*Convicts in Air: Implementation by the CIA of the extraordinary rendition programme in European territory. Special reference to Spanish practice**

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INTRODUCTION

In November 2005 the American press brought to light allegations of the use by the Central Intelligence Agency (hereafter CIA) of European territory and airspace to: i) maintain a network of secret detention centres (known as 'black holes' in intelligence

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jargon); and ii) transfer more than 800 terrorism suspects in private or commercial aircraft to countries where they were tortured to extract information.[1]

The execution in Europe of this plan for a world-wide fight against international terrorism, launched by the Bush administration following the 9/11 attacks and structured around an 'improved version' of so-called *extraordinary renditions*,[2] has provoked reactions of various kinds, both in the media and among the European governing classes and public opinion.

In the European international organisations most relevant to this article, the reaction was not long in coming. At the same time as this information was emerging, the Council of Europe and the European Union each initiated an investigation, which it is the object of this study to analyse.

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[1] See Report compiled by Amnesty International on 5/4/2006: "USA: Below the radar: Secret flights to torture and disappearance", at *http://web.amnesty.org/library/print/ENGAMR510512006*, consulted on 1/6/2007.

[2] This programme (also called *High-Value Detainee*) was set in motion with the approval of a *Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War,* issued by President G.W. Bush on 13/11/2001, to which we must add the *Detainee Treatment Act* and the *Military Commissions Act* (Acts of Congress passed in December 2005 and October 2006 respectively). These statutes can be found at *http://www.whitehouse.gov.* The legitimacy of these methods has been questioned, among other authorities by the US Supreme Court, which on 29/6/2006 took the view that the Military Commissions created by the Bush administration to judge the Guantánamo detainees breached the Single Code of US Military Justice and the four Geneva Conventions which in the Court's opinion are applicable to the detainees at Guantánamo, see *Hamdan v. Rumsfeld*, 548 U.S. (2006). On 20/7/2007 Bush signed an Executive Order entitled *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the CIA*. The Order requires that any CIA interrogation program that might go forward comply with all relevant federal statutes, including the prohibition on 'cruel, inhuman, or degrading treatment or punishment' in the Detainee Treatment Act of 2005, the federal prohibition on torture, and the War Crimes Act, all of which Project against violations of Common Article 3. This Order authorizing the use of what the administration calls 'enhanced interrogation techniques', details of which remain secret, can be referenced at *http://www.whitehouse.gov*. On 4/10/2007 journalists S. Shane, D. Johnston and J. Risen published an investigative article in *The New York Times* with the title "Secret U.S. Endorsement of Severe Interrogations", based on information gleaned from secret documents issued by the Justice Department and known to the White House and telling how since February 2005 former US Attorney General A.R. Gonzales had been giving his secret backing to the use of methods of torture during interrogations of persons suspected of terrorism; at *http://nytimes.com*. In the doctrine: see M. Crenshaw, "La guerra contra el terrorismo: ¿están ganando los Estados Unidos?", in *Análisis del Real Instituto Elcano (ARI)*, no 37, November 2006, pp. 12–18; A. Kent, "D.C. Circuit Upholds Constitutionality of Military Commissions Act Withdrawal of Federal Habeas Jurisdiction for Guantánamo Detainees", in *ASIL Insight*, vol. 11, issue 8, March 21, 2007; F.L. Kirgis and D. Amann, "Alleged Secret Detentions of Terrorism Suspects", in *ASIL Insight*, vol. 10, issue 3, February 14, 2006.

By examining both lines of enquiry along with Spanish practice in the matter[3] as they relate to general international law on the international responsibility of States,[4] we shall be in a position to evaluate the possible legal implications for Spain in light of the attitude and the measures adopted by our authorities – without omitting a review of those other international instruments whose provisions may have been infringed, or whose efficacy may have been compromised, as a result of these events.[5]

Before addressing these issues it will be well to look some more at the factor that triggered these events: the programme of extraordinary renditions pursued by the United States following the attacks on Washington and New York in September 2001.

I. THE EXTRAORDINARY RENDITION PROGRAMME

Extraordinary renditions consist in the capture of persons suspected of international terrorism in one State with the intention of transferring them to another State or territory where they are subjected to cruel, inhuman and degrading treatment or are tortured to extract information. In addition, such transfers are typically carried

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[3] See J. Ruiloba Alvariño, "La responsabilidad de los Estados europeos en los vuelos secretos de la CIA. Especial referencia a España", in *RDCE*, no. 24 (May/August 2006), pp. 541–569. First study on Spanish doctrine to analyse these events.

[4] Particularly relevant in this connection are Articles 4 (conduct of organs of a State), 7 (excess of authority or contravention of instructions) and 16 (aid or assistance in the commission of an internationally wrongful act) of the draft articles on international responsibility of States. See Res. 83(LVI), A/RES/56/83, approved by the UN General Assembly on 12/12/2001, where the UNGA takes note of these articles, at *http://documents.un.org*.

[5] In the ambit of the United Nations, both the Committee against Torture and the Human Rights Committee have severely criticised the US legislation and the actions carried out by US authorities and functionaries under the heading of the fight against terrorism. During its 36th session period (1–9 May 2006), the Committee against Torture had the opportunity to examine the second periodic report remitted by the United States under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/48/Add.3/Rev.1). In light of the content of this report the Committee approved a number of conclusions and recommendations reproving the United States on various aspects concerning the treatment dealt to terrorism suspects inside and outside its borders (CAT/C/USA/CO/2, 25/7/2006). For its part, during its 87th session period (10–28 July 2006) the Human Rights Committee examined the two periodic reports submitted by the United States under Article 40 of the International Covenant on Civil and Political Rights (CCPR/C/USA/3). In its Final Remarks, the Committee expressed deep concern at the wide range of anti-terrorist practices and methods that the United States had implemented following the 9/11 attacks. The Committee condemned secret incommunicado detentions, the use of interrogation methods entailing torture or cruel, inhuman or degrading treatment or punishment, extraordinary renditions, etc., and recommended their immediate abolition (CCPR/C/USA/CO/3, 15.9.2006).

out without any recourse to legal or administrative procedure, thus evading any kind of judicial supervision.

In 1995, the US National Security Council began to sketch out what from 2001 on would degenerate into the current extraordinary rendition programme.[6] This practice was originally conceived as an effective alternative means of bringing terrorism suspects to justice when all other instruments of international judicial cooperation and assistance proved ineffective.[7]

In that initial period the start-up of the rendition programme was contingent on compliance with a number of requirements that the US Administration laid down before it would authorise any operation of this kind; these requirements included that there be legal proceedings pending against the suspect (normally in connection with acts of terrorism that the person had committed in his/her country of origin); that a report or personal profile drawn up by the CIA be submitted (based on intelligence reports and reviewed by lawyers); that the State in whose territory the suspect was collaborate in his/her capture; and lastly, that diplomatic guarantees be

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[6] Presidential Decision Directive No 39, issued by US President W.J. Clinton on 21/6/1995 provides thus: 'It is the policy of the United States to deter, defeat and respond vigorously to all terrorist attacks on our territory and against our citizens, or facilities, whether they occur domestically, in international waters or airspace or on foreign territory. The United States regards all such terrorism as a potential threat to national security as well as a criminal act and will apply all appropriate means to combat it. In doing so, the U.S. shall pursue vigorously efforts to deter and pre-empt, apprehend and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks […] 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 and shall be a continuing central issue in bilateral relations with any state that harbors or assists them […] 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, consistent with the procedures outlined in NSD-77, which shall remain in effect', at *http://fas.org/irp/offdocs/pdd39.htm*, consulted on 1/7/2007.

[7] Actions of this kind, like others justified under the disputed *male captus, bene detentus* clause, have traditionally found an ecosystem favourable to their development in the United States. Although the precedents cited in practice do not match the actions discussed here in terms of purpose, intensity or seriousness, they do clearly highlight that inertia displayed by the US authorities (and those of other States) when it comes to prosecuting and preventing certain crimes outside their own borders with a view to bringing before their authorities persons suspected of having committed a crime in their territory or having attacked national interests abroad. Another feature of actions of this kind is that they are carried out without due respect for the sovereignty or territorial integrity of the State where the suspect is detained and finds that his/her human rights are being violated. See *Ker v. Illinois*, 119 U.S. 436 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); N. Poulantzas, *The right of hot pursuit in international law*, The Hague 2002, Part I; and in the Spanish doctrine, C. Jiménez Piernas, "El llamado 'Nuevo Orden Internacional' visto desde España", in *Anales de la Universidad de Alicante. Facultad de Derecho*, nº 7 (1992), 87–106, pp. 102–105; J. González Vega, "Male captus, bene detentus: extradición, detención y derechos humanos en el Caso Roldán", in *REDI*, vol. XLVII (1995) 1, pp. 119–130.

requested from the State that would be judging the suspect in order to ensure that persons transferred there would not be tortured and would be treated in accordance with the current laws of the land wherever that might be.[8]

The events of 9/11 marked a turning-point in the rendition programme.[9] Following the attacks in Washington and New York, extraordinary rendition became a controversial instrument in the service of the war on terrorism,[10] whereby persons suspected of collaborating with enemies of the United States (*High-Value Detainees*) are transferred, without due legal or judicial process, to countries whose security forces are expert in the application of torture during interrogation, or at best they are sent to facilities run by US personnel abroad,[11] where they may languish for years in a planned legal limbo, subjected to cruel, inhuman and degrading treatment, or even to torture.[12]

The collateral effects of the example of such illegal methods, which ultimately undermine such fundamental rights as the right to life, freedom and security, to physical and mental integrity or to a fair trial, have not been long in making themselves felt in Europe. These practices have raised a considerable commotion

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[8] Before departing for a four-day trip to Europe, the US Secretary of State Condoleezza Rice said on 5/12/2005 at Andrews ATB: "The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured", see *http://usinfo.state.gov/dhr/Archive/2005/Dec/05–436751.html*, consulted on 1/7/2007.

