When Extraordinary Means Illegal: International Law and European Reaction to the United States Rendition Program

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol30/iss1/2
The power of our society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.

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

Hassan Mustafa Osama Nasr, a.k.a. Abu Omar, is not just a name. He is a true story. As a member of the extremist Egyptian organization “Jamaa Islamiya,” Abu Omar is closely associated with certain key Al Qaeda affiliates. In 1997, after long stays in Afghanistan and Bosnia, and shorter stays in Albania and various cities in Italy, Abu Omar moved to Milan where he became an imam at the local mosque.

On February 17, 2003, Abu Omar was walking to his mosque from Via Guerzoni, a narrow and isolated road, when he was approached by two unknown men. Unprovoked and with no explanation, the two men suddenly injected Abu Omar with a
sedative, pushed him in a van, and drove away.\textsuperscript{3} A woman walking on the other side of Via Guerzoni also witnessed the abduction.\textsuperscript{4}

Three days later, Abu Omar’s wife informed the police of her husband’s disappearance.\textsuperscript{5} The Italian antiterrorism task force, DIGOS,\textsuperscript{6} immediately suspected a kidnapping.\textsuperscript{7} In mid-March, the United States informed the Italian services that Abu Omar was being held in the Balkans.\textsuperscript{8} In mid-April, the Italian police were able to wiretap several phone calls from Abu Omar to his wife.\textsuperscript{9} Surprisingly, these calls were made to a number in Egypt – not to the Balkans.\textsuperscript{10} In one of these phone calls, Abu Omar claimed to have eaten “in the best Egyptian restaurants.”\textsuperscript{11} In truth, he had been brutally tortured by the Egyptians.\textsuperscript{12} Abu Omar endured electric shocks to his genitals and excruciatingly loud music.\textsuperscript{13} As a result of this treatment, Abu Omar became incontinent and lost his hearing in one ear.\textsuperscript{14}

All of Abu Omar’s calls to his wife and friends were wiretapped, including one call to a friend who later collaborated with the prosecutors.\textsuperscript{15} The DIGOS began its investigation by analyzing phone calls made to and from Via Guerzoni on February 17, 2003.\textsuperscript{16} Its discoveries were astonishing. Calls from Via Guerzoni had been placed to phones in Langley, Virginia, the U.S. embassy in Milan, and the Aviano Airbase in Pordenone, Italy.\textsuperscript{17} It was later revealed that a call was placed between the U.S. embassy in Milan and Egypt on the day of the capture and that further calls

\begin{itemize}
\item \textsuperscript{3} Id. at 27.
\item \textsuperscript{4} Id.
\item \textsuperscript{5} See id. at 26: Omar’s wife contacted the police on February 20, informing them that she last saw her husband on February 17. Id.
\item \textsuperscript{6} DIGOS means “Direzione Investigazioni Generali e Operazioni Speciali” [Department of General Investigations and Special Operations] and is the core of antiterrorist investigation structure in Italy.
\item \textsuperscript{7} See OLIMPIO, supra note 1, at 26.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id. at 27.
\item \textsuperscript{10} See id.
\item \textsuperscript{11} Id. at 29 (“Ho mangiato nei migliori ristoranti d’Egitto”).
\item \textsuperscript{12} See id. at 25-36.
\item \textsuperscript{13} Id. at 29-39; see also Stephen Grey & Don Van Natta, Jr., In Italy, Anger at U.S. Tactics Colors Spy Case, N.Y. TIMES, June 26, 2005, at A4.
\item \textsuperscript{14} OLIMPIO, supra note 1, at 28; see also Grey & Van Natta, supra note 13, at A4.
\item \textsuperscript{15} Craig Whitlock, CIA Ruse is Said to Have Damaged Probe in Milan, WASH. POST, Dec. 6, 2005, at A1.
\item \textsuperscript{16} OLIMPIO, supra note 1, at 30-31.
\item \textsuperscript{17} Id. at 31-32.
\end{itemize}
were made until mid-March 2003.\textsuperscript{18} This led Italian investigators to a U.S. diplomat at the embassy in Milan.\textsuperscript{19} Clearly, the U.S. Central Intelligence Agency (CIA) had been involved in the kidnapping.

Abu Omar’s case is not an isolated incident. There are other stories like his, perhaps even hundreds. On October 23, 2001, Jamil Qasim Saeed Mohammed, a Yemeni national suspected in the bombing of U.S.S. \textit{Cole} in 2000, was moved by CIA agents from Karachi, Pakistan to Jordan, after being taken into custody by Pakistani intelligence, the ISI.\textsuperscript{20} Another incident concerned an Australian and Egyptian national named Mahdouh Habib, who was taken from Pakistan to Egypt.\textsuperscript{21} Mahdouh Habib was forced, by way of torture, to sign a confession of affiliation with Al Qaeda, which he subsequently retracted.\textsuperscript{22} In December 2001, Swedish authorities (the Sakerhetpolisen or SÄPO) arrested two men, Ahmed Agiza and Mohammed Zeri, and rushed them to Egypt, where they were subjected to the worst abuses imaginable.\textsuperscript{23} In 2002, Ibn al-Shaykh al-Libi was arrested in Afghanistan and moved to the U.S.S. \textit{Bataan} in the Persian Sea before he was eventually handed over to Egyptian authorities.\textsuperscript{24} Information obtained through the torture of al-Libi has been used to create a link between Osama bin Laden’s organization and Saddam

\begin{itemize}
\item \textsuperscript{18} \textit{Id.} at 31.
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} See TREVOR PAGLEN & A.C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA’S RENDITION FLIGHTS 59-60 (2006). The event became known because the operators of the plane used to transport Jamil Qasim Saeed Mohammed refused to pay the landing fees due to the Pakistani airport authorities. The plane was therefore unable to take off and eventually, ISI officials had to intervene.
\item \textsuperscript{22} Bonner, \textit{Detainee Says He Was Tortured}, supra note 21.
\item \textsuperscript{24} See Dana Priest, \textit{Al Qaeda-Iraq Link Recanted: Captured Libyan Reverses Previous Statement to CIA, Officials Say}, WASH. POST, Aug. 1, 2004, at A20; see also \textit{The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees"} 24-25 (Human Rights Watch Briefing Paper, Oct. 2004), \textit{available} at http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf.
\end{itemize}
Hussein.\textsuperscript{25} Al-Libi later recanted this statement, and the CIA was unable to substantiate either his statement given under interrogation or his subsequently recanted statement.\textsuperscript{26} In the same year, Binyam Mohammed, an Ethiopian student who lived in London, was abducted in Pakistan and moved to Morocco where he was tortured during interrogations.\textsuperscript{27} In September 2002, a Canadian citizen, Maher Arar, was seized by U.S. immigration authorities while traveling from Tunis to Montréal via New York’s John F. Kennedy International Airport.\textsuperscript{28} He was forcibly moved to Syria – a member of the so-called “Axis of Evil”\textsuperscript{29} – where he was detained for almost a year in a dirty, three-feet by six-feet cell.\textsuperscript{30} Syrian authorities also beat him and threatened him with electrocution.\textsuperscript{31} In March 2002, Abou Elkassim Britel, a Moroccan and Italian national, was removed from Pakistan to Morocco where he was subjected to torture and sentenced to nine years in prison after a secret trial.\textsuperscript{32} On New Year’s Eve 2003, Khaled el-Masri – whose name was confused with that of Khalid al-Masri, a significant Al Qaeda member linked to the “Hamburg cell” – was arrested at the border checkpoint at Tabanovce, Macedonia, and

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\bibitem{25} See Priest, \textit{supra} note 24, at A20.
\bibitem{26} Id.
\bibitem{29} Because Syria is in the so-called “Axis of Evil,” the United States can hardly justify the sending of a terrorist to that country; yet, obviously there are certain political junctures between Syria and the United States, under which they actually collaborate, especially because of the presence of American forces in the nearby Iraq. Presumably, the same reason brought the United States to halt renditions to Syria. See Hawkins, \textit{supra} note 28, at 263. Moreover, “[e]ven when diplomatic relations between two countries are strained, as they are between the United States and Syria, sometimes intelligence services are able to work out mutually beneficial deals. That is, sometimes the relationship between spymasters is quite different from the relationship between diplomats. Not always do the scenes on stage correspond with that goes on off the stage.” A. John Radsan, \textit{A More Regular Process for Irregular Rendition,} 37 SETON HALL L. REV. 1, 24 (2006).
\bibitem{31} Id. The case of Maher Arar is particularly well-known because of the international and domestic implications following Arar’s release.
then transferred to a CIA facility in Afghanistan. Here, el-Masri was detained, interrogated and tortured for five months. He was finally released, but only after his story came to the personal attention of U.S. Secretary of State Condoleezza Rice. The list does not end there.

Turning back to Abu Omar, on June 23, 2005, an Italian public prosecutor obtained a warrant from Judge Chiara Nobili of the Tribunal of Milan authorizing the arrest of thirteen CIA agents for Abu Omar’s abduction. One day later, another judge, Judge Guido Salvini, issued a warrant against Abu Omar charging him with international terrorism. In the order seeking Abu Omar’s pretrial incarceration, Judge Salvini affirmed that “Abu Omar’s kidnapping is not only illegal, for it breached Italian sovereignty, but it is also an ill-omened and polluting act with regard to the whole fight against terrorism.” In Judge Salvini’s view, Abu Omar was a victim of an Extraordinary Rendition Program (ERP).
Under the law it goes by another term: abduction, or in French, *enlèvement criminal.*

This article addresses the illegality of the ERP. In fact, ERP actions raise important legal questions from both domestic and international viewpoints. Its legality has been challenged in several ways, through public debates and condemnations, diplomatic protests, and lawsuits. This article argues that the current international law framework, fueled by a fierce European campaign against the ERP, clearly demonstrates the illegality of this program. As background, Part II reviews the factual and legal structure of the ERP. Part III analyzes the ERP as a violation of international law norms concerning the ban on torture. Part IV examines inconsistencies in European reactions to the ERP and the way in which these reactions may affect future ERP exploitation by the U.S. government. Part V concludes that the ERP is wholly inconsistent with international law.

II. UNDER THE COLOR OF “ADAPTATION”

U.S. policy-makers make use of the adjective “extraordinary” in describing the ERP. Actions can be “extraordinary” if they are contingent on a particular moment or characterized by unusual circumstances. Therefore, characterizing the rendition program as “extraordinary” could either indicate that the ERP is part of a

"rendition clause" at the federal constitutional level provides for the surrendering of individuals between the states. See U.S. CONST., art. IV, § 2.

