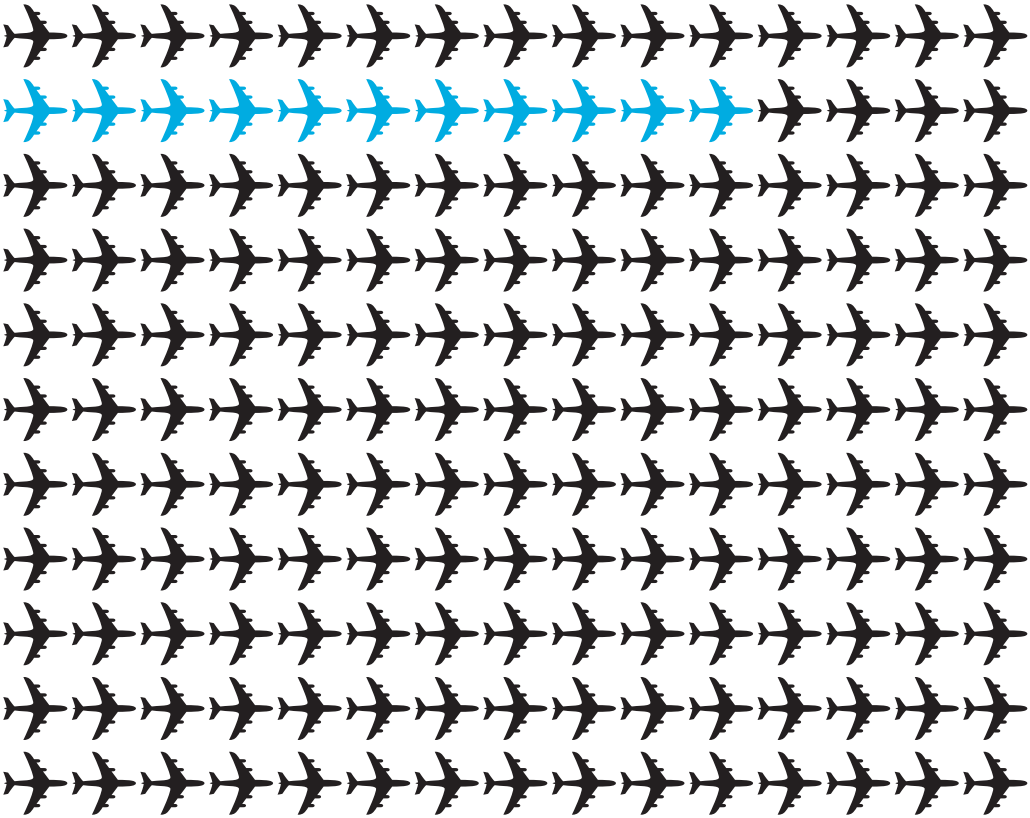

# CIA- »EXTRAORDINARY RENDITION« FLIGHTS, TORTURE AND ACCOUNTABILITY – A EUROPEAN APPROACH

EDITED BY: EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

ECCHR!

**WITH A PREFACE BY MANFRED NOWAK**
(UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE)

SECOND EDITION

ECCHR!
EUROPEAN CENTER
FOR CONSTITUTIONAL
AND HUMAN RIGHTS

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The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit civil society organization founded by a small group of well-known human rights lawyers. It is dedicated to advancing and protecting the rights guaranteed by the Universal Declaration of Human Rights and other international and national laws and constitutions. The attorneys representing ECCHR are committed to the creative and effective use of law as a positive force for social change.

ECCHR was established as a litigation, training, educational and coordination group. From its headquarters in Berlin, Germany, ECCHR aims to coordinate and thereby strengthen the efforts of human rights advocates across national borders, initiating and supporting key litigation and providing public education and training in international human rights law.

ECCHR's founding and collaborating attorneys have worked for many years in the field of international human rights litigation. Their experience, practice, competence, knowledge and contacts are crucial to ECCHR's credibility and viability.



## PREFACE

by Manfred Nowak, United Nations Special Rapporteur on Torture

The U.S.-led strategy of combating terrorism outside the rule of law and outside minimum standards of international human rights and humanitarian law by resorting to systematic practices of arbitrary detention, enforced disappearance, torture, denial of habeas corpus and minimum standards of a fair trial, constitutes gross and systematic human rights violations and may even be considered crimes against humanity. The global spider web of secret detention facilities, torture chambers and so-called extraordinary rendition flights operated by the CIA with privately chartered aircrafts for the purpose of circumventing the requirements of international aviation law, can no longer be concealed.

Thanks to meticulous investigations by journalists, non-governmental human rights organizations, international and regional human rights monitoring bodies, as well as litigation by human rights lawyers and law firms, innumerable pieces of a global puzzle were put together to reveal a shameful picture. At a time when we should be celebrating the 60th anniversary of the Universal Declaration of Human Rights and the achievements of the international human rights movement since then, the world finds itself in a deep moral, political and human rights crisis.

But it would be far too simple to just blame the Bush Administration for this distressing reality. The CIA could not have established its global spider web without the active support and cooperation of many governments and intelligence services in all regions of the world, including Europe. Various investigations by the Council of Europe and the European Union have established beyond reasonable doubt that the CIA was operating secret detention facilities in at least Poland and Romania, and that most European governments willingly and knowingly provided their air space and airports for these illegal rendition flights, and cooperated with the CIA in deporting suspected terrorists to countries well-known for their practice of torture.

Nevertheless, European governments did not provide the required information to the Secretary General of the Council of Europe and other European investigation bodies. The United States and Europe, once at the forefront of human rights protection worldwide, have lost much of their credibility as global human rights defenders in the "War on Terror." In addition, by compromising their principles of combating global terrorism within the boundaries of international human rights law and the rule of law, Western government have in fact played into the hands of terrorists who aim to reveal and criticize the hypocrisy of Western human rights policies.

Furthermore, the systematic practice of rendition, torture and disappearance by the United States and its allies has provided an extremely negative example to other states with disastrous consequences. Time and again, I was confronted with one simple question by governments in all regions of the world that I visited in my function as UN Special Rapporteur on Torture: "Why do you criticize us for torture if even the United States of America is officially using this practice? Is torture not legitimate in our common fight against the evil of global terrorism?"

The U.S.-based Centre for Constitutional Rights and its European counter-part, based in Berlin, have been pioneers in human rights litigation before domestic courts in the U.S. and Europe, as well as before international human rights monitoring bodies relating to human rights violations committed in the "War on Terror." Although the Bush Administration used all its powers, including invoking the state secrecy privilege, to obstruct human rights litigation before U.S. courts, this strategy turned out to be counter-productive in the long-term. Nobody can understand why a German citizen (who was abducted by the CIA in Macedonia, illegally rendered to Afghanistan where he was severely tortured by U.S. officials, and then rendered back to Europe after his abduction turned out to be a "mistake") would be prevented from holding the U.S. government accountable before U.S. courts and receiving adequate reparation for the illegal infliction of suffering.

Similarly, why should a Canadian citizen (arrested by U.S. officials during his stopover in New York on his return to Canada, illegally rendered to Syria via Jordan to be several tortured, and handed back to Canada only after the mistake was discovered, handed back to Canada), receive 10.5 million Canadian dollars in compensation by the Canadian government after a thorough investigation of his case by independent Canadian experts, but not one cent for compensation from the U.S. Government simply because tort litigation before U.S. courts could possibly reveal "state secrets" which the Bush Administration, for obvious reasons, would prefer to keep confidential? Why should Donald Rumsfeld (who in his function as U.S. Secretary of Defense explicitly ordered systematic methods of torture against terrorist suspects in Guantánamo Bay, Abu Ghraib and other places of U.S. detention) not be brought to justice before a competent criminal court in the U.S. or any other state party to the UN Convention against Torture, based on the principle of universal jurisdiction explicitly established in this international treaty ratified by the United States and most European countries?

Do we apply different standards of justice to Augusto Pinochet Ugarte, Hissène Habré, Charles Taylor, Slobodan Milosevic, George Bush or Dick Cheney? Is torture not the same crime when it is practiced in Chile, Chad, Sierra Leone, the former Yugoslavia or the United States of America and its detention facilities are found in Afghanistan, Iraq and Guantánamo Bay (Cuba)?

The second edition of the "CIA- »Extraordinary Rendition« Flights, torture and Accountability - A European Approach" by the European Center for Constitutional and Human Rights analyzes a growing number of well-documented cases

of extraordinary rendition and similar crimes in the U.S.-led "War on Terror." These cases, whether based on civil or criminal litigation, are only the tip of the iceberg. They reveal immense human suffering, injustice and an incredible disrespect for the international rule of law and minimum standards of human rights by those who are responsible for organizing and conducting the "War on Terror".

I wish to thank Wolfgang Kaleck and his team for all their efforts and courage to put together this collection of well-documented cases of individual suffering in what the U.S. government calls "extraordinary renditions".

*Vienna, 10 December 2008*

**Univ.-Prof. Dr. Manfred Nowak**
Professor for International Human Rights Protection, University of Vienna
Director, Ludwig Boltzmann Institute of Human Rights
United Nations Special Rapporteur on Torture



## JUSTICE AND ACCOUNTABILITY IN EUROPE: DISCUSSING STRATEGIES

by Wolfgang Kaleck

Since October 2007, the European Center for Constitutional and Human Rights (ECCHR) has been involved in litigation against human rights abuses in the context of the "War on Terror" and has organized a series of conferences and a practitioners´ workshop on "CIA-Extraordinary Rendition Flights and Torture" in Warsaw, Berlin and Copenhagen. One outcome of these meetings was the first edition of this booklet, which gave an overview of European involvement in the CIA extraordinary rendition Flight Program and the judicial reactions in various European countries. ECCHR was founded in 2007 as a European litigation and human rights organization. Among other issues, ECCHR focuses on human rights violations committed in the context of the "War on Terror." Although most of the cases of extraordinary rendition discussed here occurred some years ago, many facts have since been revealed and a number of legal proceedings have been initiated, are pending, or have even been closed. ECCHR identified a need for regional discussions focused on the practical aspects and litigation strategies of the rendition cases from a European perspective. Anglo-American litigation strategies, along with the concept of public interest organizations and the offensive use of law, are widely unknown in Continental Europe. Consequently, individual European lawyers are often overburdened with rendition cases, as they are complex transnational cases and require a comparatively complex and transnational response.

We are publishing a second extended version of our booklet earlier than we originally planned. The reason is at least partially encouraging: many new developments have occurred over the last year, including significant activity in Eastern European countries. New criminal cases against domestic officials and U.S. government officials have been opened in Poland, Bosnia-Herzegovina and Macedonia. Freedom of information procedures in the same countries, as well as in Albania and Romania, are ongoing.

Three articles are included in this edition: In this article, "Justice and Accountability in Europe – Discussing Strategies," I examine the different strategies of U.S. and European human rights lawyers in approaching allegations of European state involvement in extraordinary renditions and secret detention facilities in Europe. I will provide an overview of the legal responses to these contested practices including freedom of information policies, domestic criminal prosecution, universal jurisdiction practice, and civil proceedings.

In "The U.S. Program of Extraordinary Rendition and Secret Detention under International Human Rights Law," Margaret Satterthwaite discusses the evolution and scope of the extraordinary rendition program as practiced under the Bush administration. Satterthwaite evaluates various legal approaches and strategies under international human rights and humanitarian law for challenging this law-free zone.

In "Pending Investigation and Court Cases," co-authors Denise Bentele, Kamil Majchrzak and Dr. Georgios Sotiriadis provide an overview of legal approaches and new developments in European countries, Canada and the U.S.A., in advocating against the grave human rights violations committed within the framework of extraordinary renditions. A special focus is devoted to the alleged secret detention facilities in Poland where individuals suspected of terrorist activities have been held.

## WHAT DEFINES "EXTRAORDINARY RENDITION"?

"Extraordinary Rendition is not a legal term but a practice implemented by the Central Intelligence Agency (CIA) defined already by its informality" (Margaret Satterthwaite). Since 2001, several hundred terrorism suspects are estimated to have been abducted and detained in more than a dozen countries – Afghanistan, Pakistan and Iraq, but also Italy, Macedonia and Sweden. CIA agents then transferred these suspects forcibly, without legal procedure, to countries known for brutal and systematic torture like Egypt, Syria and Jordan. In secret prisons, suspects were held for months *incommunicado* (at least partially) where they were tortured and interrogated. Some suspects have been released while others remain in custody. The term "rendition" was used by previous United States government administrations to describe the extralegal transfer of individual suspects from another country to the U.S. where they were put on trial or later transferred to other countries. However, the original purpose of rendition flights was to put suspects on trial, though clearly with no consideration of extradition procedures or other international rules. The model shifted under the Bush administration, as Margaret Sattherhwaite explains in her article, from rendering to justice using illegal means, to intelligence gathering without trial or due process.

Widespread human rights abuses since 2001 reminded observers of similar abuses in history, such as the U.S.-led Operation Condor, a continental secret service operation in the framework of the dirty war in Latin America in the 1970s. Journalists first discovered the CIA's extraordinary rendition program. Investigators from both non-governmental organizations and official institutions researched the program and U.S. officials, including former CIA agent Michael Scheuer, later confirmed its existence. President Bush later publicly acknowledged the program in his speech on September 6, 2006.

## WHY SHOULD EXTRAORDINARY RENDITION BE ON THE EUROPEAN AGENDA?

Criticisms of the use of extraordinary rendition have largely been directed toward the U.S. government. However, several cases also affirm the responsibility of European governments. As Manfred Nowak stresses in his preface, "it would be far too simple to just blame the Bush administration for this distressing reality." During a conference in Copenhagen organized by ECCHR and the Danish Retssikkerhedsfonden in December 2007, the former Minister of Foreign Affairs, Mogens Lykketoft, explained to Danish jurists and politicians that support from European allies was a derivative of 9/11 and the collective fight against the threat of international terrorism. Thus, when NATO invoked Article 5, the principle of collective defense on September 12, 2001, no European government

objected.[1] In his June 2007 report for the Parliamentary Assembly of the Council of Europe, Special Rapporteur Dick Marty describes in detail why this decision led to fatal developments:

> There was a critical, almost paradoxical policy choice in the U.S. Government's stance towards the NATO alliance in early October 2001. The invocation of Article 5 could have been developed as a basis upon which to conduct a military campaign of a conventional nature, deploying Army, Navy and Air Force troops in a joint NATO operation. Instead it became a platform from which the United States obtained the essential permissions and protections it required to launch CIA covert action in the "War on Terror".

According to Marty, "the key date in terms of the NATO framework is October 4, 2001, when the NATO allies met in a session of the North Atlantic Council to consider a set of concrete proposals put forth by the United States." The allies agreed to the following:

- *Enhance intelligence-sharing and co-operation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it*
- *Assist states subject to increased terrorist threats as a result of their support for the campaign against terrorism*
- *Provide blanket overflight clearances for the United States' and other Allies' aircraft for military flights related to operations against terrorism*
- *Provide access to ports and airfields on NATO territory, including for refueling, for United States and other Allies for operations against terrorism*

Marty complains that the most relevant information, even when requested for use during official investigations was not released by NATO or European governments until 2007. He blames NATO for "its secrecy and security of information regime" and calls the "NATO Security Policy and its supporting Directive on the Security of Information […] the most formidable barriers to disclosure of information that one might ever come across." For Marty, "it is easy to understand […] why an institution or state agency wishing to carry out clandestine operations would opt to bring them under the protections of the NATO model."

1 This was the first time in NATO's 52-year history that Article 5 was invoked.



The system as established in the wake of the aforementioned decisions is described by Marty and others as a "global spider's web" in which 15 European countries were involved. Not all European countries participated equally. Their roles ranged from tolerating the program to, in several cases, actively assisting the CIA – providing intelligence, granting access to airport facilities and airspace ("stop over points," "staging points," "pick up points," "detainee transfer or drop off points") handing over detainees, and even (in the case of Poland and Romania) allowing the CIA to interrogate prisoners in secret detention centers on their territories.

## WHY IS EXTRAORDINARY RENDITION UNLAWFUL?

The CIA "rendition" flights – the outsourcing of torture to countries notorious for their torture practices and the complete deprivation of fundamental rights of the abducted persons – constitute some of the most outrageous human rights violations of our time. "Rendition" flights violate several prominent national and international laws and principles that Margaret Satterthwaite explains in her article in this edition. The range of laws breached is quite vast and includes: human rights provisions in international human rights law, international humanitarian law, refugee law over international aviation law (the "Chicago-Convention"), and customary international law (diplomatic and consular treaties, such as the Vienna Conventions). In the European context, "rendition" practices breach national domestic law, particularly criminal law, and regional law of the European Court of Human Rights, among others. Some of the most egregious violations of law under the European Convention on Human Rights (ECHR) include: the right to freedom (ECHR, Article 5); the right to security (ECHR, Article 7); the right to humane treatment and freedom from torture (ECHR, Article 3); the right to communicate freely with the outside world (ECHR, Article 5); the right to reasonable

prison conditions (ECHR, Article 3); and the right to judicial remedies (ECHR, Article 5).

## CONSEQUENCES

Some critics question why resources and effort should be focused on human rights violations in the context of counterterrorism measures. Their critique highlights the potentially more dramatic and gross human rights violations committed worldwide, such as mass rapes in the Democratic Republic of Congo and massacres in Sudan.

What these critics overlook, however, is that each case of extraordinary rendition results in a personal tragedy including long-term, physical and psychological damage to the victim and the victims' families (though this latter element is generally ignored). The pain and injustice is further exacerbated when relatives are denied their right to an effective judicial remedy and denied their right to information concerning their relative's whereabouts. Additionally, each case of extraordinary rendition should be regarded as a crime on both the international and domestic level. These crimes Encompass torture and enforced disappearances, both viewed as international crimes, particularly when tantamount to war crimes or crimes against humanity. Therefore, all states involved are legally obliged to investigate the facts and, under certain conditions, prosecute these crimes.

However, the system of extraordinary rendition encompasses not only the legal, but complex social and political aspects of torture. The term itself is so complex in fact, that it took many decades to achieve a universally recognized absolute prohibition of torture. Torture is still a common practice in a number of states, however state-sponsored torture practices have never before been accompanied by precise theoretical justifications set out to question the law as such. When Columbian and Chinese policemen tortured and killed political opponents, for example, it was clear that the rule of law (inclusive of the basic norms of human dignity and the absolute prohibition of torture) had been violated and these legal concepts were never questioned by the majority of civilized nations. Since 2001, the "War on Terror" has undermined international consensus; the United States, one of the world's most significant supporters of international law, began to systematically attack universal standards of human rights and justify their actions by shifting the boundaries of the rule of law. Examples of this shift include increasing executive (presidential) powers, reducing universally accepted human rights with regards to enemy combatants, redefining torture, and using siege competences excessively. These actions have led to a significant reduction of human and civil rights protection not only within the United States, but all over the world. As Manfred Nowak describes in his preface, in his function as UN Special Rapporteur on Torture he was often confronted with the same question in regions around the world: "Why do you criticize us for torture if even the United States of America is officially using this practice? Is torture not legitimate in our common fight against the evil of global terrorism?" The "War on Terror" has led to a slippery slope. Under its banner and in the name of security, basic rights have been and continue to be denied. The fight against torture, whether case-by-case or in abstract terms, is therefore critical to ensure a humane and civilized society. Combating torture means taking decisive action against its propagation and insisting that those directly responsible for torture as well as those who organize the practice of torture are punished.

As a system of outsourcing illegal interrogation methods and torture, extraordinary rendition impacts the fight against torture globally. Several states, some of whom consider themselves models of democracy and rule of law, participate in and profit from information and intelligence gained by police and secret services in states notorious for the use of torture. As many cases took place on European territory, a genuine European approach to countering the system of extraordinary rendition is necessary.

The basis for this work has been established: a new coalition of non-governmental actors including journalists, lawyers and human rights activists have joined with institutional actors who have assisted in revealing the existence and details of the secret CIA extraordinary rendition program. The first investigations were undertaken by a local prosecutor in Milan, Italy, by local journalists in Mallorca, Spain, and by writers for the *New York Times* and the *New Yorker.* The former Swiss prosecutor, Dick Marty researched and compiled all of the facts in his Council of

Europe Reports in 2006 and 2007. His conclusions noted that European governments lack the political will to fully investigate the facts and to draw conclusions in both political and legal terms.

## LEGAL RESPONSES TO THE EXTRAORDINARY RENDITION PROGRAM

The first goal in cases where clients are held in illegal detention is to seek judicial review, fair trials, and essentially to obtain the freedom of the detained persons. This is the goal of the Guantánamo Initiative conducted by the Center for Constitutional Rights (CCR) and of organizations such as Reprieve in the UK. Most of the legal steps must be taken outside of Europe and instead be pursued in the U.S., Africa and Asia, where the individuals are held as prisoners. The legal strategies taken outside of Europe are not described in detail in this report, although many of the legal instruments discussed here are connected to the efforts in other regions. There are four main areas of litigation in Europe: 1. Freedom of Information, 2. Criminal Law, 3. Universal Jurisdiction, and 4. Civil Law.

1. Many political changes are necessary to avoid future human rights violations within counterterrorism measures. To begin, better oversight and control of military operations, police, and secret services is necessary. Transparency is urgently required, as many of the human rights violations described in this publication were made public through the security apparatuses involved. In this regard, the election of President Obama represents a significant change and provides some hope that serious investigation into the torture program that began in September 2001 will be made. A presidential inquiry pursued outside the U.S. Freedom of Information Act would be an effective tool to achieve a greater level of transparency. Approximately 70 countries worldwide have enacted freedom of information laws. With respect to the extraordinary rendition program, the United States and Eastern European countries (particularly Albania, Macedonia, Poland and Romania) are at the forefront in terms of freedom of information policies. In 1966, the United States of America enacted the Freedom of Information Act (FOIA), a federal law establishing the public's right to obtain information from federal government agencies. The FOIA is codified at 5 U.S.C. Section 552 and was amended most recently in 2002. Under this policy, "any person" can file a FOIA request including U.S. citizens, foreign nationals, organizations, associations, and universities. This report will describe the ongoing attempts to establish similar freedom of information policies in Eastern Europe. Cases have been initiated in Albania and Macedonia, while others will be pursued in Poland and Romania after more information is available. Once freedom of information requests can be made under national law, these requests, together with litigation, will increase the capacity for revealing new and relevant information. Freedom of information policies can help raise awareness regarding rendition-related abuses and strengthen the ongoing criminal or civil litigation cases.

2. Cases of extraordinary rendition constitute international crimes and as such, the states involved have a legal obligation to investigate the facts and if appropriate, prosecute these crimes. Numerous criminal proceedings have been initiated since the first cases were made public. These cases are perhaps the most relevant in terms of legal procedures currently used in the context of rendition cases. Therefore, they are described in detail in this edition. The preliminary results are manifold and often contradictory. There are ongoing investigations in Madrid, Milan, and Munich, and new investigations in Warsaw and Sarajevo since the summer of 2008. Further attempts for investigations have been made in France and Sweden.

Every criminal case, regardless of its legal success, has had very tangible impacts. Criminal cases raise public awareness about rendition cases and therefore trigger other political and legal reactions (sometimes even outside the country where the cases were first presented). Legal victories have been achieved in some of the cases. In the Italian case of Nasr ("Abu Omar"), for the first time in Europe, CIA agents involved with the extraordinary rendition program are facing trial *in absentia* in Milan. In Italy, as well as in the German case concerning Khaled El Masri, arrest warrants have been issued. Because the Italian and German governments have refused to issue extradition requests for the alleged perpetrators in the United States, legal proceedings have been blocked. However, the suspected CIA agents now risk arrest whenever they travel outside the United States. In both

cases, the proceedings are still pending. The litigation strategies in both of these cases and in the Spanish investigation revealed important information. This alone can be regarded as a success.

3. Two criminal complaints were served to the German Federal Prosecutor in 2004 and 2006 based on the principle of universal jurisdiction. The complaints requested that the prosecutor open an investigation and ultimately pursue criminal prosecution of high-ranking U.S. officials responsible for authorizing and participating in war crimes, including CIA rendition flights, in the context of the "War on Terror."

The complaint alleges that high-ranking U.S. officials, such as former Secretary of Defense Donald Rumsfeld, former Director of the CIA George Tenet and others named as defendants, bear individual criminal responsibility for war crimes against a number of detainees in Iraq, Afghanistan and in the U.S.-operated Guantánamo Bay prison. The case is evidence that universal jurisdiction complaints can be used as a last resort, although political obstacles against such complaints should be expected.

There are no international courts or tribunals in Iraq, or in any other state where "extraordinary renditions" have occurred, mandated to conduct investigations and prosecutions of U.S. officials responsible. The United States has refused to join the International Criminal Court, thereby eliminating any option to pursue prosecution in that arena. The Iraqi courts have no authority to prosecute. Furthermore, the U.S. safeguarded its personnel in Iraq by providing immunity from Iraqi prosecution. The United States has refused to investigate the responsibility of top persons in command. German courts became a potential last resort to end impunity and obtain justice for victims of abuse and torture that occurred while they were detainees of the United States.

The complaint in Germany against U.S. officials generated enormous public interest. There has been extensive national and international media coverage of this case. Numerous national, international and regional NGOs, as well as renowned individuals have endorsed the complaint. It is clear the public believes that political and military leaders who allowed, ordered or implemented unlawful extraordinary renditions and abusive interrogation techniques should be held accountable.

This case is somewhat different from the others presented under the banner of extraordinary rendition cases. It does not exclusively refer to a secretly abducted person who was then transferred to a country where he was subjected to torture or other cruel and inhumane treatment. Rather, the case directly challenges an entire policy and how governments manage persons suspected of terrorism and their legal and physical treatment. It refers to unlawful detentions and to the establishment of a system intended to extract presumably useful intelligence through torture. The universal jurisdiction complaint is an important mechanism for legally evaluating "extraordinary renditions." The initiation of investigations and a possible conviction for war crimes would inevitably lead to the re-characterization of acts of rendition as falling within the parameters of the definition war crimes.

Universal jurisdiction was similarly invoked in the Spanish CIA flight case, although territorial arguments are most relevant in that case. As such, this case should be regarded as a typical criminal case in which active or passive personality principles, or elements of territoriality, establish the grounds for the court's jurisdiction over the case.

4. Two civil cases are of great significance: the first, on behalf of Murat Kurnaz, Khaled El Masri, and Maher Arar against Rumsfeld, Ashcroft and other high-ranking U.S. officials; and the second, a complaint against the aviation company, Jeppesen Dataplan, Inc. Both demonstrate different ways to challenge human rights violations in the context of the "War on Terror." Legal proceedings before U.S. courts pursuant to the Alien Tort Statute have been one effective strategy. Civil litigation strategies make individuals and private companies aware of potential consequences of collaborating with illegal actions. Ideally, these complaints could dissuade individuals or companies from cooperating with CIA agents for financial gains in order to avoid potential legal liability. Maher Arar's civil case in the U.S. helped trigger a Canadian investigation and helped support the Canadian government in pursuing that investigation. This case is of fundamental

importance. It shows which tools can be employed by a democratic government involved in "extraordinary renditions" to manage such crimes and acknowledge responsibility. By allowing its institutions to be supervised, the Canadian government was the first government that attempted to make amends and to offer redress for damage caused by rendition.

There are undoubtedly more legal instruments available for human rights defenders in challenging cases of extraordinary rendition. Regional instruments like the European Court of Human Rights and the African Commission on Human and Peoples´ Rights will become increasingly significant in the future. there are no limits to the political and legal instruments available that are capable of combating the extraordinary rendition program. Local and global remedies can be used – in addition to the use of soft law and hard law procedures in several countries simultaneously.

Within this discussion of legal remedies and their effects one must not forget the obstacles and legal and practical problems that victims, their families, lawyers and human rights organizations are facing. The law seems to be a weaker mechanism than political solutions when it comes to transnational security and war issues. Due to state secrecy policies and related laws, a severe lack of information remains in nearly every case. The details of the CIA flights are still not completely known; the main actors and suspects both in the U.S. and elsewhere remain largely unknown; and many victims remain unknown. When determining that a certain flight departed, stopped, or landed is the only fact that can be confirmed, it is difficult to then assign these events to specific individuals. There are severe obstacles in obtaining access to victims who still remain in detention, such as the alleged "high-value detainees" who cannot be interviewed about the details of their treatment. The various legal systems pose many challenges because national legislation in many countries does not allow for prosecution of human rights crimes, such as crimes against humanity, war crimes or forced disappearances. For such crimes, a full-scale investigation of the complexity of the crime would be more suitable, involving different locations, individuals, and the different stages of the crime. Many prosecution procedures are only conducted due to allegations of ordinary crimes, such as murder.



Political obstacles are observed in every country and jurisdiction. In Italy and Germany, where prosecutors and judges seriously investigated and finally released arrest warrants for CIA agents, both governments suspended the cases and delayed the judges several times. In both countries, constitutional and administrative courts were involved in determining the legality of government involvement.

Globalized counterterrorism measures are now countered by a globalized transnational human rights movement. This transnational approach is a new advantage, the strength of which was observed in Berlin when European, German, American, Macedonian and Albanian lawyers working on El Masri's case met in June 2008. On the same occasion in a joint press conference, the ACLU, OSJI and ECCHR demonstrated their common goal to seek truth and justice in all possible jurisdictions.

The "global spider's web" contains totalitarian elements as it is both secret and hidden. It attempts to conceal the extraordinary rendition program and guarantee immunity and impunity. Since 2001, the transnational human rights movement has proved that it is capable of investigating human rights violations and of successfully exposing scandalous programs like Guantánamo and extraordinary rendition. Efforts on behalf of the Guantánamo detainees illustrate that existing national and international human rights laws can guarantee a minimal standard of protection for the individual. The efforts of transnational actors support the enforcement of fundamental principles including the absolute prohibition against torture. The fight against torture is an ongoing one; it is a global, social and legal struggle that must include new law, as well as innovative methods and strategies for enforcing existing laws.

The upcoming presidency of Barack Obama will most certainly lead to the termination of some of the most scandalous practices in the "War on Terror" and to investigations of acts carried out over the past eight years. However, the fight for truth and justice and the restoration of the respect for human rights and the rule of law is much too important to be left in the hands of one government's administration. While it is crucial to end the torture in Guantánamo and release every prisoner who cannot be convicted in a fair trial, there are several more Guantána-

mos around the world and many more detainees to be released. Reparations must be paid and those responsible for crimes must be held accountable until some justice is achieved. The use of legal instruments by human rights lawyers and organizations may not be sufficient, but this work remains vital in reaching these goals.



## THE U.S. PROGRAM OF EXTRAORDINARY RENDITION AND SECRET DETENTION: PAST AND FUTURE

by Margaret Satterthwaite[1]

Within weeks following the attacks of September 11, 2001, U.S. President George W. Bush approved a secret program[2] aimed at taking terrorism suspects "off the streets."[3] This extraordinary rendition and secret detention program ("the Program") reportedly[4] involves the covert approval of "kill, capture or detain" orders for specific individuals.[5] As the name implies, such "K-C-D" orders reportedly allow U.S. agents – secretly and without warning to those targeted – to apprehend, imprison, and perhaps even target for death those individuals who are determined to be eligible for the Program.

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1 Associate Professor of Clinical Law and Faculty Director, Center for Human Rights & Global Justice, NYU School of Law. This article draws significantly on a series of articles I have published on the topic of rendition, including The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the "War on Terror," in Human Rights Advocacy Stories (Hurwitz, Satterthwaite & Ford, eds., 2009), Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L.R. 1333 (2007); What's Wrong with Rendition?, 29 Nat. Sec. L. Rep. No. 4 (2007); Extraordinary Rendition and Disappearances in the "War on Terror," 10 Gonzaga J. Int'l L. 70 (2006); and Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law, 6 The Long Term View 52 (2006), co-authored with Angelina Fisher.

2 See generally President George W. Bush, President Discusses Creation of Military Tribunals to Try Suspected Terrorists (Sept. 6, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html) [hereinafter President's Sept. 6, 2006 Address]; President George W. Bush, Press Conference of the President (Sept. 15, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html).

3 President's Sept. 6, 2006 Address, supra note 5.

4 Because the Program under discussion is by its very nature secretive, I will use terms such as "reportedly" and "apparently" where specified facts have not been plainly established.

5 See Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report, 64, Doc. No. 11302 rev. (2007), available at http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf [hereinafter Council of Europe June 2007 Report].