[9] 'On September 17, 2001, America's rendition policy changed in scale and purpose. That day, President G.W. Bush signed a secret presidential finding that authorized the CIA to kill, capture, or detain members of Al-Qaeda anywhere in the world […] The order also authorized secret offshore prisons known as 'black sites' where the CIA could send suspects for coercive interrogation of the sort that is illegal in the United States. The presidential finding did not require the CIA, in detaining and transferring suspects, to seek case-by-case approval from the White House, the State Department, or the Justice Department"; see A.Z. Huq, "Extraordinary Rendition and the Wages of Hypocrisy", in *World Policy Journal*, Vol. XXIII, no 1, Spring 2006, at *http://www.worldpolicy.org*.

[10] There can be no doubt that excesses of this kind, so typical of the most recent Republican administrations, are simply one more attempt to redirect and force the needful interpretation of international law in the interests of an ill-considered hegemony in order to justify the serious abuses that have been committed. Appearing on 23/03/2004 before the Congress National Committee set up after the 9/11 attacks, the Defense Secretary at the time, D.H. Rumsfeld set out the chief objectives of the global strategy against terrorism. Among these objectives he cited: 'To use all elements of national power to do so [To eliminate the al-Qaeda network] – diplomatic, military, economic, intelligence, information and law enforcement', at *http://fas.org/irp/congress/2004_hr/rumsfeld_statement.pdf*, consulted on 1/7/2007.

[11] These facilities are located in Guantánamo, Iraq and Afghanistan, albeit there is evidence of the presence of other secret detention facilities in at least six other countries besides, including Romania, Poland, Albania, Pakistan, Thailand and Russia (Chechnya).

[12] See M. Pérez González & J.L. Rodríguez-Villasante y Prieto, "El caso de los detenidos de Guantánamo ante el Derecho internacional humanitario y de los derechos humanos", in *REDI*, Vol. LIV (2002) 1, 11–40, especially pp. 12–17 and 36–39.

on the European institutional scene. This has been the reaction to the production of proof that since the 9/11 attacks, European territory has been regularly used by the CIA as a field of operations, not only for the preparation but also for the execution of action plans connected with the rendition programme.

II. THE INVESTIGATION CARRIED OUT BY THE EUROPEAN COUNCIL

Curiously enough, the whistle on the existence of clandestine CIA-run prisons in European territory was blown by the US daily *The Washington Post* in information published in 2 November 2005.[13] These articles divulged the existence of a number of secret detention centres, some located in unidentified countries in Eastern Europe, where the CIA held and tortured persons suspected of belonging to Al-Qaeda. Although *The Washington Post* did not identify the European countries where these prisons were allegedly located, the human rights organisation *Human Rights Watch* was quick to accuse Poland and Romania of harbouring clandestine detention and torture facilities in their territory.[14]

This information, added to the various witness reports and press articles which for some time had been calling attention to the existence of an arrangement whereby European airports and airspace were being used to transfer terrorism suspects to detention facilities where they were tortured, eventually forced the European Council to institute enquiries.[15]

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[13] D. Priest, a journalist specialising in intelligence, authored an article entitled: "CIA holds Terror Suspects in Secret Prisons"; this was later followed up by another article entitled: "Wrongful Imprisonment: Anatomy of a CIA Mistake", this last published in 4/12/2005; see *http://www.washingtonpost.com.*

[14] See Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe. Published on 7/11/2005 at *http://hrw.org/english/docs/2005/11/07/usint11995.htm*, consulted on 1/6/2007. As well as these two States, Bulgaria, Macedonia, Kossovo and the Ukraine could also be implicated to judge from the content of a fax sent by the Egyptian Minister for European Affairs to the Egyptian embassy in London, which was presumably intercepted by Swiss intelligence. This last piece of information is taken from the second memorandum submitted by the European Council's Special Rapporteur Mr Dick Marty. See *http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdpc/documents/AS-Jur(2006)03revE.pdf*, consulted 1/7/2007.

[15] According to the European Council's web page, these enquiries began on 1/11/2005, one day before the article cited was published in *The Washington Post* (we do not know whether the date is erroneous or it was inserted deliberately in order to put the initiation of the investigations ahead of the journalistic scoop). Before the enquiries commenced, the European Council had already expressed concern over a number of issues bearing closely on the system of extraordinary renditions. On 21/1/1999, the Parliamentary Assembly recommended that Member States exercise more and better control over their security services in order to avert situations posing potential hazards for fundamental rights and freedoms. In June 2003, the Assembly passed a Resolution requesting the United States to afford due legal protection to persons detained in the custody of their military in Guantanamo and Afghanistan [Resolution 1340(2003) of 26/6/2003]. In April

Of these investigations we would highlight the following for their salient legal aspects: 1. Two reports compiled by the Secretary-General of the Council of Europe, based on the official replies offered by the member States of the Organisation requested under the terms of Article 52 of the ECPHR;[16] 2. The opinion of the European Commission for Democracy through Law (Venice Commission), on the international obligations of the member States of the Council of Europe as regards the existence of secret facilities and the international transfer of prisoners; and 3. Two reports compiled by the Parliamentary Assembly's Legal Affairs and Human Rights Committee on the implication of member States of the Council of Europe in the illegal transfer of prisoners and the existence of secret detention facilities.

1. The replies of the Member States to the questions put by the Secretary-General of the Council of Europe

On 21 November 2005, the Secretary-General of the Council of Europe, Mr Terry Davies, sent a questionnaire to the States Parties to the ECPHR requesting an answer in the light of information suggesting that persons suspected of being involved in acts of terrorism could have been arrested and transferred by air within or from European territory, either by or at the initiative of certain foreign agencies, with the active or passive cooperation of the authorities of States Parties to the ECPHR; or again by the authorities of States Parties themselves without there being any outside initiative.[17]

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2005, Resolution 1433 (2005) of the Parliamentary Assembly, dated 26/4/2005, not only declared that the condition of the persons detained in Guantanamo was a disgrace in legal and humanitarian terms but also reproved the United States for setting up a system of extraordinary renditions whose sole purpose is to take persons suspected of terrorism to places where they can be tortured with impunity. In this connection the Assembly called on the United States government for immediate cessation of these practices and respect for the fundamental rights of all detainees in their custody. The Assembly further requested that all Member States of the Organisation enhance their diplomatic and consular efforts to protect the rights and secure the freedom both of their own nationals and of any other persons who were legally resident in their territory before being taken to Guantanamo. The Assembly also asked the Member States to cease cooperating with the United States in any business concerning Guantanamo, and in particular to try and ensure that their territory is not used for actions relating to the system of extraordinary renditions. See *http://assembly.coe.int.*

[16] See BOE no 243, 10.10.1979. Article 57 of the ECPHR states: 'On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention'. The Secretary-General has used this procedure on 7 further occasions (1964, 1970, 1975, 1983, 1988, 1999 and 2002), the first five times in general terms and the sixth and seventh addressed to Russia (1999) and Moldova (2002).

[17] The States Parties to the ECPHR had to state their positions on the following questions: 1. whether they considered that proper control was exercised over acts carried out by

All the responses, accompanied by a number of legal considerations, appear in two reports made public on 28 February and 14 June 2006,[18] in which the Secretary-General analysed the answers given by the States Parties and further suggested that a number of measures be adopted to prevent future risks that might endanger any of the rights recognised in the ECPHR.[19]

The first report begins by advising (in accordance with general international law as confirmed by the ECHR)[20] that the ECPHR contains not only negative obligations but also positive obligations – in other words the authorities of the States Parties to the ECPHR are obliged not only not to violate the rights that it protects through their own acts, but also, in a positive sense, to seek to safeguard the effective enjoyment of these rights from actions of third parties (whether private individuals or foreign secret agents). In other words, the infringement of rights recognised in the ECPHR may arise as a result not only of an action but of an omission by State authorities.

As is rightly noted in respect of the illegal detentions and transfers carried out by the CIA, the activities carried on by foreign agents in European territory cannot be attributed to the States Parties to the ECPHR since such agents do not belong to their organisations. On the other hand, these States can be said to be liable if it should be proven that the State authorities actively assisted in the perpetration of such acts or that the said authorities made no effort to try and prevent the commission such acts.[21]

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agents belonging to foreign agencies within their jurisdictions; 2. whether the preventive measures adopted had been sufficient to prevent the unwarranted detention of terrorism suspects in their territories; 3. whether the response to events of this kind provided for in their respective domestic laws was appropriate as well as satisfactory; 4. whether since 1 January 2002 any State functionary had been involved in such acts, and if so whether any kind of official investigation had been mounted. In addition to these four questions, there were two more contained in a supplementary questionnaire sent on 7/3/2006 to those States which had answered the first questionnaire vaguely or incompletely (37 States all in all, among them Spain): 5. effectiveness of State mechanisms for controlling the action of national or foreign secret intelligence services; 6, control mechanisms used in the sphere of air transport.

[18] See SG/Inf. (2006) 5 and SG/Inf. (2006) 13, at *http://www.coe.int/sg/e/*, consulted on 1/7/2007.

