

Fruit of the Poisonous Tree

Member States' Indirect Use of Extraordinary Rendition and the EU Counter-Terrorism Strategy

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Abstract

Recent investigations, not least by the EP Temporary Committee, have shed light on the illegal practice of extraordinary renditions and unlawful detentions by foreign security services on European territory with the alleged involvement of certain member states, which suggests that the line between cooperation and complicity has become blurred. This paper addresses the issue of how EU member states could not resist taking advantage of extraordinary renditions and unlawful detentions and how they still profit from such practice. Recent examples of this kind of profiteering are provided, together with an assessment of their legality.

The paper also addresses the issue from an EU perspective and evaluates implications of and for EU counter-terrorism policies, in particular the question of how these policies might be tainted by the counter-terrorism behaviour of member states. A concrete set of policy recommendations is proposed in the last chapter.

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FRUIT OF THE POISONOUS TREE

MEMBER STATES' INDIRECT USE OF EXTRAORDINARY RENDITION AND THE EU COUNTER-TERRORISM STRATEGY

FLORIAN GEYER*

Introduction

The expression 'fruit of the poisonous tree' is a set term in Anglo-American common law. It stands in the context of unlawful investigations, searches and seizures and the question of whether 'neutral' information based on unlawfully gathered evidence can be admissible in court proceedings. The ratio of the metaphor is evident: if the source of the evidence (the tree) is tainted, then anything deriving from it (the fruit) bears the same flaw. To give an example: if during an unlawful search investigators find a key to a post office box containing a crucial document which might prove the defendant's guilt, this document will – as a rule – not be admissible as evidence in court proceedings since it is just one product of the unlawful search. To stick to the metaphor: the document is the fruit of the poisonous tree. Established in 1920 by the US Supreme Court in its decision *Silverthorne Lumber CO. vs. US*,¹ this rule has been subject to certain restrictions and exceptions, but – in principle – still governs US police and criminal evidence law.

The doctrine – with its highly symbolic allusion to temptation and its mediated, prolonged effects – fits only too well with the topic of this paper – though is understood in a wider sense here. The issue at stake is the EU member states' indirect, second-hand use of situations and 'possibilities' created by extraordinary renditions and unlawful detentions, as opposed to their direct complicity or silent consent in secret US intelligence activities.² The resolution of the European Parliament (EP) on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, as adopted by the plenary on 14 February 2007³

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¹ 251 US 385 (1920); it received its name some years later in *Nardone vs. US*, 308 US 338 (1939), cf. D. Osborn, "Suppressing the truth: judicial exclusion of illegally obtained evidence in the United States, Canada, England and Australia", in *Murdoch University Electronic Journal of Law*, Vol. 7, No. 4, December 2000.

² For a perspective from beyond European borders see the case of Maher Arar and the entanglement of Canadian authorities, 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, retrieved 30.3.2007 from www.ararcommission.ca; see also Government of Canada, Office of the Prime Minister, *Prime Minister releases letter of apology to Maher Arar and his family and announces completion of meditation process*, 26.1.2007, retrieved 30.3.2007 from <http://news.gc.ca>.

³ European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)), P6_TA-PROV(2007)0032, 14.2.2007; see also the 'Dick Marty report' for the Council of Europe Parliamentary Assembly, Committee on Legal

as well as the EP Temporary Committee's recent working document No. 9,⁴ give ample illustrations of such practice and offer a good opportunity to address some of the issues concerned.

This paper therefore deals with the subject of how EU member states could not resist the temptation of taking advantage of extraordinary renditions and unlawful detentions and how they still profit from such practice. Recent examples of this kind of 'profiteering' are provided, together with an assessment of their legality. The second part of the paper addresses the issue from an EU perspective and evaluates various related implications of and for EU counter-terrorism policies, in particular the question of these policies being tainted by the questionable counter-terrorism behaviour of member states, and what possible solutions exist to prevent or at least lessen such entanglement. To this end a concrete set of policy recommendations is proposed in the last chapter.

In the context of this paper 'rendition' shall be understood as a situation in which one state obtains custody over a person suspected of involvement in a serious crime in the territory of another state, with the aim of transferring such a person to custody in the first state's territory (or a place subject to its jurisdiction) or to a third state. A rendition shall be considered 'extraordinary' when it is not executed in accordance with the law applying in the state where the person was situated at the time of seizure.⁵ 'Unlawful detention' shall be understood as a deprivation of personal liberty characterised by a violation of indispensable defense rights, e.g. access to judicial review and professional legal advice⁶; in short: a detention, which places the detained person de facto outside the protection of law.⁷

1. Taking advantage of extraordinary rendition and unlawful detention

At least two variations of how European 'security professionals'⁸ profited or tried to profit from extraordinary renditions and unlawful detentions have come to light in recent months.

Affairs and Human Rights, *Alleged secret detentions in Council of Europe member states*, Information Memorandum II, AS/Jur (2006) 03 rev, 22.1.2006. An ongoing observation is provided by Statewatch, cf. <http://www.statewatch.org/rendition/rendition.html>.

⁴ EP Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, *Working document No. 9*, 26.2.2007.

⁵ Cf. also E.U. Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion no 3-2006: The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe ('extraordinary renditions')*, 25.5.2006, p. 6.

⁶ Cf. European Commission for Democracy through Law (Venice Commission), *Opinion no 363/2005 on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners*, adopted by the Venice Commission at its 66th plenary session (Venice, 17-18 March 2006), CDL-AD(2006)009, 17.3.2006, para. 121 pp.

⁷ Cf. Art. 2 International Convention for the protection of all persons from enforced disappearances as adopted by the UN General Assembly on 20 December 2006.

⁸ See for this term: D. Bigo, "Globalized (in)security: the Field and the Ban-opticon", in D. Bigo & A. Tsoukala (eds), *Illiberal Practices of Liberal Regimes: the (In)Security Games*, L'Harmattan: Paris, 2006, pp. 5-49.

1.1 Variation No. 1 – Interrogations at Guantánamo Bay and other detention centres

The EP resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners states that at least two member states and one candidate country have sent security professionals to Guantánamo Bay and detention centres in Pakistan and Syria. The duty of these officials has not been to provide assistance to their detained citizens or long-term residents, but to interrogate and gain information from them. The countries named in the EP resolution are the UK,⁹ Germany¹⁰ and Turkey.¹¹ Media coverage suggests that other countries might have done the same, e.g. France. According to these sources French intelligence agents questioned six French citizens inside the Guantánamo camp in 2002.¹² In addition, certain countries have adopted the practice of not sending their own officials for the interrogations on these sites, but instead they supply questions to foreign interrogators, making it practically impossible to control the methods of interrogation.¹³

In Germany, at least¹⁴ the federal government has not denied having sent its officials abroad, a practice that came under scrutiny early in 2006 by the *Parlamentarische Kontrollgremium*. This parliamentary control panel of the German *Bundestag* has the statutory mandate to observe and hold accountable the activities of the German intelligence service. In its report for the panel, the German government conceded that officials had been interrogating detainees abroad and upheld that such activities are an indispensable part of intelligence information gathering. The government stressed that the information obtained is destined only to serve intelligence purposes and not as evidence in criminal court proceedings. The German government guaranteed that ‘in future’, officials of criminal investigation services will no longer be part of interrogation teams (a guarantee demonstrating that in the past, the distinction between intelligence and criminal investigations was not observed). The government report further notes that interrogations abroad only took place – and will continue to do so – with the free consent of the person interrogated. In addition, no interrogation will commence or continue – according to the government – when there are signs that the person has been subjected to torture.¹⁵ With the

⁹ European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)), P6_TA-PROV(2007)0032, 14.2.2007, para. 76, 77.