## FROM "RENDITION TO JUSTICE" TO EXTRAORDINARY RENDITION

While the term extraordinary rendition is newly in use, its cousin – "rendition to justice" – has been official U.S. policy for several decades. Rendition to justice was approved for use against terrorism suspects by President Ronald Reagan in 1986.[6] Rendition was apparently authorized along with a variety of other procedures in National Security Decision Directive 207, which formalized U.S. policy to fight terrorism.[7] According to reports, when it was first approved, rendition to justice involved the apprehension of suspected terrorists by U.S. agents in (1) countries in which no government exercised effective control (i.e. "failed states" or states in chaos because of civil war or other massive unrest); (2) countries known to plan and support international terrorism; or (3) international waters or airspace.[8] These were locations where the U.S. government could not expect to obtain custody over an individual suspected of a crime using the traditional method of international extradition. Extradition is a "formal process by which a person is surrendered by one state to another."[9] It is the usual method for transfer of suspects and fugitives, and it is designed to protect the sovereignty of the nation where the suspect has taken refuge while also allowing the requesting state to obtain jurisdiction over an individual who is suspected of committing a crime subject to its criminal jurisdiction.[10] Under U.S. law, extradition requires a valid treaty authorizing the representative of a foreign state to request the transfer of a named individual.[11] The request is followed by a judicial proceeding in which a federal judicial officer determines whether the crime is one covered by an extradition treaty, and whether there is probable cause to sustain the charge.[12] Once these prerequisites are satisfied, the judicial officer certifies the individual as extraditable to the Secretary of State.[13] The Secretary of State must then decide whether to surrender the alleged fugitive to the requesting foreign state.[14]

During the 1980s, the United States expanded the reach of its criminal law to cover a host of crimes against U.S. nationals or U.S. interests that occurred outside of U.S. territory.[15] At the same time, the United States experienced significant difficulties obtaining jurisdiction over suspected terrorists, in part because the United States did not have valid extradition treaties with the countries most commonly harboring terrorists, and in part because those states sometimes asserted that the suspects were not eligible for extradition, since their crimes were "political" crimes, acts that have traditionally been excluded from extradition arrangements.[16] The rendition to justice policy was born of this frustration with what one former intelligence official has called "the enormously cumbersome and sometimes impossible process" of extradition.[17]

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6 D. Cameron Findlay, Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law, 23 Tex. Int'l L.J. 1, 2-3 (1988); see also Dana Priest, CIA's Assurances On Transferred Suspects Doubted, Wash. Post, Mar. 17, 2005, at A01; Shaun Waterman, Analysis: Rendition a Routine Practice, United Press Int'l, Mar. 9, 2005 (citing a former intelligence official knowledgeable about rendition who explained that rendition was approved in 1986 by President Reagan along with the establishment of the Counterterrorist Center). It should be noted that rendition to justice has also been used since the 1980s to bring individuals suspected of drug trafficking or arms dealing to the United States to face trial. See United States v. Noriega, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990), aff'd, 117 F.3d 1206 (11th Cir.1997) (where U.S. military forces arrested former Panamanian leader Manuel Noriega in Panama City and transferred him to the United States for trial on drug charges).

7 See U.S. Gen. Accounting Office, GAO/NSIAD-99-135, Combating Terrorism: Issues to be Resolved to Improve Counterterrorism Operations 3 (1999). President Ronald Reagan's National Security Decision Directive 207 has only been partly declassified; the sections discussing rendition have not been made public. See National Security Decision Directive 207: The National Program for Combating Terrorism (Jan. 20, 1986), available at http://www.fas.org/irp/offdocs/nsdd/index.html.

8 Findlay, supra note 9, at 3 (citing a classified annex to a Presidential report on renditions to justice).

9 M. Cherif Bassiouni, International Extradition: United States Law & Practice 1 (5th ed. 2007).

10 Valerie Epps, The Development of the Conceptual Framework Supporting International Extradition, 25 Loy. L.A. Int'l & Comp. L. Rev. 369, 371-72 (2003).

11 See 18 U.S.C. § 3184 (2006).

12 Quinn v. Robinson, 783 F.2d 776, 787 (9th Cir. 1986).

13 18 U.S.C. § 3184.

14 Id. §§ 3184, 3186; see also 22 C.F.R. § 95.2(b) (1999).

15 See Christopher L. Blakesley & Dan E. Stigall, The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century, 39 Geo. Wash. Int'l L. Rev. 1 (2007), for an overview of this issue.

16 See Findlay, supra note 9, at 6-15.

17 See Waterman, supra note 9.

When carrying out renditions to justice, U.S. agents would apprehend the individual (sometimes luring suspects to the chosen location through elaborate ruses[18]) and would then forcibly transfer the person to the United States, where the individual would face indictment on criminal charges for specific acts of terrorism aimed at the United States or its citizens.[19] In sum, renditions to justice were a forcible means of obtaining personal jurisdiction over an individual who was sought on regular criminal charges.[20] While some cases of rendition involved allegations of mistreatment during abduction or interrogation, it has never been suggested that the purpose of this program was to subject the detainees to torture or cruel, inhuman or degrading treatment, or to hold them secretly. Once in the United States, the rendered individual would be treated like any other federal detainee awaiting trial.

Rendition to justice came to be seen as an imperative method for bringing suspected terrorists to the United States for trial during the 1990s. Although the document itself remains classified, President George H.W. Bush authorized specific procedures for renditions in 1993 through National Security Directive 77 ("NSD-77").[21] President Clinton followed the lead of Presidents Reagan and H.W. Bush by continuing the rendition program.[22] President Clinton signed Presidential Decision Directive 62 ("PDD-62") on May 22, 1998, setting up streamlined responsibilities for ten major anti-terror programs, the first of which was called

18 Consider, for example, the case of Fawaz Yunis, who was lured into international waters by undercover FBI agents posing as drug traffickers and then arrested and transferred to an American munitions ship. The D.C. Circuit rejected Yunis' legal objections to this method of gaining jurisdiction over him. See United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (upholding jurisdiction to try Yunis); United States v. Yunis, 859 F.2d 953, 957 (D.C. Cir. 1988) (describing arrest).

19 Findlay, supra note 9, at 3-4.

20 See generally Findlay, supra note 9.

21 See Fed'n of Am. Scientists, National Security Directives (NSD) [Bush Administration 1989-1993], available at http://www.fas.org/irp/offdocs/nsd/index.html (listing NSD-77 as classified). The only unclassified reference to the content of NSD-77 is in PDD-39, discussed infra text accompanying note 25.

22 See Fed'n of Am. Scientists, Presidential Decision Directives [PDD] Clinton Administration 1993-2000, available at http://www.fas.org/irp/offdocs/pdd/index.html (containing the unclassified segments of PDD-39).



"Apprehension, Extradition, Rendition, and Prosecution."[23] Then-CIA Director George Tenet testified in 2000 that the CIA had rendered more than two dozen suspects between 1998 and 2000;[24] in 2004, he estimated the agency had conducted more than eighty renditions before September 11, 2001.[25]

Two important Clinton-era renditions must be included in this historical overview because they mark the beginning of an important shift in approach: the cases of Tal'at Fu'ad Qassim and the Tirana Cell. According to Human Rights Watch, Qassim was an Egyptian national who had been granted asylum in Denmark and traveled to Bosnia in the mid-1990s, reportedly to write about the war.[26] Concerned by the increasing globalization of terrorism and the radical Islamists who the United States saw as the central players, the United States demanded that the Bosnian government expel militants found inside its territory during the war. When the Bosnian government failed to do so, the U.S. government targeted Tal'at Fu'ad Qassim for rendition – to Egypt, not to the United States. According to news reports, Qassim was taken aboard a U.S. navy ship and interrogated before being transferred to Egyptian custody in the Adriatic Sea.[27] As Human Rights Watch

23 PDD-62 has not been declassified. It is discussed in Nat'l Comm'n on Terrorist Attacks Upon the U.S., Staff Statement No. 5: Diplomacy (2004), available at http://govinfo.library.unt.edu/911/staff_statements/staff_statement_5.pdf. An unclassified summary of PDD-62 states: "To meet these challenges, President Clinton signed Presidential Decision Directive 62. This Directive creates a new and more systematic approach to fighting the terrorist threat of the next century. It reinforces the mission of the many U.S. agencies charged with roles in defeating terrorism; it also codifies and clarifies their activities in the wide range of U.S. counter-terrorism programs, from apprehension and prosecution of terrorists to increasing transportation security, enhancing response capabilities and protecting the computer-based systems that lie at the heart of America's economy." Press Release, The White House, Fact Sheet: Combating Terrorism: Presidential Decision Directive 62 (May 22, 1998), available at http://www.fas.org/irp/offdocs/pdd-62.htm.

24 See Waterman, supra note 9.

25 Panel I Day Two of the Eighth Public Hearing of the National Commission on Terrorist Attacks Upon the United States 30 (Mar. 24, 2004) (remarks of George Tenet, Director of Central Intelligence), available at http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf.

26 Human Rights Watch, Black Hole: The Fate of Islamists Rendered to Egypt 19 (2005), available at http://hrw.org/reports/2005/egypt0505/egypt0505.pdf. Unless otherwise noted, the facts in this paragraph are taken from this publication.

27 Id. at 20 (citing Anthony Shadid, Syria is Said to Hang Egypt Suspect Tied to Bin

reports, "Qassim's case is the first known rendition by the U.S. government to a third country with a record of torture."[28] Qassim was reportedly executed while in Egyptian custody. Three years later, the CIA worked with Albanian secret police to monitor the activities of a suspected terrorist cell made up of Egyptian nationals living in Tirana. After determining to their satisfaction that the men were engaged in terrorist activities, the Albanian police apprehended four men and handed them to the CIA, which in turn rendered the men to Egypt. Within a month, the CIA rendered another Egyptian national from Bulgaria to Egypt. The men were tried as part of a mass trial and they alleged that they had been severely abused while in pre-trial detention. According to a former intelligence official discussing this new kind of rendition, in which suspected terrorists were transferred to third states instead of being taken to the United States: "'[t]he only requirement was that there be some kind of legal process (to which the rendered person would be subject)' in the receiving country."[29]

The model had been created. In the aftermath of 9/11, the complete transition would be made: intelligence-gathering, not trial, would become the purpose for transfer; the legal process requirement would be dropped; countries with a record of torture or secret CIA prisons hidden from the world, would become the sites of detention; and rendition to justice would become extraordinary rendition.

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Laden, Boston Globe, Nov. 20, 2001, at A1; Andrew Higgins & Christopher Cooper, Cloak and Dagger: A CIA-Backed Team Used Brutal Means to Crack Terror Cell, Wall St. J., Nov. 20, 2001, at A1).

28 Id. It is impossible to confirm whether this was the first such transfer, since such actions were covert. One former intelligence official told UPI that this form of rendition was common, and even qualified "rendition to justice" in the United States as the exception to the norm of rendition to third states. See Waterman, supra note 9.

29 Quoted in Waterman, supra note 9.



## THE SCOPE AND AUTHORIZATION OF THE EXTRAORDINARY RENDITION PROGRAM

The stories of individuals who have emerged from the Program are among the main sources of information about the U.S. extraordinary rendition and secret detention program. Although official acknowledgments about the Program continue to emerge, the U.S. government has not released comprehensive information about rendition and secret detention; still unconfirmed are the exact number and identities of people subject to "K-C-D" orders, the number and identities of people rendered to third countries for interrogation, and the number and identities of individuals held in secret CIA "black sites."

Concerning transfers to foreign governments, CIA Director Hayden has said that the number of individuals subject to rendition since 2001 is "mid-range, two figures," and investigative journalist Dana Priest has reported that her sources estimate that about seventy detainees have been subject to extraordinary rendition.[30] In an oft-cited 2005 New Yorker article, Jane Mayer estimated that there had been between 100 and 150 transferees.[31] Other estimates reach several thousand.[32] The Egyptian government alone has stated that approximately sixty

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30 See Council on Foreign Relations, A Conversation with Michael Hayden, Sept. 7, 2007, available at http://www.cfr.org/publication/14158/; Dana Priest, CIA Holds Terror Suspects in Secret Prisons: Debate is Growing within Agency about the Legality and Morality of Overseas System Set up After 9/11, Wash. Post., Nov. 2, 2005, at A1. For a comprehensive account of publicly available information about the Program, see Center for Human Rights and Global Justice, On the Record: U.S. Disclosures on Rendition, Secret Detention, and Coercive Interrogation (2008), available at http://www.chrgj.org/.

31 See Jane Mayer, Outsourcing Torture: The Secret History of America's Extraordinary Rendition Program, New Yorker, Feb. 14, 2005, at 106, 107 (citing Scott Horton); see also CIA 'Outsourcing Torture,' Agence France Presse, Feb. 7, 2005, available at http://www.commondreams.org/headlines05/0207-12.htm ("Scott Horton – an expert on international law who has examined CIA renditions – estimates that 150 people have been picked up in the CIA net since 2001.").

32 See Center for Human Rights and Global Justice (CHRGJ), NYU School of Law, Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush 3 (2005), available at http://www.chrgj.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf (quoting Jane Mayer: "one source knowledgeable about the rendition Program suggested that the number of renditions since September 11, 2001 may have reached as high as several thousand" (citation omitted)).

to seventy detainees had been transferred to its custody between September 11, 2001 and May 2005.[33] Because of the confusion over definitions and the related practices involved in the U.S. government's "War on Terror" strategy, it is impossible to know with any certainty how many people have been subject to extraordinary rendition. One explanation for the range in estimates is that it appears likely that a larger number of individuals were secretly transferred to the custody of foreign governments, while comparatively few were held directly by the CIA in "black sites."

A presidential directive signed on September 17, 2001 – less than one week after the attacks of September 11 – purportedly provided the CIA with legal authority for the Program.[34] Although the directive remains classified, the Council of Europe and the media have reported that it greatly expanded the CIA's authority to operate independently and to apprehend, transfer, detain, or even kill individuals designated for such treatment.[35] Attorneys from the Department of Justice, the CIA, and the administration are reportedly involved in the designation of individuals who become eligible to be captured, detained, or even killed.[36]

On September 6, 2006, President Bush officially acknowledged that the U.S. government had created what he called a "separate program operated by the Central Intelligence Agency" to detain and interrogate individuals who were suspected of being "the key architects of the September 11th attacks, and attacks on the

33 Shaun Waterman, Terror Detainees Sent to Egypt; Official, U.S. Deny Torture is Condoned, Wash. Times, May 16, 2005, at A4 (quoting the Prime Minister of Egypt).

34 The presidential directive has not been declassified, but the CIA admitted its existence during the course of a lawsuit by the ACLU. See Leahy 'brushed off' on Secret Terror Docs, United Press Int'l, Jan. 3, 2007; Press Release, Am. Civil Liberties Union, CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad (Nov. 14, 2006), available at http://www.aclu.org/safefree/torture/27382prs20061114.html.

35 See Council of Europe June 2007 Report, supra note 8, at 11-12; Tyler Drumheller, On the Brink: An Insider's Account of How the White House Compromised American Intelligence 35 (2006). With respect to killing, see Barton Gellman, CIA Weighs 'Targeted Killing' Missions: Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists, Wash. Post, Oct. 28, 2001, at A01.

36 See Council of Europe June 2007 Report, supra note 8, at 12.



USS Cole, an operative involved in the bombings of our embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians across the world."[37] In a companion fact sheet, the Office of the Director of National Intelligence set out key facts concerning the Program.[38] It is important to note that these disclosures – and the information that has cumulated since – did not include anything about authorization to "kill" designated suspects, and what is known about this element of the Program, assuming there is such an element, remains obscure.

President Bush's September 6, 2006 statement came during a legislative battle in which he sought explicit authorization for military commissions to try suspected terrorists. The President sought such explicit authorization because the Supreme Court had – a few months earlier – struck down the existing military commissions system. In Hamdan v. Rumsfeld, the Court held that the commission created to try individuals held at Guantánamo "lack[ed] power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions."[39] In reaching this holding, the Court also signaled that Article 3 ("Common Article 3") – common to all four of the 1949 Geneva Conventions[40] and designed to provide minimum guarantees of humane treatment for all individuals detained in connection with any type of armed conflict – operates as a minimum standard for the treatment of individuals apprehended in the "War on Terror," at least those initially detained in Afghanistan. Soon after the Hamdan decision, the media reported that the White House believed the CIA to be bound by Common Article 3 under the Hamdan rule; the CIA did not comment on the issue.[41]

37 President's Sept. 6, 2006 Address, supra note 5.

38 See Office of the Director of National Intelligence, Summary of the High Value Terrorist Detainee Program (Sept. 6, 2006), available at http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf; see also Office of the Director of National Intelligence, Biographies of High Value Terrorist Detainees Transferred to the U.S. Naval Base at Guantánamo Bay (Sept. 6, 2006), available at http://www.dni.gov/announcements/content/DetaineeBiographies.pdf.

39 548 U.S. 557 (2006).

40 See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

41 See Mark Mazzetti & Kate Zernike, White House Says Terror Detainees Hold Basic

The CIA emptied out its "black sites" – at least temporarily – following the Hamdan decision. In his September 6 speech, President Bush announced the transfer of fourteen named "high-value detainees" from CIA custody to the base at Guantánamo and stated that "[t]he current transfers mean that there are now no terrorists in the CIA program."[42] Human rights groups later reported on the cases of two individuals who had been held in "black sites" until soon after the Hamdan decision, when they were returned to their states of nationality.[43] Media reports surfaced of CIA agents purchasing insurance protection from potential lawsuits connected to the Program.[44] Critically, government officials believed the extraordinary rendition and secret detention program to be in jeopardy at this time. Explaining the need for the Program, the President said that "as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical – and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information."[45]

Congress would have to authorize the Program if it was to continue. Weeks after President Bush announced the existence of the Program, Congress passed the Military Commissions Act[46] (MCA), which sets out procedures for detaining, interrogating, and trying "unlawful enemy combatants" as defined in the MCA.[47] President Bush considered the MCA sufficient approval of the program,[48] although there is in fact no authorization for secret detention or extraordinary rendition in the law.[49] In July 2007, President Bush issued an executive order explicitly affirming that the CIA runs "a program of detention and interrogation."[50] In the last few years, a number of individuals have been held secretly by the CIA before being transferred to Guantánamo, and the CIA has acknowledged that the Program continues.[51]

In addition to the facts that were made public in September 2006, careful observers have been able to piece together a picture of the system based on a variety of sources, including: reports about released detainees;[52] investigations conducted by inter-governmental organizations such as the Council of Europe and the European Union;[53] statements about specific aspects of the Program by various

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Rights, *N.Y. Times*, July 12, 2006. For a discussion of the debate within the Bush administration concerning the applicability of Common Article 3 to terrorism suspects, see Tim Golden, Detainee Memo Created Divide in White House, *N.Y. Times*, Oct. 1, 2006, at A1.

42 President's Sept. 6, 2006 Address, supra note 5.

43 See, e.g. Amnesty Int'l, United States of America: A case to answer: From Abu Ghraib to secret CIA custody: The Case of Khaled al-Maqtari, AI Index AMR 51/013/2008, at 26, Mar. 14, 2008 [hereinafter The Case of Khaled al-Maqtari]; Human Rights Watch, Ghost Prisoner: Two Years in Secret CIA Detention 24 (2007).

44 See, e.g., Georg Mascolo & Matthias Gebauer, Milan's Extraordinary Renditions Case: The CIA in the Dock, *Der Spiegel* (Hamburg), Jan. 10, 2007; Mayer, supra note 39; R. Jeffrey Smith, Worried CIA Officers Buy Legal Insurance: Plans Fund Defense In Anti-Terror Cases, Wash. Post, Sept. 11, 2006, at A01.

45 President's Sept. 6, 2006 Address, supra note 5.

46 Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28 U.S.C.).

47 For a summary of the MCA's troubled relationship to international law, see John Cerone, The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and U.S. Law, ASIL Insights, Nov. 13, 2006, available at http://www.asil.org/insights/2006/11/insights061114.html.

48 See President George W. Bush, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), available at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html (stating that "This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives.").

49 In October 2006, John Bellinger, Legal Adviser to the Department of State, stated that "[t]he act itself does not specifically address the CIA program." See John B. Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing on the Military Commission Act of 2006 (Oct. 19, 2006), available at http://fpc.state.gov/fpc/74786.htm.

50 Exec. Order 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

51 See Press Release, Human Rights Watch, U.S.: Close CIA Prisons Still in Operation (Apr. 27, 2007), available at http://hrw.org/english/docs/2007/04/27/usdom15795.htm (discussing the CIA's secret detention and subsequent transfer of Abd Al-Hadi Al-Iraqi); see also The Charlie Rose Show: Interview with Director Michael Hayden (PBS television broadcast Oct. 22 & 23, 2007) (transcript available at https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/interview-with-charlie-rose.html) (in which CIA Director Michael Hayden explains the continuation of the U.S. Program of rendition and CIA detention).

52 The Case of Khaled al-Maqtari, supra note 51, at 26; Amnesty Int'l, USA: Below the radar: Secret flights to torture and 'disappearance,' AI Index AMR 51/051/2006, Apr. 5, 2006; CHRGJ, NYU School of Law, Surviving the Darkness: Testimony from the U.S. "Black Sites" (2007), available at http://www.chrgj.org/projects/docs/survivingthedarkness.pdf; Human Rights Watch, supra note 51, at 24.

53 See Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, Alleged Secret Detentions in Council of Europe Member States, Doc. No. AS/Jur (2006) 03 rev. (2006),

governmental agencies;[54] and documents released through litigation.[55] What follows is a snapshot of the functioning and scope of the Program, based on these sources. The extraordinary rendition and secret detention Program is made up of three main components: apprehension and transfer operations, CIA "black sites," and sites in foreign countries where individuals are held at the behest of the United States. Apprehension and transfer involves a "rendition team" made up of individuals dressed entirely in black and wearing facemasks. These individuals forcibly strip the detainee, subject him to a body cavity search, photograph him while naked, and dress him in a diaper before putting him in a new outfit. Detainees have reported being subjected to beatings during this process. The team next restrains the prisoner using handcuffs, ankle shackles, and chains, and deprives the detainee of sensory perception by covering his ears and eyes. Detainees are then placed aboard a plane (often a small, erstwhile civilian plane) and flown – sometimes for great distances.

Detainees are taken either to a secret CIA prison – a so-called "black site" – or delivered to a foreign government. Some detainees have experienced both fates. In the "black sites," guards dress in black and wear face masks, and detainees are often subjected to sensory manipulation including the use of excruciatingly loud music, horrifying sounds, pitch dark conditions, and sensory deprivation (e.g., through the use of constant white noise). Some detainees have been subjected to waterboarding – simulated drowning – and other "enhanced

available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf [hereinafter Council of Europe January 2006 Report].

54 For a detailed catalog of facts concerning the secret detention and extraordinary rendition Program that have been acknowledged by the U.S. government, see CHRGJ, supra note 38.

55 Press Release, Am. Civil Liberties Union, Newly Released Army Documents Point to Agreement Between Defense Department and CIA on "Ghost" Detainees, ACLU Says (Mar. 10, 2005), available at http://www.aclu.org/safefree/general/17597prs20050310.html. The declassified documents are available at American Civil Liberties Union: Torture FOIA, available at http://www.aclu.org/intlhumanrights/gen/13794res20050429.html. See also Press Release, Amnesty International, Center for Constitutional Rights & CHRGJ, Rights Groups Challenge CIA for Failure to Release More than 7000 Documents Relating to Secret Detention, Rendition, and Torture Program (June 26, 2008), available at http://www.chrgj.org/projects/detainees.html#Disappearances.



interrogation techniques" (or, as President Bush has called them, an "alternative set of procedures"[56]) reportedly approved for use on "high-value detainees."[57] Detention in foreign facilities involves confinement in maddeningly small spaces (such as in the notorious Far Falestin prison in Syria[58]) and the use of torture such as falaka (beatings on the soles of the feet, reportedly used in Jordan[59]), sexual abuse (reportedly used in Jordan and Egypt),[60] and electric shocks (reportedly used in Egypt).[61] Whether in black sites or in foreign facilities, detainees are not given access to the outside world; they are not formally charged with any crime; and they are not allowed to seek the assistance of their governments.

## IS THIS LEGAL? EXTRAORDINARY RENDITION AND INTERNATIONAL HUMAN RIGHTS LAW

Although there have been vigorous debates in the United States about the legality of the extraordinary rendition and secret detention program, intergovernmental organizations such as the Council of Europe, the European Parliament, and nu-

56 See generally President's Sept. 6, 2006 Address, supra note 5.

57 For admissions concerning waterboarding by former CIA Officer Daniel Kiriakou, see CIA man defends 'water-boarding,' BBC News, Dec. 11, 2007, available at http://news.bbc.co.uk/2/hi/americas/7137750.stm; Darius Rejali, 5 Myths About Torture and Truth, Wash. Post, Dec. 16, 2007, at B03; and Joby Warrick & Dan Eggen, Waterboarding Recounted: Ex-CIA Officer Says It 'Probably Saved Lives' but Is Torture, Wash. Post, Dec. 11, 2007, at A01. For a description of the six "enhanced interrogation techniques" that were reportedly approved for use on "high-value detainees", see Brian Ross & Richard Esposito, CIA's Harsh Interrogation Techniques Described, ABC News, Nov. 18, 2005, available at http://abcnews.go.com/WNT/Investigation/story?id=1322866.

58 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of Professor Stephen J. Toope, Fact Finder 13-17 (2005), available at http://www.ararcommission.ca/eng/ToopeReport_final.pdf (describing Maher Arar's detention in Far Falestin prison).

59 See, e.g., Amnesty Int'l., Amnesty International Report 2007: The State of the World's Human Rights 155 (2007), available at http://report2007.amnesty.org/document/15.

60 Id.

61 See Letter from Abu Omar while in an Egyptian prison, translated in Abu Omar, This is How They Kidnapped Me, Chi. Trib., available at http://www.chicagotribune.com/news/nationworld/chi-cialetter-story,1,2033270.story.

merous United Nations bodies have stated unequivocally that the Program contravenes international human rights law binding on the United States.[62]

The relevant human rights norms protecting against extraordinary rendition and secret detention include the following: the prohibition of refoulement, which proscribes transfers to a risk of torture; the prohibition of enforced disappearances, which prohibits the concealment of the fate and whereabouts of individuals deprived of their liberty; and the norm against torture and cruel, inhuman or degrading treatment.[63]

The prohibition of refoulement is set out in a wide variety of human rights instruments. Most relevant to the United States and its partners in the Program are the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment ("Torture Convention" or "CAT") and the International Covenant on Civil and Political Rights ("ICCPR"), which the U.S. government has ratified. CAT article 3 prohibits the transfer of individuals to states where they may be in danger of torture: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Article 7 of the ICCPR prohibits torture and cruel or degrading treatment; this article has been understood to implicitly include a non-refoulement rule. Both of these articles have been interpreted to apply to

62 See U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999: Addendum: United States of America, 5, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) [hereinafter U.S. Second Periodic Report to Committee Against Torture] (considering U.S. report submitted May 6, 2005); U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); Council of Europe June 2007 Report, supra note 8; Council of Europe June 2006 Report, supra note 61; Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007 (2007), available at http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf; Draft Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. A6-0213/2006 (2006), available at http://www.statewatch.org/cia/reports/ep-cia-interim-report-english.pdf.

63 Also relevant but not addressed here are, inter alia, rights against arbitrary detention, rights to consular access, and due process rights.



all forms of inter-state transfer of individuals, and therefore should be read to apply to informal transfers such as rendition. When extraordinary rendition involves transfer to a country where an individual is at real risk of torture or cruel, inhuman or degrading treatment, the transfer is prohibited by binding international human rights law.

Transfers to secret detention are likewise prohibited, in part because prolonged incommunicado detention of the type that detainees experience in CIA "black sites" has itself been found to constitute cruel and inhuman treatment or torture. In addition, secret detention is itself unlawful under international human rights law. The U.N. Committee Against Torture has found that secret detention is a per se violation of the Torture Convention.[64] Further, when carried out in the manner used in the Program, secret detention amounts to enforced disappearance. The recently concluded International Convention for the Protection of All Persons from Enforced Disappearance (adopted by the General Assembly in December 2006) defines enforced disappearance as:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. (Article 2)

While the United States has not ratified this convention, it is bound by the customary international law norm prohibiting enforced disappearance. In addition, a wide variety of other human rights norms are violated through rendition and secret detention, including: the prohibition on arbitrary detention; rights to due

64 See Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture; United States of America, 17, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) (finding that detaining individuals in secret sites constitutes a "per se" violation of the Convention), available at http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf.

process and judicial guarantees; and the right to be free from cruel, inhuman and degrading treatment.

The U.S. government has focused a great deal of energy in the last several years on efforts to carve out legal space for its actions in the "War on Terror." Indeed, it has systematically produced legal arguments – pursuant to both international and domestic law – to support its actions. In relation to the extraordinary rendition and secret detention program, the strategy has been to try to clear a space for actions free of international legal constraints.

The first argument is that human rights law only applies within the territory of a ratifying state – in other words, that human rights norms do not apply extraterritorially. In its reports to the United Nations treaty bodies monitoring the implementation of human rights treaties, the United States has consistently maintained that, unless explicitly specified otherwise, it is bound by human rights treaties only in activities it conducts within U.S. territory.[65] In other words, if you are outside the United States but under the control of the U.S. government, you are unprotected by the human rights norms set out above.

While this argument may have traction under U.S. law, it ignores the relevant jurisprudence of international and regional human rights bodies.[66] Broadly speaking,

65 See, e.g., U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of States Parties Due in 1995: Addendum: United States of America, 183–88, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (considering U.S. report submitted Oct. 15, 1999), available at http://www.bayefsky.com/reports/usa_cat_c_28_add.5_1999.pdf. The U.S. government has made this argument consistently in reports to the U.N. filed in recent years. See Satterthwaite, Rendered Meaningless, supra note 1 at 1351-1354.

66 Although the U.S. Supreme Court has rejected the extraterritorial application of the non-refoulement rule set out in the United Nations Convention Relating to the Status of Refugees, the extraterritorial application of the Convention Against Torture is a separate issue. Congress has passed legislation implementing the Convention's non-refoulement obligation, setting out U.S. policy as follows: "the United States [shall] not . . . expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note (2000) (emphasis added). For an in-depth discussion of this issue,



human rights bodies have determined that treaties apply to two separate extraterritorial situations: cases where states have effective control over territory, and cases where states have power over an individual.[67] Under the effective control doctrine, human rights treaties would apply to places abroad that are under the control of the United States, as well as to the physical territory of the state itself. This means that human rights treaties would apply to U.S. conduct at Guantánamo and other locations where the United States has detention centers. If this were the only scenario in which human rights apply extraterritorially, human rights treaties would protect people in those spaces but not individuals transferred or detained by U.S. authorities in territories not under U.S. control. The second scenario, however – governed by the personal control doctrine – extends to protect all individuals who are within the personal control of U.S. agents, no matter where they happen to be in the world.

The personal control doctrine is especially suitable to cases of transfer and detention, which involve physical custody of individuals by state agents. This reading ensures that human rights treaties fulfill their object and purpose – to protect those vulnerable to state abuses – instead of letting States avoid their duties by moving individuals farther and farther away from the protection of courts, oversight bodies, and humanitarian agencies. Under the personal control test, human rights law applies to all individuals who are apprehended and transferred by a state – here the United States. International human rights law therefore prevents transfers to countries where the individual is at risk of torture or secret detention.

In the instances in which the United States has directly defended aspects of the Program, it has emphasized the promises – so-called "diplomatic assurances" – that it obtains from cooperating countries concerning humane treatment of the detainees it transfers. Very little is known about the process for obtaining diplomatic assurances as part of the Program. Anonymous officials have told the media that CIA-initiated transfers have routinely been accompanied by assurances.

see Satterthwaite, Rendered Meaningless, supra note 1 at 1376-1379.

67 For citations and in-depth discussion of the doctrines discussed in this paragraph, see Satterthwaite, Rendered Meaningless, supra note 1 at 1351-1375.

