

# WHEN ‘EXTRAORDINARY’ MEANS ILLEGAL: INTERNATIONAL LAW AND THE EUROPEAN REACTIONS TO THE UNITED STATES RENDITION PROGRAM

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*The power of our society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.<sup>†</sup>*

SUMMARY: 1. “I ate in the best restaurants of Egypt.” – 2. Under the color of “adaptation.” – 3. The complex legacy of the ERP. – 3.1. Can abduction be justified? – 3.2. Assessing the risk of torture. – 3.2.1. A very absolute ban. – 3.2.2. Conflicting obligations. – 4. How the ERP is undermining international relations. – 4.1. Foreign policy and the courts. – 4.2. The European struggle: hard reactions against blind eyes. – 4.2.1. The Council of Europe: blind eyes on human rights. – 4.2.2. The European Parliament resolution. – 5. Conclusions.

## 1. “I ATE IN THE BEST RESTAURANTS OF EGYPT.”

Hassan Mustafa Osama Nasr, aka Abu Omar, is not only a name.<sup>1</sup> He is a true story. As a member of the extremist Egyptian organization called “Jamaa Islamiya,” he is a good friend of certain Al Qaeda affiliates. On 1997, after a long stay in Afghanistan and Bosnia, he moved to Albania and subsequently to Italy: Puglia, then Rome and Milan, where he became an *imam* in the mosque on Jenner boulevard. This place is located within ten minutes walking distance from my parents’ home.

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<sup>†</sup> High Court of Justice (Isr.) 168/91, *Morcos v. Minister of Defense*, 45(1)P.D. 467, 470-471 (Aharon Barak op.).

<sup>1</sup> See Guido Olimpio, *Operazione Hotel California* (2005), at 36.

On February 17, 2003, Abu Omar was walking from his home to the mosque, per his usual daily routine. When he reached Guerzoni Street, a narrow and isolated road, two men stopped him and asked him to identify himself. With no time for an explanation, he was suddenly pushed into a van, injected with a sedative, and driven away. A woman walking on the other side of Guerzoni street assisted at the event. Three days later, Abu Omar's wife informed the police of her husband's disappearance. The Italian antiterrorism task force, DIGOS,<sup>2</sup> immediately suspected a kidnapping. In mid-March, the United States informed the Italian services that Abu Omar was actually in the Balkans. However, in mid-April, Italian police started to wiretap several phone calls from Egypt to Abu Omar's wife. "I ate in the best Egyptian restaurants" – Abu Omar said in one of these calls.<sup>3</sup> Yet in truth he had been brutally tortured by Egyptians. They administered electric shocks to his genitals and subjected him to loud music. As a result, Abu Omar became incontinent and lost hearing in one ear.<sup>4</sup> All of the calls with his wife and friends, especially one who later collaborated with the prosecutors, were wiretapped. The DIGOS began their investigation by analyzing the phone traffic on Guerzoni Street on the day of February 17, 2003, and the discovery was astonishing: in the same time frame, several calls were made, respectively, to Langley, Virginia, the U.S. embassy in Milan, and Aviano. One of these lines of communication was later revealed to have been used in Egypt beginning on the day of the event and continuing until mid-March, 2003, led the investigators to a U.S. diplomat at the embassy in Milan. Clearly, the CIA had been involved in the kidnapping.

Abu Omar's case is not an isolated one. There are other stories like his one, perhaps hundreds. On October 23, 2001, Jamil Qasim Saeed Mohammed, a Yemeni national suspected of being involved in the bombing of USS *Cole* in 2000, had been taken into custody by ISI<sup>5</sup> agents in Karachi, Pakistan, and forced by CIA agents to move out to Jordan.<sup>6</sup> In the meanwhile, Mahdough Habib, an Australian and Egyptian national, was transferred from Pakistan to Egypt, and forced under torture to sign a confession of affiliation with Al Qaeda, which he subsequently retracted.<sup>7</sup> Eight weeks later, Swedish

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<sup>2</sup> DIGOS means "Direzione Investigazioni Generali e Operazioni Speciali" [Department of General Investigations and Special Operations] and is the core of antiterrorist investigation structure in Italy.

<sup>3</sup> Olimpio, *supra* note 1, at 29.

<sup>4</sup> Stephen Grey & Don van Hatten, Jr., *In Italy, Anger at U.S. Tactics Colors Spy Case*, N.Y. TIMES, June 26, 2005, at A1.

<sup>5</sup> The term "ISI" stands for "Inter-Service Intelligence" and indicates the Pakistani secret services.

<sup>6</sup> The event became known because, once charged the plane with the suspect, the operator refused to pay the fees due to the Pakistani airport authorities. Thus the plane stayed several hours stopped on the runway and eventually was left to flee thanks to ISI's pressures. See TREVOR PAGLEN, A.C. THOMPSON, *TORTURE TAXI. ON THE TRAIL OF THE CIA'S RENDITION FLIGHTS* (2006), 59-60.

<sup>7</sup> Mahdough Habib was arrested in Karachi, while he was on a bus, on October 5, 2001. He has been detained in Egypt, then in Afghanistan and finally in Guantanamo Bay. He has

Sakerhetpolisen (SÄPO) arrested two men, Ahmed Agiza and Mohammed Zeri, and rushed them to Egypt, where they have been subjected to the worst imaginable abuses.<sup>8</sup> In 2002, Ibn al-Shaykh al-Libi was arrested in Afghanistan and moved to the USS *Bataan*, in the Persian Sea, eventually to be rendered to Egypt, where the information that he released under torture has been used to sustain a purported link between Osama bin Laden’s organization and Saddam Hussein,<sup>9</sup> denied by the CIA itself at the time. The same year, an Ethiopian student, Binyam Mohammed, was abducted in Pakistan and moved to Afghanistan and Morocco for interrogation under torture.<sup>10</sup> On September, 2002, a Canadian citizen, Maher Arar, was seized by the U.S. immigration authorities while travelling from Tunis to Montréal via New York JFK airport; he was forcibly moved to Syria — belonging to the “Axis of Evil”<sup>11</sup> (*sic!*), where the police detained him for almost a year in a 3-foot by 6-foot dirty room, beat him and threatened him with electrocution.<sup>12</sup> In March, 2002, Abou Elkassim Britel, a Moroccan and Italian national, was removed from Pakistan to Morocco, where he was subjected to torture and sentenced to 9 years in prison after a secret trial.<sup>13</sup> On New Year’s Eve 2003, Khaled el-Masri — whose name was confused with that of Khalid al-Masri, a significant member of Al Qaeda

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been released on January, 2005, and now is involved in certain political activity in New South Wales.

<sup>8</sup> See Stephen Grey, *United States: Trade in Torture*, LE MONDE DIPLOMATIQUE, available at <http://mondediplo.com/2005/04/04usatorture>.

<sup>9</sup> See Dana Priest, *Al Qaeda-Iraq Link Canted. Captured Libyan Reverses Previous Statement to CIA, Officials Say*, WASH. POST, Aug. 1, 2004, at A24.

<sup>10</sup> See *MI6 and CIA ‘Sent Student to Morocco to be Tortured,’* THE OBSERVER, Dec. 11, 2005.

<sup>11</sup> Because Syria is in the so-called “Axis of Evil,” the United States can hardly justify the sending of a terrorist to that country; yet, obviously there are certain political junctures between Syria and the U.S., under which they actually collaborate, especially because of the presence of American forces in the nearby Iraq. Presumably, the same reason brought the U.S. to halt renditions to Syria. See Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of “Rendition,”* 20 GEO. IMMIGR. L.J. 213 (2006), at 263 (“[t]he official said the U.S. stopped sending prisoners to Syria because of concerns over suspects’ treatment, but that may not have been the only factor; tensions with Syria over the situation in Iraq were mounting at approximately the same time”). Moreover, “[e]ven when diplomatic relations between two countries are strained, as they are between the United States and Syria, sometimes intelligence services are able to work out mutually beneficial deals. That is, sometimes the relationship between spymasters is quite different from the relationship between diplomats. Not always do the scenes on stage correspond with that goes on off the stage.” A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1 (2006), at 24.

<sup>12</sup> The case of Maher Arar is particularly well-known, because of its international and domestic implications after the detainee’s release.

<sup>13</sup> A good summary of Britel’s accident is contained in a parliamentary inquiry, raised by some members of the Italian Parliament to the government. See Senate of Republic (Italy), Act No. 3-00291 (Dec. 12, 2006). See also StateWatch, *Italy/Morocco Renditions: Italian and European MPs set to request pardon for Abou Elkassim Britel*, at <http://www.statewatch.org/news/2007/jan/10britel.htm>.

linked to the “Hamburg cell” — was arrested at the border checkpoint at Tabanovce, Macedonia, and then transferred to a CIA facility in Afghanistan. Here, el-Masri was detained, interrogated and tortured for five months. Then, he was taken to Albania and abandoned in a field road. The list is not over.<sup>14</sup>

Turning back to *Abu Omar*, on June 23, 2005, an Italian public prosecutor obtained from the judge of the Tribunal of Milan, Chiara Nobili, a warrant against thirteen CIA agents for Abu Omar’s abduction.<sup>15</sup> One day later, another judge, Guido Salvini, issued a warrant against Abu Omar charging him with international terrorism.<sup>16</sup> In the order seeking Abu Omar’s pretrial incarceration, Judge Salvini affirmed that “*Abu Omar’s kidnapping is not only illegal, for it breached Italian sovereignty, but it is also an ill-omened and polluting act with regard to the whole fight against terrorism.*”<sup>17</sup> In Dr. Salvini’s view, Abu Omar was a victim of a program called “Extraordinary Rendition Program” (ERP).<sup>18</sup> Yet it is only a non-technical term, the legal one being “*abduction*,” the French version for “*enlèvement criminel*.”<sup>19</sup>

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<sup>14</sup> For a complete list see the table published at [www.nyuhr.org/docs/Case%20Annex%20Final.pdf](http://www.nyuhr.org/docs/Case%20Annex%20Final.pdf).

<sup>15</sup> Judge Presiding over Preliminary Investigation [Giudice per le Indagini Preliminari, GIP], Dr. Chiara Nobili, Tribunal of Milan, file no. 10838/05, Arrest warrant (June 22, 2005), available at <http://www.statewatch.org/rendition/rendition.html> [in English].

<sup>16</sup> GIP, Dr. Guido Salvini, Tribunal of Milan, file no. 5236/02, Order establishing the imprisonment provisional measure (June 24, 2005), available at <http://www.statewatch.org/cia/documents/milan-tribunal-abu-omar.pdf> [only in Italian] (hereinafter, “Salvini’s Order”).

<sup>17</sup> Salvini’s Order, *supra* note 16, at 10 “[q]uindi il sequestro di Abu Omar non solo è stato illegale avendo violato gravemente la sovranità italiana ma è stato anche un atto nefasto e inquinante ai fini dell’efficacia della complessiva lotta al terrorismo”].

<sup>18</sup> The word “rendition” has no technical meaning. Indeed, “[t]he term is, of course, a euphemism for abduction and subsequent transfer designed to circumvent ordinary extradition procedures.” David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture*, 46 VA. J. INT’L L. 585 (2006), at 586. Moreover, “[t]his is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State’s territory, or a place subject to its jurisdiction, or to a third State. “Rendition” is thus a general term referring more to the result – obtaining a custody over a suspected person – rather than the means.” European Commission for Democracy Through Law (“Venice Commission”), Opinion on the International Legal Obligations of COE Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, No. 363/2005, CDL-AD(2006)009 (March 17, 2006), par. 30, available online at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp) (hereinafter “Venice Commission’s Opinion”). Actually, the term is used in a legal context in the U.S., where an appropriate “rendition clause” at the federal constitutional level provides for the surrendering of individuals between the states. See U.S. Const., art. IV, § 2.

<sup>19</sup> Salvini’s Order, *supra* note 17, at nt. 9. Salvini explains that the term “Extraordinary Rendition” has no technical denotation and seems rather justificatory, while under international law such an action is called “*abduction*,” or, in French, “*enlèvement criminel*.” See Vincent Coussirat-Coustère & Pierre M. Eisemann, *L’enlèvement des personnes privées et le droit international*, 76 REVUE GÉNÉRALE DE DR. INT. PUBLIC 346 (1972).

The subject of the present article is the illegality of the ERP.<sup>20</sup> In fact, ERP actions raise important legal questions from both domestic and international viewpoints.<sup>21</sup> Its legality has been challenged in several ways, through public debates and condemnations, diplomatic protests, and lawsuits.<sup>22</sup> This article argues that the current international law framework, fueled by a fierce European campaign against the ERP, clearly demonstrates the illegality of this program. First, we will deal with the factual and legal structure of the ERP (§ 2) as a premise for the following analysis. Second, we will determine whether the ERP violates the international law norms concerning the ban on torture (§ 3), and, third, we will examine the inconsistency in European reactions to it and the way in which these reactions may affect the future ERP's exploitation by the U.S. Administration (§ 4). Some conclusions will finally be made (§ 5).