¹⁰ European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)), P6_TA-PROV(2007)0032, 14.2.2007, para. 87, 93.

¹¹ European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)), P6_TA-PROV(2007)0032, 14.2.2007, para. 135.

¹² Cf. “French agents questioned detainees in Guantanamo”, *The Independent*, 6.7.2006, retrieved 27.3.2007 from www.independent.co.uk.

¹³ Cf. House of Lords/House of Commons, Joint Committee on Human Rights, *The UN Convention against Torture (UNCAT)*, Nineteenth report of session 2005-06, Volume I – Report and formal minutes, 18 May 2006, p. 22, relying on a court statement by the Director General of the Security Services, Dame Eliza Manningham-Buller.

¹⁴ For the UK see also House of Lords/House of Commons, Joint Committee on Human Rights, *The UN Convention against Torture (UNCAT)*, Nineteenth report of session 2005-06, Volume I – Report and formal minutes, 18 May 2006, para. 57.

¹⁵ Bericht der Bundesregierung (Offene Fassung) gemäß Anforderung des Parlamentarischen Kontrollgremiums vom 25. Januar 2006 zu *Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des Internationalen Terrorismus*, Berlin, 23.2.2006, pp. 82-87, retrieved 24.11.2006 from <http://www.bundestag.de>.

majority of its members in the parliamentary control panel, the government coalition of Christian Democrats (CDU) and Social Democrats (SPD) largely accepted the government's statements, cleared its activities and acknowledged the promises to draw a clearer line between intelligence and criminal investigation in the future.¹⁶ However, this rather lenient outcome has met with well-pronounced dissent from the members of the opposition in the panel.¹⁷

1.2 Variation No. 2 – Information exchange with foreign services and the use of such information

The second variation of profiting from extraordinary renditions and unlawful detention is somewhat more sophisticated: officials themselves don't have to travel around and be confronted with the difficult question of whether a detainee has 'voluntarily' given consent to the interrogation; but it is the 'neutral' information itself that makes its way from detention centres abroad to databases and files in Europe. The information is offered by foreign services and the question of whether these services have used torture or other inhuman or degrading treatment in order to obtain the valuable information remains unclear. This is illustrated in the German government's report to the parliamentary control panel, mentioned above:

Interrogation output – also from the American side – has been occasionally offered in the past to the German government, insofar as foreign authorities considered it relevant for German authorities. This interrogation output contains statements that the interrogated persons have made in relation to specific issues. However, it does not contain any information on the whereabouts of the detainees nor of their rendition to other countries. The interrogation protocols neither contain information on the circumstances of the interrogation nor the personal condition of the detainees.¹⁸

Concerning the use of information obtained in this way, a telling example is provided by recent proceedings in the UK. Unlike the German government, which according to its February 2006 report does not intend to use such information in court proceedings, the UK government strongly propagated the view that information obtained through torture abroad (in the following: 'foreign torture information') must be admissible as evidence in court as long as there is no direct participation of British officials during the torture itself.¹⁹ It may come as a surprise that not only the Special Immigration Appeals Commission (SIAC) – nothing less than a superior court – but also the Court of Appeal for England and Wales²⁰ approved this 'innovative' interpretation. It eventually required the Law Lords of the House of Lords to remind the

¹⁶ Deutscher Bundestag, Parlamentarisches Kontrollgremium, *Bewertung des Parlamentarischen Kontrollgremiums (PKGr) zum Bericht der Bundesregierung zu den Vorgängen im Zusammenhang mit dem Irak-Krieg und der Bekämpfung des internationalen Terrorismus*, 22.2.2006, pp. 35-39, retrieved 24.11.2006 from <http://www.bundestag.de>.

¹⁷ Cf. Abweichende Bewertung des Abg. Dr. Max Stadler (FDP), 22. Februar 2006, retrieved 24.11.2006 from under <http://www.bundestag.de> ; Abweichende Bewertung des Abg. Wolfgang Neskovic (Die Linke), no date, retrieved 24.11.2006 from <http://www.bundestag.de>, Abweichende Bewertung des Mitglieds des Parlamentarischen Kontrollgremiums Hans-Christian Ströbele (Bündnis 90/Die Grünen), 23.2.2006, retrieved 24.11.2006 from <http://www.bundestag.de>.

¹⁸ Bericht der Bundesregierung (Offene Fassung) gemäß Anforderung des Parlamentarischen Kontrollgremiums vom 25. Januar 2006 zu *Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des Internationalen Terrorismus*, Berlin, 23.2.2006, p. 80 (translation by the author).

¹⁹ See European Parliament, *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)), P6_TA-PROV(2007)0032, 14.2.2007, para. 79.

²⁰ England and Wales Court of Appeal (Civil Division), 1123. judgment of 11.8.2004.

executive and the lower courts of the common law tradition, as well as European and international law obligations, prohibiting the use of torture. The House of Lords rejected this ‘new’ understanding in no uncertain terms. To cite Lord Bingham of Cornhill:

But the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention. I am startled, even a little dismayed, at the suggestion (and the acceptance by the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all.²¹

As clear as this position seems to be, there still remain unresolved questions. One of them is of a more procedural – but no less important – nature and concerns the burden of proof: who should prove that evidence presented by the prosecutors is in fact a fruit of torture? The accused or the prosecutor? The majority in the House of Lords has shifted this burden ultimately to the accused, however not without having to face heavy criticism from some of their peers. Again, Lord Bingham of Cornhill:

(...) it is inconsistent with the rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.²²

Lord Bingham of Cornhill’s criticism is justified, as the majority of the Law Lords has in fact imposed too high a standard on the burden of proof. As a consequence, the Law Lord’s test has provoked the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, to submit an interim report to the UN General Assembly analysing the Law Lords’ decision. In this report he recalls that according to the individual complaints procedures before the UN Committee against torture, it is established that the applicant is only required to demonstrate that his or her allegations of torture are well-founded. The ultimate burden of proof thereafter shifts to the state.²³

The second question in the House of Lords’ judgment that remains open – as the Lords did not have to rule on it – is whether there is a difference between foreign torture information used in courts and such information used by executive bodies. While the Lords ruled out the first, their *obiter dicta* suggest that they accept the latter. We will come to this later in more detail.

1.3 Contradictory combinations of these two variations

The account of these two variations of profiteering from extraordinary renditions and unlawful detention shall serve as an interim conclusion before advancing to the legal assessment and EU implications. At this stage it is important to note that in practice neither variation will stand separately from each other but will be mostly complementary or even overlap. Such complementarity, however, might have adverse effects: responsible behaviour of security officials in questionable situations might get frustrated by the fact that the information these officials were originally supposed to obtain, but refused to do so, nevertheless finds its way to the interested clientele in the long run. The following serves as an example:

²¹ House of Lords, Opinion of the Lords of Appeal for judgment in the cause A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71, 8.12.2005, para. 51.

²² House of Lords, Opinion of the Lords of Appeal for judgment in the cause A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71, 8.12.2005, para. 59.

²³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, United Nations General Assembly Doc. A/61/259, 14.8.2006, p. 17.