One intelligence official specified that assurances are used whenever renditions are carried out with the purpose of delivering the detainee for interrogation, and not for trial. Recently retired CIA officers have said that verbal assurances are required by the CIA's Office of General Counsel whenever a rendition is carried out. Far from reducing the risk of torture, however, these assurances were known to be "a farce," according to a CIA officer who participated in the rendition program.[68] The U.S. government has explained to the United Nations' human rights bodies that it relies on such assurances "as appropriate"; assurances are balanced against concerns that the individual may be at risk of torture in the custody of the country's officials.[69] This balancing approach is out of line with human rights standards concerning diplomatic assurances, which focus on safeguards that must accompany any use of assurances.[70] U.S. practice is in blatant violation of these safeguards. Worse, if renditions are being conducted with the intent of subjecting an individual to coercive interrogations, the incentive structure is classically and horribly perverse: the sending country has an investment in the receiving country's abusive practices, and both states want those abuses to remain secret. As one official told *The Washington Post*, "they say they are not abusing them, and that satisfies the legal requirement, but we all know they do."[71]

## AT WAR WITH AL-QAEDA? EXTRAORDINARY RENDITION AND INTERNATIONAL HUMANITARIAN LAW

Extraordinary rendition often takes place far from any traditional battlefield. Whether these operations qualify as part of an armed conflict that is governed by humanitarian law[72] – either its authorizing norms or its limiting rules – is hotly contested.[73] Briefly, the heart of the matter is this: humanitarian law authorizes – or at least accepts – the use of lethal force by privileged combatants (armies and militias that follow the rules of war), and limits the use of force and coercion in relation to protected persons (including prisoners of war, civilians, and those placed hors de combat because of injury or sickness). In relation to extraordinary rendition, the question is what law applies to the transfers and secret detention of individuals the United States asserts are unlawful combatants in a new kind of war.

Among the most controversial arguments the United States has made is that it is engaged in an armed conflict against Al-Qaeda – or more broadly, against ter-

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68 Priest, supra note 9.

69 United States, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America, at 32-37, available at http://www.usmission.ch/Press2006/CAT-May5.pdf (submitted to the Comm. Against Torture).

70 Satterthwaite, Rendered Meaningless, supra note 1, at 1379-86.

71 Priest, supra note 9.

72 International humanitarian law – the law of armed conflict – is made up of both treaty law and customary international law. The most important treaties governing the treatment of individuals during times of armed conflict are the four Geneva Conventions of 1949. These treaties – which have been ratified by every state in the world – together set out basic rules of humane treatment. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

73 In launching its attacks on Afghanistan, the administration declared that it was engaged in an international armed conflict. At first, this approach was largely accepted by the international community, and the legality of the U.S. resort to force was, on the whole, accepted: the magnitude of the attacks on the World Trade Center and the Pentagon were deemed sufficient to trigger the inherent right of self-defense, and few countries argued that it was unlawful or inappropriate to target the Taliban as well as Al-Qaeda in response. The controversy began when the United States declared that detainees picked up on the battlefield in Afghanistan were not entitled to protection under the Geneva Conventions – neither Geneva III (which protects prisoners of war) nor Geneva IV (which protects civilians). See, e.g., Memorandum from Alberto Gonzales on Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban to the President, (January 25, 2002), reprinted in The Torture Papers 118-19 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) ("In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning and renders quaint some of its provisions. . .").

rorism[74] – in which the entire world is literally a battlefield where unlawful combatants are subject to being killed, captured or detained without notice (hence the potential to issue "K-C-D" orders). [75] This argument is aimed at legitimating the administration's use of military or military-like techniques against a non-state enemy, while insulating its actions against that enemy from assessment under international humanitarian or human rights law. The argument proceeds generally as follows: the United States is engaged in an international armed conflict against a non-state enemy (Al-Qaeda, a transnational terrorist network and its affiliates). As such, the conflict is not regulated by the protective norms of humanitarian law, which apply either to armed conflicts between nations ("international armed conflict," as described by Common Article 2 of the 1949 Geneva Conventions),[76] or to intrastate armed conflict ("non-international armed conflict," as described by Common Article 3 of the Geneva Conventions).[77] Because this new kind of armed

74 As Marco Sassòli explains: "Astonishingly. . . the administration proceeded to declare that it was engaged in a single worldwide international armed conflict against a non-State actor (Al-Qaeda) or perhaps also against a social or criminal phenomenon (terrorism) if not a moral category (evil). This worldwide conflict started – without the United States characterizing it as such at that time – at some point in the 1990s and will continue until victory." Marco Sassòli, Use and Abuse of the Laws of War in the "War on Terrorism," 22 Law & Ineq. 195, 197–98 (2004).

75 The President determined on February 7, 2002, that the Geneva Conventions applied to the "present conflict with the Taliban," but found that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under article 4 of [the Third] Geneva [Convention]." Memorandum from President George W. Bush on Humane Treatment of Al-Qaeda and Taliban Detainees to the Vice President, reprinted in The Torture Papers, supra note 84, at 134 (determining that "none of the provisions of Geneva apply to our conflict with Al-Qaeda in Afghanistan or elsewhere throughout the world. . ."). This decision was based on a series of memos prepared by Bush administration officials, the State Department, and the military concerning the proper interpretation of several technical provisions of Geneva III. See generally memoranda reprinted in The Torture Papers, supra note 84, at 138–43.

76 See Geneva III art. 2 (stating that the Convention shall apply to "all cases of declared war or of any other armed conflict").

77 Before the June 2006 Hamdan ruling, the United States denied that even Common Article 3 standards applied to detainees it determined were unlawful combatants, apparently concluding that such individuals are not protected by the Geneva Conventions at all, but instead, that as "enemy combatants" they essentially fall outside the laws of war. See generally memoranda reprinted in The Torture Papers, supra note 84, at 138–43. This decision has been widely critiqued on the basis that – to use the words of the ICRC, writing in 1958: Every person in enemy hands must have some status under international



conflict is not covered by the "quaint" provisions of international humanitarian law,[78] the United States is entitled to adapt its techniques to the circumstances without running afoul of the rules. One of these adaptations is the use of extraordinary rendition and secret detention.

In its interactions with United Nations human rights bodies, the United States has asserted that it is engaged in a "War on Terror" that is governed exclusively by the laws of armed conflict.[79] In making this assertion, the United States has argued that international humanitarian law is the applicable lex specialis,[80] i.e., that humanitarian law provides the relevant substantive rules regarding the treatment of individuals in the "War on Terror." In combination, the administration's reference to the lex specialis rule[81] and its argument that it can "render" suspected terrorists as part of its "War on Terror," seem to indicate that the U.S. government believes that no law applies to protect individuals against such transfers. The legal vacuum is constructed as follows: since the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al-Qaeda members, however, are unprivileged combatants, and thus unprotected by rules found in the Geneva Conventions concerning the transfer of prisoners of

law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.
Int'l Comm. of the Red Cross, Commentary: IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 (1958) (principally authored by Oscar M. Uhler & Henri Coursier; edited by Jean S. Pictet).

78 See, e.g., Memorandum from Alberto R. Gonzales, supra note 84 ("In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning and renders quaint some of its provisions …").

79 See United States, Reply of the Government of the United States of America to the Report of the Five UN Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 16 (Mar. 10, 2006), available at http://www.asil.org/pdfs/ilib0603212.pdf ("The United States is engaged in a continuing armed conflict against Al-Qaeda, and customary law of war applies to the conduct of that war and related detention operations.").

80 Id. at 22.

81 The international law rule lex specialis derogat legi generali means that a special rule prevails over a general rule. See Malcolm N. Shaw, International Law 116 (5th ed., 2003).

war or other protected persons. Finally, the argument concludes, the rules of human rights law do not apply either, since humanitarian law operates as lex specialis to oust such rules from application. For this reason, suspected terrorists may be informally transferred from place to place without those transfers being unlawful, since no law applies.

A similar – though more textual – argument has been made in relation to secret detention. In the few instances in which the United States has defended the practice, it has alleged that certain individuals who pose a threat to security are not protected by the Geneva Conventions' provisions concerning access by the International Committee of the Red Cross ("ICRC") to detainees.[82] Simultaneously, the United States implies that the Geneva Conventions are the only relevant source of any obligations to allow access to detainees or to disclose the location of such detainees held in the context of armed conflict. In other words, the United States indicates that because such individuals are not covered by the Convention provisions concerning access to detainees, they are not protected against secret detention.[83] The ICRC has repeatedly sought access to detainees held in secret locations, and has expressed concern publicly about the practice.[84] Further, the ICRC has determined that enforced disappearance is unlawful under customary international humanitarian law, which

82 See, e.g., Steven R. Weisman, U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret, *N.Y. Times*, Dec. 10, 2005, at A10.

83 See, e.g., Sean McCormack, Spokesman, Dep't of State, Daily Press Briefing (May 12, 2006) (transcript available at http://www.state.gov/r/pa/prs/dpb/2006/66202.htm) ("Look, there are – under the Geneva Conventions there is a certain category of individual, and this is allowed for under the Geneva Conventions, individuals who forfeit their rights under Geneva Convention protections, and they do this through a variety of different actions. So there are a group of – there are allowances in the Geneva Convention for individuals who would not be covered by that convention and, therefore the party holding them would not be subject to the Geneva Conventions in providing access to those individuals.")

84 See ICRC, U.S. Detention Related to the Events of 11 September 2001 and its Aftermath--The Role of the ICRC, May 14, 2004, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/73596F146DAB1A08C1256E9400469F48 (noting that "the ICRC has repeatedly appealed to the American authorities for access to people detained in undisclosed locations. . . . Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations.").



binds all states as a general matter.[85] With respect to international humanitarian law, there are three main responses to the Bush administration's "War on Terror" approach to extraordinary rendition and secret detention. All begin with the common agreement that the current struggle against Al-Qaeda and other transnational terrorist groups is not neatly governed by the laws of war. This is because international humanitarian law applies only to situations of armed conflict, and the definition of "armed conflict" is not easy to apply to the disparate circumstances of the "War on Terror" in a uniform manner.[86] Beyond cases in which two or more states' armies face off on a traditional battlefield, an armed conflict exists for the purposes of international humanitarian law only under the following circumstances:

> a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified.[87]

When these characteristics are absent, international humanitarian law treaties are not the controlling law, since their minimum threshold of applicability will not have been reached. These characteristics, which are drawn from treaty and customary

85 See International Red Cross, 1 Customary International Humanitarian Law: Rules 340-343 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

86 Common Article 2 provides for the following rule of application: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." See art. 2 of Geneva I, Geneva II, Geneva III, and Geneva IV, supra note 83. The ICRC Commentary explains that the term "armed conflict" was chosen to avoid the potentially "endless" arguments that would arise if the word "war" was instead used; the emphasis was to be on the factual situation – the Conventions should apply to "[a]ny difference arising between two States and leading to the intervention of members of the armed forces" – not on the legal circumstances for such intervention. ICRC, Commentary: III, Geneva Convention Relative to the Treatment of Prisoners of War 26 (1960) (prepared by Jean de Preux; edited by Jean S. Pictet).

87 Gabor Rona, Legal Advisor, ICRC, Presentation at Workshop on the Protection of Human Rights While Countering Terrorism, Copenhagen: When is a War Not a War? The Proper Role of the Law of Armed Conflict in the "Global War on Terror" (Mar. 16, 2004) (available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5xcmnj?opendocument).

law governing non-international armed conflicts, are not uniformly present in the "War on Terror."[88]

In the face of this mismatch, the administration suggests that there is a legal vacuum. International legal scholars and advocates reject this approach, and tend to make three alternative arguments. The first asserts that the laws of war are not applicable to the "War on Terror," but human rights law continues to apply. A second argument posits that although the law is not perfectly suited to the current situation, the United States' conflict with Al-Qaeda is best viewed as a non-international armed conflict, to which only the minimum rules applicable to such conflicts apply. The final argument accepts the administration's view that the United States is engaged in a new type of war. Rather than accepting that international humanitarian law is silent about this new form of conflict, however, this line of reasoning asserts that international humanitarian law should be read in conjunction with other rules of international law to protect the basic rights of all – including suspected terrorists. In the end, the problem with the administration's arguments is that extraordinary rendition and secret detention are illegal under any of these paradigms – they violate both human rights law and international humanitarian law.

After Hamdan, the U.S. government appears to have accepted that its "War on Terror" activities are governed by Common Article 3.[89] While there was some

88 Of course, certain campaigns or operations in the "War on Terror" plainly entail armed conflict, including the wars in Afghanistan and Iraq. Those operations are limited in space and time, however, and are distinct from the concept of a "War on Terror" that is not limited by geography.

89 Soon after the Supreme Court delivered its judgment in Hamdan, Deputy Defense Secretary Gordon England issued a memo stating that "[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al-Qaeda." Memorandum from Gordon England, Deputy Defense Secretary, to the Secretaries of the Military Departments (July 7, 2006), available at http://graphics8.nytimes.com/packages/pdf/politics/060711pentagon_memo.pdf. Although Secretary England stated that all Department of Defense operations other than the military commissions found to be impermissible by the Supreme Court were in line with Common Article 3, he ordered Department of Defense officials to review all policies and directives to ensure they were in compliance with this provision. Id.; see also Donna Miles, England Memo Underscores Policy on Humane Treatment of Detainees, AM. FORCES PRESS SERVICE, July



confusion concerning the application of Common Article 3 to the CIA's activities,[90] the issue was settled on July 20, 2007, when President Bush issued an executive order stating that Common Article 3 "shall apply to a program of detention and interrogation operated by the Central Intelligence Agency."[91] After "reaffirming" that terrorism suspects are "unlawful combatants" not eligible for protection as prisoners of war, President Bush "determine[d] that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section."[92] While this would seem to bring the United States closer to compliance with international legal standards, the Order also purports to peg the humane treatment standards of Common Article 3 to standards set out in domestic law, and concludes that the CIA's detention and interrogation Program is compliant with relevant law, including Common Article 3 as defined in the Order. While the order certainly has some domestic legal effect, it plainly did not clarify U.S. compliance as a matter of international law.[93]

Common Article 3 protects all individuals who have been detained from – among other things – "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment." This language should be interpreted to prohibit secret detention, since – as discussed above – undisclosed detention

11, 2006, available at http://www.defenselink.mil/news/NewsArticle.aspx?ID=114. John Bellinger, Legal Adviser to the Department of State, has indicated that his Department understands the Hamdan decision to have extended Common Article 3 to the general "conflict with Al-Qaeda." John B. Bellinger, Legal Advisor, Dep't of State, Foreign Press Center Briefing: The Military Commission Act of 2006, at 1 (Oct. 19, 2006), available at http://fpc.state.gov/fpc/74786.htm.

90 See Mark Mazzetti & Kate Zernike, White House Says Terror Detainees Have Basic Geneva Rights, *N.Y. Times*, July 12, 2006, at A1. For a discussion of the debate within the administration concerning the applicability of Common Article 3 to terrorism suspects, see Tim Golden, Detainee Memo Created Divide in White House, *N.Y. Times*, Oct. 1, 2006, at A1.

91 Exec. Order 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

92 Id.

93 For a comprehensive discussion of the ways in which this executive order condones activities that contravene international law, see Amnesty Int'l, USA: Law and Executive Disorder: President Gives Green Light to Secret Detention Program, AI Index AMR 51/135/2007, Aug. 17, 2007.

in itself, has been found to violate norms against torture and cruel, inhuman or degrading treatment. The humane treatment provisions in Common Article 3 should also be read to include protection against transfer to a country or location where the individual is at risk of torture or cruel treatment. Applying the same logic used by international bodies interpreting human rights treaties, the protection against torture and cruel or degrading treatment in Common Article 3 should be interpreted to include a protection against non-refoulement to the same kind of treatment; this is necessary to ensure the prohibition on torture, and the humane principles on which it is built, has real meaning.[94] Further, the fact that Common Article 3 does not include an explicit non-refoulement rule is not dispositive: at the time it was drafted, this provision was largely designed for application in the context of civil wars and other intra-state conflicts.[95] Extraordinary rendition and secret detention are therefore both prohibited by Common Article 3.[96]

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94 See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 88 (1989) (holding that "[i]t would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."); see also Satterthwaite, Rendered Meaningless, supra note 1, at 1357 n.141 and accompanying text (discussing Human Rights Committee's construction of Article 7 of the ICCPR).

95 Unlike Geneva III and IV, which contain explicit rules concerning inter-state transfer of protected persons, therefore, Common Article 3 contains only the most basic guarantees required for situations of non-international armed conflict. Although it was not envisioned at the time that states would transfer among themselves fighters in non-international armed conflicts, this failure of imagination should not be taken as a limitation on the protection against refoulement.

96 A comparatively more difficult question is whether the United States is obliged to apprehend instead of killing suspected Al-Qaeda operatives under Common Article 3. In other words, even if certain ways of carrying out the "capture" and "detain" parts of a "K-C-D" order are unlawful, is the U.S. government within its rights to instead kill designated individuals? This question must be addressed because non-state fighters are not protected against attack when they are taking an "active part in the hostilities" in a non-international armed conflict. Serious debate rages over what types of activities trigger this loss of immunity and whether individuals deemed to be "enemy combatants" by the



Further, international authorities have found that international humanitarian law must be read in conjunction with international human rights law. The International Court of Justice explained the relationship between humanitarian law and human rights law in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,[97] where it stated plainly that international human rights law continues to apply in times of armed conflict. The lex specialis rule, operating as a conflicts-of-law norm, requires that when rights have incongruous content in times of armed conflict, humanitarian law must necessarily inform the interpretation of such rights. When a conflict arises between norms, the lex specialis rule requires preference of international humanitarian law. In such cases, international humanitarian law allows for the justification of what would otherwise be a violation of human rights law. A soldier shooting an enemy on the battlefield looks like a human rights violation (the deprivation of life without due process) until the international humanitarian law rule is applied (privileged combatants may kill other combatants, or civilians taking a direct role in hostilities). In the context of extraordinary rendition, there is no conflict between norms: the rules of non-international armed conflict prohibit torture and cruel treatment. Human rights law prohibits the same kind of treatment, but also provides more specific – and harmonious – content, prohibiting not only torture and cruel treatment, but also adding precision by prohibiting refoulement to such treatment.

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U.S. government have, by definition, been found to have taken such an active part, making them legitimate targets for military marksmen or CIA drones. In other words, under humanitarian law, the application of Common Article 3 standards to the "War on Terror" may not bar the United States from killing members of Al-Qaeda in situations of armed conflict, even if the United States had not attempted to arrest or detain them. However, reading international humanitarian law together with human rights law produces a rule that does require states to prefer the apprehension of terrorist suspects over killing them. For a discussion of these issues, see, e.g., Philip B. Heymann & Juliette N. Kayyem, Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism (2004), available at http://www.mipt.org/pdf/Long-Term-Legal-Strategy.pdf; Emmanuel Gross, Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens, 15 Temp. Int'l & Comp. L.J. 195, 245-46 (2001); see also Jonathan Ulrich, Note, The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism, 45 Va. J. Int'l L. 1029 (2005).

97 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996).

## THE UNCERTAIN FUTURE OF THE EXTRAORDINARY RENDITION AND SECRET DETENTION PROGRAM

What is the future of the extraordinary rendition and secret detention program? Will President Barack Obama abolish the Program, replace it with something different, or allow it to continue in its current form? Human rights and civil liberties organizations in the United States and abroad have submitted recommendations concerning counter-terrorism policy to the new president; the vast majority of such recommendations call on the new president to cease extraordinary rendition.

Indeed, by now, there are few – if any – commentators, policy-makers, or national security experts who will defend the policy of "extraordinary rendition." More precisely, most everyone now agrees that extraordinary rendition – transferring individuals (since 9/11, usually terrorism suspects) to countries where they face a substantial risk of torture – is illegal, morally wrong, counterproductive, or a combination of the three.

Where the debate still rages – and where policy-makers will need to tread carefully – is in relation to three main issues: (a) whether it is likewise wrong to transfer a terrorism suspect to a country where s/he is likely to face cruel, inhuman and degrading treatment ("CIDT") that stops short of torture; (b) whether informal promises by a receiving country – usually referred to as "diplomatic assurances"- – are legally sufficient to obviate an otherwise patent risk of torture upon transfer; and (c) whether there are any legal, moral, or policy constraints on the transfer of an individual outside of legal process when risk of torture and CIDT are not a concern. A careful analysis of human rights law establishes that (a) it is illegal to transfer suspects to countries where they are at serious risk of mistreatment short of torture; (b) diplomatic assurances are not worth the paper they are (not) written on; and (c) even in the absence of a substantial risk of torture or CIDT, informal transfers, as currently practiced, are prohibited under international law and should be formalized and regulated.

Confusion arises concerning the legality of transfers of individuals to countries where they may face CIDT but not torture because the U.S. has ratified two different treaties that each set out a different standard concerning non-refoulement. As discussed earlier in this article, CAT prohibits transfers to a risk of torture. The ICCPR, on the other hand, prohibits transfers to a risk of torture and CIDT. This prohibition is not explicit, but stems from the non-derogable nature of the prohibition of ill-treatment set out in Article 7 of the ICCPR, and the recognition that CIDT at times becomes so severe that it amounts to torture. The ICCPR refused to draw a bright line between the two forms of ill-treatment, instead prohibiting both in stark terms. On the basis of this equality of protection, numerous international bodies have determined that the ICCPPR and similar conventions prohibit all transfers to a risk of torture or CIDT. Until now, however, this rule has not been implemented domestically. Despite this failure, the United States ratified the ICCPR without relevant reservations, and it is thus bound by this requirement to refrain from transferring individuals to a risk of CIDT. Renditions to a risk of cruel, inhuman or degrading treatment should be explicitly banned by Congress or prohibited by the new administration.

Second, if it is impermissible for the United States to transfer individuals to countries where they face a substantial risk of torture or CIDT, will diplomatic assurances be sufficient to protect against this risk, transforming otherwise risky transfers into legal ones? Diplomatic assurances ("DAs") are promises made by a receiving country concerning the treatment of a specific individual facing transfer. While DAs are subject to regulation when used in the context of extradition or removal from inside the United States, there are no such regulations applicable to extra-territorial transfers. Assurances have, however, been obtained by the Department of Defense when affecting transfers from Guantánamo Bay, and by the CIA when transferring individuals to countries such as Egypt, Syria, and Morocco. While DAs may seem perfectly reasonable in the abstract, they are woefully inadequate in practice. This is true for three main reasons. First, instead of being secured through a legally-authorized procedure, DAs are obtained through back-room deals by diplomats in secret. Second, assurances have not been subject to judicial review. Individuals facing rendition are by definition unable to access review, since they are picked up and transferred without any process at all. Third, once secured, assurances are not carefully monitored. This is in part because the incentive structure behind such promises ensures that both parties will minimize

opportunities to discover whether breaches have occurred, since such breaches would reflect badly on both sending and receiving countries. International human rights bodies have found that both CAT and the ICCPR require that DAs fulfill three basic requirements to be permissible:

> *(1) Assurances must be obtained using "clear" and established procedures.*
> *(2) Assurances must be subject to judicial review.*
> *(3) Assurances must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.*

U.S. practice concerning DAs is out of compliance with each of these requirements, and is therefore illegal under human rights law. The new president and Congress should either reject DAs outright, or strictly regulate their use.

The final issue is whether there are any legal, moral, or policy constraints on the transfer of an individual outside of legal process when risk of torture (and CIDT) is not a concern. This form of transfer – rendition without the modifier "extraordinary" – is the form that has been most vociferously defended by administration officials and commentators. For example, on December 5, 2005, Secretary of State Condoleezza Rice claimed that, "[f]or decades, the United States and other countries have used have used 'rendition' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." Secretary Rice was right that the U.S. and other States have used rendition to bring individuals into their territory to face regular criminal charges. Indeed, as discussed above, the United States has used such "renditions to justice" as an official policy since the Regan era, when drug kingpins and criminals wanted for terrorist crimes were lured or abducted to the United States to stand trial with full constitutional guarantees of due process. What is different now is that there has been no effort to charge or bring to trial individuals who have been transferred. Instead, individuals have been picked up, transferred, and interrogated or detained without charge. The detaining powers are U.S. "War on Terror" allies such as Egypt and Pakistan, or the U.S. itself, which holds such individuals in CIA "black sites" or transfers them to Guantánamo. While Secretary Rice has asserted that these transfers are lawful under international law, the U.S. practice is in fact unlawful, and the new administration should either halt its use or bring it in line with international law.

Under international law, there are several basic principles that must be upheld whenever an individual is transferred from the custody of one government to that of another. First, the transferring state must respect the sovereignty of the state where the individual is found. This requirement means, for example, that a transferring state may not abduct an individual on another state's territory without the permission of that state. Of course, sovereignty concerns are not always an issue, since an individual may be apprehended on the high seas or with the cooperation of the state where the individual is found. Second, in all cases, the transferring state must respect and protect the human rights of the individual being transferred once that person is taken into their custody. This requires, at minimum, that the transferring state act in accordance with the principle of legality, meaning that the apprehension must have a basis in established law, and that the apprehension must not amount to arbitrary deprivation of liberty under international human rights law. This is especially relevant for individuals apprehended and sent to CIA "black sites" or foreign interrogation centers, where no procedures whatsoever are in place to check against arbitrariness of detention. Finally, while international law in this area is nascent, a procedural right to challenge transfer before it has been effected has been clearly enunciated by a number of international bodies. This right requires states to provide a forum in which the individual facing transfer can access a neutral decision-maker to articulate his or her challenge to the contemplated transfer. The scope of this challenge has not been clearly articulated, but at a minimum it includes the procedural right to make out a claim of non-refoulement. Although this may sound like a simple restatement of the earlier substantive rule against return to a risk of torture, this is in fact a right to a specific procedure – one that would allow the individual himself to articulate his subjective fear of mistreatment – and not one in which the transferring state determines, ex parte, whether a risk exists or not. It is up to the transferring state to determine whether this challenge should be heard by a traditional court, an administrative body, or some other neutral decision-maker authorized by law, but in all cases, the review available must be conducted by a body that has been regularly constituted and which is governed by transparent procedures.

Until and unless the United States complies with its human rights obligations when carrying out informal transfers, it will continue to flout international law. What was once an informal process designed to bring scofflaws within the reach of justice has become a process aimed at taking individuals outside the rule of law. The new administration must reverse course, extending human rights to all – even those suspected of the worst crimes.



# PENDING INVESTIGATION AND COURT CASES

by Denise Bentele[1], Kamil Majchrzak[2] and Georgios Sotiriadis[3]

## I. THE FREEDOM OF INFORMATION CASES (USA/EUROPE)

### Facts

Approximately 70 countries worldwide have enacted freedom of information laws. In relation to the U.S. rendition program, two regions have been at the forefront: the United States of America and Eastern Europe, primarily Albania, Macedonia, Poland and Romania.

### 1. FOIA CASES IN THE U.S.

In 1966, the United States of America enacted the Freedom of Information Act (FOIA) as a federal law that establishes the public's right to obtain information from federal government agencies. The FOIA is codified at 5 U.S.C. Section 552 and was amended most recently in 2002.[4] According to the law, "any person" can file a FOIA request including U.S. citizens, foreign nationals, organizations, associations, and universities.

On December 21, 2004, the Center for Constitutional Rights (CCR) submitted a FOIA request to the Department of Defense, the Central Intelligence Agency (CIA),

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4 Freedom of Information Act, 5 U.S.C. § 552, 4 July 1966, available at: www.usdoj.gov/oip/foiastat.htm.

the Department of Justice and the Department of State.[5] On April 25, 2006, Amnesty International USA (AI USA) and Washington Square Legal Services (WSLS) submitted two FOIA requests to the same agencies, in addition to the Department of Homeland Security, to gain information about supposed ghost detainees, unregistered detainees and CIA detainees.[6]

Despite official U.S. government acknowledgment of the rendition and secret detention of individuals in connection with the so-called "War on Terror," the agencies have continued to withhold documents that are responsive to the FOIA requests.[7] The CCR, AI USA and WSLS have only received five documents.[8]

On June 7, 2007, the three organizations filed a lawsuit under the Freedom of Information Act against the Department of Defense, the Department of Justice, the Department of State, the Department of Homeland Security and the Central Intelligence Agency. The organizations sought the immediate release of records requested from the agencies pertaining to the secret detention and extraordinary rendition of individuals in the so-called "War on Terror."[9]

The information contained in the requested records allegedly includes evaluations or authorizations of secret detentions and transfers, policies and procedures for such programs, the identities of individuals detained or transferred and the locations of their detention or transfer, the activities of private contractors and non-governmental actors, and injuries sustained and treatment of individuals detained or transferred.[10]

The suit raises six causes of action for violation of the FOIA: failure to expedite processing of the requests,[11] failure to make the sought records promptly available,[12] failure to respond efficiently to their requests,[13] failure to release records, [14] failure to grant a fee waiver,[15] and improper withholding of agency records.[16] The suit seeks immediate and expedited processing and release of the requested records. On September 4, 2008, the government submitted a memorandum of law opposing the human rights organizations´ cross-motion for partial summary judgment. [17] The case remains pending.

On December 20, 2006, attorney Baher Azmy filed a complaint on behalf of Murat Kurnaz[18] based on the Freedom of Information Act after the Department of Defense was unresponsive to his FOIA request filed in October 2006. The request sought the release of transcripts and records related to Kurnaz' Combatant Status Review Tribunal and Administrative Review Board proceedings. [19]

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5 Complaint of Center for Constitutional Rights (CCR), Amnesty International (AI) USA and Washington Square Legal Services (WSLS) v. Central Intelligence Agency (CIA), Department of Defense, Department of Homeland Security, Department of Justice, Department of State and their components before the U.S. District Court for the Southern District of New York, 7 June 2007 ("U.S. Complaint"), No. 30.

6 Amnesty International and Washington Square Legal Services, Request Submitted under the Freedom of Information Act for Records Concerning Detainees, including 'Ghosts Detainees/Prisoners,' 'Unregistered Detainees/Prisoners,' and 'CIA Detainees/Prisoners', 26 April 2006, available at: www.chrgj.org/docs/FOIA%20Requests.pdf.

7 U.S. Complaint, No. 6.

8 U.S. Complaint, No. 34.

9 Center for Constitutional Rights, Freedom of Information Act: Ghost Detention and Extraordinary Rendition Case, available at: www.ccrjustice.org/ourcases/current-cases/freedom-information-act%3A-ghost-detention-and-extraordinary-rendition-case.

10 U.S. Complaint, No. 29 I-V.

11 U.S. Complaint, No. 36-37.

12 U.S. Complaint, No. 38-40.

13 U.S. Complaint, No. 38-40.

14 U.S. Complaint, No. 41-42.

15 U.S. Complaint, No. 43-45.

16 U.S. Complaint, No. 46-47.

17 Center for Constitutional Rights, Freedom of Information Act: Ghost Detention and Extraordinary Rendition Case, supra note 9.

18 Baher Azmy v. United States Department of Defense. U.S. (2006) available at: http://law.shu.edu/administration/public_relations/press_releases/2006/kurnaz_complaint_12_21_06.pdf.

19 For detailed information about the case of Murat Kurnaz please see the separate chapter "6. The Cases of Murat Kurnaz and Khaled El Masri (Germany)."

## 2. Freedom of information cases in Eastern Europe

Freedom of information laws have been enacted in Albania,[20] Macedonia,[21] Poland[22] and Romania.[23]

In October 2007, groups in all four countries began working with the Open Society Justice Initiative on a project to explore how freedom of information requests and related litigation might be used to shed light on the involvement of their governments in the CIA's program of extraordinary rendition. The aim was to pave the way for possible cases before the European Court of Human Rights to challenge information denials and complicity in those renditions.

In Albania, the Center for Development and Democratization of Institutions (CDDI) filed freedom of information requests with the Ministry of Defense and the Ministry of the Interior regarding Albania's role in the detention, interrogation and rendition of Khaled El Masri.[24]

CDDI's freedom of information requests were rejected on personal privacy and state secrets grounds. CDDI appealed this judgment. To date, the parties are still awaiting the decision of the Tirana District Court. It should be noted that the Ministry of Defense failed to appear at most scheduled court hearings or defend its denial. CDDI recently filed a second freedom of information request against the Ministry of the Interior demanding clarification on many of the unanswered inquiries. The Ministry of Interior denied having any knowledge or records related to El Masri 's entry into Albania, but confirmed that their records did indicate that El Masri left Albania on a commercial flight on May 29, 2004. There have been no further explanations provided for how El Masri entered the country and whether he was ever detained by Albanian law enforcement agencies.

In Macedonia on May 15, 2008, the Open Society Foundation filed information requests on behalf of El Masri against the Ministry of Interior, the Ministry of Defense, and the Civil Aviation authorities. This freedom of information request focused on the circumstances of El Masri´s stay in Macedonia and the flight that brought him to Afghanistan. The Civil Aviation authorities confirmed that a flight landed in Macedonia without passengers and then took off for Afghanistan with one passenger. To date, there have been no responses provided from the other ministries involved. As a part of a multi-track strategy, on October 6, 2008 attorneys for El Masri in Macedonia filed a criminal complaint against torture and unlawful deprivation of liberty with the General Public Prosecutor's Office in Skopje. The case is still pending.

