LUISS

Department of Political Sciences
Degree Program in International Relations

Chair of Security Law and Constitutional Protection

Extraordinary Renditions: A Black Hole in the Rule of Law in the Fight Against Terrorism

Prof. Davide Paris
SUPERVISOR

Prof. Giuseppe Pascale
CO-SUPERVISOR

Daniele Camponeschi
Matr. 647372
CANDIDATE

Academic Year 2022/2023

Index

INTRODUCTION

Terrorism is now considered a permanent danger due to the frequent and unexpected number of terrorist attacks which are committed anywhere at any time and threaten international security, human lives, and social cohesion. Therefore, the responses of national governments and international organizations are persistently challenged by the strategies and beliefs employed by terrorist groups that always adapt themselves to the emerging issues affecting their living conditions. Despite its complex nature as well as its undeniable gravity and repercussions, a universally agreed-upon definition of terrorism does not exist.[1]

Schmid offered four reasons to explain this: first, terrorism is characterized by divergent interpretations across political, legal, social science, and public domains; second, the question of defining it is intricately tied to processes of (de)legitimization and criminalization; third, the phenomenon encompasses various categories of terrorism which display different patterns and manifestations; fourth, the term itself has undergone semantic transformations over the years.[2]

In addition, it must be mentioned that the United Nations (UN), which represents the most legitimate entity to define it, failed to provide a clear and concise definition, thereby allowing States to delineate terrorism according to their own understanding and political interests. Indeed, most sovereign governments have formulated distinct interpretations of terrorism depending on the existence or absence of domestic terrorist activities.[3] For instance, Title 18, Section 2331 of the United States Code defines terrorism as the "*premeditated, politically motivated violence perpetrated against non-combatant targets, usually intended to influence an audience*". Another example is Article 421-1 of the French Penal Code which defines a terrorist act as "*any offense committed intentionally in connection with an individual or collective enterprise whose purpose is to seriously disturb public order through intimidation or terror*".[4]

After the events of 11th September 2001, the European Union (EU) has also taken significant steps to provide a comprehensive and standardized definition of

[1] Esmailzadeh, Y. (2023). *Defining Terrorism: Debates, Challenges, and Opportunities*. Lulu Press, 6.
[2] Bakker, E. (2015). *Terrorism and counterterrorism studies: Comparing theory and practice*. Leiden, The Netherlands: Leiden University Press.
[3] Esmailzadeh, Y. (2023). *Defining Terrorism: Debates, Challenges, and Opportunities*. Lulu Press, 82.
[4] Esmailzadeh, Y. (2023). *Defining Terrorism: Debates, Challenges, and Opportunities*. Lulu Press, 88-89.

terrorism within the European legal framework and promote harmonized anti-terrorist strategies among its Member States by enacting the Framework Decision on Combating Terrorism on 13th June 2002. Article 1 defines terrorist offences as those "*under national law, which, given their nature and context, may seriously damage a country or an international organization where committed with the aim of: (1) seriously intimidating a population, or (2) unduly compelling a Government or international organization to perform or abstain from performing any act, or (3) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or international organization*".[5]

In view of the previously highlighted dilemma, several attempts have been undertaken also by academic scholars in the realms of law and social studies to articulate a precise definition of terrorism. In 1988, Schmid and Jongman offered a frequently referenced interpretation of terrorism, defining it as "*the deliberate and systematic use of violence against noncombatants by subnational groups, usually intended to influence an audience, for political purposes*".[6]

Despite the lack of a commonly accepted definition of terrorism, it is possible to identify some fundamental attributes that are intrinsic to terrorism from these different definitions such as the use or threat of violence, the intent to instill fear and coerce, the deliberate focus on civilians or non-combatants, and the overarching pursuit of political, ideological, or religious aims. The seriousness of terrorism and the necessity for a synchronized response are other elements that emerge from the observation of these perspectives, which encourage States to engage in the exchange of vital information, enhance intelligence sharing, and foster collaboration in investigating and prosecuting individuals involved in terrorist activities. In addition, these approaches promote a collective effort which encompasses the protection of human rights, the rule of law and democratic principles to achieve a safer society.[7]

Because terrorists can operate on a local, regional, or global scale, terrorism poses important challenges to national and international security since it damages social stability, weakens trust, and threatens the rule of law as well as human rights. Therefore,

[5] Casale, D. (2008). EU institutional and legal counter-terrorism framework. *Defence Against Terrorism Review*, 1(1), 61-62.
[6] Schmid, A. P., & Jongman, A. J. (1988). *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*. New Brunswick, NJ: Transaction Books.
[7] Cassese, A. (2006). The multifaceted criminal notion of terrorism in international law. *Journal of International Criminal Justice*, 4(5), 933-958.

both governments and international entities are forced to adopt measures to prevent and contrast terrorism as well as ensure national security and the safety of citizens which include tactics such as intelligence gathering, antiterrorism, counterterrorism, and consequence management.[8]

Intelligence gathering represents a fundamental tool to fight criminal activities, especially terrorism, and consists in the collection and analysis of crucial information to identify potential threats, evaluate the capabilities and intentions of terrorist groups, and disrupt their networks and operations. This process can be carried out in several different ways ranging from traditional investigative work to advanced electronic data and voice capture and may sometimes intersect with concerns related to privacy and civil liberties, particularly in relation to innocent actors involved.[9]

Antiterrorist programs are designed to dissuade potential threats through security awareness, protection of potential targets, physical security measures, and the pursuit of individuals associated with terrorism. In addition, the collaboration between private corporations and public entities constitutes another essential aspect of antiterrorism: law enforcement agencies are essential to investigate and prosecute individuals involved in terrorism-related activities through the enforcement of counterterrorism laws, surveillance, arrests, and study of evidence. Moreover, establishing effective legal frameworks is essential to ensure that terrorists can be brought to justice, the principles of due process are respected, and human rights are safeguarded.[10]

Counterterrorism comprises a wide range of proactive strategies, policies and actions undertaken by governments and security agencies to prevent terrorist threats, dismantle terrorist networks and mitigate the impact of potential attacks.[11]

Intelligence research and analysis predominantly reside within large public agencies and are used to examine the collected information related to terrorist activities with the aim of drafting and sharing reports with other entities involved in combating terrorism.[12]

---

[8] Bolz Jr, F., Dudonis, K. J., & Schulz, D. P. (2016). *The counterterrorism handbook: Tactics, procedures, and techniques*. Crc Press, 28.

[9] Cassese, A. (2006). The multifaceted criminal notion of terrorism in international law. Journal of International Criminal Justice, 4(5), 933-958.

[10] Ramraj, V. V., Hor, M., & Roach, K. (Eds.). (2009). *Global anti-terrorism law and policy*. Cambridge University Press.

[11] Spalek, B. (2012). *Counterterrorism*. Community-Based Approaches to Preventing Terror.

[12] Bolz Jr, F., Dudonis, K. J., & Schulz, D. P. (2016). *The counterterrorism handbook: Tactics, procedures, and techniques*. Crc Press, 28.

In response to the growing threat of global terrorism affecting both domestic targets and US interests overseas, the United States has greatly increased its capacity to counter terrorism during the last decade. It must be first mentioned that the direction of the general counterterrorism policy is vested in the US President in conjunction with a coordinating Committee of the National Security Council. This prerogative is outlined in Presidential Directive 39, titled "United States Policy on Counterterrorism", which also emphasizes the need for quick and resolute capabilities in countering terrorism, such as protecting citizens, apprehending terrorists, responding to terrorist sponsors, and assisting victims.[13]

In reaction to the bombings against the US embassies in August 1998 in East Africa, the US Congress convened the Gilmore Commission to investigate innovative techniques for combating both threats and acts of terrorism. The agency suggested a shift in strategy, urging the US military to address weapons of mass destruction threats, refuse to collaborate with terrorists, ensure that terrorists were held responsible for their actions, use diplomatic pressure, and improve the counterterrorism capabilities of countries collaborating with the US and in need of help.[14]

The US secret intelligence service is responsible for protecting government leaders including the President, Vice-President, and their families from terrorist threats and, in coordination with the US Department of State, safeguards foreign politicians and other international representatives during their trips to the United States. The Federal Bureau of Investigation (FBI) deals with crisis management for domestic terrorist attacks, including prevention, immediate incident response, and post-incident operations. The Federal Emergency Management Agency (FEMA) manages the aftermath of terrorist acts. In extraordinary circumstances, local military troops may be involved to save lives, alleviate human suffering, and protect physical assets. On a global scale, the US State Department assists friendly nations in their anti-terrorism efforts, providing financial assistance, training, and intelligence sharing. By proactively acquiring intelligence and partnering with government and non-government organizations, the Central Intelligence Agency (CIA) also plays a critical role in preventing international terrorism.[15]

---

[13] Bolz Jr, F., Dudonis, K. J., & Schulz, D. P. (2016). *The counterterrorism handbook: Tactics, procedures, and techniques*. Crc Press, 22.
[14] *Ibid*.
[15] Bolz Jr, F., Dudonis, K. J., & Schulz, D. P. (2016). *The counterterrorism handbook: Tactics, procedures, and techniques*. Crc Press, 23.

Counterterrorism strategies must achieve a delicate equilibrium between the imperatives of security and the preservation of human rights and civil liberties to prevent the infringement of fundamental freedoms, the marginalization of certain communities, or the violation of international legal standards.[16]

Recent legislative and administrative measures adopted to counter international terrorism have demonstrated their highly restrictive nature by containing severe limitations on fundamental rights and individual freedoms. This phenomenon resulted in a noteworthy alteration of their legal standing, transitioning from ordinary legal instruments to exceptional norms, which makes it difficult to distinguish between ordinary and emergency times. The main problem is represented by constitutions that do not specifically address emergencies other than war, i.e. the Italian Constitution, because they do not contain provisions that govern the imposition of limitations or derogations of individual rights during times of crisis.[17]

Within this context of heightened security concerns, the extensive use of secrecy in the name of national security has progressively surfaced in an alarming manner, particularly within mature democracies, becoming the norm rather than an exception.[18] Indeed, intelligence services, generally entrusted with the collection and assessment of information concerning national security, have assumed an increasingly pivotal role in the execution of counter-terrorism strategies. This is evident in the comprehensive surveillance of the public and the expansion of control mechanisms aimed at ordinary citizens, extending far beyond those individuals merely suspected of engaging in criminal activities.[19]

Although secrecy and democracy may seem incompatible, democratic principles emphasize transparency; in democratic nations, citizens possess the right to access information regarding their government's decisions and activities; and governments are accountable to the electorate for the actions they undertake on behalf of the citizens who have elected them. Consequently, transparency serves as a prerequisite for holding the executive branch accountable since its authority ultimately

[16] Spalek, B. (2012). *Counterterrorism*. Community-Based Approaches to Preventing Terror.
[17] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 879.
[18] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 884.
[19] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 885.

derives from the citizens. Therefore, democracy relies on the transparency of governmental political actions.[20]

In light of what has been discussed until now, this dissertation aims at describing, explaining and analyzing the program of extraordinary renditions carried out by the CIA in collaboration with foreign countries to arrest, detain, transfer and interrogate suspected terrorists involved in the 9/11 terrorist attack. As opposed to other anti-terrorist measures, this practice was the most brutal one because it was unjustifiably used by a well-established democracy such as the United States. Thus, it is noteworthy to understand whether Courts all over the world were able to do something when dealing with these secret operations which entailed a blatant violation of fundamental rights and principles on which a democracy is founded.

In order to do so, the first Chapter will describe the essence of extraordinary renditions, which were used to abduct and deport suspects of terrorism in secret detention centers for the purpose of interrogation without granting them any legal process, and the reasons behind their implementation, namely the 9/11 terrorist attack which led George W. Bush to expand the program to fight Al-Qaeda's terrorist networks all over the world. Then, it will trace the historical origins of irregular renditions as well as the US Supreme Court's interpretation on this matter through the analysis of the first notorious cases. In addition, it will depict the main terrorist attacks between the 1980s and 1990s and their impact in the United States and the evolution of US counterterrorism: Presidents Reagan and Clinton reacted by implementing the so-called "renditions to justice" to bring criminals before US Courts while George W. Bush adopted a strategy based on military force. Finally, to better understand the implications of this program, it will be fundamental to examine in detail the main practices, namely torture and cruel, inhuman, and degrading treatment; transfer to torture and cruel, inhuman, and degrading treatment; and arbitrary detention and enforced disappearance, as well as the fundamental rights involved in the secret operations carried out by the CIA to understand the obligations and boundaries that States must comply with.

The second Chapter will explain how the program of extraordinary renditions, which was noticeably kept secret due to reasons of national security, was unveiled in the United States thanks to the contribution of *The Washington Post* which collected and published witnesses from former CIA officials as well as several NGOs which

[20] *Ibid.*

started to investigate and issue official reports that unveiled various aspects of the secret activities. It will also examine how the CIA's operations were discovered in Europe through the investigations carried out by European institutions which assigned the task of reporting all the details that could be discovered, especially those related to European countries' involvement, to Special Rapporteurs. Afterwards, the most pertinent cases of extraordinary renditions will be described including one of the most relevant terrorist leaders Abu Zubaydah and, in the end, it will explore the development of US counterterrorism policy under the Obama administration to understand whether the United States ceased to carry out the practice of extraordinary renditions.

The final Chapter represents the core of this dissertation since it will examine the judicial reasoning and interpretations related to extraordinary renditions and the balance between protecting national security against safeguarding fundamental human rights. To do so, it will analyze in detail the three most significant cases from a judicial point of view: Maher Arar, Khaled El-Masri and Abu Omar. The first will expose the US Courts' approach to victims of extraordinary renditions, the second will describe the judicial interpretation of the European Court of Human Rights (ECtHR) and the third will show the different standpoints on the role of European States involved in the secret CIA program adopted by national and supranational judicial bodies.

CHAPTER I - EXTRAORDINARY RENDITIONS: ORIGINS, EVOLUTION, AND LIMITS

Extraordinary renditions, which consisted in the arrest and transfer of suspected terrorists by the Central Intelligence Agency (CIA), in collaboration with other countries, to secret locations to detain and interrogate them, started to be used within US counterterrorism policy by the George W. Bush administration. During Clinton's presidency in the 1990s, several terrorist attacks affected the United States domestically and abroad thus renditions were used to bring terrorists before US Courts to be prosecuted for the crimes they committed. After the so-called 9/11 terrorist attacks against the New York's Twin Towers carried out by the most influential terrorist organization, namely Al-Qaeda, the scope of renditions changed because Bush's counterterrorism approach was proactive, meaning that it included and legitimized the use of force. Indeed, extraordinary renditions were used to detain and interrogate terror suspects to gather crucial information on their involvement in terrorist activities to destroy Al-Qaeda and its related terrorist networks. This will be all analyzed in detail in the first section of this Chapter, which will help the reader to understand the nature and framework of extraordinary renditions.

Since colonial times, the United States have resorted to the practice of rendition for slave and criminal fugitives and the second section of the Chapter will trace the history and evolution of irregular renditions by reporting the most significant legal cases. Indeed, the evolution of the US Supreme Court's interpretation on cases of renditions will be examined starting from the very first case *Ker v. Illinois* in 1886 until the latest crucial decision in *United States v. Alvarez Machain* (1992).

To understand how the practice of renditions evolved since the 1980s, the third section will focus on Reagan and Shultz's counterterrorism policy and on the earliest terrorist attacks that affected the United States at the domestic and international level. Then, Clinton's approach to counterterrorism will be examined together with the most crucial Presidential Directives that provided the basis to which George W. Bush inspired.

After having explained in detail how the extraordinary rendition and secret detention programs, both carried out by the CIA, were implemented, the last section will explore the prohibitions of torture and cruel, inhuman, and degrading treatment; transfer to torture and cruel, inhuman, and degrading treatment; arbitrary detention and enforced disappearance as well as the potentially affected human rights.

The aim of the first Chapter is to explain the phenomenon of extraordinary renditions by focusing on the historical and political context in which they were born and evolved, namely the years in which the terrorist threat started to be considered as something stronger than ever, the essence of such activities and, finally, the limits within which countries could operate.

1) Extraordinary Renditions Under the George W. Bush Administration

In the 2001 general elections, the Republican party's candidate and the former President George H.W. Bush's son, George W. Bush, became the 43rd President of the United States. During his first year of office, the most tragic event in the United States' history occurred: the Al-Qaeda's suicide terrorist attacks against the World Trade Center's Twin Towers in New York City and the Pentagon in Virginia on 11th September 2001, commonly known as 9/11. The nineteen Islamist terrorists took the control of four aircrafts which were used for domestic flights and crashed them against the buildings, which were destroyed, killing almost 3000 people including themselves and the CIA immediately identified Al-Qaeda as responsible behind the attacks. This represents still today the deadliest terrorist attack in human history. The 9/11 attacks represented the most important turning point because international terrorism gained relevance in both domestic and international politics, Al-Qaeda started to be considered as a strong war machine rather than a small group of mentally ill people and security became the crucial issue in the public debate.

In response to the attack, the United States invoked Article 5 of NATO on collective security which legitimized all NATO members to jointly respond, and President Bush immediately launched the Global War on Terrorism (GWOT), known as the War on Terror, which was an international counterterrorism military operation that lasted until 2021, when the US troops withdrew from Afghanistan. The main aim was fighting Al-Qaeda's terrorist networks in Afghanistan and Pakistan and other objectives included killing Bin Laden and Al-Zarqawi, destroying terrorist groups, putting an end to States sponsoring terrorism, improving the conditions which led people join these organizations and protecting US nationals domestically and globally. Within the GWOT, Bush launched the Operation Enduring Freedom which consisted in the invasion of Afghanistan to contrast Al-Qaeda's networks by destroying training

camps and arresting affiliated terrorists as well as to remove the Taliban regime, whose leader Bin Laden had strong connections with the organization.[21]

Furthermore, President Bush adopted the Authorization for Use of Military Force (AUMF) which granted him the power to take all necessary measures against all those involved in 9/11, including the use of US Military Armed Forces. This provision is fundamental because it was used several times by the US government to justify all the operations involved to fight international terrorism, including extraordinary renditions. In addition, it is important to remember that once the Head of the State declares a state of emergency, the President inherits relevant powers which enable him or her to suspend fundamental legal rights and the difference between public and private disappears.[22]

The government's official response to the attacks was the National Strategy for Homeland Security which was aimed at enhancing the prevention of terrorist attacks, the protection of US citizens and buildings, the recovery from the attacks and the redefinition of security law in the United States. To do so, the Department of Homeland Security was created as a federal executive department to deal with security, counterterrorism, border control, immigration, deterrence, and supervision. US authorities recognized that globalization, easy border-crossing, rapid access to information and multicultural communities had to be regularized in terms of security thus it was necessary to adapt the existing rules.

In the same year, President Bush issued a series of National Security Presidential Directives (NSPDs) to proclaim his decisions on nationwide security which focused on the organization of the National Security Council System, the improvement of military quality of life, defense strategy, deterrence, intelligence, the fight against the terrorist threat and the US Strategic Nuclear Forces. In addition, he also adopted Homeland Security Presidential Directives (HSPDs) for homeland security which regulated the Homeland Security Council and revised immigration policies to contrast terrorism.[23]

After having analyzed Bush's response and approach to fight international terrorism, it is important to highlight the differences between Clinton's strategy and

[21] Roberts, A. (2005). The 'war on terror' in historical perspective. *Survival*, 47(2), 101-130.
[22] Grimmett, R. F. (2006). *Authorization for use of military force in response to the 9/11 attacks (PL 107-40): Legislative history*. Library of Congress Washington DC Congressional Research Service.
[23] See at https://irp.fas.org/offdocs/nspd/index.html

Bush's one to also understand the urge need for the United States to actively react. The main difference between Clinton's counterterrorism policy and Bush's one was that the first considered it as a matter of law enforcement while the other believed it to be a military issue. However, the Bush administration followed, and adapted Clinton's principles contained in his counterterrorism policy including economic isolation, multilateral cooperation, increased resource allocation and retaliation. In addition, both considered it as a crucial threat to national security. This demonstrated a coherent and uniform US policy based on a strategy which was born at the beginning of the 1990s.

Contrarily to Clinton, Bush had to react immediately because there was no time to discuss on which measures would better fit for the situation thus, he had to rely on the existing means on counterterrorism. Bush's militarization of US counterterrorism strategy represented a novelty in US policy to combat terrorism and it was justified and accepted by all regardless of political ideas, social class, or nationality. Bush's military approach included the acceptance of the use of force, a rapid increase of US military and defense spendings, the extensive use of economic sanctions in conjunction with political tension and the legitimization of military pressures within the UN system.[24]

More specifically, Bush pushed for an offensive rather than defensive strategy based on retaliation that directly included not only terrorist organizations but also those supporting them as well as military operations which became the priority. Then, he also imposed economic sanctions against States that sponsored international terrorism such as Syria and Iraq, blocked US exports, froze and seized their assets, confiscated property, limited financial transactions also for all those who had contacts with terrorism through executive orders and acts. Furthermore, Bush also promoted international cooperation in the fight against terrorism by participating in several meetings: the G8 members adopted the Recommendations on Counterterrorism, the Counter-Terrorism Action Group, the Man-portable Air Defense Systems and the Secure and Facilitated International Travel Initiative while the UN Security Council created the Counter-Terrorism Committee (CTC) and passed several resolutions to enhance participation and cooperation among all nations.[25]

[24] Badey, T. J. (2006). US counterterrorism: Change in approach, continuity in policy. *Contemporary Security Policy*, 27(2), 308.
[25] Badey, T. J. (2006). US counterterrorism: Change in approach, continuity in policy. *Contemporary Security Policy*, 27(2), 315.

Now that it has been clarified why Bush needed to rapidly adopt a stronger counterterrorism strategy because he had no time to reflect and Al-Qaeda threatened the United States' hegemony worldwide, the evolution of the extraordinary rendition program will be explained more in detail.

Within his counterterrorism policy, one of the most crucial shifts caused by the 9/11 terrorist attack was the large expansion of the program of renditions, which were already used by US authorities to arrest and prosecute terrorists before US Courts during the Clinton administration. The relevant difference between renditions and extraordinary ones is that the latter entailed an illegal arrest and transfer of suspected terrorists to third countries with the purpose of detention and interrogation rather than prosecution.

Indeed, although an official definition of extraordinary rendition was never provided by US authorities, it consisted in the State-sponsored capture of suspected terrorists and deportation of high-value detainees from one country to another to detain and interrogate them without any legal process, meaning that their right to legally challenge their imprisonment before a judicial authority was not guaranteed. This new program was mainly carried out by the CIA in collaboration with other States which arrested them or harbored detention centers as well as non-State actors such as private companies which organized the flights to relocate detainees. Prisoners were brought to overseas military facilities controlled by the CIA such as those at Guantanamo Bay or in Afghanistan which were outside the boundaries of law meaning that they were deprived of their right to challenge their arrest or imprisonment. In addition, they were secretly interrogated by US officials by using specific means to gather information on their suspected participation in terrorist activities to destroy terrorist networks. It is important to note that in most cases, the countries to which detainees were transferred had very low standards of rights' protection and known for employing torture against prisoners such as Egypt, Jordan and Afghanistan. Therefore, it represented for the United States a way to circumvent both national and international human rights law.

To carry out the program of extraordinary renditions, President Bush issued a Presidential Directive which authorized CIA agents to abduct and render suspected terrorists and to create secret detention facilities, known as "black sites", to detain and interrogate high-value detainees outside the United States so that any means could be

used.[26] Indeed, they were taken by private companies on unregistered planes or on flights whose destination was unknown and transferred to these places so that they could not be neither identified nor registered to circumvent any control.[27] Therefore, the extraordinary rendition and secret detention programs were two sides of the same coin.

The secret detention program started during the 1980s under the Reagan administration where several terrorists were detained in foreign countries such as Egypt and Jordan by the CIA. However, after 9/11, the CIA collaborating with foreign intelligence services kidnapped more individuals including those who were suspected to be linked with the terrorist attacks. Most of them were brought to the Guantánamo Bay detention center, which has always generated doubts over sovereignty and thus responsibility since it was in Cuba but under US authority. During this period, the facility was strengthened to increase its capacity to harbor more enemy combatants as well as to intensify the interrogation methods used to obtain relevant information. In 2002, Camp X-Ray was opened and housed several Afghan prisoners and then it was closed to transfer them to Camp Delta while children were kept in a different detention center known as Camp Iguana. Other detention camps used by the CIA were Abu Ghraib in Iraq and Bagram Air Force Base in Afghanistan.[28]

It is important to highlight that the transfer of detainees did not require an authorization neither by the State involved nor by the US President. Both extraordinary renditions and the secret detention programs included the kidnapping and disappearance of prisoners, their secret and illegal deportation to unknown territories and the use of physical means during interrogations and detention.

Within these operations, the CIA developed the so-called "enhanced interrogation techniques" to obtain relevant information to disrupt terrorist organizations which consisted in the use of physical means that inflicted physical and psychological pain to detainees. These corrective and coercive methods were diversified: waterboarding or simulated drowning, uncomfortable positions, confinement in a box for many hours, insulting, slapping, beating, forced nudity, sleep

[26] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 14-15.
[27] Duffy, H. (2017). *Detention and Interrogation Abroad: The 'Extraordinary Rendition' Programme*. Cambridge University Press, 93.
[28] Hillebrand, C. (2009). *The CIA's extraordinary rendition and secret detention programme: European reactions and the challenges of future international intelligence cooperation*. Netherlands Institute of International Relations Clingendael, 16.

deprivation, exposure to extreme temperatures, dietary restraints, wall standing and many others. In 2002, the Justice Department's Office of Legal Counsel (OLC) approved them in several legal opinions: according to the Assistant Attorney General Jay Bybee, these means did not entail torture because they did not lead to the loss of organs or death and that prosecuting officials under the US anti-torture statute would breach the President's war powers in a memorandum in 2002.[29] However, as a matter of fact most of these techniques entailed torture as well as inhuman, cruel and degrading treatment.

Finally, it must be mentioned that both the extraordinary rendition and secret detention programs operated by the CIA were kept secret because, as it was stated, Bush needed an urgent and efficient counterterrorism response to eliminate State-sponsored international terrorism. Indeed, since the beginning of such activities in 2001 all the information related to them emerged throughout the years from testimonies coming from US agents involved and former detainees who were released and interviewed. Although some progress has been made, today it is still uncertain to what extent other countries and which ones contributed to these covert operations.

