstrated by the 'social classes affected by the offending national measure;'[64] the targeting of 'vulnerable' groups for instance may be indicative of a serious breach of an Article 2 TEU value.[65] Result meanwhile may 'concern any one or more of the principles referred to in Article [2];'[66] while a 'simultaneous breach of several values' increases the likelihood of finding a serious breach.'[67]

Given today's omnipresent fear of the threat of terrorism, 'detainees held for political and security reasons' are, according to the United Nations Committee Against Torture, a particularly vulnerable group;[68] their targeting therefore could potentially satisfy the

[62] See Section 2.

[63] *Article 7 TEU Communication* (n 59) para 1(4)(3).

[64] ibid.

[65] ibid.

[66] ibid.

[67] ibid.

[68] Committee Against Torture, *Agiza v Sweden*, Communication No 233/2003, UN Doc CAT/34/D/233/2003 (20 May 2005) para 13(4).

Commission's 'purpose' criterion. As for 'result,' as noted above,[69] extraordinary rendition simultaneously violates several values protected by Article 2 TEU, including human dignity, freedom, the rule of law and respect for human rights.

The Commission's seriousness definition, necessary for the first prong of any Article 2 TEU violation, is thereby satisfied.

5.2.3. Persistent Breach

For the second prong of the Article 7(2) TEU breach of Article 2 TEU values, the 'persistence' requirement, the Commission understands this to mean that it 'must last some time,'[70] although persistence can also 'be expressed in a variety of manners … [for example] in the form of a piece of legislation or an administrative instrument'[71] or, where there is no specific written authorisation, through the 'administrative or political practice of the authorities of the Member State.'[72] Previous 'complaints or court actions, in the Member State or internationally,'[73] as well as '[s]ystematic repetition of individual breaches'[74] additionally are indicative of persistence. Finally, repeated condemnation 'for the same type of breach over a period of time by an international court … or by non-judicial international bodies … [and a demonstrable lack of] intention of taking practical remedial action is a factor that could be taken into account,'[75] in any application of Article 7(2) TEU.

It is extremely unlikely that there exists any specific legal or administrative instrument authorising the abduction, detention and torture of terror suspects; and although there is

[69] See Section 5.2.1.

[70] *Article 7 TEU Communication* (n 59) para 1(4)(4).

[71] ibid.

[72] ibid.

[73] ibid.

[74] ibid.

[75] ibid.

significant evidence indicative of Member State involvement in extraordinary rendition, to demonstrate that this was the explicit policy of any one State would probably prove an insurmountable hurdle. The direction any Article 7(2) TEU application should take instead should highlight the action taken, both at the national and international level, towards obtaining accountability for European complicity in the CIA-led programme. Cases have been filed domestically against, *inter alia*, Italy and the United Kingdom, as well as internationally before the ECtHR.[76] Moreover, non-judicial international bodies have repeatedly condemned the practice, including the two named as an example by the Commission: the Parliamentary Assembly of the Council of Europe and the United Nations Commission on Human Rights.

Further, although the involvement of certain Member States may be said to be more 'persistent' than others, in terms of the 'systematic repetition of individual breaches' – for example Poland, which allegedly hosted a secret detention centre would, arguably, have breached more fundamental rights than a Member State which 'merely' allowed use of its airspace – in almost every instance the Member State has refused to take any 'practical remedial action.' Compensation has only been paid in five instances and, despite the urging of the European Parliament and other international bodies, Member States have consistently refused to (re)open investigations into their alleged participation in the CIA-led programme.

Accordingly, an arguable case can also be made that Member States of the European Union, through their alleged involvement in extraordinary rendition, seriously and persistently breaches a value protected under Article 2 TEU so as to be found politically accountable under Article 7 TEU.

6. A New European Union Human Rights Framework?: Analysis

[76] See Section 2.

