II.d.- THE INTERNATIONAL RESPONSIBILITY OF EU IN US "EXTRAORDINARY RENDITIONS" OF SUSPECTED TERRORISTS

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"One by one, the terrorists are learning
the meaning of American Justice"
President George W. Bush, *State of the Union,* 2003

Introduction. American Anti-terrorist Policy: a New Challenge for International Law in the 21st Century

Since the appalling attacks of September 11, 2001 we have been immersed in what is generally known as the "war against terrorism", the so-called "first war of the 21st Century"[2] whose main victim may well be the international order itself, the basic principles of co-existence which have governed international relations over recent decades. Some of the measures adopted by the United States Administration in the "war on terror" can undoubtedly be described as an attack on many international obligations. The use of force outside the legal framework of the United Nations Charter; the refusal to apply the Geneva Conventions to prisoners suspected of terrorist offences; the transfer of prisoners with no criminal procedure guarantees; the existence of secret prisons; the so-called Legal Black Hole at Guantánamo; the use of torture in interrogations despite the absolute prohibition in international conventions. In the words of Professor Sands, the fight against terrorism appears to have become a horrifying opportunity to develop the Anti-International Law Project[3]

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[2] "Bush talks of first war of the 21st century". *The Guardian,* 14 September 2001, p. 5.
"President Bush arrives in New York today to pay his first visit to the scene of the attack on the World Trade Centre, the main target of what he described as the "first war of the 21st century"".

[3] "International Law?...I don't know what you are talking about by international law", President Bush, December 2003. SANDS, Ph. "Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality", *Hastings International & Comparative.Law,* 29, 2006, p.301 and 307.

The apparent vulnerability of the Western model in the face of the challenge presented by the new terrorist techniques appears to suggest that "everything has changed" and the system must be revised. This philosophy is the basis for an approach to anti-terrorist policy which pays less attention to the protection of the civil rights of individuals involved in such activities and is more concerned with preventing new attacks and safeguarding national security.

This lack of balance is nothing new at all, it is, in short, a classic danger for States in their attempts to combat domestic terrorism. Now, however, globalisation of the terrorist threat has transferred what were formerly considered internal deviations to the international scene.

In this context, the authority of Law has already been undermined in many important ways. As the United Nations High Commissioner for Human Rights, Mary Robinson highlighted in the aftermath of 9/11, despite efforts to frame the response to terrorism within the framework of crimes under national and international law, an alternative language dominated. The language which has shaped to a much larger extent the response at all levels, has spoken of a war on terrorism. As such, it has brought a subtle change in emphasis in many parts of the world: order and security often involved curtailment of democracy and human rights. Misuse of language has also led to Orweillian euphemisms, so that "coercive interrogation' is used instead of torture, or cruel and inhuman treatment: kidnapping becomes 'extraordinary rendition'[4]

Considering that neither conventional judicial instruments nor those established under the framework of the laws of war could effectively counter the new forms of international terrorism, the White House decided to develop new legal concepts such as "enemy combatant", "indefinite detention" and "extraordinary rendition". With the exercise of executive powers by the Commander-in-Chief authorised by Congress[5] providing the legal basis, the United States has progressively woven a clandestine "spider web" of

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[4] ROBINSON, M. "Five Years on from 9/11-Time to Re-Assert the Rule of Law", *International Rule of Law Lecture 2006,* see: Workers' Daily internet edition.

[5] "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons". *Authorization for Use of Military Force* (AUMF): S. J. RES. 23, 107th Cong. 2001. *Commander in Chief Clause,* Article II Constitution. 13/11/2001, *Military Order on the Detention Treatment and Trial of Certain Non-Citizens in the War against Terrorism*.

disappearances, secret detentions and unlawful inter-state transfer, all thanks to the active collaboration or tolerance of many States, including some Council of Europe members. In at least ten cases, in relation to seventeen victims[6], it has been established that Europe breached its treaty obligations by carrying out secret cooperation with no democratic legitimacy. Although the breach has been uneven[7], it was a *determining factor* for the viability of the operations,

[6] The profile of the CIA flights has been established with the information obtained from EUROPOL and the national air traffic control authorities on the flight plans from 2001 to 2005. Official air traffic data was compared with the times, dates and places of the alleged illegal transfer operations and with the testimony of the victims and their lawyers.

Reports from humanitarian organisations coincide in the following six well documented, high profile cases:

1.-Mustafa Ait Idir, BelKacem Bensayah, Hadj Boudellaa, Saber Lamer, Lakhdar Boumediene, Mohamed Nechle. They are Bosnian citizens of Algerian origin captured by the Bosnia-Herzegovina Federation and handed over to United States forces who are part of the NATO-led peace-keeping Stabilization Forces. They are still at Guantánamo.

2.-Muhammad Haydar Zammar. German national detained in December 2001 first in Morocco and then in Syria.

3.-Abu Omar. Egyptian cleric who had been granted asylum in Italy abducted in Milan on 17 February 2003 by CIA agents to Egypt.