2) History of Renditions: from Etymology to Earliest Irregular Cases

To understand the origins of extraordinary renditions, it is necessary to analyze the historical roots of rendition and extradition in the United States which were combined since the beginning within Article 4, section 2 of the US Constitution.[30] According to law, rendition is defined as the legal procedure of surrendering or handing over a fugitive by a jurisdiction to another for law-enforcement purposes, such as charging him or her with a crime. The term "rendition" originates from the obsolete French word *reddition* and the Latin verb *reddere*, which means "to return". Indeed, the English term "render" derives from *reddere* in fact rendition is the act of rendering. The English word "surrender" comes also from the Old French word *rendre*, which means "to deliver" and affected the passage from the word *reddition* to rendition.[31] On the other hand, extradition is "the act of making someone return for trial to another country or State where they have been accused of doing something illegal" and derives from the French word *extradition* and the Latin term *ex*, which means out, and *traditionem*, that means

[29] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 16.
[30] Lasch, C. N. (2013). Rendition resistance. *North Carolina Law Review*, 92(1), 163-164.
[31] Online Etymology Dictionary, rendition (n.), at https://www.etymonline.com/word/rendition

handing over. In addition, it also comes from the Latin verb *tradere*, which literally means "to hand over".[32] Although both terms "rendition" and "extradition" have a similar meaning, the main difference is that the first involves a secret operation which can affect innocent people while the second entails a lawful request by a State to send back a criminal fugitive.

During colonial times, rendition and extradition were first used by slave owners who wanted to retake their slaves that escaped to confining territories within the United States or abroad, there were no formal rules that regulated these processes and a strong division over the issue of slavery was present.[33]

In *Prigg v. Pennsylvania* (1837), the US Supreme Court clarified that the Congress had exclusive power to enact legislation on these issues, but it could not force State officials to implement federal law or retake fugitive slaves.[34] This was confirmed by the 1850 Fugitive Slave Act, which established that federal officials could exclusively enforce rendition, and by the US Supreme Court in *Kentucky v. Dennison* (1860).[35]

In 1848, the first federal extradition statute was issued by the US Congress to regulate extradition, which could be authorized only if an extradition treaty between the two countries involved existed. Since then, the United States started to adopt bilateral extradition treaties with several countries worldwide.[36] In addition, the American Civil War ended the disputes over fugitive slaves and several African Americans who became free from slavery migrated to the North to escape from racism.[37]

In general, a Court's power to enforce jurisdiction over individuals relies on whether they are physically present within the borders of the State pursuing to practice such authority. However, there have been numerous cases of forcible abduction in which human beings have been deported to another country to be tried. Thus, the main legal question was whether the receiving country's Court could exercise jurisdiction

---

[32] Cambridge Dictionary, extradition (n.), at https://dictionary.cambridge.org/dictionary/english/extradition; see also https://www.etymonline.com/search?q=extradition for the etymology.
[33] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics,* 25(4), 820.
[34] Finkelman, P (1979). *Prigg v. Pennsylvania and Northern State Courts: An Anti-Slavery Use of a Pro-Slavery Opinion*. 25 Civil War History 5, 7-8.
[35] Lasch, C. N. (2013). Rendition resistance. *North Carolina Law Review*, 92(1), 179.
[36] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 823-824.
[37] Civil Rights Act of 1871, chapter 22, 17 Stat. 13, 13.

over people who have been abducted. The principle of *male captus, bene detentus*, which means improperly captured, properly detained, has mostly been dominant in the early years meaning that Courts, including the US ones, rejected any case of individuals brought before them after being kidnapped by other States.

The US Supreme Court was called to adjudicate a case of rendition to another State for the first time in 1886: Ker, a citizen of Illinois charged with criminal records that escaped to Peru, was captured by Chilean authorities, and sent back to his State of origin where he was kept in custody. Therefore, he appealed to the US Supreme Court claiming that the Illinois Court could not exercise its jurisdiction because he was arrested in Peru and then brought to the United States without having invoked the 1870 extradition treaty between the two countries. Lima was occupied by Chilean forces at that time, and this is the reason why this treaty could not be executed. First, the US Supreme Court agreed to set aside jurisdiction over this case simply because of the mere physical presence of the defendant before the Court regardless of how he was brought there. Indeed, the fact that he was delivered to the Court in non-regular ways was not sufficient to enable him to escape criminal prosecution. Then, it decided that his transfer from Peru to the United States for prosecution, without invoking the extradition treaty, did not infringe the US Constitution, laws, or treaties. Another crucial aspect of this case is the affirmation of the Court that, according to the Sixth Amendment of the US Constitution, an impartial judge must try the extradited defendant. This case represented an important judicial remark on renditions and was considered as a rule by US Courts in the following decades.[38]

In 1926, the Uniform Criminal Extradition Act (UCEA) was adopted to cover all interstate transfers of fugitives from criminal justice and, by 1983, it was adopted by all legislatures in the United States. It also included the cases of fugitives from justice that were detained in other States in which a detainer, which consisted in a request, could be used by States to detain that person. To avoid any abuse, the Interstate Agreement on Detainers (IAD) was adopted in 1956. Since this moment, the relationships between legislatures concerning fugitives from justice have been regularized.[39]

[38] *Ker v. Illinois*, No. 118 U.S. 436, 444 (US Supreme Court 1886).
[39] Lasch, C. N. (2013). Rendition resistance. *North Carolina Law Review*, 92(1), 195-200.

In 1952, the US Supreme Court confirmed its previous jurisprudence developed in Ker in *Frisbie v. Collins* arguing that, first, the State could capture an individual to take him from one jurisdiction to another to be tried and the Court's power to prosecute him could not be impeded by the fact that the abduction was forcible. Collins was sentenced to life because of a murder and was forcibly abducted to Michigan for trial. Indeed, he filed a *habeas corpus* petition alleging a violation of the Fourteenth Amendment of the US Constitution and the 1932 Federal Kidnapping Act to a US District Court, which rejected it. This case has been recalled by the Supreme Court in other cases arguing that any conviction could be nullified because the perpetrator was illegally arrested by State authorities. Indeed, the Ker-Frisbie doctrine developed according to which any erring person could not escape prosecution simply by the fact that he was brought to trial unwillingly.[40]

Between the 1970s and the 1990s, there was a huge will to modernize extradition treaties with foreign countries especially because of the expansion of international drug trafficking.[41] During this period, it is possible to draw attention to the United States' refusal to adopt multilateral extradition treaties such as the 1970 European Convention on Extradition and the 1981 Inter-American Convention on Extradition. The main reason behind this was that bilateral accords were more aimed at pursuing the United States' interests. The only exceptions were all the agreements on hostage taking, terrorism and drug trafficking which included extradition.[42] Thereupon, more criminal offences were included within these extradition treaties such as the principle of dual criminality, which permitted extradition for those that committed a crime which was punished in both States for at least one year. In addition, more specific crimes were covered such as robbery and burglary with France or mutilation with Mexico.[43]

When extradition treaties with other countries did not exist, informal means were used by the United States for the rendition of fugitives from abroad that consisted in collaborating with foreign police or private entities by providing them the adequate competences to arrest these criminals. This has been the origins of irregular renditions

[40] *Frisbie v. Collins*, No. 342 U.S. 519, 522 (US Supreme Court 1952).
[41] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 825.
[42] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 827.
[43] Treaty for the Extradition of Persons Charged with Crimes (1861), US-Mexico, 12 Stat. 1199.

which started when Mexican and Canadian governments illegally arrested criminal fugitives along the confining borders and rendered them to the United States. In contrast, the United States has always refused to deliver fugitives to foreign governments without giving them the possibility to challenge the rendition before US Courts. The only means that could be used to deliver them to other nations were immigration procedures which allowed the United States to deport those who tried to illegally enter the country and were arrested within the territory. This method was used to expel many Italian members of mafia, Nazi offenders, and South American drug traffickers. Moreover, as it was established by the Ker-Frisbie doctrine, there were no limits for US officials to abduct fugitives from foreign countries according to US law. However, the only limitation was imposed in 1974 according to which the rendition of fugitives could not be performed if US officials employed inhuman treatment while arresting the criminal.[44]

During the 1970s, the United States' authorities wished to contrast drug trafficking thus started to collaborate with Latin American countries, who cooperated because the individuals involved were non-nationals, to arrest drug dealers without the use of legal extradition rules.[45] This cooperation consisted in a variety of ways to arrest these individuals including stopping fugitives during their journeys or flights, inducing them to go to other countries or using undercover operations. Indeed, there was a move in the US policy because federal officials wanted to prosecute foreign drug dealers before US Courts thus the Drug Enforcement Administration (DEA) was created to regularize this kind of rendition.

An example of irregular rendition was the request of the United States in 1971 to extradite a Corsican drug dealer, called Auguste Ricord, to Paraguay, which at the beginning refused claiming that the extradition treaty between the two countries did not include crimes on drug, he never entered the United States' territory, and the principle of dual criminality could not be applied. Then, the US President Nixon insisted through diplomacy although the President of Paraguay did not want to make any compromise.

[44] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 857-859.
[45] Solomon, R. (1979). The Development and Politics of the Latin American Heroin Market. *9 J. Drug Issues*, 349-363.

However, one of his close friends died thus extradition was then granted by the local Court and Ricord was sent to New York.[46]

Since the 1980s, the United States intensified the use of irregular renditions because of the growth of the cocaine business, hostage taking, the Iranian Revolution and the spread of terrorism. For instance, in 1985 a group of Mexican drug dealers abducted, tortured, and killed two DEA agents and, although at first Mexico did not collaborate with the United States to investigate this issue, Mexican police arrested and prosecuted them. In some cases, they were also delivered to US Courts.[47]

The first case where a suspected terrorist, Fawaz Younis, was kidnapped by US authorities abroad, namely in the Mediterranean, occurred in 1987. It is important to note that the extraterritorial arrests of suspected terrorists represented just one section of the overall US counterterrorism strategy at that time because at the basis there was a cooperative exchange of crucial information among intelligence and police authorities of different countries.[48]

One relevant case concerning rendition resistance was *Puerto Rico v. Brandstad* in 1987 where the judge Marshall overruled *Dennison* stating that governors must respect the duty coming from the Extradition Clause. A white citizen of Iowa, Ronald Calder, was indicted for the murder of two people in Puerto Rico thus he escaped to Iowa convinced to avoid the extradition process. However, although the governor of Iowa refused to transfer Calder to Puerto Rico, he was forced to respect the obligation of the Extradition Clause. Therefore, it was established that the federal government can force State legislatures to comply with their duty since it was directly imposed by the Constitution itself. This case did not solve the question of whether the Tenth Amendment forbade the federal government to oblige a State to comply with the obligation to render immigration detainers.[49]

In the 19th century, the death penalty became a problem especially for foreign governments that were reluctant to extradite fugitives to the United States and it persisted up to nowadays. In the 20th century, a compromise was found in which the foreign country agreed to extradite fugitives from justice while the United States agreed

[46] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 862-863.
[47] Shannon, E. (1988). *Desperados: Latin Drug Lords, US Lawmen and the War America Can't Win*, 231-244.
[48] Engelberg, S. (1986). US is Said to Weigh Abducting Terrorists Abroad for Trials Here. *The New York Times*.
[49] Lasch, C. N. (2013). Rendition resistance. *North Carolina Law Review*, 92(1), 201-202.

to avoid capital punishment. For instance, there was a particular case in which, in 1985 Canada decided to extradite a person charged with several murders only after the United States' promise to avoid death penalty while in 1989, it extradited another person to California although the legislature did not ensure any ban on capital punishment.[50] In *Soering v. United Kingdom*, the European Court of Human Rights in 1989 intervened by stating that the UK could not deliver Soering to a Virginian Court in the United States without any promise to ban the imposition of the death penalty because evidence showed that the local prison employed violence and inhuman treatment.

Another notorious case of an irregular rendition carried out by the United States' authorities was the one concerning the kidnapping of Manuel Noriega in 1989 after the US invasion of Panama in the Operation Just Cause. The US President Bush defended the assault by declaring it as a self-defense response to Panama's killing of a US agent. The rendition was irregular because he was first arrested and sent to the US Howard Air Force Base in Panama by the US Marshals Service and then rendered to DEA agents, who took him to Miami to prosecute him before US Courts. However, this rendition was highly contested by the UN General Assembly, the Organization of American States, other nations, and many academics of international law.[51]

Finally, in 1992 the Ker-Frisbie doctrine was further implemented by the US Supreme Court in *United States v. Alvarez Machain*, where it decided that detainees subjected to forcible abduction from Mexico could be tried before US Courts for breaches of US criminal law although there was an extradition treaty with that State. [52] This is the most popular case on this subject in the United States and regarded the murder of a US agent working at the DEA in Mexico in 1985. After some years, a Mexican national, Alvarez Machain was condemned by US Courts for his involvement in this killing. Francisco Sosa, who was a Mexican policeman collaborating with DEA's agents, illegally arrested and deported him to Texas where he was captured by US authorities. The trial Court and the Ninth Circuit Court of Appeals accepted Machain's claim that US Courts had no jurisdiction to hear his case because the extradition treaty between the United States and Mexico was infringed by the unlawful arrest. Therefore, the US government appealed to the Supreme Court, which ruled that the extradition

[50] Zagaris, B. (1989). *Canada Extradites Ng Without Seeking Death Penalty Assurances*, International Enforcement Law Report 420.
[51] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 879-880.
[52] *United States v. Alvarez Machain*, No. 504 U.S. 655 (US Supreme Court 1992).

treaty was not violated by the abduction of Machain and that any US Court could exercise its jurisdiction over this case despite the breach of international law coming from the illegal arrest. Thus, the Supreme Court reversed the lower Courts' judgements and advocated for the Ker doctrine, which was treated as an authority for an entire century since 1886. However, Machain was acquitted by the trial judge because of the lack of evidence against him and fled to Mexico.[53] A great deal of international human rights law academics condemned the US Supreme Court's jurisprudence in supporting the illegal expansion of police authority by the US administration in other countries. In 1993, Machain brought both Sosa and the US government for his kidnapping and arbitrary confinement before the District Court, which confirmed only the claim against Sosa, who had to award him with a fine of $25,000 for damages. Therefore, on 11th September 2001 both appealed, and the San Francisco's Ninth Circuit Court of Appeals sitting in a three-judge panel confirmed the previous decision and added that the US government was accountable for Machain's illegal kidnapping under the Federal Tort Claims Act. Specifically, this Act enabled individuals to sue the United States before Courts for any tort experienced. In 2003, the Ninth Circuit Court of Appeals sitting in its entirety acknowledged its judgement and affirmed that the arbitrary capture and custody violated international law. This case was crucial because, for the first time, a US Federal Court of Appeals enabled a foreign citizen to bring proceedings against the US government for abduction and arbitrary detention.[54] Nonetheless, the lower Court's decisions were overruled by the Supreme Court which granted *certiorari* in both cases: in *Sosa v Alvarez Machain* (2004), it argued that, despite the infringement of international law in Machain's abduction, not enough foundation was provided by the Alien Tort Statute for the suit.

In conclusion, it must be noticed that the process of international rendition of fugitives was bound by political and practical constraints rather than legal ones, in fact if both the US government and Courts wanted to prosecute an individual within the US territory, there were few limitations to block them. Today, extradition is considered as a crucial tool to repress criminal fugitives.

[53] Lowenfeld, A. F. (1990). *US Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 *AJIL*, 444-461.
[54] Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics,* 25(4), 872.

3) How the Intensification of Terrorism and US Counterterrorism Policy led to Extraordinary Renditions

After having analyzed the origins of rendition and extradition, it is crucial to examine the United States' counterterrorism strategies adopted since the 1980s, when international terrorism started to become a major threat to the US national security. Therefore, the United States started to carry out a program of renditions, which consisted in the relocations of detainees into the United States' territory or to foreign countries for criminal prosecution without ensuring them any legal process.[55]

In 1981, the Republican Party's candidate Ronald Reagan became President of the United States after the crucial period of the hostage crisis in Tehran which importantly affected the previous Carter administration and the whole nation. Reagan strengthened national defense by doubling defense spending and, together with the Secretary of State Shultz, introduced a new approach to counter terrorism since the terrorist threat and political violence deepened.[56] This entailed a shift from passive to proactive policies and it was formalized by the Secretary of State Shultz in the 1984 speech at the Park Avenue Synagogue in which he argued that the solution to fight terrorism was military, which then became known as the Shultz Doctrine, and based on prevention, pre-emption, and retaliation. He also highlighted the necessity of flexibility in terms of methods, speed of response and location where to operate in the fight against terrorism.[57] The inclusion of civilians as targets of these preventive measures contributed to the increase of hatred towards the United States.[58] This policy was formalized through the National Security Decision Directive No. 179 which created the Task Force on Combating Terrorism led by the Vice President George Bush to improve counterterrorist programs. The redefinition of terrorism and the shift towards a multi-dimensional counterterrorism strategy included deterrence, proactive action and the mixture of military, diplomatic and political processes. Furthermore, the United States,

---

[55] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 13.

[56] Stohl, M. (1987). States, and State Terrorism: The Reagan Administration in the Middle East. Arab Studies Quarterly. *Pluto Journals*, Terrorism, and the Middle East: Context and Interpretations, 9(2), 162. https://www.jstor.org/stable/41857905

[57] Toaldo, M. (2012). The Reagan Administration and the Origins of the War on Terror: Lebanon and Libya as Case Studies. *New Middle Eastern Studies* 2, 1.

[58] Stohl, M. (1987). States, and State Terrorism: The Reagan Administration in the Middle East. Arab Studies Quarterly. *Pluto Journals,* Terrorism, and the Middle East: Context and Interpretations, 9(2), 165. https://www.jstor.org/stable/41857905

through a CIA operation, collaborated with the Lebanese intelligence sector to prepare and equip counterterrorist units to fight against terrorist suspects.[59]

The 1983 bombing of the US Marines' bases in Beirut as well as the increase of American nationals' fatalities in terrorist attacks which amounted to 271 deaths, mostly in Lebanon, forced the Reagan administration to find an effective reaction.[60] Indeed, Reagan proposed four bills to the US Congress to fight international terrorism. The first was aimed at implementing at the domestic level the International Convention Against the Taking of Hostages which was ratified by the United States in 1981. It also extended federal jurisdiction over kidnappings aimed at blackmailing any actor and provided for sanctions against those that took hostages. The second was the Aircraft Sabotage Act and the other two were the Act for Rewards for Information Concerning Terrorist Acts and the Prohibition Against the Training or Support of Terrorist Organization Act, which would have given the Justice Department the power to prosecute those supporting terrorism.[61]

The Libyan ruler, Muhamad Gaddafi, was thought to finance international terrorism and collaborate with the Soviet Union, thus, several scholars believed that he represented an opportunity for Reagan to restore the United States' credibility after the failures of Vietnam and Iran and to contrast Soviet allies.[62] Although the CIA launched some warnings on the overthrowing of Gaddafi arguing that there were some risks for the United States, Reagan and the Secretary of State decided to act and pursue regime change in Libya.

After the 1986 bombing in a West Berlin's discotheque where many American soldiers died, Operation *El Dorado* Canyon was launched by Reagan to carry out an attack against Libya via air strikes. This event marked a crucial step in the US strategy of counterterrorism because the United States decided to use military force to respond to state-sponsored terrorism and this contributed to the escalation which ended up with the 9/11 attack. Then, Reagan formed its own intensified counterterrorist strategy to

---

[59] Stohl, M. (1987). States, and State Terrorism: The Reagan Administration in the Middle East. Arab Studies Quarterly. *Pluto Journals*, Terrorism, and the Middle East: Context and Interpretations, 9(2), 168. https://www.jstor.org/stable/41857905

[60] Stohl, M. (1987). States, and State Terrorism: The Reagan Administration in the Middle East. Arab Studies Quarterly. *Pluto Journals,* Terrorism, and the Middle East: Context and Interpretations, 9(2), 163. https://www.jstor.org/stable/41857905

[61] Nash Leich, M. (1984). Four Bills Proposed by President Reagan to Counter Terrorism. *The American Journal of International Law*. Cambridge University Press. 78(4), 915-928.

[62] Toaldo, M. (2012). The Reagan Administration and the Origins of the War on Terror: Lebanon and Libya as Case Studies. *New Middle Eastern Studies 2*, 5.

fight Libyan support on terrorism which included economic sanctions and limited military strikes.

Moreover, in 1986 the US President, through the National Security Decision Directive No. 207, authorized the "renditions to justice" for those suspected of criminal wrongdoing coming from territories in which safe custody could not be provided including countries which had no government control, those that supported international terrorism, airspace, and international waters. They were carried out by US authorities into US territory.

Some scholars argued that Reagan's intervention against terrorism in the Middle East was highly influenced by the Cold War mindset: his administration focused primarily on the Soviet Union and its allies rather than on the emergence of political Islam as well as the regional dynamics in the Middle East produced by the 1979 Iran revolution.[63] Another problem was that terrorism was conceived as a new threat rather than something which was evolving and producing more problems to the United States' hegemony. Non-State entities, such as the Abu Nidal Organization, were undermined by the administration which failed to believe that it could represent a problematic enemy for the nation without the aid of any State.[64]

Furthermore, he provided the basis for the subsequent George W. Bush's War on Terror during the 2000s which incorporated the classification of terrorism as a form of warfare, the use of military force, the application of preventive measures and the idea of overthrowing regimes.[65] Moreover, the enlisted countries that were thought to sponsor terrorism by the Reagan administration were then used by Bush to employ his own counterterrorism policy.

In 1989, the Republican Party won the elections again and Reagan's Vice-President, George H. Bush, became the President of the United States and contributed to the end of the Cold War by participating in the Fall of the Berlin Wall which reunified Germany. It must be remembered that, after the Iraqi invasion of Kuwait, the United

[63] Toaldo, M. (2012). The Reagan Administration and the Origins of the War on Terror: Lebanon and Libya as Case Studies. *New Middle Eastern Studies 2*, 9.
[64] Toaldo, M. (2012). The Reagan Administration and the Origins of the War on Terror: Lebanon and Libya as Case Studies. *New Middle Eastern Studies 2*, 16.
[65] Toaldo, M. (2012). The Reagan Administration and the Origins of the War on Terror: Lebanon and Libya as Case Studies. *New Middle Eastern Studies 2*, 2.

States participated in the First Gulf War from 1990 to 1991 by leading a coalition of 35 States which freed Kuwait from Saddam Hussein.[66]

In 1993, the Democratic Party's candidate Bill Clinton became the President of the United States and two important events that occurred in that year marked his presidency since the beginning: the CIA headquarters shooting and the World Trade Center bombing. The first attack was committed by Mir Aimal Kansi, a Pakistan national who entered the United States using fake documents and shot two employees at the entrance of the CIA headquarter in Virginia. Only in 1997, after a secret informant provided relevant evidence on where Kansi was located, he was captured by the FBI forces, collaborating with Pakistani intelligence, in Pakistan which registered his fingerprints to identify him. Then, he was kept in custody but there was no evidence about where he was detained: some believed in the center held by Pakistani authorities while others in the US embassy in Islamabad. He was later rendered to the United States, and, during the flight, he released crucial information that was documented by US authorities. However, there were some controversies around his rendition because no request for extradition was made by the United States and no extradition procedures were carried out. Afterwards, the United States declared that the extradition treaty signed with the United Kingdom before the creation of Pakistan rendered Kansi's rendition constitutional and the US Supreme Court affirmed that the procedures contained in the treaty were not the only means available to extradite him. Finally, he was condemned to life imprisonment in 1998 and executed by the injection of a lethal substance in Virginia in 2002. The Kansi case demonstrates that the Clinton administration maintained the use of renditions to deport suspected terrorists into the United States to be tried.[67]

The second terrorist attack that occurred in 1993 against the World Trade Center consisted in a van bomb that was detonated in the garage below the North Tower of the Center so that the Southern one could also collapse and kill more people. The victims were six, including a pregnant woman, and many other people were injured. The conspirators were members of the terrorist organization Al-Qaeda and illegally entered the United States to commit the attack. Although everybody thought Iraq to be involved

[66] Engel, J. A. (2010). A Better World . . . but Don't Get Carried Away: The Foreign Policy of George H. W. Bush Twenty Years On. *The Journal for the Society for Historians of American Foreign Relations (SHAFR)*. Wiley Periodicals, Inc. 34(1).
[67] Spaaij, R. (2010) *The Enigma of Lone Wolf Terrorism: An Assessment, Studies in Conflict & Terrorism*, 33(9), 854-870,

in this bombing, it was later discovered that Saddam Hussein had no direct connection with Al-Qaeda. In 1994, the perpetrators were sentenced to life sentence. Both events affected Clinton's concern over counter terrorism: he continued Bush's policy of limiting Iranian influence in the Middle East and attributed the term 'rogue State' to Iran accusing it of sponsoring terrorism.[68]

In 1995, there was another terrorist bombing in Oklahoma City against a federal government complex committed by two anti-government fanatics. Thus, it represented a case of domestic terrorism without involving Muslim countries or international threats. 168 people died and 680 remained injured making it the deadliest case of internal terrorism in US history. The two perpetrators behind the attack were both convicted and condemned to life sentences in 1997 and one of them was later subjected to lethal injection.

In response to the latest terrorist attacks, Clinton adopted legislation to improve the security and the structure of US federal buildings, which were divided into five security levels different from each other in terms of the security requirements implemented. For instance, each level could harbor a certain number of employees, a specific type of activities and safety guidelines. This provision was aimed at improving emergency plans of these structures as well as at preventing any potential collapse.[69]

Moreover, Clinton also passed the 1996 Antiterrorism and Effective Death Penalty Act which changed the rules of *habeas corpus*, aided victims, prohibited international terrorist fundraising and any type of assistance, removed alien terrorists, restricted the use of nuclear weapons, amplified the penalties, and improved the effectiveness of counterterrorism measures. This Act was crucial in limiting the right to *habeas corpus*: State prisoners could not be granted this right before federal Courts and the possibility of claiming new petitions for *habeas corpus* was limited.[70] Clinton also passed the Illegal Immigration Reform and Immigrant Responsibility Act to strengthen borders' control and illegal migrants entering the United States.