41. Salvini's Order, supra note 38, at 10 n.9. Salvini explains that the term "extraordinary rendition" has no technical denotation and seems rather justificatory, while under international law such an action is called "abduction," or, in French, "enlèvement criminal." See Vincent Coussirat-Coustère & Pierre M. Eisemann, *L'enlèvement des personnes privées et le droit international,* 76 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 346 (1972) (Fr.). Abduction is another term for kidnapping, which is defined as “the crime of forcibly abducting a person from his or her own country and sending the person to another.” BLACK'S LAW DICTIONARY 886 (8th ed. 2004) (defining “kidnapping”).

42. Significantly, “[w]hether a particular ‘rendition’ is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights. Thus, even if a particular ‘rendition’ is in accordance with the national law of one of the States involved (which may forbid or even regulate extraterritorial activities of State organs), it may still be unlawful under the national law of the other State(s). Moreover, a ‘rendition’ may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law.” Venice Comm’n, supra note 40, ¶ 30.

43. This article will not address the problem of the ERP's consistency with the U.S. Constitution. Some issues concerning the problem of secrecy will be dealt with infra at Part IV.

larger government strategy for emergency response to global terror, or that its legal framework is specifically connected to particular situations. It could also mean, however, that the rendition program is lawless. Yet, none of these explanations do justice to the true legacy of the ERP.

Although the ERP is intimately connected with the global fight against terrorists, ERP-type actions took place well before 9/11. The legal framework for the U.S. ERP originated in Presidential Directives issued to the CIA in 1995. At that time, the administration of President William J. Clinton was stirred to action by a wave of terrorism including the 1993 World Trade Center bombing and the 1995 bombings in Oklahoma City and Tokyo. Although there was no single terrorist group linked to these events, the U.S. government decided to expand the CIA’s powers in order to prevent further tragedies. Thus, President Clinton enacted the Presidential Decision Directive (PDD) 39:

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

45. See Venice Comm’n, supra note 40, ¶ 31.
46. In 1995, in Zagreb, Croatia, CIA agents seized an Egyptian, Talaat Fouad Quassem, an alleged extremist, detained him for interrogation on a ship in the Adriatic Sea, and then transferred him to Egypt, where he disappeared. His family believes that he was executed in Egypt. See Anthony Shadid, US, Egypt Raids Caught Militants, BOSTON SUNDAY GLOBE, Oct. 7, 2001, at A1. In 1998, five people were grabbed by the Albanian police and moved to Egypt on a CIA flight. Rajiv Chandrasekaran & Peter Finn, U.S. Behind Secret Transfer of Terror Suspects, WASH. POST, Mar. 11, 2002, at A1. In the same year, three people, Ahmed Salama Mabrouk, Essam Hafez, and Ihab Muhammad Saqr were transferred by the CIA from Azerbaijan to Egypt and tortured there. Susan Sachs, A Nation Challenged: Bin Laden’s Allies; An Investigation in Egypt Illustrates Al Qaeda’s Web, N.Y. TIMES, Nov. 21, 2001, at A1.
49. Presidential Decision Directive 39, supra note 47; see also Kash, supra note 48, at 141.
Initially, the principal addressee of PDD 39 was the FBI. It directed U.S. agencies to identify terrorists and then seek the cooperation of the involved country. Identification and cooperation were the paradigms underlying PDD 39. Upon locating the terrorist, PDD 39 suggests the following: "[o]nce the terrorist is located . . . more detailed information . . . is usually required to effect an arrest. Intelligence officers and their sources on the scene are usually better able to do that than enforcement officers from the United States." By the terms of the directive, efficiency and efficacy require the exploitation of local intelligence agencies that maintain contacts and collect information at a local level, which enforcement agencies such as the FBI rarely have at their disposal.

Enlisting the help of local intelligence agencies, however, has its drawbacks. Cooperation between law enforcement entities of different countries is usually based on treaties, especially in the context of extraditions. These treaties are only concluded following long negotiations between the concerned governments, and their enforcement can be both time consuming and rife with political roadblocks. Arguably, this would impede the effectiveness of PDD 39 by delaying the ability of the United States to collect intelligence through interrogations of terror suspects. If the ability to gather this intelligence is frustrated, counterterrorism measures could not move as quickly, leaving terrorists more time to plan deadly attacks. This is the logic that prompted the U.S. government to entrust its rendition strategies solely to the CIA, eschewing cooperation with local, foreign intelligence agencies and ignoring enforceable extradition treaties.

In pursing its rendition strategies, the CIA’s actions are constrained solely by the goals of prevention and immediate political convenience. While

53. Id.
56. Specifically, "[t]he rendition techniques . . . are extraordinary in the legal sense, since extradition exists as an ordinary legal process. However, recourse to these techniques may well be due to the frustration of a requesting state following formal channels of rendition." M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 251 (4th ed. 2002).
prevention comports with the traditional identification-cooperation duality of PDD 39, prevention as it is practiced by the CIA loses the cooperation aspect; those who have relevant information (such as the CIA) act directly, even if such action is unlawful.

But what justification allows the CIA to violate international law in pursuit of the U.S. government’s rendition strategies? During a press conference on the eve of her visit to Europe in December of 2005, Condoleezza Rice stated that the “[r]enditions [carried out by the CIA] . . . save lives." When asked to specifically respond to the claims that some European countries were hosting CIA prisons for interrogating and torturing suspected terrorists, she neither denied nor confirmed their existence. Instead, Rice gave this response:

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

Essentially, the rendition strategies of the U.S. government can be seen as an “adaptation” to the evolving terrorist threat. The concept of “adaptation” was the theme of Rice’s entire speech. Clearly, this recourse to “adaptation” represents an effort to bring actions, which evidently have no legal basis, under existing laws. Rice assumes that the changing world environment has made some international laws antiquated and that international law must therefore evolve with the changing environment. Consequently, Rice believes that the rendition strategies of the U.S. government

60. ‘Renditions Save Lives’: Condoleezza Rice’s Full Statement, supra note 58.
61. Id. “The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt.” Id.
62. See id.
are a response to the changing world environment and are therefore compatible with international law.\footnote{See id. Rice added that "[i]n some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens." Id.}

An example of this misguided view on the necessity of "adaptation" is represented by the U.S. government's attempt to arrange typical operations of criminal justice, such as arrest of suspects, outside the framework of the ordinary criminal process.\footnote{Shaun Waterman, \textit{Ex-CIA Lawyer Calls for Law on Rendition}, \textit{SPACE WAR}, Mar. 9, 2005, http://www.spacewar.com/news/2005/upinews-030905-1410-52.html.}  This arrangement emerges from the so-called "Memorandum of Notification," a classified directive signed by President George W. Bush on September 17, 2001.\footnote{Id.}  This directive allows the CIA to render terrorists without governmental approval and establishes measures restraining individual freedoms without due process of law (i.e., a formal indictment).\footnote{Id.}  It also allows the CIA to carry out renditions abroad, without any formal criminal charge, merely for the purpose of interrogation.\footnote{Id.}  Rice justifies this right to rendition as an "adaptation" of intelligence structures in order to achieve the goal of neutralizing dangerous terrorists.\footnote{Id.}  Nevertheless, as demonstrated below, the ERP remains essentially beyond the law.  Claiming that the goal of prevention makes rendition actions legal is anything but well-grounded.

### III. The Complex Legacy of the ERP

There are two main phases of each ERP action. First, a person is abducted – a forced and illegal taking of an individual allegedly made legal by the ERP.\footnote{\textit{Renditions Save Lives': Condoleezza Rice's Full Statement}, \textit{supra} note 58.}  This component clearly entails restraint on physical freedom, and may also necessarily involve the use of violence.  Second, ERP actions involve the transfer of an
individual to a country where law enforcement authorities or intelligence agencies practice torture. To be sure, "[t]here were no cases where a prisoner was released, or had contact with a family member, human rights worker, or other visitor, and did not make any allegations of torture." The CIA's continuing program of enlisting the assistance of these countries for purposes of torture indicates that the CIA must believe torture to be an effective way of obtaining information. The apparent justification of the ERP is that another country is doing the "dirty job" of interrogating the suspected terrorist.

A. Can Abduction be Justified?

Under classic international law, states have a duty to refrain from exercising their sovereign powers within the territory of other states. Accordingly, the taking of foreign citizens in a foreign country is generally forbidden. If the taking is illegal under international law, one should use the term "abduction." As a matter of sovereignty, however, the territorial state can consent to the operation, in which case the taking is considered perfectly legal.

Customary international law permits an international law violation if it is justified by the violated state's consent. Consent, however, must be "valid" and the violation must respect the limits

70. See El-Masri v. Tenet [El-Masri I], 437 F. Supp. 2d 530, 537 (E.D. Va. 2006) ("[S]ince the early 1990s the CIA has been operating interrogation centers in countries where the United States believes legal safeguards do not constrain efforts to interrogate suspected terrorists. This practice is commonly known as 'extraordinary rendition.'" (emphasis added)).
71. Hawkins, supra note 28, at 264 (emphasis added).
72. See El-Masri I, 437 F. Supp. 2d at 537; El-Masri II, 479 F.3d at 300.
73. See S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).
74. See S.C. Res. 579, pmbl., U.N. Doc. S/RES/579 (Dec. 18, 1985) (Under international law, abduction still stands as an "offence . . . of grave concern to the international community, having severe consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States.").
75. See BLACK'S LAW DICTIONARY, supra note 41, at 886 (defining "kidnapping").
77. Id. This principle translates into a customary international law norm. See id. (stating that ("[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.").
of that consent. The question of whether consent is valid is generally governed by the applicable international law norms, particularly norms regulating the power of state agents to agree to treaties on behalf of a state. The law of treaties requires that, for a state to be bound by a treaty obligation, the state's agent must either: (1) be vested with an unrestrained ability to act on behalf of the state ("plenipotence" or "plein pouvoir"); or (2) be empowered to act through a recognized course of dealing between states (in which case an agent's authority is evidenced by past dealings with the foreign state).

Accordingly, in the ERP context, consent to violate sovereignty must be given by an agent with appropriate powers to grant such consent. A serious question therefore arises as to whether assurances given by members of foreign intelligence agencies are legally adequate to grant such consent.

