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# CHAPTER 19

# EXTRAORDINARY RENDITION

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## 1. Introduction

The years immediately following the terrorist attacks of 11 September 2001 ("9/11") have seen the emergence of a somewhat novel variation on the way in which governments and state officials may infringe individual rights in the name of (real or purported) national security considerations, in the form of the so-called "extraordinary rendition" programme carried out by the United States ("US"). Although instances of irregular transfer, detention and interrogation of terrorist suspects are of course not new,[1] the phenomenon of "extraordinary rendition", on the scale and with the modalities in which it has occurred in the aftermath of 9/11, has undoubtedly posed several unprecedented challenges to human right lawyers, international human rights monitoring bodies, domestic courts and other oversight bodies in attempting to ensure accountability.

Quite apart from the obvious questions concerning the legality of the actions of intelligence agencies and other State officials under domestic law, the practice of extraordinary rendition raises a number of serious concerns with regard to its international legality.[2] It is on this latter aspect that the present chapter focuses. Following a background section (section 2) which briefly describes the extent and the modalities of implementation of the extraordinary rendition programme and the international reaction to it, section 3 then discusses the international law implications of the phenomenon, with particular focus on its illegality under international human rights law and the questions of international responsibility of the States

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[1] For instance, well before the events of 9/11, the US occasionally engaged in operations having as their aim "rendition to justice", whereby individuals were apprehended and detained abroad and then transferred to the US in order to stand trial. "Extraordinary renditions" under the Clinton administration consisted of the arrest of Al-Qaida members and their rendition to third States where they faced legal proceedings; for discussion see S. Borelli, "Rendition, Torture and Intelligence Cooperation", in H. Born, I. Leigh, A. Wills (eds), *International Intelligence Cooperation: Challenges, Oversight and the Role of Law* (Routledge, 2011), 88.

[2] As noted by the European Commission for Democracy through Law ("Venice Commission"), "[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 law. Thus, even if a particular "rendition" is in accordance with the national law of one of the States involved (which may not 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, *Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners* (no. 363/2005, 17 March 2006), para. 30.

which have assisted the US in the implementation of the programme.[3] Section 4 then looks at the attempts which have been made to ensure that victims of extraordinary rendition obtain redress, both through civil litigation, criminal prosecutions and litigation before international human rights bodies, and through parliamentary commissions of inquiry and other procedures aimed at bringing to light the true extent of the programme or the extent of involvement of third States, and to identifying and allocating (political and legal) responsibilities. Section 5 provides brief conclusions.

## 2. The US "extraordinary rendition" programme

Due to the relative novelty of the phenomenon which it describes, the expression "extraordinary rendition" has not (yet?) become a term of art in international law, although its use in recent years has been relatively homogenous. Before the rendition programme of the US became the object of attention and condemnation by the international community, the word "rendition" was sometimes used in a neutral, descriptive sense to refer to the various mechanisms by which an individual was transferred from the jurisdiction (and possibly the custody) of a State to the custody of another State, whether by legal or extra-legal means. In light of the practice in the years since 9/11, the term, generally accompanied by the adjective "extraordinary", has progressively acquired the unambiguously negative connotation of removal of an individual suspected of terrorism to another country, without judicial supervision, particularly for purposes such as coercive interrogation and/or indefinite or extrajudicial detention.[4]

Under the Bush administration rendition was regarded as a "vital counterterrorism tool"[5] and "an effective way to take terrorists off the streets and collect valuable intelligence".[6] Following the change in Administration in January 2009, although there has been a renunciation of torture and other harsh interrogation methods, and covert overseas detention facilities have been closed,[7] there has been no outlawing of the practice of rendition as such.[8]

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[3] Other branches of public international law, including in particular, depending on the circumstances, international humanitarian law and international refugee law, may be relevant to the legality of rendition. However, they fall outside the scope of the present chapter. For discussion of the international humanitarian law aspects, see D. Weissbrodt and A. Bergquist, "Extraordinary Rendition and the Humanitarian Law of War and Occupation", 47 (2006-2007) *Virginia Journal of International Law* 295.

[4] See, e.g., Parliamentary Assembly of the Council of Europe ("PACE"), *Resolution 1433 on lawfulness of detentions by the United States in Guantánamo Bay*, 26 April 2005, para. 7(vii); Venice Commission, Opinion no. 363/2005 (above n. 2), paras 30 and 31; see also *Babar Ahmad and Others v. United Kingdom* (App. 24027/07 et al.), ECtHR, Judgment of 10 April 2012, para. 113, defining "extraordinary rendition" as "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment".

[5] "Prepared Statement of Dr Daniel Byman", Hearing before the Senate Committee on Foreign Relations, 26 July 2007, available at: http://foreign.senate.gov/testimony/2007/BymanTestimony070726.pdf.

[6] "Opening Statement of the Chairman, Senator Biden", Hearing before the Senate Committee on Foreign Relations, 26 July 2007, available at: http://foreign.senate.gov/testimony/2007/BidenStatement070726.pdf, 1.

[7] See Executive Order 13491 "Ensuring Lawful Interrogations", 22 January 2009, 74 Fed. Reg. 4893.

[8] See Department of Justice, "Special Task Force on Interrogations and Transfer Policies Issues Its

Although the modalities of each case of extraordinary rendition vary, some common features can be identified. The first such feature is that, in the initial phases of the operation, US agents[9] have almost invariably acted with the acquiescence/consent – and generally also with the material support – of agents of the country in which the targeted individual was found/located ("the territorial State"). The degree of involvement of local agents varies greatly: in some cases, the targeted individual was arrested by the local authorities either of their own initiative on the basis of intelligence provided by their US counterparts or at the instigation/request of the US. Thereafter, following a period of – generally extrajudicial – detention in the country where they had been apprehended, and possibly interrogation by the local authorities (whether with or without the involvement of US agents), the rendered individual was then handed over to the exclusive control of US agents for transfer. In other cases, the involvement of local agents has been limited to providing logistical or other support to the US agents carrying out a "lightning-grab" operation in the territorial State.[10]

With regard to the modalities of the transfer, the rendered individuals have generally been transferred by US agents, through the use of planes owned by or leased to the CIA or the US military. Also in this context, however, the involvement of third States has not been negligible, insofar as it appears that a number of States have knowingly allowed US "rendition flights" to either make use of their airspace or to stop and refuel at airbases located on their territory.[11]

Finally, with regard to the last phase of the odyssey of the rendered individuals, the countries of destination ("the rendition countries") are principally States outside Europe, in particular Egypt, Syria, Jordan, Afghanistan, although some Council of Europe Member States, including Romania, Lithuania and Poland have also been implicated.[12] Once they had reached

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Recommendations to the President", 24 August 2009, available at www.justice.gov/opa/pr/2009/August/09-ag-835.html; and see D. Johnston, "US Says Rendition to Continue, but With More Oversight", *New York Times*, 24 August 2009, available at www.nytimes.com/2009/08/25/us/politics/25rendition.html. Since 2009, reports of US detention and interrogation of individuals abroad have continued to appear, see, e.g., Open Society Justice Initiative, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition", 21 February 2013 (hereinafter "OSJI Report 2013"); C. Whitlock, "Renditions continue under Obama, despite due-process concerns", *The Washington Post*, 1 January 2013.

[9] US Agencies involved in the programme have included the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI) and the US Diplomatic Security Service, as well as the US military.