In 1996, there was another case of domestic terrorism in Georgia which is known as the Centennial Olympic Park bombing where two people died and 111 were injured by Eric Rudolph, despite the early warning of a security guard. Many people

[68] Parachini, J. V. (2000). *The World Trade Center Bombers (1993).* Toxic terror: Assessing terrorist use of chemical and biological weapons, 185-206.
[69] Hogan, D. E., Waeckerle, J. F., Dire, D. J., & Lillibridge, S. R. (1999). Emergency department impact of the Oklahoma City terrorist bombing. *Annals of emergency medicine*, 34(2), 160-167.
[70] Senate, U. S. (1996). Antiterrorism and Effective Death Penalty Act.

were present at the event, which was a musical concert in the public park designed for the Olympics. Clinton's reaction was to publicly condemn the attack and announce that he was willing to do anything to identify and prosecute the perpetrator.[71]

In 1998, Clinton issued another Presidential Decision Directive No. 62 on the Protection Against Unconventional Threats to the Homeland and Americans Overseas to clarify the tasks and the scope of federal agencies in the fight against terrorism and focused on prevention, prosecution, and management of the post-crisis situation. It also addressed security over transportation and computer-based systems used to identify terrorist perpetrators. Among the "successes" mentioned within the Directive, it appears the huge number of renditions of terrorists performed by the United States. It also mentioned how renditions and apprehensions should be performed. Clinton also issued the Presidential Decision Directive No. 39 on the US policy on Counterterrorism which gave federal agencies the power to take actions to decrease susceptibility to terrorism, respond to terrorist attacks and prevent the implications of the use of weapons of mass destruction by terrorists. It also treated terrorism as a matter of national security rather than law enforcement and ensured that the FBI Director had the responsibility to manage and guide the counterterrorism resources.

In the same year, the leader of Al-Qaeda Osama Bin Laden promulgated the fatwa to condemn US troops in Saudi Arabia and encouraged Muslims to react against the United States. Then, two groups of suicide bombers detonated against the United States' embassies in Dar es Salaam and in Nairobi killing 224 people, including CIA's agents and civilians, and injuring more than 4000 individuals. The attack occurred on 7th August 1998, which was the eighth anniversary of the presence of the US army in Saudi Arabia since the First Gulf War. The perpetrators, members of Al-Qaeda and Egyptian Islamic Jihad, wanted to revenge for the United States' extradition and torture of four members of the organization, which were arrested in Albania and rendered to Egypt by the United States.

The US intelligence immediately understood that Al-Qaeda was behind the bombings and Clinton launched the Operation Infinite Reach which consisted of cruise missile strikes against Al-Qaeda camps in Afghanistan and Al-Shifa pharmaceutical factory in Sudan suspected to support Bin Laden. This was the first time that a pre-

[71] Pellom, B. L., & Hansen, J. H. (1997). *Voice analysis in adverse conditions: the centennial Olympic Park bombing 911 call*. Proceedings of 40th Midwest Symposium on Circuits and Systems. Dedicated to the Memory of Professor Mac Van Valkenburg, 2, 873-876.

emptive attack was carried out by the United States against a non-State actor. Although Al-Qaeda lost many of its members, supporters and facilities, its leaders survived, and the attacks contributed to enhancing Al-Qaeda's propaganda against the Western world. Indeed, since the international community supported the United States and Bin Laden was not killed, many Muslims all over the world believed that this operation was an attack against their lands and religion and were inspired by him. Although Clinton tried to negotiate with the Taliban to hand over Bin Laden, negotiations failed so he imposed economic sanctions against Afghanistan.

The international community was shocked about the huge number of victims involved in these bombings and the UN Security Council issued Resolution 1189 to condemn the Taliban and Al-Qaeda and to encourage States to adopt preventive measures and Resolution 1267 to classify them as terrorist organizations and to impose sanctions on them. The operation was justified by the United States by invoking Article 51 of the UN Charter on self-defense and Title 22, Section 2377 of the US Code of Laws that allowed the President to take all the necessary measures to fight international terrorism.[72] The world was divided between the West led by the United States including Germany, Israel, the United Kingdom, Australia and, on the other side Muslim countries, Russia, and China. These latest events fueled a strong resentment in the Arab world against the United States, thus several protests were organized where the US flag was burnt.

At the end of the century, since it was not always possible to apply extradition procedures, the US authorities had to find another strategy to fight terrorism: the CIA started to transfer prisoners to foreign States to prosecute them and local countries started to secretly render detainees to the United States or third countries for trial. Indeed, Egypt became one of the first partners of the United States' rendition program already in 1995 because it desired to identify its nationals suspected to be part of Al-Qaeda and approach the United States' capabilities to catch and render suspects worldwide.[73] Indeed, Talaat Fouad Qassem, who was an Egyptian citizen sentenced to death for murder, was captured and sent to Egypt, where he vanished, by the United States in 1995 or Shawki Salama Attiya, who was arrested by the Albanian police

[72] Ramcharan, B. G. (2002). *Condemnation of Terrorism Resolution 1189 (1998).* The Security Council and the Protection of Human Rights. 219-220.
[73] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 14.

collaborating with the CIA and sent to Egypt, where he suffered from various torture techniques such as electric shocks.[74] However, there were only few cases of these deportations to third countries and, in most of them, individuals were subjected to torture, inhuman conditions and death penalty without fair trial.

4) Human Rights Involved in Extraordinary Renditions

As it can be noted, the program of extraordinary renditions carried out by the CIA after the 9/11 terrorist attack potentially entailed five main practices which are prohibited by international law: torture; cruel, inhuman, and degrading treatment; transfer to torture and cruel, inhuman, and degrading treatment; arbitrary and secret detention; and enforced disappearance. Therefore, it is crucial to examine which are the legal standards that prohibit such activities both at the international and continental level as well as the main fundamental rights which could be affected. As it will be seen, some of these practices will be analyzed in conjunction because they have elements in common. This will contribute to have a general overview on the safeguards that every detainee secretly detained and extraordinarily rendered by the CIA was entitled to, and on the duties that participating States should have complied with. As it was already mentioned, it must be remembered that within such activities, the "enhanced interrogation techniques", which entailed the use of physical means, were applied during interrogations to gather essential information to contrast international terrorist networks. At the end of this final section of the first Chapter, the primary rights which could be directly and indirectly involved within the CIA's activities will be enlisted.

4.1) Torture and Cruel, Inhuman, and Degrading Treatment

The main issue that was involved within the program of extraordinary renditions was the prohibition of torture and cruel, inhuman, and degrading treatment, which is a *jus cogens* rule, that allows no derogation according to international law.[75] Indeed, the prohibition of torture is enshrined in several legal standards both at the international and continental level and the first provision adopted was Article 5 of the Universal Declaration of Human Rights (UDHR), which, although not legally binding, is one of the most important legal instruments for rights' protection that led to the creation of

[74] Mayer, J. (2005). Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program. *The New Yorker*, 109. http://www.newyorker.com/archive/2005/02/14/050214fa fact6
[75] Article 53 Vienna Convention on the Law of Treaties (1969).

international human rights law and was signed by most American and Muslim countries, including the United States and Egypt.[76]

The four Geneva Conventions represent the most crucial legal standard for the protection of humanitarian treatment that applies only for those involved in time of war and armed conflict such as prisoners of war and were ratified by the United States in 1955.[77] Although torture is not defined, the Convention Relative to the Treatment of Prisoners of War, also known as the POW Convention, prohibits killing, torture and inhuman treatment. This category of individuals expands to volunteers, participants of the armed forces, militias, and resistance movements. Moreover, Article 131 denies the possibility to derogate from the ensured rights, Common Article 1 of the Conventions provides that the POW Convention must be always respected in all circumstances and Common Article 3 prohibits violence to life, cruel treatment, and torture also in case of non-international armed conflicts for those *hors de combat*, which means no longer involved in conflicts. Although some US officials argued that this Article did not apply to international conflicts, it must be considered that it applied to all cases of armed conflicts. In addition, to extend the Article's application to all individuals, the Additional Protocols to the Geneva Conventions were established.[78] According to Bush' declarations in 2002, this Article could not be applied to Al-Qaeda detainees because the so-called War on Terror was not a non-international armed conflict. However, the US Supreme Court rejected this view in the famous case of *Hamdan v. Rumsfeld* by stating that the Common Article applied to prisoners held at Guantanamo. It is important to notice that torture, inhuman treatment, deprivation of the right to fair trial and unlawful deportation are classified as grave breaches by the four Conventions, which means they are the most significant offences. Therefore, States are obliged to implement effective legal provisions to prosecute these grave breaches and those who committed them.[79]

Another provision which prohibits torture, cruel, inhuman, or degrading punishment is Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which was adopted by the UN General Assembly and obliges States

[76] Weissbrodt, D., & Bergquist, A. (2006). Extraordinary Rendition: Human Rights Analysis. *Harvard Human Rights Journal*, 19, 130-132.
[77] Geneva Conventions (1949).
[78] Weissbrodt, D., & Bergquist, A. (2006). Extraordinary Rendition: Human Rights Analysis. *Harvard Human Rights Journal*, 19, 152-153.
[79] Article 49-50 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).

to respect civil and political rights including the right to life, due process, and fair trial. Most States around the world approved it including the United States, which ratified it in 1992 with five reservations on the freedom of speech and association which impeded an effectful implementation.

The prohibition of torture is considered absolute, still during crisis, because it is part of the principles of international law also by the UN Human Rights Committee, which is an expert body of 18 professionals that examines the reports submitted by States on their efforts to comply with the ICCPR and the complaints brought by individuals.[80]

According to the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, who is an expert that examines cases of torture and organizes country visits since 1985, tolerating torture amounts to a violation of its prohibition.[81]

The most important international legal standard that includes the prohibition is the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which was signed in 1985 and is binding upon most of UN Member States thus also the United States. It prohibits torture in absolute terms, namely even during emergencies or wars and, thanks to its adoption, the prohibition of torture became one of the principles of customary international law which must be respected by everyone.[82] Article 1 UNCAT provides for a definition of torture:

> *"…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person…".*

Article 4 states that torture, including the failed effort or indirect involvement to commit it, must be criminalized by Contracting Parties which must provide adequate sanctions such as extradition to prosecute perpetrators. It is important to remark that countries that do not execute any kind of torture but facilitate it by giving any kind of

[80] UN Human Rights Committee (2001). *General Comment No. 29*. paras. 11 and 13.
[81] Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment (2004). *Report delivered to the General Assembly.*
[82] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 13.

assistance, such as participating in the interrogation process, violate this provision.[83] In particular, the United States' federal extraterritorial jurisdiction over the acts of torture committed abroad is recognized by a federal criminal statute, known as 18 U.S.C. §2340A, which was adopted to fulfil the obligations enshrined in Articles 4 and 5 of UNCAT. Article 12 provides that, if there are sufficient reasons to consider a case involving torture, swift and objective investigations must be carried out by States. These inquiries must be performed by qualified personnel, must be efficient and must delineate the events and discover the responsible behind them. Article 14 UNCAT requires Contracting Parties to provide an effective remedy and fair compensations to all victims of torture entailing procedural and substantive obligations: the first concerns the adoption of adequate legal provisions and bodies and the second consists of ensuring complete and actual recompence and reparation.[84] Article 16 obliges its Parties to prevent any act involving torture or any other cruel and degrading treatment by adopting active statutory, governmental, and judicial measures that apply in any location that falls under their jurisdiction. The Convention also establishes that States must also scrutinize any allegation of torture or ill-treatment.

To check if States implement and respect the UNCAT, the UN Committee Against Torture (CAT) was created in Geneva in 1987 to urge its Contracting Parties, including the United States, to periodically issue a report on the safeguard of rights. If they do not provide these reports, the Committee takes note of it in its annual report while if it finds that there has been a scarce effort to prevent torture, it can issue non-binding proposals on how to improve the situation. If there is a serious violation of the prohibition of torture, the CAT refers the question to the UN General Assembly which will decide whether to bring the issue before the International Criminal Court. Non-governmental organizations and human rights organizations are also entitled to participate and issue reports directed at States that provide no sufficient effort to secure rights. Contracting States are also entitled to refer a question before the CAT if they consider that one of the Parties is not respecting the UNCAT because the Committee has a dispute settlement function. In some cases, it can accept individual applications, which must be written in one of the languages of the Committee and the applicant must be recognized, alleging violations of rights committed by one of the Contracting Parties.

[83] Weissbrodt, D., & Bergquist, A. (2006). Extraordinary Rendition: Human Rights Analysis. *Harvard Human Rights Journal*, 19, 145.
[84] Committee Against Torture (2012). General Comment No. 3, para. 1.

It imposes that investigations must be aimed at identifying the events and the responsible of any infringement, must be useful and performed by trained personnel.[85]

Another important legal standard at the international level that prohibits torture is the Rome Statute of the International Criminal Court, which entered into force in 2002 and defines four types of international crimes that can never be tolerated: genocide, crimes against humanity, war crimes, and the crime of aggression. Most countries around the world are Contracting Parties, however, the United States together with Russia, Israel and Sudan signed it without ratifying it and expressed their intention not to take further steps escaping the obligations coming from the Statute. Article 7.1 of the Statute argues that violations of the prohibition of torture are considered crimes against humanity.[86]

Beside the abovementioned instruments of international law, the prohibition of torture in absolute terms is also contained in several continental human rights instruments, such as Article 3 of the European Convention of Human Rights (ECHR), which is the most important legal instrument to guarantee the respect of rights in Europe adopted by the 46 Council of Europe's members in 1953 to condemn any human rights violation. In addition, any exception or limitation is never allowed, and States can never torture someone, even in times of emergencies: Article 15 of the Convention does not provide any derogation from Article 3.

In the Americas, the Inter-American Convention to Prevent and Punish Torture, which was adopted in 1985 by the Organization of the American States (OAS) that was set up in 1948 to enhance cooperation and peace and protect human rights among American countries including the United States.[87] The main aim of the Convention is to prevent and ban torture and any similar conduct, and it imposes on its Contracting Parties the obligation to adopt efficient measures to do it by providing a way to boost extradition. However, the United States of America neither signed nor ratified it.

In the African continent, the freedom from cruel, inhuman, or degrading treatment or punishment is recognized by Article 5 of the African Charter on Human and Peoples' Rights, also known as the Banjul Charter, which entered into force in 1986

[85] Garcia, M. J. (2009). *UN Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*. Library of Congress Washington DC Congressional Research Service.
[86] Arsanjani, M. H. (1999). The Rome Statute of the International Criminal Court. *American Journal of International Law*, 93(1), 22-43.
[87] Engel, S. (1964). The new charter of the organization of central American States. *American Journal of International Law*, 58(1), 127-138.

to promote and respect human rights in the region. It was adopted by the African Union (AU), which reunited all African countries except a few which have been suspended, enhanced cooperation and the respect for territorial integrity. The primary judicial organ of the AU, which is the African Court of Justice and Human Rights (ACJHR), checks if AU Member States respect the African Charter and can issue advisory and adjudicative opinions on human rights violations.[88]

In 1989, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment entered into force, and it was adopted by all Council of Europe's members to ensure a careful compliance of European States by punishing any infringement. Today, it is also open for ratification for non-members of the Council of Europe although none of them has ever signed it. Article 1 provided for the creation of the Committee for the Prevention of Torture (CPT) which has the power to organize visits in Contracting Parties' areas of imprisonment in which torture or any form of deprivation of liberty are exercised on individuals that are detained there without their consent. It is composed of autonomous and neutral experts that come from each member, have different academic specializations, are elected for four years by the Committee of Ministers, and can be re-elected for a second term. Article 2 encourages States to enable the Committee's staff to perform these visits, which will end up with a report containing all the confidential information and recommendations on the current situation concerning inhuman treatment of the recipient State.[89]

Another fundamental human rights standard that must be mentioned and prohibits any kind of torture and maltreatment is the Cairo Declaration on Human Rights in Islam (CDHRI) which was adopted in 1990 by the members of the Organization of Islamic Cooperation (OIC) which comprised all Muslim countries in North Africa and in the Middle East.[90]

The last provision that needs to be mentioned and prohibits torture and inhuman treatment is Article 4 of the Charter of Fundamental Rights of the European Union, which was ratified in 2000 and it has been legally binding since 2009 for all EU institutions, Member States, and citizens. It must also be mentioned that any provision

[88] Umozurike, U. O. (1983). The African Charter on Human and Peoples' Rights. *The American Journal of International Law*, Cambridge University Press, 77(4), 902-912. http://www.jstor.com/stable/2202548
[89] Ginther, K. (1991). The European Convention for the prevention of torture and inhuman or degrading treatment or punishment. *European Journal of International Law*, 2, 123.
[90] Al-Ahsan, A. (2008). Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC's Cairo Declaration of Human Rights. *Journal of Law and Religion*, Cambridge University Press, 24(2), 569-597. https://www.jstor.org/stable/25654330

or ruling which contrasts with the Charter is automatically invalidated by the judicial branch of the EU thus Member States while implementing any legislation at the national level must consider it. This is also true according to the principle of prevalence of EU law over domestic one if the two conflict with each other.[91]

4.2) Transfer to Torture and Cruel, Inhuman, and Degrading Treatment

Another duty that States retained and could arise when participating in the program of extraordinary renditions was the so-called principle of *non-refoulement*: if there are reasonable grounds to believe that there is an effective risk of torture or inhuman treatment in certain countries, States cannot transfer (or '*refouler'*) individuals there because they have a positive obligation to prevent any act of torture including those committed by other countries. This principle is provided by international law in respect to three main areas: refugee law, human rights law, and international customary law. As it can be seen, the prohibition on *refoulement* is therefore related to the absolute prohibition of torture.

The principle of *non-refoulement* originated in the 1933 Convention on the International Status of Refugees, which defined the responsibilities of States towards refugees, and then emerged in the 1951 Convention Relating to the Status of Refugees.[92] Although Article 42 of the second Convention establishes that *non-refoulement* cannot be derogated, there is a criminality exception meaning that the asylum State must first demonstrate that the refugee constitutes a threat to its national security and then expel the person if he or she has been convicted by a final judgement of a serious crime and represents a danger to the community.[93]

However, this exception is not provided by international human rights law, namely the UNCAT, the ICCPR and the ECHR, which ensure a higher protection from *refoulement* because they apply to everyone regardless of their past activities or status.

For instance, Article 3 UNCAT provides that an individual cannot be expelled, returned, or extradited to another country if there is a high risk of torture there and the right to an actual, independent, and fair review of the decision to expel or relocate a person to another country must be guaranteed. This commitment has been

[91] Garcia, R. A. (2002). The General Provisions of the Charter of Fundamental Rights of the European Union. *European Law Journal*. Blackwell Publishers Ltd. 8(4), 492-514.
[92] Convention on the International Status of Refugees (1933) and Convention Relating to the Status of Refugees (1951).
[93] Article 33 of the Convention Relating to the Status of Refugees (1951).

constitutionalized in the United States' legal system, in particular through the 1998 Foreign Affairs Reform and Restructuring Act. In addition, it has an extraterritorial effect: deporting an individual to a non-party country to the UNCAT amounts to a violation of the Article because, first, the person would face the risk of torture and, second, he could not avail himself of the protection under the Convention.[94]

Article 7 ICCPR also states that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…without his free consent to medical or scientific experimentation*".[95]

This principle is also provided by the ECHR which imposes a positive obligation on its Contracting Parties which must prevent any suffering from torture or degrading treatment committed in Europe and elsewhere. Indeed, States cannot deport any individual to foreign countries where there is a high risk of torture or cruel treatment.[96]

Unlike the prohibition of torture and cruel, inhuman, and degrading treatment, *non-refoulement* cannot be assuredly considered as a *jus cogens* rule because the international community has not a common view on the application of the principle for those associated with terrorism and there are still States which are not parties to conventions which prohibit *refoulement*. [97] However, the principle is a fundamental component of the customary prohibition of torture and cruel, inhuman or degrading treatment thus it can be said that it acquired a customary normative status. Furthermore, the standards examined are not subject to any limitation or reservation, no balance between the risk of torture and the potential threat to national security is required, and these principles are absolute and apply to every human being.

4.3) Arbitrary Arrest and Enforced Disappearance

Another obligation that States must comply with and that was involved in the extraordinary rendition program was the prohibition of arbitrary arrest and detention of individuals which is explicitly contained in several provisions including Article 9 UDHR, Article 9 ICCPR, the Cairo Declaration and Article 25 of the American

[94] Committee against Torture (1994), *Report, 50th Session*, Supp. No. 44, 45, Annex V.
[95] Article 7 of the International Covenant on Civil and Political Rights (1976).
[96] Dzehtsiarou, K. (2011). European consensus and the evolutive interpretation of the European Convention on Human Rights. *German Law Journal*, 12(10), 1730-1745.
[97] Duffy, A. (2008). Expulsion to Face Torture? *Non-refoulement* in International Law. 382

Declaration of the Rights and Duties of Man.[98] Indeed, every human being is entitled to the right to liberty and security thus there could never be any deprivation of such privileges. According to the Working Group on Arbitrary Detention, secret detention is arbitrary in itself and represents an example of enforced disappearance.[99] Both are prohibited in absolute terms by international humanitarian law, which applies only in times of war, through the words of the Geneva Conventions, which argue that prisoners must always be documented and kept in official detention facilities.[100] Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, also called the Civilian Convention, protects all civilians held during armed conflicts and occupations, defines and prohibits any enforced deportation in absolute terms.

Article 13 ICCPR also prohibits the expulsion of any non-national who is legally resident of a State unless it is carried out by respecting the law and by ensuring the right to an adequate review.

In 1980, the UN Working Group against Enforced and Involuntary Disappearances was created by the UN Human Rights Committee to investigate all the cases of secret detention or disappearance and it is composed of independent representatives to ensure transparency. The Working Group stated that State interests can never be used as a justification to build up secret detention facilities, even in times of emergency or conflict.

Moreover, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) was adopted in 2010 by the UN General Assembly to prohibit any case of enforced disappearance, which is considered as a crime against humanity and defined in Article 2 as "*the arrest, detention, abduction…by agents of the State…followed by a refusal to acknowledge the deprivation of liberty…of the disappeared person, which places such a person outside the protection of the law*."[101]

Finally, the 1996 Inter-American Convention on Forced Disappearance of Persons was approved by many OAS members except the United States to prohibit

[98] Bayefsky, A. F. (2000). *American Declaration of the Rights and Duties of Man*. The UN Human Rights Treaty System in the 21st Century. 1013-1018.
[99] Working Group on Arbitrary Detention (1997). *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*. Para. 8, 54th Session.
[100] Article 70 Geneva Convention III and Article 106 Geneva Convention IV.
[101] UN Human Rights Committee (2006). *Concluding Observations on the United States of America*, paras. 12-16.

enforced disappearance of individuals. Any individual alleging violations to the Convention can appeal to the Inter-American Commission on Human Rights.[102]

The three main prohibitions that have been analyzed are those that mostly relate to extraordinary renditions. However, it is fundamental to mention which essential human rights were directly or indirectly involved in these operations: the right to life; the right to liberty, security, integrity, dignity of a person; the right to physical and mental health; the right to consular access; the right to equal protection before the law; the right to create a family or family rights; the right of asylum; the right to fair trial and access to Courts; the right to be recognized as a person before the law; the right to an effective remedy; the right to due process of law; the right to judicial protection; the prohibition of arbitrary deprivation of property; and freedom of thought, opinion, expression, association and movement.

Conclusion

The first section of the Chapter has shown that after 9/11, the George W. Bush administration strengthened the US counterterrorism policy to fight States which supported international terrorism and Al-Qaeda's networks by expanding the program of renditions, which were introduced under Clinton's presidency to arrest and render terrorists involved in the main terrorist attacks that affected the United States during the 1980s and the 1990s. Although Bush's strategy inherited several principles and tactics of Clinton's approach, the first advocated more for the use of military force. Indeed, the CIA was authorized to carry out extraordinary renditions to interrogate and detain high-value detainees to gather information related to terrorist groups.

Although at the birth of the United States rendition and extradition were not properly regulated, the US Supreme Court developed its own interpretation on cases of irregular renditions, namely the Ker-Frisbie doctrine according to which individuals charged with any crime must be prosecuted before US Courts regardless of how they were brought to trial. This is what the second section demonstrated.

As it was explained in the third section, between the 1980s and the 1990s, several terrorist attacks affected the United States both domestically and abroad thus the US counterterrorism policy evolved. Reagan and the Secretary of State Shultz introduced a new offensive approach based on pre-emption, prevention, and retaliation

[102] Goldman, R. K. (2009). History and action: The inter-American human rights system and the role of the Inter-American Commission on Human Rights. *Human Rights Q*., 31, 856.

as well as the so-called “renditions to justice” for criminal offenders. Clinton improved the counterterrorism strategy because of several attacks that hit the country by continuing the use of renditions to bring suspected terrorists before US Courts.

The last section of the Chapter considered the main practices potentially affected by the program of extraordinary rendition, namely torture and cruel, inhuman, and degrading treatment; transfer to torture and cruel, inhuman, and degrading treatment; and arbitrary detention and enforced disappearance, which are all prohibited by international law and involved several fundamental human rights. Therefore, it can be immediately seen the conflict between the invocation of State secrecy to justify the government’s actions and the blatant violation of human rights safeguarded by international law. It is also important to note that not only States directly torturing individuals are responsible, but also those who assisted them to commit such activities or those who failed to prevent any cruel treatment.

In the next Chapter, it will be explained how the program of extraordinary renditions was publicly discovered in the United States, how European institutions reacted to unveil the truth, which were the most significant cases of irregular renditions and whether the CIA ceased to carry out these secret operations.

CHAPTER II – EXTRAORDINARY RENDITIONS: REVELATIONS, INVESTIGATIONS AND KEY CASES

As it was seen in the first Chapter, the CIA started to carry out the extraordinary rendition and secret detention programs in which suspected terrorists were abducted and transferred to unknown detention centers for the purpose of interrogation without legal process. The Bush administration decided to keep these operations extremely secret because an urgent and efficient counterterrorism strategy was needed, thus it pursued the legitimate principle of secrecy for reasons of national security.

Therefore, the first section of this Chapter will examine the earliest revelations made by former US officials and CIA agents, who directly participated in these activities by working at the overseas detention facilities or witnessing detainees' interrogation procedures. These interviews were first published by the US journal *The Washington Post* which denounced "a practice with ambiguous status in international law" and led to more attention on the United States' conduct abroad.[103] Therefore, several NGOs investigated extraordinary renditions and reported what they discovered by interviewing former detainees.

Once *The New Yorker* published an article written by Jane Mayer who revealed that also European countries were involved in these activities, European institutions started to investigate the matter to discover whether, which and to what extent European States were involved in these secret activities in conjunction with the CIA.[104] One of the members of the Parliamentary Assembly of the Council of Europe (PACE), Dick Marty, was designated as Rapporteur by the Council of Europe with the task to investigate European countries' involvement in the CIA's secret operations. After some years, Marty who was the representative of the Committee on Legal Affairs and Human Rights collected all the crucial information and data related to European countries' assistance to secretly capture, render, and detain suspected terrorists in two significant reports which carefully explained the issue. This will be further explored within the second section of the Chapter.