Many scholars assert that, even if the territorial state did not give valid consent to a sovereignty violation, the fact that an ERP arrest violated international law has no bearing on the adjudication of the suspect. To support this contention, some scholars recall the non-inquiry doctrine, or rule of *male captus bene detentus*. According to this doctrine, domestic criminal courts may not ascertain whether the circumstances of the arrest

78. *See id.; see also MALCOLM N. SHAW, INTERNATIONAL LAW 707 (5th ed. 2003) (“wrongfulness is precluded provided that the act is within the limits of the consent given”).

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


81. *See id.*

82. Take, for instance, the case of Abu Omar, where CIA agents acted with the complicity of the director of the SISMI (the Italian Secret Service), Niccolò Pollari. Whether Pollari is responsible for complicity in kidnapping Abu Omar will presumably be ascertained by the judges in Milan. The extent to which Pollari consented to the CIA’s action may be relevant for settling the problem of whether Italian authorities consented to the action itself. *See generally* Salvini’s Order, supra note 38. Certainly Pollari has no powers to sign agreements with foreign secret agents; neither international practice nor prior U.S.-Italy relations suggests otherwise.

83. *See Kash, supra note 48, at 144.*

84. *Id.; see also Silvia Borelli, The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 331, 353-62 (Andrea Bianchi ed., 2004).*
violated international law. In other words, the power of a domestic court to adjudicate the case is not affected by circumstances which reveal that the government acted illegally. Scholars rely on well-established jurisprudence in arguing that ERP arrests and subsequent trials remain legal, despite any violation of international law that may have been involved in the suspect’s capture. A few notable cases underscore this point of view, including: Ker, Frisbie, Eichmann, Argoud, and the recent U.S. decision in the case of Alvarez-Machain.

It is the opinion of this author, however, that any reliance on male captus must be rejected. First, there is some confusion surrounding the male captus rule because its supporting precedents are often misunderstood or misapplied. As one scholar phrased this problem of application, “the courts of the world have . . . failed the decisive question[, which] . . . is not whether jurisdiction exists, but whether jurisdiction should be exercised.” Reassuringly, there is a recent trend in domestic courts to overrule such precedent.

85. Borelli, supra note 84, at 353-62.
86. Indeed, “[w]ith rare unanimity and undeniable justification, the courts of the world have held that the manner in which an accused has been brought before a court does not and, indeed cannot deprive it of its jurisdiction.” Frederick Alexander Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 407, 414 (Yoram Dinstein ed., 1988).
87. See Ker v. Illinois, 119 U.S. 436 (1886).
89. See Att’y-Gen. of the Gov’t of Israel v. Adolf Eichmann, 36 I.L.R. 5 (S. Ct. 1962) (Isr.).
90. See Re Argoud, 45 I.L.R. 90 (Cass. Crim. 1964) (Fr.), reprinted in 92 JOURNAL DU DROIT INTERNATIONAL 93 (1965) (Fr.).
92. Mann, supra note 86, at 414.
93. In some cases, for instance, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has affirmed that the illegality of the arrest generally does affect the Court’s jurisdiction, but the trial can nevertheless be validly initiated if the violations of the accused’s rights have not been “of such an egregious nature.” Prosecutor v. Nikolic, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, ¶ 114 (Oct. 9, 2002); see also Prosecutor v. Dokmanovic, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused (Oct. 22, 1997) (distinguishing between “luring” and “kidnapping,” only the latter raising issues related to jurisdiction); Aparna Sridhar, The International Criminal Tribunal for the Former Yugoslavia’s Response to the Problem of Transnational Abduction, 42 STAN. J. INT’L L. 343, 355 (2006); Michael P. Scharf, The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY, 11 LEIDEN J. INT’L L. 369, 379-81 (1998).
Specifically, domestic courts have attempted to analyze jurisdiction in rendition cases under the treaty norms of extradition, holding that the legality of an arrest does affect jurisdiction. In this vein, courts have exercised their supervisory power to reject the domestic prosecution of an accused if he or she has been forcibly abducted from another national jurisdiction with the aid of the government.

Second, and more generally, the ERP must be distinguished from the legal environment in which the male captus rule emerged. The male captus rule emerged in criminal trials against the kidnapped person, while the ERP's exclusive purpose is the pre-adjudicatory step of interrogation. No criminal trial is initiated, no criminal charges are brought against the abducted person, and as a general matter, instruments of criminal law are avoided. It is, as mentioned above, the paradigm of "adaptation."

Third, it must be emphasized that mere adjudication of an abducted criminal does not legitimize a violation of human rights law, even when the operation occurs with the approval of a

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96. Borelli, supra note 84, at 346 (noting that an emerging body of jurisprudence suggests that when an accused has been forcibly abducted from another national jurisdiction – particularly if the abduction was done with the aid of the same government that subsequently seeks to prosecute him – a court may exercise its supervisory authority and decline to try the accused); see also Connelly v. Dir. of Pub. Prosecutions, [1964] 3 All E.R. 510 (A.C.) (Eng.); Dir. of Pub. Prosecutors v. Humphreys, (1976) 2 All E.R. 497 (Eng).

97. Borelli, supra note 84, at 355.
98. See id. at 353-55.
99. See 'Renditions Save Lives': Condoleezza Rice's Full Statement, supra note 58.
100. To be sure, "[n]one of the current estimated 3,000 captives were charged with recognizable criminal offense . . . ." John Fitzpatrick, Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond, 25 LOY. L.A. INT'L & COMP. L. REV. 457, 460 (2003).
101. See 'Renditions Save Lives': Condoleezza Rice's Full Statement, supra note 58.
102. See Borelli, supra note 84, at 356 (arguing that "with the development of international human rights law, the issue of forcible abduction can be framed in ways other than the traditional issue of inter-State responsibility"); see also Royal J. Stark, The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and United States Sponsored Kidnapping of Foreign National Abroad, 9 CONN. J. INT'L L. 113, 134 (1999) (demonstrating that the Ker-Frisbie doctrine "cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying the government the fruit of its exploitation of any deliberate and unnecessary lawlessness on its part . . ."). In support of his argument, Stark mentions United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), and Cook v. United States, 288 U.S. 102 (1933), as examples where U.S. courts refused to refer to Ker and established that jurisdiction on specific cases depended on the government's previous misconduct with regard to the accused's abduction. Stark, supra, at 134. Remarkably, in Toscanino, the
territorial state. In particular, forced abduction is clearly an arbitrary deprivation of freedom, and is thus incompatible with the international norms that affirm an individual’s right to freedom. To be sure, there exist multiple international treaties and norms which expressly forbid international abduction. Recently, the UN General Assembly sponsored a global convention on the topic of forced disappearance, which concluded on December 20, 2006. Forced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of a federal court recalls Article 2(4) of the UN Charter and Article 17 of the Charter of the Organization of American States [OAS], and concludes that the territory of a member state “may not be the object . . . of measures of force taken by another state, directly or indirectly, on any grounds whatever.” Toscanino, 500 F.2d at 277.

103. See BASSIOUNI, supra note 56, at 256 (noting that, given the asylum state’s consent, “such a practice would . . . not disrupt relations between the respective states nor it would involve infringement of sovereigntv”) Human rights issues and constitutional issues would still remain. Id.

104. See International Covenant on Civil and Political Rights [ICCPR] art. 9(1), Mar. 23, 1966, 999 U.N.T.S. 171 (“No one shall be subjected to arbitrary arrest or detention” and “[n]o one shall be deprived of his liberty except of such grounds and in accordance with such procedure as are established by law.”).


106. See Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, Preamble, U.N. Doc. A/RES/47/133 (Dec. 18, 1992) (declaring that “enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity”).

107. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Jan. 12, 2007). Fifty-seven states signed the Convention. Id. Article 1 states that “[n]o one shall be subjected to enforced disappearance.” Id. art. 1(1). However, the convention also states that exceptional circumstances, whether they be war, threat of war, internal political instability, or any other public emergency, “may be invoked as a justification for enforced disappearance.” Id. art. 1(2).
person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment . . . "

For these reasons, the reference to both the territorial state's consent and the *male captus* rule as a means to uphold the legality of suspected terrorist abductions are highly questionable in the ERP context. The *male captus* rule is perfectly adaptable to the violation of sovereignty, but it can hardly be applied to human rights violations. Human rights violations were actually ignored in the cases cited above. Generally, such rule raises doubts from a moral viewpoint, since "[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." Abduction is a *per se* violation of international law. Accordingly, Condoleezza Rice's claim that consent of the territorial state shows sufficient respect for international law is extremely naïve.

**B. Assessing the Risk of Torture**

1. A Very Absolute Ban

As mentioned supra, the second component of the ERP is the moving of a suspected terrorist to a country that practices torture for interrogation. Torture is unquestionably illegal under international law. Indeed, its prohibition is provided by a norm of *jus cogens*, making it non-derogable and unjustifiable under all circumstances.


111. See Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶ 153 (Dec. 10, 1998), reprinted in 38 I.L.M. 349 (1999) (emphasizing that "[b]ecause of the importance of the values [the principle proscribing torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules"). Usually norms of *jus cogens* prevail on all other norms of international law. See Vienna Convention, *supra* note 80, art. 53 ("[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law"). Although the general
The main problem with such a principle is that it calls for states to enact "effective legislative, administrative, judicial or other measures to prevent torture." Clearly, prevention is essential if human dignity is to be preserved at the global level. The sovereignty of states, however, severely limits any attempt to prevent torture because states cannot extend their efforts to the territories of other countries.

International law addresses this problem by regulating cases where individuals under the control of one state face the risk of torture if moved to another state. Article 3(1) of the Convention Against Torture (CAT) states that "[n]o State Party shall expel, return (refouler) or extradite a person to another state when there are substantial grounds for believing that he would be in danger of being subjected to torture." This norm establishes that the authorities deciding whether to allow a transfer have an obligation to refuse the transfer if there is a risk of torture in the country of destination.

A question may arise about the meaning of the word "return" – in French, "refouler." While it is clear that the norm applies to expulsion and extradition proceedings, it also seems to contemplate the simple "turn[ing] back" of an immigrant. The principle considers conflicting norms void, the solution applied in practice deems the norms of treaties which are inconsistent with jus cogens to be simply unoperative or unenforceable. Id. Extradition treaties are an example of this – the duty to extradite under a treaty cannot be enforced incompatibly with the prohibition of torture, even though the treaty still remains operative and enforceable. Erika De Wet, The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law, 15 EUR. J. INT'L L. 97, 101-12 (2004).