Of the three accountability methods described above, at the EU level, there has only been calls for activation of Article 7 TEU[77] and, to date, the European Commission has sent a minimum of ten confidential letters to Poland, Romania and Lithuania, asking for a progress report on the state of their national investigations into the countries' respective role in the CIA programme,[78] in what is viewed as a 'pre-Article-7-of-the-EU-Treaty exercise.'[79] Nevertheless it is unknown whether these letters have in fact been replied to or acted upon.

Such exclusive focus on the political sanction mechanism can potentially be explained, as seen in the discussion on obtaining accountability before the national courts and the CJEU, of the difficulty in otherwise having to prove a link between Member State action and EU law.[80] As noted above, it is extremely unlikely that there exists any legislative instrument at the EU level officially sanctioning Member State involvement in extraordinary rendition.[81] With its horizontal and general application, allowing EU institutions 'to act not only within the limited framework of the areas covered by EU law but also in the event of a breach in an area where the Member States act autonomously,'[82] Article 7 TEU circumvents this difficulty.

Yet, if past precedent is anything to go by, this may be as far as it goes. To date, Article 7 TEU has never been activated; remaining latent even in the face of grave potential breaches of Article 2 TEU values.

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[77] See, for example, European Parliament, *Resolution* (15 December 2005) (n 5) para 5.

[78] European Parliament, *Resolution on Alleged Transportation and Illegal Detention of Prisoners in European Countries by the CIA: Follow-Up of the European Parliament TDIP Committee Report*, P7_TA(2012)0309 (11 September 2012).

[79] European Parliament, Directorate-General for Internal Policies, *The Result of Inquiries into the CIA's Programme of Extraordinary Rendition and Secret Prisons in European States in Light of the New Legal Framework following the Lisbon Treaty* (2012) 41.

[80] See Sections 3.2.1 and 4.2.2.

[81] See Section 5.2.3.

[82] *Article 7 TEU Communication* (n 59) para 1(1).

This perhaps is to be expected given that Article 7 TEU is a fundamentally political prerogative. Member States decide if and when to open the procedure and, via their seats on the Council, what penalties, if any, should follow. The power of review of the CJEU is deliberately circumscribed to procedural matters; it cannot judicially review the decision taken on whether or not there existed a serious and persistent breach of the values referred to in Article 2 TEU. With 18 out of 28 of the Member States potentially involved in the CIA-led programme, it is extremely unlikely that the unanimity required for an Article 7(2) TEU activation will ever be reached. This same reason, and for issues of diplomacy, too negate against a Member State bringing enforcement proceedings against another Member State under Article 259 TFEU.

Article 258 TFEU proceedings do however provide for a neutral arbiter in the institution of the Commission. Given the politically charged atmosphere surrounding alleged European involvement in extraordinary programme, if this 'objective' body should take the lead in seeking accountability it would save any one Member State that spoke against the programme from being accused of 'not doing its bit' in the 'War on Terror.'

Nonetheless, in deciding whether to bring an infringement proceeding under Article 258 TFEU, or a follow-up procedure under Article 260(2) TFEU, the Commission is afforded absolute discretion. Accordingly, regardless of the seriousness of the alleged failure to fulfil an obligation under the Treaties through a Member State's participation in extraordinary rendition, or the strength of evidence adduced in this respect, it is entirely for the Commission to decide whether and how to follow up on it. Empirical evidence has suggested that the Commission, sensitive to the objections of larger and more politically powerful Member States, is more hesitant in bringing a case against them.[83] Indeed the CJEU strongly condemned the Commission for failing to bring certain infringement proceedings in the 1970s,[84] while in 2006 the European Parliament criticised its excessive focus on 'purely economic criteria and evaluations,' to the detriment of fundamental

[83] Christian B Jensen, 'Implementing Europe: A Question of Oversight' (2007) 8 European Union Politics 451, 457.

[84] Case 149/77 *Defrenne v SABENA* [1978] ECR 1365.

freedoms and general principles of the Treaties.[85] As some of the largest and most powerful EU Member States, for example Germany and the UK, have been linked to the programme; it is questionable whether the Commission will risk their ire in commencing proceedings against them.