## 2. UNDER THE COLOR OF "ADAPTATION"

The term ERP contains the adjective "*extraordinary*." It basically means that its actions are contingent on a particular moment, characterized by unusual circumstances. It could also mean that either the Rendition Program is part of a government's larger strategy of emergency response to global terror, or that its legal framework is very specifically connected to particular situations. Finally, it could mean that it is lawless.<sup>23</sup> Yet none of those explanations does justice to the true legacy of the ERP.

The ERP is intimately connected with the global fight against terrorism. Such actions took place even before 9/11.<sup>24</sup> Their legal framework resides in

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<sup>20</sup> Signally, "[w]hether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights. Thus, even if a particular "rendition" is in accordance with the national law of one of the States involved (which may forbid or even regulate extraterritorial activities of State organs), it may still be unlawful under the national law of the other State(s). Moreover, a "rendition" may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law." Venice Commission's Opinion, *supra* note 18, par. 30.

<sup>21</sup> This article will not deal with the problem of ERP's consistency with the U.S. Constitution. Some issues concerning specifically the problem of secrecy will be dealt with *infra* at par. 4.

<sup>22</sup> ALFRED W. MCCOY, *A QUESTION OF TORTURE. CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* (2006), at 171-177.

<sup>23</sup> Likewise, see Venice Commission's Opinion, *supra* note 18, par. 31.

<sup>24</sup> In 1995, in Zagreb, Croatia, some CIA agents seized an allegedly Egyptian extremist, Talaat Fouad Quassem, detained him for interrogation on a ship in the Adriatic Sea and then transferred him to Egypt, where he disappeared. His family think he had been executed in Egypt. See Anthony Shadid, *America Prepares the War on Terror; US, Egypt Raids Caught Militants*, BOSTON GLOBE, Oct. 7, 2001. Also, in 1998, seven people were grabbed by the Albanian police and moved to Egypt on a CIA flight. In the same year, three people, Ahmed Salama Mabrouk, Essam Hafez and Ihab Muhammad Saqr, were transferred by the CIA from Azerbaijan to Egypt and tortured there.

the Presidential directives to the CIA, enacted in 1995. At that time, a wave of terrorism had stirred the Clinton Presidency to action. The World Trade Center in 1993, Oklahoma City and Tokyo in 1995 were all rocked by terrorist assaults. Although there was no connection between those events, the U.S. government decided to expand the CIA's powers in order to prevent further tragedies. Thus, Clinton enacted the Presidential Decision Directive (PDD) 39:

“[w]hen terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority [...]. If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government [...].”<sup>25</sup>

Initially, the main addressee of the PDD 39 was the FBI.<sup>26</sup> United States should identify terrorists and then seek the cooperation of the involved country. Identification and cooperation were thus the paradigms underlying the PDD 39. However, “[o]nce terrorist is located, more detailed information [...] is usually required to effect an arrest. Intelligence officers, and their sources, on the scene are usually better able to do that than enforcement officers from the United States.”<sup>27</sup> Efficiency and efficacy thus, by this understanding, require the exploitation of intelligence agencies, which have contacts and information at the local level that enforcement agencies such as the FBI rarely have. The use of intelligence has consequences for the legal framework of inter-state cooperation. In fact, normally cooperation between law enforcement entities of different countries is based on treaties, especially extradition treaties.<sup>28</sup> Yet international treaties are concluded only following long negotiations between the concerned governments, and their enforcement could prove to be very problematic. On the contrary, using intelligence would allow counterterrorism measures to proceed more quickly, thereby leaving terrorists less time and breathing space to plan their deadly attacks. For these reasons, the CIA was immediately enlisted to carry out the rendition strategies of the U.S. government. Here is what is really *extraordinary*: that renditions are conducted by the CIA outside the confines of any international treaty, answerable only to

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<sup>25</sup> Presidential Decision Directive 39, U.S. Policy on Counterterrorism (June 21, 1995), available also online at <http://www.fas.org/irp/offdocs/pdd39.htm>. See Douglas Kash, *Abducting Terrorists Under PDD-39: Much Ado About Nothing New*, 13 AM. U. INT'L L. REV. 139 (1997), at 141.

<sup>26</sup> See Yonah Alexander, *United States*, in YONAH ALEXANDER, *COUNTERTERRORISM STRATEGIES. SUCCESSES AND FAILURES OF SIX NATIONS* 9-43 (2006), at 29 (the PDD “designated the FBI as the lead agency for investigating acts against American citizens worldwide”).

<sup>27</sup> Paul R. Pillar, *Terrorism and U.S. Foreign Policy* (2001), at 118.

<sup>28</sup> Cf. ISIDORO ZANOTTI, *EXTRADITION IN MULTILATERAL TREATIES AND CONVENTIONS* (2006), pp. 48-89.

contingent motives such as prevention or immediate political convenience.<sup>29</sup> Whilst the identification-cooperation duality corresponds to the legal mission of enforcement agencies, prevention requires, in addition, that those who have the relevant information act directly, even if this means in an outlaw context.

One should ask what purpose lies in such a highly structured ERP. Interviewed by some journalists before her visit to Europe on December 2005, the U.S. Secretary of State Condoleezza Rice affirmed that “[r]enditions [...] save lives.”<sup>30</sup> She was asked to specifically respond to the claims that some European countries were hosting CIA prisons for interrogating and torturing suspected terrorists. While neither denying nor confirming these prisons’ existence,<sup>31</sup> Condoleezza Rice answered very firmly that:

“[w]e must track down terrorists who seek refuge in areas [...] where the terrorists cannot in practice be reached by the ordinary processes of law. [...] The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt.”<sup>32</sup>

The concept of “adaptation” seems to form the spine of Rice’s entire speech. She speaks of the adaptation of governmental actions to the unique status of captured terrorists, which draws law far afield from the traditional justice context. One should adapt to terrorists’ conduct, on the one hand, and to the particular situation, on the other. Where a country – Condoleezza Rice argues – cannot extradite or prosecute a terrorist, the negotiation or enforcement of an extradition treaty is not a viable option. The U.S. must act promptly, possibly with the cooperation of the territorial state: here, Rice assumes that rendition actions are compatible with international law.<sup>33</sup> Clearly, this recourse to “adaptation” represents an effort to bring under existing laws actions which

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<sup>29</sup> Precisely, “[t]he rendition techniques [...] are extraordinary in the legal sense, since extradition exists as an ordinary legal process. However, recourse to these techniques may well be due to the frustration of a requesting state following formal channels of rendition.” M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (4th ed, 2002), p. 251.

<sup>30</sup> ‘Renditions Save Lives:’ *Condoleezza Rice’s Full Statement*, TIMES ONLINE, Dec. 5, 2005.

<sup>31</sup> Currently the public opinion knows that these prisons actually exist, and they are located in Poland and Romania. See Committee on Legal Affairs and Human Rights (Council of Europe), *Secret Detentions and Illegal Transfer of Detainees Involving the Council of Europe Member States: Second Report, Explanatory Memorandum*, AS/Jur (2007) 36 (June 7, 2007) (hereinafter, “Marty’s Committee Second Report”), para. 198 (on “[s]ecret detention operations at Stare Kiejkuty [Poland]) and 201 ff. (“[s]ecret detention operations in Romania.”)

<sup>32</sup> ‘Renditions Save Lives’, *supra* note 30.

<sup>33</sup> Condoleezza Rice added that “[i]n some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.” *Ibid.*

evidently have no legal basis. One symptom of the “adaptation” pathology is represented by the attempt to arrange typical operations of criminal statute, such as the arrest, outside the framework of the ordinary criminal process, *i.e.* without a formal indictment. This is what emerges from the so-called “Memorandum of Notification,” a classified directive signed by President George W. Bush on September 17, 2001.<sup>34</sup> This directive allows the CIA to render terrorists without governmental approval and to carry out renditions abroad without any formal criminal charge, but merely for the purpose of interrogation. It establishes measures restraining individual freedom without due process of law. That is what Condoleezza Rice, in reality, was assuming: rendition is an “adaptation” of intelligence structures to the temporary need of making dangerous terrorists harmless. Nevertheless, as we will see shortly, the ERP remains essentially beyond the law. The claim that the goal of prevention makes the action legal is anything but well-grounded.

### 3. THE COMPLEX LEGACY OF THE ERP

Normally, all ERP actions have two common components.<sup>35</sup> First, they concretize an abduction, that is a forced and illegal taking of an individual. This component clearly entails an often violent restraint on physical freedom. Second, ERP actions involve the transfer of the individual to countries where law enforcement authorities or intelligence agencies notoriously practice torture. To be sure, “[*t*]here were no cases where a prisoner was released, or had contact with a family member, human rights worker, or other visitor, and did not make any allegations of torture.”<sup>36</sup> The use of torture is significant because ERP actions aim to obtain information from the abducted individual; that is ultimately the reason why the CIA exploits the assistance of countries where torture is covertly admitted.<sup>37</sup> This is the key: another country is doing

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<sup>34</sup> Shaun Waterman, *Ex-CIA Lawyer Calls for Law on Rendition*, UPI, Mar. 9, 2005, available online at <http://www.spacewar.com/news/2005/upinews-030905-1410-52.html>.

<sup>35</sup> It has been noticed that “collectively the cases [...] testify to the existence of an established *modus operandi* of rendition, put into practice by an elite, highly-trained and highly-disciplined group of CIA agents who travel around the world mistreating prisoner after prisoner in exactly the same fashion.” EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *EXTRAORDINARY RENDITIONS: A EUROPEAN PERSPECTIVE*, Speech given by M. Olivier Dutheillet de Lamothe, Cardozo School of Law, Sept. 25, 2006 [hereinafter “Olivier Dutheillet Speech”], par. I.3, available at [http://www.venice.coe.int/docs/2006/CDL\(2006\)077-e.asp](http://www.venice.coe.int/docs/2006/CDL(2006)077-e.asp).

<sup>36</sup> Katherine Hawkins, *supra* note 11, at 264.

<sup>37</sup> This component is currently present in some definitions given by courts and scholars. See, for instance, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (“since the early 1990s the CIA has been operating interrogation centers in countries where the United States believes *legal safeguards do not constrain efforts to interrogate suspected terrorists*. This practice is commonly known as ‘extraordinary rendition.’” *Emphasis added*); *El-Masri v. United States*, 2007 WL 625130 (C.A. 4 (Va.)) (ERP is “the clandestine abduction and detention outside the

the “dirty job” of interrogating the suspected terrorist. We will address both components in the subsequent chapters.

### 3.1. CAN ABDUCTION BE JUSTIFIED?

Under classic international law, states have a duty to refrain from exercising their sovereign powers on the territory of other states.<sup>38</sup> Accordingly, the taking of foreign citizens in a foreign country is generally forbidden.<sup>39</sup> If the taking is illegal under international law, one should use the term “*abduction*.” However, as a matter of sovereignty, the territorial state can consent to the operation, in which case the taking is considered to be perfectly legal.

First, customary international law provides for the lawfulness of an international law violation which is justified by the concerned State’s consent.<sup>40</sup> However, this consent must be “valid”<sup>41</sup> and the action taken accordingly must respect the consent’s limits.<sup>42</sup> While the latter condition relates to the specific case at issue, the question of the validity of consent is generally governed by the applicable norms, in particular those regulating the power of State agents and the consent in the field of treaties.<sup>43</sup> In this respect, the law of treaties requires that for a State to be bound by a treaty obligation, its agent must show his “*plein pouvoirs*” or, in case of a common practice, it must result from therein that the agent does have the powers as a State representative.<sup>44</sup> Accordingly, in the ERP context, consent must be given by an agent with appropriate powers, a

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United States of persons suspected of involvement in terrorist activities *using methods impermissible under U.S. and international law.*” Emphasis added).

<sup>38</sup> See ‘*Lotus*’ (*France v. Turkey*), 1927 PCIJ (Ser. A.), No. 9 (Sept. 7, 1927).

<sup>39</sup> Under international law abduction still stands as an “offence[...] of grave concern to the international community, having severe consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States.” S.C. Res. 579 (1985), preamble, U.N. Doc. S/RES/579 (Dec. 18, 1985).

<sup>40</sup> This principle translates a customary international law norm. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), U.N.G.A.O.R., 56th sess., Supp. no. 10 (A/56/10) (hereinafter “Draft Articles”), art. 20 (stating that “[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”)

<sup>41</sup> *Ibid.*

<sup>42</sup> In fact, “wrongfulness is precluded provided that the act is within the limits of the consent given.” MALCOLM N. SHAW, *INTERNATIONAL LAW* (5th ed., 2003), at 707.