[10] This appears to have been the *modus operandi*, for instance, in the case of Hassan Mustafa Osama Nasr (known as Abu Omar), the Muslim cleric kidnapped by CIA agents in the streets of Milan in February 2003 by CIA agents, with the material support of an Italian *carabinieri* officer and the Italian secret services. On the Abu Omar case, see below, text accompanying nn. 60 *et seq*.

[11] See European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (Rapporteur: Giovanni Claudio Fava), "Working Document No. 8 on the companies linked to the CIA, aircraft used by the CIA and the European countries in which CIA aircraft have made stopovers", 16 November 2006, doc. PE 380.984v02-00, available at http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf, reporting that at least 1,245 flights with links to the extraordinary rendition programme had used European airspace in the period up to the date of the report. Details of these flights by country can be found in *OSJI Report 2013* (above n. 8).

[12] See PACE, Committee on Legal Affairs and Human Rights, "Secret detentions and illegal transfers of detainees involving Council of Europe member states – Second report", Rapporteur: Mr Dick Marty, doc. 11302 rev, 11 June 2007 ("Marty Report 2007"), available at http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=11555&Language=EN.

the country of destination, the rendered individuals were either detained in official/registered detention facilities operated by the local authorities or held in unacknowledged/secret detention centres set up and operated by the US government on the foreign State's territory with its consent (i.e., the notorious "black sites" run by the CIA),[13] or operated by agents of the territorial State on behalf of the US. In addition, some of the detainees ended up at the US Naval Base at Guantánamo Bay.

Figures relating to the number of individuals who have been subjected to rendition are inexact because of the inherent secrecy of the process. However, sources agree that between 2001 and 2005, the number of renditions was in the hundreds.[14] While some victims of these renditions have now been released and returned to their country of residence, many are still detained, either at Guantánamo Bay or in other countries, with or without charges.

## 3. The international legal framework

### *3.1 Extraordinary rendition as a complex human rights violation*

From an international human rights law perspective, the practice of extraordinary rendition has the potential to infringe a broad range of internationally recognized rights, including, first and foremost, and in all cases, the right to liberty and security of the person. In the vast majority of cases, the right to be free from torture and other ill-treatment is also engaged, as well as the right to fair trial (in cases where the rendered individual is then tried in the receiving State, either on the basis of tainted evidence or without proper fair trial guarantees), and the right to life (in cases where the rendered individual is subsequently prosecuted and charged with offences carrying the death penalty in the country of destination). Further, the abduction and *incommunicado* detention of rendered individuals may involve a breach of the right to respect for private and family life both of the rendered individual and of his family members.

The right to liberty and security of the person is violated in each and every case of extraordinary rendition, as the irregular and extrajudicial apprehension and detention of the targeted individual outside the normal procedures amount *per se* to a violation of the prohibition of arbitrary arrest and unlawful detention, inherent in the duty to respect and protect the right to liberty and security. Further, to the extent that the individual is subsequently detained outside the normal legal framework in the receiving State, the right to liberty and prohibition of arbitrary detention is also necessarily violated.[15] Finally, the extra-

[13] See L.N. Sadat, "Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law", 37 (2005-2006) *Case W. Res. J. Int'l L.* 309; M. Satterthwhite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law", 75 (2007) *George Washington Law Review* 1333.

[14] The 2013 report by the Open Society Justice Initiative mentions 136 documented cases of extraordinary rendition; see *OSJI Report 2013* (above n. 8), at 30. These figures do not include detention and transfers conducted by any agency other than the CIA, including detention and transfer of detainees to and from Guantánamo Bay by the US Department of Defense.

[15] Depending on the way the individual is detained, the detention may also amount to an enforced disappearance as defined in the International Convention for the Protection of All Persons from Enforced Disappearance, GA

legal modalities of the transfer to a third State also result in a *per se* violation of the right to personal liberty.[16]

Further, and again with regards to the transfer itself, the modalities of such transfer can in themselves amount to violations of the right to be free from ill-treatment.[17] In addition, depending on the treatment inflicted on the individual during the arrest and subsequent detention *before* he or she is handed over to agents of another State, there may also be a direct violation of the prohibition of torture and ill-treatment by the agents of the territorial and/or of the rendering State. This is the case for instance when the individual is detained in the State of apprehension and subjected to coercive interrogation by, or in the presence of, agents of the territorial State before being rendered to a third State.[18]

Quite apart from – and in addition to – those violations which result *directly* from the modalities of arrest, initial detention and transfer of suspected terrorists, and any subsequent detention, the practice of rendition invariably involves a breach of the international prohibition of transfer of individuals to a country where there is a real risk of violation their fundamental rights (sometimes referred to as the prohibition of *refoulement*). Although international human rights law does not, as a general matter, guarantee a right for foreign nationals to enter or remain in a foreign country, once the individual is under the jurisdiction of the State, the State is not permitted to deport or otherwise transfer him or her to another State if there is a well-founded and individual fear that he or she will suffer violations of fundamental rights in the country of destination. The prohibition of transfer in these circumstances, in addition to forming a fundamental principle of international refugee law,[19] is a well-established principle of international human rights law, which is explicitly enshrined, in relation to torture and other ill treatment, in the UN Convention Against

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Res. 61/177, 20 December 2006 (not yet in force). See also *El-Masri v. Former Yugoslav Republic of Macedonia* (App. 39630/09), ECtHR [GC], Judgment of 13 December 2012, para. 240.

[16] See, e.g., Venice Commission, Opinion no. 363/2005 (above n. 2), para. 277 (f).

[17] In his 2006 Report, the Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE), Mr Dick Marty, describes in detail some common features of the treatment to which rendered individuals have been subjected immediately after their transfer into US hands (so-called "security checks") and whilst on transfer towards the rendition destination: see PACE, Committee on Legal Affairs and Human Rights, "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states – Part II (Explanatory memorandum)", Rapporteur: Mr Dick Marty, doc. AS/Jur (2006) 16 Part II, restricted (provisional version), 7 June 2006, available at http://assembly.coe.int/Main.asp?Link=/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.htm (hereinafter "Marty Report 2006, Part II"), paras 79-87). The Rapporteur concludes that "[…] it is simply not acceptable in Council of Europe member States for security services, whether European or foreign, to treat people in a manner that amounts to such 'extreme humiliation'"; ibid., para. 87, footnotes omitted. See also Human Rights Committee, *Alzery v. Sweden* (Comm. 1416/2005), UN doc. CCPR/C/88/D/1416/2005 (2006), para. 11.6; *El-Masri v. Former Yugoslav Republic of Macedonia* (App. 39630/09), ECtHR [GC], Judgment of 13 December 2012, paras 205-210.

[18] See, e.g., the case of Khalid El-Masri, discussed below, text accompanying nn. 29 *et seq*. The ECtHR found that the treatment inflicted upon the applicant by Macedonian agents during the period of his incommunicado detention in a hotel room in Skopje amounted to a breach of his rights under Art. 3 ECHR; see *El-Masri* (above n. 16), paras 200-204.

[19] See Art. 33, Convention relating to the Status of Refugees (Geneva, 28 July 1951), 189 UNTS 150.