In November 2006, German media reported the case of 74-year old Abdel-Halim Khafagy, a long-term German resident of Egyptian nationality.²⁴ He was reported to have been captured in 2001 in Bosnia-Herzegovina, maltreated and brought to a US military base in Tuzla, named 'Eagle base'. Two officials from the *Bundeskriminalamt*, the German federal criminal police office and one interpreter from the *Bundesnachrichtendienst*, the German secret service, were apparently sent to interrogate Khafagy. Since they formed the impression that detainees in Eagle base were subject to inhuman, torture-like treatment, they refused to interrogate, travelled back to Germany and reported the situation to their offices. Cited by *Süddeutsche Zeitung*, one of the officials said: "Serbs found themselves before the UN criminal tribunal in The Hague for what the Americans did in Tuzla".²⁵ After three weeks Khafagy was supposedly brought to Egypt and then back to Germany. He later applied for German citizenship. During the administrative naturalisation proceedings pursued by the local Munich administration, Khafagy – in 2004 – was suddenly confronted with information he was said to have given at Eagle Base in 2001, insinuating links with a terrorism suspect. In essence this means that although German officials declined to take advantage of the situation in 2001, information obtained in Eagle Base nevertheless made its way to Germany, was saved and stored, ready to be provided to local administrations and used in a case of naturalisation. If proven correct, these findings suggest that inter-service exchange of information might well override efforts of single officials to comply with legal and moral standards in counter-terrorism activities.

2. Legal assessment

In general there is no dissent on the legal principles regarding the use of torture and inhuman or degrading treatment. However, the consequences which are then derived from these principles is a huge field open to dispute.

2.1 The foundations

To put it bluntly: torture is outlawed and criminalised. "The torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind."²⁶ The prohibition of the use of torture and other inhuman or degrading treatment is enshrined in many human rights treaties of international law²⁷, the most prominent being the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (CAT).²⁸ In many national criminal laws, torture is explicitly formulated as an offence, in accordance with Article 4 CAT.²⁹ The Convention also goes beyond the traditional

²⁴ „Behörden nutzten Informationen von Misshandelten“, *tagesschau.de*, 24.11.2006, retrieved 24.11.2006 from www.tagesschau.de; „Unbequeme Fragen im Untersuchungsausschuss“, *Süddeutsche Zeitung*, 25./26.11.2006, p. 7.

²⁵ „In der Rolle eines lästigen Bittstellers“, *Süddeutsche Zeitung*, 1.3.2007, p. 6 (translation by the author).

²⁶ US Court of Appeals for the Second Circuit, 30.6.1980, *Filartiga v. Peña-Irala*, 630 F.2d 876.

²⁷ Cf. Article 7 International Covenant on Civil and Political Rights (ICCPR); Article 5 Universal Declaration of Human Rights (non-binding, but persuasive authority); Article 3 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Article 4 Charter of Fundamental Rights of the European Union (non binding, but persuasive authority).

²⁸ UN Treaty Series, Vol. 1465, p. 85. The Convention entered into force on 26.6.1987 and has currently (March 2007) 144 parties.

²⁹ See for a detailed survey on EU member states compliance with article 4 CAT: E.U. Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion no 3-2006: The human rights*

understanding of territorial and national jurisdiction and establishes – with the aim of avoiding safe havens for torturers – the principle of universal jurisdiction: all states are entitled and obliged to investigate and prosecute torture allegations, no matter if they have been committed on their territory or by one of their citizens or residents.³⁰ Article 14 of the UN Convention provides an enforceable right for the victims of torture to fair and adequate compensation.³¹

In addition, “because of the importance of the values it protects this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”³² This means that states cannot derogate from the prohibition of torture through international treaties or local custom.³³ In addition, the classification as *jus cogens* imposes direct obligations on individuals that transcend national obligations imposed by individual states. Even if a state would authorise the use of torture, each individual official – although legitimised by his state – would nevertheless be bound to comply with the principle. This personal criminal liability is furthermore enhanced by the entitlement of every other state to prosecute and punish any torturer present in its jurisdiction, as stated above.³⁴

Concerning the scope of obligations put on states by this principle, the International Criminal Tribunal for the Former Yugoslavia has ruled:

States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.³⁵

Due attention must furthermore be paid to the following legal bedrocks:

- a) Article 1 of the UN Torture Convention asks for more than just abstention from the use of torture but also explicitly outlaws consent and acquiescence of a public official or other person acting in an official capacity.

responsibilities of the EU member states in the context of the C.I.A. activities in Europe (‘extraordinary renditions’), 25.5.2006, pp. 18-20.

³⁰ On the reluctance of making use of this principle see, United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Report, United Nations General Assembly Doc. A/HRC/4/33, 15.1.2007, pp. 11-15.

³¹ United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Report, United Nations General Assembly Doc. A/HRC/4/33, 15.1.2007, pp. 20-21; see also “Torturers ‘must pay victims’ – UN”, *BBC News*, 27.3.2007, retrieved 28.3.2007 from www.bbc.co.uk.

³² International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Anto Furundzija [1998] ICTY 3, 10 December 1998, para. 153.

³³ Cf. also Council of Europe, *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, p. 12.

³⁴ Cf. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Anto Furundzija [1998] ICTY 3, 10.12.1998, para. 155, 156.

³⁵ International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Anto Furundzija [1998] ICTY 3, 10.12.1998, para. 148.

- b) Article 3 ECHR, prohibiting torture or any other inhuman or degrading treatment or punishment enshrines one of the most fundamental values of democratic society and requires states inter alia to take positive action to prevent individuals within their jurisdiction from falling subject to torture or inhuman or degrading treatment, according to the European Court of Human Rights (ECtHR).³⁶
- c) Finally, and most importantly: states cannot abandon their human rights obligations simply by acting outside their territorial jurisdiction.³⁷

With regard to the legal assessment of ‘extraordinary renditions’, the EU Network of Independent Experts on Fundamental Rights stated the following in its opinion no. 3-2006 of 25 May 2006:

‘Extraordinary renditions’ infringe on various national and international laws, like the Convention on International and Civil Aviation of 7 December 1944 (Chicago Convention) and other bilateral aviation agreements, the principle of sovereignty and domestic laws regulating the legality of activities of foreign agents on the host State’s territory, and, most importantly, a number of human rights provisions, including the right to personal liberty, freedom of movement and the prohibition of arbitrary expulsion, the right to a fair trial and, finally, the right not to be subjected to torture or other forms of cruel, inhuman or degrading treatment or to be brought to a country where there are substantial grounds for believing that the personal risk to be tortured is high (principle of nonrefoulement).³⁸

As a consequence of the fact that the actions labelled ‘extraordinary renditions’ also amount to criminal offences, like deprivation of liberty and battery, public prosecutors and judges in several member states, e.g. Italy and Germany, have issued arrest warrants against individuals being suspected of having committed these offences.³⁹

2.2 The participation of agents in interrogations abroad

What follows from this for the assessment of the first variation of member states’ profiteering? The interrogation of an individual kept in unlawful detention or having been subject to extraordinary rendition by agents of European intelligence or law enforcement services appears not only to be highly hypocritical from a political point of view, given the fact that in June 2006 EU leaders urged President Bush to close the Guantánamo camp,⁴⁰ but – in view of the legal

³⁶ ECtHR, *Z. and others v. U.K.*, application no. 29392/05, 10.5.2001, para. 69-75.

³⁷ International Court of Justice (ICJ), Advisory opinion on legal consequences of the construction of a wall in the occupied Palestinian territory, 9.7.2004, para. 109; ECtHR, *Öcalan v. Turkey*, application no. 46221/99, 12.5.2005, para. 91; ECtHR, *Issa and others v. Turkey*, application no. 31821/96, 16.11.2004, para. 66-71; ECtHR, *Ilaşcu and others v. Moldova and Russia*, application no. 48787/99, 8.7.2004, para. 310-319; see also E. Guild, *Security and European Human Rights: protecting individual rights in times of exception and military action*, Wolf Legal Publishers: Nijmegen, 2007, pp. 17-21.