4.-Khaled el-Masri. German national of Lebanese origin abducted on 31 December 2003 while seeking to enter Macedonia. He was later detained in Kabul. The US authorities realized they had made a mistake.

5.-Ahmed Agiza and Mohammed El Zari. Egyptian nationals and asylum seekers in Sweden. Abducted by CIA agents to Egypt. The UN Committee against Torture determined that Sweden had breached its obligations under the Convention against torture.

6.-Bisher Al-Rawi and Jamil-Banna. An Iraqi and a Jordanian national transferred first to Afghanistan and then to Guantánamo where they are still held.

See, *inter. alia*, AMNESTY INTERNATIONAL. *Partners in Crime: Europe's Role in US Rendition.*

[7] According to the Council of Europe, some States have collaborated actively, while others have confined themselves to saying nothing or looking the other way. Cooperation has taken the following forms:

1. secretly detaining a person on European territory for an indefinite period of time, whilst denying that person's basic human rights and failing to ensure procedural legal guarantees such as habeas corpus;
2. capturing and handing a person over to the United States whilst knowing that such a person would be unlawfully transferred into a US-administered detention facility;
3. permitting the unlawful transportation of detainees on civilian aircraft carrying out rendition operations, travelling through European airspace or across European territory;
4. passing on information or intelligence to the United States whilst being fully aware that such material would be relied upon directly to carry out a rendition operation or to hold a person in secret detention;
5. directly taking part in interrogations of persons subjected to rendition or held in secret detention;
6. accepting or making use of information gathered in the course of detainee interrogations, before, during or after which the detainee in question was threatened or subjected to torture or other forms of human rights abuse;
7. making available civilian airports or military airfields as "staging points" or platforms for rendition or other unlawful detainee transfer operation, and facilitating the preparation and take off of an aircraft on its operation from such a point; and
8. making available civilian airports or military airfields as "stopover points" for rendition operations, whereby an aircraft lands briefly at such a point on the outbound or homebound flight, for example to refuel.

States responsible for extraordinary renditions: Sweden, the United Kingdom, Italy, the ex Yugoslavian Republic of Macedonia, Germany and Turkey.

States responsible for active or passive complicity: Poland and Romania for the unproved appearance of detention centres; Germany, Turkey, Spain and Cyprus for serving as platforms for flights related to

drawing severe criticism from civil society, and leading us in this study to talk in terms of international responsibility[8].

Extraordinary rendition is not a legal term[9]. It is a practice whereby an individual, usually suspected of terrorism, including American nationals[10], are transferred from one country to another, to CIA black sites in countries with few scruples about protecting fundamental rights[11], outside judicial procedure, with the aim of interrogating them using torture or inhuman or degrading treatment. This "new trend" in anti-terrorist measures is playing a leading role in calling into question and endangering obligations under the absolute prohibition of torture and all forms of cruel, inhuman or degrading treatment and the *non-refoulement* principle. It attempts to avoid *ius cogens* norms by adopting the so-called "balanced approach", based on the use of diplomatic assurances and modifying State obligations under international human rights treaties or the established interpretation of such obligations[12].

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the transfer of detainees; Ireland, the United Kingdom, Portugal, Greece and Italy for serving as stopovers for the same purpose.

COUNCIL OF EUROPE. Resolution 1507 (2006), *Alleged Secret Detention and Unlawful Inter-State Transfer of Detainee Involving Council of Europe Member State,* para.10.

[8] In the words of Amnesty International:

"The uncomfortable truth is that without Europe's help, some men would not now be nursing torture wounds in prison cells in various part of the world. Without information provided by European intelligence agencies, some of the victims of rendition may not have been abducted in the first place. Without access to Europe's airport facilities and airspace, CIA planes would have found it more difficult to transport their human cargo. In short, Europe has been USA's partner in crime". AMNESTY INTERNATIONAL, *Partners in Crime: Europe's Role in US Rendition.*

[9] The Government calls the practice 'extraordinary rendition', human-rights activists call it 'torture outsourcing' or 'torture by proxy'.

[10] *Cfr.* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004), presenting the first instance of a U.S. citizen categorized as an "enemy combatant". For more detailed analysis of the violation of the 4th Amendment in relation to renditions of American citizens, *vid.* LALMALANI, Sapna G.: "Extraordinary rendition meets the U.S. citizen: the United States' responsibility under the fourth amendment", *Connecticut Public Interest Law Journal,* 5, 2005, pp. 1-28. Gary Williams also studies the case of José Padilla which is still awaiting judgment. WILLIAMS, Gary**:** "Indefinite detention and extraordinary rendition", *Los Angeles Lawyer,* 29, 2006, pp. 44-49.