Torture,[20] and, in relation to enforced disappearances, in the UN Convention Against Enforced Disappearances.[21] The principle has also been consistently recognized in the case-law of all relevant human rights courts and monitoring bodies, which have recognized that the prohibition of transfer where there is a risk of serious human rights violations constitutes a fundamental corollary of the duty of States to respect and protect the rights of all individuals under their jurisdiction.[22] The prohibition of transfer applies not only to all individuals who are found within the State's own territory, but also to any individual who is under the jurisdiction (i.e. the physical control) of agents of the State.[23] Further, it also applies to transfers to a State in circumstances in which there is a risk that the individual would then in turn be removed to a country where his or her fundamental rights are at real risk of being violated.[24]

Whilst the prohibition of transfer in such circumstances has long been principally, if not exclusively, applied in practice in cases in which the transferred individual faced a risk of treatment amounting to torture or other ill-treatment,[25] in recent years international monitoring bodies have increasingly applied the principle to situations where the core aspects of other fundamental rights are at risk of being violated in the country of destination.[26]

It is worth noting that the prohibition of transfer to a risk of violation of fundamental rights is absolute, in the sense that, similarly to the core aspects of the rights which it ultimately aims to protect, the prohibition cannot be derogated from in times of emergency and applies to all individuals under the State's jurisdiction, irrespective of their criminal record or of the (real or presumed) security threat which they pose to the national community. The absolute nature

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[20] Art. 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), 10 December 1984, UNTS, vol. 1465, p. 85; see also UN Committee Against Torture (CAT), *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, UN doc. A/53/44, annex IX; Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States Parties*, UN doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007). See also Art. 13(4), *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS Treaty Series, No. 67. A general prohibition of *refoulement*, modelled on that contained in the Art. 33 of the 1951 Refugee Convention, is contained in Art. 22(8) of the *American Convention on Human Rights* (San Jose, 22 January 1969), OAS Treaty Series No. 36, 1144.

[21] Art. 16, International Convention for the Protection of All Persons from Enforced Disappearance (above n. 16).

[22] See, e.g., Human Rights Committee, *Ng v. Canada* (Comm. 469/1991), UN doc. CCPR/C/49/D/469/1991 (1994), para. 14(1); *Kindler v. Canada* (Comm. 470/1991), UN doc. CCPR/C/48/D/470/1991 (1993), para. 6(2); *Soering v. United Kingdom* (App. 14038/88), ECtHR, Judgment of 7 July 1989, Series A, No. 161, in particular at para. 91.

[23] See, e.g., Committee against Torture, *Conclusions and Recommendations: United States of America*, UN doc. CAT/C/USA/CO/2 (25 July 2006), para. 20; *Hirsi Jamaa v. Italy* (App. 27765/09), ECtHR [GC], Judgment of 22 February 2012, in particular at para. 74; *Al-Saadoon and Mufthi v. United Kingdom* (App. 61498/08), ECtHR, Judgment of 2 March 2010.

[24] See, e.g., Human Rights Committee, *General Comment No. 31*, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 12; *M.S.S. v. Belgium and Greece* (App. No. 30696/09), ECtHR [GC], Judgment of 21 January 2011, paras 342-343).

[25] All of the cases cited in n. 23 above concern situations where the transferred individual would have faced treatment amounting to torture or other ill-treatment in the State of destination.

[26] See, e.g., *Othman (Abu Qatada) v. United Kingdom* (App. 8139/09), ECtHR, Judgment of 17 January 2012 ("flagrant denial of justice" in the receiving country); *Al-Saadoon* (above n. 24) (death penalty).

of the prohibition of transfers to a risk of serious human rights violations has long been recognized by international human rights bodies and has been consistently end emphatically reiterated in the years since the events of 9/11. [27]

These principles found specific application in *El-Masri v. Macedonia*, the first case concerning the US extraordinary rendition programme upon which the European Court ruled on the merits.[28] In a judgment handed down in December 2012, the Grand Chamber of the European Court found that Macedonia, by handing the applicant over to CIA agents, despite the existence of a real risk that he would be subjected to torture and other ill-treatment had breached, *inter alia*, its obligations under Article 3 of the ECHR.[29] In addition, the Court found that, "it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5", in the form of arbitrary, incommunicado and indefinite detention, and that therefore, Macedonia had also breached Article 5 ECHR.[30] Finally, the Court found that, by transferring the applicant to the US authorities, Macedonia had also breached his right to respect for private and family life under Article 8 of the Convention.[31]

The practice of extraordinary rendition can accordingly properly be regarded as resulting in "complex" human right violations. The notion of a complex human right violation has been used to account for the particular nature of enforced disappearances, a practice with which "extraordinary renditions" share a number of characteristics.[32] The notion is important in that it conveys the idea that, although it is possible to regard the various abuses and deprivation of rights suffered by the victim, as well as his family and friends,[33] as a series of discrete violations of specific rights, such practices are particularly abhorrent because of the cumulative effect of those violations.

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[27] For early statements of the principle see Committee Against Torture, *Tapia Paez v. Sweden* (Comm. 39/1996), UN doc. CAT/C/18/D/39/1996 (1997), para. 14.5; *Soering* (above n. 23), para. 111; *Chahal v. United Kingdom* (App. 22414/93), ECtHR, Judgment of 15 November 1996, para. 81. Recent reaffirmation of the absolute nature of the prohibition of unlawful transfer are contained, inter alia, in *Saadi v. Italy* (App. 37201/06), ECtHR [GC], Judgment of 28 February 2008, para. 139; Human Rights Committee, *Alzery v. Sweden* (above n. 18).

[28] *El-Masri* (above n. 16). Khalid El-Masri, a German national erroneously suspected of involvement in terrorism, was arrested on 31 December 2003 by plain-clothes agents of Macedonia in Skopje. He was held incommunicado for twenty-three days in a hotel room, under constant guard by agents of the Macedonian security forces, before being handed over at Skopje Airport to CIA agents. He was then transferred on a special CIA-operated flight to a CIA-run secret detention facility in Afghanistan, where he was tortured and ill-treated for over four months, until his release in May 2004. The Court did not rule on the merits in a number of cases either because they were rejected as inadmissible or due to the Court's finding that it lacked jurisdiction *ratione temporis*. See below nn. 89 and 94 and accompanying text.

[29] *El-Masri* (above n. 16), paras 215-222.

[30] Ibid., paras 238-239.

[31] Ibid., paras 248-250.

[32] ADD SUPPORT [http://www.frouville.org/Publications_files/FROUVILLE-CED-ALSTON.pdf].

[33] On the impact on the family members of the rendered individual, see Marty Report 2006, Part II (above n. 18), paras 88-91.

### *3.2 Issues of State responsibility: the role of European States*

The list of human rights violations resulting from the practice of extraordinary rendition is long, but relatively uncontroversial as a matter of international law. Similarly uncontroversial is the fact that the US is responsible both as a matter of international customary law and of its treaty obligations for those violations, either directly or as a result of the breach of the prohibition of *refoulement*. In addition, no questions arise as to the responsibility of those States of destination ("rendition States") which have been directly responsible for the extra-judicial detention and/or coercive interrogation of the rendered individuals.

More complex, from a legal perspective, is the question of the international responsibility of third States which have been involved, to varying degrees, in the programme. The involvement of several Member States of the Council of Europe has been highlighted, inter alia, in the two reports to the Parliamentary Assembly of the Council of Europe compiled by Dick Marty in 2006 and 2007.[34] Commenting on the role played by some European States, the Rapporteur noted that the extraordinary rendition programme could not have been performed effectively without "the active participation, or at least the collusion of, national intelligence services" of a number of European States.[35] The modalities and extent of the participation of European States vary from allowing the use of their national airspace or their civilian or military air bases for rendition flights, to allowing US agents to kidnap, detain and mistreat individuals under their jurisdiction and within their territory (whether or not with the active participation of the local authorities), to hosting US-run secret detention facilities. At a further step removed, some States have sent their intelligence agents to assist in interrogation sessions, or provided intelligence for use in interrogation.