In Poland, the Helsinki Foundation for Human Rights filed information requests with Prime Minister Donald Tusk[25] (PO) and the Chairman of the Parliamentary Special Services Committee,[26] Janusz Zemke (LiD),[27] on January 10, 2008. The requests focused on previous and planned actions by the committee involving the alleged use of Polish air space, the Szymany Airport near Szczytno, and in-

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20 Republic of Albania Assembly, Law No. 8503 on the Right to Information over the Official Documents, 30 June 1999, available at: www.freedominfo.org/documents/AL%20RightInfoOffDocs.doc.

21 Republic of Macedonia, Law on the Free Access to Information of Public Character, 25 January 2006, available at: www.freedominfo.org/documents/Macedonia%20FOI%20Law%20ENG%20Official%20Gazette%2013-2006.doc.

22 Act on Access to Public Information, Journal of Laws, 2001 September 6, available at: www.ec.europa.eu/information_society/policy/psi/docs/pdfs/implementation/po_tra_%20dz-u-01-112-1198_21-03-05.doc.

23 Parliament of Romania, Law No. 544 on Free Access to Public Information, 12 October 2001, available at: http://www.sie.ro/En/Legi/544.pdf.

24 For further details about the case, please see the separate chapter "6. The Cases of Murat Kurnaz and Khaled El Masri (Germany)."

25 Helsińska Fundacja Praw Człowieka, Pytamy Premiera o 'tajne loty CIA', Program Spraw Precedensowych, 13 January 2008, available at: http://www.hfhrpol.waw.pl/precedens/pl/aktualnosci/pytamy-premiera-o-tajne-loty-cia.html.

26 Helsińska Fundacja Praw Człowieka, Wniosek o udostepnienie informacji publicznej do speckomisji, Program Spraw Precedensowych, 13 January 2008, available at: http://www.hfhrpol.waw.pl/precedens/pl/aktualnosci/wniosek-o-udostepnienie-informacji-publicznej-do-specko.html.

27 Lewica i Demokraci [Left and Democrats] is a coalition of parties established in 2006 from the Sojusz Lewicy Demokratycznej (SLD), Unia Pracy (UP), Partia Demokratyczna - demokraci.pl and Socjaldemokracja Polska (SDPL), led by former polish president Aleksander Kwaśniewski.

telligence facilities in Stare Kiejkuty, by the Central Intelligence Agency (CIA) to transport, interrogate and detain individuals suspected of terrorism between 2002 and 2005 by the U.S. government. Less than two weeks later, the chairman of the committee withdrew the request stating that it was unfounded. A second request was submitted on February 15, 2008, demanding an endorsement of this decision by the committee. The Polish Parliament (Sejm) replied on February 29, 2008 with a statement asserting that according to parliamentary rules of procedure and the law on access to public information, the chairman of the committee was not entitled to admit or deny the request for access to public information. On March 14, 2008, Prime Minister Donald Tusk replied to the request claiming that the allegations had been clarified in 2005, and that at this point the Polish government did not have any intention to start a new investigation.[28]

In late June, Polish Ombudsman Janusz Kochanowski asked the Prime Minster to clarify which measures had been undertaken or are currently planned to verify the information about the detention and torture of terror suspects in secret detention facilities.[29] In his letter, Kochanowski affirmed that the allegations were of renewed interest after a publication by Scott Shane in the *New York Times*. After a subsequent request [30] by the Polish Helsinki Foundation on May 9, 2008, the Prime Minster transferred the case to the National Prosecution Service in Warsaw. A secret investigation examining the existence of secret detention facilities has been ongoing since that time.[31]

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28 Kancelaria Prezesa Rady Ministrów, Letter from Jacek Filipowicz (Chancellery of the Prime Minister) to Danuta Przywara (President of the Polish Helsinki Foundation for Human Rights), 14 March 2008, available at: http://www.hfhrpol.waw.pl/precedens/images/stories/odpowiedz_premier.pdf.

29 Rzecznik Praw Obywatelskich, Letter from Janusz Kochanowski (Polish Ombudsman) to Donald Tusk (Prime Minister) 30 June 2008, available at: http://www.rpo.gov.pl/pliki/12149079480.pdf.

30 Helsińska Fundacja Praw Człowieka, Letter from Danuta Przywara to Donald Tusk, 9 May 2008, available at: http://www.hfhrpol.waw.pl/precedens/images/stories/wniosek_ponowny.doc.

31 For further details about the case please see the separate chapter "9. The Criminal Investigation into the Existence of black sites in Poland."



Despite the allegations about the existence of a secret detention in Romania and the involvement of Romanian officials in the rendition program, the Romanian government has strongly denied that renditions or detention have taken place on Romanian territory.[32] The government has also pointed to internal investigations by relevant Romanian authorities into the allegations.[33] A Senate Committee of Inquiry to investigate these allegations was established in December 2005.[34] The inquiry, which was documented in a final report in March 2007, found that there was no evidence of a CIA rendition aircraft landing in Romania or overflying Romanian territory, that no Romanian authorities could have participated, either knowingly or through omission or negligence, and that there was no facility base, which could have been used for the purpose of detention.[35] The adequacy of the Senate investigations has been strongly questioned: the Special Rapporteur of the Council of Europe, Dick Marty, criticized the restrictive terms of the inquiry's ambit in his report and pointed to contradictions between the conclusions of the parliamentary committee and flight records of aircraft linked with the CIA.[36] The European Commission was also unsatisfied with the Romanian parliamentary inquiry and European Justice Commissioner Franco Frattini sent a letter to the Romanian government in November 2007 demanding further information about this issue.[37]

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32 Letter from Mihal-Razvan Unqureanu (Romanian Minister of Foreign Affairs) to Terry Davis. Response of the Romanian government on the investigation initiated by the Secretary General of the Council of Europe, 15 February 2006.

33 Letter from Parliamentary Assembly of the Council of Europe. Doc. 11302 Addendum, Secret detentions and illegal transfers of detainees involving Council of Europe member states: Dissenting Opinion by the delegation of Romania to the Parliamentary Assembly, 15 June 2007.

34 Art. 1 of Decision No. 29 of the Senate. See also the homepage of the Romanian Senate to this issue: http://diasan.vsat.ro/pls/parlam/structura.co?idc=87&cam=1&leg=2004&idl=1.

35 See also Senate Decision to approve the Commission's Report, available at: http://diasan.vsat.ro/pls/legis/legis_pck.htp_act?ida=79336&frame=0.

36 Parliamentary Assembly of the Council of Europe, Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second Report—Explanatory memorandum, Report of Dick Marty, 7 June 2007 [hereinafter "Marty 2007 Memorandum"], available at: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.

37 BBC News, "Romania says it had no CIA bases," BBC News 15 November 2007. http://news.bbc.co.uk/2/hi/europe/7097253.stm.

The fragmented explanations provided by Romanian officials were challenged by the Romanian Helsinki Committee (APADOR-CH) when the organization filed an request for information in April 2008. Submitted to the Ministry of Transport and Civil Aviation, the request contained a number of inquiries into the use of Romanian airports by CIA authorities between 2002 and 2006. The Romanian Helsinki Committee isolated the suspicious flights and requested information regarding the exact route of each of these flights, including dates and locations of departures and arrivals, information about stopovers and the exact Romanian airports involved, and the purpose of the flights and the identities of the passengers. In the same request, the organization asked the authorities to specify the number of departures or arrivals of flights involving Centurion Aviation, Jeppesen, and Jeppesen Sanderson, all companies which allegedly performed several extraordinary rendition flights. The Romanian authorities declined the public information request on the basis that it would not be in the "public interest." The Romanian Helsinki Committee appealed this decision before the Magistrates Tribunal in attempt to compel the Senate, the Ministry of Transport and Civil Aviation, and the President to provide a range of information regarding the existence of unofficial agreements between Romania and the U.S. permitting the use of Romanian airports in the framework of the CIA rendition program. The appeal is still pending.

**Importance of the Cases**

Freedom of information requests can reveal important information and raise awareness about rendition-related abuses. Freedom of information cases can also strengthen ongoing criminal and civil litigation cases. Moreover, revealed information can be used in future detention/torture cases.

*I. Lawyers Involved:*
- Shayana Kadidal (for the CCR)
- Margaret L. Satterthwaite (for AI USA and WSLS)
- Catherine Kane Ronis (Wilmerhale for AI USA)
- Baher Azmy
- Diana Hatneanu (for the Romanian Helsinki Committee)
- Adam Bodnar (for the Polish Helsinki Foundation for Human Rights)
- Dorota Pudzianowska (for the Polish Helsinki Foundation for Human Rights)
- Neda Korunovska (for the Open Society Foundation-Macedonia)
- Filip Medarski (for the Open Society Foundation-Macedonia)
- Ilir Aliaj (for the Centre for Development and Democratization of Institutions (CDDI), Albania)
- Darian Pavli (for the Open Society Justice Initiative)

*II. Main Non-Governmental Organizations Involved:*
- Amnesty International USA: www.amnestyusa.org
- Center for Constitutional Rights: www.ccrjustice.org
- Center for Human Rights and Global Justice: www.chrgj.org/projects/detainees.html
- Centre for Development and Democratization of Institutions (CDDI): http://www.qzhdi.com/
- Helsinki Foundation for Human Rights (HFPCz): http://www.hfhrpol.waw.pl/
- Open Society Justice Initiative: www.soros.org/initiatives/osji or www.justiceinitiative.org

*III. Main Sources:*

1. Complaint of CCR, AI USA and WSLS versus Central Intelligence Agency, Department of Defense, Department of Homeland Security, Department of Justice, Department of State and their components before the U.S. District Court for the Southern District of New York, 7 June 2007: www.ccrjustice.org/files/CCRvCIA_complaint_06_07.pdf.

2. Complaint of Baher Azmy versus United States Department of Defense, United States District Court for the Southern District of New York, 20 December 2006: www.law.shu.edu/administration/public_relations/press_releases/2006/kurnaz_complaint_12_21_06.pdf.

## 1. The Case of Ahmed Agiza and Mohammed Al Zery (Sweden)

### Facts

Ahmed Hussein Mustafa Kamil Agiza and Mohammed Suleiman Ibrahim Al Zery (also: Alzery, El Zari, El-Zari) are two Egyptian nationals who sought asylum in Sweden.

On December 18, 2001, the Swedish government refused Al Zery's and Agiza's residence permits on "security grounds." It rejected their asylum claims despite both men having successfully established their fear of persecution in Egypt (including the risk of being tortured) as well-founded. Finally, Sweden denied them legal protection against forcible return to Egypt. The latter decision was based on diplomatic assurances Sweden had obtained from Egypt. These assurances were to guarantee that both men would "be awarded a fair trial," would "not be subjected to inhuman treatment or punishment of any kind" and that they would "not be sentenced to death or - if such a sentence were to be imposed - that it would not be executed."[38]

In order to ensure that this decision could be executed that same day, the Swedish authorities accepted an American offer to place an aircraft at their disposal that enjoyed special overflight authorizations. Following their arrest by the Swedish police, the two men were taken to Bromma airport where, with Swedish consent, they were subjected to a "security check" by hooded American agents.[39] Neither man was granted the right to inform his lawyer.[40] The procedure applied by the American agents as described by the Swedish police officers on scene was evidently well rehearsed: the agents communicated with each other by gestures without words. Acting very quickly, the agents cut Agiza's and Al Zery's clothes off of them using scissors, dressed them in tracksuits, examined every bodily aperture and hair minutely, handcuffed them, shackled their feet, and walked them to the aircraft barefoot.[41]

Using Gulfstream V executive jet number N379P, both were flown from Sweden to Egypt where they were handed over to the Egyptian authorities. A Swedish security police officer and a civilian interpreter were also on the flight. They subsequently confirmed that both men had been strapped to mattresses in the rear of the plane and that they remained handcuffed and shackled during the entire flight to Cairo. Al Zery was kept blindfolded and hooded throughout the transfer.[42] Despite diplomatic assurances given to Sweden beforehand, Agiza and Al Zery were tortured in Egypt. The torture included extremely grave acts such as electro shocks to very sensitive parts of the body.[43] Both men were held incommunicado for five weeks.[44]

During the Swedish ambassador's first prison visit to Ahmed Agiza on January 23, 2002, Agiza complained of being forced to remain in a painful position during the flight from Sweden to Egypt, of being blindfolded during interrogation,

38 Amnesty International, "Sweden - The case of Mohammed El Zari and Ahmed Agiza: violations of fundamental human rights by Sweden confirmed," AI Index EUR 42/001/2006, 27 November 2006.

39 Parliamentary Assembly Council of Europe, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Report of Dick Marty, Rapporteur, Ch.3 No. 153, 12 June 2006 [hereinafter "Marty 2006 Report"], available at: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

40 According to information by Amnesty International, Al Zery was on the phone with his lawyer at the time of his arrest and their communication was cut short. He also stated that his subsequent request to contact his lawyer was refused. At the airport, both men again were not given an opportunity to contact their lawyers. See: AI, 27 November 2006, AI Index EUR 42/001/2006.

41 See Marty 2006 Report, Ch. 3 No. 154, supra Note 39.

42 AI, AI Index EUR 42/001/2006, 27 November 2006.

43 On March 23, 2005, Kjell Jönsson, the Swedish lawyer of Al Zery, testified before the Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners of the European Parliament [hereinafter "Temporary Committee"].

44 Amnesty International, "Partners in crime: Europe's role in U.S. renditions, AI Index: EUR 01/008/2006," June 2006.

of beatings by prison guards and of threats against his family by interrogators. Mohammed Al Zery complained that he was interrrogated further for another five weeks, during which he was subjected to torture or other ill-treatment including electric shocks applied to his genitals, nipples and ears. Furthermore, he stated that his torture was monitored by doctors to ensure it would not leave him with visible scars. The Swedish ambassador met with the Egyptian security services to discuss the allegations. The denials offered by the Egyptian authorities were accepted by the Swedish authorities. Moreover, the Swedish government withheld relevant information provided by the Swedish Ambassador's report of his first visit, including the complaints of mistreatment. In January 2002, Sweden's State Secretary Gun-Britt Anderson assured Al Zery's Swedish lawyer that neither he, nor Ahmed Agiza, had complained of any ill-treatment to the Ambassador.[45] On February 20, 2002, Al Zery was moved to another correction center where he was kept in a small isolation cell measuring 1.5 by 1.5 meters until December 2002.[46] He was released from prison in October 2003 having never been charged. Under the terms of his release, he cannot leave his village without consent of the authorities. Nevertheless, the Swedish Migration Board continues to refuse to grant Al Zery a residence permit due to extraordinary reasons raised by the Swedish Security Police (SÄPO). This decision has already been appealed. In a trial by a military court in April 2004, Ahmed Agiza was sentenced to 25 years imprisonment. Swedish observers were excluded from the first two days of the four-day trial. Although Agiza complained of torture during his forced return to Egypt and two-year detention, and despite the fact that he displayed signs of physical injuries that were recorded by the prison's doctor, the military court did not act on the defense's request for an independent medical examination.[47] The decision could not be appealed. In June 2004, Egyptian President Hosni Mubarak reduced Agiza's sentence to 15 years.

Ahmed Agiza remains in prison.

## Political and Judicial Reactions

The affair received public attention mainly from the Swedish TV Channel Four "Kalla Fakta" television program.[48]

In June 2003, Agiza, represented by his Swedish counsel Bo Johansson, filed a complaint with the United Nations Committee against Torture. The committee decided in May 2005 that the procurement of diplomatic assurances had not sufficiently protected the expelled persons against the widespread use of torture, for which Egypt was known. The conduct of the Swedish authorities, inter alia, violated Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[49]

In October 2004, a chamber of the European Court of Human Rights declared the case of Al Zery inadmissible because it had been introduced out of time.[50]

The behavior of the Säpo (the Swedish secret police) gave rise to a detailed investigation by the Swedish parliamentary ombudsman, Mats Melin. He stated that the treatment of Agiza and Al Zery by the U.S. authorities was degrading

45 AI, AI Index EUR 42/001/2006, 27 November 2006.

46 United Nations Human Rights Committee, Communication No 1416/2005, 10 November 2006, U.N. Document CCPR/C/88/D/1416/2005, No. 3.16: "On 20 February 2002, he was moved to another correction centre where he was kept in small isolation cell measuring 1.5 by 1.5 meters until the second week of December 2002. On three or four occasions in 2002, he was called to hearings before a prosecutor for decision on his continued detention. At the first hearing in March 2002, the author complained of the torture and ill-treatment that he had suffered. He was not provided with hearing records. Although represented by a lawyer at the time, the latter did not react to his statement, which left the author to speak on his own behalf at subsequent hearings."

47 Communiqué of Human Rights Watch (HRW) of 5 May 2005. (A representative of HRW had observed the entire trial.)

48 "The Broken Promise," 17 May 2004, English transcript available at: http://hrw.org/english/docs/2004/05/17/sweden8620.htm.

49 United Nations Committee Against Torture, Agiza v. Sweden, Communication No. 233/2003, 20 May 2005, U.N. Doc. CAT/C/34/D/233/2003, No. 13.4.

50 HRC, CCPR/C/88/D/1416/2005, No. 3.19, 10 November 2006.

and inhuman.[51] The Swedish judicial authorities also examined the case and concluded that they lacked sufficient grounds for a criminal prosecution against the involved Swedish agents, the pilot of the aircraft, or other American agents who were acting members of the team responsible for transporting Agiza and Al Zery to Egypt.[52] Supported by his counsel, Anna Wigenmark, Al Zery filed a communication to the United Nations Human Rights Committee in July 2005. With respect to Sweden's investigations at Bromma airport, the committee concluded that the Swedish authorities "were aware of the mistreatment" suffered by Al Zery. Sweden "waited over two years for a private criminal complaint before engaging its criminal process. In the Committee's view, that delay alone was insufficient to satisfy the State party's obligation to conduct a prompt, independent and impartial investigation into the events that took place."[53]

Although the UN Human Rights Committee described the investigations of the parliamentary ombudsman as thorough, it did state a violation –of Article 7 (read in conjunction with Article 2 of the Covenant) because Sweden did not ensure "that its investigative apparatus is organized in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring the appropriate charges in consequence."[54]

According to the committee, Sweden "has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the

51 A review of the enforcement by the security police of a government decision to expel two Egyptian citizens, Adjudication No. 2169-2004, 22 March 2005.

52 Concerning the responsibility of the Swedish police, the Assistant Chief District Prosecutor decided in 2004 not to institute a preliminary inquiry as there were no grounds for suspecting that any offense subject to criminal prosecution had been committed. Report of the Swedish Ombudsman Mats Melin: a review of the enforcement by the security police of a government decision to expel two Egyptian citizens, Adjudication No. 2169-2004, 22 March 2005: 3. English version available at: www.dr.dk/NR/rdonlyres/10A41711-4D95-4E66-BBAC-1DA3C6379644/713795/Rigsdagensombudsmands.doc.

53 HRC, CCPR/C/88/D/1416/2005, No. 11.7, 10 November 2006.

54 Supra note 53



Covenant" on Civil and Political Rights (ICCPR) and "thus amounted to a violation of article 7 of the Covenant."[55]

Despite the fact that even prior to the Human Rights Committee's decision on the complaint of Al Zery Sweden had accepted that it had violated its obligations under the ICCPR, the Swedish government has failed to acknowledge that both men were in fact tortured or otherwise ill-treated in Egypt. On July 3, 2008, Swedish Chancellor of Justice Göran Lambertz announced that Sweden had reached a settlement with Mohammed Al Zery and would pay him 3 million kronor (approximately USD 502,000) in compensation for the circumstances of his deportation. In October 2008, the Swedish government also granted the same sum to Ahmed Agiza for the human rights violations he suffered as a result of the actions of Swedish authorities. Nevertheless, in the case of Ahmed Agiza, the Swedish Chancellor of Justice denied the responsibility of Sweden for the unfair trial in Egypt and for Agiza's separation from his family following the government's decision to deport him. According to his lawyers, the Swedish government should permit Agiza's return to Sweden where he can be reunited with his family.[56]

## Importance of the Case

The case of Ahmed Agiza and Mohammed Al Zery is one of the best-documented rendition cases. The case serves as dramatic proof that diplomatic assurances are not an appropriate instrument to guarantee the safety of persons involved.[57]

For the first time, a European government learned from the United Nations Committee against Torture (CAT) that diplomatic assurances, even in combination with

55 HRC, CCPR/C/88/D/1416/2005, No. 11.5, 10 November 2006.

56 "Sverige betalar miljonbelopp för tortyransvar," news release by Swedish Helsinki Committee for Human Rights, 3 July 2008, available at: http://www.shc.se/sv/4/110/1280/; "Compensation for Ahmed Agiza – but only part way," News release, 6 October 2008, available at: http://www.shc.se/en/4/110/1324/.

57 See also the article by Margaret Satterthwaite in this publication "Is this Legal? Extraordinary Rendition and International and Human Rights Law" pp. 12, 20.

follow-up clauses, is insufficient to absolve the expelling state of their responsibility for torture or ill-treatment in the accommodating state. Although the total compensation granted to Al Zery did not meet his initial demand (30 million kronor), his settlement with Sweden is significant. Sweden has become the second country (after Canada), to take meaningful measures aimed at limiting the damages caused by rendition.[58] It is also relevant that the Chancellor of Justice of Sweden acknowledged that torture had taken place.

*I. Lawyers Involved:*
(Mohammed Al Zery)
- Kjell Jönsson, Stockholm, Sweden
- Anna Wigenmark, Stockholm, Sweden
(Ahmed Agiza)
- Bo Johansson, Stockholm, Sweden
- Hafes Abu Seada, Cairo, Egypt

*II. Main Organizations Involved:*
1. Governmental:
- United Nations Committee against Torture:
http://www.unhchr.ch/html/menu2/6/cat/index.html
- United Nations Human Rights Committee:
http://www.unhchr.ch/html/menu2/6/hrc.htm
2. Non-Governmental:
- Swedish Helsinki Committee: www.shc.se/en/3/
- Amnesty International: www.amnesty.org
- Human Rights Watch: www.hrw.org

*III. Main Sources:*
1. United Nations Human Rights Committee, Communication No 1416/2005, Al Zery v. Sweden, November 10, 2006, U.N. Document CCPR/C/88/D/1416/2005: www.unhchr.ch/tbs/doc.nsf/0/13fac9ce4f35d66dc12572220049e394?Opendocument.

58 For details on Canada as the first country to attempt to limit the effects of rendition see separate chapter "2. The Case of Maher Arar (Canada)."



2. United Nations Committee against Torture, Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003.
3. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states," Part II of February 7, 2006: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

## 2. The Case of Maher Arar (Canada)

### Facts

Maher Arar, an information technology consultant, was born in Syria and moved to Canada with his family at the age of 17. He became a Canadian citizen in 1991.[59]

On September 26, 2002, he arrived at JFK Airport in New York on a flight from Zurich. He had started his trip in Tunisia and was connecting through New York on his way to Montreal. Upon his arrival at the JFK International Airport he was detained by American authorities. On October 7, 2002, after interrogations about his possible connection to Al-Qaeda, the Regional Director of the U.S. Immigration and Naturalization Service (INS) issued an order that determined Arar to be a member of Al-Qaeda and directed his removal from the United States. Under American custody, on October 8, 2002 Arar was flown to Jordan. A short time later he was driven to Syria where he was tortured and imprisoned under inhumane and degrading conditions.[60] Faced with the threat of suffering harsher torture methods, he claims to have been forced to falsely confess the alleged links to terrorist groups.[61] In spite of this confession, Arar

59 For a detailed presentation see the personal website of Maher Arar: www.maherarar.ca/index.php.

60 Report of the Events Relating to Maher Arar, Analysis and Recommendations, p. 139, available at: www.ararcommission.ca/eng/.AR_English.pdf.

61 More details can be obtained under: www.maherarar.ca/mahers%20story.php.

was released in October 2003, almost one year after his initial detention, at which time he returned to Canada without having been charged with criminal offenses in Syria or elsewhere. Although the Royal Canadian Mounted Police (Canadian national police service) conducting a terrorism-related investigation were interested in interviewing him, he was not considered a suspect in that investigation.[62]

## Political and Judicial Reactions

During his imprisonment and until his return, Arar's wife, Monia Mazigh, campaigned relentlessly on his behalf. This campaign highlighted the absurdity of his detention and removal to a country known for its torture methods,[63] and also the dubious role of the Canadian intelligence services for his detention, and lead to extensive national and international media coverage of this case in the later stages of Arar's imprisonment and after his return to Canada.[64] Concerns have been raised about the role Canadian officials played in relation to his detention in the U.S., his rendition to Syria and his imprisonment and treatment there. Under pressure from Canadian human rights organizations and a growing public interest, the Canadian government announced the establishment of a Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.[65]

The Report of Events regarding Maher Arar's case was published in July 2006.

62 This is considered as a proven fact: www.ararcommission.ca/eng/AR_English.pdf, p. 9.

63 State Department Report on Human Rights Practices (2003) remarks at: www.state.gov/g/drl/rls/hrrpt/2003/27938.htm; (the last report (2005) repeats this point of view).

64 Exemplarily: Jane Mayer, "Outsourcing Torture," The New Yorker, 14 February 2005.

65 This commission had a fact-finding mandate and is not to be perceived as an adversarial proceeding where the parties involved could assert their claims. Its mandate was divided into two parts: the first part, referred to as the Factual Inquiry, required the investigation and report on the actions of Canadian officials in relation to Arar. The second one, the Policy Review, aimed at recommendations concerning an independent review mechanism for the Royal Canadian Mounted Police activities with respect to national security. See: www.maherarar.ca/cms/images/uploads/Opening_statement_attorney_general.pdf.



The report concluded that the Royal Canadian Mounted Police had provided misleading, inaccurate and unfair information to U.S. authorities. According to the report, this information had "very likely" led to the decision to send Arar to Syria. However, no evidence that Canadian officials participated in or agreed with this decision was found.[66] The commissioner cleared Arar of all terrorism allegations stating that he was "able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada."

In response to these findings, the Canadian Prime Minister apologized publicly for the misconduct of Canadian officials and their services. He announced that Arar was removed from the Canadian lookout lists and that a mediation process had been successfully completed. Arar will receive compensation totaling CAD 10.5 million in addition to legal costs for the ordeal he has suffered.[67]

The Center for Constitutional Rights (CCR) on behalf of Maher Arar filed a civil lawsuit in the U.S. on January 22, 2004 (Arar v. Ashcroft). The civil action brought before a District Court of New York charged that the defendants had violated Arar's constitutional rights to due process. The suit also contained a claim under the Torture Victims Protection Act (TVPA). The plaintiff sought a jury trial, compensatory and punitive damages, and a declaration that the actions of defendants were illegal and violated Arar's constitutional, civil, and international rights. The U.S. government moved to dismiss the case by asserting that litigation would disclose state secrets. Despite Arar's response claiming that evidence would be available without disclosing privileged information, the lawsuit was dismissed due to national security and foreign policy considerations. An appeal was held before the Court of Appeals for the Second Circuit and on June 30, 2008, the court affirmed the District Court's judgment. The court ruled 2-1 to dismiss Arar's complaint due

66 "Report: Canada Gave U.S. Misleading Information that Likely Led to Canadian's Transfer to Syria," International Herald Tribune, 18 September 2006.

67 Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process. 26 January 2007, available at: http://pm.gc.ca/eng/media.asp?id=1509.

to "special factors" (i.e. foreign relations and the government's ability to ensure national security) and held they were "against the judicial creation of a damages remedy for claims arising from his removal to Syria." The court held that as a foreigner not formally admitted to the U.S., Arar did not have due process rights to counsel, and furthermore, he did not adequately prove "gross physical abuse." In his dissent, Judge Sack opined that the majority's solution gave license to federal officials "to violate constitutional rights with virtual impunity."[68]

This ruling was not the last in this case. On August 12, 2008, the Second Circuit Court of Appeals, acting spontaneously ("sua sponte") issued an order that the case of Maher Arar should be reheard en banc in December 2008.[69]

The case of Maher Arar and the practice of extraordinary rendition were examined in a joint-session of the House of Representatives' Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight and the House of Representatives' Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. After Arar testified before the commission, members of congress have publicly apologized for the government's role in sending him to Syria. During a hearing of this committee, Secretary of State Condoleezza Rice carefully conceded that U.S. officials mishandled the rendition of Arar, but she neither openly apologized, nor offered to remove him from the U.S. no fly list.[70]

On July 10, 2008, members of Congress wrote to Attorney General Michael Mukasey to request the appointment of an outside special counsel to investigate and prosecute any crimes committed by U.S. officials in sending Maher

68 The complete judgment on appeal is available at: http://www.ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft.

69 See the Replacement Opening Brief for rehearing en banc, filed by Center for Constitutional Rights: http://www.ccrjustice.org/files/9.23.08%2006-4216-cv%20Arar%20v%20%20Ashcroft%20Replacement%20Appellant%27s%20Brief%20Anti-Virus.pdf

70 Jen Nessel, "Secretary of State Rice Admits U.S. Government Mishandled Rendition of Maher Arar," Center for Constitutional Rights, 24 October 2007, available at: www.ccr-ny.org/newsroom/press-releases/secretary-state-rice-admits-u.s.-government-mishandled-rendition-maher-arar.



Arar to Syria. In a hearing before Congress, the Attorney General dismissed this request.[71]

## Importance of the Case

This case is significant for two reasons: first, it illustrates what tools are available to a democratic government involved in extraordinary renditions in dealing with such crimes and acknowledging responsibility. For example, by allowing oversight of its institutions, the Canadian government was the first to attempt to make amends and limit the damage caused by rendition.[72] Second, this case demonstrates how the exchange of unverified information between national police and intelligence services can lead to serious violations of constitutional rights and to misconduct with severe consequences for the individuals involved.

*I. Lawyers Involved:*
- Michael Ratner (for CCR), New York, USA
- Maria LaHood (for CCR), New York, USA
- Marlys Edwardh, Ruby and Edwardh, Lorne Waldman, Toronto, Canada (Inquiry legal team)
- Julian Falconer, Toronto, Canada (Civil litigation team)

*II. Main Organizations Involved:*
1. Governmental:
- Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Canada): www.ararcommission.ca
2. Non-Governmental:
- FIDH (France): www.fidh.org
- Center for Accountability and Justice (CAJ), USA: www.cja.org

71 Arar vs Ashcroft et al. available at: http://www.ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft.

72 Special Rapporteur of the Council of Europe, Dick Marty. See Marty 2007 Memorandum, No 334, supra note 36.

*III. Main Sources:*

1. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states," Part II of February 7, 2006: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf
2. Official site of the Arar Commission
3. Maher Arar's personal site: www.maherarar.ca

### 3. The Case of Osama Mustafa Hassan Nasr 'Abu Omar' (Italy)

#### Facts

Osama Mustafa Hassan Nasr, an Egyptian cleric better known as Abu Omar fled Egypt in 1988 after he was accused of being a member of Gama'a Islamiya, an Egyptian militant group that later allegedly carried out terrorist attacks. He denied the allegation and was granted political asylum in Italy.[73]

On February 17, 2003, Nasr was stopped on a walk to the Viale Jenner mosque in Milan by some Italian-speaking men who identified themselves as police. They demanded his identification, then sprayed an unknown substance on his mouth and nose and pushed him into a van where his mouth was taped. The van drove off and traveled for approximately five hours.[74] Nasr claimed that he had been beaten while bound and gagged; he began bleeding and thought he was going to die.[75]

Nasr was brought to the joint U.S./Italian airbase at Aviano, near Venice, Italy.

73 Stephen Grey, "Preacher seized by CIA tells of Torture in Egypt," 14 June 2007. See: http://www.stephengrey.com.

74 Amnesty International, "Partners in Crime: Europe's role in U.S. renditions. Chapter 3: Italy, Germany, and the case of Abu Omar, AI Index: EUR 01/008/2006," 14 June 2006.