The trial against the US citizen Ahmed Abu Ali was flawed by the exclusion of evidence about torture in Saudi Arabia. See: www.amnesty.org

[11] The most common destinations are: Saudi Arabia, Egypt, Jordan, Morocco, Syria and Yemen, all of which use torture during interrogations according to U.S. State Department. *See* U.S. Dep'T of State Country Reports on Human Rights Practices (2003), available at www.state.gov.

[12] According to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin) extraordinary rendition practices not only involve the use of torture, the forced transfer in itself, with no regulated court procedure, amounts to torture by proxy. COMMISSION ON HUMAN RIGHTS. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* 28 December 2005, para. 56 b). E/CN.4/2006/98.

In Europe, after the alarm was raised by humanitarian organisations and important international newspapers[13], the Council of Europe, and on the basis of its work, the European Parliament, activated control mechanisms to evaluate events and make a statement on the responsibility incurred by Member States for infringing the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the UN Convention against Torture (UNCAT) and article 6 of the Treaty of the European Union (TEU). On the 15 June 2006[14], based on the evidence presented, the European Parliament was obliged to admit that on several occasions the CIA and other US secret services had been directly responsible for kidnapping, transferring, and detaining terrorist suspects on the territory of Member States and adhering and candidate countries and that the extraordinary rendition of European citizens or residents had taken place. CIA agents have used our air space and our airports to avoid the legal obligations imposed on state aircraft under the Chicago Convention and permit the illegal rendition of persons suspected of terrorism to CIA custody or to the United States army in countries (Jordan, Syria, Afghanistan) where torture is routinely practised according to the US Government's own reports.

Non-derogable human rights, often classified by their *ius cogens* nature have been violated with apparent impunity. The very effectiveness of these norms largely rests on the capacity to demand responsibility, to regulate the negative effects of injurious conduct. That is why, as we await the results of the

[13] In November 2005 the first article was published in the Washington Post and the first Human Rights Watch report on the existence of secret detention centres in certain democratic countries in Central and Eastern Europe, and flights chartered by the National Intelligence Agency to transport persons suspected of terrorism aside from the legality of the detention centres. These reports brought immediate reaction from the Council of Europe whose investigation took place on two different levels: within the Parliamentary Assembly (Legal Affairs and Human Rights Committee) and through the Secretary-General using his powers of inquiry under Article 52 to invite the member States to provide an explanation of the manner in which their internal law ensures the effective implementation of ECHR rights and guarantees. In the European Union, the European Parliament set up a Temporary Committee (Temporary Committee on the Alleged use of European countries by the CIA for the transport and illegal detention of prisoners), to investigate possible illegal action in the territory of the EU in the framework of the fight against terrorism. For a comprehensive analysis of the research done by both organisations, and of Spanish action in particular, *vid.* RUILOBA ALBARIÑO, J. "La responsabilidad de los Estados europeos en los vuelos secretos de la CIA. Especial referencia a España", *Revista de Derecho Comunitario Europeo,* no. 24, 2006, pp. 541-570.

[14] EUROPEAN PARLIAMENT. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Draft Interim Report on the alleged use of European Countries by the CIA for the transport and illegal detention of prisoners*, Rapporteur: Giovanni Claudio Fava, 2006/2027(INI), 15/06/2006. Report adopted by 389 votes in favour, 137 against and 55 abstentions.

internal parliamentary and judicial investigations currently being carried out in the European States involved in the extraordinary renditions, the issue puts the need to evaluate the capacity of European control organs to prosecute and punish illegal conducts by member States (speed of response, eradication of the phenomenon, political and legal capacity to demand compliance and punish the guilty parties) back on the table. We want a European community whose objective is to build a Freedom, Security and Justice Area (EU Treaty article 2), where new methods for fighting international terrorism can be discussed, but must necessarily be based on full respect for human rights and fundamental freedoms (EU Treaty article 6).

I.- From "Rendition to Justice" to "Rendition to Torture". The perversion of the system.

The act of 'rendition' may not *per se* constitute a breach of international human rights Law. It is worth noting that other States have also asserted their right to apprehend a terrorist suspect on foreign territory in order to bring him to justice if the tool of international judicial assistance or cooperation did not attain the desired result. International law permits cooperation on the transport of detainees provided it is carried out with full respect for human rights and other international obligations. The US, however, has transformed rendition into one of a range of instruments with which to pursue its so called 'war on terror', perverting the initial characteristics of rendition.

For us, "Extraordinary Rendition is the transfer of an individual, with the involvement of the United States or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment"[15]. The main objective of this technique is to obtain intelligence information by interning the suspect in secret detention centres where he can be submitted to aggressive interrogation techniques which can often be classified as torture or as inhuman and degrading treatment at least. It is this purpose which distances this type of rendition from renditions in the past.

[15] THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & THE CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW: *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition"*, 2004, p. 4.