With regard to those countries which hosted CIA-operated secret detentions centres on their territory, their international responsibility for any violations which have taken place in those facilities is engaged simply by virtue of the fact that the relevant conduct has taken place on their territory, and therefore, by definition, are within their "jurisdiction" for the purpose of application of their human rights obligations.[36] Although the question of secret detention facilities has not yet been adjudicated upon by any international treaty bodies, the relevant principle is that clearly set out by the European Court in *El-Masri*, namely that a Contracting

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[34] See PACE, Committee on Legal Affairs and Human Rights, "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states – Information Memorandum II", Rapporteur: Mr Dick Marty, doc. AS/Jur (2006) 03rev, 22 January 2006, available at http://www.assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (hereinafter "Marty Report 2006, Part I"); Marty Report 2006, Part II (above n. 18); Marty Report 2007 (above n. 12).

[35] Marty Report 2006, Part II (above n. 18), at 230

[36] This is clearly the case in relation to the ICCPR, whose provision on scope of application provides that States Parties have an obligation to respect and to ensure the Covenant rights to all individuals "*within [their] territory* and subject to [their] jurisdiction"; see Art. 2, International Covenant on Civil and Political Rights (ICCPR), FULL CITE (emphasis added). International practice demonstrates that it is only in very exceptional circumstances that acts occurring within a State's territory will be regarded as not falling within its "jurisdiction" for the purpose of application of its human rights obligations: see, e.g., *Ilaşcu and Others v. Moldova and Russia* (App. 48787/99), ECtHR [GC], Judgment of 8 July 2004, para. 318; *Catan and Others v. Moldova and Russia* (App. 43370/04), ECtHR, Judgment of 19 October 2012*;* cf. *Ivanţoc and Others v. Moldova and Russia* (App. 23687/05), ECtHR, Judgment of 15 November 2011.

State, "[...] must be regarded as responsible under the [European] Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities".[37]

Also legally controversial, as a matter of international law, is the position of those States which, on the one hand, have provided information to the US which has led to the rendition of a specific individual[38] or which has been relied upon by interrogators during the coercive interrogation / torture of the individual in question.[39]

In that regard, the international responsibility of the State may be engaged on the basis that it has provided "aid or assistance" to the rendering State or the State which subsequently tortures the individual. Responsibility on this basis derives from the principle codified in Article 16 of the International Law Commission's Articles on State Responsibility, according to which:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.[40]

Since there is no doubt that, for the purposes of the second limb, the acts of torture and ill-treatment, incommunicado detention, and other abuses to which rendered individuals are subjected would be unlawful if committed by any State, the crucial question in this regard is whether, under the first limb the State providing the information had knowledge of the use to which such information would be put. In that connection, it can be argued that those States which have provided information on specific individuals to US agencies after the public emergence of the first allegations about the programme, at a minimum ought to have known that such information could have put the individuals at risk of being "rendered" or could have been used during interrogation. Whilst there are yet no international cases in which responsibility has been found to exist on this basis, at the domestic level, responsibility for cooperation with the US leading to the rendition of Maher Arar was accepted by the Canadian Government.[41] In the contexts of claims brought before the domestic courts, in which it is alleged that agents of the British security services were involved in the interrogation of British citizens or residents who had been rendered, and then detained and

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[37] *El-Masri* (above n. 16), para. 206. See also ibid., para. 210; and *Alzery* (above n. 18), para. 11.6.

[38] As was the case with the (incorrect/erroneous) intelligence provided by the Canadian authorities to their US counterparts, leading to the arrest of Maher Arar in the US and his rendition to Syria. See below .

[39] In relation to the UKs connivance/involvement in coercive interrogation and torture of UK nationals rendered to third States or detained at Guantánamo Bay, see, e.g., R. Norton-Taylor, "Torture prosecutions against MI5 and MI6 unlikely to be pursued", *The Guardian*, 12 January 2012, available at http://www.guardian.co.uk/law/2012/jan/12/decision-torture-charges-mi5-mi6. [Discussion of the legal issues which arise in relation to those States which have made use of information gathered through the rendition programme are outside the scope of the present chapter.

[40] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

[41] See below, text accompanying n. 76 *et seq*.

subjected to coercive interrogations in third countries, it is reported that the UK Government, although not accepting either liability or that it was involved, has reached out of court settlements involving the payment of substantial compensation to several individuals, including some who remain detained at Guantánamo Bay.[42]

## 4. Seeking redress for rendition

It is a basic principle of international law that every violation of an international obligation entails a duty to make full reparation.[43] With regards, more specifically, to international human rights law, the obligation to afford full redress to victims of human rights violations is universally recognized as a cardinal principle of contemporary human rights law, and all international human rights law instruments require States Parties to provide an effective remedy to individuals who claim to have been the victims of violations of their fundamental rights.[44] In addition, States have an independent and parallel obligation to carry out a prompt, independent and effective investigation into allegations of, *inter alia*, torture and other ill-treatment, which should be capable of leading to the identification and punishment of those responsible.[45] Despite these clear obligations, several years after the rendition programme came to light, victims of rendition are still struggling to obtain redress and their quest for truth has so far been unsuccessful. Various attempts have been made, although they have mostly failed, with very few exceptions, due to the obstacles deriving from state secrets and, in some cases, rules on immunities.[46]

### *4.1 The role of the domestic courts: prosecuting and litigating rendition*

Domestic prosecuting authorities and courts have the potential to play an important role in providing an effective remedy and redress to victims of rendition, as well as in ensuring that State agents involved in the irregular apprehension and transfer of terrorist suspects are held accountable. However, attempts to bring civil claims in relation to renditions or to prosecute those allegedly responsible have encountered a number of obstacles and, to date, have been far from effective.

With regards to civil remedies, victims of renditions have brought cases in a range of fora in an effort to obtain redress for the violations suffered. A first group of cases concerns

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[42] See below n. 50.

[43] See *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; and *Merits*, 1928, P.C.I.J., Series A, No. 17, p. 47; and ILC Articles (above n. 41), Art. 31.

[44] See, e.g., *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147 (21 March 2006) and the provisions cited in the Preamble thereto.

[45] See, e.g., *El-Masri* (above n. 16), paras 82-85 and authorities cited therein.

[46] See PACE, Committee on Legal Affairs and Human Rights, "Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations" (Rapporteur: Dick Marty), 6 October 2011 ("Marty Report 2011"), available at http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf.

litigation against high ranking officers of the government agencies involved, both in the United States and in third countries involved in the programme.