<sup>43</sup> In particular, “[w]ho has authority to consent [...] depend on the rule,” and with respect of consent’s coercion, error or fraud, “the principles concerning the validity of consent to treaties provide relevant guidance.” JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLE ON STATE RESPONSIBILITY. INTRODUCTION, TEXT AND COMMENTARY* (2002), at 164.

<sup>44</sup> See Vienna Convention on the Law of Treaties, signed on May 23, 1969, 1155 U.N.T.S. 331, art. 7(1)(a), (b).

serious question arises as to whether the assurances given by a member of the intelligence are legally adequate to grant the consent.<sup>45</sup>

Second, it is commonly asserted by some scholars that, even in the case that the territorial state did not consent to the operation, there is room to retain the legality of the ERP action from the standpoint of international law. In order to determine the lawfulness of the ERP in this case, some scholars recall the non-inquiry doctrine, or rule of “*male captus bene detentus*,” according to which domestic criminal courts may not ascertain whether the circumstances of the arrest were in violation of international law.<sup>46</sup> In other words, although the circumstances reveal that the government acted illegally, this does not affect the courts’ power to adjudicate the case. The scholars rely on a well-established jurisprudence in order to affirm that the arrest, and the subsequent trial, remain legal despite the international law violation. Signally, the famous cases *Ker*,<sup>47</sup> *Frisbie*,<sup>48</sup> *Eichmann*,<sup>49</sup> *Argoud*<sup>50</sup> and, more recently, *Alvarez-Machain*,<sup>51</sup> would confirm this point.<sup>52</sup>

In my view, however, this argument must be rejected. First of all, there is some confusion surrounding the *male captus* rule, because the precedents usually called upon to support it are often misunderstood or misapplied,<sup>53</sup> and

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<sup>45</sup> Take, for instance, *Abu Omar*. Here, the CIA agents acted with the complicity of the director of the SISMI, Niccolò Pollari. Whether Pollari is really responsible for complicity in kidnapping Abu Omar will be presumably ascertained by the judges in Milan. However, the extent to which Pollari consented to the CIA’s action may be relevant for settling the problem of Italian authorities’ consent to the action itself. From this viewpoint, certainly Pollari has no powers to sign agreements with foreign secret agents, neither the practice of the U.S.-Italy relations seems to prove otherwise.

<sup>46</sup> See Douglas Kash, *supra* note 25, pp. 153-154; critically, Silvia Borelli, *The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation*, in *ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* 331 (Andrea Bianchi ed., 2004), pp. 353-362.

<sup>47</sup> *Ker v. Illinois*, 119 U.S. 436 (1886).

<sup>48</sup> *Frisbie v. Collins*, 342 U.S. 519 (1952).

<sup>49</sup> *Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (no. 40/61), 36 INT’L L. REP. 5, esp. par. 41.

<sup>50</sup> Cour de Cassation, Judgm. June 4, 1964 (fr.), reprinted in *JOURNAL DU DR. INT.* 93 (1965).

<sup>51</sup> *United States v. Alvarez-Machain*, 504 U.S. 673 (1992).

<sup>52</sup> Indeed, “[w]ith rare unanimity and undeniable justification the court of the world have held that the manner in which an accused has been brought before a court does not and, indeed cannot deprive it of its jurisdiction.” Frederick Alexander Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY. ESSAYS IN HONOUR OF SHABTAI ROSENNE* 407 (Yoram Dinstein ed., 1988), at 414.

<sup>53</sup> The principle of *male captus bene detentus* is highly contested in some domestic cases. In particular, “if on the one hand it may still be premature to affirm the existence of a customary rule [...] compelling the courts to divest themselves from jurisdiction over abducted defendants, it would on the other hand be extremely inaccurate to maintain [...] that ‘the violation of [international] law does not affect the validity of the subsequent exercise of jurisdiction over [illegally seized] offenders’ [quoting IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (5th ed., 1998), at 320].” Borelli, *supra* note 46, p. 361. Moreover, “the

indeed apparently overruled by the recent practice.<sup>54</sup> Domestic courts constantly try to bring rendition cases back to the treaty norms of extradition.<sup>55</sup> Second, and more generally, the ERP must be distinguished from the legal environment in which the *male captus* rule had emerged. In fact, the *male captus* rule applies to criminal trials held later against the kidnapped person. The ERP's exclusive purpose, instead, is interrogation. No criminal trial is initiated, no criminal charge is brought against the abducted people, and indeed, as a general matter, instruments of criminal law are avoided.<sup>56</sup> It is, as we mentioned above, the paradigm of "adaptation."<sup>57</sup> Third, one must emphasize that the simple adjudication of an abducted criminal does not legitimate a violation of human rights law,<sup>58</sup> nor when the operation occurred with the approval of the territorial

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courts of the world have [...] failed the decisive question. This is not whether jurisdiction exists, but whether jurisdiction should be exercised." Mann, *supra* note 52, at 414.

<sup>54</sup> In some cases, for instance, the International Criminal Tribunal for the Former Yugoslavia [ICTY] has affirmed that the illegality of the arrest generally does affect the Court's jurisdiction, but nevertheless the trial can be validly initiated if the violations of the accused's rights have not been "of such an egregious nature." ICTY, IT-94-2-PT, *Prosecutor v. Dragan Nikolic*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (Oct. 9, 2002), par. 104; similarly, IT-95-13a-PT, *Prosecutor v. Slavko Dokmanovic*, Decision on the Motion for Release by the Accused (Oct. 22, 1997) (distinguishing between "luring" and "kidnapping," only the latter raising issues related to jurisdiction). See Aparna Sridhar, *The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction*, 42 STAN. J. INT'L L. 343 (2006), at 355 ff.; Michael P. Scharf, *The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY*, 11 LEIDEN J. INT'L L. 369 (1998), at 379-381.

<sup>55</sup> Borelli, *supra* note 46, at 346 ("[a]n emerging body of jurisprudence suggests that when an accused has been forcibly abducted from another national jurisdiction – particularly if the abduction was done with the aid of the same government that subsequently seeks to prosecute him – a court may exercise its supervisory authority and decline to try the accused.") See also *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254; *Director of Public Prosecutors v. Humphreys*, [1976] 2 All E.R. 497.

<sup>56</sup> To be sure, "[n]one of the current estimated 3,000 captives was charged with recognizable criminal offense." John Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457 (2003), at 459.

<sup>57</sup> See *supra* § 2.

<sup>58</sup> See Borelli, *supra* note 46, at 356, arguing that "with the development of international human rights law, the issue of forcible abduction can be framed in ways other than the traditional issue of inter-State responsibility." See also Royal J. Stark, *The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and United States Sponsored Kidnapping of Foreign National Abroad*, 9 CONN. J. INT'L L. 113 (1999), at p. 134 (demonstrating that the *male captus* doctrine "cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying the government the fruit of its exploitation of any deliberate and unnecessary lawlessness on its part"). The last cited scholar, in support of its argument, mentions *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) and *Cook v. United States*, 288 U.S. 102 (1933), as examples where U.S. courts refused to refer to *Ker* and established that jurisdiction on specific cases depended on the government's previous misconduct with regard to the accused's abduction. Remarkably, in *Toscanino* the federal Court recalls art. 2(4) of the U.N. Charter and art. 17 of the Charter of the Organization of American States (holding that the territory of a Member State

state.<sup>59</sup> In particular, forced abduction is clearly an arbitrary deprivation of freedom, and thus incontrovertibly incompatible with those international norms which affirm the individual's right to freedom.<sup>60</sup> To be sure, there do exist multiple international treaties<sup>61</sup> and norms, which expressly forbid international abduction,<sup>62</sup> and recently the U.N. General Assembly sponsored a global Convention on the topic of forced disappearance which was concluded on December 20, 2006.<sup>63</sup> Forced disappearance, in fact,

“places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families[; i]t constitutes a violation of [...] the right to recognition as a person before the law, the right to liberty and security of a person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment.”<sup>64</sup>

For these reasons, the reference to both the territorial State's consent and the *male captus* rule as a way to maintain the legality of suspected terrorists'

“may not be object [of] measures of force taken by another State, directly or indirectly, on any ground whatever.” *Ibid.*, at 277).

<sup>59</sup> See Bassiouni, *supra* note 29, noting that, present the asylum state's consent, “such a practice would [...] not disrupt relations between the respective states nor it would involve infringement of sovereignty. However, issues of human rights would remain”. *Ibid.*, at p. 256. Again, also constitutional issues remain.

<sup>60</sup> See International Covenant on Civil and Political Rights, signed on March 23, 1966, 999 U.N.T.S. 171, art. 9(1) (“[n]o one shall be subjected to arbitrary arrest or detention” and “[n]o one shall be deprived of his liberty except of such grounds and in accordance with such procedure as are established by law.”)

<sup>61</sup> See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9\*, art. 7(1)(i). This is a norm of customary international law. See Antonio Cassese, *Crimes Against Humanity*, in ANTONIO CASSESE, PAOLA GAETA & JOHN R.W.D. JONES (EDS.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 353 (2002), at p. 374; Paola Gaeta, *Extraordinary Renditions and Immunity of State Agents from Criminal Jurisdiction [Extraordinary Renditions e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar]*, 89 RIVISTA DI DIRITTO INTERNAZIONALE 126 (2006), p. 129. See also Inter-American Convention on the Forced Disappearance of Persons, signed on June 9, 1994 at Belem, Brazil, entered into force on March 28, 1996, OAS Doc. OEA/Ser.P/AG/Doc. 3114/94 (1994), reprinted in 33 INT'L LEGAL MATERIALS 1529 (1994). See finally Reed Brody, Felipe Gonzales, *Nunca Más: An Analysis of International Instruments on 'Disappearances'*, 19 HUM. RTS Q. 365 (1997), at 376.

<sup>62</sup> See G.A. Res. 47/133, *Declaration on the Protection of All Persons from Enforced Disappearance*, preamble, U.N. Doc. A/RES/47/133, holding that “enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts os of the nature of a crime against humanity.”

<sup>63</sup> Moreover, on Dec. 20, 2006, 57 states signed the International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177, which at art. 1 states that “[n]o one shall be subjected to enforced disappearance”. *Ibid.*, art. 1(1). Moreover, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”. *Ibid.*, art. 1(2).

<sup>64</sup> G.A. Res. 47/133, art. 1(2), *supra* note 62.

abductions are highly questionable in the ERP context. The *male captus* is perfectly adaptable to the violation of sovereignty, but it can hardly be applied to human rights violations, which were actually ignored by the cases cited above. Generally, it raises doubts from a moral viewpoint, since “[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.”<sup>65</sup> In conclusion, abduction is *per se* a violation of international law and, accordingly, Condoleezza Rice’s claim of the territorial state’s consent being sufficient grounds to show a respect for international law sounds extremely naïve.

### 3.2. ASSESSING THE RISK OF TORTURE

#### 3.2.1. A VERY ABSOLUTE BAN

The second component of the ERP, as mentioned earlier, is that the suspected terrorist is moved, for the purpose of interrogation, to a country that practices torture. Now, torture is unquestionably illegal under international law.<sup>66</sup> Indeed, its ban is provided by a norm of *jus cogens*,<sup>67</sup> making it inderogable and unjustifiable under all circumstances.<sup>68</sup>

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<sup>65</sup> *Toscanino*, *supra* note 58, at 274.

<sup>66</sup> See, for instance, U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], adopted by the General Assembly by resolution 39/46 of Dec. 10, 1984, art. 2, 1465 U.N.T.S. 85 (entered into force on June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], signed in Rome on Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 (into force since Sept. 3, 1953) (stating that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed on November 26, 1987, *reprinted in* 27 INT’L LEGAL MATERIALS 1152 (entered into force on February 1, 1989) (establishing a monitoring mechanism based on visit).

<sup>67</sup> See ICTY, IT-95-17/1, *Prosecutor v. Furundzija* (Dec. 10, 1998), par. 153, 38 INT’L LEGAL MATERIALS 349 (1999) (emphasizing that “[b]ecause of the importance of the values [the principle proscribing torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”). Usually norms of *jus cogens* prevail on all other norms of international law. See the Vienna Convention on the Law of Treaties, signed on May 23, 1969, 1155 U.N.T.S. 331, art. 53 (“[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”). Although the general principle is considering conflicting norms void, the solution found by the practice considers the norms of treaties which are inconsistent with *jus cogens*, simply unoperative or unenforceable. An example is given by treaties of extradition: the duty to extradite under a treaty cannot be enforced incompatibly with the prohibition of torture, even though the treaty still remains operative and enforceable. Erika De Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97 (2004), pp. 101-112.