³⁸ EU Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion no 3-2006: The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe* (‘extraordinary renditions’), 25.5.2006, p. 25; Cf. also Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: international and domestic law applicable to ‘extraordinary renditions’*, 2004, modified June 2006.

³⁹ Cf. Pressemitteilung der Staatsanwaltschaft München I in Sachen El Masri, 31.1.2007, retrieved 22.3.2007 from <http://www4.justiz.bayern.de>; „The CIA in the dock”, *Spiegel online*, 10.1.2007 retrieved 22.3.2007 from <http://www.spiegel.de>.

⁴⁰ „EU to press for Guantánamo closure“, *Financial Times*, 12.6.2006, retrieved 12.3.2007 from www.ft.com; “Guantanamo clouds EU-US meeting”, *BBC News*, 21.6.2006, retrieved 12.3.2007 from

foundations outlined above – would also appear to be legally borderline, and most probably beyond what is legal.

A joint report by five UN Special Rapporteurs was submitted to the UN Human Rights Commission on the ‘Situation of detainees at Guantánamo Bay’ in February 2006. The report highlights severe violations of human rights obligations by the US administration, inter alia article 9 ICCPR⁴¹ (prohibition of arbitrary detention) and article 14 (right to fair trial). The interrogation methods applied were said to amount to degrading treatment in violation of article 7 ICCPR and article 16 CAT.⁴² The general conditions, and in particular the uncertainty about the length of detention and prolonged isolation confinement, were considered to represent inhuman treatment and to be in violation of the obligation to treat detainees with humanity and respect for the inherent dignity of the human person, article 10 ICCPR.⁴³ An analysis applying the obligations deriving from the ECHR⁴⁴ would reach different conclusions, as highlighted by the Venice Commission’s opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners. This opinion also supports the argument that prolonged unlawful detention as such – independent of the question of torture being applied – may constitute inhuman or degrading treatment prohibited by article 3 ECHR – not to mention the violation of the right to a fair trial as enshrined in article 6 ECHR.⁴⁵

Based on these findings, the EU Network of Independent Experts on Fundamental Rights concluded that EU member states are under an obligation to prohibit the removal of persons under their jurisdiction to Guantánamo Bay or any other location where such persons risk being subject to torture or to forms of treatment which are considered cruel, inhuman or degrading under international law, and that member states are furthermore obliged to start criminal proceedings and investigate substantiated allegations of torture and unlawful detentions.⁴⁶ The findings of the Venice Commission in relation to Council of Europe member states have been no different in this regard.

In conclusion, member states’ practice of taking advantage of extraordinary renditions and unlawful detention by sending their agents to these sites hardly seems legal or justifiable. If

<http://newsvote.bbc.co.uk>. Cf. also: “The right to a fair trial is another basic human right. With respect to secret or incommunicado detention centres, the EU’s position is clear. As Javier Solana has said, any such centres, in Europe or elsewhere, would violate international human rights and humanitarian law”, G. de Vries, *The fight against terrorism – five years after 9/11*, Presentation by Gijs de Vries, EU Counter-Terrorism Coordinator, Annual European Foreign Policy Conference, London School of Economics & King’s College London, 30.6.2006, p. 8 retrieved 24.3.2007 from <http://consilium.europa.eu>.

⁴¹ See footnote 27.

⁴² For a documentation on the so called ‘torture memos’ of the US administration, see K.J. Greenberg & J.L. Dratel, *The Torture Papers – the Road to Abu Ghraib*, Cambridge University Press: Cambridge, 2005.

⁴³ UN Economic and Social Council, Commission on Human Rights, *Situation of detainees at Guantánamo Bay*, UN Doc. E/CN.4/2006/120, 15.2.2006, pp. 36-40.

⁴⁴ See footnote 27.

⁴⁵ European Commission for Democracy through Law (Venice Commission), *Opinion no 363/2005 on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners*, adopted by the Venice Commission at its 66th plenary session (Venice, 17-18 March 2006), CDL-AD(2006)009, 17.3.2006, para. 121.

⁴⁶ EU Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion no 3-2006: The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe (‘extraordinary renditions’)*, 25 May 2006, p. 28.

member states are under an obligation to protect their citizens and residents from such treatment and to start criminal investigations against the abductors, the only acceptable reasons for their officials to visit sites where individuals are unlawfully detained or subject to inhuman treatment must be to provide assistance to the detainees or to gather evidence against the persons responsible for the rendition or detention.

The categorical misunderstanding that seems to cloud official discourse so far, however, is illustrated by the German government's report of 23 February 2006.⁴⁷ While the government seeks to emphasise the legality of interrogations abroad by establishing that these will only take place with the free consent of the person interrogated and that no interrogation will commence or continue when there are signs that the person has been subject to torture, it – intentionally or not – ignores the fact that entanglement and complicity is still there, even if the person has not been subject to torture. Indeed the 'simple' fact of illegal rendition and detention is already a violation of human rights and a breach of law severe enough to prohibit member states from taking any advantage of it.

There is another dimension to this issue that may have been neglected so far: member states not only carry responsibility for their detained citizens or residents, but also for their agents. As laid down under article 2.1, one of the consequences of the *jus cogens* nature of torture prohibition is that every person who finds himself in breach of this principle will be held individually responsible and will not be allowed to justify himself by referring to higher orders or state legitimatisation. Member state governments should therefore be aware of the duty of care for their officials and not expose them to the risk of criminal charges by sending them to questionable sites.

2.3 The use of information obtained through torture

The second question that needs to be addressed relates to the use of 'foreign torture information' obtained by intelligence services or law enforcement agencies. As already outlined above 1.2, the official discourse discerns two possible usages of such information: a) the use of foreign torture information as evidence in courts and b) the use of foreign torture information for executive purposes, e.g. intelligence activities, prevention of imminent dangers, etc.

In relation to the ECHR, the Court in Strasbourg has ruled that the use of evidence in criminal proceedings obtained through methods of coercion or oppression in defiance of the will of the accused has to be assessed by the right not to incriminate oneself; a right that is considered part of the fair trial provision of article 6 ECHR.⁴⁸

With regard to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment its article 15 stipulates:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

As has been intensively demonstrated in the House of Lords judgment of December 2005,⁴⁹ the underlying rationale of this provision is not only that evidence under torture is most often

⁴⁷ See above 1.1.

⁴⁸ ECtHR, *Saunders v. UK*, application no. 43/1994/490/572, 17 December 1996, para. 68, 69; ECtHR, *Funke v. France*, application no. 10828/84, 25 February 1993, para. 44.