[19] In particular, the contents of Articles 2 (right to life), 3 (prohibition of torture), 5 (rights to freedom and security), 6 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to effective remedy), and also the right to freedom of movement recognised in Article 2 of Protocol No 4.

[20] See As. Ireland v. United Kingdom (18/1/1978) para. 159; As. Osman v. United Kingdom (28/10/1998) para. 115; As. Mahmut Kaya v. Turkey (28/3/2000), paras. 77 and 101; As. Paul and Audrey Edwards v. United Kingdom (14/03/2002) para. 54; As. Öneryildiz v. Turkey (30/11/2004), paras. 71; As. Ilascu and others v. Moldova and the Russian Federation (8/7/2004), para. 331; As. Gongadze v. Ukraine (8/11/2005), para. 165.

[21] In this connection see the provisions included in the Proposal on international responsibility of States cited above in note 4.

Clearly then, participation or assistance by functionaries of any State Party in the commission of such acts in breach of rights recognised in the ECPHR would *ipso facto* constitute an infringement of the ECPHR. On the other hand, passivity in the face of such acts would only constitute an infringement of the ECPHR if it were proven that the State authorities failed to act with due diligence to prevent or prosecute such acts as the case may be.[22] Unlike the position taken in the report, we do not believe that the latter case is an instance of vicarious responsibility but rather of the type of responsibility which arises from failure to fulfil an international obligation of diligence – an obligation of activity and not of result.

The existence of secret prisons in the territory of any State Party is quite another issue. In this case, as noted, simple proof of the presence of such facilities could automatically bring responsibility upon the State in whose territory they are located, since all States Parties to the ECPHR are obliged to prevent places over which they have full jurisdiction from being used for the conduct of activities incompatible with the rights recognised therein. It is a reasonable assumption that the opening and subsequent maintenance of a facility of this kind can hardly go unnoticed by the authorities of a State. In such cases States have very little room to evade their responsibility, since a contrary assumption would plainly be hard to sustain.[23]

All these legal considerations lead up to an analysis of the responses sent by the States. And in that analysis we would stress first and foremost a lack of a critical sense in evaluating responses which in our view are excessively vague and ambiguous.[24]

Firstly, both reports afford a glimpse of the inefficacy of the control mechanisms employed by the States Parties to prevent intrusions of this kind. As the reports note, such mechanisms are either scanty or non-existent. The responses from the States insist that it was impossible in any case (in our view this ought not to have been so) to prevent aircraft using European airports and airspace from being

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[22] By due diligence we mean: "Degree of objective care which, in light of all the circumstances in each case, a State endowed with the minimum infrastructure demanded by International Law is duty bound to employ within its jurisdiction or in areas free of State sovereignty in order to safeguard a good or interest protected by an international obligation against conduct by private individuals not acting on behalf of the State or persons assimilable to that category, whether to prevent harm to them or to prosecute the perpetrators of such conduct"; see F. Lozano Contreras, *La noción de debida diligencia en Derecho Internacional Público*, Barcelona 2007, p. 308.

[23] Even supposing – as the Secretary-General notes – that the presence and existence of such facilities run by foreign agents were authorised by the State authorities, these same authorities would be under an obligation to assure by any means possible that the activities carried on there do not infringe provisions of the Convention. The same obligation to control would apply in the case of NATO military bases in Europe, albeit as the Secretary-General himself acknowledges, in such cases the actual limits on jurisdiction would seriously narrow the scope of that obligation.

[24] In this connection one is particularly struck by the fact that nowhere in the reports is there any express reference to the CIA as the organisation carrying out the acts there analysed. Instead, the very neutral formula 'foreign secret services' is used.

used by foreign security agencies to carry out extraordinary renditions. According to the reports, the State control procedures envisaged to combat practices of this kind are so ineffective that they cannot even control the actions of domestic secret services.

In the opinion of the Secretary-General, this fact combined with the inadequacies of the control system envisaged in the International Convention on Civil Aviation[25] and the erroneous interpretation of the Convention by European States made it quite impossible to prevent the abuses that were committed on board these aircraft, which freely traversed European airspace and in some cases even used airports as their centres of operations.[26]

Secondly, both reports noted that while in general the State's legal system provided adequate guarantees for the protection of the rights of freedom and security against any infringement by domestic public authorities, such guarantees are ineffective when the infringement is committed by intelligence agents, whether domestic or foreign. In such cases the creation of a legal framework designed to prevent these agents from violating rights recognised in the ECPHR is not sufficient in and of itself. In addition, the police and the State judicial authorities both need to exercise their jurisdiction. In practice that is enormously complicated, and all the more so if one seeks to control the activity of foreign agents, especially when these operate outside the framework of cooperation with domestic agents. As the reports noted, the rules on immunity raise obstacles, in some cases insurmountable, which prevent national authorities from exercising their jurisdiction over such agents, especially when these are in transit and moreover travel under diplomatic cover.

In conclusion, it is essential that States create more appropriate mechanisms to prevent the continued commission of acts in violation of human rights beneath a shroud of secrecy and impunity.[27] In the words of the Secretary-General, the rule that prohibits acts of torture has the status of *jus cogens* and hence constitutes an exception to the rules on immunity.[28]

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[25] See BOE no 311, 29/12/1969 and no 4, 5/1/1999.

[26] The Secretary-General was equally surprised at the lack of any explanations for the overflight permissions granted by some States during that time, either unilaterally or under bilateral or multilateral treaties (concluded within the framework of the EU and NATO) – even although some of that information was public. For the purposes of this research, it would indubitably have been important to know the exact nature and scope of those agreements in order to determine whether they provide the guarantees required by the ECPHR.

[27] The second report likewise raised this point and reached the same conclusions.

[28] Article 26 of the draft articles on international responsibility provides thus: 'No provision of this chapter shall exclude the illegality of any act committed by a State that is not in compliance with an obligation emanating from an imperative norm of general international law'. In the same vein, Article 53 of the 1969 Vienna Convention on the Law of Treaties (see BOE no 142, 13/6/1980) avers: 'A treaty is void if at the time of its conclusion it conflicts with an imperative norm of general international law […] a norm accepted and recognised by the international community of States as a whole as

The third conclusion that transpires from the reports is the one that raises the least difficulties. The report states that while it is true that the laws of the States Parties to the ECPHR contain mechanisms for the protection of individuals (regardless of their nationality) against illegal detention, it is not clear that victims can obtain some kind of compensation when the detention has been carried out by foreign agents, above all if the claimants are not legally resident in the State where the illegal detention took place.

In the analysis of the answers to the question of whether after 1 January 2002 any State functionary had been implicated in such acts and if so whether any kind of official investigation had been set in motion, one will find that 24 States answered in the negative to the first part of the question (State implication), 17 gave a partial or indirect answer[29] and 4 gave no answer,[30] while Russia offered a very vague answer. As regards the second of the issues raised in the same question (setting an official enquiry in motion), 6 States said that they were conducting some kind of official enquiry at that moment,[31] 19 States asserted that they had already completed enquiries in connection with such events,[32] 10 stated that they had neither completed nor were conducting an enquiry of this kind and 11 simply gave no answer, while Bosnia-Herzegovina gave an incomplete answer.[33]

On the question of whether States have in place adequate and effective means for controlling air transport, the supplementary report notes that most of the States

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a norm from which no derogation is permitted [. . .]'. This exception, which has been used in respect of the prohibition of torture, also applies in respect of other similar practices. See ICTY: Prosecutor v. Furundzija (Case No IT-95-17/1-T), 10/12/1998, pp. 58–61, at *http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf*, consulted on 1/7/2007; ECHR: Al Adsani v. the United Kingdom, 21/11/2001, para. 61, at *http://www.echr.coe.int/echr*; or Article 7 of the Statute of the International Criminal Code, which provides that for the purposes of the Statute acts of torture shall be considered crimes against humanity when they are committed as part of a generalised or systematic attack on a civil population and the attack is known, in BOE No 126, 27/5/2002. However, this is not the best place to judge the suitability of the way in which the Secretary-General classifies the acts of torture that concern us here.

[29] This last group included Spain.

[30] Bosnia-Herzegovina, Georgia, Lithuania and Macedonia – despite being obliged to do so under Article 52 of the ECPHR.

[31] Spain, Germany, Greece, Romania, Switzerland and the United Kingdom.

[32] Spain is also in this list.

[33] In the Secretary-General's words: 'This state of affairs is particularly serious as regards those States which have been cited in the allegations referred to in the Information memorandum presented by Mr D. Marty in January and have nevertheless failed to provide a full and clear reply'. This brief memorandum, referred to by the Secretary-General in this passage, is dated 22/11/2005 and was drafted by the Legal Affairs and Human Rights Committee as a species of prologue or preamble to the first report, which we analyse in point 3 of this section. See AS/Jur. (2005) 52 rev. 2, at *http://www.coe.int.* A message which on this occasion the Secretary directed at Poland, Macedonia, Bosnia-Herzegovina, Italy, Bulgaria, Ukraine and Greece.

had not carried out any kind of effective check to verify whether aircraft in transit through their territory had been used for purposes contrary to the ECPHR.

The timid recommendations with which the Secretary-General concludes both reports agree in general terms with the conclusions noted above.