After having gathered most information regarding both programs, it is possible to discuss the most relevant cases of extraordinary renditions which affected several

[103] Priest, D., Gellman, B. (2002). U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities. *The Washington Post* 26.
[104] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue.

suspected terrorists coming from different nations and analyze the lessons that can be learnt from their experience. Indeed, the third section will deal with the cases of Abu Zubaydah, Ibn Al-Shaykh Al-Libi, Ahmed Agiza, Muhammed Al-Zery and Abd Al Rahim Al Nashiri to give a clear idea of what extraordinary renditions concretely were and how they were conducted.

Throughout the years, US counterterrorism policy evolved, and the Obama administration decided to issue three Executive Orders aimed at stopping both programs. However, the last section of the Chapter will check whether extraordinary renditions were no longer used by the United States to abduct, transfer, and interrogate detainees in foreign countries without granting them any legal process.

The aim of this second Chapter is to make the reader familiar with the extraordinary rendition program by explaining how the details concerning the secret operations emerged in the public sphere both in the United States and Europe, how the world reacted to the scandals affecting the country's reputation focusing in particular on the institutional inquiries set up by European institutions, how extraordinary renditions were carried out and what were the results obtained and, finally, how the US government attempted to put an end to these activities.

1) First Revelations on Extraordinary Renditions in the United States

The George W. Bush administration decided to invoke the principle of secrecy, according to which operations can be kept secret for reasons of national security, to justify the use of extraordinary renditions and effectively fight international terrorism. This section will cover how the program of extraordinary renditions was discovered in the United States through the interviews made by former US officials and detainees who experienced these realities and contained in newspapers and reports published by several NGOs advocating for the protection of rights.

1.1) *The Washington Post*'s Article in 2002

Concerning extraordinary renditions, several former intelligence officials, CIA agents, or witnesses that worked within the detention centers started to report what they experienced and how the US government instructed them to perform the covert operations. Indeed, on 26th December 2002, *The Washington Post* reported the first

interviews provided by those who worked at the Bagram Air Base in Afghanistan.[105] It is important to note that these witnesses all argued that violence was right and required to achieve the goals set by the War on Terror and that, in their opinion, most Americans would have shared this viewpoint.

The article first acknowledged that prisoners who did not cooperate with authorities in the CIA's interrogation centers were subjected to abusive methods such as standing for hours, sleep deprivation, stress, and painful positions and then transferred to foreign countries that tortured them, while those who collaborated gained respect and, sometimes, also a financial reward.

Then, it focused on the United States' involvement by underlining that high-ranking US officials were always present or informed about everything that happened during these operations. Indeed, they performed several activities including the oversight and direct participation in the interrogation process, thanks to the collaboration of translators, and the "false flag" operation, which consisted in making detainees think that they were in a country in which human rights were not respected to scare them. In addition, women were used to interrogate them so that they could feel psychologically upset because females are considered inferior according to the Islamic culture. US agents also revealed that when prisoners were rendered to foreign nations, which were known to employ violence or use drugs, such as Egypt and Jordan, they prepared a list of questions to pose. Indeed, one of them revealed that the United States were only involved in the deportation of captives while the interrogation procedures were decided and carried out by other countries. The former CIA Inspector General Fred Hitz publicly declared that US officials just used the information collected by third countries and did not employ torture. Although US agents mentioned that the CIA's involvement in these operations differed according to the country in which detainees were transferred to, what Saudi Arabia, Jordan, Morocco, and Syria all had in common was their propensity to easily apply torture and inhuman methods to interrogate captives, as it was reported in different human rights reports.

The article also reported some relevant data released by US officials: since 9/11, 3000 suspected Al-Qaeda terrorists were imprisoned all over the world, of which 625 were held at Guantanamo Bay and less than 100 were illegally transferred to foreign

[105] Priest, D., Gellman, B. (2002). U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities. *The Washington Post* 26, 1.

countries. US officials justified the extraordinary rendition program by arguing that detainees were sent to third countries, where the intelligence services spoke Arabic, to create a stronger affinity and induce them to collaborate. On 11th December, the former CIA director George Tenet publicly stated that the interrogations conducted outside the United States led to significant results: in fact, one-third of Al-Qaeda's leaders were detected and stopped.[106]

Another crucial point that appeared in the article was that, distinct from Guantanamo Bay, the access to the CIA's overseas detention centers was denied to strangers, attorneys, associations and sometimes also to other governments. Although it was not respected, international law established that the International Committee of the Red Cross (ICRC) had the duty to inspect prison camps during times of war.

At the end of the article, the writers revealed that President Clinton started to use the extraordinary rendition policy after the attacks against the US embassies in Kenya and Tanzania in 1998 but the borders of law were respected during prisoners' interrogations. Indeed, once Egypt was believed to employ torture and refused to listen to the United States' will, Clinton stopped collaborating and funding the Egyptian secret services.[107]

In May 2002, as it was required by Title 22 of the US Code, the US Department of State issued its annual report on terrorism which confirmed the formation of a coalition of States to combat the international terrorist threat and revealed that ten suspected terrorists were rendered into the United States to be prosecuted under Clinton's presidency, thus between 1993 and 2001.[108]

As it was mentioned in the first Chapter, the Justice Department's Office of Legal Counsel (OLC) issued several legal opinions to authorize the use of the "enhanced interrogation techniques", such as waterboarding, and, in August, the Assistant Attorney General Jay Bybee published two memoranda: in the first, he stated that physical pain did not entail torture because it did not lead to death or injury to organs and he mentioned the so-called self-defense clause according to which a State was justified to use abusive methods in the context of the War on Terror.[109] The second

[106] Priest, D., Gellman, B. (2002). U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities. *The Washington Post* 26, 2-3.
[107] Priest, D., Gellman, B. (2002). U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities. *The Washington Post* 26, 6.
[108] US State Department (2002). *Patterns of Global Terrorism 2001*. 131, Appendix D.
[109] US Justice Department Office of Legal Counsel (2002). *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*. Memorandum for Alberto Gonzales, Counsel to the President, from

memorandum permitted the CIA to employ 10 techniques on Abu Zubaydah, who was one of Al-Qaeda's leaders, including letting him stand for hours, depriving him of sleep and kicking him.[110]

After the revelations on *the Washington Post*, the Bush administration refused to comment, make any public statement, or disprove that torture was the main purpose of the extraordinary rendition program.

In 2003, after the invasion and occupation of Iraq, the United States started to detain political prisoners, including suspected terrorists, at the Abu Ghraib prison in Iraq which then became infamous for the violations of human rights committed by US agents who tortured and killed detainees. Indeed, Amnesty International interviewed former prisoners who revealed that they did not know where they were, had no access to a lawyer or a judicial authority, were subjected to extreme heat, sleep deprivation, sore positions, protracted hooding, noisy music, and confiscation of property.[111] The Associated Press described in detail how US officials humiliated captives regardless of their age or physical conditions: they were deprived of water, which was fundamental considering the high temperatures of the territory, and women were treated like men. It also reported that General Janis Karpinski, who was the commander of Iraqi detention centers, stated that the treatment reserved to detainees was fair and human.[112]

In April 2004 the Abu Ghraib scandal emerged when *CBS News* published several pictures which horrified the entire world showing US officials' methods of torture authorized by the Defense Secretary Donald Rumsfeld. President Bush immediately took distance by stating that the prisoners shown in the photos were only some specific cases rather than a small part of a bigger picture and publicly apologized together with Rumsfeld. Moreover, the US Department of Defense discharged 17 soldiers and officials from office and convicted them. The international community was so shocked that the Red Cross, Amnesty International and Human Rights Watch

---

Assistant Attorney General Jay Bybee. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf.

[110] US Justice Department Office of Legal Counsel (2002). *Interrogation of an Al Qaeda Operative*. Memorandum for John Rizzo, Acting CIA General Counsel, from Assistant Attorney General Jay S. Bybee.

[111] Amnesty International (2003). Iraq: Continuing failure to uphold human rights. *Press Release No. 176*, 1-2.

[112] Hanley, C. J. (2003). AP Enterprise: Former Iraqi detainees tell of riots, punishment in the sun, good Americans, and pitiless ones. *Associated Press*. https://web.archive.org/web/20140503221406/http://legacy.utsandiego.com/news/world/iraq/20031101-0936-iraq-thecamps.html.

condemned the United States' conduct within its detention centers also at Guantanamo Bay and in Afghanistan. The Major General Antonio Taguba, who was requested to conduct the official military investigation into the abuses, confirmed that detainees were beaten, kicked, photographed, subjected to electric shocks, threatened by guns or aggressive dogs, forced to remain naked, masturbate and have sex with each other, wear hoodies and those who died were photographed with US personnel smiling. At the end of his report, he recommended US agents to train interrogators, publicize the treatment reserved to detainees, establish standards that must be respected, ensure that soldiers respected the Geneva Convention and many other actions.[113]

In May, the CIA Office of Inspector General published a special review on the detention and interrogation programs starting from 9/11 until October 2003 which discovered that no guidelines were provided, interrogation experience lacked, and health care was not offered in the custody centers. In addition, it found out that the use of waterboarding against Abu Zubaydah was inconsistent with that approved by the Department of Justice in 2002, thus it recommended the CIA to ensure that its program was in line with US law and to notify the Department of Justice about when this measure would be employed.[114]

In June, one of the Torture Memos, which were legal memoranda outlined by the US Deputy Assistant Attorney General John Yoo and signed by the OLC's leader General Bybee in 2002 to inform the CIA, the Department of Defense, and the President on the use of the "enhanced interrogation techniques" and their legality, was disclosed. After the resignation of Jack Goldsmith, who was the OLC's leader that took distances from the Yoo memos, the Attorney General Ashcroft re-authorized torture by issuing another opinion.

On 30th December 2004, the shared disagreement generated by the first Bybee memorandum convinced the Office of Legal Counsel to release another memo to the Department of Justice Command Center to condemn torture and take distances from Bybee's one. However, it offered the same conclusions starting by explaining how the capture, rendition of high-value detainees and interrogation techniques were performed and then underlining their importance to counter terrorism. During this process, it was

[113] Taguba, A. M. (2004). *Article 15-6 Investigation of the 800th Military Police Brigade*. Bernan Assoc, United States Central Command.
[114] Central Intelligence Agency Inspector General (2004). *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*. Office of Inspector General. https://irp.fas.org/cia/product/ig-interrog.pdf.

highlighted that detainees were not mistreated, and they were subjected to physical and psychological medical visits which established whether they could be interrogated. Finally, the memorandum explained in detail each interrogation method and it presented a typical interrogation procedure which occurred every day.[115]

In May 2005, the OLC, after trying to distance itself from the Bybee's memo, released three memoranda to confirm the lawfulness of the previously authorized methods according to the Federal Anti-torture Statute and Article 16 of CAT, which prohibited torture and inhumane treatment.

On 4th December 2005, *The Washington Post* published another crucial article in which a CIA agent declared that several individuals, who had nothing to do with terrorism, were erroneously arrested and rendered to foreign countries because of ambiguity over evidence or names.[116] Indeed, the Inspector General of the CIA's office also stated that he dealt with several cases of erroneous renditions. The day after, the former Secretary of State Condoleezza Rice considered extraordinary rendition as a crucial instrument to fight the terrorist threat leaving aside the fact that the United States did not always care about whether foreign countries could torture detainees.[117]

1.2) Reports on Extraordinary Renditions Published by NGOs

In October, Human Rights Watch conducted a study in which it clarified that the CIA defined "ghost detainees" as "the most sensitive and high-profile terrorism suspects" held in prolonged custody at Abu Ghraib without being registered anywhere and then disappeared.[118] Although it requested information on detainees' conditions, the US government did not provide the destiny or whereabouts of prisoners, thus it was also difficult for the media to access such data. As most international authorities argued, protracted incommunicado detention amounted to mistreatment because the main guarantees were eliminated, and torture was allowed. Although US officials believed that the information obtained through coercive interrogation methods highly contributed to the fight against international terrorism, it was difficult to assess the

[115] US Justice Department Office of Legal Counsel (2004). *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, 1-2.
[116] Priest, D. (2005). Wrongful Imprisonment: Anatomy of a CIA Mistake. *The Washington Post.*
[117] Rice, C. (2005). *Remarks Upon Her Departure for Europe*. https://2001-2009.state.gov/secretary/rm/2005/index.htm.
[118] Human Rights Watch (2004). *The United States "Disappeared": The CIA's Long-Term "Ghost Detainees"*. 8.

truthfulness of what detainees declared. Enforced disappearances, which put individuals outside the safeguards provided by law, entailed that liberty was impaired, government officials participated, the detention was not recognized, and the destiny or location of detainees was not provided. The NGO encouraged the United States to stop tolerating disappearances and those who ordered them, ensure that international law applied to all prisoners, keep prisoners in acknowledged prisons, register everything in written form, provide access to the ICRC, allow judicial and impartial oversight and investigations into violations of the prohibition of torture.[119]

On 27th February 2006, Manfred Nowak, who served as Special Rapporteur on Torture of the UN Commission on Human Rights between 2004 and 2010, and other four Rapporteurs published a joint report on the conditions of detainees held at Guantanamo Bay.[120] Since 2002, the five scholars monitored the situation and, in 2004, they asked the US government to visit the detention center and then revoked the "*one-day visit to three of the five mandate holders…which… will not include private interviews or visits with detainees*". The report contained information coming from the US government, detainees held in other countries in Europe, lawyers of Guantanamo's prisoners, NGOs, and media reports.

First, the report recalled that, despite the urgent need to fight terrorism, UN Member States, including the United States which were parties to several conventions, were obliged to respect human rights, humanitarian and international law and that derogation from certain rights was not always possible. Second, it argued that the 2001 Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism which regulated the legal framework in the Guantanamo facility obstructed the rule of law and several rights such as the right to challenge the lawfulness of one's detention, contained Article 9 ICCPR, and the right to fair trial, enshrined in Article 14 ICCPR, because it allowed for an indefinite detention without trial before an impartial judge.[121] Indeed, detainees could bring their case before military commissions which were administrative tribunals created by the US government. After recalling all the several rights' violations, the report recommended to respect the rights deriving

[119] Human Rights Watch (2004). *The United States "Disappeared": The CIA's Long-Term "Ghost Detainees"*. 13-23.
[120] Nowak, M. et al. (2006). *Situation of detainees at Guantanamo Bay.* Commission on Human Rights, UN Economic and Social Council, 1-4.
[121] Nowak, M. et al. (2006). *Situation of detainees at Guantanamo Bay.* Commission on Human Rights, UN Economic and Social Council, 4-8.

from international law, close the Guantanamo Bay's center, stop the use of torture and rendition to countries with an elevated risk of inhuman treatment, ensure the right to make a complaint, effective investigations, fair compensation for victims and complete access to the five Rapporteurs.[122]

In April 2006, Amnesty International argued that most terrorist suspects were imprisoned in Pakistan, which was a closer partner to the United States, and then transferred them to other nations.[123] Indeed, the Pakistani government admitted having captured 700 suspects who were then rendered to US detention centers. It also revealed that, in 2003, the Spanish judge Baltasar Garzon issued an indictment which "*called for the arrest of 34 other men, including Osama Bin Laden, on charges including membership of a terrorist group or planning terrorist acts*", who had a prominent role in the training of volunteers from Southern European countries.[124] Although the judge requested an international arrest warrant for Mustafa Nasar, the Spanish government had no reaction. The NGO discovered how detainees were treated at Far' Falastine, which was a prison in Damascus known for employing torture and cruel conditions. There, 40 different acts of torture were practiced against them: they were isolated for days, kicked, not allowed to see the sun, to go to the toilet when they needed or to eat enough food. Amnesty International listed the planes and airports connected with the rendition policy and noticed that the Convention on International Civil Aviation, also known as the Chicago Convention, established that only private and non-commercial flights could fly over a nation without any authorization, thus the CIA used planes provided by private companies to render detainees. In most cases, these corporations were CIA front companies meaning that they were registered on documents but did not exist at all.[125]

On 19th May 2006, the UN Committee Against Torture, after having noticed that the United States denied the ICRC the access to secret detention centers, asked the

[122] Nowak, M. et al. (2006). *Situation of detainees at Guantanamo Bay.* Commission on Human Rights, UN Economic and Social Council, 25-26.
[123] Amnesty International (2006). *United States of America, Below the radar: Secret Flights to torture and 'disappearance'*. International Secretariat, United Kingdom, 1-6.
[124] Amnesty International (2006). *United States of America, Below the radar: Secret Flights to torture and 'disappearance'*. International Secretariat, United Kingdom, 7-8.
[125] Amnesty International (2006). *United States of America, Below the radar: Secret Flights to torture and 'disappearance'*. International Secretariat, United Kingdom, 29-30.

Contracting Party to cease the activities, close Guantanamo Bay and ensure the respect of rights.[126]

In July 2006, the World Policy Council, which believed that the CIA's practices violated essential American ideals such as liberty and led to worthless and futile results, criticized Bush's inaction, denial and contradictions, and justification under the clause of secrecy.[127] It also noted that, although Bush argued that the Geneva Conventions did not apply to enemy combatants, he could be convicted for war crimes. Another crucial point for the Council was that the information collected through torture could not be presented before any Court and could not be considered as reliable, in fact sometimes detainees were revealed fake evidence. Finally, it wanted to remind that the extraordinary rendition program "*lowers us to the level of all those rogue and evil regimes that we have fought against in the past and against which we claim we are now struggling*", thus justice could not be pretended if those who led the world were the first to be unfair.[128]

2) Investigations on European States' Involvement in the Practice of Extraordinary Renditions

The information revealed by US journals, memoranda, and reports on the violations of human rights committed by US authorities within the extraordinary rendition and secret detention programs represented a warning alarm for European institutions to investigate whether, which and to what extent European States were involved in such operations. This will be analyzed in detail in this section because, as the law establishes, the responsibility for the infringements could not only be attributed to the United States but also to all those countries that cooperated and assisted them.

On 14th February 2005, *The New Yorker* published its annual issue containing an article by Jane Mayer who was the first to reveal that some Council of Europe's Member States cooperated with the United States in the rendition of captives during Clinton's presidency: Croatia captured Talaat Fouad Qassem and gave him to US agents in 1995 while Albania arrested some suspects and rendered them to Egypt in

[126] Committee Against Torture (2006). *Press Release of the United Nations Office at Geneva, CAT Concludes Thirty-Sixth Session*.
[127] World Policy Council (2006). *The centenary report of the Alpha Phi Alpha World Policy Council*. Alpha Phi Alpha Fraternity, 1-20. https://issuu.com/apa1906network/docs/world_policy_council_2006.
[128] World Policy Council (2006). *The centenary report of the Alpha Phi Alpha World Policy Council*. Alpha Phi Alpha Fraternity, 21-22. https://issuu.com/apa1906network/docs/world_policy_council_2006.

1998. [129] Indeed, after some days from the Albanian operation, the US embassies in Kenya and Tanzania were attacked by terrorists. Her article explained the use and scope of extraordinary renditions by starting to tell Maher Arar's story who was captured in New York, tortured outside the boundaries of the law in Syria and freed in 2003. She argued that detainees were transferred to locations which were known for human rights' violations such as Egypt, Morocco, Syria and Jordan and US authorities tried to keep these illegal activities as secret as possible. Although most US officials believed that coercion brought confessions, the latter did not represent the truth, in fact, "*the detainees told…that they had been coerced into making false confessions*" to avoid being subjected to painful techniques.[130] She also revealed that evidence coming from aviation documents showed that the Gulfstream V jet was the most used US aircraft for the rendition policy and that several innocent detainees were tortured. At the end of the article, Mayer pointed out that the right of detainees to challenge their imprisonment before a judicial authority was impaired because the Combatant Status Review Tribunals (CSRT), which were established in 2004 to check whether the classification of detainees as "enemy combatants" was correct in non-public hearings, were used to reject claims of innocence.[131]

The scandal coming from Mayer's revelations on European countries' participation in the CIA's secret operations encouraged European institutions, namely the Council of Europe and the European Parliament to investigate on whether fundamental human rights' violations have been committed within European soil.

2.1) The Council of Europe's Reaction

After two months from the publication of Mayer's article on *The New Yorker*, the Parliamentary Assembly of the Council of Europe (PACE) launched its first alarm by adopting Resolution 1433/2005 and Recommendation 1699/2005 to encourage the United States to end the illicit procedure of secret detention and safeguard the rule of law as well as human rights.

[129] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 1-15.
[130] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 18.
[131] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 26.

In June, the EU Committee of Ministers shared the PACE's position and requested the US government to ensure the respect for the rule of law and human rights but received no response.

In November, the Committee on Legal Affairs and Human Rights met under the instructions of the PACE's President and demanded the Venice Commission to issue an opinion to urge the Council of Europe's Member States to respect rights and their duties. Then, the Vice-President of the EU Commission Franco Frattini supported the Council and obtained essential data from Eurocontrol and the EU Satellite Center which helped them to track the flights involved in the extraordinary rendition policy in Europe. The day after, *ABC News* reported that Poland and Romania housed secret detention facilities, which were closed after *The Washington Post*'s revelations, in which the "enhanced interrogation techniques" were applied to 11 captives who were then deported to Northern African CIA centers. Afterwards, *The Washington Post* revealed to know which countries were involved in the operations, but it stipulated an accord with US authorities according to which it was not possible to release such information.

In December, one of the Parliamentary Assembly's members called Dick Marty was appointed as Rapporteur by the Council of Europe to start investigations into the existence of CIA's black sites and the violations committed by European nations. The Council of Europe wished to have a report as soon as possible because there was an urgency to know whether European values were respected or not by European Member States.

After having searched and gathered relevant information on whether, how and to what extent the practices of extraordinary rendition and secret detention were carried out within the European soil, Mr. Marty released its first report on 7th June 2006, which confirmed that 14 European countries assisted the United States in the extraordinary rendition and secret detention programs thus violating not only international law but also European legal standards.[132]

First, the author attributed the term "global spider's web" to the system created by the United States in collaboration with all the other governments that did not show any effort to investigate into the existence of detention centers abroad and the use of the "enhanced interrogation techniques".

[132] Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 1-8.

Then, he criticized the 2001 Military Order because it deprived several individuals of their liberty by establishing a legal framework which contrasted international, European and US domestic law. Indeed, Guantanamo's prisoners were illegally abducted, rendered to third countries without invoking any extradition treaty and deprived of the most fundamental rights: right to be heard, right of appeal and so on.[133]

Moreover, the author collected crucial data from Eurocontrol and other aviation authorities and reconstructed the flight circuits linked to the illegal inter-state transfer of detainees. Afterwards, the report enlisted the number of flights directed by the United States and the airports in different continents which were involved in these operations.

After having examined in detail the cases of Romania and Poland which both housed secret detention facilities, Marty described the "security check" process carried out by the CIA before each rendition and believed that the infringement of human rights, dignity and the principle of proportionality could not be justified by any measure on national security. The report also contained the personal experiences of several detainees who were subject to the extraordinary rendition program including Khaled El-Masri and Abu Omar as well as the government's attitude and response to these cases.[134]

Marty stated that, although he asked European governments to start investigating the cases, only the German and UK parliaments reacted positively while the others including Poland, Romania and Macedonia did nothing. Finally, the Parliamentary Assembly underlined the importance of preventing and fighting terrorism as well as respecting human rights and the rule of law.

In conclusion, the European States which were responsible for participating in the extraordinary rendition program were enlisted: Sweden, Bosnia-Herzegovina, United Kingdom, Italy, Macedonia, Germany, and Turkey.[135]

After the immense impact of all the reports and scandals denouncing the unlawful practices performed by the CIA and European countries, on 6th September

[133] Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 9-12.
[134] Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 14-19.
[135] Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 54-56.

2006, President Bush for the first time publicly admitted that he was aware of the rendition policy. Indeed, he confirmed that the CIA secretly kidnapped and rendered captives to interrogate them abroad and underlined the importance to continue this practice to obtain the necessary information to fight terrorists. Therefore, it is possible to state that he justified the secret operations and the use of the "enhanced interrogation techniques" by considering them as a crucial instrument to prevent terrorism. In addition, he recognized that about 100 detainees were secretly held by the CIA and that only 14 high-value detainees were kept in CIA custody before being deported to Guantanamo Bay.[136] Finally, he also admitted that the CIA held prisoners abroad in Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand to interrogate them.

However, several details regarding these programs remained classified and the Council of Europe felt the responsibility to deepen its knowledge about the CIA's conduct in collaboration with European countries. Therefore, Mr. Marty was asked again to investigate the issue and provide another report to ensure accountability and transparency as much as it was possible to do.

Consequently, on 7th June 2007, another report was published and first clarified that the information gathered in his study was reliable because it came from different sources such as flight records, detainees and authorities and confidentiality was imposed thus witnesses felt free to speak.[137] Then, the Rapporteur explained that the CIA's secret operation to arrest, transfer and interrogate terrorist suspects was called the "High-Value Detainees (HVD) Program", soundly organized and carried out for five years between 2001 and 2006. It was designed by American lawyers who were part of the CIA, the Justice Department and the Bush Administration and approved the "Kill, Capture or Detain" (KCD) orders through which the CIA decided whether to arrest, imprison or kill high-value targets.[138] The black sites run by the CIA also expanded:

[136] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 6.
[137] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 4.
[138] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 10-12.

the island of Diego Garcia, lent by the United Kingdom, was used to process detainees and Thailand offered the first secret site which also housed Abu Zubaydah.[139]

To start these covert programs, the CIA needed permissions from the US government, which established transnational agreements with its foreign allies' military apparatuses for the creation of military connections and the authorization to freely travel by military means of transportation. Indeed, although Article 5 of NATO on collective security was invoked after the 9/11 to start a military campaign, it enabled instead the United States to obtain the permissions and protections that the CIA needed to start its secret operations: the country made unilateral decisions, no collective self-defense was provided, several documents on the NATO authorization were undisclosed, the NATO granted the blanket overflight clearances and the access to airfields, non-NATO members participated and collaborated, a great deal of information remained classified.[140]

Moreover, the CIA also needed protections for what regarded the security of its employees and the secrecy of the information involved.[141] Indeed, the United States stipulated exceptional accords with Poland and Romania mainly because their economies were weak thus in need of an economic stimulus to overcome difficult periods of transition. More specifically, Poland was involved in the US operations in Afghanistan and Iraq, and it wanted to reform its secret services to surpass the communist mindset while Romania already developed a site to detain high-value detainees.[142]

Therefore, the reporter confirmed the existence of secret detention centers in Europe, especially in Poland and Romania, which were directly and completely run by the CIA, in fact, the local personnel were not allowed to know the exact number of prisoners held there. He also recalled that only few countries, such as Bosnia and Herzegovina, admitted their responsibility in the participation of such illegal activities

---

[139] Parliamentary Assembly. (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 13.

[140] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 16-22.

[141] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 15.