As to Article 3 of the ECHR, supra note 110, scholars note that "only in this article are there no qualifications or exceptions, and no restrictions to the rights guaranteed. The prohibition is absolute." CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 58 (3d ed. 2002); see also JOHN COOPER, CRUELTY: AN ANALYSIS OF ARTICLE 3, at 9 (2003). In Chahal, the ECHR dealt with the deportation of a Sikh separatist from the United Kingdom to India, where he was threatened with torture. Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (1996). The British government argued that he was a dangerous terrorist and his expulsion was required for the security of English citizens. Id. Interestingly, the Court pointed out that "even in these circumstances, the Convention prohibits in absolute terms torture." Id. § 79; see also Soering v. U.K., 11 Eur. Ct. H.R. 439 (ser. A) (1989).

The proper translation of the French word "refouler" is to force back, to push back, "to turn back [immigrant] . . . to reject [candidate]." THE OXFORD-HACHETTE FRENCH DICTIONARY 719 (3d ed. 2001).
term "refouler," however, which sparked animated debate during the CAT negotiations, usually refers to the case of an individual who presents himself at the border. Thus, Article 3(1) might not apply when the refoulement occurs outside the territory of the host country.

Some scholars and U.S. officials strongly believe that these doubts are well-grounded and that the CAT does not extend extraterritorially. In support of this argument, one scholar cites the 1993 U.S. Supreme Court decision in Sale v. Haitian Centers Council. The Court's conclusion was that U.S. agents acting abroad have no restraints in transferring individuals to other countries, even when these individuals face the risk of being tortured.

Before challenging this interpretation, one should recall Article 3(2) of the CAT. While Article 3(1) forbids the extradition, expulsion, or deportation of a person only when there are "substantial grounds" to believe he or she would face torture, Article 3(2) addresses the problem of determining when such a threshold is met:

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the

118. See J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 50 (noticing that, during negotiations, "it was said that there were strong humanitarian reasons to include [the] word ['return' ('refouler')], which broadened the protection of the persons concerned").


120. See John Yoo, Transferring Terrorists, 79 NOTRE DAME L. REV. 1183, 1229 (2004) ("the [CAT] is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in case of extradition) and, hence, cannot apply to Al Qaeda and Taliban prisoners detained outside the U.S. territory" (italics omitted)); see also Radwan, supra note 29, at 21 (assuming, but not explaining, that "CAT's territorial reach is limited"). According to John Bellinger, Legal Advisor to the U.S. Department of State, "[t]he United States has long taken the position that [Article 3 of the CAT] applies to people expelled or returned from the United States and we're very careful about that obligation. It does not apply, though, to a transfer that takes place wholly outside of the United States, because that's not a return or an expulsion." John Bellinger, Legal Advisor, U.S. Dept of State, On-The-Record Briefing on the Committee Against Torture Report, May 19, 2006 [hereinafter Bellinger Briefing], available at http://www.state.gov/s/l/rls/66519.htm.

121. Yoo, supra note 120, at 1229 (citing Sale, 509 U.S. at 179-83).

122. Sale, 509 U.S. at 155.

123. CAT, supra note 110, art. 3(1).
State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.\textsuperscript{124} This norm apparently establishes the conditions under which competent authorities must decide when extradition, expulsion, or deportation should be forbidden.\textsuperscript{125} More precisely, it establishes that: (1) "it is illegal to disregard any information about the likelihood of torture;"\textsuperscript{126} and (2) all circumstances must be taken into account, particularly whether gross violations of human rights were perpetrated by the state.\textsuperscript{127} Besides these indications, however, Article 3(2) does not contain any other criteria to guide the assessment of the likelihood of torture with regard to extradition, expulsion, or deportation proceedings.\textsuperscript{128}

Nevertheless, some guidelines can be extrapolated from Article 3(2). First, the individual does not have to prove that he or she would be subject to torture.\textsuperscript{129} It is enough for him or her to show that there are systematic violations of human rights in the destination state, because, generally, "where systematic violations of human rights take place, it is highly likely that torture takes place as well."\textsuperscript{130} This presumption favors the applicant.\textsuperscript{131} Second, for obvious reasons, states normally refrain from expressly declaring their direct involvement in torture cases. Thus, it is unlikely that an applicant will find strong evidence of torture in the recipient country. As a result, CAT does not require a high burden of proof of the truthfulness of the facts concerning torture.\textsuperscript{132}

This author takes the position that the standards provided by Article 3 of the CAT apply to ERP actions. First, it is the author's belief that the denial of the CAT's extraterritorial reach is a product of a patent misunderstanding. It is correct to argue that if Article 3 forbids certain transfers for regular proceedings, such as expulsion or extradition, it must \textit{a fortiori} oversee irregular

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} art. 3(2).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} Hawkins, \textit{supra} note 28, at 229.
\item \textsuperscript{127} \textit{Id.} at 230.
\item \textsuperscript{128} CAT, \textit{supra} note 110, art. 3(2).
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} Matteo Fornari, \textit{La Convenzione delle Nazioni Unite contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti, in LA TUTELA INTERNAZIONALE DEI DIRITTI UMANI 203, 211 (Laura Pineschi ed., 2006) ("laddove si verifichino sistematiche violazioni dei diritti umani, [è] altamente probabile il compimento di atti di tortura") (Italy).
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} See Burgers & Danelius, \textit{supra} note 118, at 127.
\end{itemize}
Clearly, Article 3's aim is to prevent torture, where the expulsion, extradition, or return proceedings are exhausted. Without Article 3, the expelling state party would hardly be held responsible for torture, and the individual, nevertheless, would have been tortured. Sale does not affect this because it concerned Article 33 of the UN Protocol on the status of refugees, a norm that's scope is clearly distinct from Article 3 of the CAT. Moreover, in Furundzja, the International Criminal Tribunal for the Former Yugoslavia (ICTY) determined that the prohibition of torture as an absolute value applies to all individuals over whom states wield authority, regardless of any jurisdicctional issues. The ICTY could have chosen to proscribe torture against all individuals within the jurisdiction of a state, but instead explicitly chose the broader prohibition. The CAT, accordingly, applies extraterritorially to the extent to which a state claims authority over an individual outside its territory. A very strange legal system would be the one that forbade questionable conduct in an unconditional way, and then condoned the same conduct as an extraterritorial exception.

Second, it is a matter of fact that the recipient countries are always the same: Egypt, Syria, Jordan, Uzbekistan, Morocco, Pakistan, and, very recently, Ethiopia and Somalia. Several official reports of the U.S. government have denounced these countries, most of which are guilty of both torture and massive

133. "International human rights law is equally applicable to cases of expulsion/deportation as it is to regular extradition; it is arguably even more important in protecting individual rights in cases of irregular rendition." Borelli, supra note 84, at 339.


135. "The scope of the two provisions is different. In the Refugee Convention, protection is given to refugees, i.e. to persons who are persecuted in their country of origin for a special reason, whereas article 3 of the [CAT] applies to any person who, for whatever cause, is in danger of being subjected to torture if handed over to another country." BURGERS & DANELIUS, supra note 118, at 125. It should be noted that the authors refer to Article 33 of the Refugee Convention, which is similar to Article 33 of the U.N. Protocol Relating to the Status of Refugees.


137. Id.

138. CAT, supra note 110, art. 3.

violations of human rights. Pursuant to the requirements of Article 3(2) of the CAT, it is inexplicable that the U.S. government ignored evidence that there were substantial grounds for believing that rendered individuals would be tortured in the recipient countries. It should have been clear to the government that all the abducted individuals could be subjected to torture if sent to the aforementioned countries a fortiori under the U.S. Senate’s notorious interpretation of Article 3(2) of the CAT. It is disingenuous for the U.S. government to avoid its responsibilities under CAT by claiming that the ERP does not involve torture on the part of the CIA agents who perform abductions, when clearly abduction is prerequisite to rendition of the impacted individuals to a recipient country.

2. Conflicting Obligations

Another aspect that appears relevant to the present analysis is the relationship between the ERP and other international obligations which concern the fight against terrorism. Two points are relevant to this inquiry. First, it is important to determine whether rendition remains a violation of international law, even though local authorities complied with certain other international legal obligations regarding the fight against terrorism. Second, it is

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141. CAT, supra note 110, art. 3(2).

142. Eligibility for Withholding of Removal Under the Convention Against Torture, 8 C.F.R. § 208.16(c)(2) (2007).

143. See Radsan, supra note 29, at 19. In all the cases cited in this article, “the grounds for believing that someone will be tortured are close to 100%.” Id. It seems, however, that CAT Article 3(2) allows at least one case in which the violation of that norm could be excused: when the sender state has no reasons to believe that torture will take place because of the strong assurances given by the recipient state. CAT, supra note 110, art. 3(2). Indeed, diplomatic assurances might make the sender state reasonably believe that the individual concerned will not be tortured, and if torture still occurs, then the sender state is not held responsible. This perspective is problematic. Since the aim of CAT’s Article 3 is to prevent torture, it seems unlikely that the state could justify its conduct by relying on diplomatic assurances from a country that is reported to have committed gross violations of human rights. Of course, if torture takes place despite diplomatic assurances, the sender state would thereafter be proscribed from relying on any future assurances provided by the implicated recipient state. Yet, what future do human rights have if all the world’s states send at least one individual to Egypt under the latter’s diplomatic assurances? What is the sense of legitimizing a legal framework which condones systematic torture under the cover that diplomatic assurances were provided?
important to evaluate the persuasive authority which supports the argument that the ERP violates norms on extradition of suspected terrorists.

The Committee Against Torture addressed this first issue in Agiza in 2005. In this case, the Committee evaluated the rendition of Agiza, a known terrorist, by SÄPO to Egypt in 2001 via a CIA flight. Sweden argued that the action was a part of its national effort to comply with the obligations deriving from UN Security Council Resolution 1373. In particular, the government emphasized that, according to Resolution 1373, states must prevent terrorists from exploiting the institution of asylum. The Committee responded by noting that measures taken to fight terrorism, including denial of safe haven, deriving from binding Security Council Resolutions are both legitimate and important. Their execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the [CAT].

Stated differently, even if Security Council resolutions are deemed to prevail over all other international obligations, according to Article 103 of the UN Charter, the ban on torture established by the CAT is so strong that it may not be overridden by any other UN norm when rendition of an individual to a recipient country may result in torture. Under these circumstances, the explanation lies in the hierarchy of international law. Even though a subsequent agreement regarding the rendition of a particular individual concluded by the

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145. Id.


147. U.N. Committee Against Torture, Communication 233/03, supra note 144, ¶ 4.9 (noting that Resolution 1373 “called upon Member States to ensure, in accordance with international law, that the institution of refugee status is not abused by perpetrators, organizers or facilitators of terrorist acts”).