2. The Report of the Commission for Democracy Through Law (Venice Commission)

The report[34] compiled by the Commission for Democracy Through Law (hereafter the Venice Commission)[35] was requested in 15 December 2005 by the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe. That request asked the Commission to give its opinion: i) on the legality of secret detention facilities in light of the ECPHR and the European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[36] ii) on the responsibility of States Parties to the Convention in the event that by act or omission they should have allowed a foreign agent to carry out an illegal detention or abduction in European territory; iii) on the exact scope of the obligations binding the Member States of the Council of Europe with regard to the transfer of prisoners on their territory, in the light of the ECPHR and of general international law; and iv) on the type of relations linking these obligations and the obligations

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[34] Opinion No 363/2005, published on 17/3/2006, at *http://www.venice.coe.int/site/main/documents_E.asp*, consulted on 1/7/2007.

[35] This Commission was created on 10/5/1990. At this time all the Member States of the Council of Europe are also members of the Committee, which besides providing legal assistance on constitutional matters, analysing the electoral processes of the Member States of the Council and cooperating with the various constitutional courts, can also compile reports or surveys, on its own initiative or at the request of the Parliamentary Assembly as the case may be. It is composed of independent experts with demonstrable experience in so significant a field of action as that of the guarantees offered by the Law through democracy. See *http://www.venice.coe.int.* On the Spanish doctrine, see S. Salinas Alcega, *La Comisión para la Democracia a través del Derecho (Comisión de Venecia): una acción, en el marco del Consejo de Europa, para el desarrollo y la extensión de los valores democráticos*, Real Instituto de Estudios Europeos, Zaragoza, 1999, pp. 12–40.

[36] Adopted on 26/11/1987, in force as from 1/2/1989; at 20/10/2007, 47 European States are parties, among them Spain. See BOE no 159, 5/7/1989. By virtue of this instrument the Member States of the Council of Europe created a European Committee for the prevention of practices of this kind, whose mission is to examine, on the basis of visits, the treatment dealt to persons deprived of their freedom with a view to enhancing their protection against torture and other cruel, inhuman or degrading treatment or punishment. In its 17th General Report, published on 14/9/2007 (CPT/Inf [2007] 39), the Council of Europe's Anti-Torture Committee denounced secret detention, an illegal practice that has been resorted to in particular in the context of the fight against terrorism. Responding to reports that certain secret detention facilities were located in European countries, the CPT invites anyone who is in possession of information concerning such facilities to bring it to the attention of the Committee. In the Preface to the mentioned Report the CPT also denounced the so-called 'renditions'; at *http://www.cpt.coe.int*.

contained in cooperation treaties on the subject concluded on an individual basis with other Member States of the Council of Europe, or within the framework of other international organisations.

The report notes that the implication of a Member State of the Council of Europe in any way in the arrest and subsequent detention of an international terrorism suspect in a manner not subject to the guarantees laid down in the ECPHR would, on the basis of the rules approved by the ILC, carry international responsibility.[37]

Cooperation, whether active or passive, by any Member State in the commission of such acts could entail a breach of several provisions of the ECPHR[38] and of other norms of general international law.[39] For that reason a Member State must not only refrain from carrying out or cooperating in such illegal arrests and detentions, but it is further under obligation to prevent such arrests taking place on its territory when they are executed by foreign agents.[40] This last obligation of diligence[41] still applies if the arrests are made by foreign authorities by virtue of the jurisdiction allowed them in what are known as Status of Forces Agreements.[42]

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[37] International responsibility would be attributable irrespective of whether the arrest or subsequent detention was carried out directly by the authorities of the Member State (Article 4 of the ILC's draft articles on international responsibility of States) or the Member State aided or abetted another State in the commission of such acts (Article 16 of the same Draft). The same would apply in the event that the authorities of the Member State had acted *ultra vires* (Article 7). See Res. 83 (LVI) of the UNGA, *loc. cit*.

[38] In particular Articles 1 and 5 of the Convention (and in some cases Article 3).

[39] Recognised by instruments of general scope intended to protect human rights, including those that specifically prohibit torture.

[40] On this point the Commission and the Secretary-General both evade any explicit mention of the CIA.

[41] This obligation is contained in Article 1 of the ECPHR, as the jurisprudence of the ECHR has confirmed on numerous occasions; see Neumeister v. Austria, 27/6/1968, para. 15 and p. 44; Belgian Linguistic v. Belgium, 23/7/1968, p. 70 in fine and p. 87, para. 1; Stögmüller v. Austria, 10/11/1969, p. 45; De Wilde, Ooms and Versyp v. Belgium, 18/6/1971, p. 43, para. 80 and p. 47, para. 4; Ringeisen v. Austria, 16/07/1971, p. 45, para. 109 in fine, and p. 46, paras. 5–6; Golder v. United Kingdom (21/02/1975) p. 20, para. 40 in fine, p. 22, para. 45 in fine, and p. 23, paras. 1–2; Engel and others v. Netherlands, 8/6/1976, p. 29, para. 69 in fine, p. 37, para. 89 in fine, and p. 45, paras. 4, 5 and 11; Ireland v. United Kingdom, 18/1/1978; Osman v. United Kingdom, 28/10/1998, para. 116, at *http://www.echr.coe.int*. The most illustrative of them all is Ireland v. United Kingdom, the Spanish version of which can be found in: *Tribunal Europeo de Derechos Humanos. 25 años de Jurisprudencia 1959–1983* (BJC, Publicaciones de las Cortes Generales), Madrid, 1985, pp. 369–432.

[42] There are sufficient indications to found a presumption that US agents, illegally and on various occasions, also used NATO airports and military bases located on European territory, whose use is regulated by a number of bilateral or multilateral treaties whereby a State, without waiving its sovereignty, consents to the presence of foreign armed forces in its territory. Member States have concluded several such agreements with the United States (in the case of Spain see the Defence Cooperation Agreement between Spain and the United States, the last review of which, approved by the government of J.M. Aznar on 10/4/2002, flexibilises the system of authorisations for US military operations

In such cases the authorities of the Member States are under obligation to seek, by all legal means in the frame of his sovereign power,[43] to assure the application of and respect for the ECPHR in their own territory.

As well as seeking to prevent actions of this kind from taking place within their jurisdiction, Member States are duty-bound to conduct a rapid and effective investigation in the event that it has proven impossible to prevent such acts.[44]

As regards the transfer of prisoners, the report notes that the extraordinary rendition programme does not match any of the four instances of legally recognised surrender (deportation, extradition, transit and transfer of convicted persons for the purpose of completing their sentence in another State). In this connection it is expressly prohibited to transfer a person to a State where there is a risk of his/her being tortured or ill-treated;[45] this prohibition applies not only to the State responsible for the capture and subsequent transfer of a suspect, but also to all Member States of the Council of Europe which by act or omission may have cooperated in or permitted the commission of such acts. Furthermore, transfers of this kind contravene the principle of non-refoulement as recognised, among other

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at Spanish bases and allows the criminal intelligence services of the US armed forces to operate on Spanish territory provided that they do so in order to secure the assets or interests of their country; in BOE no 45, 21/2/2003), and with NATO (See *http://www.nato.int/docu/basictxt/b510619a.htm*, consulted on 1/6/2007, in particular Article VII of the cited multilateral agreement). Although the host State may find itself constrained in the full exercise of its jurisdiction by such agreements, such constraint cannot be interpreted as carte blanche, for in the Commission's opinion: 'The sending State does not benefit from an unrestricted freedom of movement within, and overflight of, the receiving State, unless such rights are expressly granted in a base agreement. In any case, the national and international law that is applicable to military bases cannot, and does not claim to, diminish the obligations and responsibilities of the member States of the Council of Europe under human rights treaties'. In this connection see note 28 *supra*.

[43] Including diplomatic channels.

[44] This is another obligation under general international law, also recognised by the ECHR on several occasions. See note 20.

[45] In accordance with the rules of general international law on the international responsibility of States, the ECHR takes the view that the abduction of a person by agents of State A in territory of State B for the purpose of transferring that person to State A or to a third State not only violates the territorial sovereignty of State B but also constitutes an internationally illegal act entailing responsibility, in this case for State A. The Court has also gone so far as to assert that there is no provision of the ECPHR that guarantees the right not to be extradited or deported. However, such extradition or deportation may be rendered illegitimate if the rights or freedoms of the extraditee or deportee are not respected. In such an event a State could be declared internationally liable for breach of Articles 2, 3, 5 or 6 of the ECPHR. See Soering v. United Kingdom, 07/07/1989, paras. 86–91; Stocké v. Germany, 12/10/1989, paras. 167–169; and Chahal v. United Kingdom, 15/11/1996, para. 80, at *http://www.echr.coe.int*.

instruments, in Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[46]

The same thing applies to overflights on European territory. If a Member State of the Council of Europe should have substantial grounds for believing that an aircraft crossing its airspace has on board persons who are being taken to countries where they will be subjected to torture, its authorities are bound to take all necessary steps to prevent such a transfer from taking place, using to that end the limited instruments of control envisaged in the Convention on International Civil Aviation[47] and in the 1963 Convention on infringements and certain other acts committed on board aircraft.[48] As in the preceding instance, this obligation of diligence will apply even in the event that such overflights are authorised by the terms of an international treaty or agreement of a military nature.[49]

3. The Reports compiled by the Parliamentary Assembly of the Council of Europe

The investigations of the Council of Europe to date are rounded off by two reports issued by the Legal Affairs and Human Rights Committee of the Parliamentary

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[46] Article 3(1) of this Convention provides: "No State Party shall expel, return ('refoulement') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"; in BOE no 268, 9.11.1987. The United Nations Anti-Torture Commission takes the same view in Agiza v Sweden (CAT/C/34/D/233/2003 and CCPR/CO/74/SWE). In a decision of 24/5/2005, the Committee judged Sweden to be guilty of violating that provision in allowing the plaintiff to be transferred to Egypt, where he was tortured. In the Committee's opinion, Sweden was fully aware of that torture was used as a method of interrogation in Egypt and yet it transferred him. In the words of the Committee, in cases of this kind a request for diplomatic guarantees is insufficient to protect against such danger; at *http://www.unhchr.ch/tbs/doc.nsf/Documentsfrsetsp?OpenFrameSet*, consulted on 1/6/2007. In this connection, according to ECHR doctrine the existence of a danger should be appreciable first and foremost in facts of which the State Party could or ought to be aware at the time of the expulsion. See Cruz Varas and others v. Sweden, 20/3/1991, para. 75; Vilvarajah and others v. United Kingdom, 30/10/1991, para. 107; Mamatkulov and Askerov v. Turkey (04/02/2005), para. 69, at *http://www.echr.coe.int*.