[142] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 22-26.

while most national authorities in Europe not only remained silent but also refused to take any action to discover the truth by invoking the principle of State secrets.

Furthermore, Marty pointed out that, in most cases, once detainees who were unfairly subjected to abuses were freed, they received no apology from authorities, except for Canadian ones, and, especially in Europe, they were victims of discrimination.

Regarding human right violations, Marty argued that the CIA's secret operations led to a dehumanization process in which detainees were referred to as "aliens" or "ghost prisoners" who were entitled to have no rights and disappear. After having reported the inhuman conditions and treatment reserved to captives in those centers, he analyzed some cases of extraordinary renditions involving European countries, such as El-Masri, Abu Omar and Maher Arar and pointed out a decreasing trend towards the safeguard of rights. The author defined this system as a "legal apartheid" because these operations were designed only for non-American individuals.[143]

According to Marty, although the fight against terrorism was fundamental, the end did not justify the means and the main problem was the lack of an international strategy to stop the terrorist threat. The report also pointed out the importance of avoiding the spread of racism and discrimination towards the Muslim population, namely Islamophobia, which must be protected by European countries where it resided. He also advocated for the establishment of codes of conduct and effective oversight for all the agencies involved in these activities and the following investigations.[144] Therefore, the author urged for the necessity of an international consensus on how to fight terrorism, how to define certain concepts such as "war", "enemy" and "combatant" and how to conduct interrogations by establishing clear, structured, and detailed standards.[145]

Finally, the report concluded that, if the words used by Bush in his 2006 speech were examined, it would have been possible to confirm that he left the possibility for a

[143] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe Member States: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 3.
[144] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe Member States: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 5.
[145] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe Member States: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 68-71.

further use of extraordinary renditions open: in fact, another high-value detainee, namely Abd Al-Iraqi, was rendered to Guantanamo Bay in 2007.[146]

2.2) The European Parliament's Response

Once it became evident that European nations participated in the CIA's secret extraordinary rendition and detention programs, at the beginning of 2006, the European Parliament created the Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners (TDIP) composed of 46 members, to inspect such issues.

In April 2006, the TDIP, whose Rapporteur was Claudio Fava, argued that any European country which actively or passively participated in the secret detention program was responsible, even when national forces operated *ultra vires* without notifying the government.[147] Therefore, it was necessary to improve controls on the intelligence's activity in other territories because the rules regarding this matter were inappropriate. The Committee strongly highlighted "*the serious and inadmissible violations of fundamental human rights*" enshrined in the European Convention of Human Rights (ECHR) and other international legal standards, and it condemned the practice of extraordinary renditions.[148] It reminded that it was impossible that European governments were not aware of the renditions performed in their lands, skies, and airports as well as of the high risk of torture in the receiving countries such as Egypt. The Committee's members also underlined that the prohibition of torture was absolute thus no exception was accepted, the information obtained through torture could not be considered as valid evidence because they have been rarely efficient to prevent or repress terrorism and the Chicago Convention was repeatedly violated.[149] They also urged the Council of Europe, its Member States, the European Commission and national parliaments to cooperate with each other and to support the work of the TDIP. After having recognized that after 9/11 there was a huge reduction in the human rights' safeguards, the Committee reported its visits such as that in Skopje to examine the case

[146] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe Member States: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 72.
[147] European Parliament (2006). *Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.* European Parliament, 1-5.
[148] European Parliament (2006). *Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.* European Parliament, 6.
[149] European Parliament (2006). *Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.* European Parliament, 7-8

of El-Masri and the one in Washington to meet Congressmen and the Department of Justice's employees. Finally, it reported its analysis on 32 planes linked to the CIA that operated in Europe which led to the reconstruction of the stops made to render between 30 and 50 detainees.[150]

Once Bush admitted that the United States resorted to extraordinary renditions, the TDIP released some documents which, after criticizing the lack of cooperation of European nations to put an end to this practice, contained details on the CIA's flights used to deport detainees and proved that European airports were systematically and illegally used as stopovers by the CIA to arrest suspected terrorists.[151] Indeed, it revealed that 1245 flights controlled by the CIA flew above Europe and transited in European airports between 2001 and 2005. Therefore, the Committee argued and criticized that European States were aware of such programs because they let the CIA operate above their skies without any control or authorization. It also examined country by country the extent to which European nations were involved in these covert operations: Italy, the United Kingdom, Germany, Sweden, Austria, Spain, Portugal, Ireland, and many others.

On 20th July 2007, President Bush signed the Executive Order 13440 through which he determined that Common Article 3 of the Geneva Conventions applied to the CIA's programs, which were re-authorized under specific conditions: torture or any similar act was not tolerated, isolation and interrogation could be used only for Al-Qaeda's members or those withholding crucial information, basic needs were provided to detainees, the CIA Director wrote down the policies that direct all the activities, which had to be lawful.

Afterwards, the Justice Department's Office of Legal Counsel issued a memorandum which established that detentions should have lasted as long as it was required to acquire the necessary information and, later, detainees would have been sent to the Defense Department. Indeed, it also noticed that this *modus operandi* was applied to Abd Al-Iraqi, who was first detained under CIA custody and then handed to the Defense Department. Finally, the OLC requested permission to use some specific

[150] European Parliament (2006). *Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.* European Parliament, 11-12.
[151] European Parliament (2007). *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.* Procedure 2006/2200(INI). https://www.europarl.europa.eu/doceo/document/A-6-2007-0020_EN.html.

techniques such as the injection of liquid meal, sleep deprivation for a maximum of 96 hours, facial hold, insult, and facial slapping since, according to it, they were legal.[152]

3) Most (In)famous Cases

This section will examine the most notorious cases of extraordinary renditions of terrorist leaders and suspects to provide a clearer insight on how the secret CIA programs were conducted in collaboration with other States. Each case that has been selected had its own importance because each of them will provide a particular aspect related to extraordinary renditions and the use of torture during the interrogation procedure.

3.1) Abu Zubaydah

The first case that must be analyzed is the one regarding Abu Zubaydah, who was a stateless Palestinian, senior leader of Al-Qaeda and closer collaborator of Osama Bin Laden. He was believed to be involved in several attempted terrorist attacks against the American population and he assisted Al-Qaeda's volunteers to reach training camps in Afghanistan and set up the terrorist cells all over the world. After Bin Laden and Al-Zawahri, he was the third most wanted terrorist by US authorities.[153] In addition, he was allegedly contacted by suspected terrorists a few days after the 9/11 attack and mentioned several times by US authorities during public speeches, interviews, and memoranda.

He was shot and captured in a house in Faisalabad, Pakistan, on 28th March 2002 by US and Pakistani authorities. He was first deported to a black site in the northeast province of Udon Thani in Thailand and then held under CIA custody in Poland for nine or ten months. For four years, he was detained in secret detention centers worldwide until September 2006 when he was transferred to Guantanamo Bay. As it was reported by *The Washington Post* and *The New York Times*, painkillers were given to him during his custody for the purpose of interrogation. As it was already mentioned, the second memoranda issued by the OLC in August 2002 authorized the use of 10 interrogation techniques, including waterboarding, against him. US officials reported

[152] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 17-18.
[153] Human Rights Watch (2004). *The United States "Disappeared": The CIA's Long-Term "Ghost Detainees"*. 26.

to *The Washington Post* that the information gathered from Zubaydah was crucial to capture other terrorists such as Rahim Al-Nashiri and Omar Faruq.[154]

In 2005, it was found out by an OLC's memorandum that he was subjected to waterboarding, in which the prisoner was put under water and made believed to drown, for 83 times in 2002 in Thailand and that this did not lead to any further revelation.[155] Moreover, 92 recordings of his interrogations were demolished by the CIA. He then brought his case before the European Court of Human Rights (ECtHR), and it was revealed that he was extraordinarily transferred to a secret detention facility in Lithuania which was set up *ad hoc* and authorized by Lithuanian authorities for the CIA's operations. On this occasion, it became also known that he was detained in Rabat, Morocco, in 2003 and deported by Lithuanian agents to another unknown detention facility controlled by the CIA.[156]

In 2006, it was publicly acknowledged by the Bush administration that Zubaydah was one of the 14 high-value detainees who were transferred to Guantanamo Bay. In addition, Amnesty International analyzed a series of flights used by Finland for extraordinary renditions and argued that perhaps Zudaydah was deported on the aircraft with tail number N733MA, which departed from Portugal and landed in Helsinki and in Lithuania on the same day in March 2006.[157]

In 2009, Ali Soufan, who was an FBI official that gained trustworthy information by using other methods during interrogations, reported the flaws of using physical means including the fact that, according to him, they conflicted with American principles and damaged the United States' reputation. During the proceedings for the case of Abu Zubaydah, Soufan proved that when the "enhanced techniques" were applied to the detainee, he was not willing to cooperate with the authorities until non-violent means were used to approach him.[158]

---

[154] Priest, D. (2004). CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review. *The Washington Post.*

[155] US Justice Department Office of General Counsel (2005). *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General.

[156] Goldman, A., & Apuzzo, M. (2010). Guantánamo captive's interrogation tapes found under CIA desk. *Huffington Post.*

[157] Amnesty International (2011). *Finland must further investigate U.S.A. rendition flights*.

[158] US Senate Committee on the Judiciary (2009). Testimony of Ali Soufan.

In 2010, during the investigations into the violations committed by Polish authorities, Interights requested for him the status of victim which was later obtained after some weeks. In 2011, Zubaydah with the help of Interights filed an application before the ECtHR claiming that Lithuania was involved in his rendition, enforced disappearance and ill-treatment in its detention center.

In 2012, the Committee on Civil Liberties, Justice, and Home Affairs (LIBE) visited Lithuania and gathered more data from Eurocontrol which demonstrated that Zubaydah's plane N787WH, while transferring him to Lithuania, stopped in Morocco in 2005. Therefore, the European Parliament urged Lithuania to investigate its participation in the CIA's secret operations if new evidence was brought to light. Today, he is still detained at Guantanamo Bay.[159]

3.2) Ibn Al-Shaykh Al-Libi

Another well-known case of extraordinary rendition concerned Ibn Al-Shaykh Al-Libi, who was a Libyan senior Al-Qaeda member arrested in Pakistan in November 2001, handed to the FBI at Bagram Air Base and then kept under CIA custody in Kandahar, Afghanistan.[160] He was also included in the US list of the most wanted suspected terrorists, his assets were frozen by President Bush, he was the senior leader of Bin Laden's terrorist training camp in Khalden, Afghanistan, and operated under Abu Zubaydah's directions.

Then, he was interrogated on the USS Navy assault ship Bataan in the Arabian Sea where there was a dispute over interrogation strategies between the FBI, which wanted to safeguard his life, and the CIA, which threatened him and his family. As a matter of fact, he was given to the CIA which extraordinarily transferred him to Egypt in 2002.

There, he was interrogated by Egyptian officials and the information he provided to US agents on Al-Qaeda's efforts to acquire Iraq's weapons of mass destruction was so essential that it was cited by the Secretary of State Colin Powel in his speech to the UN Security Council in 2003. According to his claims, Al-Qaeda's members were trained to use poisons and deadly gases by Iraq, thus his revelations were used by the Bush administration to confirm Saddam Hussein's possession of chemical

[159] The New York Times (2023). *The Guantanamo Docket, profile: Abu Zubyadah*. http://projects.nytimes.com/guantanamo/detainees/10016/documents/11.
[160] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 10.

weapons.[161] In addition, he also told US interrogators about the plot which was underway and consisted in the explosion of the US embassy in Yemen with a truck bomb.

However, Al-Libi confessed that he provided false information to avoid the torturing techniques that were announced to be applied against him and to receive a better treatment: in fact, after being confined in a box 50 cm x 50 cm for 17 hours and kicked, he invented a story about three members of Al-Qaeda who visited Iraq to learn how to use chemical weapons. Therefore, his case confirms the theory according to which torture and ill-treatment do not always provide information which can be surely considered reliable. Other theories about his false testimony argued that he did that to increase his relevance or to encourage the United States to attack Iraq, which was the weakest Islamist State in his opinion.

He was later rendered from Egypt to Afghanistan on the CIA plane N379P and kept under CIA detention in other locations until he reached the Abu Salim prison in Tripoli, Libya, in 2006. Then, he was sentenced to life imprisonment by the State Security Court which was known for not respecting detainee's right to fair trial and received a visit from Human Rights Watch in 2009.[162] Immediately after two weeks, he committed suicide in his cell. According to *The New York Times* and Al-Zawahiri, Libyan authorities tortured him until he died but still today there are doubts over his death because it was discovered that he also suffered from tuberculosis. In 2014, *The New York Times* revealed that Al-Libi was deported to Guantanamo Bay in 2003 and then rendered to Morocco in 2004.

3.3) Ahmed Agiza and Muhammed Al-Zery

The cases of Ahmed Agiza and Muhammed Al-Zery, who were both Egyptian nationals living with their families in Sweden, must also be considered. While seeking political asylum, they were arrested and taken to the Bromma airport in Stockholm by the Swedish Security Police in December 2001 and then given to the CIA, which rendered them on the Gulfstream V plane N379P to Egypt. There, although the country promised not to torture them and Swedish officers visited them temporarily in the Tora prison to monitor their conditions, they were tortured and held in the State prison in Nasr City

[161] Human Rights Watch (2004). *The United States "Disappeared": The CIA's Long-Term "Ghost Detainees"*. 2.
[162] Human Rights Watch (2009). *Libya/U.S.: Investigate Death of Former CIA Prisoner*.

for one year and electric shocks were used against them. After being kept in the Tora prison for two years, Agiza was sent to the Scorpion high security facility.

In 2003, Agiza filed an application before the UN Committee Against Torture claiming a violation of Article 3 of the Convention Against Torture committed by the Swedish authorities.[163] In October, Al-Zery was released after two years under Egyptian detention.[164]

In April 2004, a Court condemned Agiza to 25 years of detention after a military trial because he was a member of an Islamic terrorist organization and rejected his desire to call a doctor to check whether he had been subjected to torturing techniques or not. Furthermore, the principle of the due process of law was not guaranteed according to Human Rights Watch which assisted Agiza in the trial. In June, the penalty was reduced to 15 years with no reason.[165]

In 2005, the UN Committee Against Torture concluded that Sweden violated the UN Convention Against Torture by expulsing Agiza and relying on Egypt's assurances which did not safeguard him from torture. Al-Zery also filed an application before the UN Human Rights Committee claiming a violation of Article 7 of the ICCPR, which contained the prohibition of torture or any other cruel treatment.[166] After having conducted an investigation of Sweden's expulsion of both individuals, the Swedish Parliamentary Ombudsman Mats Melin condemned the Swedish police which acted inactively, was not well organized and should have regulated the operations at the airport without letting US officials exercise an inhuman treatment. Despite the inquiries, criminal prosecution was not called for Sweden by the Ombudsman.[167]

In 2006, the UN Human Rights Committee argued that Sweden violated the absolute prohibition of torture because it did not prevent Al-Zery's ill-treatment, removed him despite it was aware that he would have faced a high risk of torture in Egypt and criminal investigations were not conducted. The Council of Europe also arrived at the same conclusions by stating that the human rights' infringements

[163] *Agiza v. Sweden*, No. 233/2003 (Committee Against Torture 2003).
[164] Human Rights Watch (2005). *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*. 57-60.
[165] ACLU (2007). *Biography of Plaintiff Ahmed Agiza*. http://www.aclu.org/national-security/biography-plaintiff-ahmed-agiza.
[166] *Alzery v. Sweden*, No. 1416/2005 (UN Human Rights Committee, 2006).
[167] Human Rights Watch (2005). *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*. 63.

committed by the country could amount to a violation thus Sweden could be responsible.[168]

In 2007, the European Parliament issued a report to criticize Sweden which removed Agiza and Al-Zery in 2001 relying only on Egypt's diplomatic assurances which did not protect them from torture, obstructed their rights contained in the ECHR because their lawyers were informed later and offered US agents a plane which was authorized to bring them to Egypt. It also condemned the Swedish Security Police which did not react when US authorities reserved a humiliating treatment by cutting their clothes at the Bromma airport breaching the rule of law. On this occasion, the European Parliament shared the positions of the UN Committee Against Torture and the UN Human Rights' Committee which condemned Sweden for having infringed the prohibition of torture. Moreover, it was also found that the CIA's aircrafts used for the extraordinary renditions of Agiza and Al-Zery made several stopovers at German, Greek, Irish, Italian, and Polish airports.[169]

In 2008, Agiza and Al-Zery were awarded three million Swedish krona as reimbursement for Sweden's participation in their transfer and ill-treatment, as the Swedish Chancellor of Justice established. Therefore, it is possible to conclude that diplomatic assurances and post-transfer monitoring to ensure that torture is not enforced represent an ineffective protection against torture. Agiza was freed in 2011 and, after one year, he received permanent residency by Sweden.[170]

3.4) Abd Al Rahim Al Nashiri

The last case of extraordinary rendition that must be examined is the one regarding a Saudi citizen: Abd Al Rahim Al Nashiri, who was believed to be involved in two terrorist attacks by US authorities: the first occurred in 2000 on the USS Cole in Yemen where some American sailors died and the second happened in 2002 when the French oil tanker MV Limburg exploded killing several crew members.

Therefore, he was arrested in Dubai in October 2002, transferred to CIA detention centers of the Salt Pit in Afghanistan and then in Bangkok, Thailand, where waterboarding was used against him. He was later extraordinarily rendered on the aircraft N63MU to a secret Polish black site held by the CIA, where he was subjected

[168] Report Council of Europe (2006), para. 150.
[169] Report European Parliament (2007), para. 12.
[170] Nordstrom, L. (2012). Egyptian deported by CIA gets residency in Sweden. *Associated Press*.

to several torturing and humiliating techniques including mock execution, standing naked and hooded, painful positions and threat to sexually abuse his mother.

In 2003, Poland and the United States collaborated in a joint secret operation which consisted in flying Al Nashiri to other unknown locations including Rabat, Guantanamo Bay, and Bucharest. In 2006, he was brought to Guantanamo Bay and the Bush administration confirmed that he was one of the 14 high-value detainees transferred there.[171]

In 2008, the former CIA Director Michael Hayden confirmed that Al Nashiri was one of the three detainees who were subjected to waterboarding, as Bush previously announced, and added that this technique was no longer used. On the same day, it was declared that no criminal investigations into the CIA's application of waterboarding would be conducted by the US Attorney General Michael Mukasey.[172]

In 2010, an investigation into Al Nashiri's detention and treatment in Poland was requested by his lawyers and he received the status of victim by the Polish prosecutor showing that Polish authorities did something wrong. In 2011, the US military commission prosecutors wanted to impose the death penalty on him because of the suspicion of his involvement in the two terrorist attacks in 2000 and 2002.[173] Therefore, with the help of the Open Society Justice Initiative, he filed an application before the ECtHR against Poland and Romania since, although most of ill-treatment was inflicted by US officials, they were both Contracting Parties to the European Convention of Human Rights, which represented a stronger standard for the protection of human rights.[174]

In 2012, the ECtHR notified the Polish and Romanian governments on Al Nashiri's application and requested evidence in terms of documents, written statements or agreements linked to his custody in the secret Polish and Romanian facilities.[175]

---

[171] Office of the Director of National Intelligence (2006). *Biographies of High Value Terrorist Detainees Transferred to the U.S. Naval Base at Guantanamo Bay.*
[172] Hillebrand, C. (2009). *The CIA's extraordinary rendition and secret detention programme: European reactions and the challenges of future international intelligence cooperation*. Netherlands Institute of International Relations Clingendael, 21.
[173] US Defense Department (2011). *DOD Announces Charges Sworn Against Detainee Nashiri.*
[174] *Al Nashiri v. Poland*, (ECtHR, 2011) and *Al Nashiri v. Romania*, No. 33234/12 (ECtHR, 2012).
[175] Singh, A. (2012). *European Court Probes for Truth on CIA's Secret Prison in Poland*.

4) The End of Extraordinary Renditions?

On 20th January 2009, Barack Obama became the President of the United States, and his foreign policy aimed at starting a new era of relationships with the Muslim world: in fact, he made his first interview to the Arab satellite TV network, Al Arabiya, a video message for the Iranian population for the New Year, a speech at the Cairo University to promote peace and supported the Iranian protesters during Presidential elections in Iran.

In addition, he immediately announced the will to end the conflict in Iraq by instructing the US military to reduce its combat troops in the country and leave only those involved in counterterrorism operations or training. Once the CIA detected Osama Bin Laden who was living in a small area in Pakistan, President Obama authorized an organized raid which ended with the death of the terrorist leader in 2011 and huge celebrations in the United States. However, he decided to increase US troops in Afghanistan which, in his opinion, was more likely to attack the United States and focused also on Pakistan, which supported Afghan terrorism. He also ordered the killing of Anwar Al-Awlaki, who was an American Imam and supporter of Al-Qaeda, strengthened the relationships with Saudi Arabia by signing arms and technology agreements, launched an airstrike campaign against the terrorist organization ISIL and destroyed Libyan air defense.

For what regards the CIA's extraordinary rendition and secret detention programs, Mr. Obama promised during the electoral campaign to put an end to these practices initiated by the Bush administration. Indeed, once in office he passed three Executive Orders which affected detention and interrogation processes for suspected terrorists carried out by US authorities.

The first was Executive Order 13491 which revoked President Bush's 2007 Order that re-authorized the CIA's secret detention program, enabled Al-Qaeda and Taliban's detainees to be protected under the Third Geneva Convention and established that Common Article 3 applied to detentions and interrogations thus allowing some of the "enhanced interrogation techniques". It established that the methods enshrined in the Army Field Manual 2-22.3 had to be used to interrogate all prisoners captured by the United States during armed conflicts and they were entitled to access the International Committee of the Red Cross. The Order also urged the CIA to close its detention centers and stop any setting up of other secret facilities. It also created the

Special Task Force on Interrogation and Transfer Policies, which was led by the Attorney General, checked the compliance of the Army Field Manual's means with the CIA's provisions and ensured that torture or any degrading treatment was not employed in the renditions of detainees to foreign governments.[176]

The second was Executive Order 13492 which requested to check whether all detainees held at Guantanamo Bay could be relocated, freed, or prosecuted in accordance with the United States' interests of national security, foreign affairs, and justice. In addition, it became impossible to bring any case before the military commissions which were established by the Military Commission Act. More importantly, the Order called for the closure of Guantanamo Bay's detention center within a year because it was in the interests of the United States.[177]

The third was Executive Order 13493 which set up the Special Interagency Task Force on Detainee Disposition with the task to perform a careful evaluation of the existing detention policy options that the US Federal government had to arrest, detain, transfer, release individuals involved in terrorist activities during armed conflicts.[178]

However, although President Obama surely took further steps to end the CIA's secret operations, renditions were not prohibited but persisted as a lawful counterterrorism strategy and were just subjected to a closer supervision to ensure a correct treatment of all those involved in this practice. Torture and secret detention were prohibited only for those detainees that were under the effective control of US officers or kept in detention facilities controlled by the United States. Therefore, the Obama administration did not consider that the CIA could assist other countries in detaining and rendering captives who were under their control. Indeed, several reports demonstrated that the CIA exploited this black hole by participating in the rendition and custody of suspected terrorists in Somalia in the years following President Obama's Orders. In addition, suspected terrorists could be temporarily abducted and detained by the CIA before being transferred to other governments for interrogation or trial and kept under custody by all units within the Department of Defense, as President Bush's 2001 Military Order established. Indeed, this provision was not annulled by Mr. Obama thus

[176] Executive Order 13491 (2009). *Ensuring Lawful Interrogations*. Federal Register, 74 (16), 1-3. http://www.therenditionproject.org.uk/.
[177] Executive Order 13492 (2009). *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*. Federal Register, 74 (16), 1-4. http://www.therenditionproject.org.uk/.
[178] Executive Order 13493 (2009). *Review of Detention Policy Options*. Federal Register, 74 (16), 1-2. http://www.therenditionproject.org.uk/.

the President could still impose indefinite military detention anywhere for those suspected to be Al-Qaeda's members or threats to the US national security. Consequently, the number of prisoners detained at Bagram Air Force in Afghanistan, which was not closed, drastically increased. It must be noted that the Obama administration relied on recipient countries' diplomatic assurances to avoid torture and post-transfer monitoring of prison treatment which, as it was seen in the cases of Agiza and Al-Zery, did not represent a successful safeguard against ill-treatment. Although the Interagency Task Force created by President Obama issued a report which recommended to improve the procedures to receive anti-torture diplomatic assurances from third countries and supervise detainees' treatment there, it remained classified as well as several documents on the investigations into the CIA's secret programs. [179] It must be noted also that, at the end of 2006, CIA detention centers were already mostly empty.

Therefore, it is possible to conclude that US officials could still be involved in extraordinary renditions and detentions thus the implications of Barack Obama's Executive Orders were doubtful. Although he denounced torture and strengthened the supervision system of detainees' treatment, the use of irregular rendition was maintained.

For what regarded the closure of the detention center at Guantanamo Bay, there were several reasons why it was delayed: first, the Congress opposed to acquire the necessary funds and to relocate detainees held there, second, most trials involving them did not initiate in fact, the first case was heard only in 2008, third, the information involved in these cases was not fully reliable and, fourth, prisoners feared to go back to their countries of origins which employed torture.[180]

The new President also reduced the secrecy reserved to Presidential documents and, in April 2009, the CIA Director Leon Panetta announced the closure of black sites and the end of the use of the "enhanced interrogation techniques".

Furthermore, President Obama publicly expressed his will to move forward in fact he did not appoint any special prosecutor to inquiry the allegations of torture committed during Bush's presidency. Although in August the Assistant US Attorney

[179] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 7.
[180] Hillebrand, C. (2009). *The CIA's extraordinary rendition and secret detention programme: European reactions and the challenges of future international intelligence cooperation*. Netherlands Institute of International Relations Clingendael, 23-24.