In fact, only individuals bringing State liability proceedings are exempt from the external political pressure surrounding whether or not to bring an action. Moreover, by 'creat[ing] a large number of "private attorney-generals" who operate not only to vindicate their own private rights, but also to ensure that the norms of … [Union law] are correctly applied … [e]nforcement of the Treat[ies] is … shared,'[86] thereby easing the burden on (and resources associated with) the 'watchdog' role of the Commission.

Yet victims of extraordinary rendition tend not to be particularly prosperous financially. Permanently damaged by the experience at the hands of their captors or still tainted by the smoke of terrorism allegations, most have found it challenging to readjust to society, never mind hold down a job capable of financing litigation against the State.

Should they benefit from legal aid or a *pro bono* offer of a law firm, individuals are naturally self-selective; only pursuing litigation to further their own private interest. Even in the instance of extraordinary rendition, where one would imagine most claims to run parallel, differences in experience means that each State liability judgement will only address certain aspects of illegality peculiar to that particular individual, rather than ruling definitively on the permissibility of the CIA-led practice and the wider legal issues which extend beyond the dispute.

Moreover, as proceedings are reserved to the national courts, courts of each of the 18 Member States allegedly involved in the CIA-led practice could reach 18 different

[85] European Parliament, *Report on the Commission's 21st and 22nd Annual Reports on Monitoring the Application of Community Law (2003 and 2004),* A6-0089/2006 (24 March 2006) para 13.

[86] Paul Craig, 'Once upon a Time in the West: Direct Effect and the Federalisation of EEC Law' (1992) 12 Oxford Journal of Legal Studies 453, 454.

conclusions, resulting in the fragmentation of EU law, with the possibility of the victims of extraordinary rendition obtaining a remedy dependant on which Member State they brought their challenge.

This leads to the wider question of what sanction, if any, would prove proportionate to the human rights violated, which includes torture and even death, via extraordinary rendition. Given the declaratory nature of Article 260(1) TFEU orders, it is for the Member State itself to decide what actions are in fact needed to fulfil its obligations under the Treaties. In Article 258 TFEU proceedings brought for a breach of the Article 4(3) TEU principle of sincere cooperation in instances where the Member State has failed to cooperate in a *bona fide* manner with the European Parliament's inquiry into extraordinary rendition, the action required is self-evident; the Member State must respond to all requests for information and forward any evidence in its possession. Yet in a process commenced as a result, not of the Member States' failure to act, but instead as a result of its direct contribution to the CIA-led programme, through, for example, abducting and interrogating a terror suspect, the action required is much less palpable. Clearly the Member State must immediately desist from participating in any way in the counterterrorism operation. Extraordinary rendition is however, for the most part, an historical practice and in satisfying its Article 260(1) TFEU obligation, a Member State perhaps therefore should adapt its national laws so as to prevent anything similar from occurring in the future.[87]

Sanctions suggested under Article 7(3) TEU, for their part, include a suspension of 'the voting rights of the representative of the government of that Member State in the Council.' Yet with the possibility of voluntary withdrawal introduced by the Treaty of

[87] For example, by implementing the recommendations included in the Report of the Council of Europe's Secretary General which revealed the ways in which States' internal laws helped facilitate the extraordinary rendition programme. Secretary General, *Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies*, SG/Inf (2006) 5 (28 February 2006).

Lisbon,[88] this may lead a suspended State, which finds itself only with obligations resulting from its membership,[89] to leave the Union. This would contradict the entire '*raison d'être* of the sanction mechanism … [whose] purpose was to improve the human rights situation on the ground rather than get rid of a "rogue" Member State.'[90]

To the individual victim of the CIA-led programme moreover these remedies offer little. Any penalty or lump sum paid under Article 260(2) TFEU 'is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established.'[91] Individuals' interests and right to compensation are alternatively to be protected before national courts via State liability.