148. Id. ¶ 13.1.

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

150. It should be noted that this Article does not review the controversial issue of balancing human rights obligations with the UN framework of resolutions concerning the fight against terrorism.
intelligence agencies of a concerned country can overrule a treaty on cooperation or extradition,\textsuperscript{151} the norms of \textit{jus cogens} are mandatory and cannot be derogated by the states.\textsuperscript{152} The rights affirmed as \textit{jus cogens} are not waivable; states cannot exploit the consent of those rights in order to justify a violation of \textit{jus cogens}.\textsuperscript{153} Moreover, the argument that Resolution 1373 justifies such actions is very reductive. Resolution 1373 does not authorize states to kidnap individuals and torture them.\textsuperscript{154} Furthermore, it would be dishonest to interpret its norms as a justification for violating the \textit{jus cogens} provision contained in Article 3 of the CAT.

In addressing the second question of whether the ERP violates the norms on extradition, one wonders what is so problematic with developing an alternate system to extradition. Why should the ERP not be intended as a means of rendition that is an “alternative” to the one provided by extradition treaties? The answer is very simple: “[e]xtralegal remedies to extradition . . . invariably pose a threat to international peace and security.”\textsuperscript{155} Of course, not all of the remedies held outside the framework of a treaty are automatically illegal. For example, some extralegal remedies could be justified as countermeasures.\textsuperscript{156} This argument, however, is tenuous at best.

\textsuperscript{151} This author agrees with Professor Bassiouni’s argument regarding rendition accidents, which states that “[t]he solution . . . should be to make extradition more efficient, not to subvert it by resorting to unlawful or legally questionable means.” BASSIOUNI, supra note 56, at 251. In the view of this author, however, the problem is political. Legally speaking, there is no issue when a state party to an extradition treaty derogates from the treaty with the consent of the other state party. A different solution would be settled in case the territorial state did not consent to the operation. Here, absent the approval of the territorial state, no legal agreement can be construed as to supersede the previous one, which remains valid. Furthermore, the abduction is clearly a breach of the valid treaty.

\textsuperscript{152} \textit{Id.}


\textsuperscript{154} See S.C. Res. 1373, supra note 146.

\textsuperscript{155} BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 69-70 (1991) (“[e]xtralegal methods of extradition may also endanger the national and international rights of criminal defendants”).

\textsuperscript{156} Under international law, countermeasures are reactions (or, juridically speaking, “legitimate reprisals”) brought by a State which has been harmed by another State’s conduct. Generally, countermeasures are illegal if brought out of the requirements established by international law. One of these requirements is that countermeasures must be “taken in response to a previous international wrongful act of another State and . . . directed against that State.” Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 83 (Sept. 25). Those limits explain why international law cannot justify the abductions of aliens. First, one should determine which norm has been breached. This cannot be the norm on cooperation against terrorism, or the principle of \textit{aut dedere aut judicare}, because
Nevertheless, ERP actions are illegal if they are inconsistent with treaty provisions, i.e., they are "contrary to the treaty right[s] of another State." Where extradition treaties require substantive or procedural guarantees for extradition proceedings or a minimum standard of treatment for the detainee, abductions clearly constitute a breach of treaty norms. In the U.S. Supreme Court's dissenting opinion in Alvarez-Machain, Justice Stevens, joined by Justices Blackmun and O'Connor, correctly stressed that:

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

In Alvarez-Machain, the U.S. government claimed that the extradition treaty between the United States and Mexico was not exclusive, but that extradition was only an "optional method of obtaining jurisdiction over alleged offenders." Although the majority agreed with this perspective, their viewpoint was incorrect. States go through the effort of negotiating and stipulating complex international treaties in order to set a legal framework for their cooperation. They assess a duty to extradite because the territorial state's consent is essential to the continued peaceful cohabitation of sovereign entities. If states could freely kidnap people everywhere, why would they stipulate hundreds of

usually the States that kidnap alleged terrorists are cooperative countries (e.g. Italy, Sweden, Pakistan, and Bosnia-Herzegovina). Indeed in some of those countries, criminal proceedings were already ongoing (as was the true in the cases of Abu Omar and Boumediene). Second, "[c]ountermeasures shall not affect . . . obligations for the protection of fundamental human rights." Draft Articles, supra note 76, at 333. Clearly, such countermeasures would drastically affect the individual right to be free from arbitrary detention. Third, before taking countermeasures, the State must fulfill some obligation, such as the request of negotiations and the call for halting the violation, something which hardly occurs in the ERP cases. Id. at 345. For all these reasons, ERP actions could be justified as countermeasures under international law.

157. CRAWFORD, supra note 79, at 83; Draft Articles, supra note 76, at 68.
160. Id. at 674 (Stevens, J., dissenting).
161. Id. at 675 (Stevens, J., dissenting).
162. Id. at 681 (Stevens, J., dissenting).
treaties on extradition and cooperation in criminal matters? The extradition process might be time-consuming but it is, nevertheless, efficient. While abductions are life-threatening and inhumane by definition, supporters note that "extradition[s] have yet to kill anyone." Rather than legitimizing other techniques of capturing suspected terrorists, the Security Council has strengthened its stance against terrorism after 9/11 by calling upon states to better cooperate with one another.

Certainly, "[t]he integrity of the internationally recognized process of extradition should not be subverted for practical considerations . . . [and] alternative devices to extradition should not be allowed." The presumption that the ERP saves lives is highly questionable. Unlike the extradition processes, the ERP seems to deeply affect human dignity, to undermine international relations, and, as discussed below, to challenge government supremacy in foreign policy.

IV. HOW THE ERP IS UNDERMINING INTERNATIONAL RELATIONS

A. Foreign policy and the courts

Traditionally, domestic courts have little room to question a government's maneuvers in its relations with other states. The ERP, however, has broken with this classical picture of domestic constitutional structure. Because foreign policy remains a strict prerogative of the executive branch in most constitutional systems - with some intervention by Parliament - the courts' interference with ERP cases is likely to raise serious questions of domestic legitimacy within the United States as well as in all other concerned countries. Several examples are illustrative.

164. See S.C. Res. 1373, supra note 146; see also Borelli, supra note 84, at 363 ("[i]nternational cooperation is therefore . . . a viable alternative to abduction").
165. BASSIOUNI, supra note 56, at 310-11; see also SATYADEVA BEDI, EXTRADITION: A TREATISE ON THE LAWS RELEVANT TO THE FUGITIVE OFFENDERS WITHIN AND WITH THE COMMONWEALTH COUNTRIES 396 (2002); GILBERT, supra note 163, at 375-76 (proposing a framework of new rules on abduction, regulated by a treaty whose violation would divest domestic courts of jurisdiction).
First, consider the Abu Omar case. Apparently, the CIA agents acted with the placet of the Italian secret service, the SISMI. Some SISMI members, including a director, were indicted for the abduction. The Italian government strongly opposed any declassification of the information related to the incident, and appealed the release of classified information to the Constitutional Court. The judge, however, denied the appeal, and allowed the case to go to trial. Furthermore, while the Italian penal code provides for trial in absentia, the arrest warrant issued by the Milan Court is valid throughout the entire European Union, pursuant to the so-called “European arrest warrant” approved in 2002, despite the fact that many European countries do not support a trial in absentia.

Second, in the El-Masri case, both the Federal District Court of East Virginia and the Fourth Circuit Court of Appeals determined that the state secret privilege applied to discovery sought by plaintiff and consequently dismissed the case. According to the appellate court, details of the ERP must remain secret because the interests of U.S. national security so require. Nevertheless, the German authorities initiated investigations about El-Masri’s abduction. In late January 2007, a criminal court in Münich issued an arrest warrant for several CIA agents supposedly involved in the incident. Reportedly, the Frankfurt airport and the U.S. airbase at Ramstein had been used for flights

167. Id.
168. Id.
169. See id. The Italian government argued before the constitutional court that the judges in Milan “overstepped their powers by violating laws against the release of state secrets in the investigation of the kidnapping of Abu Omar.” Id.
170. Id.
171. CODE DI PROCEDURA PENALE [C.P.P] art. 420-quater (Italy).
174. El-Masri v. Tenet [El-Masri I], 437 F. Supp. 2d 530, 537 (E.D. Va. 2006) (“any admission or denial . . . in this case would reveal the means and methods employed pursuant to this clandestine program and such revelation would present a grave risk of injury to national security”); see also id. at 539 (“any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument”).
175. El-Masri v. United States [El-Masri II], 479 F.3d. 296 (4th Cir. 2007).
176. See id.
177. Id. at 300. It should be noted that el-Masri is a German citizen.
associated with the ERP. Like the Italian arrest warrant, the German warrant is valid in all European states.

Third, in the Arar case, the Canadian policy against terrorism received a strong and polemic rebuff by an ad hoc commission, elected by the Canadian legislature and presided over by Justice Dennis O’Connor (Arar Commission). The Arar Commission was required to inquire into the factual circumstances of Arar’s deportation to Syria, and to recommend potential reforms for the Canadian security services. The Arar Commission issued a total of four reports, and ultimately recommended, among other things: (1) the rigorous separation of the intelligence agencies from those of law-enforcement, like the Royal Canadian Mounted Police (RCMP); (2) a strengthening of the cooperation and information-sharing process both within and between the intelligence and law enforcement agencies; and (3) the introduction of “clearly established policies respecting screening for relevance, reliability and accuracy and relevant laws

179. Id.
184. See ARAR COMM’N, ANALYSIS AND RECOMMENDATIONS, supra note 182, at 312-16.
185. Id. at 316-22.
respecting personal information and human rights. These policies, subsequently outlined in the Fourth Report, must be attached as a caveat to any information shared with foreign agencies. Most importantly, if foreign agencies made "improper use" of the information provided by Canadian agencies, "a formal objection should be made to the foreign agency and the foreign minister of the recipient country." The Arar Commission further stated that "it is essential that there be a proper and professional assessment of the reliability of information... received... from countries with questionable human rights records.

The clear aim of these recommendations is to prevent Canadian agencies from using information obtained by torture or human rights abuses. The Arar Commission's findings on the conduct of the RCMP triggered a negative public reaction, which convinced the government to publicly acknowledge, by formal apology, the RCMP's mistakes in Arar and to award the victim over ten million Canadian dollars in compensation for damages incurred because of the RCMP's misinformation. Although the American Arar Court, defending the secrecy of the ERP, continued to maintain that "the need for much secrecy can hardly be doubted," Canada decided to inform the public of the U.S. governmental agencies' questionable behavior and to conduct a complete investigation on the relevant facts and remedies of the case. A formal protest by the Canadian Prime Minister to Secretary of State Condoleezza Rice also followed.