John Durham was appointed by the Attorney General Eric Holder to investigate possible infringements of domestic law during the interrogations committed in the secret black sites, the "enhanced interrogation techniques" such as waterboarding which were authorized by the OLC were not included. Therefore, the investigations were impaired.[181]

In August 2010, Open Society Foundations published a piece of information revealed by 20 former detainees who were detained in a secret center at Bagram Air Base controlled by the Joint Special Operations Command (JSOC) and claimed to be subjected to torturing methods including exposure to extreme temperatures, forced nudity and sleep deprivation.[182] The existence of these temporary secret facilities to gather crucial information on terrorist activities was confirmed by US military officials.[183]

In September, several requests to disclose documents on investigations on erroneous renditions were issued by the Open Society Justice Initiative under the Freedom of Information Act stipulated with the CIA, FBI, and the Departments of Justice, State, and Homeland Security.[184]

In 2011, the Justice Department opened a full criminal investigation into two suspected terrorists held in CIA detention centers abroad, namely Gul Rahman who died in 2002 at the Salt Pit prison in Afghanistan and Manadel Al-Jamadi who was interrogated at Abu Ghraib center in 2003, after Durham recommended it. The Department also announced that the investigations into the CIA's participation in the detention of 99 prisoners would be closed soon.[185]

In April, the Associated Press claimed that secret detentions and interrogations on suspected terrorists persisted in several non-permanent locations in Afghanistan such as the Bagram Air Base in which they were conducted by the JSOC. Indeed, this

[181] US Justice Department (2009). *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees*. http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html.
[182] Open Society Foundations (2010). *Regional Policy Initiative on Afghanistan and Pakistan, Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*. 3.
[183] Schmitt, E. (2009). US Shifts, Giving Detainee Names to the Red Cross. *The New York Times*. http://www.nytimes.com/2009/08/23/world/middleeast/23detain.html.
[184] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 15.
[185] Lichtblau, E., & Schmitt, E. (2011). US Widens Inquiries Into 2 Jail Deaths. *The New York Times.*

was confirmed by former prisoners who witnessed the degrading treatment to which they were subjected.[186]

In July, it was discovered that the Somali citizen Ahmed Abdulkadir Warsame was arrested in international waters between Yemen and Somalia and then imprisoned and interrogated for two months on a US ship by the Obama administration, namely the High-Value Interrogation Group, which consisted of FBI, CIA, and Defense Department's members.[187] Then, *The Nation* denounced that a secret site, guarded by Somali agents, under the headquarters of the Somali National Security Agency (NSA) was used by the CIA to detain Kenyans suspected to be connected with Al Shabaab, which was a local Islamist terrorist organization linked to Al-Qaeda, in inhuman conditions. Indeed, they were not allowed to go outside and were forced to stay in prisons with no windows. There, the US intelligence service remunerated, and trained officials working there and interviewed prisoners: in fact, they gathered the needed information to capture in Nairobi and extraordinarily rendered the Kenyan national Ahmed Abdullahi Hassan to Somalia to interrogate and imprison him without guaranteeing his right to trial and legal assistance. Hassan was believed to be a closer collaborator of Nabhan, who was the Al-Qaeda's leader in East Africa suspected to be involved in the organization of the attacks against the US embassies in Kenya and Tanzania in 1998. The case of Hassan suggested that the United States were still involved in CIA secret detention and rendition operations also during the Obama administration although at a lower degree. Moreover, *The Nation* also interviewed Somali officials who confirmed that the CIA was the main actor in the Somali counterterrorism program: in fact, Mr. Obama launched a drone attack where the JSOC intervened and killed several Al Shabaab members.[188] The CIA's financing and training provided to Somali officers was later documented also by *The New York Times*.[189]

In 2012, Holder declared that criminal charges in the two cases of Rahman and Al-Jamadi would not be pursued by the Justice Department.[190] In August, *The Washington Post* revealed that national authorities in Djibouti captured three

[186] Dozier, K. (2011). Afghanistan Secret Prisons Confirmed by the US. *Associated Press.*
[187] Dilanian, K. (2011). Terrorism suspects secretly held for two months. *Los Angeles Times.*
[188] Scahill, J. (2014). The CIA's Secret Sites in Somalia. *The Nation.*
[189] Gettleman, J., Mazetti, M., & Schmitt, E. (2011). US Relies on Contractors in Somalia Conflict. *The New York Times*. http://www.nytimes.com/2011/08/11/world/africa/11somalia.html?pagewanted=all.
[190] US Justice Department (2012). *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*. http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html.

individuals with Somali origins after keeping them under custody and interrogating them for several months also by US agents despite their apparent innocence. After two months, a New York's Grand jury prosecuted them, thus they were handed over to the FBI and brought before the US Court to be tried. Another case which was reported by *The Washington Post* was that of Mohamed Ibrahim Ahmed, who was an Eritrean national detained in Nigeria for four months under US control: he was first interviewed by US personnel who did not respect his right to silence and legal assistance and then brought before a US Court to be prosecuted for links with terrorism.[191]

In December, the highly classified report called "Study of the Central Intelligence Agency's Detention and Interrogation" was approved by the US Senate Select Committee on Intelligence, whose chairman Dianne Feinstein condemned the setting up of the "black sites" and the implementation of inhuman means. She was also convinced that, once the white paper was published, the debate on whether it was possible to use physical means during interrogations would have ended.[192]

Conclusion

In 2002, *The Washington Post* revealed essential information provided by former intelligence and CIA agents who worked within the Bagram Air Base, which was a black site in Afghanistan where suspected terrorists were held. They provided details on how these secret activities were exercised since President Bush's rise to power: torture and ill-treatment were reserved to those who refused to collaborate with US authorities, who were always aware of what occurred in the center and made detainees think to be in countries where human rights were not respected. The Abu Ghraib scandal in 2004, which showed horrible pictures of US personnel with dead or suffering prisoners, hugely affected the United States' reputation and encouraged NGOs to focus their attention on how the country was operating abroad. Indeed, Human Rights Watch, Amnesty International and the World Policy Council contributed to put pressure on the Bush administration.

In 2005, Jane Mayer announced for the first time that European countries, namely Croatia and Albania, collaborated with the United States in such secret operations. Therefore, the world became aware of the huge scope of these activities and

[191] Whitlock, C. (2012). Renditions Continue Under Obama, Despite Due Process Concerns. *The Washington Post.*
[192] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 7.

European institutions immediately started to investigate European assistance. Dr. Marty was the most noticeable figure on this occasion: after being classified as Rapporteur by the Council of Europe, he provided two fundamental reports which clarified to what extent European nations were involved in assisting the CIA.

All these revelations and investigations forced President Bush to admit the United States' participation in the extraordinary rendition of 14 high-value detainees. Among them, Abu Zubaydah, who was the third most wanted terrorist by the United States, arrested in Pakistan and rendered to several locations worldwide where he was subjected to waterboarding. Ibn Al-Shayk Al-Libi demonstrated that the use of torture did not always produce reliable information: he invented stories on Al-Qaeda's attempt to obtain Iraqi weapons of mass destruction to avoid being kicked. The cases of Agiza and Al-Zery showed that diplomatic assurances by receiving countries did not guarantee that torture would not have been employed to detainees. In the case of Al Nashiri, the European Court of Human Rights (ECtHR) condemned for the first time a European country, namely Poland, involved in these operations.

In conclusion, this Chapter demonstrated that although the Obama administration wanted to put an end to these activities, the practice of irregular renditions could still be carried out by the United States in fact US officials participated in the interrogation of prisoners held in other detention facilities in Afghanistan and Somalia between 2010 and 2012. These are the last known cases of extraordinary renditions in which the CIA participated to arrest and render suspected Al Shabaab's members.

While the first two Chapters have been mainly descriptive, the next one will examine in detail the judicial interpretations of US and European Courts that dealt with the appeals brought by the victims of extraordinary renditions.

CHAPTER III – EXTRAORDINARY RENDITIONS: JUDICIAL INTERPRETATION IN THE UNITED STATES AND IN EUROPE

After having described how the CIA's program of extraordinary renditions and secret detention was discovered and carried out, it is essential to provide an analysis of the judicial decisions adopted by the Courts which dealt with the cases brought by the victims of these operations in the United States and in Europe.

The first section of the Chapter will analyze the case of Maher Arar, a Syrian citizen residing in Ottawa, who was arrested and interrogated for several hours by US authorities at the JFK Airport in New York and then extraordinarily rendered to Syria. There, he was subjected to ill-treatment by Syrian authorities instructed by US ones to gather information related to his alleged membership to Al-Qaeda. Once released, he filed a petition before US lower Courts which all dismissed his claims and established that his due process rights were not violated. In addition, the final decision of the US Supreme Court, which refused to review the lower Courts' judgements on Arar's instance, put an end to his case. Therefore, this case was examined to expose the US Courts' approach to extraordinary renditions which sided with the executive rather than ensuring that the rule of law was rightfully respected.

The second section will explore the story of Khaled El-Masri, a German citizen of Lebanese origins arrested in 2003 by Macedonian security officers, who violently ill-treated and rendered him to the CIA detention center in Kabul, where he was tortured. His case was dealt with by different judicial authorities: US Courts dismissed his claims because of State secrecy, German ones provided a contradictory viewpoint and the European Court of Human Rights ruled in favor of him condemning Macedonia for having violated Article 3, 5, 8 and 13 of the European Convention on Human Rights. This case was selected because it was the first time in which the Strasbourg Court dealt with extraordinary renditions and condemned a European country involved in these operations.

Finally, the third section will focus on Abu Omar, an Egyptian imam living in Milan, who was arrested, and transferred to different locations controlled by the CIA until Cairo, where he was detained, tortured, and interrogated. Although released, he was re-captured and sent to Istiqbal Tora prison where he was kept for two years. Once his wife denounced his disappearance, the investigations into the Italian authorities' involvement started and confirmed such participation. The Italian Constitutional Court advocated for the executive's discretionary power on State secrecy while the Milan

Court condemned *in absentia* twenty-three agents involved in Omar's extraordinary rendition including the Head of the CIA office in Milan Robert Seldon Lady. However, other domestic Courts annulled the conviction of the Italian officials and the President of the Republic pardoned some of them. Therefore, Abu Omar appealed to the Strasbourg Court which dismissed the objections raised by the Italian government and condemned Italy for the infringement of the ECHR. The relevance of this case is the contraposition between domestic and supranational Courts' interpretations on extraordinary renditions which suggested that supranational entities do not have to give an account to any national government in case of human rights' violations, thus they are freer to make fair and independent decisions.

As opposed to Chapter I and Chapter II whose aim was descriptive, this one has an analytical nature because it aims at examining the judicial reasonings concerning extraordinary renditions to provide the reader with a more complete comprehension on how these secret operations were treated from a judicial point of view.

1) Maher Arar: US Courts' Dismissal of His Claims

Maher Arar, who was a dual citizen born in Syria and residing in Canada, was arrested on 26th September 2002 while he was catching a connecting flight to return home from Tunisia at the John F. Kennedy airport in New York by US personnel and interrogated for eight hours on any possible contact with terrorist organizations. The capture was ordered once the Royal Canadian Mounted Police (RCMP) provided evidence on his alleged engagement in terrorist activities. He was then transferred in chains and shackles and put in solitary confinement within an empty cell in which the lights were permanently turned on. The day after, he was interrogated again by FBI agents who insulted him, denied him the possibility to request a lawyer and offered him the chance to go back to Syria which was rejected since Arar knew that he would have been tortured there. He was then transferred to the Metropolitan Detention Center in Brooklyn where he was put in solitary confinement again and denied any likelihood to meet an attorney.[193]

In October, removal proceedings were started by the Immigration and Naturalization Service (INS), and he was declared inadmissible to enter the United

[193] Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 41.

States because he was thought to be an Al-Qaeda member. Although he succeeded in contacting his family in Ottawa and receiving an attorney, Amal Oummih, to assist him, the lawyer was not allowed to participate in the interrogations carried out by INS personnel. In addition, the Regional Director of the INS Scott Blackman called for his expulsion from the United States arguing that Arar was surely a member of that terrorist organization. Indeed, the removal was carried out by the CIA which transferred him to a detention facility in Amman, Jordan where he was physically abused by local authorities.

Then, Arar was extraordinarily rendered to Syria in the Palestine Branch of Syrian Military Intelligence, which was controlled by the Syrian Military Intelligence (SMI), where he was detained in a very small cell, kicked, tortured, and interrogated in various inhuman ways for more than ten months. It was then discovered that he was deported in the CIA flight N829MG, which made several stopovers at German, Greek, Irish, Italian, and Portuguese airports.[194]

It is important to note that neither Canadian consulate officials nor his attorney were informed about the removal to Syria and that, although Syria offered diplomatic assurances to the US government that Arar would have never been tortured, he was subjected to ill-treatment. Consequently, he was forced to admit that he was trained in terrorist camps in Afghanistan although it was not true, and he demonstrated that US officials instructed Syrian authorities to interrogate him in such a degrading way by providing documents supporting his accusations.[195]

Once the Canadian embassy reached Syria to comprehend Arar's conditions, he was no longer interrogated nor tortured and received five visits from Canadian consular officials, who heard his confessions on the violations to which he was subjected only during the last visit when he decided to denounce.

In August 2003, he was forced to sign a statement in which he admitted his participation in terrorist activities in Afghanistan and was imprisoned in the overcrowded Sednaya prison for six weeks. The following month, he returned to the Palestine Branch for a week during which he heard other prisoners' requests to stop being tortured and, on 5th October, he was freed under protection of Canadian officials

[194] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 2.
[195] Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 3.

and decided to go back to Canada and rejoin his family.[196] His case was exceptional because, unlike other targets of the extraordinary rendition program, he was arrested on US territory rather than being kidnapped from foreign countries and then taken to the United States.

1.1) US District Court for the Eastern District of New York's Judgement Against Arar

At the beginning of 2004, the Center for Constitutional Rights, which is a legal advocacy organization advocating for the protection of freedoms and human rights, brought a petition before the US District Court for the Eastern District of New York on Arar's behalf against the Attorney General John Ashcroft, the FBI Director Robert Mueller, and Secretary of Homeland Security Tom Ridge and other US officials.

In 2005, the US government defended itself and attempted to dismiss Arar's case by arguing that he was designated as an Al-Qaeda member for reasons that were considered as State secrets, thus they could not be revealed.

On 16th February 2006, the US District Court for the Eastern District of New York, represented by Judge Trager, delivered its judgement following Arar's decision to file a complaint against US officials who detained and extraordinarily rendered him to Syria to interrogate and torture him by local authorities. Arar brought four claims: first, US personnel violated the Torture Victim Protection Act (TVPA) by assisting Syrian authorities to practice torture; second, they infringed his rights to due process contained in the Fifth Amendment of the US Constitution by purposely exposing him to torture; third, he was put in arbitrary and indefinite custody and deprived of the right to legal assistance; fourth, he was subjected to cruel, inhuman and degrading treatment.[197]

Although before being released Arar was forced to declare that he was trained in terrorist camps in Afghanistan, he has never been there nor involved in any terrorist activity nor been a member of any terrorist organization. More specifically, he argued that he was unfairly associated with an individual who was involved in terrorism and casually met in October 2001.[198]

---

[196] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 32.
[197] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006).
[198] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), para. 256.

The applicant also brought several official records that confirmed Syrian authorities' illicit approach to human rights to demonstrate to be a victim of torture and identified ten John Doe law enforcement agents who were involved in Arar's unconstitutional detention and interrogation.

Although Arar requested a declaratory relief claiming that his imprisonment violated the due process of law contained in the US Constitution, the Court established that it could not be granted because he was not challenging his removal to Syria nor the classification as inadmissible to enter the United States. Therefore, if the Court had decided that his detention or removal to Syria was illegitimate, this would not have affected the possibility for him to return to the country.[199]

Regarding the TVPA, the Court considered that it was a statutory note to the Alien Tort Claims Act (ATCA) thus it had to be considered in conjunction with it rather than a jurisdictional provision on its own, it extended liability to secondary actors who supported primary wrongdoers, Section 3 (b)(1) which required the applicant to be under the defendant's custody or physical control could be not considered and the Act applied only to US nationals who were tortured abroad. In addition, it noted that although the Foreign Affairs Reform and Restructuring Act (FARRA) which obstructed the United States to expel any individual to a country where there was a high risk of torture, the plaintiff did not bring any claim under it. The Court also pointed out that the statute's requirement to hold responsible those acting under authority or color of law of any foreign country was not involved because US officials were acting under domestic rather than foreign law and Syrian authorities did not demand them to torture Arar. Therefore, the TVPA did not apply, and Arar's first claim was dismissed also because evidence showed that the US Congress used the Act for US nationals who were tortured in a foreign State.[200]

Concerning the due process claims for Arar's detention and torture in Syria, namely the second and third ones, the Court first argued that it could consider the merits and then established that Bivens, according to which the right to recover damages had to be ensured to all victims of violations committed by federal agents although it was not enshrined in any provision, could not be extended for the applicant because it would alter the decisions taken by the executive branch on national security and foreign

[199] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), para. 260.
[200] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), para. 260-66.

affairs.[201] Judge Trager considered these elements as "special factors counseling hesitation", which was the exception in which a Bivens remedy could not be applied. It was also underlined that the judicial branch had to balance individual rights and national security matters under the guidance of the other two political branches to avoid threatening the role of the US President in conducting foreign policy. Therefore, "Courts must proceed cautiously in reviewing constitutional and statutory claims in that arena, especially where they raise policy-making issues that are the prerogative of coordinate branches of government".[202] Moreover, giving Arar the possibility to sue the US government for having infringed his rights would have caused pronounced embarrassment to the United States at the international level undermining its reputation.[203]

Therefore, it rejected both claims. Moreover, the Court noted that *Johnson v. Eisentrager* could neither be applied in this case because the factual backgrounds were completely different: Arar was held in incommunicado detention on US territory and denied access to any judicial or administrative body to review his case while in the other circumstance prisoners had never been to the United States and they were brought to trial before a military commission.[204] Judge Trager concluded that Arar was not an alien and his particular status was not regulated by US law, thus the Congress could neither regulate his position nor provide a specific cause of action for him.[205]

Also, the fourth claim advanced by Arar was dismissed by the Court which concluded that, first, the plaintiff was stopped at the border rather than entering the United States and that he should have further demonstrated the judicial assistance of which he was deprived to assert a violation of the Fifth Amendment.[206]

The Court also added that Arar should have precisely identified those who were involved in the command, development, and supervision of the violations of the due process safeguards and that the State-secrets privilege was not relevant in this case.

Finally, after having considered Arar's story and the extraordinary policy to which he was subjected that emerged from his testimony and official documents, the

---

[201] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (US Supreme Court 1971).
[202] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), para. 281.
[203] Sage, M. V. (2006). The exploitation of legal loopholes in the name of national security: case study on extraordinary rendition. *California Western International Law Journal*, 37(1), 134-135.
[204] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), paras. 267-284.
[205] Sage, M. V. (2006). The exploitation of legal loopholes in the name of national security: case study on extraordinary rendition. *California Western International Law Journal*, 37(1), 133.
[206] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), paras. 285-286.

District Court dismissed his four claims arguing that, first, the applicant could not request a declaratory relief, second, he could not prove that he had a feasible cause of action under the TVPA as he was not a national, third, Bivens could not be invoked for reasons of national security and foreign policy and, fourth, he should have identified those who directly participated in the unlawful procedure exercised on him and the exact harm that he underwent.[207] Therefore, the Court ruled in favor of the defendants, namely the US political branches, and obstructed Arar's possibility to redress his grievances.

The District Court's approach thereby enabled the United States to circumvent the legal standards prohibiting torture and any other inhuman treatment such as the Convention Against Torture provided by the United Nations. Furthermore, when US authorities arrested and interrogated Arar, they informed him that his rendition complied with Article 3 of CAT and the Geneva Conventions did not apply for his case.[208]

In the meantime, in February 2004, the Arar Commission of Inquiry was set up by the Canadian government and led by Justice Dennis O'Connor with the purpose of investigating the activities carried out by Canadian personnel in relation to Arar's detention in the United States, his rendition to Syria and his permanence there.[209]

In September 2006, the Arar Commission issued its report which concluded that there was no evidence to confirm that Arar's conduct could threaten Canadian national security because he has never had any contact with terrorist organizations. The Commission also discovered that the information provided by the RCMP and used by US officials to arrest Arar in 2002 was imprecise and erroneous because he did not commit any wrongdoing. In addition, it found out that Canadian consular officials should have focused more attention on the possible allegations on torture and thus, on Arar's declarations during Syrian custody. It also accused national authorities of having reported confidential and misleading information to the media to undermine Arar's public image and pursue their own political interests.[210] According to the report, Canada would have put Arar under surveillance rather than detained him, thus US authorities

[207] *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (Eastern District of New York 2006), para. 288.
[208] Sage, M. V. (2006). The exploitation of legal loopholes in the name of national security: case study on extraordinary rendition. *California Western International Law Journal*, 37(1), 137.
[209] Roach, K. (2007). Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry. *Cardozo L. Rev.,* 29, 53.
[210] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 71.

decided to render him to Syria because they knew that the torturing methods used there could have helped them to gather crucial information for the fight against terrorism.[211]

In 2007, the Canadian Prime Minister Stephen Harper published the letter which apologized and compensated Maher Arar and his family with 11.5 million Canadian dollars in exchange for retreating a complaint against the Canadian government, thus Canada was the first and only country to follow such behavior in respect of a victim of extraordinary renditions.[212] The Canadian government also accepted all the recommendations provided by Commissioner O'Connor, sent letters to both US and Syrian political leaders to oppose the treatment which was reserved to Arar and delisted him from the lookout lists.

1.2) US Court of Appeals for the Second Circuit's Judgements and Closure of the Case

At the end of 2006, Arar filed a Notice of Appeal in the Second Circuit while the Center for Constitutional Rights brought an appeal before the Court of Appeals for the Second Circuit which was argued in the following year.

On 30th June 2008, a three-judge panel of the Second Circuit of the US Court of Appeals by a 2-1 vote decided that Arar had no due process rights since, first, accepting his claims would have altered US national security, and second, he was a non-national. On this occasion, the Court apparently overruled the District Court's ruling by concluding that Arar made a *prima facie* showing which was sufficient to establish personal jurisdiction over the defendants, however, his claims were dismissed again.[213] Indeed, the majority, namely Judges Cabranes and McLaughlin, decided that Arar's Bivens claims could not be accepted because, first, there was an "alternative remedial scheme" provided by the Congress to have his removal order reviewed, and second, his claims affected national security and foreign policy which represented "special factors counseling hesitation" again.[214] Judge Sack was the one who dissented this opinion by recognizing an infringement of Arar's due process rights because, first, he was on US

[211] Lobel, J. (2008). Extraordinary rendition and the constitution: the case of Maher Arar. *Review of Litigation*, 28(2), 487.
[212] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 71.
[213] *Arar v. Ashcroft*, 532 F. 3d 157 (Second Circuit of the US Court of Appeals 2008).
[214] Lobel, J. (2008). Extraordinary rendition and the constitution: the case of Maher Arar. *Review of Litigation*, 28(2), 486.

soil, and second, the United States purposedly rendered him to Syria to subject him to torture.[215]

Therefore, it is possible to note that, on one hand, Canada examined, acknowledged, apologized, and compensated Arar for what he experienced while, on the other hand, the United States still considered Arar as a member of Al-Qaeda and opposed at all costs to his attempts to achieve justice and to admit their responsibility before a Court.

In August, the Court of Appeals for the Second Circuit decided that the case needed to be reheard *en banc*, meaning that all the judges of the Court would have participated.

On 2nd November 2009, the Second Circuit Court of Appeals confirmed the District Court's ruling in a 7-4 *en banc* decision dismissing Arar's claims.[216] Indeed, the Court acknowledged that Arar lacked standing to request a declaratory relief and failed to address his claims regarding his detention in the United States.[217] The separation of power principle was also respected by the Court since it argued that it was up to the executive branch to decide how extraordinary renditions had to be carried out and to the legislative one to establish whether Arar was entitled to receive compensation from the officers who were involved or directly by the government. Finally, it recalled that "The Congress has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence".[218] The four dissenting judges believed that, first, this was not an immigration case, and second, a Bivens remedy could be sought by Arar to receive compensation.[219]

In 2010, the Center for Constitutional Rights, in conjunction with several organizations which supported Arar, brought an action before the US Supreme Court, which did not grant Arar's petition for *certiorari* meaning that the lower Courts' decisions could not be reviewed thus also the Supreme Court dismissed Arar's claims. After the Supreme Court's refusal, Arar and his attorneys announced that investigations

[215] Lobel, J. (2008). Extraordinary rendition and the constitution: the case of Maher Arar. *Review of Litigation*, 28(2), 491.
[216] *Arar v. Ashcroft*, 585 F. 3d 559 (Second Circuit of the US Court of Appeals 2009).
[217] *Arar v. Ashcroft*, 585 F. 3d 559 (Second Circuit of the US Court of Appeals 2009), para. 563.
[218] *Arar v. Ashcroft*, 585 F. 3d 559 (Second Circuit of the US Court of Appeals 2009), para. 565.
[219] *Arar v. Ashcroft*, 585 F. 3d 559 (Second Circuit of the US Court of Appeals 2009), para. 582.

into US and Syrian officials involved in his extraordinary rendition would have been started and conducted by the Royal Canadian Mounted Police (RCMP).[220]

In 2012, a petition asking the Obama administration to publicly apologize for Arar and all victims of the US-led rendition program was signed by 60.000 people and filed by the Center for Constitutional Rights since Arar was never charged with any crime, thus he was unfairly tortured.[221]

In April 2015, the former CIA officer John Kiriakou, who worked at the Counterterrorism Center, revealed that Arar's innocence was known by the United States, indeed, several US officials fought with each other because some believed that he was the wrong person to punish. As a result, no comment was made by the US government.[222]

In September, the RCMP wanted to extradite and prosecute Col. George Salloum, who was a Syrian intelligence officer who tortured Arar, before Canadian Courts and issued a Canada-wide warrant and Interpol notice to arrest him.[223]

2) Khaled El-Masri: Different Judicial Perspectives

Khaled El-Masri, who was a German citizen of Lebanese origins designated as an Al-Qaeda member, was arrested on 31st December 2003 at the Serbian-Macedonian border while he was leaving his home in Ulm, located in the south of Germany, and going to Skopje in Macedonia by bus and detained by Macedonian security officers, who took away his passport, imprisoned and ill-treated him for some hours. Then, he was held at the Skopski Merak hotel in Skopje where he was put in incommunicado detention, interrogated on his suspected interactions with terrorist organizations and mistreated by the local personnel, who rejected any of his requests to see any lawyer, interpreter, consular official or member of his family. In addition, he was given the possibility to leave, if he admitted being an Al-Qaeda's member.[224]

---

[220] Center for Constitutional Rights (2010). *Canadian RCMP Conducting Criminal Investigation of U.S. and Syrian Officials for Maher Arar's Rendition to Torture*. See at https://ccrjustice.org/home/press-center/press-releases/canadian-rcmp-conducting-criminal-investigation-us-and-syrian

[221] Center for Constitutional Rights (2010). *60,000 People Ask President Obama for Apology to Torture Victim Maher Arar*. See at https://ccrjustice.org/home/press-center/press-releases/60000-people-ask-president-obama-apology-torture-victim-maher-arar

[222] Panetta, A. (2015). 'This is the wrong guy': Former spy reveals CIA debate over arrest, torture of Maher Arar. *The Canadian Press*. See at https://www.theglobeandmail.com/news/national/this-is-the-wrong-guy-former-spy-reveals-cia-debate-over-arrest-torture-of-maher-arar/article23799416/

[223] CBC News (2015). *RCMP charges Syrian officer in Maher Arar torture case*. See at https://www.cbc.ca/news/politics/maher-arar-rendition-development-rcmp-1.3211088

[224] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 94.