<sup>68</sup> As to art. 3 of the ECHR, *supra* note 66, scholars note that “only in this article are there no qualifications or exceptions, and no restrictions to the rights guaranteed. The

The main problem with such a provision is that states must put forth their strongest efforts to *prevent* torture.<sup>69</sup> Prevention is essential if human dignity is to be preserved at the global level. This assumption of the overriding priority of prevention of torture must deal with the problem of limited sovereignty of states. By this measure, states cannot extend their efforts to the territories of other countries. International law provides a solution for this problem by regulating the cases in which an individual, who is under the control of a state faces the risk of torture if moved to another state. In this regard, article 3(1) of the Convention against Torture (CAT),<sup>70</sup> signed in 1984 under the U.N. General Assembly auspices, states that

“[n]o state party shall expel, return or extradite a person to another state when there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>71</sup>

This norm establishes that the authorities deciding on the transfer are obliged to refuse if there is a risk of torture in the country of destination. A question may arise about the meaning of the word “*return*,” in French “*refouler*.” While it is clear that the norm applies to expulsion and extradition proceedings, it seems to also contemplate the simple “turn[ing] back” of an immigrant.<sup>72</sup> However, the term “*refouler*” — which sparked animated debate during the CAT’s negotiations<sup>73</sup> — usually refers to the case of an individual who presents at the border, thus article 3(1) might not apply when the *refoulement* occurs on the territory of another country. Some scholars<sup>74</sup> and

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prohibition is absolute.” CLARE OVEY & ROBIN WHITE (EDS.), *JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed., 2002), at 58; likewise JOHN COOPER, *CRUELTY. AN ANALYSIS OF ARTICLE 3* (2003), at 9. In *Chahal*, the European Court of Human Rights [ECtHR] dealt with the deportation of a Sikh separatist from the United Kingdom to India, where he was threatened with torture. The British government argued that he was a dangerous terrorist and his expulsion was required for the security of English citizens. Interestingly, the Court pointed out that “even in these circumstances, the Convention prohibits in absolute terms torture.” *Chahal v. United Kingdom*, par. 80, (1997) 23 E.H.R.R. 413 (dec. Nov. 15, 1996). See also *Særing v. United Kingdom*, par. 88, (1989) 11 E.H.R.R. 439 (dec. July 7, 1989).

<sup>69</sup> CAT, art. 2(1), *supra* note 66.

<sup>70</sup> *Id.*

<sup>71</sup> *Ibid.*, art. 3(1).

<sup>72</sup> The proper translation of the French word “*refouler*” is “*to force back, to push back, to turn back, [...] to reject*.” *THE OXFORD-HACHETTE FRENCH DICTIONARY* (3d ed., 2001), at 719.

<sup>73</sup> See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1988), p. 50, noticing that during negotiations “it was said that there were strong humanitarian reasons to include [the] word [‘return’ (‘refouler’)], which broadened the protection of the persons concerned.”

<sup>74</sup> See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004), at p. 1129 (“the [CAT] is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in case of extradition) and, hence,

U.S. officials<sup>75</sup> strongly believe that these doubts are well grounded, and that the CAT does not extend extraterritorially. In support of this argument, one of them proudly cites the U.S. Supreme Court decision in *Sale v. Haitian Centers Council* of 1993.<sup>76</sup> Their conclusion is that U.S. agents acting abroad have no restraints in transferring individuals to other countries, even when these individuals face the risk of being tortured.

Before challenging this interpretation, we should recall article 3(2) of the CAT. While article 3(1) forbids the extradition, expulsion or deportation of a person only when there are “*substantial grounds*” to believe he or she would face torture,<sup>77</sup> article 3(2) addresses the problem of determining *when* such a threshold is met, and provides that

“[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”<sup>78</sup>

This norm apparently establishes the conditions under which the “*competent authorities*” must decide when extradition, expulsion or deportation is to be considered forbidden. Precisely, it establishes, first, that all circumstances must be taken into account, meaning that “*it is illegal to disregard any information about the likelihood of torture,*”<sup>79</sup> and, second, that between those circumstances there are gross violations of human rights perpetrated by the state concerned. Besides these indications, article 3(2) does not contain any other criteria as to how to assess the likelihood of torture with regard to extradition, expulsion or deportation proceedings. Nevertheless, some guidelines can be extrapolated from article 3(2). First, the individual does not have to prove that he or she would be subject to torture. It is enough for him or her to show that there are systematic violations of human rights in the destination state, because generally “*where systematic violations of human rights take place, it is highly likely that torture takes place as well.*”<sup>80</sup> This is a

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cannot apply to Al Qaeda and Taliban prisoners detained outside the U.S. territory”); John Radsan, *supra* note 11, p. 21 (assuming but not explaining that “CAT’s territorial reach is limited”).

<sup>75</sup> According to John Bellinger, “[t]he United States has long taken the position that [art. 3 of the CAT] applies to people expelled or returned from the United States and we’re very careful about that obligation. It does not apply, though, to a transfer that takes place wholly outside of the United States, because that’s not a return or an expulsion.” On-The-Record Briefing, *supra* note 194.

<sup>76</sup> *Sale v. Haitian Center Council Inc.*, 509 U.S. 155 (1993).

<sup>77</sup> CAT, art. 3(1).

<sup>78</sup> *Ibid.*, art. 3(2).

<sup>79</sup> Hawkins, *supra* note 36, at 229.

<sup>80</sup> Matteo Fornari, *La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti*, in LAURA PINESCHI (ED.), *LA TUTELA INTERNAZIONALE DEI DIRITTI UMANI. NORME, GARANZIE, PRASSI* 203 (2006), at 211 [translation

presumption in favor of the applicant.<sup>81</sup> Second, for obvious reasons states normally refrain from expressly declaring their direct involvement in torture cases. Accordingly, it is unlikely that an applicant could find strong evidence of torture in the recipient country. It follows, hence, that the CAT does not require full proof of the truthfulness of the facts concerning torture.<sup>82</sup>

I take the position that the standards provided by article 3 of the CAT apply to the ERP actions. First, I believe that the denial of the CAT's extraterritorial reach is a product of a patent misunderstanding. As it has been correctly argued, if article 3 forbids certain transfers for regular proceedings, like expulsion or extradition, it must also *a fortiori* regulate also the irregular ones.<sup>83</sup> As I pointed out above, article 3's aim is to prevent torture: where the expulsion, extradition, or return proceedings are exhausted, the expelling state party will not be held responsible for the norm's violation, and the individual, nevertheless, will have been tortured.<sup>84</sup> As to *Sale*, it concerned article 33 of the U.N. Protocol on the status of refugees, a norm which is clearly distinct, with respect to its scope, from article 3 of the CAT.<sup>85</sup> Moreover, in *Furundzija*, the International Criminal Tribunal for the Former Yugoslavia has determined that the prohibition of torture as "*an absolute value*,"<sup>86</sup> applies, regardless of jurisdictional issue, to all individuals on which states "*wield authority*."<sup>87</sup> The CAT, accordingly, applies extraterritorially to the extent to which States claim authority over an individual outside their territory. It would be a strange legal system that forbade questionable conduct in the most unconditional way and then permitted the same conduct on an extraterritorial exception!

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from Italian: "laddove si verificano sistematiche violazioni dei diritti umani, [è] altamente probabile il compimento di atti di tortura").

<sup>81</sup> *Id.*

<sup>82</sup> Likewise Burgers & Danelius, *supra* note 73, p. 127.

<sup>83</sup> Precisely, "international human rights law is equally applicable to cases of expulsion/deportation as it is to regular extradition; it is arguably even more important in protecting individual rights in cases of irregular rendition." Borelli, *supra* note 46, at 339.

<sup>84</sup> As remarked by the U.N. Committee Against Torture, "the main aim and purpose of the Convention is to prevent torture, and not to redress torture once it has occurred." U.N. committee Against Torture, Communication 21/1995, *Alan v. Switzerland*, U.N. Doc. CAT/C/16/D/41/1996, par. 11.5.

<sup>85</sup> In fact, "the scope of the two provisions is different. In the *Refugee Convention*, protection is given to refugees, i.e. to persons who are persecuted in their country of origin for a special reason, whereas article 3 of the [CAT] applies to any person who, for whatever cause, is in danger of being subjected to torture if handed over to another country." J. Herman Burgers & Hans Danelius, *supra* note 73, p. 125. Note that the Authors refer to the *Refugee Convention*, whose art. 33 has the same formulation than art. 33 of the U.N. Protocol of the status of refugees.

<sup>86</sup> ICTY, *Furundzija*, *supra* note 67, par. 154 (the ban of torture "signals to all members of the international community and the *individuals over whom they wield authority* that the prohibition of torture is *an absolute value* from which nobody must deviate." Emphasis added).

<sup>87</sup> *Ibid.* Notice that the Tribunal could have said "individuals over whom they have jurisdiction:" clearly the meaning is to extend the prohibition of torture wherever the government could extend its control.

Second, as a matter of fact the recipient countries are always the same: Egypt, Syria, Jordan, Uzbekistan, Morocco, Pakistan, and, very recently, Ethiopia and Somalia.<sup>88</sup> Most of them are not only notoriously involved in torture, for which they have been denounced by several U.S. government official reports,<sup>89</sup> but also concerned in massive violations of human rights. Pursuant to article 3(2), one cannot see how the U.S. government could ignore the evidence of “*substantial grounds*” for the risk of torture in those countries. Clearly all the abducted individuals are under risk of torture if sent to the aforementioned countries, *a fortiori* under the notorious U.S. Senate interpretation of article 3(2) of the CAT, the so-called “*more likely than not*” standard.<sup>90</sup> It seems very perplexing to maintain that the ERP does not involve torture on the part of the CIA agents who are responsible for specific abductions, and therefore lead to the international responsibility of the U.S..<sup>91</sup>

### 3.2.2. CONFLICTING OBLIGATIONS

Another aspect that appears relevant to the present analysis is the relationship between the ERP and other international obligations concerning the fight against terrorism. We will address this issue from two viewpoints. First, we will determine whether the rendition remains a violation of international law even though the local authorities complied with certain other international legal obligations regarding the fight against terrorism; second, we will evaluate the

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<sup>88</sup> See *Ethiopia Secret Prisons Under Scrutiny*, N.Y. TIMES, Apr. 5, 2007. For a visual map of the CIA “black sites” and the countries involved therein, see the webpage available at the address <http://upload.wikimedia.org/wikipedia/en/0/0b/ExtRenditionMap.gif>.

<sup>89</sup> See for instance U.S. DEPARTMENT OF STATE, *EGYPT, COUNTRY REPORT ON HUMAN RIGHTS PRACTICE* (2004), available online at <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>, denouncing that “[t]he security forces continued to mistreat and torture prisoners,” and “[r]eports of torture and mistreatment at police stations remained frequent.” *Ibid.*

<sup>90</sup> 8 C.F.R. § 208.16(c)(2).

<sup>91</sup> In all the cases mentioned in this note, “the grounds for believing that someone will be tortured are close to 100%.” John Radsan, *supra* note 11, p. 19. It seems, however, that art. 3(2) of the CAT allows at least one case in which the violation of that norm could be excluded, that is when the State has not reasons to believe that the torture will take place because of the strong assurances given by the recipient State. In other words, diplomatic assurances might make the sender State reasonably believe that the individual concerned will not be tortured, and if then torture occurs, then the sender State could not be held responsible for that. This perspective seems highly problematic. Since the aim of CAT’s article 3 is to prevent torture, it seems unlikely that the State could justify its conduct by using the diplomatic assurances from a country that is reported to commit gross violations of human rights. Of course, once the torture takes place, the sender State is forbidden to trust the diplomatic assurances in the future. Yet, what future do human rights have if all world States send at least one individual to Egypt under the latter’s diplomatic assurances? What is the sense of legitimating a legal framework which justifies systematic torture through diplomatic assurances but finding a very legal hole for torturing people?

persuasive authority of the argument that the ERP violates the norms on extradition of suspected terrorists.

As to the first question, it was raised in the *Agiza* case, decided in 2005 by the Committee Against Torture. The Committee was seized by *Agiza*, a terrorist rendered by SÄPO to Egypt in 2001 on a CIA flight.<sup>92</sup> Sweden argued that the action should have been considered a part of its national efforts to comply with the obligations deriving from the U.N. Security Council Resolution 1373 (2001).<sup>93</sup> In particular, the government emphasized that, according to Resolution 1373, states must prevent the institution of asylum from being exploited by terrorists.<sup>94</sup> The Committee responded by expressly acknowledging that, although

“measures taken to fight terrorism, including denial of safe haven, deriving from binding Security Council Resolutions are both legitimate and important [..., t]heir execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the [CAT].”<sup>95</sup>

Stated differently, even if formally speaking Security Council resolutions are deemed to prevail over all other international obligations according to article 103 of the U.N. Charter,<sup>96</sup> the ban on torture established by the CAT is so strong that U.N. norms prevalence may not be invoked when the risk of torture is at stake.<sup>97</sup>

On this aspect, the explanation lies in the hierarchy of international law. While on the one hand a treaty on cooperation or extradition could be overruled by a subsequent agreement concluded by the intelligence agencies of the concerned countries as to the rendition of a particular individual,<sup>98</sup> norms of *jus*

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<sup>92</sup> U.N. Committee against Torture, Communication 233/03, *Agiza v. Sweden*, CAT/C/34/D/233/3002 (May 20, 2005), available online at <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html>.