186. Id. at 334.
187. ARAR COMM’N, A NEW REVIEW MECHANISM, supra note 183.
188. ARAR COMM’N, ANALYSIS AND RECOMMENDATIONS, supra note 182, at 339-42.
189. Id. at 344.
190. Id. at 348.
191. Id. ("Canadian agencies must exercise care in agreeing to receive information from countries with questionable human rights records. It is important that, in doing so, they not appear to encourage or in any way condone abuse of human rights or the use of torture.").
195. Id.
Finally, the Boumediene case is worthy of mention. In October 2001, the police of the Federation of Bosnia-Herzegovina arrested Lakhdar Boumediene and five other people (the Algerian Six) on the charge of having planned an assault on the U.S. and British embassies in Sarajevo. Among them, five had obtained Bosnian citizenship, and one was a resident under permission. On January 17, 2002, the investigative judge of the Bosnian Federation’s Supreme Court ordered their release due to a lack of grounds for further detention. The court delivered the order that afternoon; that evening, the Chamber of Human Rights of Bosnia-Herzegovina (CHR) issued an interim order to prevent the detainees’ transfer. Nevertheless, the police handed over the prisoners to U.S. forces. In late January, the U.S. government declared that it had detained the six men in Guantanamo.

On October 12, 2002, the CHR determined that police removed the Algerian Six illegally, and that the Bosnian government violated the European Convention of Human Rights. Subsequently, the CHR ordered Bosnian State and Federation authorities to undertake a number of measures to counteract the violations, such as the annulment of the removal order. The fact that the Bosnian government disregarded two

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197. See id. at 1.

198. Id. at 2.

199. See id. (granting a request made by the detainees who feared extradition to Algeria, where they were believed that they would be subjected to torture by Algerian authorities).

200. Id. at 3.

201. Id.


203. Specifically, the CHR ordered the government to address the following violations of the ECHR: Art. 1 of Protocol 7 (right not to be arbitrarily expelled in the absence of a fair procedure); Art. 5(1) (right to liberty and security of person); Art. 6(2) (right to be presumed innocent until proven guilty); Art. 1 of Protocol 6 (right to not to be subjected to death penalty). See James Sloan, Dayton Peace Agreements: Human Rights Guarantees and Their Implementation, 7 EUR. J. INT’L L. 207, 209 (1996); Amnesty Int’l, supra note 196, at 3.
different orders from domestic courts obviously exacerbated the conflict between powers. The CHR instructed the government to "use all diplomatic channels in order to protect the basic rights of the applicants, taking all possible steps to establish contacts with the applicants and to provide them with consular support," and to "prevent the death penalty from being pronounced against and executed on the applicants."

In addition to the judicial and the executive branches, the conflict also involved the legislature. On May 11, 2004, the House of Representatives of the Parliament of Bosnia-Herzegovina adopted a report by a parliamentary Commission for Human Rights, Immigration, Refugees and Asylum. In 2005, the same body demanded the Council of Ministers of Bosnia and Herzegovina to urge the U.S. government to release the Bosnian detainees held at Guantanamo. Finally, Boumediene's attorneys filed a petition before the European Court of Human Rights, citing the CHR decision of 2002, in support of their argument that Bosnia-Herzegovina breached the European Convention of Human Rights.

Initially, it is possible to infer from these examples that a nation's foreign policy is no longer the strict prerogative of the executive branch or the parliament. Although this is a domestic constitutional issue, it triggers relevant political effects at the international level. By incriminating U.S. citizens acting in their official capacity, other national courts may embarrass and strain possibly already delicate relations with the United States. Indeed, the questioning of various international and domestic courts raises serious doubts about the legitimacy of a government's behavior in cooperating with the ERP, especially in the eyes of the public. It also destabilizes the U.S. government's efforts in the global war on terror, and may even potentially delegitimize the U.S. government itself.

206. Boumediene Application, supra note 204, ¶ 43.
207. Id. ¶ 56.
208. See id. ¶ 114.
Moreover, the international implications of the court's intervention should be considered. For instance, in the case of the Italian and German officials' involvement in the ERP, the European arrest warrants against the CIA agents extend throughout the entire European Union. Thus, it concerns all European criminal courts by default. This raises significant political issues for all states in the EU, not only for the state whose court issued the warrants. The involvement of EU domestic courts is therefore bound to have political implications for the relationship between local secret services and the CIA.

In addition, one should wonder why national governments vigorously insist on protecting their involvement in ERP actions by way of the state secrecy defense. Since this seems to be a common trend in both European countries and the United States, it is natural to ask whether a new transnational concept of state secrecy will arise from judicial disputes concerning the ERP. Irrespective of the constitutional concerns of the state secrecy doctrine, governments who invoke this defense usually justify it through reasons of national security. But, since ERP actions "[t]ook place with the requisite permissions, protections, or active assistance of government agencies," it is likely that high among these national security concerns are reliance on, and the protection provided by, an alliance with the United States. Clearly, this results in a trend of concealment of some aspects of international relations from democratic scrutiny, and, more generally, a lack of accountability.

These episodes demonstrate that, although the conflict regarding the legality of rendition may appear to exclusively impact the domestic legal order, the current trend of questioning renditions under ERP must also be considered as the dominant legal order at an international level.

B. The European Struggle: Hard Reactions Against Blind Eyes

1. The Council of Europe: Blind Eyes on Human Rights

The Council of Europe (COE), a political organization with a broader membership than the EU, intervened against ERP action

210. In fact, "[i]n Italy, as in Germany, irrespective of the alternation in political power between parties, the same line has apparently been chosen, namely the preservation at any price of relations (and especially of interests) with the powerful ally, with 'state secrecy' being invoked whenever an unpleasant truth might become public." Id. pt. C, ¶ 323.
that took place within the territories of its member states. The Parliamentary Assembly of the Council of Europe (PACE) formed an investigation committee, presided over by Swiss senator Dick Marty (Marty’s Committee), while the secretary-general of the COE made inquiry to member state governments regarding the existence of secret CIA detention facilities in their territories, pursuant to procedure established by Article 52 of the European Convention on Human Rights. Additionally, PACE requested an advisory opinion from the European Commission for Democracy Through Law, commonly referred to as the “Venice Commission,” on the legality of secret detention with regard to states’ obligations under the European Convention on Human Rights.

On February 26, 2006, the secretary-general published a first report on the states’ responses. The report focuses on three aspects of European Convention on Human Rights enforcement: (1) effective domestic laws to sanction the Convention’s breaches, (2) omissions in the enforcement of the Convention, and (3) significant controls on the air traffic within states’ jurisdiction.

211. See Secret Detentions: Second Report, supra note 59, pt. C, ¶ 9 (describing the formation of Marty’s Committee and summarizing the committee’s published findings as of the date of its second report). Pursuant to Article 52, the Secretary General of the COE is, in fact, empowered to request “any High Contracting Party ... [to] furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the European Convention of Human Rights.” ECHR, supra note 110, art. 52.

212. Venice Comm’n, supra note 40.


214. Id. ¶¶ 20, 22-23. “Such renditions involve multiple human rights violations, including transfer in breach of the principle of non-refoulement, as well as arbitrary arrest and incommunicado detention. The victim is placed in a situation of complete defencelessness with no judicial control or oversight by the European Committee for the Prevention of Torture (CPT) leaving the door open for the use of torture and other forms of ill-treatment. According to the [ECHR], the unacknowledged detention of an individual is a complete negation of the Convention’s guarantees against arbitrary deprivation of liberty and a most grave violation of Article 5 (right to liberty and security).” Id. (citing Kurt v. Turkey, 27 Eur. Ct. H.R. 373, §§ 123-24 (1998)). The COE secretary-general also states that “[t]he arbitrary arrest, detention and transfer of an individual” affects human rights in violation of “Articles 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 2 of Protocol No. 4 (freedom of movement), as well as, depending on the circumstances, Article 2 (right to life) and Article 3 (prohibition of torture).” Id. ¶ 22. The COE secretary-general further noted that, although “[t]he activities of foreign agencies cannot be attributed directly to States Parties ... [t]heir responsibility may nevertheless be engaged on account of either their duty to refrain from aid or assistance in the commission of wrongful conduct,
Interestingly, the report states that some responses were incomplete or extremely generic. Moreover, although some states provided a regulatory framework for the activities of foreign agents on their territories, the parliamentary or judicial controls on these activities are generally limited in several ways, and most actions of foreign officials are protected by the foreign agents' immunity exception. Indeed, the restraints on flights within domestic airspace have been surprisingly ineffective; thus, any foreign airplane could engage in illegal activities, such as those carried out by through the ERP, in several member states without difficulty.

An intriguing finding was the extent to which some states clearly dissimulated their own roles in specific ERP actions. For instance, the Italian government denied any involvement of its public officials in “flying prisons” – words that still remain obscure in meaning – notwithstanding the ongoing criminal proceedings in Milan. Similarly, the Republic of Macedonia did not respond to the question of involvement, nor did Bosnia-Herzegovina. It seems obvious from these reactions that the questions posed by the secretary-general were disconcerting to these governments, acquiescence and connivance in such conduct, or, more generally, their positive obligations under the Convention. In accordance with the generally recognised rules on State responsibility, States may be held responsible of aiding or assisting another State in the commission of an internationally wrongful act. There can be little doubt that aid and assistance by agents of a State Party in the commission of human rights abuses by agents of another State acting within the former’s jurisdiction would constitute a violation of the Convention. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State Party’s responsibility under the Convention. Of course, any such vicarious responsibility presupposes that the authorities of States Parties had knowledge of the said activities.”

215. Id. ¶¶ 17-19.
216. Id.
217. Id. ¶ 41.
218. Id. ¶¶ 70-71 (citing international jurisprudence that addresses the problem of immunity of foreign agents with regard to violations of human rights).
219. Id. ¶ 54.
220. Id. ¶¶ 54-55.
221. Id. ¶ 91 (noting that by “[g]iving only a partial reply to the question about involvement and not replying at all to the question about official investigations, Italy has failed to provide information about the well-known ongoing criminal investigation into the alleged abduction of Abu Omar by CIA agents in Italy, in contrast to Germany and Switzerland which provide information about ongoing investigations by their own authorities”).
222. Id. ¶ 90.
223. Id.
which are already mired in court battles at home. The insufficiency or incompleteness of their answers is a clear signal, in the view of the COE secretary-general, that the European Convention of Human Rights needs a more powerful enforcement framework to deal with illegal actions like those of the ERP. On April 12, 2006, the secretary-general held a press conference and concluded that "virtually none of our member states have proper legislative and administrative measures to effectively protect individuals against violations of human rights committed by agents of friendly foreign security services operating in their territory."