After 23 days, he was put in a car and brought to Skopje airport by Macedonian officers who surrendered him to the CIA, which violently stripped, hooded, and kicked him. He was later forced to assume drugs and transferred to Baghdad and then to the Salt Pit secret CIA detention center in Kabul, where he was held for four months, repeatedly tortured, and denied access to any attorney, member of his family or German authority. There, he was interrogated also by US agents on his alleged contacts with Islamic terrorists in Germany. His rendition to and from Afghanistan was possible because of Jeppesen Dataplan, which was a company that offered aircrafts and other services to the CIA to carry out several extraordinary renditions. Indeed, on 24th January 2004 Boeing 737 was used by the corporation to deport El-Masri from Skopje to Kabul.[225] Then, after having started a hunger strike with other detainees, El-Masri met two American officers among whom one of them knew that he was innocent but only senior officials in Washington could authorize his release. Therefore, the United States was aware that he was not guilty at some point.

In May, a German speaker who presented himself as "Sam" visited him in prison and refused to let him know who instructed him to stay with the detainee.

On 28th May 2004, El-Masri was taken from Kabul and extraordinarily rendered on the CIA Gulfstream aircraft N982RK to the Albanian military airbase Berat-Kuçova Aerodrome, where he was put in a car without knowing the destination and then brought to Mother Teresa airport in Tirana to be transferred to Frankfurt. More specifically, this flight made several stopovers at Cypriots, German, Greek, Irish and Spanish airports, therefore, Germany was aware of his illegal arrest.

He was later freed without receiving any apology or clarification and, after arriving in Germany, he told his story to a lawyer, who reported El-Masri's claims to the German government. The day after, the Albanian Ministry of the Interior revealed that El-Masri abandoned the country on a commercial flight.[226]

After his release, he recognized "Sam" who went to see him in prison and stayed with him during his rendition to Albania through a picture and realized that he was one of the German intelligence agents named Gerhard Lehmann. He also reported that precise and private questions were asked to him during interrogations in Afghanistan

[225] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 64.
[226] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 65.

confirming that Germany cooperated with and provided information to local authorities there although German officials did not confirm to have reported such data to US authorities.[227]

Therefore, Albania not only offered the CIA its skies and territory for El-Masri's rendition, but it also captured and brought him to an aircraft on the way to Germany. It is important to note that Albania did not investigate its involvement in the CIA's secret operations, nor it admitted its participation in El-Masri's extraordinary rendition although his passport was issued by Albanian officials, nor it provided any information on his situation.[228]

2.1) US Courts' Dismissal of El-Masri's Claims

Once *the New York Times* and *the Washington Post* investigated and denounced El-Masri's story, on 6th December 2005, the German Chancellor Angela Merkel publicly recognized that he was erroneously kidnapped by US authorities despite the Secretary of State Condoleezza Rice and her collaborators' disagreement with Merkel's choice. Therefore, the CIA's Office of Inspector General started the investigations of the case and drafted a report which remained classified. However, he argued that El-Masri's extraordinary rendition could not be justified and condemned an analyst, who received a promotion, and a lawyer, who was just reprimanded, working for the CIA.[229]

The day after, El-Masri, supported by the American Civil Liberties Union (ACLU), filed a petition before the US District Court for the Eastern District of Virginia against the former CIA Director George Tenet, CIA agents and other US officials who lent the aircrafts to the United States to carry out his extraordinary rendition. The applicant alleged that, first, some of the defendants violated his due process rights by not granting him a legal process and depriving his liberty, second, they all violated the prohibition of prolonged arbitrary detention contained in international rules and, third, the prohibition of cruel and degrading treatment was neither respected pursuant to the Alien Tort Statute (ATS).[230] In addition, the United States refused to let El-Masri and his lawyer enter the country thus they had to follow the case in a video call. According

[227] Grey, S. (2007). *Ghost Plane: The True Story of the CIA Rendition and Torture Program*. St. Martin's Griffin. 233.
[228] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 65.
[229] Mayer, J. (2008). *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. Anchor. 287.
[230] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (US District Court for the Eastern District of Virginia 2006).

to some scholars, this already reflected and heralded the United States' intention to dismiss his claims.

Indeed, on 12th May 2006, the case was heard by Judge T.S. Ellis III once the US government asked the Court to dismiss it a few days before because, according to it, accepting El-Masri's claims would have altered US national security and divulged State secrets. On this occasion, the Court decided first to examine whether the United States validly asserted the State secrets privilege. It started by clarifying that the State secrets privilege exclusively belonged to the executive branch which had to correctly invoke it while the judicial branch had to understand whether the contested information deserved to be classified as State secrets and thus needed to be protected. Then, it found out that "There was no doubt that the State secrets privilege was validly asserted here" by the government because it provided an *ex parte* classified declaration containing the reasons why accepting El-Masri's claims would have threatened national security including the exposure of the methods used by US officials in carrying out the program which would have rendered the policy vulnerable.[231] Therefore, the Court confirmed that the operational details of the extraordinary rendition operation were correctly claimed as State secrets because the CIA did not admit nor deny the applicant's allegations concerning the secret program.[232]

The second step of the Court's reasoning consisted in deciding whether to dismiss the case or simply adopting other means to accept El-Masri's claims without disclosing these State secrets. The judicial authority followed the first option by arguing that the applicant's claims could be accepted only if he was able to prove that he was subjected to the program of extraordinary rendition, but this would have contrasted the State secrets privilege thus the case was dismissed.[233]

Before giving its conclusion, the Court clarified that its judgement was not aimed at approving or condemning the practice of extraordinary rendition and that, if El-Masri's allegations had been true and accepted, he would have been entitled to receive compensation by the political branches.

---

[231] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (US District Court for the Eastern District of Virginia 2006), para. 537.
[232] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (US District Court for the Eastern District of Virginia 2006), para. 538.
[233] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (US District Court for the Eastern District of Virginia 2006), para. 539.

Indeed, after some days the lawsuit was dismissed by the Federal Court in Alexandria which concluded that the State secrets privilege claimed by the United States was valid thus its motion to dismiss El-Masri's claims was accepted.[234]

In November, the ACLU appealed the dismissal before the US Court of Appeals for the Fourth Circuit which confirmed the lower Court's decision by acknowledging the validity of the State secrets privilege's invocation and dismissing El-Masri's claims in March 2007.After two months, the ACLU requested a petition of certiorari before the US Supreme Court which refused to review the case. Therefore, it is possible to conclude that US Courts dismissed El-Masri's claims and denied him the possibility to have his case reviewed.[235]

Therefore, the US Courts' approach to the El-Masri case serves as a noteworthy illustration of deference granted to the executive branch as well as an example of the erroneous interpretation of the State secrets privilege, coupled with a deep denial of justice which led to a clear violation of fundamental rights.[236]

2.2) German Courts' Approach to El-Masri's Allegations

In June 2004, German public prosecutors started to investigate El-Masri's case following a complaint filed by him and confirmed that he entered Macedonia by bus at the end of 2003, temporarily remained there under detention and then left the country in January 2004. After having analyzed his hair, they also concluded that he was malnourished for a prolonged period while he was held in South Asia.[237]

In January 2006, the Munich District Court authorized the surveillance and recording of the telephone and fax lines of El-Masri's lawyer because of the amplified media attention on his story and the alleged attempt by US officials to negotiate with him to find an informal solution. In August, the Regional Court Munich I extended the surveillance order. Therefore, El-Masri and his lawyer appealed to the German Federal Constitutional Court to challenge the lower Courts' decisions.

---

[234] *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (US District Court for the Eastern District of Virginia 2006), para. 541.
[235] ACLU of Virginia (2005). *CIA's use of "Extraordinary Rendition," El-Masri v. Tenet*. See at https://www.acluva.org/en/cases/el-masri-v-tenet.
[236] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 900.
[237] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 80.

In the same year, the German intelligence service (BND) admitted being aware of El-Masri's erroneous abduction right before the German government was informed of that in May 2004. In October, it was revealed by *the Washington Post* that German prosecutors were denouncing US authorities' unwillingness not to cooperate with them thus obstructing their inquiry. In that year, the first Marty report revealed that the aircraft N313P, which was used to extraordinarily render El-Masri and other detainees, stopped at the Algiers airport in January 2004.[238]

At the beginning of 2007, arrest warrants were issued by German prosecutors for thirteen suspected CIA officials involved in El-Masri's deportation and transmitted to Interpol in February.

In September, Germany failed to ask the United States for the extradition for all the thirteen CIA agents.[239] From 2006 to 2009, Germany's participation in the CIA's secret operations was investigated in a German parliamentary inquiry to examine the government's conduct in the extraordinary renditions of El-Masri, Murat Kurnaz, Muhammed Haydar Zammar and Abdel Halim Khafagy. The results of the investigations were published in a report which revealed that German authorities were not responsible for any illegal arrests, transfers, imprisonments, or torture affecting German citizens or inhabitants.[240]

In January 2009, the Center for Development and Democratization of Institutions (CDDI) in Albania requested information from the Ministry of Defense and Ministry of the Interior on the Albanian government's involvement in El-Masri's imprisonment, interrogation, and rendition. However, both representatives rejected such a demand by arguing that the government was concerned with the respect of privacy since the information was related to a military airport and thus had to remain classified.

In June, the German Constitutional Court found a violation of the Constitution by the government which obstructed the Parliament's role in overseeing and checking the executive's conduct by not collaborating with the parliamentary inquiry.[241]

---

[238] Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Appendix 1.

[239] Spiegel International (2007). *Germany Drops Pursuit of CIA Kidnappers*. Spiegel Online. See at http://www.spiegel.de/international/germany/0,1518,507455,00.html.

[240] Amnesty International (2011). *Annual Report 2011: The State of the World's human rights*.

[241] The Federal Constitutional Court (2009). *Limited grant of permission to testify and refusal to surrender documents to BND committee of inquiry partly contrary to constitutional law*. Press Release No. 84/2009 of 23 July 2009.

At the end of 2010, El-Masri's lawsuit against Germany's failure to extradite and prosecute the 13 US officials suspected to be involved in his extraordinary rendition was dismissed by the Cologne Administrative Court. On this occasion, the Cologne Court established that the German government's decision not to seek extradition for those individuals was lawful. It was later discovered that US officials put pressure on Germany to deny the extradition for those individuals once WikiLeaks released diplomatic cables between the two countries.[242]

2.3) El-Masri Case Before the Strasbourg Court Against the former Yugoslav Republic of Macedonia

The Macedonian government was asked several times to provide information related to El-Masri's case by the German and Spanish prosecutors and the PACE and European Parliament's inquiries. On 6th October 2008, the Office of the Skopje Prosecutor received a request issued by El-Masri to start investigations into his unlawful capture and deportation and prosecute those responsible, who, according to him, were officers of the Macedonian Ministry of the Interior. However, nothing was done by the Prosecutor until early 2009.[243]

The 2007 Marty report acknowledged that the Macedonian government withheld information on its involvement in the CIA programs.[244] It is important to highlight that both Council of Europe's reports confirmed that the Macedonian UBK (Security and Counterintelligence Service) participated in the arrest and rendition of El-Masri to Kabul.

On 24th January 2009, a civil lawsuit was issued by El-Masri against the Macedonian Ministry of the Interior for damages due to his illegal arrest, detention, and transfer. [245] However, the case is still pending.

On 20th July 2009, El-Masri, represented by the Open Society Justice Initiative, filed an application under Article 34 of the ECHR before the European Court of Human Rights against Macedonia which arrested, detained, ill-treated, and delivered him to the

[242] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 80.
[243] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 65.
[244] Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 274-284.
[245] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 95.

CIA which extraordinarily rendered him to Afghanistan, where he was tortured for more than four months.[246] Therefore, the Grand Chamber of the ECtHR was formed to review the case, and, on 13th December 2012, issued its judgement in favor of El-Masri.

The Court first considered the circumstances of the case including El-Masri's version of what happened, the position of the Macedonian government, the international inquiries such as those conducted by the European Rapporteurs Marty and Fava, and the legal proceedings before national Courts in Germany and Macedonia. It then examined Macedonian domestic law including the 1991 Constitution which safeguarded the right to liberty, the Criminal Code that explicitly condemned torture and ill-treatment, the 1997 Criminal Procedure Act which provided for the prerogatives of those arrested such as the right to remain silent and consult a lawyer and the Obligations Act that defined the framework for compensation of victims. Afterwards, the international legal standards related to extraordinary renditions such as the ICCPR and fundamental human rights as well as pertinent case-law of other jurisdictions and other relevant documents were analyzed.[247]

Therefore, the Court recalled the applicant's declarations on what he experienced and then examined the defendant's position which denied its involvement in the capture, detention, ill-treatment at the Skopje airport and rendition to the CIA of El-Masri and argued that the only contact it had occurred when he crossed the country's border on 31st December 2003. This standpoint was supported by official documents provided by Macedonia including the results of the Macedonian Ministry of the Interior's inquiries, border-crossing and police records and the hotel guest book. Moreover, the government objected that El-Masri did not comply with the six-month rule according to which it is not possible to file a petition after six months from the occurrence of the alleged events. However, the Court confirmed that the applicant complied with such rule because the starting point to consider could not be the date in which the Public Prosecutor issued its decision but rather the day when El-Masri was informed about it, namely on 20th January 2009, which was six months before the submittal of the petition.[248]

[246] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 1.
[247] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 3-40.
[248] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 46.

After having acknowledged that all the evidence examined supported the applicant's claims, the Strasbourg Court admitted his complaints under Article 3, 5, 8 and 13 ECHR, and found out that these provisions were violated.

Regarding Article 3, which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", the Court rendered four reasons: first, it found that there was a procedural violation because the Republic of Macedonia failed to "Carry out an effective investigation into the applicant's allegations of ill-treatment"; second, the Court determined that El-Masri endured inhuman and degrading treatment while being detained at a hotel in Skopje; third, it concluded that he was subjected to ill-treatment at Skopje Airport, which was classified as torture; fourth, despite the presence of an effective risk of cruel treatment, the applicant was handed over to the custody of US authorities, thereby breaching Article 3 also in its substantial aspect.[249]

Indeed, the Skopje Public Prosecutor limited the investigation by only requesting information to the Ministry of Interior without exploring the versions of the applicant or those working at the hotel where he was held as well as how the rendition was conducted. The absence of a thorough and efficient investigation was linked to the right to truth because the applicant and his family were constantly denied access to vital information concerning his incommunicado detention and the period of suffering. This inevitably obstructed the possibility of knowing the identities of those allegedly responsible for his ordeal. Moreover, in the Joint Concurring Opinion, the judges emphasized that the pursuit of truth constituted the main purpose of the obligation to investigate, it served as the underlying rationale for transparency, diligence, and independence, and contributed to bolster trust in public institutions as well as uphold the rule of law. As it was seen in the US Courts' dismissal of El-Masri's claims, the invocation of State secrecy was used to obstruct the search for the truth, but the Strasbourg Court altered this stance.[250]

Therefore, the Court concluded that the testimony provided by El-Masri was validated "beyond reasonable doubt" and Macedonia bore responsibility for subjecting him to torture and ill-treatment within its own territory, as well as during his subsequent

[249] Krstevska, K. (2016). Case of El-Masri v. Republic of Macedonia – with a special focus to the violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *ЕВРОПСКЕ ИНТЕГРАЦИЈЕ: ПРАВДА, СЛОБОДА И БЕЗБЕДНОСТ Том 2*, 81.
[250] Stefanovska, V. (2021). The importance of the "right to the truth" in El-Masri case: Lessons learned from the extraordinary rendition. *Torture Journal*, 31(3), 65-66.

transfer to the US authorities, which occurred in the context of an extrajudicial process, namely an extraordinary rendition. It is important to remind that the prohibition of torture is an unqualified and absolute right thus it cannot be derogated, and it was not the first time in which the Strasbourg Court recognized that Macedonia violated Article 3.[251]

Afterwards, the Court considered Arar's complaints under Article 5 ECHR, according to which the respondent State was responsible for having unlawfully held him in incommunicado detention without any arrest warrant and denying him the possibility to appear before any judicial authority, not manifestly ill-founded and found out that the provision was violated. After having noted the importance of the right to liberty and security of a person especially in a democracy, the Court found out that the applicant's detention in Skopje was not authorized by any Court order and was not supported by any custody records, he was not allowed to contact any lawyer, relative or German official or challenge his detention and was deprived of his liberty. Moreover, the infringement was aggravated by the fact that Macedonia not only failed to prevent any restriction to El-Masri's liberty but also facilitated the unlawful detention in Afghanistan under the CIA custody although it knew the risk he would have faced. Therefore, the Strasbourg Court found a violation of Article 5 in its substantial as well as procedural aspects since Macedonian authorities also failed to carry out an effective investigation into the applicant's allegations of ill-treatment.[252]

Furthermore, the Court examined the alleged violation of Article 8 of the Convention, which protected the right to private and family life by stating that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security". On this occasion, it found that El-Masri was not protected against arbitrary interference thus it was not in accordance with the law because "*Article 8 also protects a right to personal development, the right to establish and develop relationships with other human beings and the outside world*" and "*A person should not be treated in a way that causes a loss of dignity*".[253]

[251] Krstevska, K. (2016). Case of El-Masri v. Republic of Macedonia – with a special focus to the violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *ЕВРОПСКЕ ИНТЕГРАЦИЈЕ: ПРАВДА, СЛОБОДА И БЕЗБЕДНОСТ Том 2*, 85-86.
[252] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 69-73.
[253] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 73-74.

Lastly, the ECtHR established that also Article 13 ECHR was infringed because El-Masri received no effective remedy before any national authority to challenge the legality of his confinement and his handover into CIA custody. Indeed, he could not "*avail himself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation*" and the Macedonian government failed to provide evidence to demonstrated that the decision to hand the applicant over to the CIA was reviewed with reference to the risk of ill-treatment. It also held that the complaint brought by the applicant under Article 10 of the Convention, which safeguarded the right to freedom of expression, did not need to be discussed because it raised no further issues that had not been already considered by the Court.[254]

In conclusion, the Strasbourg Court condemned Macedonia for having violated Article 3, 5, 8 and 13 ECHR and, in accordance with Article 41 of the Convention, forced the government to compensate El-Masri with 60.000 euros for damages.[255]

This judgement represented a landmark decision for European human rights law because the program of extraordinary renditions was acknowledged and condemned for the first time by a judicial authority, it was the first documented case of extraordinary rendition that amounted to torture, it was discussed in several official documents such as the Marty reports and, although the amount that Macedonia had to pay as a reward to the applicant was not significant, it was the highest sum it ever provided as a respondent State.[256]

In addition, this case stood out from others for several reasons: the applicant was not a national of the respondent State but rather a German citizen of Lebanese descent; he was not only represented by a Macedonian lawyer, but also by the Open Society Justice Initiative's New York office; third-party comments were submitted by esteemed organizations such as the UN Office of the High Commissioner for Human Rights, Interights, Redress, International Commission of Jurists, and Amnesty

[254] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 75-78.
[255] *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09 (ECtHR 2012), 81.
[256] Krstevska, K. (2016). Case of El-Masri v. Republic of Macedonia – with a special focus to the violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *ЕВРОПСКЕ ИНТЕГРАЦИЈЕ: ПРАВДА, СЛОБОДА И БЕЗБЕДНОСТ Том 2*, 83.

International; the Court convened as a Grand Chamber comprising 17 judges, and the judgment was accompanied by two separate opinions as annexes.[257]

Furthermore, the right to the truth was invoked as "an autonomous right triggered by gross violations" meaning that the Court expanded its scope which fell within the one of Articles 2, 3, 5 and 13 ECHR: in the past, it was only involved in cases of enforced disappearance and concerned the right to know the victim's destiny while the Strasbourg Court extended it to all the victims of gross human rights violations who wished to understand the causes of such abuses and conferred it a collective dimension. In other words, the right to the truth served a twofold purpose: it not only sought to redress the harm suffered by the victim and his relatives, but it also endeavored to establish a comprehensive truth that served the interests of the entire civil society. In the end, the ECtHR's endorsement of an innovative paradigm concerning the right to truth was evident in its assessment of the violations of the European Convention because it emphasized the importance of the case not only for El-Masri and his family, but also for other individuals who have been victims of similar crimes, namely extraordinary renditions.[258]

Finally, it must be remarked that the Strasbourg Court's approach significantly diverged from that of US Courts when it came to reviewing State secrecy in the context of extraordinary renditions. Indeed, US Courts have consistently upheld the legitimacy of this privilege, regardless of whether the information in question has been already publicly known or whether it resulted in a denial of justice for serious human rights violations. In contrast, the European Court adopted a different approach by treating secrecy as an exception that must be strictly interpreted and requiring a higher threshold of legitimacy for assertions of a secrecy privilege. As a result, the ECtHR stands as the primary forum where States are held accountable for gross human rights violations committed in the fight against terrorism as well as the last resort for victims seeking to hold their national governments accountable. The Court demonstrated its ability to

[257] Krstevska, K. (2016). Case of El-Masri v. Republic of Macedonia – with a special focus to the violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *ЕВРОПСКЕ ИНТЕГРАЦИЈЕ: ПРАВДА, СЛОБОДА И БЕЗБЕДНОСТ Том 2*, 84.
[258] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 915-917.

combat impunity, particularly in cases where domestic jurisdictions have failed to do so and contributed to the pursuit of justice by unveiling previously undisclosed facts.[259]

3) Abu Omar: How European Jurisprudence Prevailed

Hassan Mustafa Osama Nasr, known as Abu Omar, was an Egyptian imam of a mosque who moved to Italy in 1997 and obtained the status of political refugee in 2001. He was investigated by the Milan Public Prosecutor because he was a member of Jama'a Al-Islamiya, which was an Islamist movement considered as terrorist by Egyptian authorities and arrested in Milan on 17th February 2003 after being stopped by a police officer who asked for his documents and violently took him into a white van.

Afterwards, Abu Omar was brought to the United States Air Forces in Europe (USAFE) military base in Aviano, Italy, transferred to the NATO base in Ramstein, Germany, and extraordinarily rendered to Cairo, Egypt, on a CIA-operated aircraft. There, he was secretly detained for fourteen months, interrogated, and tortured with electric shocks by Egyptian authorities. Indeed, he was held in inhuman conditions in a cell of two square meters with no window, no toilet, and no water, denied any chance to communicate with the outside or pray towards the direction of Mecca, beaten, physically and mentally abused, threatened, stripped, and forced to reveal fake information.[260]

On 19th April 2004, he was freed by the Egyptian State Security Investigations Services (SSIS) that advised him to tell a false version of what happened to him: he personally decided to leave Italy, reach Egypt by his own means, give his passport to Egyptian authorities to avoid returning to Italy and no ill-treatment was reserved to him. Then he decided to contact the Milan Public Prosecutor by sending a statement through which he described the abduction and torture he was subjected to.

However, in May he told his wife and friends living in Italy what he truly experienced in Egypt so Egyptian agents captured and brought him to the SSIS office in Nasr City, then to Istiqbal Tora prison and lastly to Damanhour prison, outside Alexandria, in which he was kept in administrative custody ordered by the Ministry of the Interior who invoked the emergency law.[261]

---

[259] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 923.
[260] Mazza, C. (2012). The Abu Omar Case and the" Extraordinary rendition" Program. *Central European Journal of International & Security Studies*, 2(6), 152.
[261] Mazza, C. (2012). The Abu Omar Case and the" Extraordinary rendition" Program. *Central European Journal of International & Security Studies*, 2(6), 153.

In February 2005, he was brought to Istiqbal Tora prison again and freed after two years.

After some days from the abduction, Omar's wife Mrs Nabila Ghali reported his disappearance to the Milan police station and a witness identified as Mrs R. confirmed having seen two white men who forced an Arab individual to get on a white van parked at Via Guerzoni in Milan while she was walking with her children. Therefore, the Milan Public Prosecutor's Office in Milan instructed the DIGOS (General Investigations and Special Operations Division) to start the investigations against unknown persons and wiretap the phones which were active in that area at the time of the kidnapping.[262]

In the meantime, the conversations between Omar and his wife and friends in May 2004 were recorded by the DIGOS which became aware of what he experienced and sent a report on the investigations to the Public Prosecutor. The document contained the identification of some suspicious telephone chips that were used to call the Head of the CIA office in Milan Robert Seldon Lady, the Head of American security in Aviano Colonel Joseph Romano and other people at the CIA's headquarters in Virginia under false identities, stopped to function once Omar was abducted, moved to the Aviano Air Base, and remained in Cairo for some weeks.

Moreover, the DIGOS collected a great deal of information from different sources including air traffic controls, photos, plane tickets and hotel reservations which confirmed Omar's version of the facts and the guiltiness of nineteen Americans including the diplomatic and consular personnel in Italy and Mr. Lady. Evidence also showed that the plane which extraordinarily rendered Abu Omar was operated by the American company Richmor Aviation and made several stopovers in different airports: Cyprus, Germany, Ireland, and Italy.

In June, the GIP (judge for preliminary investigations) of Milan issued an order which imposed the measure of pre-trial detention for only thirteen of the accused individuals. Therefore, the Public Prosecutor challenged the order, which was reversed by the Milan Court that established the precautionary custody in prison for all the suspects involved.

[262] Izzo, A. (2016). The Abu Omar case European Court of Human Rights vs State secret doctrine. *Student's Social Science Journal*, 1(1), 134.