⁴⁹ See above 1.2; cf. also T. Thienel, "The admissibility of evidence obtained by torture under international law", *European Journal of International Law*, vol. 17 no. 2, 2006, pp. 349-367; N. Rasiah,

proven to be unreliable and that investigators should be discouraged from applying torture.⁵⁰ In addition, the admissibility of evidence obtained through torture would shock the judicial conscience, degrade the proceedings and involve the state in moral defilement.⁵¹

Consequently, the House of Lords unanimously rejected the government's notion that only 'homemade' torture evidence would be barred from serving as evidence in courts. This judgment should be considered as a leading case and serve as persuasive authority for similar proceedings in other member states' courts. However, as mentioned earlier, the Lords did not have to rule on the question of foreign torture information being admissible for usages outside the court room. They nevertheless addressed the issue and took a rather different approach. Lord Nicholls of Birkenhead's opinion serves as an illustration of this:

67. Torture attracts universal condemnation, as amply demonstrated by my noble and learned friend Lord Bingham of Cornhill. No civilised society condones its use. Unhappily, condemnatory words are not always matched by conduct. Information derived from sources where torture is still practised gives rise to the present problem. The context is cross-border terrorism. Countering international terrorism calls for a flow of information between the security services of many countries. Fragments of information, acquired from various sources, can be pieced together to form a valuable picture, enabling governments of threatened countries to take preventative steps. What should the security services and the police and other executive agencies of this country do if they know or suspect information received by them from overseas is the product of torture? Should they discard this information as 'tainted', and decline to use it lest its use by them be regarded as condoning the horrific means by which the information was obtained?

68. The intuitive response to these questions is that if use of such information might save lives it would be absurd to reject it. If the police were to learn of the whereabouts of a ticking bomb it would be ludicrous for them to disregard this information if it had been procured by torture. No one suggests the police should act in this way. Similarly, if tainted information points a finger of suspicion at a particular individual: depending on the circumstances, this information is a matter the police may properly take into account when considering, for example, whether to make an arrest.

69. In both these instances the executive arm of the state is open to the charge that it is condoning the use of torture. So, in a sense, it is. The government is using information obtained by torture. But in cases such as these the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.⁵²

Lord Nicholls' statement that it would be 'absurd' and 'ludicrous' to reject torture information that might help prevent imminent danger to the lives of citizens is representative of this discussion so far. In a similar notion, the German government stated that the principles of rule of law do not prevent the government from accepting interrogation-output from foreign

"A v Secretary of State for the Home Department (No 2): Occupying the moral high ground?", *Modern Law Review*, Vol. 69, No. 6, 2006, pp. 995-1005.

⁵⁰ Cf. J.H. Burgers & H. Danelius, *The United Nations Convention against Torture: Handbook on the Convention against Torture*, Dordrecht et al: Martinus Nijhoff Publishers, 1988, p. 148; see also T. Bruha & C. J. Tams, "Folter und Völkerrecht", *Aus Politik und Zeitgeschichte*, no. 36, September 2006, pp. 16-22; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, United Nations General Assembly Doc. A/61/259, 14.8.2006, p. 10.

⁵¹ House of Lords, Opinion of the Lords of Appeal for judgment in the cause A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71, 8.12.2005, para. 39.

⁵² House of Lords, Opinion of the Lords of Appeal for judgment in the cause A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71, 8.12.2005, para. 67-69.

services. Although it concedes that there is no guarantee that this information might have been gained by unlawful means, the government upheld that in order to protect public security it is obliged to pursue any hints that might help to prevent imminent acts of violence.⁵³ In an interview with a German newspaper, the federal minister of interior, Wolfgang Schäuble was cited with the words: “If we were to say that under no circumstances would we use information where we cannot be certain it was obtained under completely constitutional conditions that would be totally irresponsible. We must use such information.”⁵⁴ Similarly, in 2004 the UK Home Secretary David Blunkett commented on the favourable decision of the Court of Appeal.⁵⁵

The fact that even those Law Lords who so vigorously rejected the government’s attempt to rewrite the history of torture prohibition have been willing to accept that in certain circumstances foreign torture information may be used by executive agencies, cannot be easily dismissed.⁵⁶ On the other hand there can be no doubt that such use of torture information undermines the absolute prohibition of torture and also runs counter to one of the underlying reasons of article 15 CAT: the discouragement of security professionals to resort to torture or inhuman or degrading treatment. In addition, there remains a question mark over why the other reasons underlying the exclusion of torture evidence in court proceedings shall not pertain to executive decisions. Is there no ‘degrading of proceedings’? No ‘state involvement in moral defilement’? The Australian scholar Ben Saul has put it like this: “Further, there is a certain moral hypocrisy about the House of Lords judgment which finds that torture evidence can never be allowed to contaminate the purity of judicial process, while holding that governments have a duty to get their hands dirty precisely this way.”⁵⁷

This dilemma has also been addressed in a recent inquiry into the UN Convention against torture, conducted by the House of Lords and House of Commons Joint Committee on Human Rights. The approach taken by the members of the Committee acknowledges the underlying difficulties but refuses to give a ‘*carte blanche*’ to the executive; this seems a good basis for further discussions and shall therefore be cited in more detail:

55. We accept that UNCAT and other provisions of human rights law do not prohibit the use of information from foreign intelligence sources, which may have been obtained under torture, to avert imminent loss of life by searches, arrests or other similar measures. We cannot accept the absolutist position on this subject advanced by some NGOs when human

⁵³ Bericht der Bundesregierung (Offene Fassung) gemäß Anforderung des Parlamentarischen Kontrollgremiums vom 25. Januar 2006 zu *Vorgängen im Zusammenhang mit dem Irakkrieg und der Bekämpfung des Internationalen Terrorismus*, Berlin, 23.2.2006, pp. 80, retrieved 24.11.2006 from <http://www.bundestag.de>.

⁵⁴ Cited after EP Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, *Working document No. 9*, 26.2.2007, p. 16 (translation by the author).

⁵⁵ Cf. Human Rights Watch, *Dangerous Ambivalence: UK Policy on Torture since 9/11*, November 2006, p.14; on the U.K.’s counter-terrorism policy in general see also R. Parkes & A. Maurer, *Britische Anti-Terror-Politik und die Internationalisierung der inneren Sicherheit- Zur Balance zwischen Freiheit, Sicherheit und Demokratie*, SWP Studie S 3, Berlin, January 2007.

⁵⁶ On the difficulties of the debate in general see e.g. M. Ignatieff, “If torture works...”, *Prospect*, issue 121, April 2006, retrieved 24.3.2007 from http://www.prospect-magazine.co.uk/vis_index.php?select_issue=519.

⁵⁷ B. Saul, “*The Torture Debate: International Law and the Age of Terrorism*”, Australian Red Cross: NSW International Humanitarian Law Program Lecture Series, NSW Law Week, 28.3.2006, p. 10, retrieved 12.3.2007 from http://www.gcentre.unsw.edu.au/publications/docs/pubs/tortureSpeech_Mar06.pdf.

life, possibly many hundreds of lives, may be at stake. (...) However great care must be taken to ensure that use of such information is only made in cases of imminent threat to life. Care must also be taken to ensure that the use of information in this way, and in particular any repeated or regular use of such information, especially from the same source or sources, does not render the UK authorities complicit in torture by lending tacit support or agreement to the use of torture or inhuman treatment as a means of obtaining information which might be useful to the UK in preventing terrorist attacks. Ways need to be found to reduce and, we would hope, eliminate dependence on such information. (...).

56. In our view, the fundamental importance of the obligations on the UK concerning torture makes it incumbent on the intelligence services to move beyond the essentially passive stance towards the methods and techniques of foreign intelligence agencies (...). In Canada, the Canadian Security and Intelligence Service ("CSIS") is under a statutory obligation to notify the Government of any arrangements for sharing information with any foreign intelligence agencies. Those liaison arrangements are also subjected to independent scrutiny by the Canadian Security and Intelligence Review Committee, a statutory body external to the intelligence agencies and at arms length from the Government. We do not necessarily suggest this as a model, but we do draw attention to the greater degree of formality in the making of arrangements between domestic and foreign intelligence services and to the fact that such arrangements are subjected to independent scrutiny. **In our view, the need to use information which has or may have been obtained by torture could be significantly reduced if the UK intelligence services took a more proactive approach when establishing the framework arrangements for intelligence sharing with other intelligence agencies, by making clear the minimum standards which it expects to be observed and monitoring for compliance with those standards, and if there were some opportunity for independent scrutiny of those arrangements.**⁵⁸ (emphasis in the original).