Marty's Committee published its first report in 2006. The report affirms that:

the CIA "rendition" programme has revealed a network that resembles a "spider's web" spun across the globe. . . . Analysis of the network's functioning . . . allows us to make a number of conclusions both about human rights violations - some of which continue - and about the responsibilities of some [COE] Member states . . . . [I]t is only through the intentional or grossly negligent collusion of the European partners that this 'web' was able to spread also over Europe.

According to the Committee, across the world, the United States has progressively woven a clandestine "spider's web" of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathising with a presumed terrorist organisation.

Marty's Committee repeatedly emphasizes the illegality of and inadequate governmental response to ERP actions. First, as to the legitimacy of the state secret defense, the committee urges that actions of secret government agencies be brought under the

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224. Id. ¶¶ 90-93.
225. See id. ¶ 101.
228. Id. pt. C, ¶¶ 280-84.
229. Id. pt. A, ¶ 5.
scrutiny of the national parliaments or the judicial branches. Second, the committee strongly recommended that member states and the United States report renditions of suspected terrorists under the rule of law. Third, the Committee makes a point of appreciating the work done by public prosecutors and parliamentary inquiry commissions to ascertain the violations of human rights that occurred in relation to specific ERP actions, such as Abu Omar and El-Masri. As to the culpability of member states, Marty's Committee concluded that some were directly responsible for the ERP, some turned a blind eye to CIA actions on their territories, and others deliberately refused to know.

Interestingly, Marty's Committee directly challenged the position taken by the United States, as evidenced in a meeting held by U.S. delegate John Bellinger before the UN Committee Against Torture in May 2006. The Committee pointed out that "the United States does not see itself bound to satisfy anyone's interpretation of international law but its own," and that "[t]he United States' formalistic and positivist approach shocks the legal sensibilities of Europeans, who are rather influenced by

230. Id. pt. A, ¶ 12 ("[t]he Assembly takes the view that neither national security nor state secrecy can be invoked in such a sweeping, systematic fashion as to shield these unlawful operations from robust parliamentary and judicial scrutiny").
231. The United States has the status of an observer of the COE. The Committee is particularly shrewd on this point, expressly challenging the position taken by the U.S. administration and proposing an alternative framework for the ERP. Specifically, the Committee comments that "[t]he American administration states that rendition is a vital tool in the fight against international terrorism. We consider that renditions may be acceptable, and indeed desirable, only if they satisfy a number of very specific requirements (which, with a few exceptions, has not been the case in any of the known renditions to date). If a state is unable, or does not wish, to prosecute a suspect, it should be possible to apply the following principle: no person genuinely suspected of a serious act of terrorism should feel safe anywhere in the world. In such cases, however, the person in question may be handed over only to a state able to provide all the guarantees of a fair trial, or - even better - to an international jurisdiction, which in my view should be established as a matter of urgency." Id. pt. C, ¶ 261.
234. See id. pt. C, ¶ 237 (pointing out that "the Italian judicial authorities and police have shown great competence and remarkable independence in the face of political pressures").
235. Id. pt. C, ¶ 238.
236. Id. pt. C, ¶ 285; see also Geoff Meade, Britain Named for Colluding in US Rendition Flights, INDEPENDENT (U.K.), June 7, 2006.
238. Id. pt. C, ¶ 271.
‘teleological’ considerations. In other words, the European approach is to opt for an interpretation that affords maximum protection to the values on which the legal rule is based.\textsuperscript{239}

This appears to be the first time that a democratic assembly of an international organization issues such a strong message to the government of the United States about the interpretation of international law. Clearly, this statement reveals concerns that an entire framework of human rights, specifically the European framework, might be disregarded for being too protective of individual rights.\textsuperscript{240} More importantly, Marty’s Committee and the subsequent resolution of the Parliamentary Assembly struggle over the legality of the ERP and attempt to bring its legal analysis of what was initially a purely foreign policy matter to a deeper confrontation with public opinion, courts and democratic inquiry commissions.\textsuperscript{241}

The Venice Commission undertook a purely legal approach to the problem of the ERP in an opinion published on March 17, 2006.\textsuperscript{242} The Opinion dealt with three issues: (1) the problem of regular versus irregular inter-state transfers of prisoners;\textsuperscript{243} (2) violations of human rights caused by the irregular inter-state transfers;\textsuperscript{244} and (3) the specific COE members’ obligations under the European Convention on Human Rights.\textsuperscript{245} First, the Commission pointed out that every transfer of individuals besides the “four situations in which a State may lawfully transfer a prisoner to another state” (i.e., deportation, extradition, transit and transfer),\textsuperscript{246} is undisputedly irregular.\textsuperscript{247} Irregularity is, therefore, linked to actions outside of the conventional framework and, by implication, outside of the law.\textsuperscript{248}

With regard to human rights violations, the ERP impacts those human rights established by the European Convention on Human Rights – in particular, the right to liberty and security

\textsuperscript{239} Id. pt. C, ¶ 272.

\textsuperscript{240} See id.

\textsuperscript{241} Id. pt. A, ¶ 19.1 (calling on the United States to “send a strong message to the world by demonstrating that terrorism can be vanquished by lawful means, thereby proving the superiority of the democratic model founded on respect of human dignity”).

\textsuperscript{242} Venice Comm’n, supra note 40.

\textsuperscript{243} Id. ¶¶ 10-31.

\textsuperscript{244} Id. ¶¶ 47-77.

\textsuperscript{245} Id. ¶¶ 116-53.

\textsuperscript{246} Id. ¶ 10.

\textsuperscript{247} Id. ¶¶ 24-29.

\textsuperscript{248} Id. ¶ 29.
under Article 5 § 1 of the Convention.\textsuperscript{249} It also impacts the prohibition of torture under the \textit{jus cogens}, including the obligation to investigate every case of torture which has arisen by circumstance.\textsuperscript{250}

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

\begin{quote}
[a]ny arrest of a person by foreign authorities on the territory of a [COE] member State without the agreement of this member State is a violation of its sovereignty and is therefore contrary to international law . . . [and further] affects that person’s individual right to security under Article 5 § 1 [of the European Convention on Human Rights].\textsuperscript{251}
\end{quote}

Indeed, where the concerned government consents to the rendition, “the question of governmental control over the security/police services, and . . . of parliamentary control over the government” may arise.\textsuperscript{252} In the Commission’s view, this situation signifies more than a simple political problem, since “[t]he Statute of the [COE] and the [European Convention on Human Rights]...

\footnotesize

\begin{itemize}
\item \textsuperscript{249} ECHR, supra note 110, art. 5(1). The Venice Commission emphasizes, in this respect, that “[t]he possible reasons for detention are exhaustively enumerated in Article 5 (1) [of the ECHR]. Paragraph 1(c) of Article 5 permits ‘the lawful arrest or detention of a person effected for the purpose of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so,’ while paragraph (f) of Article 5 permits ‘the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’ A detention for any reason other than those listed in Article 5 § 1 is unlawful and thus a violation of a human right.” Venice Comm’n, supra note 40, ¶ 50 (emphasis added). The Commission further notes that “Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantiated claim that a person has been taken into custody and has not been seen since.” Id. ¶ 53 (citing Kurt v. Turkey, 27 Eur. Ct. H.R. 373 (1988)).
\item \textsuperscript{250} Specifically, “Member States of the [ECHR] not only have the obligation not to torture but also the duty to prevent torture. In addition they have an obligation of investigation. Under this obligation Member States must assure an efficient, effective and impartial investigation. As soon as the authorities receive substantiated information giving rise to the suspicion that torture or inhuman or degrading treatment has been committed, a duty to investigate arises whether and in which circumstances torture has been committed.” Venice Comm’n, supra note 40, ¶ 61 (footnotes omitted); see also CAT, supra note 110, arts. 4, 9.
\item \textsuperscript{251} Venice Comm’n, supra note 40, ¶ 116 (internal quotations omitted) (citing Stocké v. Germany, 13 Eur. Ct. H.R. 839, 167 (1991)).
\item \textsuperscript{252} Id. ¶ 119.
\end{itemize}
require respect for the rule of law which in turn requires accountability for all exercises of public power.”

Moreover, any extrajudicial detentions within the COE’s boundaries, whether maintained under the control of a foreign country or directly held by member states’ governments, are inconsistent with Article 5 of the European Convention on Human Rights. In particular, inconsistencies persist when COE member states fail to take “effective measures to safeguard against the risk of disappearance,” as well as when European Convention on Human Rights violations take place in territories subject to the relevant treaties, operating under the exclusive control of foreign military forces, like NATO. In this case, the Venice Commission emphasizes that COE member states have the precise duty to prevent and respond to abuses; for instance, by registering and controlling aliens’ access to the foreign military base. These measures are, in fact, perfectly legal under the relevant treaties, subject only to an obligation of notification. As another means of response, the concerned states could exploit diplomatic channels to issue a protest.

Furthermore, in assessing the problem of the European Convention on Human Rights’ spatial extension, the Venice Commission points out that member states have an obligation to ensure that no violations take place in their airspace or within their

253. Id. ¶ 120. The Commission further stresses that “[d]ifferent European States exercise different systems for political insight into, and control over, the operations of the security and intelligence services, depending upon constitutional structure, historical factors etc. Different mechanisms exist for ensuring that particularly sensitive operations are subject to approval and/or adequate control. Meaningful government accountability to the legislature is obviously conditioned upon meaningful governmental control over the security and intelligence services. Where the law provides for governmental control, but this control does not exist in practice, the security and intelligence services risk becoming a ‘State within a State.’ Where, on the other hand, the law provides for a degree of distance between government ministers and officials and the day-to-day operations of the security and intelligence services, but government ministers in fact exercise influence or even control over these operations, then the phenomenon of ‘deniability’ can arise. In such a case, the exercise of power is concealed, and there is no proper accountability. Independently of how a State chooses to regulate political control over security and intelligence agencies, in any case effective oversight and control mechanisms must exist to avoid these two problems.” Id. (citations omitted).