[47] See Articles 3 (c), 3 bis (a) and (b), 4 and 54. Article 54 of the Chicago Convention provides that any State Party to the Convention may inform the Council of any infringement of the Convention that it detects.

[48] See Article 4, in BOE no 308, 25/10/1969.

[49] In the Commission's opinion: '[…] States must interpret and perform their treaty obligations, including those deriving from NATO treaty and from military base agreements and Status of Forces Agreements, in a manner compatible with their human rights obligations'.

Assembly.[50] In the context of the first report[51] it was stated that the so-called extraordinary rendition programme, for which the United States is chiefly responsible, was implemented on European territory thanks to the cooperation of several Member States of the Council of Europe which, with varying degrees of implication, made it possible for these to take place in their territory.

As regards first of all the alleged existence of secret CIA-run detention facilities in Europe, this first report notes that although there is not enough evidence to establish the implication of certain Member States of the Organisation beyond a shadow of a doubt,[52] there are sufficient indications to support the allegation that those States are liable for failing to comply with a positive obligation to investigate such events.[53] That obligation is one of a series of obligations of diligence which according to ECHR case-law and the rules on responsibility in general international law stem from the ECPHR.[54]

In the second place, as regards the use of European airspace and airports, the report, based on information from various NGOs, Eurocontrol[55] and up to twenty

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[50] These reports were presented on 7/6/2006 and 7/6/2007 respectively. AS/Jur (2006) 16 Part. II and AS/Jur (2007) 36, at *http://www.coe.int/T/E/Com/Files/Events/2006–cia/*, consulted on 1/7/2007. The first of them was preceded by two memoranda, one dated 22/11/2005 [AS/Jur. (2005) 52 rev. 2] and the other 22/1/2006 [AS/Jur. (2006) 03 rev.], containing information which grounded the arguments set out in the final report. This first report, which was approved by the Parliamentary Assembly on 27/6/2006, was followed by a Resolution and a Recommendation from the same source. Resolution 1507 (2006) and Recommendation 1754 (2006), both dated 27/6/2006. The second report, which was approved by the Parliamentary Assembly on 27/6/2007, was followed by Resolution 1562 (2007) and Recommendation 1801 (2007), both dated 27/6/2007; at *http://assembly.coe.int.*

[51] The Swiss MP Mr D. Marty was formally appointed special rapporteur for this matter on 13/12/2005. 'I have often been described as an investigator, or even a special investigator. It might be helpful to point out, therefore, that I do not enjoy any specific investigatory powers and, in particular, am not entitled to use coercive methods or to require the release of specific documents. My work has consequently consists primarily of interviews and analysis'; see AS/Jur. (2006) 16 Part. II, para. 14. His comprehensive report is further based on information obtained from official sources (international organisations and States), witnesses' statements and reports furnished by former members of the CIA, lawyers, victims and their relatives, eyewitnesses of the events, journalists and NGOs.

[52] The photographs obtained from the European Union Satellite Centre do not constitute conclusive proof of this. Nonetheless, the information furnished by Eurocontrol and the various testimonies provided by victims, journalists and other unofficial sources point to the existence of such facilities in at least three member countries of the Council of Europe: Romania, Poland and Russia (Chechnya).

[53] *Ibid.*, paras. 22–23, 62, 75, 220–229.

[54] See F. Lozano Contreras, *La noción de debida diligencia…*, *op. cit*., pp. 240–259.

[55] Eurocontrol is the European organisation responsible for air security. The main purpose of this hybrid (civil and military) institution, which currently has 37 Member States, is to establish and develop a single European airspace administered and coordinated by a species of authority called *European Air Traffic Management* (ATM); see *http://www .eurocontrol.int.*

national authorities responsible for controlling air traffic and flight plans in their territory, mentions four categories of landings as a basis for *prima facie* determination of the different degrees of implication possibly attaching to European States.[56]

At this point the investigation focuses on an analysis of nine alleged cases of illegal detention and transfer involving a total of seventeen persons,[57] several of whom provided eyewitness accounts. Following his examination, the special rapporteur reproved the attitude adopted by some of the States Parties in the Council of Europe, without whose complicity or negligence US agents could not easily have carried out such operations, and he further noted the small number of investigations of these events currently being conducted.[58] The rapporteur considered it unlikely that the European States in which these actions were carried out were totally unaware of what was going on in their territory. In addition to Romania

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[56] In Category A (*Stopover points*) the Report includes all airports at which such flights presumably stopped over to refuel before starting on their return journey [Prestwick, Shannon, Rome Ciampino, Athens, Santa María (Azores), Bangor and Prague]; in Category B (*Staging points*) the Report includes airports or places from which rendition operations departed or were prepared [Washington, Frankfurt, Adana-Incirlik (Turkey), Ramstein, Lárnaca, Palma de Mallorca and Baku (Azerbaijan)]; Category C (*One-off pick-up points*) includes airports at which a detainee or group of detainees have been put on board for illegal transfer elsewhere [Stockholm, Banjul, Skopje, Aviano and Tuzla]; while lastly, in Category D (*Detainee transfer/ Drop-off points*) the Report includes frequently-visited places where flights made stopovers for a short time, presumably for the purpose, given their location, of transferring captured persons to a nearby detention facility [El Cairo, Amman, Islamabad, Rabat, Kabul, Guantánamo, Timisoara/Bucharest, Tashkent, Algiers, Baghdad and Szymany (Poland)].

[57] These cases (most of them well-known thanks to the press) are: Khaled El-Masri, Mustafa Ait Idir, Hadz Boudella, Lakhdar Boumediene, Saber Lahmar, Mohammed Nechle, Belkacem Bensayah, Ahmed Agiza, Mohammed Alzery, Abu Omar, Bisher Al-Rawi, Jamil El-Banna, Maher Arar, Muhammad Bashmila, Salah Ali Qaru, Mohammed Zammar and Binyam Mohamed al Habashi. We should not forget the detailed description in the Report of the *modus operandi* followed by the CIA in carrying out operations of this kind. We have a description of this frightful procedure thanks to the testimony of Michael Scheuer, former head of the Bin Laden Unit at the CIA's Counter-terrorism Center, interviewed by Mr D. Marty in Washington D.C. on 12/5/2006. See AS/Jur. (2006) 16 Part. II, paras. 79–87.

[58] In the special rapporteur's words: 'Indeed, governments did not spontaneously or autonomously take any real action to seek evidence for the allegations, despite their serious and detailed nature', *Ibíd.*, para. 235. The report stresses that judicial proceedings have been initiated only in Italy, Germany, the United Kingdom, Sweden, Spain and the United States, and in some cases they have already been frozen (United States, Sweden), *Ibíd.*, paras. 237–245.

and Poland as mentioned, other prominent cases include Macedonia,[59] Sweden[60] and Italy.[61]

The second and to date the latest report confirms the suspicions noted in the first, namely that Poland and Romania harboured secret CIA-run detention facilities between 2002 and 2005. As the report notes, this was possible thanks to a secret agreement concluded among the NATO allies on 4 October 2001. Under the umbrella of this agreement the United States was, foreseeably enough, able to conclude a series of subsequent bilateral covenants with Member Status of NATO, and with some States aspiring to join it, thus enabling the CIA to proceed with the detention and imprisonment of so-called *High-Value Detainees.*[62]

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[59] The State where one of the best-documented cases took place – the abduction and transfer to Kabul of Khaled El-Masri, a German citizen of Lebanese extraction who was kidnapped on the Serbian-Macedonian border. Thanks to the assistance of the American Civil Liberties Union, Khaled El-Masri was able to file a lawsuit with the US authorities. On 6/12/2005, El Masri filed a complaint with the East District Court of the State of Virginia against former CIA Director G.J. Tenet (*El-Masri v. Tenet*, U.S. District Court, Eastern District of Virginia); the complaint was dismissed on 18/5/2006 at the instance of the Federal government on national security grounds. On 24/7/2006 appeal was brought before the Supreme Court, which rejected it on the same grounds on 10/10/200; see *http://www.acluva.org/docket/elmasri.html*, consulted on 1/7/2007. This case has caused diplomatic tension between Germany and the United States since in January 2007 a German court ordered the arrest of 13 CIA agents suspected of the detention of El Masri.

[60] The case of Sweden is perhaps the most surprising given its long democratic tradition and unimpeachable conduct as regards respect for and protection of human rights. Be it recalled that in 2005 Sweden was in fact condemned by the United Nations Committee Against Torture for the implication of its authorities in the abduction and transfer to Egypt of A. Agiza and M. Alzery, both Egytian nationals and applicants for asylum in Sweden. See note 46.