In the US, civil suits have been brought by victims of the extraordinary rendition programme against the US agents and agencies involved, at various levels, in their abduction, irregular transfer and subsequent torture.[47] These claims have encountered the apparently insurmountable obstacle of the State secret doctrine under US law and/or other obstacles to adjudication deriving from considerations of national security and foreign policy.[48] Broadly similar obstacles have meant that the civil suits brought before the civil courts of European States against individuals or State agencies involved in the programme have been scarcely more successful, although in some cases the litigation has forced the relevant government to propose an out of court settlement rather than risking proceedings which could potentially have led to a clear judicial recognition of involvement or responsibility and/or the disclosure of sensitive information.[49]

Attempts have also been made to obtain compensation from private entities involved in providing logistic support to the rendition programme. For instance, in May 2007, the American Civil Liberties Union (ACLU) brought a suit before the US courts against Jeppesen Dataplan Inc., a subsidiary of Boeing, on behalf of five foreign nationals who claimed to have been victims of renditions.[50] The suit claimed that Jeppesen, which had operated flights used to transport rendition victims, including the five plaintiffs, knew or reasonably should have known that the transferred individuals would have been subjected to forced disappearance,

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[47] In particular, in December 2005, the American Civil Liberties Union on behalf of El-Masri filed a suit in the US against the CIA Director, George Tenet. The US Government succeeded in having the case dismissed on the basis of the State secret doctrine: see *El-Masri v. Tenet*, 437 F.Supp.2d 530, 541 (E.D.Va.2006); affirmed 479 F.3d 296 (4th Cir. 2007); cert. denied 552 US 947 (2007). Similarly, in 2004, a claim was brought against the former US Attorney General, John Ashcroft, the FBI Director, Robert Mueller, and the then US Secretary of Homeland Security, Tom Ridge, in relation to the extraordinary rendition of Maher Arar. Again, the US Government successfully moved to dismiss the case, the courts accepting that national security considerations prevented adjudication on the merits, even if the actions in question had violated international law: *Arar v. Ashcroft*: see *Arar v. Ashcroft et al.*, 414 F.Supp.2d 25 (E.D.N.Y. 2006), 532 F.3d 157 (2nd Cir. 2008); 585 F.3d 559 (2nd Cir. (en banc) 2009)); 130 S.Ct. 3409 (2010) (cert denied).

[48] See, e.g., the litigation in *El-Masri v. Tenet* (above n. 48) (State secrets), and *Arar v. Ashcroft* (above n. 48) (national security).

[49] For instance, in November 2010, the UK Government paid compensation to former Guantánamo detainees who had initiated litigation before the English courts alleging UK complicity in torture and extraordinary rendition (including Binyam Mohammed, Bisher Al-Rawi and Jamil El-Banna): see, e.g., P. Wintour, "Guantánamo Bay detainees to be paid compensation by UK government", *The Guardian*, 16 November 2010, available at http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-compensation-claim. Other cases as to which details of the existence of a settlement are in the public domain include that of Sami Al-Saadi, a Libyan dissident who was rendered, together with his wife and their four young children, from Hong Kong to Libya in March 2004, allegedly with the involvement of UK officials (see http://www.reprieve.org.uk/cases/samialsaadi/) and that of Abdel Hakim Belhaj, a Lybian dissident rendered, together with his wife, to the Gheddafi regime in 2004, allegedly with the involvement of the UK security services (see R. Norton-Taylor, "Libyan dissident offered money to avoid MI6 appearing in open court", *The Guardian*, 10 April 2012, available at http://www.guardian.co.uk/world/2012/apr/10/libyan-dissident-compensation-uk-rendition?intcmp=239; I. Cobain, "Libyan politician offers to settle UK lawsuit for £3 and an apology", *The Guardian*, 4 March 2013, available at http://www.guardian.co.uk/world/2013/mar/04/libyan-politician-uk-lawsuit-apology).

[50] *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F.Supp.2d 1128 (N.D. Cal. 2008), 539 F.Supp.2d 1128 (N.D. Cal. 2008), 614 F.3d 1070 (9th Cir. (en banc) 2010), cert. denied, 131 S. Ct. 2442 (2011).

detention, and torture in countries where such practices were routine. As a consequence, the plaintiffs claimed that the company had "actively participated in" or "aided and abetted" their torture and degrading treatment, and their forced disappearance and secret incommunicado detention performed by US agents or foreign governments in concert with the CIA.[51] The US Government intervened and moved to have the complaints dismissed on the basis of the State secret privilege, claiming that the disclosure of information concerning whether Jeppesen had provided support to the CIA rendition programme would have caused "exponentially grave damage to the national security",[52] whilst the disclosure of evidence relating to the CIA's cooperation with particular foreign governments in the conduct of alleged clandestine intelligence activities would have resulted in "extremely grave damage to the foreign relations and foreign activities of the United States".[53] The suit was initially dismissed at first instance on the basis of the State secrets doctrine, the District Court accepting the Government's argument that the very subject matter of the case was a State secret.[54] Having initially been reversed by the Court of Appeals for the Ninth Circuit in April 2009,[55] the decision of the District Court was subsequently affirmed by the full Court of Appeals, sitting en banc, which found that State secrets were so central to the case that the continuation of the proceedings would have jeopardized the national security of the US.[56] On 16 May 2011, the Supreme Court declined to grant certiorari.[57]

With regard to criminal law remedies, despite the continuing emergence of new information – and evidence – about the US rendition programme, prosecutions mounted against State agents involved in extraordinary renditions are relatively few and have so far been comparatively unsuccessful, principally because, once again, they have come up against State secrets doctrines and other considerations of national security, or simply because of the lack of political / prosecutorial will to confront the US or to bring to light the involvement of the forum State's agents in the programme.

A first point to note in this regard is that, strikingly – albeit perhaps not surprisingly – no criminal prosecutions have been brought in the US. Two investigations conducted in 2008 and 2009 into the violation of US federal law in connection with interrogations of detainees at oversees location subsequent to 9/11 were deemed to be inconclusive on the basis that "the

[51] *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), at 1132.

[52] Ibid., at 1135.

[53] Ibid.

[54] Ibid., 1135-36.

[55] *Mohamed v. Jeppesen Dataplan, Inc.,* 563 F.3d 992 (9th Cir. 2009).

[56] *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir (en banc) 2010), at 1083-84. For commentary, see D.J. Natalie, "No Longer Secret: Overcoming the State Secrets Doctrine to Explore Meaningful Remedies for Victims of Extraordinary Rendition", 62 (2012) *Case Western Reserve Law Review* 1237.

[57] *Mohamed v. Jeppesen Dataplan, Inc*., 131 S. Ct. 2442 (2011) (cert. denied).

admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt".[58]

The only example of prosecution which has resulted in the conviction of domestic and foreign agents involved in a rendition operation is, to date, that mounted by the Italian authorities in relation to the case of Abu Omar, the Muslim cleric kidnapped by CIA agents in the streets of Milan in February 2003 and rendered to Egypt, where he was detained until his release in 2011 and allegedly tortured.[59]

In July 2005, an Italian prosecutor sent a formal request to the Italian Minister of Justice, to obtain the extradition of the CIA agents allegedly involved, as well as a request for international judicial assistance ("*rogatoria internazionale*"), on the basis of which Italian prosecutors would have been authorized to travel to the US to question suspects and witnesses.[60] In January 2006, the Justice Minister approved the request for international judicial assistance; however, a few months later he refused to submit an extradition request to the US.[61] In any event, the US authorities had by that stage clearly confirmed that they would not extradite their agents to Italy, nor cooperate in the investigation.[62] As a result, when the trial – in which 35 individuals, comprising 26 CIA agents, a US Air Force Colonel, and eight officers of the Italian military security services (SISMI) were charged with "abduction accompanied with aggravating circumstances" – began in 2007, most of the accused were tried *in absentia*.

The initial trial court judgment, subsequently confirmed on appeal, resulted in the conviction of 22 CIA agents, the US Air Force colonel who had been commander of the US airbase at Aviano from which the rendition flight had departed, and two SISMI agents.[63] However, the proceedings against certain of those accused have been characterized both by the invocation of the State secret prerogative under Italian law by the Italian Government and the assertion of consular and diplomatic immunity on behalf of certain of the US agents.

With regards to the first aspect, a challenge to the prosecution of certain of the SISMI agents brought by the Government on the basis that materials relied upon against them was subject

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[58] See US Justice Department, "Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees," 30 August 2012, available at http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html.