75 Grey, supra note 73.



At the base, he was handed over to people speaking in English and in Italian. They had an Arabic interpreter.[76]

His wife, Nabila Ghali, reported Nasr missing to the Italian police, who then opened a missing person investigation. It quickly emerged that an Egyptian woman, Merfat Rezk, had witnessed Nasr's abduction. She was interviewed by the prosecutor and by officers of the General Investigation and Special Operations Division (DIGOS), an Italian police unit dealing with terrorism cases.[77]

In Aviano, Nasr was reportedly put on a Learjet 35 (SPAR 92). Flight records show that the plane left Aviano at 6.20 p.m. and arrived about an hour later in Germany at Rammstein airbase, headquarters of U.S. Air Forces Europe.[78]

In Germany, Nasr was apparently transferred to a Gulfstream IV jet (N85VM) owned by Phillip Morse, a co-owner of the Boston Red Sox baseball team in the USA, which had been chartered by Richmor Aviation.[79] Throughout his journey to Cairo, Egypt, nobody spoke to him. The CIA agents had wrapped him in masking tape "like a mummy" that made his face bleed when it was later ripped off.[80]
In the first seven months, Nasr was in the hands of Egyptian foreign intelligence. He stated that its operatives had stripped him and given him constant beatings with bare knuckles, sticks and electric cables.[81]

On September 14, 2003, he was brought to Lazoghly Square, the notorious headquarters for the Egyptian interior ministry and its secret police. The Egyptian Min-

76 Amnesty International, supra note 74.

77 Merfat Rezk returned to Egypt the day after her deposition. Her husband later said that she had seen "two Western-dressed men attack a bearded Arab, dressed in a white jalabia, who struggled and cried for help while being violently grabbed and forcibly made to enter a van."

78 Stephen Grey, "Ghost Plane. The true story of the CIA torture program. Chapter 9: The Italian Job," 2006.

79 Amnesty International, supra note 74.

80 Grey, supra note 78.

81 Grey, supra note 78.

ister of the Interior General Habib al-Adly told him he would be returned home within 48 hours if he agreed to work as an infiltrator for the Egyptian secret service. His only alternative was to bear full responsibility for his refusal.[82] Nasr refused and was brought to the infamous interrogation compound in the Nasr City district of Cairo. For the next seven months his treatment worsened; he was beaten on all parts of his body including his genitals.[83] During his detention Nasr suffered from various forms of torture; he was beaten and hung upside down. He was exposed to extreme heat and then dragged into a freezing-cold room. He was denied sleep and was forced to listen to unbearable noise, which damaged his hearing. For months at a time he was not allowed to bathe.[84] There was also an attempt to rape him. Nasr suffered from electro shocks to sensitive parts of his body including his genitals. This damaged his motorist and urinary systems and he became incontinent as a result.[85]

For over a year after the abduction, DIGOS made "no significant progress" in finding Nasr. Indeed, investigators nearly dropped the case after receiving communication from the CIA in March 2003 apparently aimed at misdirecting the investigation stated "Abu Omar had relocated to an unknown Balkan location."[86]

On April 20, 2004, he was released on the condition that he not speak with the media, call his wife and family in Italy, or talk to human rights groups. When he broke these rules and phoned home, his calls were taped by Italian investigators. In a phone call recorded on May 8, 2004, Nasr told Elbadry Mohammed Reda, an Egyptian friend in Milan, what had happened to him during his detention. This alerted the Italian police to his kidnapping and they began the investigation that eventually identified the CIA team. Another phone tap in Egypt resulted in his re-arrest[87] on May 12, 2004.

Examination of mobile phone records led to a decisive breakthrough of the Italian investigation. By tracing all calls in the area at the time of the abduction, police compiled a list of suspects now believed to be CIA agents. Senior prosecutor Armando Spataro said that the police identified 17 mobile phones that were in the area at the time of the kidnapping. The same technique revealed the suspects' movements in the months leading up to the kidnapping.[88]

According to the mobile phone records, the alleged CIA agents began arriving in Milan approximately two months before the kidnapping and had staked out the predominantly immigrant neighborhood where Nasr lived. The phone records show that two groups were at work on the day of the abduction. One carried out the abduction while a second group waited on the outskirts of Milan to receive Nasr. Phone tracking shows that the kidnappers traveled to the U.S./Italian airbase at Aviano.[89]

Nasr was held in an Egyptian prison for another three years. He was finally released on February 11, 2007, but state security officials have prohibited him from leaving the city of Alexandria. Although he wants to return to Italy, he could face charges there. He is under investigation for his alleged association with international terrorism and an arrest warrant was issued against him in 2005.[90]

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82 Grey, supra note 78.

83 Stephen Grey, "Lizenz zum Foltern im Dienst der USA," Le Monde Diplomatique (German edition) 12 October 2007. Available at: www.monde-diplomatique.de/pm/2007/10/12.mondeText.artikel,a0030.idx,7.

84 Matthew Cold, "Blow back," GQ March 2007.

85 Amnesty International, supra note 74.

86 Amnesty International, supra note 74.

87 Grey, supra note 78.

88 Amnesty International, supra note 74.

89 Amnesty International, supra note 74.

90 Amnesty International, "State of Denial: Europe's Role in Rendition and Secret Detention. Case Sheets: 'Abu Omar: role and responsibility of Italy', AI Index: EUR 01/003/2008," 28 June 2008.

## Political and Judicial Reactions

In 2005 the Italian authorities issued arrest warrants for 22 CIA agents.

On November 10, 2005, a formal request was issued to the Italian government by the Milan prosecutor's office seeking the extradition of 22 alleged CIA operatives on charges of kidnapping. However, on April 11, 2006 the then Italian Justice Minister Roberto Castelli from the right-wing Northern League refused to submit an extradition request to the USA,[91] although the treaty on judicial assistance between the United States and Italy explicitly allows the extradition of U.S. nationals.[92]

In July 2006, four more arrest warrants were issued for U.S. citizens including Jeffrey Castelli, the director of the CIA office in Rome at the time of the abduction. This increased the number of arrest warrants against American agents to 26.[93]

In November 2006, Nicolo Pollari, Director of SISMI, the Italian military intelligence service, was removed from his post allegedly "in the course of a reorganization of the secret services."[94]

In February 2007, the 26 U.S. citizens, and seven Italians, including Pollari and his deputy, were formally indicted.

Pollari, the only defendant who appeared during the preliminary hearing, insisted that Italian intelligence played no role in the alleged abduction and told the judge he was unable to defend himself properly because documents clarifying his position were not permitted for use in the proceedings as they contained state secrets.[95]

91 Amnesty International, supra note 74.
92 See Marty 2007 Memorandum, Ch. 6, supra note 36.
93 See Marty 2007 Memorandum, supra note 36.
94 See Marty 2007 Memorandum, Ch. 6, supra note 36.
95 See Marty 2007 Memorandum, supra note 36.



In February and March 2007, the Italian Government asked the Constitutional Court to annul the committal for trial of the 33 defendants as the prosecution had exceeded its powers by using documents that were classified and taping phone conversations of Italian intelligence agents in their pursuit of the suspects. The Constitutional Court declared both government applications admissible, but has not ruled on their merits to date. Italian Prime Minister Romano Prodi declared that important information relating to the co-operation between the CIA and the Italian military intelligence service constituted a state secret.[96] In June 2007, the proceedings began in absence of the accused U.S. citizens. After two hearings, the case was postponed awaiting the Constitutional Court's decision regarding the investigations and whether the examining judge violated the protection of state secrets.[97]

In March 2008, the Judge Oscar Magi reopened the criminal proceeding at the request of the public prosecutors. In May 2008, the Italian government responded with new proceedings before the Constitutional Court against Judge Magi in another attempt to halt the trial.

With the Constitutional Court decision pending, the criminal trial nevertheless proceeded relatively quickly. The trial was held as a closed, in camera hearing due to secret service related legislation brought into force in August 2007. In October, Judge Magi ordered Prime Minister Silvio Berlusconi to respond to the court regarding the existence of state secrecy surrounding the case. Berlusconi responded in November affirming that divulging information on any fact could undermine state security and foreign security relations.

On December 3, 2008, the trial was suspended by Judge Magi to await the Constitutional Court ruling on security issues. The Constitutional Court is expected to rule on March 10, 2009. As of December 2008, 84 witnesses have testified in the case and more than 22 witness declarations or reports have been accepted into

96 See Marty 2007 Memorandum, supra note 36.
97 Grey, supra note 83.

evidence without opposition. Witnesses include journalists and members of Italian secret service whose testimony implicates the secret service in participating in Nasr's abduction. The criminal case is expected to resume on March 18, 2009.

The Egyptian authorities have failed to respond to the Italian prosecutors' request to allow Nasr, along with five other Egyptians, to appear as witnesses. Similar requests to the United States for assistance summoning witnesses have also been ignored, despite the existence of a Mutual Assistance Treaty on criminal matters. German prosecutors started a formal investigation in 2005 after receiving files from the Italian prosecutors indicating that Nasr had been transported from Aviano to the U.S. airbase in Ramstein, Germany. However, the German prosecutor Eberhard Bayer found no evidence implicating German officials in his abduction.[98]

### Importance of the Case

The case of Osama Mustafa Hassan Nasr is of outstanding importance. For the first time, members of the CIA extraordinary rendition program face criminal trial in Europe. Additionally, this case demonstrates the potential of cooperation among prosecutors in different countries in accomplishing timely and effective investigations concerning multinational phenomenon, such as rendition.[99]

Prior to the CIA's kidnapping of Nasr, the Italian prosecutor's office also had him under surveillance. On several occasions, senior prosecutor Spataro stressed that the incidents were illegal and counterproductive with respect to the fight against terrorism. Furthermore, Nasr's case demonstrates that European domestic intelligence services are involved in the CIA rendition program without knowledge of the judiciary.

98 Amnesty International, supra note 74.

99 Italian prosecutor Armando Spataro was granted access by the Spanish Audiencia Nacional in Madrid to the file investigating extraordinary rendition. For more details on the Spanish case see "8. The Criminal Complaint against Arbitrary Detention and Torture (Spain)" in this chapter.



*I. Lawyers Involved:*
- Carmelo Scambia, Italy
- Montasser el-Zayat, Egypt

*II. Main Organizations Involved:*
1. Governmental: Council of Europe: www.coe.int/DefaultEN.asp
2. Non-Governmental: Amnesty International: www.amnesty.org

*II. Main Sources:*
1. Stephen Grey: Ghost Plane. The true story of the CIA torture program, 2006; various articles available under: www.stephengrey.com.
2. Amnesty International: Partners in Crime: Europe's role in U.S. renditions, June 14, 2006, Chapter 3: Italy, Germany and the case of Abu Omar, AI Index: EUR 01/008/2006: http://www.statewatch.org/news/2006/jul/ai-partners-in-crime.pdf.
3. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty: "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report," June 7, 2007: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.

## 4. The Cases of Binyam Mohamed, Bisher al-Rawi and Jamil el-Banna (United Kingdom)

### Facts

There are a number of cases involving extraordinary renditions in which UK government officials have been involved.[100] Human rights groups and other

100 The Intelligence and Security Committee admits these allegations, see Intelligence and Security Committee Report, Rendition, p. 31, July 2007. Available at: http://www.cabinetoffice.gov.uk/media/cabinetoffice/corp/assets/publications/intelligence/20070725_isc_final.pdf

international organizations have documented the use of UK airports in certain cases[101] and British citizens and residents have been detained in relation to the CIA program. The cases involving Binyam Mohamed, Bisher al-Rawi and Jamil el-Banna are the most discussed and well-documented. These cases serve as examples of the complicity of British officials in the act of unlawful detentions. Binyam Mohamed was born in Ethiopia and came to Britain in 1994 where he lived for seven years and sought political asylum. He was given leave to stay in the country while his case was resolved. In the summer of 2001, Mohamed allegedly traveled to Afghanistan to get away from a social life in London that revolved around drugs.[102] After several months, he went to Pakistan before returning to the UK. In Pakistan, he was arrested because of a visa violation and before being turned over to the U.S. authorities, the Pakistani authorities mistreated him.[103] British agents confirmed his identity to the U.S. authorities and he was informed that he would be taken to a Middle Eastern country for harsh treatment.

In July 2002, Mohamed was rendered to Morocco on a CIA plane. He was held there for 18 months in appalling conditions. To ensure his confession, his Moroccan captors tortured him repeatedly. He speaks of being wounded all over his body with a scalpel and a razor blade, beaten unconscious and hung from the wall in shackles. He suffered gross physical injuries including broken bones. He was constantly threatened with death, rape and electrocution.[104] His ordeal in

101 See for example, the Marty 2007 Memorandum and Marty 2006 Report, supra note 36 and 39, the Report by the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm; about the use of UK airports. See also, the last report of Reprieve, Scottish involvement in extraordinary rendition, in www.reprieve.org.uk/documents/230807REPORTONSCOTTISHINVOLVEMENT.pdf.

102 Biography of Plaintiff Binyam Mohamed: www.aclu.org/safefree/torture/29912res20070530.html.

103 Intelligence and Security Committee, p. 33 (see footnote 100).

104 Parliamentary Assembly of the Council of Europe, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states. Draft Report—Part II (Explanatory Memorandum)," Ch. 3 No. 193-214, 7 June 2006 [hereinafter "Marty 2006 Memorandum"]. Available at: http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf; referring to this see also the interview of his appointed counsel Yvonne Bradley, in: www.cageprisoners.com/articles.php?id=19782 and the



Morocco continued for approximately 18 months until January 2004 when he was transferred to the infamous Dark Prison in Kabul. From there he was transferred to Bagram Airbase in Afghanistan, and later to Guantánamo Bay in September 2004. Although the UK government has requested his release since August 2007,[105] Binyam Mohammed remains in Guantánamo.[106] He was charged on May 28, 2008 for conspiracy with Al-Qaeda and for "providing material support for terrorism" before a military commission.[107] During his interrogations, he was confronted with allegations that could have only arisen from intelligence provided by the UK government.[108]

Bisher al-Rawi is a 39-year-old Iraqi citizen who became a resident of the UK in the 1980s. In November 2002, he traveled from London to Gambia with his friend Jamil el-Banna, a British refugee from Jordan, to help al-Rawi's brother set up a business. In Gambia, they were arrested and interrogated by the Gambian police. The grounds for their detention apparently concerned information provided by British secret services. Subsequently, they were handed over to U.S. agents for questioning about their alleged links to Al-Qaeda.

After several months of detention, and despite a habeas corpus petition in the High Court in Gambia, American officials flew the two men to Bagram Airbase in Afghanistan, and later to Guantánamo in March 2003.[109] The U.S. insists that al-

testimony of his attorney Stafford-Smith in the Information Session on Mohamed of the All Party Parliamentary Group of the British Parliament: www.extraordinaryrendition.org/index.php?option=com_docman&task=cat_view&gid=29&Itemid=27.

105 "Britain asks U.S. to Free 5 detainees," *Washington Post* 8 August 2007.

106 Cases: Binyam Mohammed (Guantánamo Bay): http://www.reprieve.org.uk/casework_binyammohammed.htm.

107 See the charges sheet against Binyam Mohammed by the U.S. government: http://media.miamiherald.com/smedia/2008/06/03/16/binyam.source.prod_affiliate.56.pdf.

108 For example, the interrogators questioned him about personal things, such as his education, his friendships in London and even his kickboxing trainer, Marty 2006 Report (see footnote 39), No. 198: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf; Binyam Mohamed is also a plaintiff in the civil lawsuit filed against Jeppesen Dataplan Inc., which is presented in a separate chapter "V. The Civil Case against Jeppesen Dataplan Inc. (U.S.)."

109 Amnesty International, supra note 73.

Rawi and el-Banna transported a weapon of mass destruction device to Gambia. Under the pressure of the court proceedings being brought on his behalf in the UK, the British government agreed to secure al-Rawi's release. In March 2007, he returned to the UK.[110] Despite el-Banna's British resident status (granted four years prior) and the fact that his entire family is British nationals, the British government initially refused to assist him, claiming he was not a British national and therefore had no jurisdiction over him.[111] On August 2007, however, the government announced that it would be making requests for release on behalf of UK residents still held at Guantánamo, including el-Banna, on the basis of their connection to the UK. El-Banna was returned to the UK on December 2007. He was detained on arrival and quickly released on bail pending a full hearing of a request from Spain for his extradition.[112]

## Political and Judicial Reactions

These cases successfully raised public awareness. Numerous committees have been dedicated to examining the circumstances of the detention of British nationals and residents, and to the possible complicity of British officials. The UK Parliament's Joint Committee on Human Rights concluded that the government could not adequately demonstrate it had satisfied its obligation to investigate any credible allegations of renditions by the UK and the subsequent torture of detainees abroad.[113] To this end, an All Party Parliamentary Group (APPG) has been established. This body is comprised of cross party membership, of members of the Parliament and Peers, and is tasked with investigations about the UK's involvement in providing assistance to the CIA in the practice of "extraordinary rendition." This body cannot however, influence the legislature.[114] Until now, the APPG held two information sessions about Binyam Mohamed, Bisher al-Rawi and Jamil el-Banna. In its first report, this body proposed the development of legal measures to address renditions; the mission of an Expert Working Group will be to finalize this proposal. This work for this group still continues.[115] The Intelligence and Security Committee has also examined the possible misconduct of British security services. This cross-party committee reporting to the Prime Minister came to the conclusion that there is no evidence linking UK-agencies directly to U.S. rendition program involvement. Nonetheless, in the cases of al-Rawi and el-Banna, it has been conceded that regardless of any appropriate sharing of intelligence information, this information may have triggered their unlawful arrest. If this were the case, the security service was slow to appreciate the change in the U.S. rendition policy.[116]

These cases have also been subject to investigations carried out by the Temporary Committee of the European Parliament (EP) and by the Special Rapporteur of the Council of Europe, Dick Marty. The Temporary Committee of the EP acknowledges that the abduction of al-Rawi and el-Banna was facilitated by partly erroneous information supplied by the MI5 (British security service). In the case of Binyam Mohamed, the British government is also harshly criticized: UK officials met Mohamed during his stay in Pakistan, but some of the questions put forth by the Moroccan interrogators appear to have been inspired by information supplied by the UK.[117] In spite of the indisputable misconduct of UK officials, which has

110 "Cases: Bisher Al Rawi (Guantánamo Bay)": www.reprieve.org.uk/casework_bisheralrawi.htm.

111 "Prisoners: Guantanamo: Jamil el Banna (Released)":http://www.cageprisoners.com/prisoners.php?id=163.

112 Amnesty International, State of Denial: Europe's Role in Rendition and Secret Detention, 28 June 2008, Case Sheets: "Bisher Al-Rawi and Jami El-Banna: role and responsibility of the UK", AI Index: EUR 01/003/2008.

113 Joint Committee on Human Rights- UK.Parliament, Nineteenth Report, Session 2005-2006, 8, Extraordinary Renditions, available at: www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18511.htm.

114 See also "All Party Parliamentary Group on Extraordinary Rendition, Briefing: Torture by proxy: International law applicable to 'Extraordinary Renditions," available at: www.chrgj.org/docs/APPG-NYU%20Briefing%20Paper.pdf.

115 Final Annual Review (2005-2006). For further information see: www.extraordinaryrendition.org; see also: Parliamentary Assembly of the Council of Europe. Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, No 335. Report of Dick Marty, Rapporteur. 7 June 2007. Available at: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.

116 Intelligence and Security Committee Report, Rendition, p. 354. July 2007. See also: www.statewatch.org/rendition/rendition.html.

117 Temporary Committee, Report on the Alleged Use of European Countries by the CIA

been elucidated by the work of these committees, disciplinary measures against specific individuals have not been initiated and criminal charges have not been filed. Binyam Mohammed is still detained in Guantánamo without any legal guarantees. He filed a habeas corpus petition, which was dismissed. Subsequently on June 13, 2008, the U.S. Supreme Court held in the case of Boumediene v. Bush that Guantánamo detainees have the right to file habeas corpus petitions in U.S. District Courts.[118] This holding is likely to lead to a revision of Mohammed's habeas corpus petition.

Lawyers for Binyam Mohammed contend that UK officials can provide evidence that Mohammed's incriminating statements, for which he could face the death penalty, were made as a result of being subjected to torture. They have urged the British government to release this information for use in the defense, but the requests have so far been ineffective. On June 3, 2008, London's High Court granted an urgent hearing to Mohammed for judicial review of his request for the documents.[119]

This court ruled on August 22, 2008, finding that UK Foreign Secretary David Miliband was "under a duty" to disclose the requested information "in confidence" to Mohamed´s legal advisers. The judges stated that not only was this necessary, but in fact it was essential for his defense.

In October 2008, the court criticized the fact that weeks after the British government identified 42 documents that would help prove Mr. Mohamed's innocence, the U.S. had only released seven of the documents to his defense team, each heavily censored. This was in direct violation of an agreement between the two governments. In recognizing the urgency of the issues presented, the court

for the Transportation and Illegal Detention of Prisoners, No 72. February 2007. Complete document available at: www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf.

118 See Boumediane et al. v. Bush: http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf.

119 BBC News, "UK Guantánamo man granted hearing," 5 June 2008. http://news.bbc.co.uk/2/hi/uk_news/7437345.stm.



clarified that if U.S. prosecutors did not comply with the written agreement that the UK courts would order the disclosure of the documents. At the same time, the court held that the UK need not disclose general information about the British government's knowledge of or involvement in the rendition program.[120] In October 2008, the British government referred Binyam Mohammed´s case to the Attorney General, requesting a full investigation of his torture and rendition by the CIA and prosecutions against the perpetrators of these crimes where appropriate.[121] Meanwhile, the U.S. military has dropped all criminal charges against Binyam Mohammed before a Military Commission in Guantánamo because the U.S. military prosecutor raised pervasive complaints about the military suppressing evidence favorable to the accused. The Pentagon, however, intends to re-file the charges against him.[122] In March 2008, Spanish judge Baltasar Garzón dropped the extradition proceedings against Jamil el-Banna. Garzón's ruling argued that the conditions in which el-Banna was held in Guantánamo and Afghanistan caused him to be in a physical and mental state that made a fair trial impossible.[123]

## Importance of the Case

Both cases are examples of ill-conceived cooperation between the security and intelligence services of different states. As the CIA tactics in the context of the

120 See "High Court decries U.S. bad faith in the case of Binyam Mohamed, British resident in Guantánamo Bay," Reprieve 22 October 2008, available at: http://www.reprieve.org.uk/Press_Binyam_Mohamed_22_10_2008.htm.

121 See "British Government refers the case of Guantánamo prisoner Binyam Mohamed to the Attorney General to investigate potential prosecution of those who rendered him to torture," Reprieve 31 October 2008, available at: http://www.reprieve.org.uk/British_Government_refers_Binyam_Mohameds_case_to_Attorney_General.htm.

122 See "U.S. Military Drops Guantánamo Charges against British Resident Binyam Mohamed," Reprieve 21 October 2008, available at: http://www.reprieve.org.uk/press_US_Military_drops_Binyam_charges_21_10_08.htm.

123 See Ruling in proceeding 25/2003 by Juzgado Central de Instrucción Número 5 de la Audiencia Nacional in Madrid, 5 March 2008, available at: http://www.elpais.com/elpaismedia/diario/media/200803/06/espana/20080306elpepinac_1_Pes_DOC.doc.

"War on Terror" have been radically hardened to the extent that both human rights and agreements between intelligence services are ignored, it appears that providing intelligence information to the U.S. may lead to extraordinary renditions and other unlawful treatment, even of presumably innocent individuals. The UK government's unwillingness to assist its residents on the basis that they are not British citizens is astonishing, especially when one recalls the gross negligence of UK authorities for sharing such "sensitive" information.

*I. Lawyers Involved:*
- Clive Stafford Smith (for Reprieve), London, UK
- Zachary Katznelson (for Reprieve), London, UK
- Gareth Peirce, London, UK
- Brent Mickum, Washington, USA
- Leigh Day, London, UK

*II. Main Organizations Involved:*
1. Governmental:
- All Party Parliamentary Group on Extraordinary Rendition (UK), www.extraordinaryrendition.org
- Joint committee on Human Rights: www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm
- UK Parliament, Intelligence and Security Committee: www.cabinetoffice.gov.uk/intelligence.aspx
2. Non-Governmental:
- Reprieve (UK): www.reprieve.org.uk
- Cageprisoners (UK): www.cageprisoners.com
- Statewatch- Observatory on renditions (UK): www.statewatch.org
- Amnesty International (UK): www.amnesty.org.uk
- Liberty (UK): www.liberty-human-rights.org.uk
- American Civil Liberties Union (USA): www.aclu.org

*III. Main Sources:*
1. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty "Alleged secret detentions and unlawful inter-state transfers involving



Council of Europe member states," Part II of February 7, 2006: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.
2. Official site of the All Party Parliamentary Group.
3. Casework of Reprieve.

## 5. The Case of Bensayah Belkacem, Hadj Boudellaa, Lakmar Boumediene, Sabir Mahfouz Lahmar, Mustafa Ait Idr, Mohammad Nechle (Bosnia-Herzegovina)

### Facts

Six Bosnians of Algerian origin, including five Bosnian citizens and one long-standing resident, were arrested in October 2001 by the federal police of Bosnia-Herzegovina on suspicion of involvement in a plot to attack the U.S. and UK embassies in Sarajevo.[124] They were detained by order of the investigative judge of the Supreme Court of Bosnia, which followed a request for an investigation by the federal public prosecutor.

On January 17, 2002, after a three-month international investigation (with collaboration from the U.S. embassy and Interpol),[125] the federal prosecutor informed the magistrate of the Supreme Court that there was no ongoing reason to keep the men in custody and the court ordered their immediate release. Although the U.S. embassy indicated that it had evidence linking the men to Al-Qaeda, this alleged evidence was never submitted to the court. On the same day, the Human Rights Chamber of Bosnia and Herzegovina issued an interim order for provisional measures to be taken in order to prevent the forcible deportation or extradition of four of

124 Their names are Bensayah Belkacem, Hadj Boudellaa, Lakmar Boumediene, Sabir Mahfouz Lahmar, Mustafa Ait Idr, Mohammad Nechle, in: Cageprisoners, Citizens No More, July 2007.

125 See Lakhdar Boumediene, et al. v. George W. Bush, et al. Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit before the Supreme Court No. 06-1195. US. 2(2007), available at: http://ccrjustice.org/files/Brief%20for%20the%20Boumediene%20Petitioners.pdf.

these men from Bosnia in response to an application that the men had submitted to the Human Rights Chamber of Bosnia several days prior.[126] In spite of this order (which according to the Dayton Peace Accords has statutory force in Bosnia), the six men were arrested by Bosnian police officers that day. The men were handed over to members of the U.S. military stationed in Bosnia.[127] During this procedure, representatives of the international community in Bosnia were given adequate notice of the imminent transfer of the men. However, the government of Bosnia was subjected to unprecedented pressure from the U.S. government. The U.S. threatened to close the American embassy and to cease diplomatic relations with Bosnia if Bosnian authorities refused to turn the six Algerians over to their custody.[128]

According to the victims' evidence, they were subsequently boarded onto an aircraft at the Tuzla military base. After a flight of several hours the aircraft landed and the six men were forced to disembark. At this stopover, most likely at the Incirlik air base in Turkey, other detainees joined them, including some from Afghanistan. The human cargo arrived at Guantánamo on January 20, 2002.[129]

126 Boudellaa, Boumediene, Nechle and Lahmar v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, cases No. CH/02/8690, CH/02/8691, Order for Provisional Measures and other Organization of the Proceedings, 17 January, 2001.

127 This is recorded as an established fact in a judgment of the Human Rights Chamber of April 4, 2003, Case no CH/02/9499, Bekaseh Bensayah against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

128 Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, supra note 117; see also the testimony given to the Temporary Committee by Wolfgang Petritch, High Representative of the international community in Bosnia-Herzegovina.

129 These facts are considered to be well-documented by international organization bodies and human rights associations; See Marty 2006 Memorandum, supra note 103; See Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners 143-148, supra note 117; Amnesty International, supra note 44; Amnesty International. "Bosnia-Herzegovina: Unlawful Detention of 6 men from Bosnia-Herzegovina in Guantánamo Bay." Available at: http://web.amnesty.org/library/index/ENGEUR630132003; Center for Human Rights and Global Justice. "Beyond Guantánamo." P.13 June 2005; Cageprisoners Report "Citizens No. more." July 2007. Available at. http://www.cageprisoners.com/citizensnomore.pdf.



## Political and Judicial Reactions

The disregard for the decision of the Bosnian Supreme Court led to an appeal to the Human Rights Chamber for Bosnia and Herzegovina, which ruled on the cases of Boudellaa, Boumediene, Lahmar and Nechle in October 2002 and the cases of Bensayah and Ait Idir in April 2003. It found that the state, as well as the federation of Bosnia and Herzegovina, had arbitrarily expelled the men in violation of Article 1 of Protocol No. 7 of the European Convention of Human Rights (ECHR) (procedural safeguards relating to the expulsion of aliens) and Article 3 of Protocol No. 4 of the ECHR (prohibition of expulsion of nationals). This ruling stated that the Bosnian authorities had violated the men's rights to liberty from the time the court ordered their release until their forcible removal from Bosnia. The chamber ordered the Bosnian government to use diplomatic channels to protect the men's rights taking all possible steps to contact them, provide them with consular support and to ensure they would not be subjected to the death penalty. The authorities were also ordered to retain lawyers to protect the men's rights while in U.S. custody and in case of proceedings, involve them in paying compensation.[130]

The Bosnian government has subsequently recognized its legal obligation and admitted that the six men were handed over to the Americans without abiding by extradition formalities.[131] As a result, a delegation of the Bosnian government went to Guantánamo in June 2004 in an attempt to visit the men. The Bosnian delegates were permitted to visit only four of the six detainees. U.S. officials were present during their conversations with the detainees. Upon returning to Bosnia,

130 Human Rights Chamber for Bosnia and Herzegovina, Boudellaa and others versus Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (Case No. CH/02/8679), Decision on admissibility and merits, October 11, 2002 (Boudellaa Decision), paras 323-332 and Conclusions. Bensayah versus Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (Case No. CH/02/9499), Decision on admissibility and merits, 4 April 2003 (Bensayah Decision), paras 212-219 and Conclusions. Ait Idir versus Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (Case No. CH/02/8961), Decision on admissibility and merits, April 4, 2003 (Ait Idir Decision), paras 163-171 and Conclusions.

131 Marty, Ch. 3 No. 140, supra note 39.

the delegation provided only limited information to the families of the detainees.[132] It remains unknown which other diplomatic measures the Bosnian government is taking to achieve the release of the six men. In April 2006, following a complaint submitted by Boudellaa's wife, the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina concluded that the Bosnian authorities had failed to implement the 2002 decision of the Human Rights Chamber with regard to Hadj Boudellaa. The Commission said the authorities had failed to use diplomatic channels to protect the rights of the detainee and to take all necessary steps to ensure that he would not be subjected to the death penalty, including asking the U.S. for guarantees to that effect. Despite many promising declarations, the Bosnian executive for the release of the six men has not taken effective action until now.[133] Recently, the Sarajevo Prosecutor´s Office launched a criminal inquiry against former Bosnian officials, including high-ranking politicians of the Social Democratic Party, accusing them of illegally handing the six suspects to U.S. authorities.[134]

The case of the six Bosnian men has also been challenged in the U.S. In late 2004, the six men were heard before the Combatant Status Review Tribunal comprised of three military officers. These tribunals concluded, however, that the men had been properly classified as enemy combatants, but on the basis of classified evidence. Following the Supreme Court's decision in Rasul v. Bush,[135] habeas corpus petitions were filed on behalf of the men in federal district courts in July

132 Amnesty International, supra note 74.

133 On August 23, 2007, Bosnia´s minister of justice released a letter to the U.S. in which he asks for guarantees that the six men will not be sentenced to death and will not be exposed to torture, inhumane and humiliating treatments. "Bosnia interested in fate of its people in Guantánamo": "Bosnia-Herzegovinian authorities recently requested guarantees from the U.S. government that six Bosnian citizens detained in Guantánamo Bay prison would not be executed or tortured, the Foreign Ministry confirmed Thursday in Sarajevo." www.earthtimes.org/articles/show/97201.html.

134 See "Global Terrorism Analysis: Bosnian Authorities Face Charges over Transfer of Algerian Six to Guantanamo," The Jamestown Foundation 10 September 2008: http://www.jamestown.org/terrorism/news/article.php?articleid=2374405.

135 The Supreme Court stated that habeas corpus statutes confer jurisdiction on federal courts to hear challenges by aliens held at Guantánamo, 542 U.S. 466 (2004).