254. See id. ¶ 124.
255. Id. ¶ 127.
256. Id. ¶¶ 129-31.
257. Id. ¶¶ 130-32.
258. Id. ¶ 131.
259. See id. ¶ 132.
territories. Thus, the European Convention on Human Rights must receive full implementation at the member state level. Although the Commission was fully aware of the practical difficulties involved in controlling airplanes in transit, it maintained that when a suspected flight is at issue, states possess all the necessary instruments to react properly, and to ensure that those flights do not breach human rights obligations. On this point, the Commission further concludes that "there is no international obligation for [member states] to allow irregular transfers of prisoners to or to grant unconditional overflight rights, for the purposes of fighting terrorism."

In sum, the COE directs multiple concerns toward member states on the legal framework of the ERP. The general trend of COE recommendations is to strengthen the enforcement of human rights protection in the face of the ERP. As a remedy, the COE points to the need for democratic legitimations of secret agencies’

260. See id. ¶ 145.
261. The hypothesis considered by the Venice Commission occurs when the “member State has serious reasons to believe that the mission of an airplane crossing its airspace is to carry prisoners with the intention of transferring them to countries where they would face ill-treatment.” Id. ¶ 144. The Commission cites the Chicago Convention of 1944. See Convention on International Civil Aviation art. 3, Dec. 7, 1944, 15 U.N.T.S. 295. The Chicago Convention applies only to civil aircraft and not to state aircraft. Id. art. 3(b-e). However, the aircrafts carrying detainees are clearly “state aircrafts” for the purposes of the Convention. Id. art. 3(b) (“[a]ircraft used in military . . . and police services shall be deemed to be state aircrafts”). If the flight operators presented the airplane as a civil one, the Commission found a violation of art. 3(c) of the Chicago Convention, according to which “[n]o state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.” Id. art. 3(c); Venice Comm’n, supra note 40, ¶ 148. According to the Venice Commission, in this case “the territorial state may therefore require landing,” and proceed with searches. Id. When the aircraft identifies itself as a state flight, but without revealing its mission, the Venice Commission found that the flag state violated its international obligation. Id. ¶ 149. In this case, the territorial state cannot proceed with a seizure or a search of the aircraft, but it could nevertheless prohibit further flights over the airspace or impose a duty to submit to searches, or protest by diplomatic channels. See id. ¶¶ 149-51. Furthermore, “any violations of civil aviation principles in relation to irregular transport of prisoners should be denounced, and brought to the attention of the competent authorities and eventually of the public.” Id. ¶ 152. The “competent authorities” would include, at the level on Convention’s enforcement, the Council of the International Civil Aviation Organization [ICAO]. See Convention on International Civil Aviation, supra, art. 54(i), (j); see also Olivier Dutheillet de Lamotte, Extraordinary Renditions: A European Perspective (Sept. 25, 2006), available at http://www.statewatch.org/news/2006/nov/venice-commission-rendition-speech.pdf.
262. Venice Comm’n, supra note 40, ¶ 153.
behavior, and the Judiciary's involvement. Although the Parliamentary Assembly of the COE has no coercive power against member states, its democratic legitimization and supranational position allows the COE to deeply affect the behavior of national governments. Additionally, the Assembly may fuel a national debate on how to implement values protected by the COE: namely, human rights enumerated under the European Convention on Human Rights. For purposes of strengthening the enforcement of human rights protections, it can be said to strongly emphasize the actual illegality of the ERP.

2. The European Parliament Resolution

On February 14, 2007, a resolution by the European Parliament (EP) concluded that, although "not all those flights have been used for extraordinary rendition," there were "at least 1,245 flights operated by the CIA ... into European airspace or stopped over at European airports between the end of 2001 and the end of 2005." This is the result of an investigation conducted by an ad hoc committee, namely the Temporary Committee on the Alleged Use of European Countries by the CIA for Illegal Activities (TDIP), which issued a report on January 31, 2007 (Report). This Committee was elected in 2005 by the Parliament to determine the role of certain member states of the European Union (EU) in the ERP.


266. Id.; see also Eur. Parl. Ass., Decision Setting Up a Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners [TDIP], at 159, Doc. No. P6_TA(2006)0012 (2006) [hereinafter Decision Setting Up a Temporary Committee]. Among other purposes, the TDIP is charged with determining whether "such actions ... could be considered a violation inter alia of Article 6 of the Treaty on European Union, Articles 2, 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the EU-US agreements on extradition and on mutual legal assistance and other international treaties and agreements concluded by the European
The Report focuses on three aspects. First, the TDIP considers the ERP counterproductive and affirms that the ERP violates international law. Further, it firmly:

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

Second, the TDIP – and the European Parliament thereafter – stressed that it received inadequate cooperation from its member states and other European institutions, especially the EU Council of Ministers. Specifically, the TDIP lamented that the level of cooperation “has fallen far below the standard that Parliament is entitled to expect,” and formally criticized the refusal by some officials to appear or keep the TDIP informed. The Committee’s concerns, the Report reads, directly affect the obligations of the European institutions to keep the Parliament informed of the EU foreign policy, and could raise the question of responsibility of member states for violation of the EU Treaties.

Moreover, the TDIP expressed its appreciation for the judicial authorities in some member states, in particular Italy, Germany and Spain, and recommended that the judiciaries of
other states follow these examples. While it supported the intervention of domestic courts, the TDIP also complained that state executives were "turning a blind eye or admitting flights operated by the CIA," affirming that when courts began proceedings against some government officials, their denial of involvement in certain abduction cases suggested deception.

Finally, as to sanctions, the TDIP vigorously urged states and EU legislators to review the limits of the secret defense, and generally deplored the unresponsiveness of states and EU institutions to ERP actions within their own territories. The TDIP concluded by recommending, among other things, that the EU Council investigate violations of the human rights protection clause sanctioned by Article 6 of the EU Treaty and adopt appropriate sanctions against Member States.

Although the TDIP's conclusions were not exhaustive, deliberations by the democratic organ of the world's most powerful and highly developed international organization may impact future assessments of the problem at the continental level. European institutions – particularly the Council, which represents the interests of Member States – will be very concerned with the EP's findings, especially in light of member deception on the matter. Moreover, three important issues are at stake: activities of secret services, counterterrorism measures, and interstate cooperation. If the EP retains those elements that were significantly threatened by the illegal ERP action, how could governments still defend the ERP?

274. Id. ¶ 15; accord id. ¶ 186 (urging "European countries . . . to commence such proceedings as soon as possible" and "recall[ing] that, according to the case law of the [ECtHR], there is a positive obligation on Member States to investigate allegations of and sanction human rights violations in breach of the ECHR").

275. Id. ¶ 43.

276. Id. ¶ 52 (condemning SISMI officials for "conceal[ing] the truth" while testifying before the Committee about their involvement in Abu Omar's abduction).

277. Id. ¶ 192.

278. See id. ¶ 43 (noting that European countries have effectively relinquished control of their airspace to the CIA); see generally id. ¶¶ 49-182, at 12-28 (citing specific failures of Member States to prevent ERP actions).

279. Id. ¶¶ 186, 226, 228.

280. See id. ¶ 225 (stressing, "in view of the powers it was provided with and of the time which it had at its disposal, and the secret nature of the investigated actions, that the Temporary Committee was not put in a position fully to investigate all the cases of abuses and violations falling within its remit and that its conclusions are therefore not exhaustive").
V. CONCLUSIONS

"Such renditions are permissible under international law,"\textsuperscript{281} Condoleezza Rice remarked in 2005; John Bellinger added, "[w]e do take our obligations seriously under the [CAT]. We think that we are in compliance with our obligations."\textsuperscript{282} These positions are inconsistent with any thoughtful perception of the legal framework surrounding the ERP. Moreover, they offend European institutions and prominent international scholars, who argue exactly the opposite.\textsuperscript{283}

U.S. opposition towards challenges to the ERP's legitimacy, accompanied by the silence of some European governments, calls into question the basis and effectiveness of the "War on Terror." Times seem deeply changed since the days immediately following 9/11, when \textit{Le Monde}'s front-page editorial evinced solidarity and passion with the United States: "Today, we are all Americans."\textsuperscript{284} The words of U.S. Rep. William Delahunt suffice to depict the present situation, when he said, "Sadly, this support has eroded dramatically. . . . [W]orld opinion has turned against the United States in recent years. . . . [T]his reality, this trend of opinion against the United States has profound negative consequences for our national interests."\textsuperscript{285}

There is evidence that a conflict has arisen between specific international organizations and their member states regarding the way in which the latter face the exigency of preventing terrorist

\textsuperscript{281} ‘Renditions Save Lives’: Condoleezza Rice's Full Statement, supra note 58.
\textsuperscript{282} Bellinger Breifing, supra note 120.
\textsuperscript{283} See, e.g., M. Cherif Bassiouini, The Regression of the Rule of Law under the Guise of Combating Terrorism, 76 INT'L REV. PEN. L. 17, 22 (2005) (stating that the ERP "is unquestionably illegal"); see also. Leila Nadya Sadat, "Torture and the War on Terror": Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law, 37 CASE W. RES. J. INT'L L. 309, 341 (2006) ("[p]roponents of these policies no doubt sincerely believe that they are justified, indeed, necessary to win the [global war on terrorism]. Yet . . . they are surely not ‘legal’ as that term is customarily understood.").
\textsuperscript{284} Jean-Marie Colombani, Editorial, \textit{Nous sommes tous Américains [Today We Are All Americans]}, \textit{LE MONDE}, Sept. 13, 2001, http://www.lemonde.fr/web/article/0,1-0@2-3232,36-913706,0.html.
attacks. In particular, several international organs make it clear that European states who collaborate with the ERP are accomplices to grave violations of international law, the CAT, and the European Convention on Human Rights. The common sympathies among democratic organs of European organizations like the EP, the Parliamentary Assembly of the COE, as well as the many prosecutors, judges, and inquiry commissions questioning ERP actions at the domestic level, all raise a broader question of whether governmental authority in determining foreign policy is entirely consistent with respect to the rule of law. If the pressures coming from these supranational initiatives trigger concerned states to refrain from cooperating with the CIA in this “spider’s web,” that issue will need to be addressed as well. While it may be too early to identify practical results, it is unlikely that governments — under the constraints of parliaments and courts — would ignore these pressures or defend the ERP. This is true both legally and politically. That law and politics will stand for the protection of human dignity and the rule of law, rather than for immediate political expediency, hopefully seems only a question of time.

286. See, e.g., TDIP Report, supra note 267, ¶ 2 (noting outgoing UN Secretary-General Kofi Annan’s observation that “the so-called ‘war on terror’ – in its excesses – has produced a serious and dangerous erosion of human rights and fundamental freedoms”).

287. See, e.g., id ¶ F (“extraordinary rendition and secret detention involve multiple violations of human rights”).