Although there is no absolute consensus on the exact origin of the technique it seems that in the late 1970s the United States Marshals Service coined the phrase "extraordinary rendition" to describe the process of bringing certain fugitives, often leading drug traffickers, within the territorial jurisdiction of the United States by kidnapping them abroad[16]. Transfers made without recourse to the regular legal procedures of extradition, removal or exclusion but not involving allegations of involvement in torture have been occurring for more than a dozen years. In the late 1980s, the concept was used to detain wanted criminals in failed states, for example during the civil war in the Lebanon. These operations, which found jurisdictional support in the US Supreme Court's Ker-Frisbie doctrine[17] took place in the midst of strict procedural norms, especially during the Clinton Administration[18], in renditions to justice that were allegedly exclusively law enforcement operations in which suspects were apprehended by covert CIA or FBI teams and brought to the United States or other States for trial or questioning[19].

After 9/11 under the conviction that the transfer of prisoners under the extradition procedure or the more general framework of immigration laws was not effective due to counter-terrorism's special features[20] and thanks to the

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[16] HENDERSON, B.: "From Justice to Torture: The Dramatic Evolution of U.S. Sponsored Renditions", *Temp. Int'l & Comp. L. J.,* 20, 2006, p.189 y 194-198.

[17] The US Supreme Court ruled: "there is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will". This legal opinion was extended in *United States v. Alvarez-Machain* (the Supreme Court upheld the practice of rendition to justice by concluding the US-sponsored abduction of a Mexican national from Mexico did not violate the extradition treaty between Mexico and the United States) and partially limited in 2004 *Sosa v. Alvárez-Machain* with the recognition that arbitrary arrest and detention violate customary international law: *Supreme Court in Ker v. Illinois* and *Frisbie v. Collins*. On US case-law in general, *Vid.* HENDERSON, B.: "From Justice to Torture: The Dramatic Evolution of U.S. Sponsored Renditions", *op.cit.,* pp.189-198.

[18] Under the Clinton administration, most extraordinary renditions appeared to be subject to strict procedures: First, the receiving country had to have an outstanding arrest warrant for the person. Second, each extraordinary rendition was subject to extensive administrative scrutiny before it was approved by senior government officials. Third, the local government was notified. Further, the CIA was required to obtain an assurance from the receiving government the individual would not be ill-treated. WEISSBRODT, D. and BERGQUIST, A.: "Extraordinary Rendition: A Human Rights Analysis", *Harvard Human Rights Journal,* 19, 2006, pp. 124-125.

[19] According to then FBI Director Louis J. Freeh, during the 1990s, the United States "successfully returned" thirteen suspected international terrorists to stand trial in the United States for completed or planned acts of terrorism against US citizens. *U.S. Counterterrorism Policy, Hearing before the Senate Judiciary Committee,* 106th Cong (Sept 1998). *Apud.* THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & THE CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW: *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition", op. cit.,* pp. 15-16.

[20] YOO, John: "Transferring Terrorist", *Notre Dame Law Review,* 79, pp. 1193.

expedited procedures approved by President Bush, affording additional flexibility to the CIA[21], the programme intensified and moved away from the original concept of renditions. Currently the purpose is not so much bringing the suspect to trial (rendition to justice) but obtaining intelligence information, by whatever means and with total indifference to procedural and detention guarantees (rendition to torture)[22].

According to the *Military Order on the Detention Treatment and Trial of Certain Non-Citizens in the War against Terrorism*, the intention is to capture "enemy combatants" and detain them indefinitely, subjecting them to prolonged and intensive interrogations without access to a lawyer or their family and summoning them to trial after the action of an *ad hoc* military committee which does not provide rights equivalent to those guaranteed under ordinary proceedings[23].

The absence of guarantees makes these transfers a hybrid violation of different human rights including arbitrary arrest, forced disappearance, forced transfer, torture and the denial of judicial and consular guarantees. If the "systematic" nature of these transfers is established, they could constitute a crime.

The Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism applies the "legitimate aim" and "proportionality in the strict sense" tests in order to evaluate whether counter-terrorist measures comply with human rights obligations[24]. Although

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[21] The *Military Order on the Detention Treatment and Trial of Certain Non-Citizens in the War against Terrorism* breaches every principle of the fundamental right to a fair trial: no specific charges; no right to be heard; no right to appeal; etc. Also: WEISSBRODT, D. and BERGQUIST, A: "Extraordinary Rendition: A Human Rights Analysis", *Harvard Human Rights Journal,* 19, 2006, p.125.

[22] Professor Fitzpatrick underscores, in this respect, the similarities between these practices and those carried out in the framework of Operation Condor in the Southern Cone. FITZPATRICK, J.: "Rendition and Transfer in the War against Terrorism: Guantánamo and Beyond", *Loyola L.A. International & Comparative Law Review,* 25, 2003, p. 458.

[23] FITZPATRICK, J.: "Rendition and Transfer in the War against Terrorism: Guantánamo and Beyond", *Loyola L.A. International & Comparative Law Review, op. cit.,* p.461. Although the President's powers are discretionary, it is not, as the Supreme Court has pointed out, a blank cheque. They cannot be arbitrary and they must submit to the rule of law both domestic and international. Yoo defends the very wide margin for appreciation left in the hands of the Executive. Yoo Jh.: "Transferring Terrorist", *Notre Dame Law Review, op.cit.,* p. 1193.