Finally, despite the increased deterrent effect of Article 260(2) TFEU which provides now for an economic penalty should the Member State fail to comply with the CJEU's previous ruling under Article 260(1) TFEU, it is unclear what would happen should a Member State refuse to pay. With total discretion left in the hands of national courts in State liability proceedings, it too is questionable whether those Member States 'that show least respect for Union law in general are ... [likely] to show any greater respect for this remedy.'[92] Paradoxically, as Hartley explains, this means that 'the remedy is likely to be least effective in those countries where it is most needed.'[93] In a situation in which a fundamental interest is at stake, such as counterterrorism operations, a Member State could 'buy' the 'right' to breach Union law, as what penalty, if any, would prove insurmountably high enough to negate the advantage of protecting its national security. The question of enforcement of this new proposed legal framework is therefore crucial as it is queried whether any system of Member State accountability can be truly mandatory.

[88] Article 50 TEU.

[89] Article 7(3) TEU.

[90] Wojciech Sadurski, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider' (University of Sydney, Sydney Law School, Legal Studies Research Paper No 10/01, January 2010) 6.

[91] Case C-304/02 *Commission v France* (n 11) para 91.

[92] Trevor Hartley, *The Foundations of European Union Law* (8th edn, Oxford University Press 2014) 255.

[93] ibid.

7. Conclusions

The previous sections have demonstrated that, *in theory*, EU Member States could be held accountable under the new proposed framework proposed, for human rights violations committed via the CIA-led programme. Nevertheless, the framework's shortcomings too are self-evident.

As primarily a political organisation with economic objectives, the means of accountability analysed at EU level were created to respond to breaches of internal market rules and not, at least originally, human rights violations. This foundational focus has been reflected in the effectiveness of the accountability methods which all suffer to some extent from being overtly political in their activation or else difficult to enforce.

Linked to, and aggravated by, these institutional limitations, external political factors additionally foretell against use of the EU human rights legal framework, in practice. With 18 out of 28 Member States, including some of the Union's most powerful, implicated in the CIA-led operation, it is extremely unlikely that the unanimity or other discretion necessary for activation of an accountability procedure will ever be achieved or that it will be deemed politically expedient to proceed. More realistic would be an aggravated breach committed by just one Member State and condemned by the others.

Yet the proposed framework is still an available accountability mechanism at the EU level. The possibility of failure is no reason to dismiss it altogether. If nothing else, by pursuing allegations of Treaty violations it would demonstrate that the Union's commitment to combating terrorism was predicated on the upholding of respect for the rule of law and fundamental rights; particularly pertinent in the aftermath of the adoption of the EU's own Charter of Fundamental Rights and as the Union negotiates its accession to the ECHR.

This would go someway towards resolving the Union's legitimacy crisis as it is accused of hypocrisy on two fronts: by the US as Member States take advantage of information gleaned by the CIA through the counterterrorism programme while simultaneously (publicly) decrying the practice;[94] and by those outside the Union, bound through trade and accession agreements to uphold fundamental human rights, which its Member States do not themselves respect.

With such perceived double-standards the EU risks angering its allies, being taken less seriously at the international level and breaking its promise to guarantee rights at a level equivalent to the constitutional traditions of the Member States – one of the reasons behind Member States relinquishing sovereignty to the supremacy of EU law in the first place.[95] This would ultimately leave the Union a more dangerous place, with fewer friends and less political influence and, potentially, could lead to its eventual break up.

With no accountability there can be no deterrence; and with no deterrence, the European Union has been, and will remain, 'a happy hunting ground for foreign security services.'[96]

[94] Christian Lagorio, 'Rice: Intel is "Two-Way Street,"' CBS News (5 December 2005) <http://www.cbsnews.com/news/rice-intel-is-two-way-street/>.

[95] *Re Wünsche Handelsgesellschaft ('Solange II')* [1987] 3 CMLR 225.

[96] Council of Europe, Secretary General, *Speaking Notes for the Press Conference on the Report under Article 52 of the ECHR* (1 March 2006) <http://www.coe.int/T/E/Com/Files/Events/2006-cia/Speaking_notes%20_sg.asp>.