2004.[136] The government moved to dismiss these habeas corpus petitions on the grounds that the facts, even if true, did not warrant a grant of habeas corpus relief. The court granted the government's motion arguing that the Authorization for Use of Military Forces also authorized the petitioners' detention.[137] The court rejected the petitioners' constitutional challenges maintaining that aliens who are not "located within sovereign U.S. territory" have no constitutional rights.

These decisions were appealed and consolidated for oral argument before the D.C. Circuit. On February 20, 2007, after having heard several stages of oral arguments, the court dismissed the appeals by a margin of 2 to 1 due to a lack of jurisdiction. On March 6, 2007, the six men filed a petition for Writ of Certiorari with the U.S. Supreme Court seeking to reverse the decision of the Court of Appeals. The petition was denied in April 2007 because the petitioners apparently failed to exhaust the remedies available in the CSRT (Combatant Status Review Tribunal) review scheme.[138] On June 2007, the Supreme Court announced that it would hear the consolidated cases of Al Odah and Boumediene. This is the third time in the history of the detention camp at Guantánamo Bay that the Supreme Court agreed to hear a case concerning the rights of detainees. On August 2007, the Center for Constitutional Rights (CCR) filed opening briefs in the Supreme Court for Boumediene v. Bush accompanied by more than 20 amicus curiae briefs in which the cases of all six men were challenged. On June 12, 2008, the U.S. Supreme Court ruled 5-4 in favor of the detainees, reversing the Court of Appeals decision and granting them the writ of habeas corpus.[139]

On November 20, 2008, Judge Richard Leon of the Federal District Court in Washington ruled that the five Algerian men from Bosnia had been held unlawfully in Guantánamo for nearly seven years, and ordered their release. In his

136 Petition for Writ of Habeas Corpus Boumediene vs Bush, No 04-1166 (D.D.C.), 2004 July 8.

137 Public Law No 107-40, 115 Stat. 224 (2001) AUMF.

138 See the timeline of the case: http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states.

139 Boumediene et al. v. Bush, available at: http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf.

ruling, Judge Leon referred to the government's weak evidence (a classified document from an unnamed source) and held that while such information may have been sufficient for intelligence purposes, it was not sufficient for the court. Consequently, he urged the government not to appeal and instead release the men "forthwith." With regard to Belkacem Bensayah, the sixth detainee, the judge ruled that he had been lawfully detained as a facilitator of Al-Qaeda.[140] His attorneys stated that they would appeal the ruling.[141]

The U.S. government claims to have transferred three of the detainees whom the Federal District Court ordered freed to Bosnia.[142]

### Importance of the Case

The case of the six unlawfully detained Bosnians in Guantánamo demonstrated the importance of a legal debate regarding the unlawfulness of detention centers where fundamental rights of detainees are completely ignored. This case illustrates the challenges for "young" democracies, such as Bosnia and Herzegovina, in enforcing the rule of law. Politically and economically vulnerable governments are uniquely susceptible to human rights violations prompted by the U.S., and as such, these governments need the support of other states.

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- Stephen Oleskey, Boston, USA
- Rob Kirsch, Boston, USA
- Wilmerhale, Boston, USA
- Gutierrez Gitanjali (for CCR), New York, USA

140 Glaberson. "Judge Declares Five Detainees Held Illegally," *New York Times* 2008 November 20.

141 See Human Rights Watch. "U.S.: New Legal Victory for Guantánamo Detainees,": http://www.hrw.org/en/news/2008/11/20/us-new-legal-victory-guantanamo-detainees.

142 Glaberson. "U.S. Is Set To Release 3 Detainees From Base," *New York Times* 2008 December 15.



*II. Main Organizations Involved:*
1. Governmental:
- Human Rights Chamber of Bosnia and Herzegovina, Supreme Court of Bosnia and Herzegovina
2. Non-Governmental:
- Center for Human Rights and Global Justice, USA: www.chrgj.org
- Cageprisoners, UK: www.cageprisoners.com
- Amnesty International, UK: www.amnesty.org.uk
- Human Rights Watch, USA: www.hrw.org
- Human Rights First, USA: www.humanrightsfirst.org
- CCR (USA), www.ccrjustice.org

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2. European Parliament's Resolution on the alleged use of European countries by the C.I.A. for the transportation and illegal detention of prisoners ("Fava-Report"), February 14, 2007.
3. Amnesty International, Partners in crime: Europe's role in U.S. rendition.

## 6. The Cases of Murat Kurnaz and Khaled El Masri (Germany)

### A. MURAT KURNAZ

### Facts

Murat Kurnaz, born in 1982 in Germany, is a Turkish national with legal residence in Germany.

In November 2001, Kurnaz claims that he was in Pakistan on a pilgrimage. He was arrested by Pakistani authorities there and brought to Kandahar in Afghani-

stan where he was allegedly handed over to U.S. soldiers in return for a USD 3,000 reward. Kurnaz states that he was regularly beaten by U.S. soldiers as well as by members of the German Special Forces Command (KSK).[143] In early February 2002, he was transferred to Guantánamo Bay, Cuba. There, he was exposed to the cold and lack of oxygen and was forced to remain in a cage with a bucket for a toilet. For weeks, he suffered from sleep deprivation and was detained incommunicado.[144] Kurnaz was interrogated by German intelligence agents[145] in September 2002[146] and in April 2004.[147] Quickly after the first interrogation, the agents concluded in October 2002 that there was no evidence in which to classify Kurnaz as dangerous, but that he was merely naive.[148] Yet by late October 2002, leaders of the German Federal Chancellery, the Federal Intelligence Service (BND) and the Interior Ministry agreed to deny Kurnaz' entry to Germany. Should he be released, it was determined that he would be deported as a Turkish national to Turkey.[149] To receive formal confirmation of this decision, the authorities in Bremen (where Kurnaz lived prior to his arrest) were contacted. Moreover, German authorities agreed to request that their U.S. counterparts physically destroy the residence permit in Kurnaz' Turkish passport to prevent his re-entry into Germany.[150]

An internal report written by the Federal Intelligence Service to its then head, August Hanning, dated November 9, 2002 states that the U.S. authorities could have released Kurnaz because of "unascertainable guilt" as well as his cooperation with the German authorities.[151] The German authorities failed to act on this opportunity.

A memorandum of the German Foreign Ministry dated October 26, 2005, mentions that Kurnaz' reentry to Germany was discussed several times with the

143 Press statement of the German Parliament, „Kurnaz ging durch die Hölle," 18 January 2007 / John Goetz, Holger Stark. „Die Nacht von Kandahar," *Der Spiegel* 3 September 2007: 60-61.

144 Press statement of the German Parliament: „Kurnaz ging durch die Hölle," 18 January 2007 / Markus Feldenkirchen. „Mit glühender Sachlichkeit," *Der Spiegel* 26 February 2007: 28-32.

145 Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners. Available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf.

146 The German news magazine *Der Spiegel* reported that Kurnaz was interrogated by two members of the German Intelligence Service (Bundesnachrichtendienst) and one member of the Federal Office for the Protection of the Constitution (Verfassungsschutz) "Gefangener der Vergangenheit", *Der Spiegel* 22 January 2007: 35. According to August Hanning, then President of the German Intelligence Service (Bundesnachrichtendienst), Kurnaz was interrogated by German Intelligence Service agents in September 2002. According to Ulrich Kerstens, then president of the German Federal Criminal Police office (Bundeskriminalamt), Kurnaz was interrogated by three German agents of the German intelligence services in autumn 2002. (Statement of August Hanning and Ulrich Kerstens in the committee of inquiry of the German Parliament. Press Releases of the German Parliament: "Hanning: Entlastende Kurnaz-Beurteilung war `grob fehlerhaft'", March 8, 2007 and „Fall Kurnaz: Kersten nimmt BKA in Schutz").

147 The behavior of the German authorities after being informed about Kurnaz' arrest is politically highly disputed and still on the agenda of the committee of inquiry of the German parliament. The following version is established in some of the most serious German newspapers and partly confirmed by officials.

148 Markus Feldenkirchen, „Mit glühender Sachlichkeit," *Der Spiegel* 26 February 2007: 28-32.

149 Marce Rosenbach and Holger Stark, „Gesuchte Vermerke," *Der Spiegel* 2007 February 26: 30.

150 Hans Leyendecker, John Goetz and Nicolas Richter: „Unschuldig im US-Gefangenenlager - Der verstoßene Murat Kurnaz - Mit deutscher Gründlichkeit: Wie die alte Bundesregierung versucht hat, die Rückkehr des Bremer Guantanamo-Häftlings zu verhindern," *Süddeutsche Zeitung* Online 19 January 2007; „29. Oktober 2002: Im Kanzleramt diskutieren die Chefs der Sicherheitsbehörden über ein Angebot der Amerikaner, Kurnaz freizulassen. Der von August Hanning geführte Bundesnachrichtendienst plädiert dafür, Kurnaz in die Türkei abzuschieben und eine Einreisesperre für Deutschland zu verhängen. Das entspricht der Meinung des Kanzleramtes und des Innenministeriums. 30. Oktober 2002: Das Innenministerium erarbeitet einen Fünf-Punkte-Plan, um Kurnaz auf Distanz zu halten. Das Ministerium befindet, die Aufenthaltserlaubnis des Bremers sei kraft Gesetzes erloschen, weil Kurnaz sich länger als sechs Monate im Ausland aufgehalten habe und nicht zurückgekehrt sei. Weil die zuständige Ausländerbehörde der Stadt Bremen dies förmlich feststellen soll, beschließt das Ministerium eine „Kontaktaufnahme mit der Stadt Bremen". (...) Das Innenministerium schlägt vor, das Bundesamt für Verfassungsschutz solle die Amerikaner darum bitten, den Pass von Kurnaz einer deutschen Botschaft zur Verfügung zu stellen, um die Aufenthaltsgenehmigung auch „physikalisch ungültig" zu machen, das heißt: Die Seite mit dem Aufenthaltstitel zu vernichten. Das Kanzleramt billigt den Plan."

151 *Süddeutsche Zeitung* online 9 November 2002: „In einem internen BND-Bericht an Behördenchef Hanning heißt es, die Amerikaner wollten Kurnaz wegen seiner „nicht feststellbaren Schuld sowie als Zeichen der guten Zusammenarbeit mit den deutschen Behörden ‚freilassen'."

former head of the Federal Chancellery, Frank-Walter Steinmeier, and the former Ministry of the Interior, Otto Schily.[152] All parties agreed to avert Kurnaz' entry to Germany.[153] On August 24, 2006, presumably as a result of talks between the recently elected German Chancellor Merkel and President George Bush, Kurnaz was released. He returned to Germany where he still lives today.

## Political and Judicial Reactions

Kurnaz' case caused a variety of judicial and political reactions, particularly in Germany.

In August 2004, the authorities of the German state of Bremen declared the expiration of Murat Kurnaz' residence permit.

On November 30, 2005, the administrative court of Bremen declared the expiry of Kurnaz' residence permit illegal because he was not given the opportunity to extend its validity.[154] The office of the prosecutor in Tübingen (southern Germany) investigated Kurnaz' accusation of mistreatment by members of the German Special Forces Command (KSK). The prosecutor closed the proceedings early for lack of evidence in May 2007, and reassumed the proceedings in August 2007 when new evidence was obtained. The case was closed again

152 *Süddeutsche Zeitung* online 26 October 2002: „In einem Vermerk des Auswärtigen Amtes heißt es: "Die Frage der Zulassung der Wiedereinreise von Kurnaz war laut Bundesinnenministerium und dem Chef des Bundeskanzleramtes bereits mehrfach Gegenstand der nachrichtendienstlichen Lage. Dort sei auch mit dem Auswärtigen Amt Übereinstimmung erzielt worden, eine Wiedereinreise des K. nicht zuzulassen."

153 Foreign Minister Steinmeier, who was head of the Federal Chancellery at that time, said in the committee of inquiry of the German Parliament, that it had been correct to classify Kurnaz as dangerous and therefore to deny him re-entry to Germany in case of his release. However, neither an official, nor an unofficial offer by the U.S. had existed to release Kurnaz. "(Press Release of the German Parliament: "Steinmeier: Haltlose Vorwürfe im Fall Kurnaz", 29 March 2007)."

154 Press Release of the Administrative Court of Bremen, 30 November 2005.



in March 2008.[155] To date, there have not been any criminal charges brought against individuals for the criminal acts against Murat Kurnaz. The case of Murnat Kurnaz was also discussed in detail during two parliamentary inquiries held by the Defense Committee and a Committee of Inquiry of the Federal German Parliament. The work of these committees has been completed, but the reports are yet to be published.[156]

In 2005, Washington federal judge Joyce Hens Green, overruled the 2004 judgment that classified Kurnaz an "enemy combatant." She stated that there was no evidence for the assumption that Kurnaz had been involved in terrorist activities.[157] In this way, the unlawful detention of Kurnaz constitutes the criminal offence of illegal restraint, for which German officials could be held accountable as contributing actors in the prolongation of the deprivation of his liberty.[158]

On December 20, 2006, American lawyer Baher Azmy filed a complaint on behalf of Kurnaz[159] based on the Freedom of Information Act,[160] after an October 2006 request to the U.S. Department of Defense seeking the release of transcripts and records related to Kurnaz's Combatant Status Review Tribunal and Administrative Review Board proceedings. To date, the defense lawyers have only gained access to the uncensored parts of Judge Green's ruling.

155 John Goetz, Holger Stark, „Die Nacht von Kandahar," *Der Spiegel* 3 September 2007: 60-61.

156 Concerning the parliamentary inquiry efforts in Germany see also the corresponding chapter, p. 73.

157 Amnesty International, „Auf der anderen Seite des Mondes", Interview with Baher Azmy, AI Journal March 2007. AI Journal March 2007, p. 14.

158 That is also the position of different opposition parties in Germany; see interview of issue the interview of Wolfgang Nescovic, Member of the parliamentary inquiry at the General Parliament for the party "The Left" of January 20, 2007, (German version): http://www.linksfraktion.de/wortlaut.php?artikel=1516975474.

159 Baher Azmy v. United States Department of Defense, supra note 18.

160 For more information concerning the FOIA cases, see the separate chapter "I. The Freedom of Information Cases (USA/Europe)" in this publication.

### Importance of the Case

In addition to the case of Khaled El Masri, the case of Murat Kurnaz attracted significant public attention in Germany. It seems that Kurnaz, evidently due to political considerations of the then incumbent German government,[161] was forced to remain in prison for years even after it became apparent to the German security authorities that there was no evidence linking him to involvement in any kind of terrorist activities.

*I. Lawyers Involved:*
- Bernhard Docke, Bremen, Germany
- Baher Azmy, New York, USA

*II. Main Organizations Involved:*
1. Governmental:
- Council of Europe: www.coe.int/DefaultEN.asp
2. Non-Governmental:
- Center for Constitutional Rights: www.ccrjustice.org
- European Center for Constitutional and Human Rights

*III. Main Sources:*
1. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Kevin McNamara: "Lawfulness of detention by the United States in Guantánamo Bay, Doc. No. 10947, 7 April 2005.
2. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty: "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", Doc. No. 11302 rev., June 7, 2007: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.
3. Report of the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for illegal activities (TDIP).

161 See Marty 2007 Memorandum, No. 311, supra note 36.



4. Amended Mandate for the Committee of Inquiry, Bundestag Printed Papers 16/990, 16/1179, 16/3028, 16/3191, 16/5751 and 16/6007.
5. Various press statements of the German parliament (only available in German): www.bundestag.de/ausschuesse/ua/1_ua/hib/index.html.

## B. KHALED EL MASRI

### Facts

Khaled El Masri (also el-Masri, Al Masri), a German national of Lebanese descent was abducted on a trip to Skopje, Macedonia on December 31, 2003.

Macedonian officials detained him after his passport was confiscated on the border between Serbia and Macedonia. He was interrogated at the border, then driven to the capital, Skopje, by armed men in plain clothes, possibly police.[162]

El Masri was subsequently held in a hotel room by at least nine different armed men who rotated watch duty in teams of three. These men are believed to be from the UBK, the Directorate of Macedonia for Security and Counter-Intelligence. El Masri was repeatedly interrogated about alleged contacts with Islamic extremists; he was threatened with the use of guns and denied any contact with the German Embassy, an attorney, or his family. He was told that confessing to Al-Qaeda membership would earn him return to Germany. On the thirteenth day of confinement, El Masri commenced a hunger strike that he continued until his departure from Macedonia.[163]

On January 23, 2004, after 23 days of detention, El Masri was blindfolded, videotaped, and driven to what he thought might have been the Skopje airport.

162 Amnesty International, Chapter 4: Macedonia, Germany and the case of Khaled El Masri, supra note 44.

163 See Marty 2006 Memorandum, Ch. 3, supra note 104.

Hooded men dressed in black and wearing gloves beat Khaled El Masri at the airport. He was ordered to completely undress and was undressed by force when he refused to do so independently. El Masri states that he was thrown to the floor; his hands were pulled behind him while someone placed their boot on his back. El Masri was dressed in plastic underpants and a tracksuit with short sleeves and legs; a plastic bag was put over his head which complicated his breathing, and he was subject to other sensory deprivation. He was marched to the plane hooded and still shackled, he was thrown to the floor in the plane and held in a spread-eagle position. His arms and legs were secured to the sides of the plane.[164] He was injected with drugs and flown to Baghdad and then on to Kabul, Afghanistan. This itinerary is confirmed by public flight record.[165]

In Kabul, El Masri was taken to a prison that his lawyers believe to have been the "Salt Pit," an abandoned brick factory run by U.S.-agents as a prison. It is located in the north of the business district in Kabul. El Masri was left in a filthy, dark cell in the cellar where he was beaten and provided insufficient food.[166] He was interrogated several times in Arabic about his alleged ties to 9/11 conspirators based in Germany. American officials participated in his interrogations[167] and on four occasions a uniformed German speaker "with no foreign accent at all" (El Masri) also participated. This interrogator identified himself only as "Sam".[168] "Sam" refused to say whether the German government had sent him or whether it knew about El Masri's whereabouts.[169] After his release, El Masri identified "Sam" in a photograph and a police line-up as Gerhard Lehmann, a member of the German Federal Police (BKA). Lehmann denies being "Sam" and claims he did not interrogate El Masri.

164 Amnesty International, "Partners in crime: Europe´s role in U.S. renditions, AI Index: EUR 01/008/2006," June 2006.

165 See Marty 2006 Report, Ch. 3, supra note 39.

166 Amnesty International, supra note 164.

167 See Marty 2006 Report, Ch. 3, supra note 39.

168 Amnesty International, supra note 164.

169 See Marty 2006 Report, Ch. 3, supra note 39.



El Masri recommenced his hunger strike. After nearly four weeks without food he was brought before two American officials. One of the Americans was convinced of El Masri's innocence, but insisted that only officials in Washington, D.C. could authorize his release. Subsequent media reports confirm that senior officials in Washington, including the CIA Director Tenet, were informed long before his release that the United States had detained an innocent man. El Masri continued his hunger strike. On April 10, 2004, he was dragged from his room by hooded men and force-fed through a nasal tube.[170]

In May 2004, Khaled El Masri was freed without having been charged with a crime or having been brought before a court. U.S. Secretary of State Condoleezza Rice is reported to have personally ordered his release, allegedly after learning that he had been mistakenly identified as someone suspected of terrorism.[171] According to Amnesty International the "mix-up" explanation lacks credibility. In both Macedonia and Afghanistan, Khaled El Masri was repeatedly interrogated about activities at the cultural center attached to a mosque in Neu-Ulm that he regularly attended. If he had really been mistaken for another Khaled El Masri, an individual identified in the 9/11 Commission Report who reportedly trained at an Al-Qaeda training camp, the interrogators would surely have asked him about this.[172]

On May 28, 2004, Khaled El Masri was accompanied by "Sam" and put on a plane. He was told he would be flown to a European country, but not to Germany. When the flight landed he was put into a car and driven along mountainous roads for approximately six hours. At one point, three men with "south European/Slavic accents" climbed into the car, but said little. He was finally let out of the car, his blindfold and handcuffs were removed, and he was given his suitcase. He was then instructed to walk down a path without looking back. It was dark, he said, and "as I walked I feared that I was about to be shot in the back and left to die."

170 See Marty 2006 Report, Ch. 3, supra note 39.

171 David Johnston, "Rice Ordered Release of German Sent to Afghan Prison in Error," The *New York Times* 23 April 2005.

172 Amnesty International, supra note 164.

A short while later, at a turn in the path, he was met by three armed men in uniform who took his passport and escorted him to a building flying an Albanian flag. There, the officer in charge informed him that he had entered Albania illegally. However, instead of detaining him as he had expected, the officer told him that he would be taken to the airport. The three men in uniform then drove him to the Mother Theresa International Airport near Tirana. They arrived at around 6.30 a.m. and were met by an officer in plain clothes who took Khaled El Masri's passport and money. A ticket to Frankfurt, Germany was purchased for him[173] and he was placed on a flight to Frankfurt.[174]

The plane arrived in Frankfurt on the morning of May 29, 2004. Khaled El Masri says that he went to his hometown to find his house deserted and his family gone. His wife, who had not known where he was or if he would ever return, had taken the children to her family's home in Lebanon.[175]

Khaled El Masri still suffers severe psychological trauma as a direct result of the ordeal. He has since been repeatedly victimized by personal attacks in the local media and has been unable to find employment in the last three years. In January 2007, he lashed out physically at a vocational training officer, whom he felt had treated him unfairly. On May 17, 2007, he was arrested in Germany as a suspect in a case of arson and placed in a psychiatric hospital. On December 11, 2007, he was sentenced to two years in prison with parole for vandalizing a shopping center. According to his therapist, the conflict between his post-traumatic care and the pressure arising from the various ongoing procedures to establish the truth, compounds El Masri's mental trauma.[176]

173 Amnesty International, supra note 164.

174 See Marty 2006 Report, Ch. 3, supra note 39.

175 Amnesty International, supra note 164.

176 See Marty 2007 Memorandum, supra note 36.



## Political and Judicial Reactions

The above-mentioned parliamentary committee of inquiry of the German Bundestag considered the case.[177] In June 2004, El Masri's German lawyer, Manfred Gnjidic, informed the German police by letter of El Masri's experience and the German prosecutors took up his case.[178] International arrest warrants were authorized by the Munich district court after a prosecutor in Munich initiated the case.

In January 2007,[179] 13 suspected CIA agents and flight personnel were accused of transporting El Masri by air to Afghanistan for interrogation before deserting him on an Albanian road in May 2004 after realizing they had abducted the wrong man.

In September 2007, the German government announced it would not pursue extradition requests to the United States, in an apparent effort to avoid potential political conflicts with the U.S. government.[180] On June 2008, the European Center for Constitutional and Human Rights (ECCHR) filed a complaint against the Federal Republic of Germany at the Administrative Court in Berlin on behalf of El Masri requesting an extradition warrant be issued for the CIA agents involved in his extraordinary rendition.[181]

It has been revealed that the telephones of El Masri's German lawyer were tapped from January until May 2006 on the instructions of the prosecutor's office. The prosecutor argued that the wiretap was needed to document any possible attempts made by the suspected kidnappers to contact El Masri's lawyer, Gnjidic, in

177 See separate chapter "IV. Other Instruments: Parliamentary and Governmental Inquiries. 1. The Parliamentary Inquiries in Germany" in this publication.

178 Amnesty International, supra note 164.

179 See Marty 2007 Memorandum, Ch. 6, supra note 36.

180 "Verzicht auf Auslieferung," *Süddeutsche Zeitung* 24 September 2007: 6.

181 See more: http://www.ecchr.eu/cases/articles/cia-rendition-case-khaled-el-masri-lawsuit-against-germany.html.

order to offer El Masri a settlement. As no such contacts were made, the wiretap was terminated. Gnjidic, who had not been informed of this wiretap in advance, appealed the decision authorizing the surveillance. On May 17, 2007, the Federal Constitutional Court ruled that the wiretap violated Gnjidic's constitutionally protected right to professional privacy.[182] In December 2005, the American Civil Liberties Union (ACLU) filed a complaint[183] in a U.S. District Court for the Eastern District of Virginia on behalf of El Masri against former CIA Director George Tenet, three CIA-linked air transport companies, and 20 employees of the CIA or the transport companies. El Masri requested USD 75,000 in damages. The case was rejected in the first instance in May 2006 on grounds of state secrecy. The complaint was dismissed again by the Court of Appeal on October 9, 2007. In answer to these rulings, the ACLU filed a petition on April 2008 with the Inter-American Commission on Human Rights (IACHR) alleging that El Masri's human rights were violated by the U.S. government and requested a hearing. The ACLU petition called on the IACHR to declare that the extraordinary rendition program violated the American Declaration of Rights and Duties of Man, to find that the U.S. violated El Masri ´s rights under that declaration, and to recommend that the U.S. publicly acknowledge and apologize for its role in violating El Masri's rights of freedom from arbitrary detention and torture.[184]

In Albania, the Open Society Justice Initiative, the Center for Development and Democratization of Institutions (CDDI), and a journalist, collaboratively submitted requests for information to the Interior Ministry and the Ministry of Defense in August 2007. The first response alleged that the requested information would harm privacy rules; the latter argued that military information would be affected and therefore, the information could not be disclosed.[185]

182 See Marty 2007 Memorandum, Ch. 6, supra note 36.

183 Khaled El-Masri versus George Tenet and others: www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf.

184 See the original text of the petition: http://www.aclu.org/pdfs/safefree/elmasri_iachr_20080409.pdf.

185 For more detailed information please see chapter "I. The Freedom of Information Cases (USA/Europe)".



Macedonia has officially denied that El Masri was illegally held on its territory.[186] Therefore, disciplinary or criminal proceedings have not been brought against the personnel of the Directorate for Security and Counter-Intelligence, nor against other officials suspected to be responsible or involved. Despite Macedonia's public agreement to assist in the various investigations,[187] they did not support the investigations of the Council of Europe or those of the European Parliament.[188]

A Macedonian parliamentary committee concluded on May 18, 2007 that the country's secret services "did not overstep their powers" in the case of Khaled El Masri.[189]

## Importance of the Case

El Masri's case is one of the best documented rendition cases and probably the one which gained most public attention due to the fact that several legal and political proceedings in different countries were initiated. The investigations led by the Munich prosecutor resulted in the authorization of a second series of arrest warrants issued against CIA agents in Europe, following the "Abu Omar" case in Italy.

Both the civil lawsuit in the United States, as well as the investigation by the German parliamentary committee of inquiry, illustrate the problems raised by the doctrine of state secrecy. In Germany, this doctrine averted the effective prosecution of Khaled El Masri's kidnappers and others who became victims of renditions.

186 Hari Kostiv, the Interior Minister at the time and later the Prime Minister, reportedly said: "There is nothing the ministry has done illegally. The man is alive and back home with his family. Somebody made a mistake. That somebody is not Macedonia."

187 Investigations by the German prosecutor, the Council of Europe and by the Temporary Committee of the European Union.

188 Amnesty International, supra note 164.

189 Dick Marty reports in his second report of June 2007 that its Chairman, Rahic, was quoted in the media as saying that "until El-Masri's account is proved and we are presented with strong evidence, we will believe the Interior Ministry".

There are no circumstances under which state secrecy should justify criminal acts and serious human rights violations.

*I. Lawyers Involved:*
- Manfred Gnjidic, Ulm, Germany
- Sönke Hilbrans, (for ECCHR), Berlin, Germany
- Rebecca K. Glenberg (for ACLU), Richmond, Virginia, USA
- Ben Wizner, R. Shapiro, Steven M. Watt, Melissa Goodman, Jameel Jaffer (ACLU), New York, USA
- Victor M. Glasberg, Alexandria, Virginia, USA

*II. Main Organizations Involved:*
1. Governmental:
- Council of Europe: www.coe.int/DefaultEN.asp
- Temporary Committee of the European Union: www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm
2. Non-Governmental:
- American Civil Liberties Union (ACLU): www.aclu.org
- Centre for Development and Democratization of Institutions (CDDI): http://www.foiadvocates.net
- Amnesty International: www.amnesty.org
- European Center for Constitutional and Human Rights (ECCHR): www.ecchr.eu

*III. Main Sources:*
1. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states", Part II, June 7, 2006: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.
2. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", June 7, 2007: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.
3. Complaint El-Masri versus Tenet et al.: www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf.



4. Amnesty International: Amnesty International, June 14, 2006, AI Index: EUR 01/008/2006, Partners in Crime: Europe's Role in U.S. Rendition, Chapter 4: Macedonia, Germany and the case of Khaled el-Masri: http://www.statewatch.org/news/2006/jul/ai-partners-in-crime.pdf.

## 7. The Criminal Complaint against Arbitrary Detention and Torture (France)

### Facts

Although committees representing a variety of European organizations have proven that European governments collaborated with the CIA extraordinary rendition program, such allegations have never been brought against France. Neither the reports of the related Parliamentary Assembly of the Council of Europe, nor the relevant report of the European Parliament discuss the possible complicity of French authorities.

Nevertheless, this conclusion is controversial. In December 2005, two human rights organizations, the International Federation of Human Rights (Fédération Internationale des Droits de l' Homme, FIDH) and the League for Human Rights (Ligue des Droits de l' Homme, LDH) filed a complaint with the Public Prosecutor of the Administrative Court of the city of Bobigny (Tribunal de Grande Instance de Bobigny) against arbitrary detentions, illegal confinement, torture and violations of the Third Geneva Convention on the fate of the prisoners of war.

On December 2, 2005, the daily French newspaper *Le Figaro* revealed the existence of two aircrafts that had landed in France suspected of transporting CIA prisoners. On at least two occasions aircrafts have allegedly landed at French airports under suspicious circumstances and without any clear indication of their destination. It is suspected that these flights are related to the transport of CIA prisoners to secret detention centers. As the secret transportation of prisoners can be linked to arbitrary detention and illegal confinement, French

authorities are obliged to inquire about these activities and to pursue possible perpetrators in accordance with domestic law.[190]

## Political and Judicial Reactions

As a result, a criminal investigation regarding CIA flights in France was opened. In March 2006, the Public Prosecutor of Bobigny initiated a preliminary investigation to be carried out by the local police department on air transport in Bobigny. The objective of this investigation was to determine if a Gulfstream III jet number N50BH arriving from Oslo, Norway had landed at the Bourget airport in July 2005, and if this plane was used to transport CIA prisoners to Guantánamo.[191] The instructions did not include investigations into another suspicious aircraft, which was claimed to have landed in Brest in March 2002. The lawyer representing the League for Human Rights complained that the judicial investigation was opened late, in January 2006, a year after the initial filing of the criminal complaint. He also complained that no verifications had been previously conducted.

The French Minister of Foreign Affairs, through his spokesman, did not exclude the possibility that CIA flights may have landed on French soil. He clarified that knowledge of these landings by French authorities must still be verified.

Despite an amended complaint containing evidence about two other flights that landed in France in April 2006, the Public Prosecutor decided in September 2006 not to open criminal proceedings against individuals who knew about these flights or abetted the illegal transportation of CIA detainees.[192]

190 See the Complaint by Fédération Internationale des Ligues des Droits de l´Homme (FIDH) FIDH and Ligue française pour la défense des droits de l'Homme et du citoyen (LDH) against arbitrary detention and torture: www.fidh.org/spip.php?article2941.

191 Concerning this matter: Decouty, La France enquête sur les avions de la CIA, Le Figaro, 15 October 2007.

192 La CIA et le tribunal de Bobigny: «Le parquet de Bobigny a décidé de classer sans suite la plainte déposée le 21 décembre 2005 par la Fédération internationale des ligues des droits de l'homme (FIDH) et la Ligue française pour la défense des droits de l'homme et du citoyen (LDH) visant les escales effectuées par des avions soupçonnés de convoyer des prisonniers pour la CIA, révèle mardi 12 septembre le quotidien Le Monde». See: http://paris.indymedia.org/article.php3?id_article=69440.

193 Another example refers to the investigations initiated in Portugal or in Switzerland, see the Report of the Temporary Committee, February 2007, available at: www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf; Krieg gegen den Terror: das System der außerordentlichen Überstellungen (extraordinary renditions), Demands by Amnesty International Switzerland, December 2006.