[24] "From a human rights standpoint, the crucial issue in this regard is whether such measures are necessary to achieve a legitimate aim, such as the investigation of a crime, and whether they are at the same time proportionate to the resulting interference with privacy and family ". HUMAN RIGHTS COMMISSION. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, op.cit.,* para.60.

there are attempts to defend the practice of extraordinary rendition using the "proportionate to a legitimate end" test, arguing that the purpose is to achieve greater security and prevent new attacks and is therefore legitimate[25], under the principle of proportionality *stricto sensu* the practice jeopardises important international human rights obligations.

This type of action is unprecedented and comes into conflict with important legal principles established in international rules on extradition (substantive and material limits to be observed during the procedure), International refugee law (especially the right to asylum and the principle of non-refoulement in cases of human rights violations), International humanitarian law (the prohibition of torture, procedural guarantees and limits to transfers during periods of armed conflict[26]) and in short, international human rights law. Extraordinary renditions are endangering the principle of the inviolability of human dignity which underlies every other fundamental right and cannot be subject to restrictions, even for the purposes of security, in times both of peace and of war[27].

It is, in conclusion, a perfect example of the serious backward step for the instruments used to safeguard and guarantee human rights which occurred after September 11, 2001[28].

2.-The positive obligations on States under the prohibition of torture. To investigate allegations

[25] On 6 September 2006, the President of the United States acknowledged the existence of the CIA's secret prisons. To justify them, he said "The most important source of information on where the terrorists are hiding and what they are planning is the terrorists themselves (…) It has been necessary to move these individuals to an environment where they can be held in secret, questioned by experts and, when appropriate, prosecuted for terrorist acts (…) our security depends on getting this kind of information (…) Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and in other places. *Vid, inter. alia, www.whitehouse.gov/news/releases/2006/09*.

[26] For an updated study of the special features of forced transfer for military or humanitarian reasons see: FERNÁDEZ SÁNCHEZ, P.A. "El traslado forzoso de población durante los conflictos armados", *Uso de la fuerza y protección de los derechos humanos en un nuevo orden internacional*, (Consuelo Ramón Chornet, ed.), Universidad de Valencia, Tirant Lo Blanc, Valencia, 2006, pp.203-228.

[27] For a comprehensive analysis of the conflict between extraordinary rendition and human rights, *vid.* WEISSBRODT, D. and BERGQUIST, A: "Extraordinary Rendition: A Human Rights Analysis", *Harvard Human Rights Journal*, 19, 2006, pp. 123-160.

[28] EUROPEAN PARLIAMENT. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Draft Interim Report on the alleged use of European Countries by the CIA for the transport and illegal detention of prisoners*,, *op. cit.*, Whereas clause D and para.6.

The obligation to respect and ensure all the rights laid down in international human rights treaties for all individuals on State territory and all persons subject to its jurisdiction[29] involves the obligation not to extradite, deport, expel or remove in any other way a person from its territory, when there are strong reasons to believe that there is a real risk that the person may suffer irreparable harm either in the country where the person is to be transferred or in any other to which the person may subsequently be transferred. International law uniformly provides that any transfer of a person due to a request for extradition procedure or exceptional circumstances of counter-terrorism or other threats to national security must guarantee that the person will not be subject to torture or inhuman or degrading treatment in application of the prohibition against torture and refoulement[30].

The duty of the State Party under article 1 ECHR to "secure" to everyone within their jurisdiction "the rights and freedoms…of this Convention" is not limited to the duty of state organs not to violate these rights themselves, this duty also includes positive obligations to protect individuals against

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[29] Council of Europe Member States are committed to respecting fundamental rights, as defined by a number of international treaties, both at the universal level (including the 1966 International Covenant on Civil and Political Rights and the 1987 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment) and at the European level, *in primis* the European Convention on Human Rights, but also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The Human Right Committee clarified in its General Comment no. 31 that a State Party must respect and ensure the rights laid down in the Covenant to anyone within "the power of effective control" of that State Party, even if not situated within the territory of the State Party.

The protection provided by the International Covenant on Civil and Political Rights and the pertinent customary law are extended to all people under its jurisdiction including those outside state territory and even in the framework of armed conflict. In the light of recent developments, however, it is understood that any individual, in any context has the right to apply to the court to control the reasons for their detention. This is a right enshrined by IHRL which is not derogable in times of armed conflict. For analysis of the status of enemy combatants and the possibility of applying international humanitarian law, *vid*. ABRIL, R. "From Bagdad to Guantanamo. Legal statute and treatment given to the detainees in the "war against terrorism"". Fernández Sánchez, P.A. (ed.), *The New Challenges of Humanitarian Law in Armed Conflicts*, Martinus Nihjoff Publishers, The Hague, 2005, pp.