[61] The case of Italy is perhaps the one that has made most media noise because of the way in which the events under scrutiny developed. On 17/2/2003 Imam Abu Omar, an Egyptian national, was abducted in the very centre of Milan in the course of a joint operation by the SISMI (Italian Secret Service) and the CIA. He was then transferred, via the US bases at Aviano and Ramstein, to Egypt, where he was apparently tortured. The trial for these events commenced in Milan on 8/6/2007 and was postponed four days later. Prominent among the defendants were the then Director of the SISMI, Nicolò Pollari, other members of the Italian secret service, a marshal of the ROS (Special Operational Detail of the Carabinieri) and twenty-six CIA agents, who were declared in default by Italian judge Oscar Magi.

[62] The rapporteur's conclusions are based on an analysis of over thirty statements gathered from members of information services in the US and Europe, and on an analysis of the information retrieved from the above-mentioned flight plan processing system. Pp. 16–49 of this second report merit special attention.

III. THE CONCLUSIONS OF THE TEMPORARY INVESTIGATING COMMITTEE SET UP BY THE EUROPEAN PARLIAMENT

Following in the wake of the Council of Europe's enquiries, on 18 January 2006[63] the European Parliament approved the creation of a temporary investigating committee[64] with four basic goals:

1. To ascertain whether the CIA, other US agents or agents belonging to the intelligence services of third countries had engaged in the abduction, surrender, detention in secret places or detention incommunicado of persons suspected of terrorism, or had subjected them to torture or other cruel, inhuman or degrading treatment of punishment in European Union territory or in the territories of acceding or candidate States, or had used European airspace for such purposes.
2. To determine whether these actions, carried out on European Union territory, ought to be considered in violation of Article 6 of the TEU, of Articles 2, 3, 5 and 6 of the ECPHR, of the EU Charter of Fundamental Rights, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and of the Agreements between the USA and EU on matters of extradition and judicial assistance, as well as other international treaties and covenants concluded by the European Union/ European Community and its Member States, including the North Atlantic Treaty and related status of forces agreements and the Convention on International Civil Aviation.
3. To investigate whether among the persons implicated or the victims of acts of abduction, 'extraordinary rendition', detention in secret locations, detention incommunicado or torture or other cruel, inhuman or degrading treatment of punishment in European Union territory or elsewhere there were citizens of the European Union or candidate countries, "or any other person entitled to protection from, or otherwise under the jurisdiction of, the EU, the Member States or the candidate countries have been among those involved in or subjected to abductions, 'extraordinary rendition' operations, detention at secret sites, detention

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[63] On 18/1/2006, the European Parliament decided, pursuant to Article 175 of its Regulation, to create a Temporary Committee on Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners. A month earlier, on 15/12/2005, the European Parliament had passed a Resolution recommending the creation of such a Committee and announced to Member States its commitment to initiating the procedure envisaged in Article 7 of the Treaty on European Union should the investigations confirm the accusations that some Member States had by act or omission lent aid to the officials who carried on these practices in the name of other governments; see P6_TA (2006)0012 and P6_TA(2005)0529. The committee's mandate is for 12 months; at *http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm*, consulted on 1/9/2007.

[64] Committee headed by a Portuguese MEP from the Popular Group, Mr Carlos Coelho (chairman) and an Italian MEP from the Socialist Group, Mr Fava (rapporteur and principal draftsman of the Committee's report).

incommunicado or torture or other cruel, inhuman or degrading treatment in the territory of the European Union or elsewhere".

4. To elucidate whether among those implicated or cooperating in acts of abduction, rendition, transportation or torture there were authorities or officials of Member States or of European Union institutions.

The object of all this is an entirely political one – to reaffirm the fundamental place of human rights in the framework of the fight against international terrorism.

Part-way through the Committee's work, on 15 June 2006[65] the rapporteur, MEP Mr Claudio Fava, presented a draft of a provisional report on Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, which was approved by Resolution of the European Parliament on 6 July 2006.[66] In that Resolution the European Parliament took the view that the Temporary Committee had gathered enough reliable information to prove that illegal activities had been carried on in European territory involving European citizens and residents, and therefore it fell to the European Governments to prove that they had really fulfilled their obligations regarding human rights, as defined in Article 6 of the TEU and the European Union's Charter of Fundamental Rights.[67]

In the light of the information furnished by the Member States and the Council of Europe and the reports of the Temporary Committee, the Parliament expressed its concern at the fact that human rights should have been violated in so serious and inexcusable manner, in particular the rights recognised in the ECPHR, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Union's Charter of Fundamental Rights and the International Covenant on Civil and Political Rights.[68] The European Parliament's Resolution accuses the CIA and other US agencies of direct responsibility for the transfer, abduction and detention of terrorism suspects in territory of Member States and of acceding and candidate countries. The Parliament further considers it unlikely, in view of the witness reports and documents available, that some European Governments had no knowledge of the activities in connection with extraordinary renditions that were going on in their territory; and it views it as extremely unlikely that there could have been several hundred flights through the airspace of several Member States, and a similar number of landings and takeoffs at European airports, without their security or intelligence services having any knowledge of the relationship between these flights and the

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[65] See A6–0213/2006. The text of the draft received a favourable vote from 25 MEPs, with 14 against and 7 abstentions.

[66] See P6_TA (2006)0316. The resolution was passed with 389 votes in favour, 137 against and 55 abstentions; at *http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm#*, consulted on 1/6/2007.

[67] See OJEU no C80, 10/3/2001.

[68] See BOE no 103, 30/4/1977.

practice of extraordinary renditions.[69] In the Parliament's opinion these suspicions are amply founded if we consider the statements made by senior officials of the US Administration, who admitted having acted in that way, albeit without infringing the national sovereignty of European countries.

The European Parliament reminded the Member States that according to the case-law of the ECHR, States have substantial positive and procedural obligations in respect of human rights, and furthermore that they are bound to take legislative steps to prevent violations of these rights from occurring on their territory and must investigate human rights violations and punish those responsible for them. The Parliament concludes with a warning to Member States that they may be held liable for infringement of the ECPHR if they have failed to honour these positive obligations.[70]

Replying on 30 January 2007 to the European Parliament's decision that the Temporary Committee should carry on with its work until the end of its mandate, in light of the latest information the MEP acting as rapporteur presented the Committee's final report.[71]

This report presents and assesses such important developments as US President G. W. Bush's declaration of 6 September 2006 in which he stated that the CIA was pursuing a programme of secret detentions outside the United States and affirmed his intention that this should continue;[72] or again the recording, obtained through

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[69] In the view of the European Parliament, many of the flights made by aircraft belonging to or chartered by the CIA, in which aircraft overflew the airspace and used airports of Member States, of countries in the process of accession and of candidate countries, constituted repeated breaches of the Chicago Convention in that they ignored the obligation to secure the requisite authorisation for State-run flights as stipulated in Article 3 of the Convention. It further regrets that no Member State or acceding or candidate country should have initiated procedures to determine whether civil aircraft were being used for purposes incompatible with the current international rules relating to human rights – a fact that the Parliament believes requires the drafting of new national, European and international rules on air traffic. The European Parliament similarly regretted that NATO should have denied the temporary committee access to the complete text of the NATO Council Decision of 4/10/2001 on implementation of Article 5 of the Washington Treaty – which in itself is suspicious. See BOE no 129, 31/5/1982.

[70] As regards the existence of CIA-run secret detention facilities in Europe, the European Parliament notes that to date the temporary committee's work has not turned up any evidence or proof of the existence of secret prisons in the EU; nevertheless, it believes that the temporary committee ought to concentrate more on this aspect in the coming months. That is entirely necessary, particularly in view of the latest report published by the Parliamentary Assembly of the Council of Europe.

[71] See A6–0020/2007 FINAL (PE 382.246v02–00). This report was preceded by a provisional report dated 24/11/2006 [2006/2200 (INI)], followed by a document containing 476 amendments submitted on 18/12/2006 (PE 382.448v01–00), at *http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm#*, consulted on 1/6/007.

[72] See Press communiqué No 488 (2006) by the President of the Parliamentary Assembly of the Council of Europe (7/9/2006), at *http://www.coe.int/press*. For its part, because

confidential sources, of an informal transatlantic meeting held on 7 December 2005 between the EU Foreign Ministers and NATO, which was attended by US Secretary of State Condoleezza Rice and confirmed that the Member States knew of the programme of extraordinary renditions and the existence of secret prisons.[73]

The Temporary Committee denounced the lack of cooperation from almost all the Member States and from the Council of the European Union and expressed its concern and disquiet at the lack of collaboration by some Community institutions and senior officials[74] and certain bodies with which the European Union has traditionally maintained close cooperative relations.[75]

The report further censures the policies pursued by Italy, the United Kingdom, Germany, Sweden, Austria, Macedonia and Bosnia-Herzegovina in that they have facilitated or permitted the surrender of persons suspected of terrorism to the US secret services for transfer to places where they were subjected to torture. In the report the Temporary Commission also expresses its disquiet at stopovers by CIA-operated aircraft in Spain, Portugal, Ireland, Greece, Cyprus, Denmark, Turkey, Poland and Romania, and in the last two cases it stresses its concern at the possibility that the territory of both States is being used to harbour clandestine detention and torture facilities.

The European Parliament approved the content of this final report in a Resolution dated 14/02/2007, in which it also placed the future political follow-up of these matters in the hands of its Committee on Civil Liberties and Internal Affairs.[76]

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of the opposition from some Member States the Council of the European Union was unable to make a conclusive response to this declaration during the meeting of the General Affairs and External Relations Council on 15/9/2006; at *http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/es/gena/91040.pdf*, consulted on 1/6/2007.