<sup>93</sup> S.C. Res. 1373 (2001), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>94</sup> *Agiza*, *supra* note 92, par. 4.9 (noting that Resolution 1373 “called upon Member States to ensure, in accordance with international law, that the institution of refugee status is not abused by perpetrators, organizers or facilitators of terrorist acts”).

<sup>95</sup> *Ibid.*, par 13.1.

<sup>96</sup> U.N. Charter art. 103 (“[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”).

<sup>97</sup> I do not deal with the very controversial issue of balancing human rights obligations with the U.N. framework of resolutions concerning the fight against terrorism.

<sup>98</sup> I basically agree with Professor Bassiouni, when he argues that in presence of rendition accidents, “[t]he solution [...] should be to make extradition more efficient, not to subvert it by resorting to unlawful or legally questionable means.” M. Cherif Bassiouni, *supra* note 29, p. 251. However, in our view this is a political problem. Legally speaking, there is no issue for a state party to an extradition treaty to derogate to it with the consent of the other state party. A different solution would be settled in case the territorial state did not consent to the operation. Here, in fact, absent the approval of the territorial state, no legal agreement could be construed as to supercede the previous one, that remains obviously valid and in respect of which the abduction is clearly a breach.

*cogens* cannot be derogated by the states, since they are imperative. The rights affirmed thereby are not negotiable; thus states cannot exploit the consent of those rights in order to justify a violation of the *jus cogens*. Moreover, as to the argument that Resolution 1373 justifies such actions, this appears very reductive. Not only does Resolution 1373 not authorize states to kidnap individuals and torture them, but it would be dishonest to interpret its norms as a justification for violating the *jus cogens* provision contained in article 3 of the CAT.<sup>99</sup>

As to the second question (whether ERP violates the norms on extradition), one should wonder what is so problematic in developing a system parallel to extradition. Why should the ERP not be intended as a means of rendition that is “alternative” to the one provided by extradition treaties? The answer is very simple: “[e]xtralegal remedies to extradition [...] invariably pose a threat to international peace and security.”<sup>100</sup> Of course, not all the remedies held outside the framework of a treaty are automatically illegal. For instance, some could be justified as countermeasures, although this argument could hardly be bought.<sup>101</sup> However, they are illegal if they are inconsistent with the treaty provisions, *i.e.* they are “contrary to the treaty right[s] of another state.”<sup>102</sup> Clearly, where extradition treaties require a minimum standard of treatment for the detainee or any substantial or procedural guarantee

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<sup>99</sup> See European Court of First Instance [CFI], case T-306/01, *Ahmed Ali Yusuf, Al Barakaat Int’l Found’n v. Council and Commission* (Sept. 21, 2005), para. 278-280, [2005] E.C.R. II-3533, *app’d under* case C-415/05, [2006] OJ C48, 11; case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* (Sept. 21, 2005), para. 227-230, [2005] E.C.R. II-3649, *app’d under* case C-402/05, [2006] OJ C36, 19.

<sup>100</sup> BARBARA M. YARNOLD, *INTERNATIONAL FUGITIVES. A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE* (1991), p. 69, stating that “[e]xtralegal methods of extradition may also endanger the national and international rights of criminal defendants.” *Ibid.*, at p. 70.

<sup>101</sup> Under international law, countermeasures are reactions (or, juridically speaking, “legitimate reprisals”) brought by a State which had been harmed by another State’s conduct. Generally, if brought out of the requirements established by international law, countermeasures are illegal. One of these requirements is that countermeasure must be “taken in response to a previous international wrongful act of another State and [...] directed against that State.” *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7, par. 83. Those limits explain why international law cannot be called to justify aliens’ abductions. First, one should determine which norm had been previously breached. This could not be the norm on cooperation against terrorism, or the principle of *aut dedere aut judicare*, because usually the States in whose territory the alleged terrorists are kidnapped are cooperative countries (e.g. Italy, Sweden, Pakistan, and Bosnia-Herzegovina), indeed in some of those criminal proceedings were already ongoing (for instance, in *Abu Omar* and *Boumediene*). Second, “[c]ountermeasures shall not affect [...] obligations for the protection of fundamental human rights.” Draft of Articles, art. 50(1)(a), *supra* note 40. Clearly, such countermeasures would heavily affect the individual right to be free from arbitrary detention. Third, before taking countermeasures the States must fulfill some obligations, such as the request of negotiations and the call for halting the violation, something that hardly happened in the ERP cases. *Ibid.*, art. 52(1). For all these reasons, barely ERP actions could be justified as countermeasures under international law.

<sup>102</sup> Crawford, *supra* note 43, at 83, related to Draft of Articles, art. 2, *supra* note 40.

for the extradition proceedings, abductions constitute a breach of these norms.<sup>103</sup> In the Court's dissenting opinion in *Alvarez-Machain*, Justice Stevens, joined by Justices Blackmun and O'Connor, correctly stressed that

“[t]he Government's claim that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform these, and other, provisions into little more than verbiage. [...] Indeed, it is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory.”<sup>104</sup>

In *Alvarez-Machain*, the U.S. government claimed that the extradition treaty between the United States and Mexico was not exclusive, but that extradition was only an “*optional method of obtaining jurisdiction over alleged offenders*.”<sup>105</sup> Although the majority agreed with this perspective, its viewpoint was wrong. States go to the effort of negotiating and stipulating complex international treaties in order to set a legal framework for their cooperation. When they assess a duty to extradite, they do so because the territorial state's consent is essential to the continued peaceful cohabitation of sovereign entities. If states could freely kidnap people everywhere, why should they stipulate hundred of treaties on extradition and cooperation in criminal matters? The extradition processes might be time-consuming, but are nevertheless efficient, because while abductions are by definition life threatening and inhumane, “*extradition[s] have yet to kill anyone*.”<sup>106</sup> Significantly, after 9/11 the Security Council has strengthened its action against terrorism not by legitimizing other techniques of capture of suspected terrorists, but calling upon states to cooperate strongly.<sup>107</sup>

In conclusion, “[*t]he integrity of the internationally recognized process of extradition should not be subverted for practical considerations[, and] alternative devices to extradition should not be allowed*.”<sup>108</sup> The presumption that ERP saves lives is highly questionable: unlike the extradition processes, the ERP seems to deeply affect the human dignity, to undermine international

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<sup>103</sup> Likewise, Nicoletta Parisi, *Brief Remarks on Judicial Co-Operation in Criminal Matters and the Rights of Individuals in the Light of International and Domestic Praxis*, in 3 STUDI DI DIRITTO INTERNAZIONALE IN ONORE DI GAETANO ARANGIO-RUIZ 2081 (2004), p. 2103.

<sup>104</sup> *Alvarez-Machain*, *supra* note 51, at 679.

<sup>105</sup> *Ibid.*, at 674.

<sup>106</sup> GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW. EXTRADITION AND OTHER MECHANISMS* (1998), p. 361.

<sup>107</sup> See S.C. Res. 1373 (2001), § 2(f) (“assistance”) and 3(b), (c), (e) (“cooperat[ion]”), *supra* note 93. See also Silvia Borelli, *supra* note 46, p. 363 (“[i]nternational cooperation is therefore [...] a viable alternative to abduction”).

<sup>108</sup> M. Cherif Bassiouni, *supra* note 29, p. 311. Likewise Satyadeva Bedi, *Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries* (2002), p. 396. Geoff Gilbert, *supra* note 106, at pp. 375-377, instead, proposes a framework of new rules on abduction, regulated by a treaty, whose violation would divest domestic courts of jurisdiction.

relations and to challenge the government supremacy in foreign policy, as we will see shortly.

#### 4. HOW THE ERP IS UNDERMINING INTERNATIONAL RELATIONS

##### 4.1. FOREIGN POLICY AND THE COURTS

Traditionally, domestic courts have little room to question the government's maneuvers in its relations with other states. However, the ERP has broken with this classical picture of domestic constitutional structure. Since in most constitutional systems the foreign policy remains a strict competence of the Executive Branch – of course, with some interventions by the Parliament – the courts' interference with ERP cases is likely to raise serious questions on domestic relations with the United States. I will proceed with several examples.

First, consider the *Abu Omar* case. Apparently, the CIA agents acted with the *placet* of the Italian secret service, the SISMI. Some SISMI members, including a director, were indicted for the abduction.<sup>109</sup> The government strongly opposed to any declassification of the information related to the accident. However, on February 17, 2007, the judge for the preliminary hearing of Milan decided that the state secret defense was untenable, and that the trial must go forth. The government appealed to the Constitutional Court,<sup>110</sup> but the prospect of lifting the veil from the "CIA-SISMI joint venture" would clearly be embarrassing to its relations with the United States. Furthermore, while the Italian code of criminal procedure provides for the trial *in absentia*, the arrest warrant issued by the Milan Court is valid throughout the entire European Union, pursuant to the so-called "European arrest warrant" approved in 2002.<sup>111</sup>

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<sup>109</sup> *Ex-Intelligence Chief, CIA Agents Indicted for Kidnapping*, CORRIERE DELLA SERA, Feb. 17, 2007 [translation in English in *Watching America*, available at [http://www.watchingamerica.com/corriere\\_dellaser000021.shtml](http://www.watchingamerica.com/corriere_dellaser000021.shtml)].

<sup>110</sup> In particular, art. 134 of the Italian Constitution vests the Constitutional Court of the jurisdiction over disputes arisen between powers. In *Abu Omar*, the dispute involved the powers of the government in the availability of state secret defense with regard to certain actions, and the courts' powers to indict state and foreign officials for criminal conducts sanctioned by the law. It is unlikely that the government advances a formal request to the U.S. government for the extradition of the CIA agents involved in Abu Omar's abduction, at least until the Constitutional Court would not have rendered its decision. See Ian Fisher, *Italians Indict C.I.A. Operatives in '03 Abduction*, N.Y. TIMES, Feb. 17, 2007, at A1.

<sup>111</sup> See Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, June 13, 2002, OJ L 190/1 (July 18, 2002), art. 1(1), 1(2).

Second, in *El-Masri*, both the Federal District Court of East Virginia<sup>112</sup> and the Court of Appeals<sup>113</sup> dismissed the case on the grounds of the doctrine of state secret. According to U.S. courts, the ERP must remain secret because the interests of U.S. national security so require. Nevertheless, the German authorities initiated investigations about El-Masri's abduction.<sup>114</sup> In late January, 2007, a criminal court in München issued an arrest warrant against some CIA agents supposedly involved in the incident.<sup>115</sup> Apparently, the airport of Frankfurt and the U.S. base at Ramstein have been used for flights concerning the ERP.<sup>116</sup> Like the Italian one, the German arrest warrant is valid for all European prosecutors.<sup>117</sup>

Third, in *Arar*, the Canadian policy against terrorism received a strong and polemical rebuff by an *ad hoc* Commission, elected by the legislature and presided over by Justice Dennis O'Connor ("O'Connor Commission").<sup>118</sup> The O'Connor Commission was required to inquire on the factual circumstances in which Arar's deportation to Syria had occurred, and to recommend the potential reforms of the Canadian security services. The Commission issued four reports<sup>119</sup> where it recommended, among other things: the rigorous separation of the intelligence agencies from those of law-enforcement, like the RMCP;<sup>120</sup> a strengthening of the cooperation and information-sharing process between the two entities;<sup>121</sup> and, finally, the introduction of "*clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.*"<sup>122</sup> These policies,

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<sup>112</sup> *Khaled El-Masri v. George Tenet et al.*, 437 F. Supp. 2d 530 (E.D. Va. 2006), at 537 ("any admission or denial [...] in this case would reveal the means and methods employed pursuant to this clandestine program and such revelation would present a grave risk of injury to national security"), and 539 ("any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument").

<sup>113</sup> *Khaled El-Masri v. United States et al.*, 2007 WL 625130 (C.A.4 (Va.)).

<sup>114</sup> One should remind that el-Masri is a German citizen.

<sup>115</sup> See Mark Lander, *German Court Confronts U.S. On Abduction*, N.Y. TIMES, Feb. 1, 2007, at A1.

<sup>116</sup> *Ibid.*

<sup>117</sup> See *supra* note 111.

<sup>118</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [O'Connor Commission], established on Feb. 5, 2004, all information available at <http://www.ararcommission.ca>.