[30] It is important to emphasize that the prohibition against torture is a peremptory norm of customary international law binding on all Status (*jus cogens*). This prohibition appears in the main international instruments for the protection of human rights: Universal Declaration of Human Rights (art. 5); International Covenant on Civil and Political Rights (art. 7); Convention against Torture and other Cruel, Inhuman or Degrading Treatment (art. 3); American Convention on Human Rights (art. 5). The *non-refoulement* obligation is integral to the prohibition against torture. It is a norm of customary international law, and arguably, enjoys the same *jus cogens* status as the overall prohibition. The prohibition of torture is absolute and admits no exceptions. The cases of incommunicado detention, kidnapping and extraordinary rendition are in violation of ECHR articles 3 and 4. Information or confessions obtained by torture or inhuman or degrading treatment can never be considered valid evidence, as established under the Convention against Torture (The trial against Abi Ali was flawed by the admission of evidence obtained by torture in Saudi Arabia).

infringements of their rights by third parties, be they private individuals or organs of third States operating within the jurisdiction of the State party concerned. The ECHR has, in particular, recognized positive obligations which flow from the prohibition of torture and inhuman treatment, the right to life, and the right to freedom and security; such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.

Having said that, even although it may not be possible to demonstrate direct or indirect involvement in the commission of an unlawful act, some European states may have incurred international responsibility because they have breached ECHR provisions under which State Parties are obliged not only to abstain from practising torture but also to *prevent it*. States have an obligation to protect individuals from any violation of their rights by third parties, be they private individuals or State organs, and to investigate whether their territory or air space have been used by the State itself or by third parties with the necessary direct or indirect cooperation.

The European Parliament has considered it unlikely that European Governments were unaware of the activity in relation to the extraordinary renditions which were taking place on their territory, nor could hundreds of flights take place through their air space without the knowledge of their intelligence or security services[31], especially in view of the terms of the 2003 Agreement between the United States and the European Union on the use of European transit facilities to support the return of criminal/inadmissible aliens, which offers no precise definition of its application to the individual case. According to the investigation by the Secretary-General of the Council of Europe, member States have not adopted appropriate measures to control who and what flies over their air space. The States "automatically" authorised the flyovers on the basis of multi- and bi-lateral treaties (such as those within the framework of the EU and NATO)[32].

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[31] The European Parliament had the contributions from the EU Counter-terrorism Coordinator and the High Representative for the Common Foreign and Security Policy who declared that they had no knowledge of any violation of domestic, European or international law by the member States who cooperate with the CIA, while also adding that community norms do not give them the authority to request member States to provide the relevant information.

[32] The use of aircraft chartered by CIA in the air space of member States, adhering and candidate countries violates the Chicago Convention as it did not comply with the obligation to obtain the

Obviously, from a practical point of view, it is not possible to guarantee effective protection of human rights as an aircraft flies through a State's air space. But although a State may be unaware of an unlawful act, it may incur international responsibility if it does not provide the appropriate protection or investigate allegations when they are brought to its attention. These States may have violated ECHR articles 3 and 5 because they allowed another State to use their territory to commit an international unlawful act and because there was no effective investigation of the allegations.

All States acquire an obligation to prevent, investigate and criminalise, any direct action or complicity or other participation, by state or non-state actors, taken with the consent or acquiescence of the state actor.

3.- Diplomatic Assurances neither preclude unlawfulness nor limit State responsibility.

In May 2005, the UN Committee against Torture decided that Sweden had violated its obligations under article 3 of the Convention when it returned Ahmed Agiza to Egypt. In its decision the Committee stated that "(…) the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk"[33].

Cases like that of Mr Agiza are a paradigmatic example of the use of diplomatic assurances to safeguard the international obligations of States which have cooperated in extraordinary renditions. It is not a question here of denying their value as an expression of the principle of good faith and mutual trust which are absolutely vital for relations between States. They cannot be admitted in this context, however, because the result cannot be controlled by the State agreeing

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corresponding authorisation with regard to state flights. The European Parliament regrets that no member State or adhering or candidate country started a procedure to verify if the civil aircraft were being used for purposes compatible with current international rules on human rights.

[33] The factors relevant to risk identified by the Committee included Egypt's record on torture, and the fact that the Government of Sweden regarded Agiza as involved in terrorism, and the fact that he was of interest to the security services in Egypt and the United States. *Ahmed Hussein Mustafa Kamil Agiza v. Sweden,* Decision CAT/C/34/D/233/2003, 24/05/2005.

The Second case involved Maher Arar, a dual Canadian-Syrian national, whom the US government transferred to Jordan in September 2002 where he was handed over to the Syrian government. The US government has claimed that prior to Arar's transfer; it obtained assurances from the Syrian government that Arar would not be subjected to torture upon return. Arar has claimed credibly that he was beaten by security officers in Jordan and tortured repeatedly, including with cables and electrical cords, during the ten months he spent in a Syrian jail.

to the rendition. Unlike cases concerning the death penalty or the right to a fair trial where effective monitoring is sufficient to demand compliance with the assurances, in cases of torture or inhuman or degrading treatment, these assurances are not enough – not to mention the weakness of inefficient control procedures in many cases[34].