## Importance of the Case

This case serves as an example for similar criminal investigations, whereby human rights organizations can effectively use pressure to open cases in other European countries. Although such investigations do not always result in a criminal conviction, campaigns of this type do shed light on the potential complicity or awareness of European governments regarding the use of their airports for the purpose of "extraordinary renditions" by the CIA.[193]

*I. Lawyers Involved:*
- Emmanuel Daoud
- Stasi et associés: www.stasiassocies.com, Paris, France
- Patrick Baudouin : www.fidh.org

*II. Main Non-Governmental Organizations Involved:*
- Ligue des Droits de l' Homme (France): www.ldh-france.org
- Fédération Internationale des Droits de l' Homme (France): www.fidh.org

*III. Main Source:*
Official website of FIDH: www.fidh.org

## 8. The Criminal Complaint against Arbitrary Detention and Torture (Spain)

### Facts

In Spain, the use of airports and the complicity of local authorities in the extraordinary rendition program of the CIA was first explored by inquiring journalists. Long before the official investigations of the Council of Europe or the European Parliament, the local magazine *Diario de Mallorca* revealed in March 2005 that the airport Son Sant Joan de Palma de Mallorca had been used as a base for aircrafts of private companies chartered by the CIA to carry out illegal transfers of suspected terrorists to countries where they were subjected to torture or other cruel, inhumane or degrading treatment.[194] The allegations referred to the landing and deployment of two aircrafts that attracted attention because they did not have any identification numbers and were docked in an unused section of the airport.

Based on this information, members of local human rights organizations filed a complaint before the District Attorney of the Supreme Court of Balearic Islands. The objective of this criminal complaint was to initiate investigations concerning the use of local airports for the transportation of detainees to countries well known for using torture. If these allegations are accurate, numerous criminal offenses would be constituted including sequestration, deprivation of personal freedom and torture. It has further been argued that the principle of universal jurisdiction is applicable, making Spanish courts competent to judge on these crimes as they were described in the complaint.

### Political and Judicial Reactions

The District Attorney of the Balearic Islands promptly ordered police inquiries to be carried out by the Guardia Civil. These investigations examined the allegations made by the journalists and as asserted in the complainants.[195] The inquiries consisted of determining the exact flights, identification of the crewmembers, their exact stay in particular hotels in Palma de Mallorca, and other significant facts such as the origin and the destination of the respective flights.

Nevertheless, according to the District Attorney these documented facts were not sufficient to substantiate claims that CIA agents had committed any criminal offences in terms of the illegal detention of persons on the territory of the Balearic Islands. The District Attorney dropped the case. Meanwhile, national and international institutions verified not only the existence of the CIA extraordinary rendition program, but also the involvement of European authorities and began examining their findings. New information surfaced suggesting which airports in the Canary Islands may have been used for extraordinary renditions.[196]

In response, the former complainants, supported by a number of individuals and human rights groups, filed a people's action in June 2005 to initiate criminal proceedings before the magistrate's court in Mallorca. This court accepted the complainants' view with respect to the criminal character of the alleged facts and sent the case to the examining magistrates of the Audiencia Nacional in Madrid.[197]

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194 La CIA usa Mallorca como base paras sus secuestros por avión, *Diario de Mallorca* 12 March 2005.

195 La Fiscalía de Canarias investigará las escalas de vuelos de la CIA en Tenerife y Grán Canaria, El Mundo 18 November 2005: "García-Panasco explicó que, a raíz de las informaciones periodísticas publicadas en medios canarios, en las que se asegura que aviones de la CIA han hecho escala en el aeropuerto grancanario de Gando y en los tiner feños de Los Rodeos y Reina Sofía, se efectuarán las consultas pertinentes para valorar la veracidad de estos hechos. Además, indicó que desde ambas fiscalías se estudiará si estas escalas suponen un delito y si son competencia de los tribunales españoles.": http://www.elmundo.es/elmundo/2005/11/18/espana/1132315880.html.

196 El Gobierno canario pide explicaciones sobre vuelos de CIA en Tenerife, El País 16 November 2005: "Los datos de AENA facilitados a este medio indican que en 2004 se registraron al menos cinco aterrizajes de aparatos Gulfstream de 15 plazas de capacidad, de los que se desconoce el listado de pasajeros, y que el avión estuvo en pista menos de 20 horas.": http://www.elpais.com/articulo/elpepinac/20051116elpepinac_3/Tes/Canarias%20pide%20explicaciones%20sobre%20las%20escalas%20de%20vuelos%20de%20la%20CIA%20en%20Tenerife.

197 This judicial body is a high court with jurisdiction throughout Spain and is reserved for cases of national or international importance such as terrorism, organized crime or genocide.

The order of the magistrate's court has since been appealed by the Attorney General's Office asserting as a main argument that there is no basis for jurisdiction of the Audiencia Nacional to judge on crimes committed outside Spanish territory. The magistrate's court rejected this appeal by validating and substantiating the principle of universal jurisdiction. This decision has again been challenged before the higher court (Audiencia Provincial de Baleares) for similar reasons. In March 2006, this court upheld the lower court's decision to initiate criminal proceedings with respect to the crimes of torture and illegal detention. The attitude previously held by the Attorney General's Office toward the case shifted significantly after the rulings of the Spanish higher courts. The Attorney General's office proposed a set of additional measures designed to support and promote the criminal investigations. The complainants requested a judicial ratification of facts to be clarified by the initial investigation carried out by the Guardia Civil. In October 2006, German national Khaled El Masri, a victim of extraordinary rendition, testified before the examining magistrate. This testimony was extremely important as it facilitated the continued progress of the ongoing case in Spain - the CIA aircraft that transferred El Masri from Skopje, Macedonia to Afghanistan took off from the airport of Son Sant Joan of Palma de Mallorca.[198]

In January 2007, the ongoing criminal investigation saw progress when the examining magistrate ruled on the request from the Spanish government to declassify secret documents and other information held by Spanish secret services.[199] These documents refer to the alleged use of airports by foreign intelligence agencies like the CIA. By requesting such "sensitive" information the judge warned the government in advance that "state security is a constitutional principle, which could also be affected if the criminal investigation does not clarify the allegations." The Spanish authorities have already decided to declassify these secret documents. Information recently provided to the examining magistrate in the Audiencia Nacional by the Spanish Civil Aviation Authority (AENA) and by Portuguese authorities of air traffic control, suggests that Spanish airports were used more extensively for CIA flights than originally assumed.[200] In November 2008, the Spanish government announced investigations into whether the former government allowed Spanish territory to be used to transport captured terrorism suspects to Guantánamo Bay.[201]

198 See Marty 2006 Memorandum, No 103, supra note 104.

199 Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, February 2007, No. 193, supra note 117.



## Importance of the Case

Irrespective of the investigation results, the model character of this case is indisputable. First, it shows the significance of civil society in the investigations of human rights violations and in triggering legal procedures. Second, this case is significant in legal terms; it offered Spanish courts the opportunity to investigate both the practical applicability, as well as the limits of the principle of universal jurisdiction. These rulings may lead to a persuasive legal precedence and thus, influence the development of the discussion concerning the protection of human rights under national criminal law.

*I. Lawyers Involved:*
- Mateo Cabrer Acosta, Spain
- Ignasi Ribas Garau, Spain
- Ferran Gomila Mercadal, Spain

*II. Main Non-Governmental Organizations Involved:*
- Asociación Pro Derechos Humanos (Spain): www.ong.consumer.es/asociacion-pro-derechos-humanos-de-espana.6
- Izquierda Unida (Spain): http://www1.izquierda-unida.es
- Asociación libre de Abogados (Spain) : www.nodo50.org/ala
- Abogados Europeos Democrátas (Spanish section): www.aeud.org

200 Miguel González, "Medio Centenar de vuelos a Guantánamo pasaron por España entre 2002 y 2007", El País 12 November 2007.

201 Harold Heckle, "Spanish Government to Probe Guantánamo Flights," Associated Press 1 December 2008.

*III. Main Sources:*

1. Ignasi Ribas/ Ferran Gomila, Report about the case of the CIA flights before the examining magistrate in Spain (unpublished).
2. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty: "Secret detentions and illegal transfers of detainees involving Council of Europe member states: first report", 12 June 2006: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.
3. European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners- 14 February 2007 ("Fava-Report").

## 9. The Criminal Investigation into the Existence of black sites in Poland

### Facts

One month after 9/11, several hundred people were captured in the war in Afghanistan. During this time, prior to developing a long-term strategy to solve the logistic problem of imprisoning large numbers of people, the United States began transporting detainees to collaborative intelligence services in Egypt and Jordan.

At the same time, the CIA began holding prisoners they deemed to be of particular importance (referred to as "highest-value detainees" or "HVD") in metal shipping containers on the Bagram Air Base. The airbase was guarded by Afghan allies. When in the winter of 2001 several detainees died of suffocation in the containers, the CIA turned to the United States Congress to find a quick, long-term solution. In response, Congress granted tens of thousands of dollars to support the establishment of a prison system in Afghanistan, which could also be used by the CIA.

The largest facility built in this context was the secret CIA prison called the "Salt Pit" located in a former brick factory outside Kabul. Road access was considered unsafe and eventually the prison was moved back to the Bagram Air Base.



According to information from the American journalist Dana Priest, in 2002 the CIA established an alternative arrangement with the Kingdom of Thailand and one Eastern European country to set up covert prisons (referred to as "black-sites") on their territories.

On March 28, 2002, the terrorism suspect Abu Zubaydah was captured in Pakistan and taken to Thailand by the CIA. Six months later, Ramzi bin Al-Shaiba (his name is often misspelled as Ramzi bin al-Shibh) was similarly captured in Pakistan and taken to Thailand.

When the media exposed the existence of the prison in Thailand, the Thai government urged the CIA to close the prison. After the closure of the secret facility in Thailand, another smaller CIA prison at the military air base of Guantánamo Bay was also scheduled for closure by 2004. The CIA had planned to expand these military facilities and to turn them into an ultra-modern security site operated by the CIA independent of the army. Instead, the CIA opted to move detainees out of Guantánamo to forestall surveillance by the United States judiciary.

Meanwhile, the number of detainees was quickly increasing. By late 2002 or early 2003, the CIA made arrangements with other foreign countries to set up secret prisons.

On December 5, 2005, U.S.-American broadcasting corporation ABC News reported that 12 prisoners were held by CIA operatives in Eastern Europe. ABC news simultaneously published a list of names on their website and identified Poland as the country in which eleven of the 12 were held.

The ABC television news broadcast first confirmed that eleven of the prisoners were held in the area of an airport in Eastern Europe. At the request of the White House, ABC did not broadcast the names of the two countries where the secret detention camps were located, nor did they report that the detainees were quickly moved off European soil to Morocco prior to the first visit of U.S. Secretary of State Condoleezza Rice to Europe. ABC removed the names of the individuals who were held in Poland from their website, however, the information had already been

indexed and made available through Google's search engine cache. ABC apparently chose later to put the original information back on their website, which is still available today through a non-linked site. [202]

These individuals are: Abu Zubaydah (first held in Thailand, then in Poland), Ibn Al-Shaykh al-Libi (first held in Pakistan and Afghanistan, then in Poland), Abdul Rahim al-Sharqawi (held in Poland), Abd al-Rahim al Nashiri (held in Poland), Ramzi bin Al-Shaiba (held in Poland), Mohammed Omar Abdel-Rahman (held in Poland), Khalid Shaikh Mohammed (held in Poland), Waleed Mohammed bin Attash (held in Poland), Hambali (an Indonesian citizen and the only one from the ABC network's list who was not detained in Poland, but instead detained in the United States in isolation from other HVDs), Hassan Ghul (held in Poland), Ahmed Khalfan Ghailani (held in Poland), Abu Faraj al-Lini (held in Poland).

According to ABC, all of these prisoners, except for Ramzi bin Al-Shaiba, have endured the torture practice referred to as "waterboarding."

On September 6, 2006, United States President George W. Bush announced in a press statement that 14 prisoners were brought to the United States Naval Base in Guantánamo Bay.

In this statement, Bush admitted for the first time that the CIA had used secret facilities in host countries that supported the United States in their "War on Terror."

The host countries were not named.

## Political and Judicial Reactions

Officials involved with the program continue to deny the existence of black sites in Poland, and claim no responsibility for their creation and operation.

202 See List of 12 so called high-value targets housed by the CIA, ABC News 5 December 2005: http://abcnews.go.com/WNT/Business/popup?id=1375287.



On December 21, 2005, a closed meeting of the Parliamentary Special Services Committee (Komisja do Spraw Służb Specjalnych) was held after several media sources identified Poland as a participant in hiding and interrogating some of the most important Al-Qaeda captives.[203]

The content of the meeting was never disclosed.[204] After the meeting, it was announced that the case would be permanently closed.

In July 2007, the UN Committee against Torture expressed its concerns regarding the persistent allegations against Poland for its involvement in extraordinary renditions in the fight against international terrorism (CAT/C/POL/CO/4).[205] The Committee expressed concern and urged Poland to share information about the scope, methodology, and conclusions from the inquiry into the allegations conducted by the Polish Parliament.

In February 2008, the European Commission rebuked Poland for its failure to clarify their role in the United States extraordinary rendition program. European Union Justice and Home Affairs Commissioner Franco Frattini wrote to Warsaw and Bucharest in July urging them to conduct in-depth inquiries into their complicity in extraordinary rendition, as had been indicated by European Parliament findings. Neither country has responded in an adequate manner.

Since mid-August 2008, the National Prosecution Service in Warsaw has been investigating the allegations of the existence of secret detention facilities in Poland. According to reports to the press, a similar investigation was conducted by the District Prosecution Office in the beginning of 2008, with no significant outcome.

203 "Komisja ds. służb ponownie o więzieniach CIA w Polsce", Gazeta Wyborcza 21 December 2005: http://wiadomosci.gazeta.pl/wiadomosci/1,55670,3078134.html.

204 „Raport ws więzień CIA w Polsce będzie tajny", Gazeta Wyborcza 27 December 2005: http://serwisy.gazeta.pl/kraj/1,69906,3084469.html.

205 United Nations, Consideration of Reports submitted by states parties under article 19 of the Convention, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 38th Session, 25 July 2007, available at: http://www.adh-geneva.ch/RULAC/news/Poland-CAT.pdf.

### Importance of the Case

The investigation conducted by the Department X (Office for Organized Crime) of the Polish National Prosecution Service is currently researching the possibility of a violation of Article 231 of the Polish Penal Code (overstepping authority).

This investigation is the first conducted in Poland regarding the existence of black sites. If proven, the allegations of crimes committed in CIA facilities on Polish territory is of immense relevance in terms of the quality of Polish democracy and rule of law. The latest investigation gives hope that even in the Eastern European countries that were part of the "Coalition of the Willing," massive human rights violations will be investigated and those responsible for them will be brought to justice.

*I. Main Non-Governmental Organizations Involved:*

- European Center for Constitutional and Human Rights (ECCHR): www.ecchr.eu

*II. Main Sources:*

1. Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners [Temporary Committee], Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, January 30, 2007 – http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0020+0+DOC+XML+V0//EN&language=EN
2. Parliamentary Assembly of the Council of Europe (PACE), Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, June 11, 2007 – http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3093
3. Anna Marszałek / Michał Majewski, Amerykanie mieli tajną bazę na Mazurach, September 7, 2008 – http://www.dziennik.pl/polityka/article233214/Amerykanie_mieli_tajna_baze_na_Mazurach.html



## III. THE UNIVERSAL JURISDICTION COMPLAINT AGAINST RUMSFELD ET AL. (GERMANY)

### Facts

On November 14, 2006, the Center for Constitutional Rights (CCR), the International Federation for Human Rights (FIDH), the German Republican Lawyers Association (RAV) and others filed a criminal complaint addressed to the German Federal Prosecutor to open an investigation and, ultimately, a criminal prosecution into the responsibility of high-ranking U.S. officials for participating in and authorizing war crimes in the context of the "War on Terror." The complaint included crimes related to CIA extraordinary rendition flights. The complaint was brought on behalf of twelve torture victims, including eleven Iraqi citizens held at Abu Ghraib prison and one Guantánamo detainee of Saudi-Arabian nationality.

The complaint was founded on the principle of universal jurisdiction.[206] It alleges that American military and civilian high-ranking officials, such as the former Secretary of Defense Donald Rumsfeld, former CIA director George Tenet and others who are named as defendants, have committed war crimes against numerous detainees in Iraq, Afghanistan and in the U.S. operated Guantánamo Bay prison. These individuals ordered, aided or abetted war crime offenses. Other persons, among them the former Assistant Attorney General Bybee and the former Deputy Assistant Attorney General Yoo, are alleged to have provided false or clearly erroneous legal opinions legitimating the use of torture.

This criminal complaint features a direct linkage to the policy of extraordinary rendition. It implicates that the tactic of the illegal detention (in some cases ab-

206 The German Code of Crimes against International Law explicitly criminalizes such offences. This statute, enacted by Germany in compliance with the Rome Statute creating the International Criminal Court (CCIL) in 2002, provides for "universal jurisdiction" for war crimes, crimes of genocide and crimes against humanity. It enables the German Federal Prosecutor to investigate and prosecute crimes constituting a violation of the CCIL, irrespective of the location of the defendant or plaintiff, the place where the crime was carried out, or the nationality of the persons involved.

duction) and transfers of merely suspected persons, often based on unqualified intelligence, facilitates and leads to torture acts and in this way, to war crimes. In the complaint, the different methods used by the U.S. administration to transfer detainees from Iraq and other American run prison camps are described in detail. Such renditions and transfers typically occurred when detainees refused to cooperate with the U.S. interrogators. As a result, they were handed over to the intelligence services in countries known for the use of torture.[207] The CIA then provided a catalogue of questions to be posed to the detainees by the intelligence service officials. Some claim that U.S. or even European secret service agents attended interrogations.[208] This complaint is related to a previously complaint filed in 2004 that has since been dismissed.[209]

## Political and Judicial Reactions

The complaint generated enormous public interest and there has been extensive national and international media coverage of this case as a result. Numerous national, international and regional NGOs, as well as renowned individuals, have endorsed the complaint.[210] It is strongly believed that political and military leaders in charge of allowing, ordering or implementing unlawful extraordinary renditions and abusive interrogation techniques should be held accountable.

No international court or tribunals either in Iraq or in other countries where extraordinary renditions have taken place have been mandated to conduct investigations and prosecutions of responsible U.S. officials. The U.S. has refused

207 See the text of the criminal complaint: www.rav.de/download/Strafanzeige_Rumsfeld_ua_2006_vol1.pdf, p. 138, 143.

208 Priest and Gellman, "U.S. Decries Abuse but Defends Interrogation," *Washington Post* 26 December 2002.

209 A notarized copy of the Federal Prosecutor's decision not to open an investigation can be obtained under: http://www.rav.de/download/ProsecutorsDecisionApril2007ENGLISH.pdf.

210 See the list of the plaintiffs: www.rav.de/download/Joint_PressRelease_CCR_RAV_FIDH_et_al_14Nov06.pdf.



to join the International Criminal Court, thereby limiting the options to pursue prosecution there. Iraqi courts also have no authority to prosecute. Furthermore, the U.S. granted immunity to all personnel in Iraq from Iraqi prosecution. The U.S. has refused to make inquiries into the responsibility of its leaders, those atop the chain of command. Thus, for victims of abuse and torture while detained by the United States, the German courts were the last resort in which to obtain justice.[211]

Nevertheless, on April 27, 2007, Germany's Federal Prosecutor announced she would not open an investigation. The decision was based upon Sec. 153f of the Criminal Procedure Code (StPO). This section permits prosecutorial discretion to not open an investigation if the suspect is neither present in the territory of the country, nor can be expected to be present in the near future. The Federal Prosecutor claimed this code applied here.[212] The prosecution also argued that any investigation would not be "promising."[213] This decision was challenged in court in November 2007 and the appeal is still pending.

A similar case has been filed in France. On October 25, 2007, the International Federation for Human Rights, the Center for Constitutional Rights (CCR), and the Ligue francaise des droits de l´Homme et du Citoyen (LDH) in France, along with the European Center for Constitutional and Human Rights (ECCHR) filed a complaint before the Paris District Prosecutor against Rumsfeld during a private visit in Paris. The complaint alleged that Rumsfeld is responsible for having directly and personally crafted and ordered the use of "harsh" interrogation techniques in violation of the Convention against Torture. The Paris Prosecutor dismissed the complaint and granted Rumsfeld immunity, basing his decision

211 See Center for Constitutional Rights, "German Warm Crimes Complaint Against Donald Rumsfeld, et al.: Why Germany?,": http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al.

212 See the ruling of the German Federal Prosecutor: www.rav.de/download/ProsecutorsDecisionApril2007ENGLISH.pdf.

213 Many of the same groups filed a complaint in France in October 2007 charging Rumsfeld with ordering and authorizing torture and other criminal offenses: http://ecchr.eu/newsreader_en/items/rumsfeld_fr_en.html.

on an opinion drafted by the French Ministry of Foreign Affairs. The plaintiffs contested the dismissal of the complaint by the Public Prosecutor without success. As a last step, the collaboration of human rights organizations sent an open letter on May 21, 2008 to France´s Minister of Justice, Rachida Dati. The letter requested that Dati intervene in the case and call on the Public Prosecutor of the Paris Appeals Court to withdraw his decision to grant Rumsfeld immunity from criminal prosecution for acts of torture.[214] On December 11, 2008, the U.S. Senate Armed-Services Committee released a bi-partisan report on the abuse of detainees in U.S. custody. The report proved beyond dispute that Donald Rumsfeld and other senior U.S. officials are directly responsible for abusive interrogation techniques used abroad. This report, issued jointly by Senator Carl Levin of Michigan, Democratic Chairman of the Panel, and Senator John McCain, former Republican nominee for President, represents the most thorough review by Congress of the origins of the abuse of prisoners in American military custody to date. The report explicitly rejects the Bush administration's assertion that tough interrogation techniques have helped keep the country and its troops safe. The report further rejected the claims by Mr. Rumsfeld and others that defense department policies played no role in the harsh treatment of prisoners at Abu Ghraib in late 2003, and in other episodes of abuse. The majority of the report, the product of an 18-month process including interviews with more than 70 people, remains classified.[215] According to the organizations responsible for filing the cases against Rumsfeld and others in Germany and France under universal jurisdiction laws for the torture of detainees in Iraq, Afghanistan, Guantánamo, and in secret sites, the report reaffirms facts already proven and merely stresses the illegality and ineffectiveness of the techniques in question.[216] Many human rights organizations demand the appointment of a

214 See the ECCHR press release: http://www.ecchr.eu/newsreader_en/items/there-is-no-immunity-for-torture.html.

215 Scott Shane and Mark Mazetti, "Report Blames Rumsfeld for Detainee Abuses," *New York Times* 11 December 2008; David Morgan, "U.S. Senate Report ties Rumsfeld to Abu Ghraib Abuse," Reuters 11 December 2008: http://www.reuters.com/article/vcCandidateFeed2/idUSN11414139.

216 See "Bi-partisan Commission Blames Rumsfeld, top Officials for Detainee Torture," Press Release, FIDH 14 December 2008: http://www.fidh.org/spip.php?article6152.



Special Prosecutor.[217] Only independent criminal investigations can ameliorate the suspicion of impunity and discourage future administrations from engaging in serious violations of the law.

## Importance of the Case

In a way, this case is different from others presented under the headline of extraordinary rendition as it does not exclusively refer to a person secretly abducted and transferred to a country where he was subjected to torture or other cruel and inhumane treatment; rather, it concerns an entire policy. This case questions the legal and factual treatment of persons suspected of terrorism, reaching from unlawful detentions to the establishment of a system of extracting presumably useful intelligence through torture. This criminal complaint has been considered important for the legal evaluation of extraordinary renditions. The initiation of investigations and a possible conviction for war crimes would inevitably also include a diagnosis of the character of such crimes as renditions.

*I. Lawyers Involved:*
- Wolfgang Kaleck, Berlin, Germany
- Michael Ratner, Peter Weiss (for CCR), New York, USA
- Antoine Bernard (for FIDH), Paris, France

*II. Main Organizations Involved:*
Non-Governmental:
- Center for Constitutional Rights, (CCR, USA), www.ccr-ny.org
- International Federation of Human Rights (FIDH, France), www.fidh.org
- Republican Lawyers Association (RAV, Germany), www.rav.de

217 See Center for Constitutional Rights, "CCR Statement on Senate Armed Services Committee Report on Abuse Detainees in U.S. Custody," 11 December 2008: http://ccr-justice.org/newsroom/press-releases/ccr-statement-senate-armed-services-committee-report-abuse-detainees-u.s.-cu.

*III. Main Sources:*

1. Official website of CCR: http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al.
2. Official website of RAV: www.rav.de/rumsfeld1.html, www.rav.de/rumsfeld2.html.

## IV. OTHER INSTRUMENTS: PARLIAMENTARY AND GOVERNMENTAL INQUIRIES

### 1. The Parliamentary Inquiries in Germany

#### Facts

The extraordinary rendition cases in Germany have been well documented, as described in the case of Murat Kurnaz and Khaled El Masri. There have been numerous allegations about the use of German airports in carrying out rendition operations. Extensive investigations have been initiated in cases where German nationals or legal residents were victimized by the CIA extraordinary rendition program.

Mohammed Haydar Zammar is a German national of Syrian descent. After the September 11, 2001 attacks, Zammar was the subject of a criminal investigation for "support of a terrorist organization" in Germany. He was suspected of having been involved in the "Hamburg cell" - a group that included the presumed leaders of the September 11 attacks. Zammar had apparently been under police surveillance for several years, but because of insufficient evidence he was not arrested. According to information from the German security authorities, Zammar traveled to Afghanistan several times to receive training at a military camp.[218]

While traveling with his German passport on October 27, 2001, Zammar left Germany for Morocco where he spent several weeks. On December 8, 2001, he attempted to return to Germany but was arrested by a special Moroccan task force at Casablanca airport and questioned by Moroccan and U.S.-American officials for over two weeks. The information exchange between German, Dutch, Moroccan and U.S.-American counterparts was seriously disputed in March of 2008.[219] Both the public and the German Parliament committee of inquiry questioned whether this information exchange facilitated Mohammed Haydar Zammar's arrest in Morocco.

According to a report in the German news magazine *Der Spiegel*, classified documents from the CIA and FBI proved that German authorities provided the CIA, intentionally or not, with the intelligence necessary to abduct Zammar and transport him to Syria. After the U.S. requested information regarding Zammar, apparently a BKA (German Federal Criminal Police Office) officer, following a guideline set by the then Interior Minister of Germany Otto Schily, provided U.S. officials with Zammar's flight information.[220] Mohammed Zaydar Zammar was flown to Damascus, Syria on a CIA-linked aircraft[221] two weeks after his arrest in Morocco. The German government was reportedly not informed of his arrest.

After the German government received information about the whereabouts of Zammar in June 2002 from U.S. officials, six German intelligence agents interrogated him in Damascus for three days in December 2002. German diplomatic officials filed eight notes orally. They sought clarification of the reasons for his detention and requested that he would be provided a lawyer. The Syrian gov-

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218 Karl-Otto Sattler, „BKA-Verhör in Damaskus," *Das Parlament* 15 October 2007.

219 See Marty 2007 Memorandum, Ch. 38, No. 185-186, supra note 36.

220 Holger Stark, "Schläge und Pistazien," *Der Spiegel* 6 March 2006: 38; Holger Stark, "Berlin ‚Helped CIA' With Rendition of German Citizen," *Spiegel Online* 11 January 2006: "Evidence for the truth of the accusations has now surfaced in the form of previously-unpublished classified documents from the files of the CIA and the FBI. (…) The BKA replied to the second request on Nov. 26, 2001. A police commissar sent a detailed biography of Zammar, in addition to a list of his relatives in Syria and Morocco. He also provided Zammar's flight information: Zammar would fly with KLM from Casablanca via Amsterdam back to Germany, departing at 6.45 a.m. on Dec. 8. The reply from the BKA ends with the words: `According to the information available to us here, Zammar is currently still in Morocco and intends to travel back on the flight he has booked.'"

221 See Marty 2007 Report, Ch. 3.8, No. 186, supra note 117.

ernment did not respond to these requests.[222] The judicial proceedings against Mohammed Haydar Zammar began in October 2006 after he had spent five years in Syrian prisons without a lawyer present and having been denied consular assistance.[223] Zammar was accused of being a member of the banned Muslim Brotherhood. Syria's Supreme State Security Court, which is used for political cases, initially sentenced Zammar to death.[224] In February 2007, the judgment was commuted to 12 years in prison.[225] Mohammed Zammar remains in Syrian prison today.

In September 2001, Egyptian citizen and Munich-based publisher Abdel Halim Khafagy traveled to Bosnia in order to print a Bosnian version of the Qur'an.

In September 2001, Masked men stormed Khafagy's hotel room in Sarajevo and brutally hit the 69-year-old man, wounding his head.[226] He was then abducted and taken to the U.S. military's Eagle Base in Tuzla. During his detention lasting approximately two weeks, Khafagy's wound was stitched without anesthesia and he suffered from sleep deprivation.[227]

In early October 2001, three German officials from the German Intelligence Service (BND) and the Federal Criminal Police Office (BKA) came to Tuzla in order to interrogate Khafagy. A BKA member, Klaus Z.[228] refused to conduct this interrogation when he suspected that Khafagy had been mistreated. He informed the intelligence service via a report. Nevertheless, the German government apparently never protested.[229]

During his detention, Khafagy was interrogated by American officers and twice by a German official.[230]

Khafagy remained in Tuzla for approximately two weeks before he was flown to Cairo, Egypt. There, he was handed over to the Egyptian authorities. They released him after several days, so that he could return in Germany. Khafagy still resides in Germany, however in 2004, despite being eligible for naturalization after 25 years of residence in Germany, his German citizenship was delayed due to the occurrences in Bosnia.[231]

## Political and Judicial Reactions

In light of the cases and allegations against German secret service members for support of the U.S. in the war against Iraq in 2003, the Federal German Parliament established a committee of inquiry in April 2006. The committee's tasks include investigating the allegations of collusion in CIA flights between German authorities and the CIA. As part of this inquiry, numerous witnesses have given testimony, including former ministers and the former leadership of the secret services.

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222 Amnesty International, "Below the radar," AI Index AMR 51/051/2006, No. 1.8., 5 April 2006.

223 See Marty 2006 Report, Ch. 3.8, No. 190: "(…) Syria refused any kind of consular intervention, on the basis of its nonrecognition of his renunciation of Syrian nationality when he underwent naturalisation in Germany, based on a policy applied generally by Syria," supra note 39.

224 Karl-Otto Sattler, „BKA-Verhör in Damaskus," *Das Parlament* 15 October 2007.

225 Press Release of the German Bundestag: "Zeuge: Im Fall Zammar wurden in Marokko Informationen offenbar blockiert," 15 November 2007 / Karl-Otto Sattler, supra note 224.

226 Cageprisoners, "Citizens no more – 'War on Terror' Abuses in Bosnia and Herzegovina", July 2007: 7.

227 Abdel Halim Khafagy in an interview by the German TV program *Kontraste* and tagesschau.de (online edition), „Erwarten Sie, dass die nett zu mir sind?" 24 August 2007, (German version) Available at: www.tagesschau.de/inland/meldung88972.html.

228 „Folter im Anti-Terror-Kampf – Was wussten die Deutschen?" *Frontal* 21 31 October 2006.

229 Hans-Martin Tillack, „Droht Steinmeier neues Ungemach?," *Stern* 2 May 2007, (German version): www.stern.de/politik/deutschland/:Entf%FChrungsfall-Khafagy-Droht-Steinmeier-Ungemach/588286.html.

230 Abdel Halim Khafagy in an interview by the German TV program *Kontraste* and tagesschau.de (online edition), „Er hat mir gesagt, dass er Deutscher ist," 23 November 2006, (German version) available at: www.tagesschau.de/inland/meldung88970.html.

231 Tillack, supra note 229.

The committee of inquiry investigated the above-mentioned cases in detail. In the case of Murat Kurnaz, the committee investigated whether German federal authorities had delivered Kurnaz´ travel data to U.S. or Pakistani agencies, and if so, for what purpose and on what legal basis. The committee also examined the efforts made by the German federal government agencies to support Kurnaz and obtain his release.[232] In a statement that stirred public attention, the former Minister of the Federal Chancellery, Frank-Walter Steinmeier, currently the acting Foreign Minister, claimed there had been no offer by the U.S. to release Kurnaz before 2006.[233] The statement has been both supported and contradicted by members of the intelligence services, however, the majority of witnesses testified that it was clear to Germany that Turkey was not willing to accommodate Kurnaz and that there was a lack of existing evidence characterizing Kurnaz as dangerous, as early as 2002. According to this version of events, it was possible that Kurnaz, could have been released by the end of 2002.[234]

This case was addressed by the German Parliament's Committee of Defense and members of the committee scrutinized Kurnaz' accusation of mistreatment by members of the German Special Forces Command (KSK).