Several aspects of this statement are important:

- 1) As a rule, the use of foreign torture information is inadmissible. Only in exceptional circumstances, i.e. to avert imminent threats to life, might it be acceptable.
- 2) Security services must under all circumstances avoid making themselves complicit in torture, let alone get directly involved. They are barred from granting tacit support or agreement to the use of torture or inhuman or degrading treatment.
- 3) Security services are not allowed to be passive consumers of foreign torture information but are under an obligation to reduce the need to use such information and must establish minimum standards for the exchange of information with foreign services.
- 4) A certain degree of formality in the making of liaison arrangements with foreign services and the independent scrutiny of these arrangements are deemed crucial.

3. Implications of and for EU counter-terrorism policies and actions

What is the European Union's part in all this? So far it appears as if the EU has found itself – justifiably or not – quite well-positioned in the affair that has evolved around CIA flights, detention centres on European territory and the complicity of European security agencies. Public outrage and the sincere concern of civil society and media has so far focused mainly on the member states and essentially spared the EU level. The recent resolution on CIA activities in

⁵⁸ House of Lords/House of Commons, Joint Committee on Human Rights, *The UN Convention against Torture (UNCAT)*, Nineteenth report of session 2005-06, Volume I – Report and formal minutes, 18 May 2006, pp. 20-21.

Europe by one of its ever more important institutions, the European Parliament, has hugely contributed to this position and has largely helped to keep the EU out of the line of fire.⁵⁹

In addition, EU counter-terrorism activities, including one of its early measures after 9/11: the framework decision on the European arrest warrant,⁶⁰ but also Europol,⁶¹ Eurojust⁶² and other mechanisms, networks and bodies established under the EU's second and third pillar,⁶³ could even help to bring to trial the suspects allegedly involved in extraordinary renditions like the CIA agents currently sought by Italy and Germany. That EU counter-terrorism measures might serve as a useful tool in the investigation and prosecution of other counter-terrorism activities, only at first sight appears to be a contradiction undermining the 'global war on terror'. At second sight, however, such measures are not only consequential but crucial, given that countering terrorism by illegal means, such as extraordinary renditions and secret detention (measures that undermine rule of law and respect for fundamental rights) eventually serve the terrorist's cause, i.e. the destruction of the liberal and democratic state, the overturning of its basic legal principles and guiding moral values.⁶⁴

In spite of these beneficial elements of EU action, policy-makers and institutional actors at EU level should be aware of the fact that the entanglement of member states' intelligence services or law enforcement agencies might easily rebound upon their efforts framed under the 'European Union counter-terrorism strategy'.⁶⁵ One of the inherent risks for the EU in illegal activities by member states exists on a practical level and is particularly imminent for the second variation of profiteering from unlawful renditions and detentions: the use of foreign torture information.

There can be no question that the *jus cogens* obligations in relation to the prohibition of torture – including personal criminal responsibility – as outlined above 2.1 also bind institutional and individual actors at EU level. Furthermore, that the EU as such is not a signatory to any of the

⁵⁹ Although the way political and national considerations of some MEPs threatened to water down the Temporary Committee's effort at the last minute was a rather disillusioning and startling incident, in view of the gravity of the issues at stake, cf. D. Oosting, "Responsibility vanishes like CIA flights", *European Voice*, 8-14 February 2007, p. 9.

⁶⁰ Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-18.

⁶¹ Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, OJ C 316, 27.11.1995, pp.2-32; See also Proposal for a Council decision establishing the European Police Office (Europol), presented by the Commission, COM(2006) 817 final of 20.12.2006.

⁶² Council decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), OJ L 36 of 6.3.2002, pp.1-13.

⁶³ For overview and analysis see the dossier "Mapping the field of European Security" on the website of the CHALLENGE project, http://www.libertysecurity.org/mot96.html?var_recherche=mapping.

⁶⁴ On the requirements of an EU counter-terrorism strategy that is centered on the dimensions of freedom and justice, see T. Balzacq & S. Carrera, *The EU's fight against international terrorism – security problems, insecure solutions*, CEPS Policy Brief No. 80, July 2005; cf. also T. Balzacq & S. Carrera, "The Development of JHA: Policy Recommendations", in T. Balzacq & S. Carrera (eds), *Security versus Freedom? – A Challenge for Europe's Future*, Aldershot: Ashgate, 2006, pp. 291-295; D. Bigo, S. Carrera, E. Guild, R.B.J. Walker, *The Changing Landscape of European Liberty and Security: Mid-term Report on the Results of the CHALLENGE Project*, CHALLENGE Research Paper No. 4, February 2007, p. 15.

⁶⁵ Council of the European Union, *The European Union counter-terrorism strategy: prevent, protect, pursue, respond – The European Union's strategic commitment to combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice*, Council doc. 14469/4/05, 30.11.2005.

international human rights treaties does not exempt the Union from the requirement to respect fundamental rights based on the rule of law, as illustrated by article 6 Treaty on European Union (TEU).⁶⁶ Furthermore, the EU and its member states constantly repeat their commitment to the protection of human rights and the rule of law, most recently in the so called ‘Berlin Declaration’ of 25 March 2007.⁶⁷

At the heart of the EU counter-terrorism strategy stands the strengthening of information exchange and the enhancement of cooperation among all relevant security services, including intelligence, law enforcement and judicial authorities.⁶⁸ The EU’s own security actors, namely (but not exclusively) Europol and its Counter-Terrorism Taskforce, Eurojust, the external border agency Frontex⁶⁹ as well as the EU Joint Situation Centre within the Council Secretariat (Sitcen)⁷⁰ rely on information provided by member states in order to perform their intelligence-driven tasks.⁷¹ In addition, the EU financial sanctions system directed against certain persons and entities with a view to combating terrorism,⁷² commonly known as ‘terror lists’⁷³ also

⁶⁶ Cf. only K. Lenaerts & P. van Nuffel, *Constitutional Law of the European Union*, 2nd edition, Sweet & Maxwell: London, 2005, para. 17-073 pp.

⁶⁷ “(...) for us, the individual is paramount. His dignity is inviolable. His rights are inalienable (...). We are striving for peace and freedom, for democracy and the rule of law, for mutual respect and shared responsibility, for prosperity and security, for tolerance and participation, for justice and solidarity”, *Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome*, 25.3.2007, retrieved 26.3.2007 from www.eu2007.de.

⁶⁸ Cf. Council of the European Union, *The European Union counter-terrorism strategy: prevent, protect, pursue, respond – The European Union’s strategic commitment to combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice*, Council doc. 14469/4/05, 30.11.2005, p. 12; EU Council Secretariat, *Factsheet – The European Union and the fight against terrorism*, 16.2.2007, p. 3. See also Council decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253, 29.9.2005, pp. 22-24, recitals 2 and 3.

⁶⁹ For an assessment of Frontex activities see S. Carrera, *The EU Border Management Strategy – Frontex and the challenges of irregular immigration in the Canary Islands*, CEPS Working Document No. 261, March 2007; for an institutional overview see H. Jorry, *Construction of a European model for managing operational cooperation at the EU’s external borders: is the Frontex agency a decisive step forward?*, CHALLENGE Research Paper No. 6, March 2007.