<sup>119</sup> The Commission decided *Arar* under two perspective. As to the facts amounting to the investigation, the Commission issued three Reports, one on *Analysis and Recommendations*, and two on the Arar's abduction *Factual Background*. See O'CONNOR COMMISSION, *FACTUAL INQUIRY* (2006), available at <http://www.ararcommission.ca/eng/26.htm>. The last Report, published on Dec. 12, 2006, concludes with a series of recommendation to the RCMP. O'CONNOR COMMISSION, *A NEW REVIEW MECHANISM FOR THE RCMP'S NATIONAL SECURITY ACTIVITIES* (2006), downloadable at <http://www.arar.commission.ca/eng/EnglishReportDec12.2006.pdf>.

<sup>120</sup> *Factual Inquiry*, *supra* note 119, pp. 312-316 (recommendation 1).

<sup>121</sup> *Ibid.*, pp. 316-322 (recommendation 2).

<sup>122</sup> *Ibid.*, p. 334 (recommendation 8).

subsequently outlined in the fourth Report,<sup>123</sup> must be attached as a *caveat* to any information shared with foreign agencies and, most importantly, if foreign agencies made “*improper use*” of the information provided by Canadian agencies, “*a formal objection should be made to the foreign agency and the foreign minister of the recipient country.*”<sup>124</sup> According to the Commission, any information screening criterion should attain a human rights standard that refuses to consider as reliable any information provided by foreign agencies with questionable human rights policies. The clear aim of these recommendations is to prevent Canadian agencies from using information obtained by torture or human rights abuses.<sup>125</sup> The O’Connor Commission’s findings triggered a negative public reaction that convinced the government to publicly acknowledge, by formal apology, the RMCP’s mistakes in *Arar* and to award the victim 10 million dollars’ compensation for the damages incurred as a result of the RMCP misinformation.<sup>126</sup> Although the American *Arar* Court still maintained that “*the need for much secrecy can hardly be doubted,*”<sup>127</sup> thus defending the secrecy of the ERP, Canada decided to inform the public of the governmental agencies’ questionable behavior and to conduct a complete investigation on the relevant facts and remedies of the case. A formal protest to Condoleezza Rice from the Canadian Prime Minister also followed.<sup>128</sup>

Finally, the *Boumediene* case is worthy of mention. In October 2001, the police of the Federation of Bosnia-Herzegovina arrested Lakhdar Boumediene and five other people (“the Algerian Six”) on the charge of having planned an assault on the U.S. and British embassies in Sarajevo. Among them, five had obtained the Bosnian citizenship and one was a resident under permission. On January 17, 2002, the investigatory judge of the Supreme Court ordered their release because of a lack of grounds for further detention; that afternoon, the order was delivered to the prison; that evening, the Chamber of Human Rights of Bosnia-Herzegovina (CHR) issued an interim order to prevent the detainees’

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<sup>123</sup> A New Review Mechanism for the RCMP’s National Security Activities, *supra* note 119.

<sup>124</sup> Factual Inquiry, *supra* note 119, p. 344 (recommendation 12).

<sup>125</sup> *Ibid.*, p. 348 (recommendation 15) (holding that “Canadian agencies must exercise care in agreeing to receive information from countries with questionable human rights records. It is important that, in doing so, they not appear to encourage or in any way condone abuse of human rights or the use of torture”).

<sup>126</sup> See Prime Minister Announces \$10.5-Million Compensation for Maher Arar, CANADIAN PRESS, Jan. 26, 2007.

<sup>127</sup> *Maher Arar v. John Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), at 281. For a criticism, see Michael V. Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. W. INT’L L. J. 121 (2006), at p. 129.

<sup>128</sup> See Meagan Fitzpartick, *Ottawa Launching “Formal Protest” over U.S. Treatment of Maher Arar*, NAT’L POST, Oct. 6, 2006; ‘Come Clean’ on Arar, Harper Asks U.S., CBCNEWS, Oct. 6, 2006.

transfer.<sup>129</sup> Nevertheless, late at night the police handed over the prisoners and immediately transferred them to the NATO Stabilization Force. In late January, the U.S. government declared that they were held in Guantanamo.<sup>130</sup> On October 12, 2002, the CHR decided that “the Algerian Six” had been removed illegally and that the Bosnian government had violated the ECHR.<sup>131</sup> Subsequently, it ordered the state and federal governments to take measures to counteract the violations, such as the annulment of the removal order.<sup>132</sup> The fact that the Bosnian government had disregarded two different orders from domestic courts obviously exacerbated the conflict between powers. Precisely, the CHR instructed the government “*to use all diplomatic channels in order to protect the basic rights of the applicants [...], taking all possible steps to establish contacts with the applicants and to provide them with consular support,*”<sup>133</sup> and “*to prevent the death penalty from being pronounced against and executed on the applicants.*”<sup>134</sup> The conflict involved not only the Judiciary and the Executive branches, but also the legislature, since on May 11, 2004 the Parliament of Bosnia-Herzegovina had participated in the conclusions of the CHR,<sup>135</sup> and indeed in 2005 had required the government to urge the U.S. Administration to release the Bosnian detainees held at Guantanamo.<sup>136</sup> Finally, the Boumediene counsels filed a petition before the European Court of Human Rights, utilizing the CHR decision of 2002 to argue that Bosnia-Herzegovina breached the European Convention of Human Rights.<sup>137</sup>

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<sup>129</sup> The interim order had been requested by the detainees themselves, who feared to be sent to Algeria, their original home country, and be tortured there.

<sup>130</sup> Amnesty International, Bosnia-Herzegovina: Unlawful Detention of Six Men from Bosnia-Herzegovina in Guantanamo Bay, AI Index EUR 63/013/2003 (May 30, 2003).

<sup>131</sup> The ECHR is in force to the Federation of Bosnia-Herzegovina according to the Dayton Agreement, whose article I incorporates the Convention. Bosnia-Herzegovina's Constitution was set under the Dayton Agreements, signed by Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia on Dec. 14, 1995. At art. VII, the Dayton Agreements establish that the Parties recognize the “observance of human rights” as set forth in the Annex 6, which contains the relevant provisions regarding human rights in the Republic. Chapter I of the Annex 6 lists the fundamental rights that the Republic abides to respect, and Chapter II structure the Commission of Human Rights, cited in the following notes.

<sup>132</sup> Precisely, the Chamber of Human Rights of Bosnia-Herzegovina [CHR] addressed the government the following violations of the ECHR: art. 1 of the Protocol 7 (right not to be arbitrarily expelled); art. 5(1) (right to liberty and security); art. 6(2) (right to be presumed innocent until proven guilty); art. 1 of Protocol 6 to the ECHR (right of not to be subjected to death penalty). See James Sloan, *Dayton Peace Agreements: Human Rights Guarantees and Their Implementation*, 7 EUR. J. INT'L L. 207 (1996), 209.

<sup>133</sup> CHR, *In re Lakhdar Boumediene*, Decision, Oct. 11, 2002, pt. 15, published as an annex in the petition in front of the ECHR, *Lakhdar Boumediene v. Federation of Bosnia-Herzegovina* (hereinafter, “Boumediene Petition”), available online at <http://www.statewatch.org/rendition/rendition.html>, sub docc. 198-99 (“Part I & II – Boumediene Petition to the European Court of Human Rights”).

<sup>134</sup> *Id.*, pt. 16.

<sup>135</sup> See Boumediene Petition, *supra* note 133, at p. 12.

<sup>136</sup> *Id.*, at p. 14.

<sup>137</sup> *Id.*, p. 28 ff.

What may be inferred from these examples is, first, that a nation's foreign policy is no longer the strict prerogative of the Executive branch or the Parliament. Although this is a very domestic constitutional issue, it triggers relevant political effects at the international level. By incriminating U.S. citizens who were acting in their official capacity, courts are embarrassing their own governments in their already delicate relations with the U.S. Indeed, their questioning stands to raise serious doubts about the correctness of the government's behavior, especially in the eyes of the public; it destabilizes its efforts in the global war on terror public debate, and even potentially delegitimizes the government itself.

Moreover, one should consider the international implications of the courts' intervention. For instance, concerning the Italian and German officials' involvement in the ERP, the arrest warrants against the CIA agents extend throughout the entire European Union, thus it automatically concerns the criminal courts in all of Europe. This can raise very significant political issues for all states in the EU, not only those whose courts had issued the initial mandate, as to the relations between the local secret services and the CIA.

In addition, one should wonder why national governments vigorously insist on protecting their involvement in ERP actions through the secrecy defense. Since this seems to be a common trend in European countries and the United States, it is natural to ask whether a new "transnational concept of State secrecy" is going to arise from judicial disputes concerning the ERP. Besides the strict constitutional aspects of State secrecy, the defense is usually justified, in the government's view, by reasons of national security. But since ERP actions "*took place with the requisite permissions, protections, or active assistance of government agencies,*"<sup>138</sup> it is likely that among the national security's reasons, the protection of alliance with and reliance by the U.S. plays a significant role.<sup>139</sup> Clearly this results in a concealment of some aspects of international relations from democratic scrutiny, and generally in a lack of accountability.

In conclusion, all these episodes demonstrate that, even though the conflict seems to impact the domestic legal order nearly exclusively, the trend of refusing the ERP at the international level must be considered, to date, to be the dominant one.

#### 4.2. THE EUROPEAN STRUGGLE: HARD REACTIONS AGAINST BLIND EYES

##### 4.2.1. THE COUNCIL OF EUROPE: BLIND EYES ON HUMAN RIGHTS

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<sup>138</sup> Marty's Committee Second Report, *supra* note 31, par. 10.

<sup>139</sup> In fact, "[i]n Italy, as in Germany, irrespective of the alternation in political power between parties, the same line has apparently been chosen, namely the preservation at any price of relations (and especially of interests) with the powerful ally, with "state secrecy" being invoked whenever an unpleasant truth might become public." *Ibid.*, at par. 323.

The Council of Europe (COE), a political organization with a broader membership than the EU, intervened against the ERP action that took place on the territories of its Member States. In 2005, the Parliamentary Assembly of the COE elected an investigation committee presided over by the Swiss Senator Dick Marty (“Marty’s Committee”),<sup>140</sup> while the Secretary-General sent a questionnaire to the governments of the member states about the existence of secret CIA detention facilities on their territories.<sup>141</sup> Meanwhile, the Parliamentary Assembly requested an advisory opinion from the European Commission for Democracy Through Law, well-known as the “Venice Commission,” on the legality of secret detention with regard to states’ obligations under the ECHR.

On March 1, 2006, the Secretary-General published a first Report on states’ responses.<sup>142</sup> The Report focuses on three aspects of the ECHR enforcement: effective domestic laws to sanction the Convention’s breaches, omissions in the enforcement of the ECHR, and, finally, significant controls on the air traffic within their jurisdiction.<sup>143</sup> Interestingly, the Report states that

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<sup>140</sup> Nov. 1, 2005.

<sup>141</sup> The Secretary-General of the COE, in fact, is empowered to request “any High Contracting Party [... to] furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of th[e ECHR].” ECHR, *supra* note 66, art. 52.

<sup>142</sup> COE, Secretary General’s 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 (Feb. 28, 2006).

<sup>143</sup> *Ibid.*, par. 20, 22-23 (“[s]uch renditions involve multiple human rights violations, including transfer in breach of the principle of *non-refoulement*, as well as arbitrary arrest and incommunicado detention. The victim is placed in a situation of complete defencelessness with no judicial control or oversight by the European Committee for the Prevention of Torture (CPT) leaving the door open for the use of torture and other forms of ill-treatment. According to the Court, the unacknowledged detention of an individual is a complete negation of the Convention’s guarantees against arbitrary deprivation of liberty and a most grave violation of Article 5 (right to liberty and security) [citing *Kurt v. Turkey*, 27 Eur. Ct. H.R. 373 (May 25, 1998), §§ 123-124] The arbitrary arrest, detention and transfer of an individual would also affect the rights under Articles 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 2 of Protocol No. 4 (freedom of movement), as well as, depending on the circumstances, Article 2 (right to life) and Article 3 (prohibition of torture). [...] The activities of foreign agencies cannot be attributed directly to States Parties. Their responsibility may nevertheless be engaged on account of either their duty to refrain from aid or assistance in the commission of wrongful conduct, acquiescence and connivance in such conduct, or, more generally, their positive obligations under the Convention. In accordance with the generally recognised rules on State responsibility, States may be held responsible of aiding or assisting another State in the commission of an internationally wrongful act. There can be little doubt that aid and assistance by agents of a State Party in the commission of human rights abuses by agents of another State acting within the former’s jurisdiction would constitute a violation of the Convention. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State Party’s responsibility under the Convention. Of course, any such vicarious responsibility presupposes that the authorities of States Parties had knowledge of the said activities”).

some responses were incomplete or extremely generic.<sup>144</sup> Moreover, although some states provide a regulatory framework for the activities of foreign agents on their territories, generally the parliamentary or judicial controls on these activities are limited in several ways,<sup>145</sup> and most actions of foreign officials are protected by the foreign agents' immunity exception.<sup>146</sup> Indeed, the restraints on flights in domestic air space have been surprisingly ineffective; thus, any foreign airplane could engage in illegal activities, such as those carried out by the ERP, in several member states without difficulty.<sup>147</sup> Intriguingly, according to the Report, some states clearly dissimulated their own roles in specific ERP actions. For instance, the Italian government denied any involvement of its public officials in "*flying prisons*" — words whose meaning still remains obscure — notwithstanding the ongoing criminal proceedings in Milan;<sup>148</sup> similarly, the Republic of Macedonia did not respond to the question of involvement,<sup>149</sup> nor did Bosnia-Herzegovina.<sup>150</sup> It seems obvious from these reactions that the questions posed by the Secretary-General were disconcerting to these governments, already enmired in court battles at home. The insufficiency or incompleteness of their answers is a clear signal, in the view of the COE Secretary-General, that the ECHR needs a more powerful enforcement framework to deal with illegal actions like those of the ERP.<sup>151</sup> On April 12, 2006, the Secretary-General held a press conference, and concluded that

“virtually none of our member states have proper legislative and administrative measures to effectively protect individuals against violations of human rights committed by agents of friendly foreign security services operating on their territory”.<sup>152</sup>

The Marty's Committee published two Reports, respectively in 2006 and 2007.<sup>153</sup> The First Report affirms that

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<sup>144</sup> *Ibid.*, para. 17-19.