As the Human Rights Watch report on Diplomatic Assurances notes, in countries where torture is widespread and systematic, it is practiced within the walls of prisons and detention facilities rarely open to scrutiny by independent, well-trained monitors. There is a growing international consensus that such promises are an ineffective safeguard against the risk of torture. Successive UN Special Rapporteurs on Torture, the UN Committee against Torture, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Council of Europe Commissioners on Human Rights and the European Committee for the Prevention of Torture have all expressed concern over their use. Leading human rights and anti-torture NGOs have called on states to stop the practice of seeking or relying on such assurances[35].

Consequently, the request for diplomatic assurances does not remove even the slightest bit of State responsibility from the obligation to respect and ensure respect for the prohibition of torture. Nevertheless, the European Parliament has seen fit to recommend the adoption of a common position on member States' use of diplomatic assurances from third countries where there are substantial grounds to believe that individuals would be in danger of being subjected to torture or ill-treatment[36], this norm would remove the wide margin for appreciation which communitarian Law allow States on the matter and rather than leaving the use of diplomatic assurances to their complete discretion,

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[34] The UN Special Rapporteur on Torture usually recommends a progressive test. First, the guarantees must be "unequivocal" and second, there must be a monitoring system. However, these post-assurances monitoring mechanisms have failed as guarantee mechanisms as shown by the case *Agiza v. Sweden* and in the recent *Shamayev and 12 Others v. Georgia and Russia*. ILPA, INTERNATIONAL LAW PRACTITIONERS ASSOCIATION "ILPA Submission to the Joint Committee on Human Rights regarding UK compliance with the United Nations Convention Against Torture", 25/09/2005.

[35] *Vid.* Human Right Watch. "Empty Promises: Diplomatic Assurances no Safeguard against Torture", April 2004.

[36] EUROPEAN PARLIAMENT. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Draft Interim Report on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, op. cit.*, paras.29 and 30.(para. 16)

would make them the object of community jurisdictional control, albeit with the well-known limitations.

4.- The obligation to cooperate with counter-terrorism and scrupulous respect for human rights obligations

Because terrorism is a threat to international peace and security all States in the international community are under the obligation to cooperate with counter-terrorism which thus becomes a matter of common interest. Any measures adopted for this purpose, however, must conform to the United Nations Charter which makes scrupulous respect for human rights inescapable[37]. The so-called "human rights clause" has formed part of the definition of the obligation since it was formulated by the Security Council in Resolution 1456:

> "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law"[38]

Within this framework, international law clearly not only permits but encourages the transfer of detainees suspected of committing terrorist activities, even in the absence of an extradition treaty; and furthermore, the Security Council can impose sanctions under Chapter VII of the Charter on any States who refuse to comply with the immanent obligation in the aut dedere aut iudicare principle, as it did in the Lockerbie case[39]. This rendition must occur, however, within the legal procedure framework and with full respect for fundamental rights. Otherwise, without such assurances, rather than cooperating to fulfil an international obligation, States would be contributing to

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[37] "Reaffirming the need to combat by all means, *in accordance with the Charter*, threats to international peace and security caused by terrorist acts". SECURITY COUNCIL. Resolution 1373, (2001), 28 September 2001. Emphasis added.

[38] SECURITY COUNCIL. *Resolution 1456* (2003) of 20 January 2003, para. 6. Repeated in the main Security Council resolutions on Counter-terrorism: *Resolution 1624* (2005), para. 4.

[39] "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to *extradite or prosecute*". SECURITY COUNCIL. *Resolution 1456* (2003), para.3.Emphasis added.

The sanctions imposed on Libya can be consulted in: SECURITY COUNCIL. *Resolution* 748 (1992).

the commission of an international unlawful act and as such would be fully responsible.

While there certainly appears to be an institutional tendency on the part of the main organs responsible for combating international terrorism to require States to relax their human rights obligations in the name of more efficient cooperation on antiterrorist matters[40], the practice of extraordinary rendition does not come from an international mandate but is a unilateral strategy outside institutions, outside the treaty framework. There is consequently no normative conflict, only the obligation to comply scrupulously with current legislation.