⁷⁰ The ‘new’ Sitcen, operational since 2005, now comprises not only the external. 2nd EU pillar intelligence dimensions but in addition also the internal 3rd pillar intelligence dimensions. Sitcen is located within the Council Secretariat and composed of analysts from member states’ external and internal security services. Their task is to assess the terrorist threat as it develops both inside Europe and outside. Cf. Interview with G. de Vries, EU Counter-Terrorism Coordinator, *Terrorism, Islam and democracy*, 4.3.2005, retrieved 27.3.2007 from www.EurActiv.com; G. de Vries, “The European Union’s role in the fight against terrorism”, *Irish Studies in International Affairs*, vol. 16 (2005), pp. 3-9; cf. also Council Conclusions, *Terrorism – Follow-up to the European Council Declaration*, 8.6.2004, point 1, Council of the European Union, Press Release 2588th Council meeting, Justice and Home Affairs, Luxembourg 8 June 2004, Council doc. 9782/04 (Presse 173), p. 9. See also Statewatch, *EU: “Anti-terrorism” legitimizes sweeping new “internal security” complex*, Statewatch bulletin, Vol. 14, No. 5, August-October 2004, retrieved 27.3.2007 from www.statewatch.org.

⁷¹ Cf. “Intelligence ... not shared is useless and sometimes dangerous”, Max-Peter Ratzel, Director of Europol, *Working together to fight terrorism and crime*, 12.9.2005, retrieved 24.3.2007 from www.epc.eu.

⁷² Cf. Council common position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, pp. 93-96; Council regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 344, 28.12.2001, pp. 70-75; Council common position of 27 May 2002 concerning

depend on member states' information (or names provided by the UN Security Council⁷⁴); information that is then transformed into EU acts. But who guarantees that information thus processed is not the fruit of torture abroad? As far as can be seen there is no mechanism in force at EU level that would allow a control over the information provided and subsequently processed by member states to establish whether it is tainted by torture or other inhuman or degrading treatment. Moreover, it seems as if awareness of the problem is lacking in the first place.⁷⁵

A recent landmark decision by the Court of First Instance (CFI) in Luxembourg dealing with the Council's 'terror lists' illustrates this lack of control over the exchange and use of information: requested by the Court to give a coherent answer on the question of which national decision was the basis for the placing of an alleged terror group on the 'terror list', neither the Council nor the UK government involved were able to provide this answer and identify the underlying national measure.⁷⁶

Attention must furthermore be given to the fact that the European Area of Freedom, Security and Justice (AFSJ) aims at the free availability of relevant security information.⁷⁷ Until now, however, there has been no common framework in place that would regulate the conditions determining how such information enters the AFSJ. As a result, even if some member states and their services would strive to come closer to the spirit and intention of the UN Torture Convention and human right obligations by establishing clear agreements of cooperation and intelligence sharing with foreign services (centred on the refusal to collaborate in or take advantage of torture or other unlawful treatment),⁷⁸ these efforts would eventually be

restrictive measures against Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings, and entities associated with them (...), OJ L 139, 29.5.2002, pp. 4-5; Council regulation (EC) No 881/2002 of 27 May 2002 imposing certain restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (...), OJ L 139, 29.5.2002, pp. 9-22.

⁷³ Cf. only "EU's terror list is hard to escape", *European Voice*, 8-14 March 2007, p. 7.

⁷⁴ See article 1(4) Council common position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, pp. 93-96.

⁷⁵ Cf. Council of the European Union, *Final Report on the evaluation of national Anti-terrorist arrangements: improving national machinery and capability for the fight against terrorism*, Council doc. 12168/05, 26.9.2005, recommendations 5 and 6, p. 9.

⁷⁶ CFI, T-228/02, *Organisation des Modjahedin du peuple d'Iran v. Council of the European Union*, 12.12.2006, para. 171.

⁷⁷ Council of the European Union, *The Hague Programme: strengthening freedom security and justice in the European Union*, OJ C 53, 3.3.2005, pp. 1-14, point 2.1; See also Council decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253, 29.9.2005, pp. 22-24; concerning the exchange of data held by law enforcement agencies see Commission of the European Communities, *Proposal for a Council framework decision on the exchange of information under the principle of availability*, COM(2005) 490 final, 12.10.2005; cf. also D. Bigo, W. Bruggeman, P. Burgess, V. Mitsilegas, *The principle of information availability*, 1.3.2007, retrieved 24.3.2007 from <http://www.libertysecurity.org/article1376.html>; concerning European Justice and Home Affairs databases see Commission of the European Communities, *Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of justice and home affairs*, COM(2005) 597 final, 24.11.2005; cf. also P. Hobbing, *An Analysis of the Commission Communication (Com(2005) 597 Final of 24.11.2005) on Improved Effectiveness, Enhanced Interoperability and Synergies among European Databases in the Area of Justice And Home Affairs*, 31.1.2006, retrieved 24.3.2007 from <http://www.libertysecurity.org/article1182.html>.

⁷⁸ See the House of Lords and House of Commons Joint Committee on Human Rights recommendations cited above 2.3.

undermined by the fact that other member states might cooperate less carefully with foreign services. Tainted information would therefore nevertheless make its way to the AFSJ and hence be shared and processed; this is a scenario that resembles the German Khafagy case as illustrated earlier (above 1.3).

Finally, in the vast majority of cases, information processed at EU level does not serve to avoid ‘*imminent* threats to life’ but rather for mid- and long-term objectives, like the freezing of financial means or – as in the case of Europol, Frontex and Sitcen – the creation of risk or crime analysis and strategic reports, e.g. threat assessments.⁷⁹ It is therefore necessary to raise the question of whether the argumentation brought forward at national level to justify the use of foreign torture information, i.e. state’s duty to prevent imminent threat to life,⁸⁰ is applicable to the work at EU level, and which consequences need to be drawn from the answer to this question.

This is a question which should be addressed urgently, not only for the simple reason of respecting international obligations and human rights law, but also in order to avoid (very likely) court proceedings. With regard to the ‘terror lists’ and the obscure manner in which these lists are drawn up, the Council – after some years of a period of grace – has eventually come under well-pronounced criticism by the European Courts in Luxembourg. In the decision of 12 December 2006, the Court of First Instance ruled that in relation to one listed group the Council act has infringed the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection.⁸¹ Contrary to the Court’s ruling, however, the Council has only reluctantly and half-heartedly started a process of altering its ‘terror list’ procedures.⁸² In another most important decision of 27 February 2007, the Court of Justice of the European Communities (ECJ), in a complicated procedural context, opened up the possibility for national courts to ask the ECJ for a preliminary ruling in matters referring to third pillar fields of police and judicial cooperation in criminal matters, including ‘terror list’ issues.⁸³

These developments highlight the fact that there is growing concern about the EU’s counter-terrorism activities, not only among European and national parliamentarians, but also among European judges, as currently discussed by the Council of Ministers. An irresponsible and careless use of foreign torture information will only serve to nurture this – justified – concern.

Conclusions and policy recommendations at EU level

Recent investigations and inquiries on various levels have shed light on the illegal practice of extraordinary renditions and unlawful detention by foreign services on European territory. However, what has also been revealed is the fact that many European states and their security agencies cannot easily wash their hands of these incidents. Many indications suggest that the line between cooperation and complicity is only too often blurred. Apart from direct participation in extraordinary renditions or a reproachable ‘aversion of the eyes’ to the facts,

⁷⁹ See Council of the European Union, *EU Action Plan on combating terrorism*, Council Doc. 5771/1/06 Rev 1, 13.2.2006, p. 7, point 2.1.