<sup>145</sup> *Ibid.*, par. 41.

<sup>146</sup> *Ibid.*, para. 70-71 (citing the international jurisprudence that face the problem of immunity of foreign agents with regard to violations of human rights).

<sup>147</sup> *Ibid.*, para. 54-55.

<sup>148</sup> *Ibid.*, par. 91 (noting that “[g]iving only a partial reply to the question about involvement and not replying at all to the question about official investigations, Italy has failed to provide information about the well-known ongoing criminal investigation into the alleged abduction of Abu Omar by CIA agents in Italy, in contrast to Germany and Switzerland which provide information about ongoing investigations by their own authorities”).

<sup>149</sup> *Ibid.*, par. 90.

<sup>150</sup> *Id.*

<sup>151</sup> See the Secretary-General's conclusions in *Ibid.*, par. 101.

<sup>152</sup> Speaking Notes for the Press Conference of Terry Davis, Secretary-General of the COE (Apr. 12, 2006), available on the Internet at [http://www.coe.int/T/E/Com/Files/PA-Sessions/April-2006/2006\\_0412\\_Speaking-notes\\_sg.asp](http://www.coe.int/T/E/Com/Files/PA-Sessions/April-2006/2006_0412_Speaking-notes_sg.asp).

<sup>153</sup> Committee on Legal Affairs and Human Rights, Report on Alleged Secret Detention and Unlawful Inter-state Transfer of Detainees Involving COE Member States, Doc. no. 10957 (June 12, 2006) (hereinafter, “Marty's Committee First Report”), available online at

“the CIA ‘rendition’ programme has revealed a network that resembles a ‘spider’s web’ spun across the globe [which entails] human rights violations – some of which continue – and [...] the responsibilities of some [COE] Member states [...], and] it is only through the intentional or grossly negligent collusion of the European partners that this ‘web’ was able to spread also over Europe.”<sup>154</sup>

According to the Committee,

“across the world, the United States has progressively woven a clandestine ‘spider’s web’ of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture[, and h]undreds of persons have become entrapped in this web, in some cases merely suspected of sympathising with a presumed terrorist organization.”<sup>155</sup>

As we can see, the Committee repeatedly emphasizes the illegality of the ERP actions and the inadequate governmental response. First, as to the state secret defense, the Committee urges that secret agencies’ actions be brought under the scrutiny of the national Parliaments or the Judicial branches.<sup>156</sup> Second, it addresses strong recommendations not only to member states, but significantly, also to the United States, to report the rendition of suspected terrorists under the rule of law.<sup>157</sup> Third, it makes a point of really appreciating the work done by public prosecutors<sup>158</sup> and parliamentary inquiry commissions<sup>159</sup> to ascertain the violations of human rights which occurred in relation to specific ERP actions, such as *Abu Omar*<sup>160</sup> and *El-Masri*.<sup>161</sup> The

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<http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>. See also the Committee’s Second Report, mentioned *supra* note 31.

<sup>154</sup> *Ibid.*, p. 1, and par. 280 at p. 59.

<sup>155</sup> *Ibid.*, par. 5, at p. 2.

<sup>156</sup> *Ibid.*, par. 12, at p. 3 (where “[t]he Assembly takes the view that neither national security nor state secrecy can be invoked in such a sweeping, systematic fashion as to shield these unlawful operations from robust parliamentary and judicial scrutiny”).

<sup>157</sup> United States has the status of an observer of the COE. The Committee is particularly shrewd on this point, expressly challenging the position taken by the U.S. Administration and proposing an alternative framework for the ERP. It states, in fact, that “[t]he American administration states that rendition is a vital tool in the fight against international terrorism. We consider that renditions may be acceptable, and indeed desirable, only if they satisfy a number of very specific requirements (which, with a few exceptions, has not been the case in any of the known renditions to date). If a state is unable, or does not wish, to prosecute a suspect, it should be possible to apply the following principle: no person genuinely suspected of a serious act of terrorism should feel safe anywhere in the world. In such cases, however, the person in question may be handed over only to a state able to provide all the guarantees of a fair trial, or – even better – to an international jurisdiction, which in my view should be established as a matter of urgency.” *Ibid.*, par. 261, at p. 53.

<sup>158</sup> *Ibid.*, para. 237-245, at pp. 49-50.

<sup>159</sup> *Ibid.*, para. 246-253, at pp. 50-51.

<sup>160</sup> See *Ibid.*, par. 237, at p. 49, where the Marty Committee points out that “the Italian judicial authorities and police have shown great competence and remarkable independence in the face of political pressures.”

<sup>161</sup> *Ibid.*, par. 238, at p. 49.

Committee concluded that some member states were responsible for the ERP, some of them turned a blind eye to the CIA actions on their territories, some simply ignored them and others deliberately refused to know.<sup>162</sup>

Interestingly, the Marty's Committee directly challenged the position taken by the United States, evidenced by the meeting held by the U.S. delegate, John Bellinger, before the U.N. Committee Against Torture in May, 2006. The Marty Committee pointed out that "*the United States does not see itself bound to satisfy anyone's interpretation of international law but its own,*"<sup>163</sup> and that "[t]he United States' formalistic and positivist approach shocks the legal sensibilities of Europeans, who are rather influenced by 'teleological' considerations. In other words, the European approach is to opt for an interpretation that affords maximum protection to the values on which the legal rule is based."<sup>164</sup> As far as we are concerned, this is the first time that a democratic assembly of an international organization addresses such a strong message to the government of the United States about the interpretation of international law. Clearly, this statement reveals the concern that an entire framework of human rights, the European one, would be disregarded for being too protective of individual rights (*sic!*). More importantly, the Marty Committee and the subsequent resolution of the Parliamentary Assembly struggle over the legality of the ERP and attempt to bring its legal analysis of what was initially a purely foreign policy matter to a deeper confrontation with public opinion, courts and democratic inquiry commissions.

A purely legal approach to the problem of the ERP has been undertaken by the Venice Commission in the *Opinion* published on March 22, 2006.<sup>165</sup> The Commission dealt with three issues: the problem of regular *v.* irregular inter-state transfers of prisoners, the violations of human rights caused by the latter, and the specific COE members obligations under the ECHR. First, the Commission pointed out that every transfer of individuals besides the "*four situations in which a State may lawfully transfer a prisoner to another state,*"<sup>166</sup> *i.e.*, deportation, extradition, transit and transfer, is undisputedly *irregular*.<sup>167</sup> Irregularity is, hence, linked to actions out of the conventional framework, and by implication, out of the law.

With regard to the second aspect (human rights violations), the ERP impacts both the human rights established by the ECHR, in particular the right

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<sup>162</sup> *Ibid.*, par. 285, at p. 59. See also Geoff Meade, *Britain Named for Colluding in US Rendition Flights*, THE INDEPENDENT, June 7, 2006.

<sup>163</sup> *Ibid.*, par. 271, at p. 54.

<sup>164</sup> *Ibid.*, par. 272, at p. 54.

<sup>165</sup> European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of COE Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, No. 363/2005, CDL-AD(2006)009, (March 17, 2006), available online at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp).

<sup>166</sup> *Ibid.*, par. 10.

<sup>167</sup> *Ibid.*, para. 24-29.

to liberty and security under article 5(1) of the ECHR,<sup>168</sup> and the prohibition of torture under the *jus cogens*, including the obligation to investigate every case of torture which has arisen by circumstance.<sup>169</sup>

Finally, as to the obligations by which the members of the COE currently abide, the Commission clarifies that

“[a]ny arrest of a person by foreign authorities on the territory of a [COE] member State without the agreement of this member State is a violation of its sovereignty and is therefore contrary to international law [, and it] also affects that person’s individual right to security under Article 5 § 1 [of the ECHR].”<sup>170</sup>

Indeed, where the concerned government consented to the rendition, “*the question of governmental control over the security/police services, and [...] of parliamentary control over the government*”<sup>171</sup> may arise. In the Commission’s view, this situation signifies more than a simple political problem, since “[*t]he Statute of the [COE] and the ECHR require respect for the rule of law which in turn requires accountability for all exercises of public power.*”<sup>172</sup> Moreover,

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<sup>168</sup> ECHR, art. 5(1), *supra* note 66. The Venice Commission emphasizes, in this respect, that “[t]he possible reasons for detention are exhaustively enumerated in Article 5 (1) ECHR. Paragraph 1(c) of Article 5 permits ‘*the lawful arrest or detention of a person effected for the purpose of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*’, while paragraph (f) of Article 5 permits ‘*the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*’ A detention for any reason other than those listed in Article 5 § 1 is unlawful and thus a violation of a human right” (emphasis added). Venice Commission, Opinion, *supra* note 165, par. 50. The Commission also notes that “Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantiated claim that a person has been taken into custody and has not been seen since [citing *Kurt v. Turkey*, *supra* note 143, § 124].” *Ibid.*, par. 53.

<sup>169</sup> Specifically, “Member States of the ECHR not only have the obligation not to torture but also the duty to prevent torture.[28] In addition they have an obligation of investigation. Under this obligation Member States must assure an efficient, effective and impartial investigation. As soon as the authorities receive substantiated information giving rise to the suspicion that torture or inhuman or degrading treatment has been committed, a duty to investigate arises whether and in which circumstances torture has been committed.” *Ibid.*, par. 61. See also CAT, art. 4 and 9, *supra* note 69.

<sup>170</sup> *Ibid.*, par. 116, citing *Stocké v. Germany*, A/199 (1990), Oct. 12, 1989, § 167.

<sup>171</sup> *Ibid.*, par. 119.

<sup>172</sup> *Ibid.*, par. 120, emphasis original. The Commission also stresses that “[d]ifferent European States exercise different systems for political insight into, and control over, the operations of the security and intelligence services, depending upon constitutional structure, historical factors etc. Different mechanisms exist for ensuring that particularly sensitive operations are subject to approval and/or adequate control. Meaningful government accountability to the legislature is obviously conditioned upon meaningful governmental control over the security and intelligence services. Where the law provides for governmental control, but this control does not exist in practice, the security and intelligence services risk becoming a ‘*State within a State*’. Where, on the other hand, the law provides for a degree of

any extrajudicial detention within the COE’s boundaries — no matter whether it is maintained under the control of a foreign country or directly held by member states governments — is inconsistent with article 5 of the ECHR.<sup>173</sup> In particular, this inconsistency also persists when the member states fail to take “*effective measures to safeguard against the risk of disappearance*,”<sup>174</sup> and also when the ECHR violations take place in a territory, that is subject to the relevant treaties, under the exclusive control of foreign military forces, like the NATO bases. In this case, the Venice Commission emphasizes that member states have the precise duty to prevent and react to abuses by, for instance, registering and controlling aliens’ access to the foreign military base. These measures are, in fact, perfectly legal under the relevant treaties, subject only to an obligation of notification. As another means of response, the concerned states could exploit diplomatic channels to issue a protest.<sup>175</sup>

Furthermore, in assessing the problem of spatial extension of the ECHR, the Venice Commission pointed out that member states have an obligation to ensure that no violations take place in their airspace as well as in their territories. Thus the ECHR must receive a full implementation at the Member States’ level. Although the Commission was fully aware of the practical difficulties involved in controlling airplanes in transit, it maintained that when a suspect flight is at issue, states possess all the necessary instruments to react properly, and to ensure that those flights do not breach their human rights obligations.<sup>176</sup> On this point, the Commission also concludes that “*there is no*

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distance between government ministers and officials and the day-to-day operations of the security and intelligence services, but government ministers in fact exercise influence or even control over these operations, then the phenomenon of ‘*deniability*’ can arise. In such a case, the exercise of power is concealed, and there is no proper accountability. The Statute of the Council of Europe and the ECHR require respect for the rule of law which in turn requires accountability for all exercises of public power. Independently of how a State chooses to regulate political control over security and intelligence agencies, in any case effective oversight and control mechanisms must exist to avoid these two problems.” *Ib.*

<sup>173</sup> *Ibid.*, par. 124.