[73] See an interesting report published by A. Carbajosa in *El País* newpaper on 26/1/2005, entitled "*La doma del gorila*", at *http://www.elpais.com*.

[74] The Temporary Committee expressed deep concern at the omissions and denials in the declarations made to the Temporary Committee by the Secretary-General (and High Representative for the CESP) of the Council of the EU Mr J. Solana in connection with the debates and the Council's awareness of the methods used by the United States in its fight against terrorism. At the same time, as the investigations confirmed that abuses and violations of fundamental rights had been committed, the Temporary Committee opened a debate on the real substance of the function of the European Union's coordinator for the fight against terrorism, an office hitherto occupied by Mr G. de Vries, whose declarations were also criticised along with his reluctance to appear before the Temporary Committee.

[75] In its report the European Parliament's Temporary Committee makes reference to NATO.

[76] See P6_TA-PROV (2007) 0032. The resolution was passed with 382 votes in favour, 256 against and 74 abstentions; at *http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm#*, consulted on 1/7/2007.

IV. SPANISH PRACTICE: OMISSION BY THE SPANISH AUTHORITIES AS A POSSIBLE FACTOR GIVING RISE TO INTERNATIONAL RESPONSIBILITY

The implementation of the extraordinary rendition programme in European territory by the United States has placed Spain at the epicentre of the controversy that blew up around practices of this kind as soon as the events analysed here came to light.[77]

The events that have presumably taken place in our jurisdiction do not differ greatly from those registered in other comparable countries. That at least is the conclusion suggested by the investigations conducted in the ambit of the Council of Europe and in the European Parliament.

Having regard first of all to the investigations carried out by the Council of Europe, the official response offered by the Spanish government[78] to the questions put by the Organisation's Secretary-General under Article 52 of the ECPHR[79] consists firstly of a report drawn up by the legal services of the Ministry of Foreign Affairs, which strikes us as generally evasive in that it omits any explicit reference to the concrete events giving rise to the consultation. That report is confined to a brief outline of our legislation on the subject.[80] In second place, the response is accompanied by the text of the statement that the Minister of Foreign Affairs was obliged to make to the Congress Foreign Affairs Commission in November 2005, in which he gave an account of the information available to and the actions taken

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[77] The first information on the subject emerged on 12/3/2005, when *Diario de Mallorca* broke the news of the presence of CIA-chartered flights in Spanish territory. The report cited Son Sant Joan airport (Mallorca) as the possible stopover point for aircraft used by the CIA to prepare and launch missions related to the programme of extraordinary renditions. Later, other Spanish airports were added to the list of possible stopover points for these aircraft. The Spanish press cited, among others, the airports of Ibiza, Málaga, Barcelona, Alicante, Tenerife, Las Palmas, Valencia, Seville and Vigo. In this connection see these two pieces of investigative journalism: F. Armendáriz, M. Goñi, and M. Vallés, *CIA Airlines*, Ed. Debate, 2006; A. Grimaldos, *La CIA en España*, Ed. Debate, 2005.

[78] The response of the Ministry of Foreign Affairs, dated 20/2/2006, was remitted to the Secretary-General of the Council of Europe on 21/2/2006 via our ambassador and permanent representative with the Council, Estanislao de Grandes. It consists of 26 pages, all drafted in English. The first 13 contain the report drawn up by the Ministry's legal services. The remaining 12 are a translation of the speech made by Mr M.A. Moratinos to the Congress Foreign Affairs Commission on 24/11/2005; at *http://www.coe.int/T/F/com/dossiers/evenements/2006–cia/Spain.pdf*, consulted on 1/6/2007. This first response was followed up by a verbal note dated 6/4/2006 in which Spain filled in the information requested by the Secretary-General of the Council of Europe regarding means of controlling foreign agents; *http://www.coe.int/T/F/com/dossiers/evenements/2006–cia/annexes*, consulted on 1/6/2007.

[79] See the content of the questions in note 17 *supra*.

[80] The report cites, inter alia, Articles 17, 53.2 and 81 of the Spanish Constitution, Articles 489–501 and 520 of the LECrim, Articles 163–165 of the Penal Code, Articles 385 et seq. of the LEC and various other related provisions and judgments.

by the Spanish government in the light of reports denouncing the possible use of Spanish airports for the transfer of prisoners or detainees on international flights. In his statement the Minister asserted that neither he nor any persons under the Ministry's authority had received any reports of the alleged stopovers in Mallorca and the Canary Islands before they were made public by the press. He recalled that these stopovers were being investigated by Spain's judiciary and that in any event it would be necessary to await the decision of the courts. He further asserted – we imagine in order to provide the audience with a measure of comfort – that 'unlike other European countries, where the accusations involve illegal detentions carried out in their territory, in Spain the accusations and the news published in the media concern the use of our airspace or our airports, merely for transit'; and he went on to stress that 'Spain is not an isolated case'. The Minister concluded his address with a promise to defend democratic values and human rights within the framework of the fight against terrorism; to provide all possible support to ongoing investigations, both *ad intra* and *ad extra*; to reinforce the controls on civil aircraft overflying or stopping over in Spanish territory; and to pass on to Congress any information that might emerge in that connection in the future.[81]

The first report compiled by the Legal Affairs and Human Rights Committee of the Council of Europe Parliamentary Assembly was rather more incisive than the ones presented by the Council's Secretary-General. This report included Palma de Mallorca airport in category B (*Staging points*), which covers airports or places from which CIA rendition operations departed or were prepared.[82]

Having regard secondly to the investigations carried out by the European Parliament, both the Provisional Report by the Temporary Investigating Committee, approved by the European Parliament on 6 July 2006, and the last report by that Committee, published on 30 January 2007, clearly point to Spain's implication in these events. The Committee expressed deep concern at the 68 stopovers by CIA-operated aircraft at Spanish airports, in many cases coming from or flying to countries linked to the circuits of extraordinary rendition and transport of detainees. The Committee likewise regretted that aircraft used by the CIA for extraordinary renditions should have made several stopovers at Spanish airports; and it expressed particular concern at the fact that three of the flights identified came from or were bound for Guantánamo. The report strongly urges Spanish prosecutors to investigate these flights and praises the firm and rigorous work being carried out by the Spanish courts in the context of the investigations currently in progress.

The fact that Spain does not emerge from these investigations in a good place should come as no surprise in view of the record of our authorities.[83] They have

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[81] The full statement, in Spanish, can be found in *Diario de Sesiones de Comisión del Congreso* nº 425, 24/11/2005, at *http://www.senado.es*.

[82] Spain's Son Sant Joan airport is cited directly in connection with the abduction and transfer of German citizen Khaled El-Masri. See notes 56 and 59 *supra*.

[83] The times when the Spanish authorities condemned American excesses without qualification are long gone. We would recall Res. 44/240 of the UN General Assembly, when

not made the slightest effort to elucidate these events, at the risk of their conduct eventually incurring international responsibility, in which case Spain, as the active subject of an international wrongful omission, could find itself obliged to make full reparation to the people who have suffered injury from these events.[84] Both in their action and in their public declarations,[85] our government representatives have confined themselves either to evading[86] or denying what has happened,[87] or again to claiming no knowledge of any of the events which presumably took place in

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cont.

Spain unhesitatingly condemned the US military intervention in Panama, and indeed was the only Member State of the European Communities to do so [See "Práctica española de Derecho Internacional Público", in *REDI*, vol. XLII (1990), pp. 530–531]; or the reproval issued by the Spanish representative, Mr J.A. Yáñez Barnuevo in the UNGA's Sixth Committee during its 38th session period, in connection with the Álvarez Machain affair [See "Spanish Diplomatic and Parliamentary Practice in Public International Law", in *SYIL*, vol. II (1992), pp. 142–144].

[84] Such responsibility could arise from failure to comply either with the provisions of the ECPHR or with the rules contained in any of the other international instruments mentioned to which Spain is a party.

[85] Appearing before the Congress on 21/12/2005, the Secretary of State for Foreign Affairs and Iberoamerica (Mr León Gross) told the Foreign Affairs Commission that he was satisfied with the declarations made by the US Secretary of State Condoleezza Rice during the ordinary annual meeting of NATO Foreign Ministers. In these declarations the Secretary of State assured her audience that the United States neither tortured nor transported people to countries where they might be subjected to torture (see *Diario de Sesiones de Comisión del Congreso* no 458, 21/12/2005, at *http://www.senado.es*).

[86] After several fruitless attempts, on 22/09/2006 the undersigned investigator made a last effort to obtain the report that the Attorney General's Office at the Ministry of Foreign Affairs compiled in May or June 2006 in response to the Council of Europe's request for information in connection with the flights allegedly operated by the CIA in Spanish territory. I am still waiting for that section's Chief Prosecutor, Mr. A. Parra, to answer my request or explain why Cadena Ser radio has been able to see the report and I have not. See the reference to this report on *Cadena Ser* radio on 8/6/2006, at *http://www.cadenaser.com*.