Final considerations The European community and the obligation to make reparation for the wrongful act

It is a principle of international law that any wrongful act gives rise to an obligation to make full reparation for the injury caused. Furthermore, as already mentioned, European states have acquired the obligation to investigate any breach of ECHR rights, and this includes providing effective measures to make reparations to the victims. Through the Council of Europe, in particular the Parliamentary Assembly and the Secretary-General and at the heart of the European Union, through the work of the European Parliament, exhaustive control measures have been set up, but they are incapable of imposing sanctions. After the national jurisdictional channels have been exhausted it might be possible for the ECtHR to admit an individual claim by a European victim or one of any other nationality if they can prove their passage through European territory. Nevertheless, it should not be a question of waiting for this mechanism to be activated. There is a binding obligation to ensure that all victims obtain prompt and adequate reparation from the State(s) responsible

[40] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin) has denounced, in his first report to the Human Rights Commission, the insensitivity of the Counter-Terrorism Committee to human rights against its express mandate. According to the Special Rapporteur it is problematic that the CTC seems to be recommending that the potential range of investigative techniques (such as "controlled delivery", pseudo-offences, anonymous informants, cross-border pursuits, bugging of private and public places, interception of confidential communications on the Internet and telephone) with the aim that some of the guarantees demanded by domestic human rights law be relaxed. Austria, for example, had to defend its law with a reference to the need to comply with human rights in the fight against terrorism and the possibility of avoiding impunity for terrorists. HUMAN RIGHTS COMMISSION. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, *op.cit.*, para.60.

including restitution, rehabilitation and fair and adequate financial compensation.

Firstly, cessation of the unlawful act requires the adoption of any measures needed to overcome legal and/or institutional lacunae detected during the course of the investigation which may have facilitated commission of the unlawful act. Thus for example, confirmation of the lack of adequate control over civil air transport to prevent possible human rights violations and the use of State aircraft for purposes in breach of ECHR requires the urgent adoption of appropriate measures to control secret service activities on our territory; to provide legal and administrative measures which can offer effective protection to individuals against human rights violations committed by foreign secret service agents; to check all cooperation agreements with the United States on the air transport of prisoners; to set up the European Union Agency for Fundamental Rights; create greater democratic and legal control on European Union antiterrorist measures and of course, for international law to clearly prohibit the "extraordinary rendition" concept.

In terms of the obligation to make reparation, activating the national jurisdictional channel or the institutional one in Strasbourg is not enough. In the case of the European Union, more forceful measures must be adopted to refine State responsibility to comply with the principle of respect for human rights expressed in EU Treaty article 6. The article declares EU submission to these values and general political objectives and consequently its internal and external actions should be compared in the light of these guiding principles. Activation of the sanctioning mechanism in Article 7 of the EU Treaty, which the European Parliament committed itself to initiating if the allegations that some member States provided help by action or omission to civil servants carrying out this practice are confirmed, is the only significant instrument for EU intervention in the case of risk of "serious breach". It is a politico-legal mechanism with a general scope which requires express ruling from the Council as the maximum responsible institution.

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[41] See the lacunae noted by the European Parliament: EUROPEAN PARLIAMENT. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Draft Interim Report on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, op. cit.,* paras. K, 18, 43, 44.

The possibility of an international court finding that the United States has breached international law, injuring the rights of other subjects, is fairly remote as it depends on the willingness of the State itself[42]. This precarious sanctioning ability inherent in the barely decentralised and inorganic system which is international law must not be repeated in the more homogenous, integrating framework of the European Union.

Under the paradigm of the obsolescence of international law in the face of the challenges posed by the terrorist threat, there has been an attempt to justify breaking away from the international order established in the 1940s and symbolised according to Sand, by the Atlantic Charter[43]. The practice of extraordinary rendition, apart from the intolerable consequences for the victims, creates a dangerous precedent which other States may use. To deny the operation of international law is a two-edged sword. Now more than ever, international law must emerge strengthened, and it is essential that our conduct

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[42] In the framework of the control procedure established by the Human Rights Commission, both the Special Rapporteur against Torture and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism have followed closely the impact on human rights of the measures to combat terrorism adopted by the United States. The United States has been asked to provide reports on specific cases of extraordinary rendition (for example in the case of Salah Nasser Salim'Ali); interrogation techniques and a list of detention centres, however there has been no response to any of these requests. HUMAN RIGHTS COMMISSION. *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Communications with Governments. E/CN.4/2006/98/Add.1, 23/12/2005, paras. 21-25.

[43] Atlantic Charter: "The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world. First, their countries seek no aggrandizement, territorial or other; Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them; Fourth, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity; Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security; Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want; Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance; Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments. Franklin D. Roosevelt, Winston S. Churchill".

be guided by these common rules[44]. As the Security Council recalled, terrorism can only be eliminated by the strict, sustained participation and collaboration of all States and international and regional organisations in accordance with the Charter of the United Nations and international law and by redoubling efforts at national level[45]. The fight against terrorism cannot be won by sacrificing the very same principles which terrorism seeks to destroy; above all, the protection of fundamental rights must never be compromised[46].

[44] SANDS, Ph. "Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality", *Hastings Int'l & Comp .L.,* 29, 2006, pp.312-313.
[45] SECURITY COUNCIL. *Resolution 1456* (2003), 20 January 2003.
[46] EUROPEAN PARLIAMENT. Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (2006/2027 INI), 15/06/2006. Whereas clause C.