[59] On the factual background to the case, see F. Messineo, "'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy", 7 (2009) JICJ 1023; see also *Adler & 12 others*, *First arrest warrant for the kidnapping of Mr Abu Omar*, n. 10838/05 R.G.N.R. and n. 1966/05 R.G.GIP (Milan Tribunal, Judge Presiding over Preliminary Investigations), 11 March 2004, official English translation available at http://www.statewatch.org/cia/documents/milan-tribunal-19-us-citizens-sought.pdf.

[60] Arrest Warrant of 20 July 2005, Tribunale Ordinario di Milano, Section XI Criminal Court as Review Judge, no. 1413/2005 RG TRD.

[61] "Italy halts CIA extradition bid", *BBC news online*, 12 April 2006, available at http://news.bbc.co.uk/2/hi/europe/4903518.stm.

[62] "US to refuse Italian request for extradition of CIA agents", *New York Times*, 28 February 2007.

[63] See Tribunale Ordinario di Milano in Composizione Monocratica (Sez. IV Penale), Sentenza No. 12428/09, 4 November 2009 (published 1 February 2010); Corte d'Appello di Milano (Sez. III Penale), Sentenza No. 368, *Adler and others v. Tribunale di Milano*, 15 December 2010.

to State secrecy[64] resulted in a decision of the Constitutional Court holding that the State secret privilege "represents a preeminent interest in any legal system, whatever its political regime", that the Executive enjoyed a wide discretion in deciding whether to classify a piece of information as a State secret, and that, since the choice as to the necessary and appropriate means to ensure national security was a political one, no judicial review of the decision to invoke the State secret privilege was possible.[65] On the basis of that judgment, it was held at first instance and on appeal that the proceedings against the high-ranking agents of SISMI had to be discontinued because *all* the evidence as to their involvement was covered by State secrecy.[66] However, in September 2012, the Italian Court of Cassation allowed an appeal by the prosecution, holding that State secrecy did not provide a blanket ban on prosecutions and did not preclude the courts from assessing other evidence which was not covered by State secrecy.[67] The case was remanded to the Milan Court of Appeal, which, on 12 February 2013, convicted the Director and Deputy Director of SISMI and sentenced them to 10 and 9 years detention, respectively, for their role in the kidnapping.[68] Three other lower-ranking SISMI agents were also convicted and sentenced to 6 years detention. As regards the invocation of immunities, in 2009 the Milan trial court rejected the argument that consular immunity prevented prosecution. However, it accepted that the accused who had been accredited as diplomatic agents at the time of the kidnapping enjoyed functional immunity.[69] Subsequently, on 1 February 2013, the Milan Court of Appeal reversed the first instance judgment in that regard, rejected the claim of immunity and convicted *in absentia* the former CIA station chief in Rome and two other CIA agents.[70]

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[64] The Italian Government challenged the continuation of the prosecution of the Director and Deputy Director of SISMI, as well as other lower ranking officers before the Constitutional Court, on the basis of "conflict of attribution" between the Executive and the judiciary, alleging that the Milan prosecutors and the judge who had sent the case for trial had improperly relied upon materials which had been classified by the Government as constituting State secrets. On that basis, the Government requested the Constitutional Court to declare invalid all evidence acquired by the prosecutors and the decision to send the case for trial (Reg. C. 2/2007 and 3/2007).

[65] Corte Costituzionale, 11 March 2009 (published 8 April 2009), No. 106/2009; quotes from paras. 3, available at http://www.eius.it/giurisprudenza/2009/038.asp. For commentary, see F. Fabbrini, "Understanding the Abu Omar Case: The State Secret Privilege in a Comparative Perspective", paper delivered at the Association of Constitutional Law World Congress, Mexico City, December 2010, available at www.juridicas.unam.mx/wccl/ponencias/6/96.pdf.

[66] See Tribunale Ordinario di Milano in Composizione Monocratica (Sez. IV Penale), 4 November 2009 (published 1 February 2010), No. 12428/09, available at http://www.penalecontemporaneo.it/upload/Trib.%20Milano,%204.11.2009%20%28sent.%29,%20Est.%20Magi%20%28Abu%20Omar%29.pdf; Corte d'Appello di Milano (Sez. III Penale), No. 368, *Adler and others v. Tribunale di Milano*, 15 December 2010, available at http://www.penalecontemporaneo.it/materia/-/-/-/774-caso_abu_omar__la_sentenza_di_secondo_grado/.

[67] Cassazione penale (V Sez.), 19 September 2012 (published 29 November 2012), No. 46340, available (in Italian) at http://www.penalecontemporaneo.it/upload/1355156864AbuOmar_Cass.pdf. Appeals against the convictions of 23 US nationals and 2 SISMI agents were dismissed.

[68] Corte d'Appello di Milano, 12 February 2012, No. 6709/2013.

[69] Cassazione penale (V Sez.), No. 46340 (above n. 68). For commentary on this aspect of the judgment, see see M. Frulli, "Some Reflections on the Functional Immunity of State Officials", 19 (2009) *Italian Yearbook of International Law 91*, at 95-99.

[70] Corte d'Appello di Milano (Sez. III), 1 February 2013 (published 14 February 2013), No. [XXX], available at http://www.penalecontemporaneo.it/upload/1362301674Sentenza%20Medero%20dpc.pdf. The station chief, Jeff Castelli, was sentenced to 7 years detention, whilst the other two agents were sentenced to 6 years.

Despite the fact that it has not so far been possible to enforce the sentences rendered against the CIA agents, and that it is extremely unlikely that they will ever serve those sentences, the Italian prosecutions remains a comparatively successful attempt to bring those responsible for renditions – including high-ranking officers of the national security services – to justice. So far, the Italian case is the only example of successful prosecution of those involved in extraordinary renditions. Nevertheless, it remains to be seen whether the convictions of SISMI agents and the CIA agents on whose behalf diplomatic immunity has been asserted will be allowed to stand.[71]

By contrast to the relative success of the Italian prosecutions, attempts in other European States have ended in decisions to discontinue the proceedings, either because of the lack of cooperation by the US authorities, invocation of doctrines of State secret by Government or, simply, the lack of genuine efforts on the part of the domestic prosecuting authorities to identify those responsible. For instance, Khalid El-Masri's attempt to obtain justice for his ordeal failed not only, as noted above, before the US courts, but also before the German courts, due to the refusal of the US Government to surrender the agents allegedly responsible for his rendition, coupled with the impossibility of holding trials *in absentia* under the German criminal justice system.[72] Attempts by Mr El-Masri to obtain justice before the courts of Macedonia were also unsuccessful, with his criminal complaint lodged with the Skopje Public prosecutor in October 2008 against unidentified officials in relation to his unlawful detention, abduction and torture, being rejected in December 2008 as unsubstantiated.[73] The conduct of the Macedonian investigating authorities, who had relied exclusively on evidence provided by the Ministry of the Interior, was subsequently strongly criticized by the European Court of Human Rights, which concluded that "the summary investigation that has been carried out in this case cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth" and that, accordingly, Macedonia had breached its procedural obligation under Article 3 ECHR.[74]

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[71] At the time of writing, a Constitutional challenge against the Court of Cassation judgment in relation to the question of State secrecy has been filed and declared admissible, whilst the February 2013 judgment rejecting diplomatic immunity remains subject to challenge before the Court of Cassation.