[87] See the Minister of Foreign Affairs' brief allusion to this matter in the debate on Spanish policy after two years in office, 23/5/2006, at *http://www.mae.es* (Declarations and speeches). In this connection I would note that in the national political arena the only gestures in favour of conducting a minimally serious enquiry into these events have come from the Congress Foreign Affairs Commission. On 05/04/2006 the latter unanimously resolved to ask the Government for a detailed report on CIA flights, albeit the original motion presented by the *Izquierda Unida-Iniciativa per Catalunya els Verds* parliamentary group proposed the creation of an interministerial commission to report on this matter to the Congress of Deputies and the European Parliament (see *Diario de Sesiones de Comisión del Congreso* no 547, 05/04/2006, at *http://www.senado.es*).

our territory,[88] also failing to press for a judicial enquiry into the said events.[89] On the other hand, we would highlight the reaction of our judicial authorities, who are currently investigating the facts.[90]

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[88] In an appearance on 14/09/2006 before the Temporary Committee set up by the European Parliament to investigate the alleged used of European airports for the illegal transfer and detention of prisoners, our Minister of Foreign Affairs stated: '[…] that at no time did the present Government have any knowledge of or authorise operations involving violation of the laws of this country [and] that none of the enquiries conducted to date have thrown up any sign that the law has been broken in Spanish territory'. This statement contrasts, firstly, with an interview conducted by *Diario de Mallorca* at his office on 08/01/2006, in which Mr Moratinos said that the Government would take steps to see that *there was no repetition* of those flights; and secondly with an article signed by him with the title "*La verdad como método*" [The Truth as Method] published in *El País* on 16/06/2006, in which he responded defensively to an article entitled "*La evasión como norma*" [Evasion as a Rule] published in the same newspaper on 13/06/2006 and signed by a group of citizens who had brought an action for the CIA flights in the Court of Instruction of Palma de Mallorca; at *http://www.mae.es* (Declarations and speeches) and *http://www.elpais.com*.

[89] The judicial enquiry into events at Spanish airports came in response to citizen action rather than the State Prosecution Service. It was a group of citizens, led by Mallorcan barrister Mr I. Ribas, who filed a criminal lawsuit in the Court if instruction of Palma, based upon a popular action for alleged offences of illegal detention, kidnapping and torture. The action claimed that the CIA had used Son Sant Joan airport as a base of operations for aircraft that were used as flying prisons for the abduction and transfer of terrorism suspects to countries where they were tortured. This group of private individuals had previously denounced these events to the chief prosecutor of the High Court of Justice of the Balearic Islands, who hurriedly shelved the matter.

[90] In November 2005 the Balearics judge Mr A. Garcías Sansaloni (presiding over Court of Instruction No 7 in Palma de Mallorca) declined jurisdiction in favour of the National High Court, claiming the direct applicability of the principle of international justice for the prosecution of the crime of torture, as provided in Article 23(4) of the Judiciary Act (LOPJ). On 12 June 2006 National High Court judge Mr I. Moreno (presiding over Central Court No 2), dissenting from the view of the prosecutor assigned to the case, Mr V. González Mota, accepted jurisdiction to investigate stopovers at Spanish airports (preliminary enquiries 109/2006), on the grounds that there was reason to suspect that three kinds of offence had been committed: illegal detention, abduction and torture. We are happy to note that these enquiries are in progress at this time. The last initiative of which we have knowledge within the context of these proceedings was a request filed by Mr. González Mota for declassification of secret papers relating to these flights, held at the National Intelligence Centre (Sp. Acronym CNI). Be it said that on 04/07/2006 the Director of the CNI, Mr A. Saiz, appearing *in camera* before the Congress Official Secrets Commission, stated that the CNI had investigated CIA flights in 2005 and had found no reason to suspect that crimes had been committed on Spanish soil; at *http://www.elmundo.es*.

CONCLUSIONS

1. If there is one thing concerning the operation of the system of extraordinary renditions in European territory that deserves to be emphasised above all others, it is undoubtedly the tension that this affair has generated between relational and institutional structures. One obvious example of this tension in the political sphere are the various reactions that this thorny problem has provoked in either structure. While institutionally these events have triggered enquiries headed respectively by the most representative bodies of the Council of Europe and the European Union, in the relational sphere there has been no reaction whatsoever, as evidenced by the lack of cooperation from all the States allegedly implicated in the extraordinary rendition programme. This failure by European States to react or cooperate is a foretaste of what will happen sooner or later in the international organisations concerned, where the inter-governmental pole – i.e. the national interests of the Member States – will eventually prevail as usual. The same tension as has arisen between relational and institutional structures appears also to have surfaced in the relationship between Policy and Law. Despite the fact that the customary and conventional international law currently applicable to this matter seems to be well consolidated, the contempt and permissiveness with which States generally treat these incidents perhaps carries implicit a political will to alter these rules as they relate to conduct, in order to tailor them to the position defended by some States – in this case specifically the determination to prosecute and suppress international terrorism by every possible means regardless of its legality.

2. As regards the enquiries conducted in the Council of Europe, these would appear to confirm suspicions already aired in journalistic and other non-governmental media – namely that European territory was used to prepare and carry out actions in connection with the system of extraordinary renditions. So say the reports compiled by the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe and, if more cautiously, the report drawn up by the Secretary-General of the Council in light of the responses received from the Member States. In the case of this last report, we had hoped that the enquiry sponsored by the Secretary-General would be far more incisive. And again, in the course of the enquiries on this subject, we would have wished to see a more vigorous initiative on this issue from both the Commissioner for Human Rights and the European Committee Against Torture. For the time being, as we wait to see whether the ECHR will admit an accusation submitted by some of the victims of practices of this kind on European territory, there is little more that we can add.

3. The outcome of the enquiries conducted by the Temporary Investigating Committee set up by the European Parliament points in the same direction. The Parliament is in no doubt that some European States, with varying degrees of involvement, facilitated the detention and transfer of suspects to countries where torture is practised, all on an arbitrary basis without any kind of judicial oversight. With the final report now to hand, we find nothing to criticise in the work of the cited Temporary Committee. That said, however, and again in the ambit of the European Union, we still fail to understand some aspects relating to these events – for instance,

why the European Parliament's Legal Service opted to recommend a Temporary Committee and did not deem it appropriate to create an Investigating Committee to analyse infringements of Community Law; or what, in view of the violation of Article 6 of the TEU, there was to prevent the implementation of a sanctioning procedure as provided in Article 7 of the TEU. There can be no doubting that the events examined are if possible even more serious than the event that prompted the inclusion of Article 7(1) in the Nice version of the TEU (we would recall the Austrian case).[91] The intention here is not to point to the existence of a clear risk of serious violation by a Member State of the principles enshrined in Article 6(1) of the TEU, but to note that this was a proven case which constrained several fundamental human rights and freedoms as guaranteed in the ECPHR and in the European Union's Charter of Fundamental Rights. If the members of the Union's Council are incapable of implementing this procedure in response to events like the ones related, it might perhaps be best to seek solutions to overcome a defect of democracy which prevents the European Parliament from acting on its own account in exceptional cases such as these. We would note that in the latest version of the TEU, approved by the Heads of State and Government at the Lisbon European Council on 18 and 19 October 2007, there is very little democratisation of this sanctioning procedure; it provides that it shall be up to the European Council, by unanimous decision at the proposal of one-third of the Member States or of the Commission, to determine the existence of a serious and persistent violation of such rights and freedoms by a Member State – subject, that is, to prior approval by the European Parliament. At the same time, we are not aware (at the time of writing) that any complaint has been made to the European Ombudsman, that the Commission has set in motion any follow-up and control machinery of its own, or that the recently-created European Agency on Fundamental Rights has made any statement in connection with these events.

4. And finally, as regards the question of international responsibility, according to general international law and European institutional practice, the implementation of the extraordinary rendition programme in European territory is sufficient cause to produce a whole number of instances of international responsibility. On this point we concur with the Council of Europe's rapporteur where he states that the extent of the responsibility that may arise in connection with the events examined may vary according to the attitude of each State in each specific case,

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[91] The event that prompted the reform of Article 7 of the TUE (introduction of a preventive procedure in paragraph 1) was the accession to power in Austria of the ultra-right Austrian Freedom Party, led by J. Haider. The Member States perceived a need to create a preventive mechanism for such cases. Then, in view of the inapplicability of Article 7 (which only envisaged the sanctioning procedure for serious and persistent human rights violations), the other 14 Members of the Union decided to impose concerted unilateral sanctions on Austria and freeze diplomatic relations with Vienna. After lengthy conversations and the compilation of a "Report by the Three Wise Men", the sanctions were lifted in September 2000. This Report recommended the introduction of the above-cited first paragraph in Article 7 of the TEU; in *RDCE*, no 4, 2000, p. 765.

so that it is possible to distinguish three possible degrees of implication: a first degree, of full, direct and active participation, applying to the United States as the party chiefly responsible for initiating and carrying out this kind of internationally illegal practices (Article 4 of the draft ILC articles); a second degree, of active implication, applying to those European States which actively aided or assisted in the implementation or execution of these acts (Article 16 of the draft ILC articles): Sweden, Italy, Germany, Macedonia, United Kingdom, Poland or Romania; and a third degree, of passive implication or implication by omission, which would apply to those States which defaulted on their positive obligation to act with due diligence to prevent, or prosecute as the case may be, such conduct in their territory: Spain, Ireland, Portugal, Greece or Cyprus, among others. In this connection we would stress what we said earlier regarding the attitude adopted by Spain, which because of the passivity of some members of the Executive could be held internationally liable, unless of course this can be avoided thanks to the action of our judicial authorities.

The possibility that in time the implementation of the extraordinary rendition programme by the United States in European territory could raise issues of international responsibility is indeed latent; however, in view of the reactions from the States we seriously doubt whether such responsibility can be made to materialise through the institution of diplomatic protection – or at least for the moment we have no knowledge of any such claim. Given the international means of protection that international law offers the victims of such conduct, the logical thing would be for the ECHR sooner or later to issue a verdict on the matter, having first exhausted all internal appeal procedures and having determined that the victim passed through European territory (in the event that he or she was not a national of a State Party to the ECPHR).