⁸⁰ See above the different statements gathered at national level, 2.3.

⁸¹ CFI, T-228/02, *Organisation des Modjahedin du peuple d’Iran v. Council of the European Union*, 12.12.2006.

⁸² Cf. “EU’s terror list is hard to escape”, *European Voice*, 8-14 March 2007, p. 7; “EU backing down on terror list secrecy”, *euobserver*, 16.1.2007; see also EU Council Secretariat, *Factsheet – Judgment by the Court of First Instance in the OMPI case T-228/02*, no date.

⁸³ ECJ, C-354/04 P, *Gestoras Pro-Amnistía, Juan Mari Olano and Julen Zenarain Enarrasti v. Council of the European Union*, 27.2.2007.

some member states seem to have made indirect use of situations and ‘possibilities’ created by extraordinary renditions and unlawful detentions. This use essentially manifested itself in two variations: 1) interrogations carried out by member states agents in Guantánamo and other sites and 2) exchange and use of foreign torture information.

This paper has argued that for various reasons member states should refrain from sending their agents to places where persons are unlawfully detained or made subject to extraordinary renditions, provided these interrogations do not serve to offer assistance to the detainees or aim at gathering evidence against the abductors. Concerning the use of foreign torture information, this paper concurs with a recent House of Lords judgment that such information may under no circumstances serve as admissible evidence in court. However, it differs from the judgment in so far as it poses a question mark over the Law Lords’ *obiter dicta* (and other official statements) that foreign torture information may be used without restrictions by governments and their services for executive activities.

The implications of and for EU counter-terrorism activities was the issue of the second part of this paper. It is contended that while European institutions, namely the EP and recently the Court in Luxembourg, play a creditable role in trying to keep the EU on a lawful and legitimate track, there is no reason to relax these efforts. The EU’s counter-terrorism activities centre on the exchange and processing of information. Since *jus cogens* obligation in the context of torture prohibition, fundamental rights and the rule of law do bind EU institutional and individual actors, measures must be discussed and instigated to guarantee that the EU does not get entangled in unlawful behaviour by using and processing foreign torture information provided by member states’ security services.

Building on these findings the following policy recommendations are put forward:

1. EU governments and their national authorities should work together and make all possible use of the existing EU counter-terrorism tools and cross-border cooperation mechanisms to support the ongoing investigations of some national prosecutors against those suspected of being involved in extraordinary renditions.
2. EU governments within the Council should address the issue of European involvement in the interrogation of detainees who have been abducted and/or unlawfully detained. A code of conduct should be drawn up that outlaws such interrogations. Visits of officials should only aim at offering assistance to the detainees or aim at gathering evidence against the abductors.
3. In the context of the follow-up discussions on the European Parliament resolution of 14 February 2007 concerning CIA activities on European territory⁸⁴, the most likely eventuality – that foreign torture information was exchanged, stored and processed on EU level and that such information might serve as a basis for the adoption of EU acts and executive decisions – must be addressed.

⁸⁴ With regard to the fact that neither the Council nor EU governments have so far officially reacted to this resolution, the EP civil liberties committee’s (LIBE) recent proposal to keep the topic on the agenda and to set up regular hearings on the progress during each Council presidency is an adequate step that deserves unconditional approval, see also “MEPs keep pressure on EU over CIA flights”, *theparliament.com*, 21.3.2007.

4. A second round of peer-evaluation of national arrangements in the fight against terrorism⁸⁵ should be instigated. This second round, however, should not – as did the first - focus on the objective of how to make information exchange between law enforcement agencies within the EU more effective, but address instead the existing arrangements with non-EU intelligence and law enforcement services and the question of how these arrangements provide for the compliance with international law, human rights obligations and the rule of law.
5. The aim of this peer-evaluation should be the adoption of a common, EU-wide accord on the conditions of cooperation and intelligence sharing with foreign services, centring on the refusal to collaborate in or take advantage of torture or other unlawful treatment. As far as general principles of this common accord are concerned (rather than operational modes), the European Parliament must be involved in the debates.⁸⁶
6. In addition, a mechanism should be established to monitor the compliance with this common accord. This mechanism could take the form of a ‘yellow card, red card’ system: the transmission of tainted information in breach of the common accord will be followed by a warning (‘yellow card’) and in case of a repeated offence eventually by exclusion (‘red card’) of the information sharing network.⁸⁷
7. Democratic oversight and accountability of security services’ activities must be ensured.⁸⁸ As both the national and EU level are concerned, a proposal that has already been made for the scrutiny of Europol’s work, appears to be the appropriate solution in this context: a joint committee composed of representatives from national parliaments or other bodies that control national intelligence services and the European Parliament.⁸⁹ In addition, the European Data Protection Supervisor could assist the work of the Committee and provide his opinion.⁹⁰

⁸⁵ For the first round see G. de Vries, “The European Union’s role in the fight against terrorism”, *Irish Studies in International Affairs*, Vol. 16 (2005), pp. 3-9; Council decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, OJ L 349, 24.12.2002, pp. 1-3; Council of the European Union, *Final report on the evaluation of national anti-terrorism arrangements: Improving national machinery and capability for the fight against terrorism*, Council doc. 12168/05, 26.9.2005.

⁸⁶ This common approach will eventually not only strengthen the position of EU intelligence and law enforcement services in the world but would – and this is even more important – reinforce the absolute prohibition of torture and other inhuman and degrading treatment. See also D. Bigo, *Intelligence services, police and democratic control: the European and transatlantic collaboration*, Briefing Paper, 13.7.2006, p. 13, retrieved 27.3.2007 from www.libertysecurity.org.

⁸⁷ See D. Bigo, *Intelligence services, police and democratic control: the European and transatlantic collaboration*, Briefing Paper, 13.7.2006, p. 13, retrieved 27.3.2007 from www.libertysecurity.org.

⁸⁸ Cf. also the discussion that is currently taking place in Canada as a consequence of the secret service’s entanglement in unlawful behaviour, Commission of Inquiry into the actions of Canadian officials in relation to Maher Arar, *A new review mechanism for the RCMP’s national security activities*, 2006, retrieved 30.3.2007 from www.ararcommission.ca.

⁸⁹ Cf. with further references, B. Müller-Wille, *SSR and European intelligence cooperation implications of the new security challenges and enlargement (both EU and NATO) for structuring European intelligence cooperation, as an important aspect of SSR*, Conference paper, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva June 2003, p. 5, retrieved 27.3.2007 from www.dcaf.ch.

⁹⁰ The bi-annual High Level Political Dialogue on Counter-Terrorism between the Council, the Commission, and the European Parliament Council of the European Union is a positive element, but does not remedy the need for proper democratic oversight over EU wide intelligence and law enforcement

8. Regarding the EU financial sanction system, based on the so-called terror lists, the Council should enhance its efforts to revise and alter the procedures in order to comply with the Court of First Instance recent judgment.⁹¹ This revision should include that in future every national decision to insert an individual or a group must be traceable. In addition, there should be an obligation to disclose – at least within the Council – the source that has provided the information upon which the suspicion against the individual or the entity is based.

cooperation with non-EU services. On this High Level Dialogue see, *The European Union counter-terrorism strategy: prevent, protect, pursue, respond – The European Union’s strategic commitment to combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice*, Council doc. 14469/4/05, 30.11.2005, p. 17.

⁹¹ CFI, T-228/02, *Organisation des Modjahedin du peuple d’Iran v. Council of the European Union*, 12.12.2006.

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