[72] Following a criminal investigation which led to the identification of the CIA agents involved in the rendition of Mr El-Masri, in early 2007, the Munich Regional Court issued arrest warrants against 13 US residents (see Regional Court (Amtsgericht) Munchen (111 Js 10154/07)). However, the warning by the US Department of Justice that they would refuse to extradite the suspects resulted in the discontinuation of the proceedings, since, contrary to Italy, the German criminal law system does not allow for trials *in absentia*. An attempt by El-Masri to challenge the decision to discontinue the proceedings before the administrative courts was rejected in December 2010 (Administrative Court (Verwaltungsgericht) Köln, judgment of 7 December 2010 (5 K 7161/08), para. 54, available (in German) at http://www.jusmeum.de/urteil/vg_k%C3%B6ln/f1507f8fe50bb94cc64dcadcc046143379fd5e935a2d99dbd6fc62d86086d6c6).

[73] See *El-Masri v. Macedonia* (above n. 16), para. 70.

[74] Ibid., paras 193-194. Similarly, attempts by rendition victims to obtain justice before the courts of those European States which are alleged to have hosted CIA detention centres have so far been unsuccessful. See, e.g., the complaints lodged with the ECtHR by Abd al-Rahim al-Nashiri, in relation, inter alia, to the failure of the Romanian and Polish authorities to carry out an effective investigation into the circumstances of his rendition (see infra, n. 97).

### *4.2 Non-judicial remedies*

Whilst judicial remedies, leading to the prosecution of those responsible and the payment of appropriate compensation, should be the preferred/principal form of remedy for human rights abuses, other, non-judicial, mechanisms can provide some degree of redress, particularly in relation to the right to the truth of both victims of rendition and more generally, of society as a whole.

The creation of commissions of inquiry has represented an alternative avenue for individuals seeking justice for their irregular rendition and the abuses suffered as a result. Due to their greater powers, and comparatively greater flexibility in assessing (and disclosing) evidence, commissions of inquiry have in some cases succeeded where civil litigation or criminal prosecution have failed due to State secret doctrines. The Canadian Commission of Inquiry created with a mandate to establish the facts and identify responsibility in relation to the extraordinary rendition of Maher Arar, a Syrian citizen resident in Canada, and his torture and unlawful detention in Syria, provides a good example in this regard.[75] In its final report, published in September 2006, the Commission concluded that Canada, and in particular agents of the Royal Canadian Mounted Police (RCMP), had played a role in the extraordinary rendition of Mr Arar by providing information to the US authorities that had led to his detention and torture.[76] As a result of the findings of the Commission, in September 2006, Mr Arar and his family received a full apology from the RCMP Commission and received a compensation payment from the Canadian government.[77]

Whilst the Arar Commission is so far the only example of an *ad personam* commission, commissions of inquiry with a more general mandate have been created in numerous States in response to growing allegations of involvement of European agents in the US rendition programme. Overall, however, those Parliamentary inquiries have been far less effective and thorough than their Canadian counterpart. For instance, in Germany, although no enquiry was specifically conducted in relation to the case of Khalid El-Masri, a Parliamentary Committee of Inquiry was established in April 2007 to review the activities of the Germany security services in the context of the US rendition programme.[78] The effectiveness of the inquiry was

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[75] Mr Arar was arrested in September 2002 by US agents during a stopover in a US airport on his way back to Canada from Tunisia. He was detained in the US, without charge, for two weeks, and then flown to Syria where he was detained for a year and tortured. He was then released and returned to Canada.

[76] See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations*, 2006, available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/index.htm, section 4.3.

[77] See "RCMP chief apologizes to Arar for 'terrible injustices'", *CBS News*, 28 September 2006, available at http://www.cbc.ca/news/canada/story/2006/09/28/zaccardelli-appearance.html; "Torture Man Gets Apology from Canada", *The Washington Post*, 27 January 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012601717.html.

[78] See *El-Masri* (above n. 16), para. 59. For the report of the Committee of Inquiry, see Deutscher Bundestag, *Beschlussempfehlung und Bericht des 1. Untersuchungsausschusses nach Artikel 44 des Grundgesetzes,*

questioned after the German Constitutional Court ruled in June 2009 that the German government's failure to cooperate with the parliamentary inquiry violated the German Constitution by impeding the parliament's right as an oversight body to investigate the conduct of the Government.[79] Although calls were made to re-open the inquiry after the decision of the Constitutional Court, the end of the legislature led to the dissolution of the Committee, which was then not reconstituted.[80] In Poland, a brief parliamentary inquiry into allegations that a secret CIA detention site existed in the country was conducted in November-December 2005.[81] The inquiry was conducted by the Parliamentary Committee for Special Services behind closed doors and none of its findings have been made public. The Polish inquiry has been criticized, inter alia, by the PACE Rapporteur, who noted in 2006 that the exercise had been " insufficient in terms of the positive obligation to conduct a credible investigation of credible allegations of serious human rights violations".[82]

### *4.3 International litigation*

In contrast to the reluctance and footdragging with which the domestic authorities of most States have reacted to the emerging of information about the extraordinary rendition programme, international organizations more generally have played a crucial role in bringing about the termination of the extraordinary rendition programme (at least in its worst manifestations), in particular by raising public awareness of the phenomenon and thereby making it politically impossible for European states to continue to provide support to the US. Pressure from international bodies has also been the moving force behind a number of domestic inquiries into the involvement of State agencies in the programme.[83]

However, whilst the action of political bodies, such as the investigations by the Parliamentary Assembly of the Council of Europe, has been very important, international litigation, in the sense of individual complaints before judicial and quasi-judicial human rights bodies, has been neither particularly effective, nor particularly speedy. This is partly due to the delays inherent in proceedings before certain human rights monitoring mechanisms, but also to the procedural and evidentiary obstacles faced by those who have attempted to bring cases relating to rendition before international bodies.

The UN monitoring bodies have probably been the most effective, in particular insofar as they have been the first to recognize the phenomenon and to bring it to light. In 2005 and

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*Drucksache 16/13400*, 18 June 2009, available (in German), at http://dipbt.bundestag.de/dip21/btd/16/134/1613400.pdf.

[79] See OSJI Report 2013 (above n. 8), at 82.

[80] See Marty Report 2011 (above n. 60). See also H. Born, *International Intelligence Cooperation and Accountability* (Taylor & Francis 2011), 174.

[81] See Application in *Al Nashiri v. Poland* (below n. 97), para. 105.

[82] *CIA above the law? Secret detentions and unlawful inter-state transfers of detainees in Europe* (Council of Europe Publications, 2008), p. 97. The 2011 Marty Report (above n. 60), comments on the Polish parliamentary inquiry, stating, among other things that "the only public indication given by the commission was that there ha[d] not been any CIA prisons in Poland" (para. 40).

[83] http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0266&language=EN.