<sup>174</sup> *Ibid.*, par. 127.

<sup>175</sup> *Ibid.*, par. 132.

<sup>176</sup> The hypothesis considered by the Venice Commission occurs when the “member State has serious reasons to believe that the mission of an airplane crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.” *Ibid.* par. 144. Here, the Commission recalls the Chicago Convention of 1944. *See* Convention on International Civil Aviation, done at Chicago on Dec. 7, 1944, 15 U.N.T.S. 295. The Convention applies only to civil aircraft and not to state aircrafts. *Ibid.*, art. 3(a). However, the aircrafts carrying detainees are clearly “state aircrafts” for the purposes of the Convention. *Ibid.*, art. 3(b) (stating that “[a]ircraft used in military [...] and police services shall be deemed to be state aircrafts”). If the flight operators presented the airplane as a civil one, the Commission found a violation of art. 3(c) of the Chicago Convention, according to which “[n]o state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.” *Ibid.*, art. 3(c). According to the Venice Commission, in this case “[t]he territorial state may therefore require landing,” and proceed with searches. Venice Commission, Opinion,

*international obligation for [member states] to allow irregular transfers of prisoners to or to grant unconditional overflight rights, for the purposes of fighting terrorism”.*<sup>177</sup>

In sum, the COE directed multiple concerns toward member states on the legal framework of the ERP. The general trend of COE recommendations is to strengthen the enforcement of human rights protection in the face of the ERP. As a remedy, the COE pointed to the need for a democratic legitimation of secret agencies' behavior, and of the involvement of the Judiciary.<sup>178</sup> True, the Parliamentary Assembly of the COE has no coercive power against member states. Nevertheless, because of its democratic legitimation and supranational position, it deeply affects the behavior of national governments, and overall may fuel a national debate on how to implement the values protected by the COE: namely, the human rights enumerated under the ECHR. For our purposes, it can be said to strongly emphasize the actual illegality of the ERP.

#### 4.2.2. THE EUROPEAN PARLIAMENT RESOLUTION

On February 14, 2007, an European Parliament resolution concluded that, although “*not all those flight have been used for extraordinary rendition,*” there were “*at least 1,245 flights operated by the CIA [...] into European airspace or stopped over at European airports between the end of 2001 and the end of 2005.*”<sup>179</sup> This is the result of an investigation conducted by an *ad hoc* Committee, namely the Temporary Committee on the alleged use of European Countries by the CIA for illegal activities (TDIP). This Committee was elected by the Parliament in 2005 in order to determine the role of certain member

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*supra* note 165, par. 148. When the aircraft identifies itself as a state flight, but without revealing its mission, the Venice Commission found that the flag state violated its international obligation. In this case, the territorial state cannot proceed with a seizure or a search of the aircraft, but nevertheless it could inhibit further flights over the air space or impose them a duty of search, and finally protest by diplomatic channels. See *Ibid.*, at para. 149-151. Furthermore, “any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public.” *Ibid.*, par. 152. The “competent authorities” would include, at the level on Convention’s enforcement, the Council of the International Civil Aviation Organization [ICAO]. See Chicago Convention, cited above, art. 54(i), (j). See also Olivier Dutheillet Speech, *supra* note 35, at par. III.2.

<sup>177</sup> *Ibid.*, par. 153.

<sup>178</sup> The Venice Commission enacted also another Opinion, concerning the role of intelligence agencies in democratic societies. See Report on the Democratic Oversight of the Security Services, Adopted by the Venice Commission at its 71st Plenary Session (Venice, June 1-2, 2007), Study no. 388/2006, CDL-AD(2007)016.

<sup>179</sup> EU Justice and Home Affairs, Presse Release, CIA activities in Europe: European Parliament adopts final report deploring passivity from some Member States, Feb. 14, 2007.

states of the European Union (EU) in the ERP.<sup>180</sup> The TDIP reported on January 31, 2007.

The *Report* focuses on three aspects. First, the TDIP affirmed that the ERP violates international law.<sup>181</sup> Further, it firmly

“[c]ondemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism [and] the condoning and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries.”<sup>182</sup>

More than illegal, the ERP is, in the Committee’s view, even counterproductive.<sup>183</sup> Second, the TDIP – and the EP thereafter – stressed that it did not receive the due *cooperation* from both the member states and the European institutions, especially the EU Council of Ministers. In particular, the TDIP decried the fact that the lack of cooperation “*has fallen far below the standard that Parliament is entitled to expect*,”<sup>184</sup> and formally criticized the refusal by some officials to appear or keep the TDIP informed.<sup>185</sup> The Committee’s concerns, the Report reads, directly affect the obligations of the European institutions to keep the Parliament informed of the EU foreign policy,<sup>186</sup> and could raise the question of responsibility of member states for violation of the EU Treaties.<sup>187</sup> Moreover, the TDIP expressed its appreciation

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<sup>180</sup> See European Parliament [EP] Resolution on Presumed Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, P6\_TA(2005)0529, OJ C 286 E (Nov. 23, 2006), p. 509; EP Decision Setting Up a Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners [TDIP], P6\_TA(2006)0012, OJ C 287 E (Nov. 24, 2006), p. 159. Among other purposes, the TDIP is charged with determining whether “such actions [...] could be considered a violation inter alia of Article 6 of the Treaty on European Union, Articles 2, 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the EU-US agreements on extradition and on mutual legal assistance and other international treaties and agreements concluded by the European Union/Community and its Member States, including the North Atlantic Treaty and its related agreements on the status of forces and the Convention on International Civil Aviation.” *Ib.*, p. 160.

<sup>181</sup> TDIP, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Detention of Prisoners*, PE 2006/2200(INI), A6-0020/2007 (Jan. 30, 2007), par. 1, at pp. 5-6 (“the fight against terrorism must be fought on the basis of, and in order to protect, our common values of democracy, the rule of law, human rights and fundamental freedoms; [...] all the work carried out by the Temporary Committee is intended to make a contribution towards the development of clear and focused measures in the fight against terrorism, which are commonly accepted and respect national and international law”).

<sup>182</sup> *Ib.*, par. 39, at p. 11.

<sup>183</sup> *Ib.*, par. 41, at p. 11.

<sup>184</sup> *Ib.*, par. 13, at p. 7.

<sup>185</sup> *Ib.*, para 26, 28 (on the Counter-terrorism Coordinator), 29 (on the Director of Europol), 34 (on the former and current Secretaries-General of NATO), at pp. 8-9.

<sup>186</sup> It is the so-called “Common Foreign and Security Policy” [CFSP].

<sup>187</sup> See TDIP Report, *supra* note 181.

for the judicial authorities in some member states, in particular Italy, Germany and Spain, and recommended that the judiciaries of other states follow these examples.<sup>188</sup> While it supported the intervention of domestic courts, the TDIP also complained that state Executives were “*turning a blind eye or admitting flights operated by the CIA,*”<sup>189</sup> affirming that when courts began proceedings against some government officials, their denial of involvement in certain abduction cases suggested deception.<sup>190</sup> Finally, as to *sanctions*, the TDIP vigorously urged states and EU legislators to review the limits of the secret defense,<sup>191</sup> and, more generally, it deplored the unresponsiveness of states and EU institutions to ERP actions within their own territories. The TDIP concluded by recommending, among other things, the EU Council to investigate the actual violation of the human rights protection clause sanctioned by article 6 of the EU Treaty, and adopt appropriate sanctions against the Member States.

Although the TDIP’s conclusions were not exhaustive,<sup>192</sup> one could predict that such a deliberation by the democratic organ of the world’s most powerful and highly developed international organization would have consequences on future assessments of the problem at the continental level. European institutions, particularly the Council, that represents the interests of Member States, will be very concerned with the EP’s pronouncements, especially since nobody could hide the governments’ deception on the matter. Moreover, three important issues are at stake: activities of secret services, counterterrorism measures, and interstate cooperation. If the EP retains those elements that were significantly threatened by the illegal ERP action, how could governments still defend the ERP?

## 5. CONCLUSIONS

“*Such renditions are permissible under international law*”<sup>193</sup> — Condoleezza Rice remarked in 2005; “[w]e do take our obligations seriously

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<sup>188</sup> *Ib.*, par. 15, at p. 7; par. 186, at p. 28 (where the TDIP “[u]rges European countries [...] to commence such proceedings as soon as possible, [because], according to the case law of the [ECtHR], there is a positive obligation on Member States to investigate allegations of and sanction human rights violations in breach of the ECHR”).

<sup>189</sup> *Ib.*, par. 43, at p. 11.

<sup>190</sup> Significantly, speaking of the *Abu Omar* case, the TDIP emphasizes that when SISMI officials were testifying before the Committee about their involvement in Abu Omar’s abduction, they were “conceal[ing] the truth.” *Ibid.*, par. 52, at p. 12.

<sup>191</sup> *Ibid.*, par. 192, at p. 29.

<sup>192</sup> This is actually due to the fact that several states and the European institutions refused to cooperate promptly with the TDIP on the ongoing investigations. See *Ibid.*, par. 225, at p. 33 (noting that “the Temporary Committee was not put in a position fully to investigate all the cases of abuses and violations falling within its remit and that its conclusions are therefore not exhaustive”).

<sup>193</sup> See *supra* note 33.

*under the [CAT] [and] we are in compliance with our obligations*”<sup>194</sup> — John Bellinger added. I find these two statement inconsistent with any thoughtful perception of the legal framework surrounding the ERP. Moreover, they are quite offensive toward European institutions and prominent international scholars, who argue exactly the contrary.<sup>195</sup> The resistance opposed by the U.S. current Administration as to the legitimacy of the ERP, accompanied by the silence of some European government, clearly question the basis and effectivity of the “War on Terror:” times seem deeply changed since September 12, 2001, when *Le Monde* main title voiced a strong signal of solidarity and passion: “*Today, we are all Americans.*”<sup>196</sup> In order to depict the present situation, the words of Rep. William Delahunt should suffice:

“Sadly, this support has eroded dramatically. [...] World opinion has turned against the United States in recent years [...] this reality, this trend of opinion against the United States has profound negative consequences for our national interests.”<sup>197</sup>

I brought some evidence that a conflict has arisen between specific international organizations and their member states as to the way in which the latter face the exigency of preventing terrorist attacks. In particular, several international organs made it clear that European states which collaborate with the ERP are accomplices to grave violations of international law, the CAT, and the ECHR. The common sympathies among democratic organs of the European organizations, like the EP and the Parliamentary Assembly of the COE, and the many prosecutors, judges, and inquiry commissions which are questioning the ERP actions at the domestic level, also raises the broader question of whether governmental authority in determining foreign policy is entirely consistent with a respect for the rule of law. If the pressures coming from these supranational initiatives actually trigger the concerned states to refrain from cooperating with the CIA in this “*spider’s web*,” that is an issue which still needs to be assessed. Although it is perhaps too early to identify practical results, it is unlikely that governments — under the constraints of parliaments and courts — would

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<sup>194</sup> On-The-Record Briefing on the Committee Against Torture Report, John Bellinger (May 19, 2006), available online at <http://www.state.gov/s/rls/66519.htm>.

<sup>195</sup> See M. Cherif Bassiouni, *The Regression of the Rule of Law under the Guise of Combating Terrorism*, 76 INT’L REV. PEN. L. 17 (2005), at p. 22, stating that ERP “is unquestionably illegal.” Similarly, Leila Nadya Sadat, *Symposium: “Torture and the War on Terror”: Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309 (2006), at p. 341 (“[p]roponents of these policies no doubt sincerely believe that they are justified, indeed, necessary to win the [global war on terrorism]. [...] T]hey are surely not “legal” as that term is customarily understood”).

<sup>196</sup> *Nous sommes tous Américains!*, LE MONDE, Sept. 12, 2001.

<sup>197</sup> Rep. William Delahunt (D-Ma), Chairman of the International Organizations, Human Rights and Oversight Sub-Committee of the House Foreign Affairs Committee, Opening Remarks on the Subject “Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations,” April 17, 2007.

ignore these pressures or defend the ERP. This is true not only from a legal standpoint, but also politically speaking. That law and politics will stand for the protection of human dignity and the rule of law, rather than for immediate political expediency, seems only a question of time.

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