In November 2008, the committee announced that its final report would be published in the next few weeks. As an outcome of their work, the committee stated that the claims of mistreatment made by soldiers of the German Special Forces Commando could neither be substantiated, nor repudiated. The opposition parties have submitted dissenting opinions, criticizing the government's unwillingness to truly address the case.[235]

In the case of El Masri, a preliminary conclusion of the investigation claimed that no evidence could be established to link German authorities to his abduction. Notwithstanding the preliminary finding, it is now undisputed by the investigators that El Masri's account of his ordeal is true. This leaves no doubt that the official denial of El Masri's illegal detention by the Macedonian authorities is inaccurate.[236]

Members on the committee of inquiry have voiced frustration over executive restrictions invoked on the grounds of state secrecy and the impact on their ability to determine the truth in this case. It is within the power of the executive to determine that certain information is classified as relating to the "core field of executive privilege" or otherwise must be kept secret to protect the higher interests of the state. As a result, the information is not made available to the committee (even when meeting on camera). The committee has been refused access to key files or testimonies on this basis. Members of opposition parties[237] eventually referred the matter to the Federal Constitutional Court.[238]

Another objective of the committee of inquiry is to clarify the purpose and legal basis for German authorities to pass travel data to agencies in the U.S., the Netherlands and Morocco in the case of Zammar. The committee is willing to consider to what extent the German government was aware of the circumstances that led to Zammar's detainment. Finally, the committee's investigation includes an inquiry into the assistance the German government provided, if any, to obtain his re-

232 Amended Mandate for the Committee of Inquiry, Bundestag Printed Papers 16/990, 16/1179, 16/3028, 16/3191, 16/5751 and 16/6007. An English version can be obtained under: www.bundestag.de/ausschuesse/ua/1_ua/auftrag/auftrag_erweiter_eng.pdf.

233 Global Research, "EU states knew and helped rendition CIA flights in Europe," Global Research: Center for Research on Globalization, 12 February 2007: www.globalresearch.ca/index.php?context=va&aid=4763 / Press statement of the German Parliament: Haltlose Vorwürfe im Fall Kurnaz, 29 March 2007.

234 See Marty 2007 Memorandum, No. 311, supra note 36 / Report of the Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, supra note 193 / Press statement of the German Parliament: Diwell: Türkei war an Kurnaz nicht interessiert, 26 April 2007 / Press statement of the German Parliament, "Gegen Kurnaz nur vage Verdachtsmomente," 14 June 2007 / Press statement of the German Parliament: BND-Mitarbeiter vertiedigt entlastendes Urteil über Kurnaz, 21 June 2007 / Press statement of the German Parliament: Bremer Verfassungsschützer kritisiert seinen Chef, 20 September 2007.

235 See the press release of Bundestag: http://www.bundestag.de/aktuell/hib/2008/2008_330/06.html.

236 See Marty 2007 Memorandum, Ch. 6, supra note 36.

237 Bündnis 90/Die Grünen [Alliance 90/The Greens], Die Linke [The Left], Freie Demokratische Partei (FDP) [Free Democratic Party].

238 See Marty 2007 Memorandum, Ch. 6, supra note 36.

lease.[239] The committee is still operating. According to a report of a German newspaper, the members of the committee have decided to hear Zammar testify as a witness.[240] In the case of Khafagy, the committee of inquiry seeks to clarify if German staff were involved in his detention, interrogation and treatment. Moreover, the committee is investigating whether Khafagy's legal counsel was informed or assisted by the German authorities.[241] In this case, the parliamentary committee of inquiry appointed Joachim Jacob as Special Deputy for the purpose of clarifying whether members of the German government had knowledge of the extraordinary renditions operations carried out in Germany.[242]

The Special Deputy presented his classified report in June 2008, where he concludes that the German government did not have any knowledge about rendition flights, and that there has been no positive evidence proving the existence of secret detention centers in Germany. According to the report, no further inquiries are necessary.[243] This report however is not free from contradictions. The deputy admits that not all existing documents were available for this inquiry and that its findings cannot be considered as exhaustive. Although there were hundreds of well-documented press reports about rendition flights over Germany, Mr. Jacob could only establish two in which the CIA used the German airspace for the secret transport of detainees.[244] Nevertheless, the Special Deputy criticized that, after the topic of rendition flights emerged, the German government failed to secure flight data and dispose relevant inquiries that could shed light on the use of German airports for the purpose of extraordinary renditions.

239 Amended Mandate for the Committee of Inquiry, Bundestag Printed Papers 16/990, 16/1179, 16/3028, 16/3191, 16/5751 and 16/6007. (English version) available at: www.bundestag.de/ausschuesse/ua/1_ua/auftrag/auftrag_erweiter_eng.pdf.

240 Andreas Förster, „BND-Ausschuss will Zammar befragen," *Berliner Zeitung* 6 March 2008.

241 Amended Mandate for the Committee of Inquiry, Bundestag Printed Papers 16/990, 16/1179, 16/3028, 16/3191, 16/5751 and 16/6007. (English version) available at: www.bundestag.de/ausschuesse/ua/1_ua/auftrag/auftrag_erweiter_eng.pdf.

242 Press Release of the Federal German Parliament of 5 July 2007, available at: http://www.bundestag.de/aktuell/presse/2007/pz_070705.html.

243 „Bericht über CIA-Flüge lässt viele Fragen offen," ARD (online edition) 20 June 2008: http://daserste.ndr.de/panorama/archiv/2008/panoramacia2.html.

244 Karl-Otto Sattler, „Ich bin doch nicht Inspektor Columbo," *Das Parlament* 23 June 2008: http://www.bundestag.de/dasparlament/2008/26/Innenpolitik/20948196.html.



## Importance of the Case

The committee of inquiry with its vast authorization to call witnesses and to obtain access to records has contributed to a more thorough documentation of the cases. It has initiated a diversified public discussion about the political legitimization of state acts that are considered to be collusive to serious human rights violations and penal law offences.

The investigation by the German parliamentary committee of inquiry helped illustrate the problems raised by the doctrine of state secrecy. In the German context, this doctrine effectively averts the prosecution of Khaled El Masri kidnappers and others involved with the renditions. State secrecy should not justify criminal acts and serious human rights violations under any circumstances. The efforts of the parliamentary inquiry in Germany demonstrate the extreme challenges faced when dealing with acquired and transferred information between police and secrete service agencies in rendition cases.

*I. Lawyers Involved:*

- Bernhard Docke, Bremen, Germany
- Baher Azmy, New York, USA
- Manfred Gnjidic, Ulm, Germany
- Gül Pinar, Hamburg, Germany
- Walter Lechner, München, Germany

*II. Main Organizations Involved:*

1. Governmental:

- German Parliament Committee of Inquiry No. 1: www.bundestag.de/ausschuesse/ua/1_ua/index.html (mainly in German)
- Council of Europe: www.coe.int/DefaultEN.asp

- Temporary Committee of the European Union: www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm
2. Non-Governmental:
- Center for Constitutional Rights: www.ccrjustice.org
- Amnesty International: www.amnesty.org
- European Center for Constitutional and Human Rights (ECCHR): www.ecchr.eu

*III. Main Sources:*
1. Council of Europe – Parliamentary Assembly – Report of the Rapporteur Dick Marty: "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", Doc. No. 11302 rev., June 7, 2007: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.
2. Report of the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for illegal activities (TDIP).
3. Amended Mandate for the Committee of Inquiry, Bundestag Printed Papers 16/990, 16/1179, 16/3028, 16/3191, 16/5751 and 16/6007.
4. Various press statements of the German parliament (only available in German): www.bundestag.de/ausschuesse/ua/1_ua/hib/index.html.

## 2. The Governmental Inquiry in Denmark

### Facts

The issue of extraordinary renditions and the use of airports for the secret transport of detainees also raised public concern in Denmark. On October 21, 2007, the Danish newspaper *Politiken* reported that one of the planes known to have been used for CIA rendition flights was given permission to cross Danish airspace on October 25, 2003. It is suspected that this plane, en route from Washington to Jordan, picked up Yemeni national Muhammad Bashmilah from an illegal detention facility in Jordan and brought him secretly into U.S. custody. According to his statement, Bashmilah was held by the U.S. in multiple undisclosed locations for over a year and a half. Kept in solitary confinement, he was frequently shackled and in handcuffs. The *Politiken* article also contains information about a rendition in 1995 of an Egyptian man who had refugee status in Denmark. The article documents former CIA officials and the U.S. State Department stating that they believed that the Danish national security service would have been informed of the rendition.[245] In a letter to the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP), the Danish government confirmed that over 100 flights have taken place through Danish airspace and 45 stopovers in Danish airports by planes allegedly used by the CIA, including those presumably used for renditions.[246] In May 2007, representatives of the Danish government told the UN Committee against Torture that "Denmark has always been strongly opposed to any measures that violated the human rights of detained persons, including terrorists" and that "it was not possible to confirm that illegal CIA activities had taken place in Danish airspace, on Danish soil, or that any Danish official had been involved in such activities."[247]

### Political and Judicial Reactions

The Danish authorities have refused to initiate an independent investigation that could bring to light the use of Danish airports, as well as the involvement of Danish officials in CIA activities.[248] A request by some parties within the Danish Parliament was dismissed. The issue of whether Danish officials have been complicit in the extraordinary rendition program of the CIA has apparently not been forgotten. On January 30, 2008, the public state television station DR1 broadcasted

245 See Amnesty International Australia, "Authorities must come clean about renditions in Denmark," 24 October 2007: http://www.amnesty.org.au/news/comments/4912/.

246 For further information about this issue see the documentation of the Center for Human Rights and Global Justice: http://www.chrgj.org/projects/docs/declarationofsatterthwaitepart2.pdf.

247 See also the Amnesty International Report 2008 – Denmark: http://www.amnesty.org/en/region/denmark/report-2008.

248 See Amnesty International ´s Briefing for the Committee against Torture, 30 April 2007: http://www.amnesty.org/en/library/info/EUR18/001/2007; see also Ellen Brun and Jacques Hersh, "The Danish Disease," Monthly Review June 2008: http://www.monthlyreview.org/080609brun-hersh.php.

the documentary film "CIA's Danish Connection."[249] The documentary claimed that a number of specific American private airline companies were in fact fronts for the CIA and that aircrafts from these companies had flown through Danish/Greenlandic airspace as part of the CIA's detention program. At least one aircraft is said to have landed at the airport in Narsaruaq in Greenland. This new information could not be ignored. Under the pressure of public opinion, the government set up an inter-ministerial working group with the mandate to examine the new information and, if necessary, consult with the relevant American authorities as part of the inquiry. The Inter-Ministerial Working Group for the Compilation of the Report Concerning Secret CIA Flights in Denmark, Greenland and on the Faroe Islands consisted of representatives from many government agencies including the Ministry of Defense, the Ministry of Justice, the Civil Aviation Administration, and the Prime Minister's Office. The working group is considered neither an all-party parliamentary inquiry committee, nor a committee with independent experts.

Part of the work of the committee was to demand answers from the American government regarding: whether U.S. agencies transferred detainees through Danish airspace or soil, how they define the terms "civil aircraft" and "state aircraft" under the Chicago Convention and if they have misused the NATO agreements regarding U.S. access to ports and airfields for operations against terrorism.[250] A central issue for this Committee was whether Danish authorities had knowledge of such extraordinary renditions in Danish territory.

The findings of this committee were not satisfying. The report, submitted to the Danish Parliament on October 23, 2008, stated that a probable connection between an aircraft that landed in Greenland and persons connected to the CIA could neither be confirmed, nor ruled out. The response from the American government has not made it possible to determine whether or not CIA flights, or more accurately extraordinary renditions, have occurred in Danish airspace, including the illegal transit of detained persons. According to the report, the available information was insufficient to verify or substantiate the claim that Danish authorities had or should have had knowledge of alleged extrajudicial CIA activities. The report concludes that the Danish government does not bear any responsibility for alleged illegal activities of the CIA, or other foreign activities.[251]

249 See: http://www.dr.dk/Salg/DRsales/Programmes/Documentary/Current_Affairs_and_Politics/20070629133445_35_1_1_1_1.htm.

250 See the press release of the Danish Ministry of Foreign Affairs: http://www.um.dk/NR/rdonlyres/40A309D6-309F-4995-86A6-AEFB79107D91/0/Bilag31HenvendelsetilUSAaf31juli2008.pdf.



## Importance of the Case

The importance of this case should be contemplated as a part of an ongoing process to shed light on the CIA extraordinary rendition program in Europe. It is true that the conclusions did not reveal any new facts about the involvement of Danish officials. The exclusion of independent experts by this committee has also been criticized.[252] Nonetheless, this case shows that governments can be influenced by the efforts of journalist and civil society actors to rectify their errors and exercise more sensitivity in the future when their national sovereignty, as well as individuals' human rights, are infringed.

*I. Main Organizations Involved:*

1. Governmental:

- Inter-ministerial Working Group for the Compilation of the Report Concerning Secret CIA Flights in Denmark
- Danish Ministry of Foreign Affairs: http://www.um.dk/en

2. Non-Governmental:

- AI: www.amnesty.org
- Retssikkerhedsfonden, Denmark: www.Retssikkerheds-fonden.dk

251 See the English Summary of the Report: www.um.dk/NR/rdonlyres/FEC4DC76-1ED0-4C4E-9F64-E758E9FCFF7C/0/081022EnglishSummary.doc.

252 See the Statement of the Manfred Nowak, Special Rapporteur on Torture, May 2008: http://www.unhchr.ch/huricane/huricane.nsf/view01/84ED7FA837084C4FC125744400517B4C?opendocument.

*III. Main Sources:*

1. Summary of the Report of the Danish Inter-ministerial Working Group for the Compilation of the Report Concerning Secret CIA Flights in Denmark: www.um.dk/NR/rdonlyres/FEC4DC76-1ED0-4C4E-9F64-E758E9FCFF7C/0/081022EnglishSummary.doc.
2. Press Release of the Danish Ministry of Foreign Affairs: http://www.um.dk/NR/rdonlyres/40A309D6-309F-4995-86A6-AEFB79107D91/0/Bilag31Henvendelsetil USAaf31juli2008.pdf.
3. Press reports:
-Presentation of the TV Documentary: http://www.dr.dk/Salg/DRsales/Programmes/Documentary/Current_Affairs_and_Politics/20070629133445_35_1_1_1_1.htm.

## 3. The Parliamentary Inquiry in Portugal

### Facts

Portugal's involvement in facilitating renditions is well documented. Already in his first report the Europe's Council Special Rapporteur Dick Marty stated that Portugal, among other states, could be held responsible for collusion, active or passive, involving secret detention and unlawful inter-state transfer of a non-specified number of persons, whose identities remained unknown.[253] The Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, appointed by the European Parliament, came to the same conclusion. The Fava-Report identified 91 stopovers at Portuguese airports, at least three of which originated from or were destined for Guantánamo. This report specified that the aircrafts involved in the rendition of Maher Arar and Abou Elkassim Britel, among others, did indeed make stopovers in Portugal on their return flights.[254]

253 See Marty 2006 Report, Ch. 11, No. 289, supra note 39.

254 See Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, No 117-122, available at: www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf.



### Political and Judicial Reactions

Although the allegations were obvious, the Portuguese government initially failed to order independent investigations or a parliamentary inquiry. However, the Portuguese judicial authorities could not ignore the facts and on February 5, 2006 the Portuguese General Prosecutor and head of the Central Investigation and Penal Action Department (DCIAP), Candida Almeida, announced that investigating magistrates would examine the stopovers made in Portugal by CIA flights suspected of involvement in renditions. This investigation envisages the possibility of bringing criminal charges against people of unknown identity and focuses on the issue of torture or inhuman and cruel treatment against detainees suspected of international terrorist offences.[255]

This judicial inquiry was triggered primarily by the efforts of a member of the European Parliament, Ana Gomes. Active during the work of the European Parliament's Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Gomes complained repeatedly about the unwillingness of the Portuguese authorities to initiate proceedings or inquiries in order to clarify the extent of rendition flights carried out in Portuguese airspace or airports. On January 26, 2007, she submitted these allegations to Attorney General Pinto Monteiro asserting that both the current and the former Portuguese government had failed to provide information concerning suspicious flights. The issue led to an exchange of accusations between Gomes and her socialist party colleague and Portuguese Minister of Foreign Affairs, Luis Amado, about the complicity of the Portuguese government.[256]

255 See the Statewatch Documentation, "Portugal: Renditions: Judicial investigation into CIA flights begins," 5 February 2007: http://www.statewatch.org/news/2007/feb/03cia-portugal.htm.

256 See the Statewatch Documentation, "Portugal: Evidence of illegal CIA rendition flights surfacing," http://www.statewatch.org/news/2006/oct/04portugal-cia-gomes.htm.

Journalist Rui Costa Pinto also played a crucial role to the initiation of a criminal investigation. Pinto published a report concerning CIA flights on the island of Terceira in the Azores. This report was not authorized by her magazine, *Visao*.[257] In the meantime, under the pressure of public interest, the Portuguese government established an inter-ministerial working group on the use of Portuguese airports by CIA rendition flights. This committee began working on September 26, 2006. Approximately a month later on October 13, 2006, the Portuguese government passed a resolution stipulating that all names of crewmembers and passengers on private flights must be submitted to the Portuguese frontier authorities.[258] In a parliamentary hearing held in September 2006, Minister of Foreign Affairs Luis Amado openly declared that the government was aware of the existence of the CIA flights between the airport of Santa Maria in the Azores and the U.S. prison based in Guantánamo.[259] On October 9, 2008, nearly two years later, the same minister explained that if Portugal's government has not made a statement on the matter, it was only to avoid prejudicing EU Commission President José Manuel Barroso, who was the Portuguese Prime Minister at the time.[260] It seems unconceivable that Portuguese officials admit their complicity in rendition flights without fear of judicial consequences.

On January 28, 2008, the UK-based human rights organization Reprieve, acting on behalf of rendition victims, published a report in which it uses flight logs obtained by Ana Gomes in 2006 while working with the European Parliamentary Committee. The report confirms that over 728 prisoners were flown to Guantánamo through Portuguese airspace, in at least 28 flights. By cross checking this data with the "in-process" records released by the U.S. Department of Defense concerning Guantánamo detainees, Reprieve concluded that 728 out of 774 prisoners were flown through Portuguese airspace.[261] In May 2008, the Portuguese Ministry of Transport confirmed that 56 flights to or from Guantánamo have passed over Portuguese airspace between July 2005 and December 2007.[262]

Both the criminal investigation and the inquiry of the inter-ministerial working group are still pending. In December 2008, Portugal announced that it would be willing to resettle some detainees from the Guantánamo detention center and urged other European countries to accept prisoners remaining at the camp. This announcement could be the first step toward closing Guantánamo in the early months of the Obama administration.[263] Portugal's willingness to accept Guantánamo detainees could be viewed as indirect compensation for its involvement in the CIA rendition program.

## Importance of the Case

This case demonstrates that the civil society cannot always rely on state authorities to reveal human rights violations or to pursue their punishment. Coordinated initiatives are required in cases where governments do not have interest in contributing to the disclosure and punishment of such acts. Human right organizations, the press, and civil society must maintain communication channels, allowing them to act promptly and effectively.

*I. Main Organizations Involved:*

1. Governmental:

- Council of Europe: www.coe.int/DefaultEN.asp
- Central Investigation and Penal Action Department

257 See also the presentation of Rui Costa Pinto, "CIA Secret Flight-Behind the Shame", available at: http://www.rcpedicoes.com/ver_Voos-*secretos*-CIA---Nos-bastidores-da-vergonha-(Vol-I).htm?lang=en.

258 See Temporary Committee, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, No. 118, supra note 254.

259 See the Statewatch Documentation "Rendition: Portuguese government admits knowledge of CIA flights of 6 June 2006," http://www.statewatch.org/news/2006/sep/01portugal-cia-flights.htm.

260 See the Statewatch Documentation, "Jornal de Noticias," 9 October 2008: http://www.statewatch.org/rendition/rendition.html.

261 See Reprieve Submission to Portuguese Inquiry on Rendition, p. 16, 2 April 2008: http://www.reprieve.org.uk/documents/080403FINALREPRIEVEPORTUGALREPORT.pdf.

262 "56 vuelos de la CIA desde o hacia Guantánamo transitaron por Portugal," Telesur 23 May 2008.

263 William Glaberson, "Move May Help Shut Guantánamo Camp," *New York Times* 11 December 2008.

- Inter-ministerial Working Group about the use of Portuguese Airports by CIA rendition flights
2. Non-Governmental:
- Reprieve: www.reprieve.org
- Statewatch: www.statewatch.org

*II. Main Sources:*
1. Council of Europe – Parliamentary Assembly – Report of Special Rapporteur Dick Marty "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states", 12 June 2006: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.
2. European Parliament's Resolution on the alleged use of European countries by the C.I.A. for the transportation and illegal detention of prisoners ("Fava-Report"), 14 February 2007: http://www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf.
3. Reprieve Submission to Portuguese Inquiry of Rendition, 2 April 2008: http://www.reprieve.org.uk/documents/080403FINALREPRIEVEPORTUGALREPORT.pdf.
4. Statewatch Observatory on Rendition: http://www.statewatch.org/rendition/rendition.html.

## V. THE CIVIL CASE AGAINST JEPPESEN DATAPLAN, INC. (U.S.)

### Facts[264]

Binyam Mohamed, a long-term British resident with Ethiopian citizenship, was apprehended in July 2002 in Pakistan and transferred by U.S. officials on a Gulfstream V aircraft to Morocco. There, he was handed over to Moroccan intelligence services agents who detained and tortured him. His interrogators routinely beat him, sometimes to the point of losing consciousness. He suffered multiple broken bones. Mohamed stated that during one incident he was cut 20 to 30 times on his genitals.[265] After 18 months he was rendered to Afghanistan where he was also mistreated. Mohamed was taken to the U.S.-run prison commonly known as the "Dark Prison." Mohamed's captors repeatedly hit his head against the wall until he bled. He was thrown into a tiny cell and chained to the floor. Mohamed was later transferred to Guantánamo where he is still imprisoned.[266] Jeppesen Dataplan, Inc., a subsidiary of Boeing Company, was the company that provided flight and logistical support to the secret flights.

In March 2002, U.S. officials detained Abou Elkassim Britel, a 40-year-old Italian citizen of Moroccan origin in Pakistan. Britel was traveling for professional reasons. After two months of interrogations he was also flown on a Gulfstream V aircraft to Morocco. The originator code on the flight records shows that Jeppesen submitted the flight plan for this itinerary. In Morocco he was held incommunicado and was denied access to his family, legal counsel or the Italian consulate. According to human rights organizations, he was held in total isolation in a tiny cell, deprived of both sleep and adequate food. While being interrogated, Britel was subjected to brutal forms of physical torture including repeated, severe beatings, and threats against his own life and those of his family. He was also subjected to "bottle torture," a technique used by Moroccan intelligence services whereby a bottle is forced into the detainee's anus. In February 2003, he was released without charges by Moroccan intelligence. Some months later, on his way back to Italy, Britel was re-arrested by Moroccan authorities on suspicion of his involvement in terrorist attacks in Casablanca. After being held for four months in extremely inhumane conditions, he signed a confession that he was never permitted to read. Following a trial that according to an Italian government observer failed to comport with universally recognized fair trial standards, Britel was sentenced to 15 years

264 In this chapter, five cases of individual victims of the CIA extraordinary renditions and torture program are presented jointly. Besides the factual similarities among all these cases, the reason for this joint approach is that these individuals filed a civil lawsuit against Jeppesen Dataplan, Inc., a company which allegedly provided flight services to the CIA and in this way enabled the clandestine transportation to numerous detention facilities.

265 See: www.aclu.org/safefree/torture/29912res20070530.html.

266 For more information about the case of Binyam Mohamed please see the separate chapter "The Cases of Binyam Mohamed, Bisher al-Rawi and Jamil el-Banna (UK)".

in prison. Upon appeal, his sentence was subsequently reduced to nine years. Presently, he is incarcerated at a prison in Casablanca.[267]

As described in a previous chapter, the Swedish security police handed over Ahmed Agiza to CIA agents who transferred him to Egypt in December 2001.[268] According to the Swedish civil aviation documents, it was Jeppesen that facilitated the flight from Sweden to Egypt. Agiza was handed over to Egyptian intelligence agents who proceeded to interrogate and torture him. In April 2004, he was sentenced to 15 years imprisonment for membership in an Islamic organization. He remains in an Egyptian prison today.

Another victim of the CIA extraordinary rendition program was the 38-year-old Yemeni national, Mohamed Farag Ahmad Bashmilah. While traveling to Jordan in October 2003, he was taken into custody by the Jordanian General Intelligence Department. He was interrogated in Jordan before being transported to Afghanistan by U.S. agents. The involvement of Jeppesen in arranging the flight from Jordan to Afghanistan is well documented. At the Bagram airbase, it is claimed that Bashmilah was subjected to six months of 24-hour solitary confinement, torture and interrogation. He was moved through a series of three different cells, each involving different methods of sensory manipulation, sleep deprivation and shackling in painful positions. In April 2004, he was flown to a secret CIA black site where he also suffered harsh mistreatment. He was held in two different cells while shackled at the ankle and subjected to months of sensory deprivation, blaring loud music and endless interrogation. After having tried to commit suicide three times, he was secretly flown to Yemen. He was imprisoned once again in Yemen before he was finally released in March 2006. Bashmilah has never faced any charges related to terrorism.[269]

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267 More information about this case: www.aclu.org/safefree/torture/29915res20070530.html, www.reprieve.org.uk/casework_binyammohammed.htm.

268 For more information about the case of Ahmed Agiza please see the separate chapter "II. The criminal Cases 1. The Case of Ahmed Agiza and Mohammed Al Zery (Sweden)" in this publication.

269 The grave concern about the rendition and the treatment of Bashmilah have been expressed by three different U.N. bodies, namely the U.N. Special Rapporteur on Torture,



The fate of Bisher el-Rawi, an Iraqi citizen and a long-term British resident, is very similar.[270] He was detained in Gambia in November 2002 and was secretly flown by the CIA to Afghanistan. Flight documents indicate that he was taken aboard the same Gulfstream aircraft used for the abduction of the persons referred to above. All logistical and flight support was once again provided by Jeppesen. In Afghanistan, he was kept shackled in complete darkness and isolation in the secret CIA facility known as the "Dark Prison." He was beaten severely and for the ensuing two months was subjected to humiliation, degradation as well as physical and psychological torture by U.S. officials. Subsequently, he was transferred to Guantánamo where he remained until his release in March 2007. No charges have ever been brought against him.[271]

## Political and Judicial Reactions

All these individuals have chosen to challenge their mistreatment. On their behalf, the American Civil Liberties Union and other human rights organizations have filed a civil lawsuit against Jeppesen Dataplan, Inc. on May 30, 2007. This company is a corporation that provides aviation logistics and travel service operation under the trade name Jeppesen International Trip Planning.

In this complaint to the District Court for the Northern District of California, it is alleged by the plaintiffs that at least since 2001, Jeppesen has provided direct and substantial services to the U.S. government essential for executing extraordinary renditions. In this way, Jeppesen enabled the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they were

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the U.N. Special Rapporteur on the Promotion and Protection of Human Rights Fundamental Freedoms while countering Terrorism and by the U.N. Working Group on Arbitrary Detention, see the text of the lawsuit: www.chrgj.org/#report%20and%20lawsuit, p. 61

270 For more information about the case of Bisher el-Rawi please see the separate chapter "II. The criminal Cases 1. The Case of Ahmed Agiza and Mohammed Al Zery (Sweden)" in this publication.

271 See "Biography of Plaintiff Bisher al-Rawi," American Civil Liberties Union, www.aclu.org/safefree/torture/31162res20070801.html.

placed beyond the reach of the law. Over a four-year period, Jeppesen has facilitated 70 secret rendition flights, a fact confirmed by public civil aviation records.

In concrete terms, the contribution of Jeppesen to the successful implementation of the extraordinary rendition program was manifold. Jeppesen provided a number of services essential to all stages of planning and running of rendition flights. In preparation for such flights, Jeppesen furnished aircraft crew with comprehensive flight planning services including itinerary, route, weather and fuel planning. Jeppesen filed the flights in advance of departure with appropriate air traffic control authorities, ensuring successful operation of the renditions. In some instances, Jeppesen filed flight plans for so-called dummy flights in order to obscure the actual routes taken by multi-flight renditions. During the flights, Jeppesen provided all information necessary to ensure the safe passage of the aircraft. Finally, once an aircraft landed, Jeppesen made all the arrangements for ground transportation and for the physical security of the aircraft and crew. In short, the extraordinary rendition program would not have been successful without the crucial assistance of Jeppesen and other similarly acting corporations.[272]

The evidence alleging Jeppensen as the aircraft and flight provider for the rendition flights described is well substantiated. Moreover, in some cases Jeppesen falsified flight plans submitted to European air traffic control authorities to shield CIA flights from public scrutiny. The European parliamentary inquiry, the reports of the Council of Europe Parliamentary Assembly and flight records obtained from different national civil aviation authorities reveal the complicity of Jeppesen in the program.[273] In coordinating these flights, Jeppesen knew or should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program and that the governments of the destination countries routinely subject detainees to torture. The plaintiffs invoked the Alien Torts Statute (ATS), which permits aliens to bring suit in U.S. courts for violations of the law of nations or of treaty law, arguring that U.S. U.S. Jeppesen is directly liable for their forced disappearance and torture. The prohibition against forced disappearance and torture is a "specific, universal and obligatory" norm of customary international law cognizable under the ATS. Furthermore, Jeppesen showed reckless disregard as to whether plaintiffs would be subjected to torture or other inhuman, cruel and degrading treatment. As a result, the amended complaint submitted in August 2007 by the plaintiffs requests compensatory, punitive and exemplary reparation. In October 2007, the U.S. government filed motion to intervene as a party and to dismiss the suit on the basis of the state secrets doctrine. The government raised similar objections in the case of El Masri. In February 2008, the district court granted a motion to dismiss on the basis of the state secrets privilege, as asserted by the U.S. government. The district court concluded that despite widespread press coverage of the extraordinary rendition program, to allow the plaintiffs' claims to proceed would necessarily involve revealing state secrets. The plaintiffs have appealed before the Ninth Circuit Court of Appeals. They argue based on precedents set in the Ninth Circuit and in the Supreme Court that the state secrets doctrine is an evidentiary privilege that may be invoked to exclude certain material during discovery but may not be used to dismiss a case at the threshold except in extreme circumstances whereby the entire scope of a classified program is secret. The appeal is still pending.[274]

## Importance of the Case

This case is extremely significant because it proves a variety of methods exist in which human rights violations in the context of the so-called "War on Terror" can be challenged. One promising method is the civil legal process before U.S. courts

272 See the amended complaint, p. 14: www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_1stamendedcomplaint.pdf.

273 See Marty 2007 Memorandum, No. 185, supra note 36; see also documentation by Jane Mayer, The CIA ´s Travel Agent, "Boeing does not mention, either on its website or in its annual report, that Jeppesen's clients include the C.I.A., and that among the international trips that the company plans for the agency are secret 'extraordinary rendition' flights for terrorism suspects," The New Yorker 30 October 2006: www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer.

274 Brennan Center for Justice, New York University School of Law, "Court Cases: Mohamed versus Jeppesen Dataplan, Inc. (Ninth Circuit Court of Appeals)": http://www.brennancenter.org/content/resource/mohamed_v_jeppesen_dataplan_inc_ninth_circuit_court_of_appeals/.

pursuant to the ATS. Civil litigation strategies make private companies aware of the possible consequences they face if they are found to be complicit in illegal actions.[275] The threat of legal proceedings may deter these corporations from co-operating with CIA agencies, even if significant financial gains are forthcoming.

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- ACLU (USA), www.aclu.org
- Reprieve (UK), www.reprieve.org.uk
- Center for Human Rights and Global Justice (USA), www.chrgj.org
- Yale Law School, International Human Rights Clinic, www.law.yale.edu/academics/AllardKLowensteinIHRC.asp

*III. Main Source:*
Official website of ACLU: www.aclu.org.

275 Ben Wizner, Workshop on Extraordinary Renditions, European Center for Constitutional and Human Rights, Berlin 3-4 October 2007, unpublished transcript, p. 15.

WWW.ECCHR.EU

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