2006 respectively, the Committee Against Torture and the Human Rights Committee handed down the first international decisions on the merits in cases related to incidents of rendition.[84] The applications concerned the irregular transfer of two Egyptian nationals suspected of involvement in international terrorism, Mohammed Alzery and Ahmed Agiza, who had applied for asylum in Sweden.[85] The two UN Committees found that, by transferring the two applicants to US agents, in the knowledge that they would be transferred to Egypt, the Swedish authorities had breached, inter alia, the prohibition of *refoulement* expressly stipulated in Article 3 of the Convention Against Torture and inherent in Article 7 of the ICCPR.[86] In addition, as noted above, the Human Rights Committee found that Sweden had breached the prohibition of ill treatment as a result of the treatment of the applicant by US agents on Swedish territory with the consent of the Swedish authorities.[87] It is interesting to note that one of the applicants had previously lodged a complaint with the European Court of Human Rights, which had however rejected his application because of a strict application of the admissibility criteria.[88]

At the regional level, several applications against the US have in recent years been filed with the Inter-American Commission on Human Rights by or on behalf of victims of extraordinary renditions.[89] Those applications have not yet resulted in any report being issued by the Commission and, in any event, there must be severe doubts as to any eventual decision will have any appreciable impact insofar as the US has consistently denied that the American Declaration on Human Rights applies in relation to extraterritorial conduct of OAS Member States and maintains that, in any case, the existence of a "war" against terrorism excludes the applicability of international human rights law.[90] Attempts to obtain redress for rendition

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[84] *Agiza v. Sweden* (Comm. 233/2003), UN doc. CAT/C/34/D/233/2003 (2005), concerning, *inter alia*, an alleged violation of Art. 3 of the Convention Against Torture; *Alzery* (above n. 18), concerning alleged violation of the *non-refoulement* obligation inherent in Art. 7 ICCPR, inadequate investigation of alleged violations of torture, exposure of risk of unfair trial, and inadequate process of expulsion of an alien and violation of the right to a remedy.

[85] The two applicants were arrested by the Swedish authorities, initially with a view to deportation, but were then handed over to US agents who in turn transferred them to Egypt, where they were unlawfully detained and allegedly tortured.

[86] *Agiza* (above n. 85), para. 13.4; *Alzery* (above n. 18), para. 11.5.

[87] *Agiza* (above n. 85), para. 13.5; *Alzery* (above n. 18), para. 11.6.

[88] See *Alzeri v. Sweden* (App. 10786/04), ECtHR, Decision of 26 October 2004, where the ECtHR ruled that the applicant had not lodged his complaint within the required time-limit under Art. 35 ECHR. The ECtHR regarded as not relevant the fact that the applicant had been detained in Egypt and had therefore been unable to act in timely manner.

[89] See "Petition alleging violations of the human rights of Khaled El-Masri by the United States of America with a request for an investigation and hearing on the merits", available at www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf); "Petition alleging violations of the human rights of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi by the United States of America with a request for an investigation and hearing on the merits", available at http://www.aclu.org/files/assets/111114-iachr-petition-final.pdf.

[90] See, e.g., the US' response to the Precautionary Measures ordered by the Inter-American Commission on Human Rights in 2002, delivered on 12 April 2002, available at http://www.ccr-ny.org/v2/legal/september.11th/docs/4-15-02GovernmentResponse.pdf. See also *Hamdan v Rumsfeld* 415 F 3d 33 (DC Cir. 2005): *In re Guantanamo Detainees* 355 F. Supp. 2d 311 (DDC 2005); and *Boumediene v. Bush* 2005 US Lexis 14580 (DC Cir. 2005). For discussion of the US position in this regard, see Borelli (above n. 1);

have also recently been made in the context of the regional system of human rights protection operating under the auspices of the African Union, and a petition filed in February 2011 against Djibouti in relation to the extraordinary rendition of a Yemeni national is currently pending before the African Commission on Human and Peoples' Rights.[91]

The involvement of the European Court of Human Rights in rendition cases has occurred comparatively late. After in 2004 rejecting the application of Mohammed Alzery as inadmissible on the basis of non-compliance with the six-month rule,[92] in 2007 the Court was seized with an application concerning the rendition from Bosnia and Herzegovina of six individuals who were at the time detained at Guantánamo Bay.[93] However, due to the fact that Bosnia Herzegovina was not a Party to the ECHR at the time the applicants were handed over to the US, the Court was unable to examine the question of the legality of the rendition itself under the Convention.[94] As mentioned above, the first rendition case to reach to a decision on the merits of the claims of complicity in rendition was the *El-Masri* case, decided by the Court only in December 2013, over twelve years after the inception of the extraordinary rendition programme.[95] Whilst the tardiness of the reaction of the Court is undoubtedly disappointing, it is fair to say that the judgment in *El-Masri* constitutes an uncompromising and strong condemnation of the practice of extraordinary rendition in all its aspects. As discussed above, the Court had no hesitation in finding that the Macedonian authorities, by lending assistance to the US, had breached a broad range of substantive and procedural obligations under the ECHR. Several other cases are now pending before the Court, which will have the opportunity to address other aspects of the involvement of European States in the programme, including the hosting of CIA detention facilities on their territory.[96]

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S. Borelli, "Casting Light on the legal black hole: International law and detentions abroad in the 'war on terror'", 87 (2005) *IRRC* 39.

[91] See *Al-Asad v. Djibouti*, application filed with the African Commission on 10 December 2009, available at http://archive-org.com/page/836825/2012-12-04/http://www.interights.org/files/240/Al-Asad_Complaint.pdf.

[92] See above n. 89.

[93] *Boumediene and Others v. Bosnia and Herzegovina* (Apps 38703/06 et al.), ECtHR, Decision of 18 November 2008. The six applicants had been arrested in October 2001 by the Bosnian authorities, who alleged that they were planning to attack the American embassy in Sarajevo. In January 2002, the Supreme Court of Bosnia ordered that they should be released for lack of evidence. However, they were immediately re-arrested and handed over to US military forces and then transferred to Guantánamo Bay.

[94] In addition to challenging the legality of the rendition itself, the applicants had also claimed that Art. 3 ECHR imposed upon the State an obligation to make diplomatic representation to the US in order to obtain their release. The ECtHR held that it was not necessary to examine whether the Bosnian authorities had an obligation under the ECHR to intervene vis-à-vis the US on behalf of the applicants, as in any case Bosnia-Herzegovina had obtained enough assurances from the US that the applicants would not be subject to the death penalty or ill-treatment and any delay or obstacle to the applicants' release was due to the US government (ibid., paras 63-67).

[95] On the *El-Masri* case see above, text accompanying n. 29 *et seq*.

[96] Pending applications before the Court include those filed by individuals currently detained at Guantánamo Bay who seek to challenge the actions of European Governments involved in their rendition to the US: see *Al Nashiri v. Poland* (App. 28761/11), lodged on 6 May 2011; *Al Nashiri v. Romania* (App. 33234/12), lodged 1 June 2012; *Abu Zubaydah v. Lithuania* (App. 46454/11), lodged 27 October 2011. A further application was filed by Abu Omar and his wife against Italy in August 2009 (*Nasr and Ghali v. Italy* (App. 44883/09), lodged on 6 August 2009.

## 5. Conclusion

The extraordinary rendition programme operated by the US is one of the most troubling novelties of the "war on terror". For a range of reasons, including historic political closeness to the US, ill-advised conceptions of what is required in order to effectively combat international terrorism, and the fear of alienating the financial and political support from the US, a number of States have been complicit in the programme, to a greater or lesser extent. Others have relied on its existence in order to justify their own rendition practices and other counter-terrorism policies which fall short of international human rights standards. The reaction of the international monitoring bodies, and that of domestic courts and political oversight bodies has been, in most cases, less then timely, partly due to the clandestine nature of a phenomenon which has been mostly orchestrated and operated by intelligence agencies. Whilst the human costs of the programme are huge, the experience of dealing with the programme has hopefully resulted in the strengthening of the international and domestic legal framework. What remains crucial, and remains still in a large measure to be achieved, is the full realization of the "right to the truth", which implies not only that those responsible, at all levels, are brought to justice, but also that rendition victims, their relatives and society at large are provided with a full and transparent account of what has happened.