In the first phase of the investigation which began after a month, the Directors of the Italian *Servizio per le Informazioni e la Sicurezza Militare* (SISMI) Nicolò Pollari and the *Servizio per le Informazioni e la Sicurezza Democratica* (SISDI) Mario Mori were required to communicate to the Public Prosecutor whether the CIA had to indicate the identities of its personnel operating in Italy to national authorities and whether the suspects were identified. In response, they guaranteed complete collaboration while preserving State secrecy and confirmed the name of Mr. Lady.[263]

In November, the Italian President of the Council of Ministers authorized the disclosure of the requested documents while asking confidentiality and not to jeopardize the constitutional order and argued that the Italian government and the SISMI were "absolutely extraneous in every respect to the kidnapping of Abu Omar".[264]

Although the Ministry of Justice was asked to request the extradition of the suspects from the United States in accordance with the agreement between the two nations, and Interpol was demanded to provide a notice of searches against these people, the Ministry refused to act, the SISMI Director Mr. Pollari and the President of the Council of Ministers decided not to reveal any information by appealing to the principle of State secrecy and the GIP issue European arrest warrants against twenty-two suspects in January 2006.[265]

Between April and June, the second phase of the investigation, which analyzed the wiretaps, revealed that the Marshal of the Carabinieri's Special Operations Group (ROS) Pironi, the former director of the Milan SISMI center Colonel D'Ambrosio, his superior Marco Mancini, his chief Colonel Pignero, the former head of the SISMI in Trieste Sergio Fedrico, the journalist Renato Farina and many others were involved in the abduction of Abu Omar.[266] Indeed, Pironi was the one who requested Abu Omar to identify himself on the day in which he was kidnapped, Mancini instructed the officials to deny any involvement of the Italian secret services, Pignero organized the kidnapping, and Farina was daily informed about the operations and deceived the investigators. Oral hearings were held also by the Italian Parliament for those who

[263] Fanchiotti, V. (2008). Sequestri, servizi, segreti: il caso Abu Omar e le sue anomalie. *Sequestri, servizi, segreti*, 1000-1018.
[264] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 55.
[265] Judgement for Conflict of Attribution Between State Powers, No. 106/2009 (Italian Constitutional Court 2009), paras. 56-58.
[266] Judgement for Conflict of Attribution Between State Powers, No. 106/2009 (Italian Constitutional Court 2009). paras. 48-53.

participated in the capture of Omar, and they all admitted having been instructed by Mr. Lady.[267]

In July, the GIP applied the measure of precautionary custody in prison for twenty-eight officials involved, including Mancini and Pignero, and underlined that it was not possible to carry out such an operation without the collaboration of national authorities. Moreover, a great deal of documents was found and confirmed the participation of the SISMI in Omar's abduction. Therefore, the Public Prosecutor asked the President of the Council of Ministers and the Ministry of Defense to disclose related information, but they refused by appealing to the principle of State secrecy.

At the end of the year, Pollari was relieved of his office, the investigation was closed, and the Public Prosecutor requested the indictment of twenty-six US nationals, six Italian citizens and other three individuals including Mr. Farina.

In February 2007, Pironi was sentenced to one year and nine months of prison while Farina had to pay a fine of 6.800 euros and twenty-six American agents were tried *in absentia* by the Milan Court.[268]

3.1) Trials Before the Milan Court and the Italian Constitutional Court

At the first hearing in June 2007, Omar and his wife filed a civil action before the Milan Court asking to be compensated for the violation of their freedom, integrity and private life and the suspension of the trial since the case was pending before the Constitutional Court. At the second hearing, the trial was suspended.

In March 2008, the Milan Court revoked the suspension because it argued that the matters linked to secrecy could be dealt with on a case-by-case basis.

In May, the Court authorized the Public Prosecutor to interrogate the SISMI members on the relation with the CIA.[269]

At the hearings in October, Mancini's lawyer demonstrated that the President of the Council of Ministers instructed State agents to keep the information covered by secrecy confidential and keep him updated of the hearings and interrogations and several witnesses refused to answer by invoking secrecy. Therefore, the Court initiated

[267] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 86.
[268] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 51.
[269] Giupponi, TF (2007). Il conflitto tra governo e procura di Milano nel caso Abu Omar. *Quaderni costituzionali*, 27 (2), 384-386.

the procedure under Article 202 of the Code of Criminal Procedure to ask the President to confirm whether the issues not revealed by the witnesses were covered by secrecy.

At the hearings in November, the Rapporteurs Dick Marty and Claudio Fava and two journalists including Farina were called to testify and the President of the Council confirmed the application of secrecy for the facts not answered by the witnesses to safeguard the reputation of the Italian intelligence services.

In February and March 2007, the President of the Council of Ministers filed two appeals to the Constitutional Court against the Public Prosecutor (Appeal No. 2/2007) and the GIP of Milan (Appeal No. 3/2007) for conflict of jurisdiction because they used and divulgated documents covered by State secrecy. The Constitutional Court declared these appeals admissible, and in June, the Public Prosecutor and the GIP also appealed to the Court against the President who, according to them, exceeded his powers because the secrecy was "applied in a general way, retroactively and without adequate justification".[270] In September, the Court admitted the Public Prosecutor's appeal and rejected the other.

In May 2008, the President of the Council of Ministers filed an appeal before the Constitutional Court against the Milan Court stating that it exceeded its power and asking to annul its orders because it acquired documents covered by secrecy. In June, the appeal was accepted.[271]

As a response, in December, the Milan Court brought a conflict before the Constitutional Court against the President because he erroneously applied secrecy on the relations between the Italian and American intelligence services obstructing the establishment of the facts. The Constitutional Court declared this appeal admissible.

On 18th March 2009, the Constitutional Court joined all the appeals related to the abduction of Abu Omar and declared those raised by the GIP of Milan and the Milan Public Prosecutor inadmissible, partially accepted those brought by the President of the Council of Ministers and dismissed the one raised by the GIP in 2008. The Court first recalled its jurisprudence on State secrets, the prevalence of the interests protected by secrecy over the others and the executive's discretionary power to check the necessity for secrecy which cannot be limited by any judicial interference.[272]

---

[270] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 79.
[271] Russo, A. (2008). *I metodi antiterrorismo al vaglio della Corte costituzionale: brevi riflessioni sulla Decisione N. 337 del 2007 e sulla riforma del Segreto di Stato*. Amministrazione in Cammino.
[272] Judgement for Conflict of Attribution Between State Powers, No. 106/2009 (Italian Constitutional Court, 2009).

For what regarded the three appeals raised by the President of the Council of Ministers, the Court argued that the search at the SISMI's headquarters and the seizure of documents were lawful because State secrecy had not been invoked yet but then the Public Prosecutor and the GIP could not disclose the documents covered by secrecy after the 2006 memorandum to prevent any damage to national security. Although it acknowledged that Omar's abduction was not covered by secrecy, the latter applied to the investigation of the matters thus, the judicial authorities could not indict the accused relying on what was discovered after the issuance of the memo. In addition, they both knew that the relations between the SISMI and the CIA were covered by secrecy thus, the Public Prosecutor could not demand the questioning of the witnesses on this issue and the GIP could not authorize such a request. Therefore, the Milan Court also exceeded its competences when admitting the witnesses who revealed detailed information on the relations between the intelligence services in 2008.[273]

Concerning the appeal brought by the Court of Milan in 2008, the Constitutional Court argued that it was clear that secrecy covered the documents on the relations between the intelligence services and on their internal organization thus, it was applied before the judicial intervention in contradiction of what the Milan Court ruled. Moreover, the Court of Milan was not required to evaluate the reasons why the President of the Council applied secrecy because it was a discretionary power reserved to the executive thus, it should have not proceeded.[274]

The most significant aspect of this sentence was the clear recognition of the *salus rei publicae*, i.e. the safety of the State, as a value of paramount importance, thereby rendering it invulnerable to being compromised for the sake of other interests. Indeed, the Constitutional Court considered the *arcana imperii*, namely State secrets, as "an essential, irrepressible interest of the community, with manifest character of absolute pre-eminence over any other, since it touches, as has been repeated, the very existence of the State, one aspect of which is jurisdiction". Consequently, it followed that "State secrecy effectively acts as a "barrier" to jurisdictional power". In consideration of the preceding points, the Court suggested the necessity to guarantee an

[273] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 99-107.
[274] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 108-109.

objective and absolute protection of State secrecy in criminal proceedings capable of resisting any cognitive demand.[275]

However, the Court's approach raised several concerns: first, its interpretation on State secrecy which did not consider the ambiguous behavior of the agents involved and the absence of any guarantee that justified their unlawful actions; second, the lack of clarification on the significant effects of the objection of secrecy on the ongoing criminal proceedings, particularly regarding the usability of relevant documentation; and third, the Court's relinquishment of its own jurisdictional oversight over secrecy in the conflict of attributions.[276]

First, the Court noted the presence of "anomalous dynamics not irrelevant to the linear development of the case" and considered the behavior of agents who initially withheld information, then cooperated with the judges by providing documents and statements, but subsequently opposed it during the hearing as "not easily explainable".[277] In addition, there were no specific provisions offering legal protection for the unlawful actions of security personnel engaged in security protection tasks: only after their involvement in the abduction of Abu Omar, Law No. 124 of 2007 was enacted and introduced some guarantees for them. Notwithstanding the retrospective implementation of these provisions, their applicability did not extend to past actions that formed the focus of the proceedings instigated by the Milan Public Prosecutor's Office. Consequently, such actions remained subject to abstract sanctions in accordance with the existing regulations prevalent at that time.[278]

Second, its effort seemed to be unsupported by the unstable and contradictory laws provided by the legislature: Article 202(5) of the Code of Criminal Procedure argued that the opposition of the State secrecy impeded the judicial authority from obtaining and utilizing, even indirectly, the information encompassed by secrecy while Article 202(6) provided that "It is not, under any circumstances, precluded for the

[275] Bonzano, C. (2010). La Consulta suggerisce una tutela oggettiva ed assoluta del segreto di Stato nel processo penale. *DIRITTO PENALE E PROCESSO*, 16(3), 301-302.
[276] Anzon Demming, A. (2014). Disarmonie tra Corte costituzionale e Corte di cassazione in tema di segreto di Stato. *Giurisprudenza costituzionale*, 59(2), 1928.
[277] Anzon Demming, A. (2014). Disarmonie tra Corte costituzionale e Corte di cassazione in tema di segreto di Stato. *Giurisprudenza costituzionale*, 59(2), 1927.
[278] Anzon Demming, A. (2014). Disarmonie tra Corte costituzionale e Corte di cassazione in tema di segreto di Stato. *Giurisprudenza costituzionale*, 59(2), 1928.

judicial authority to proceed based on elements that are autonomous and independent of the acts, documents, and things covered by secrecy".[279]

Third, the Court followed a self-restraint approach by ruling that it was called upon "to assess the subsistence or non-existence of the prerequisites of State secrecy ritually opposed and confirmed" thus it could not intervene in the merits of the decision confirming secrecy, but limited itself to examining its legitimacy or its congruence with the grounds for which secrecy could be legitimately opposed.[280] Consequently, the risk of an ultimate and definitive relinquishment of effective scrutiny over the legitimacy of opposing State secrecy in criminal trials within a conflict of attributions could arise. Therefore, it is essential to recognize that the political nature of the contested act should not automatically exclude the Court's review, since it is familiar in assessing political acts against normative standards. If the principles of the rule of law are upheld, even political acts must abide by the legal constraints and undergo scrutiny for legitimacy and validity in the appropriate forums. Moreover, it is crucial to emphasize that assessing the legality and proportionality of a political act does not entail scrutinizing its political merit.[281]

As it can be noted, the decision affected the principle of separation of powers because the Constitutional Court advocated for the dominance of the executive over national security issues. It must be reminded that if each branch recognizes to be a constituent part of a larger and more significant legal entity, the tripartition of State powers can preserve the constitutional order's equilibrium. Therefore, equating a part with the whole by attributing a natural and authoritative inclination to protect and safeguard the State's interests to one of the three powers leads to the failure of the system.[282]

Nevertheless, it must be stated that the sentence went beyond the typical scope of resolving conflicts between different branches of the State: apart from being a much more intricate and sensitive question, it was not a matter of asserting the supremacy of

[279] Bonzano, C. (2010). La Consulta suggerisce una tutela oggettiva ed assoluta del segreto di Stato nel processo penale. *DIRITTO PENALE E PROCESSO*, 16(3), 308.
[280] Orlandi, R. (2012). Una pervicace difesa del segreto di Stato ([Osservazione a] Corte cost., 23 febbraio 2012, n.40). Giurisprudenza costituzionale, 57(3), 2332.
[281] Anzon Demming, A. (2012). La Corte abbandona definitivamente all'esclusivo dominio dell'autorità politica la gestione del segreto di Stato nel processo penale ([Osservazione a] Corte cost., 23 febbraio 2012, n.40). *Giurisprudenza costituzionale*, 57(1), 535.
[282] Bonzano, C. (2010). La Consulta suggerisce una tutela oggettiva ed assoluta del segreto di Stato nel processo penale. *DIRITTO PENALE E PROCESSO*, 16(3), 302.

the Parliament over the Court or vice versa but rather the implications of the potential interference between the two on the stability of the system.[283]

At the hearings in May 2009, the Court of Milan established that all the information on the relations between the SISMI and the CIA and on their international organization could not be used and the accused personnel of the SISMI opposed State secrecy.

On 4th November 2009, the Milan Court convicted *in absentia* twenty-two CIA officials and one US military agent to five years of imprisonment because Italy did not request the extradition for them, Robert Seldon Lady to eight years for the abduction of Abu Omar and two SISMI members, Pompa and Seno, to three years for aiding and abetting.[284] They also had to compensate the applicants, namely Omar and his wife, for damages derived from the violations of their fundamental rights. The Court also decided not to rule against three American individuals including the former Chief of the CIA Office in Rome Castelli because they availed themselves of diplomatic immunity, and five SISMI members including Pollari and Mancini because of State secrecy.[285] This decision was crucial because the Court of Milan became the first and only to condemn individuals that violated human rights in the context of the CIA's program of extraordinary rendition.

After having traced back what happened and analyzed the results of the investigations, the Court first acknowledged that Abu Omar's abduction was intended, organized, and performed by CIA agents supported by Italian officials, who authorized and were aware of the operation. Then, it considered that the capture obstructed the existing investigation into Islamist groups and false evidence was provided to deceive the inquiry: both the SISMI and Egyptian authorities declared that Abu Omar intentionally left Italy and went to Egypt.[286]

3.2) Continuation of the Proceedings Against the Agents Involved

Those who were prosecuted appealed against the Court of Milan's decision of November 2009 before the Milan Court of Appeal, which declared the interrogations of four police agents of the SISMI not usable and decided not to rule against five

[283] Bonzano, C. (2010). La Consulta suggerisce una tutela oggettiva ed assoluta del segreto di Stato nel processo penale. *DIRITTO PENALE E PROCESSO*, 16(3), 312.
[284] Judgement of the Court of Milan, No. 12428.
[285] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 115-117.
[286] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 114.

respondents in December 2010.[287] In addition, the Court of Appeal confirmed the convictions of twenty-three American nationals and increased them from five to seven years of imprisonment for all, that of Lady from eight to nine years, those of Seno and Pompa at two years and eight months and finally annulled the award of damages for the last two.[288] The Court also considered as true the testimony of Mrs. R.

However, the first statements of this judgement were annulled in September 2012 by the Court of Cassation, which imposed the inclusion of those declarations which were not covered by secrecy because these individuals acted by their own will without any authorization by the SISMI or by the President of the Council, who declared to be unaware of Omar's abduction. In fact, the criminal conduct of the defendants originated from their individual choices rather than being authorized by higher officials thus, the evidence related to these actions could not be covered by State secrecy.[289] Concerning the other elements, the Court confirmed the conviction established by the Court of Appeal.

Regarding the "anomalous dynamics" emphasized by the Court of Cassation, it is pertinent to note that the initial communication from President Berlusconi on November 11, 2005, merely asserted the government and SISMI's detachment from the abduction of Abu Omar. However, in the subsequent communication from President Prodi on July 26, 2006, it was indicated that the documents related to the kidnapping had been subjected to State secrecy by the previous Prime Minister in 2005 and subsequently confirmed by him. Consequently, secrecy was not only applied belatedly but was also associated with unspecified acts and documents.[290]

In February 2013, the five officials were convicted by the Milan Court of Appeal: Di Troia, Di Gregori and Ciorra were sentenced to six years of imprisonment, Mancini to nine years, Pollari to ten years and they all had to compensate the victim for damages.[291]

The Court first considered the facts including that Abu Omar was a victim of extraordinary renditions carried out by the United States in collaboration with Italian

[287] Vedaschi, A. (2016). Cronaca di una condanna annunciata: Abu Omar a Strasburgo, l'ultimo atto. *DPCE Online*, 25, 3.
[288] Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 86.
[289] Judgement on Abu Omar, No. 46340/12 (Italian Court of Cassation 2012).
[290] Pace, A. (2014). Le due Corti e il caso Abu Omar. *Giurisprudenza costituzionale*, 1.
[291] Scovazzi, T. (2016). Segreto di Stato e diritti umani: il sipario nero sul caso" Abu Omar". *Diritti umani e diritto internazionale*, (1), 157-184.

authorities, who provided an active contribution to his kidnapping: the SISMI Director Pollari accepted the request, organized it and informed other Generals, while Di Troia, Di Gregori and Ciorra were instructed to observe the situation, knew that such action was unlawful and did nothing to avoid it.

Then, the Court noted that although the defendants' lawyer provided two notes which indicated that secrecy covered all the SISMI agents' actions, the President of the Council had nothing to do with them thus, the judicial authority decided to consider only the declarations made during the investigations.[292]

Furthermore, the Court also condemned three American officials: the organizer of the abduction Castelli was sentenced to seven years of imprisonment, while the other two Medero and Russomando to six years and they all had to pay damages to the victims.

The President of the Council of Ministers brought two appeals before the Constitutional Court: the first on the conflict of attribution between powers was against the Court of Cassation's interpretation on State secrets in 2012 and the Milan Court of Appeal's decision to acquire the declarations of the accused agents and a note in which the President extended secrecy for all the aspects related to the relations between the intelligence services and their internal organization; the second was against the Milan Court of Appeal's choice not to suspend the proceedings.

On 13th February 2014, the Constitutional Court admitted the President's first appeal on conflict of jurisdiction which was raised because both judicial authorities assumed the President's prerogatives and argued that the non-proceedings of the five officials nor the Milan Court of Appeal's orders which admitted the related evidence should have not been annulled by the Court of Cassation. In addition, it noted that the defendants should have not been convicted based on the information emerged during their interrogations. Therefore, both the Court of Cassation and the Milan Court of Appeal's judgements were annulled by the Constitutional Court which decided to restart the proceedings.[293]

Before arriving to these conclusions, the Court acknowledged that the power to oppose State secrecy entailed the dominance of national security over the State's integrity and independence and thus, secrecy inevitably interferes with other

[292] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 124-125.
[293] Judgement for Conflict of Attribution Between State Powers, No. 24/2014 (Italian Constitutional Court 2014).

constitutional principles such as those concerning the judiciary. Moreover, although this power could not obstruct the judicial authority to investigate into criminal facts, it could enable the judiciary to deal with information covered by secrecy. Therefore, the Court recognized that the President's "*wide discretionary power…could not be called into question by the judges*" because State security prevailed over the need to establish a "judicial assessment".[294]

The Constitutional Court then opposed the Court of Cassation's argument that the SISMI agents' conduct could not be covered by secrecy because their conduct was "non-functional" and they acted "in a personal capacity" by arguing that the officers were convicted for abuse of powers thus, "their conduct fell within the scope of their duties". In addition, the fact that the President reiterated the invocation of State secrecy rather than denouncing the abuse of powers implied that the officials did not act in their personal initiative. [295]

Finally, the Court considered that secrecy did not concern the applicant's abduction but everything that was related to the relations between foreign intelligence services and the SISMI's operational characteristics.[296]

Afterwards, the five officials who were convicted by the Court of Appeal in February 2013 filed a petition to challenge such a sentence before the Court of Cassation, which considered the Constitutional Court's latest judgement as ground-breaking because it established that the power to oppose State secrecy could not be questioned by the judicial authority. The Court also examined two notes brought by the defendants' lawyers before the Court of Appeal: the first confirmed that the government and the SISMI were unaware of the facts while the second argued that the conduct of the convicted officials were "institutional of the SISMI in the fight against Islamic terrorism" thus, they conflicted with the President and the SISMI's statements. In conclusion, the Court of Cassation annulled the agents' indictment by applying State secrecy.[297]

In March, the Court of Appeal condemned the American officials and rejected their claim that the practice of extraordinary rendition was legal and required by the US Patriot Act because of the state of war between the United States and international

[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid.*
[297] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 132-134.

terrorism. It also considered that the pardon which was granted by the President of the Republic to General Romano in April 2013 confirmed his criminal liability.[298]

In December 2015, the President of the Republic Sergio Mattarella pardoned Medero, whose conviction was cancelled, and Lady, whose condemnation was reduced to seven years of imprisonment, because the newly elected President of the United States Barack Obama stopped the practice of extraordinary renditions.[299]

3.3) Abu Omar Case Before the Strasbourg Court Against Italy

On 6th August 2009, Abu Omar, and his wife, Ghali, filed an application before the European Court of Human Rights against Italy alleging the violation of several Articles enshrined in the European Convention on Human Rights for its involvement in the program of extraordinary renditions.

On 23rd February 2016, the ECtHR issued its judgement in favor of the applicants condemning Italy for having violated the rights contained in the ECHR.[300]

First, the Court recalled how Abu Omar was subjected to the program of extraordinary rendition since the kidnapping in Milan in 2003, how the investigations on his case were conducted in Italy and how the domestic Courts dealt with the prosecution of both the Italian and American officials involved in the operation.

Second, it examined the Italian legislation related to the case and reported that although State secrecy was not contained in the Italian Constitution, the Constitutional Court's judgment No. 106/2009 considered it as "the supreme interest of the security of the State in its international personality, and that is the interest of the State community in its own territorial integrity and … survival" while Article 52 reminded that defending the homeland was a fundamental duty of the citizen.[301]

Law No. 801/1977, which contained the provisions concerning State secrecy, was repealed by Law No. 124/2007 bringing some novelties: all judicial activity exercised after its entry into force was included within its scope, a time limit of fifteen years maximum for the application of State secrecy was imposed, only the President of the Council of Ministers could apply and oppose secrecy, public officials could not report facts covered by secrecy in criminal trials, if secrecy was confirmed the judicial

[298] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 143.
[299] Comunicato del Presidente della Repubblica (2015). *Il Presidente Mattarella ha firmato tre decreti di concessione di grazia*. See at https://www.quirinale.it/elementi/2194.
[300] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016).
[301] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 152.

authority could not proceed, and secrecy could not be opposed by the Constitutional Court. Moreover, the President of the Council of Ministers established, by a decree in 2008, that all the information related to international cooperation for security purposes was covered by State secrecy.[302]

Therefore, it is important to underline that the executive branch could exercise an extensive power in applying State secrecy, which escaped any judicial review because of the political nature of State security. Indeed, the Constitutional Court could only rule on whether the President of the Council exceeded its power when applying or opposing secrecy rather than assessing the reasons why he behaved in that way.[303]

Third, the Strasbourg Court explained that the extradition treaty between Italy and the United States, which was stipulated in 1983 and ratified in 2009, established that the two nations agreed not to refuse the extradition of their nationals because of their nationality.[304]

Before providing its own ruling on the case, the Court also contemplated the main documents related to extraordinary renditions: relevant reports, such as Marty's ones; international legal standards, including the ICCPR; and resolutions provided by the international community.

After having reviewed these aspects, the Court dismissed the Italian government's three preliminary objections: the premature nature of the applicants' appeal and their failure to exhaust domestic remedies in criminal matters; the non-exhaustion of domestic remedies in civil matters; and the non-compliance with the six-month time limit.

On the first argument, the government argued that when the appellants filed the petition before the ECtHR, they had not previously exhausted all domestic remedies, in fact the Milan Court, the Milan Court of Appeal and the Court of Cassation had not submitted their judgements yet. However, the Court considered that although when the application was submitted, the criminal proceedings for Omar's disappearance were pending for six and a half years, their developments depended on the President of Council's decision to invoke State secrecy and the Constitutional Court's 2009 ruling that legitimated the application of secrecy. Therefore, the appellants could be condemned because they lodged the petition without waiting for such decisions and the

[302] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 153-165.
[303] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 162.
[304] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), para. 171.

proceedings ended after the issuance of the petition but before the Strasbourg Court was requested to rule on its admissibility.[305]

Concerning the second dispute, the defendant believed that the petitioners failed to exhaust the civil remedies because they failed to bring two actions: to obtain the interim compensation awarded by the Milan Court on 4th November 2009 and to request civil Courts to establish the exact amount of the compensation. The ECtHR noted that although the Milan Court prosecuted twenty-three American nationals and two Italian officials to pay compensation to the appellants, the Milan Court of Appeal in 2010 overruled such decision thus Italian agents were excluded from the reward. However, Italian authorities obstructed any possibility for the petitioners to obtain any reward from the twenty-six convicted American officials because the Minister of Justice refused to request their extradition or the publication of notices of search against them.[306]

On the third objection, the government held that the appeal was late because domestic remedies were not exhausted but the Court considered that the six-month period, starting from the day in which Abu Omar's was kidnapped, was interrupted since the national proceedings had been initiated once his wife reported his disappearance.[307]

To assess the evidence, the Court recalled that it was called to decide on the obligation of Contracting Parties to respect the rights enshrined in the ECHR, as required by Article 19, rather than on their criminal accountability. Although the Court shared the domestic Courts' conclusion that the SISMI officials could not be held responsible because of State secrecy, it noted that Pironi's declarations on the agreement between the CIA and the SISMI to jointly carry out the operation, the fake information disseminated by the journalists who wanted to obstruct the investigations, and a recorded conversation between SISMI agents which confirmed their involvement circulated before secrecy was invoked.[308]

Moreover, the Court underlined that the evidence under question had been reconstructed by domestic Courts and had not been contested by the Italian government thus it was unquestionable that the applicant was kidnapped in Italy in the presence of

[305] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 195-201.
[306] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 202-209.
[307] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 210-2014.
[308] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 219-227.

an Italian agent. The Court concluded that Italian authorities were aware that Abu Omar was subjected to the extraordinary rendition program which began with his capture in Italy and continued abroad and declared that the elements analyzed were "sufficiently convincing and established beyond any reasonable doubt".[309]

After having considered all these elements, the Court analyzed the alleged violations claimed by the applicants of the European Convention's Articles.

For what regarded the violation of Article 3 in its procedural aspect, the ECtHR argued that despite the effectiveness and thoroughness of the investigation and the trial which identified and prosecuted the perpetrators, the inquiry did not meet to the requirements of the ECHR because the executive power's application of State secrecy obstructed the indictment of the SISMI agents and the President of the Republic's decision to pardon some of the convicted agents.[310] Indeed, the exoneration of the Italian intelligence agents was not due to any deficiencies in the investigation or investigative negligence, but rather to the imposition of State secrecy. The Court also expressed its disapproval by stating that the concealed information would have been sufficient for convicting the defendants. Furthermore, the European Court of Human Rights acknowledged that secrecy served no purpose in keeping the case from public knowledge since the information had already been widely disseminated through the media and the internet. Consequently, the use of secrecy in this case seemed to be intended solely to prevent the conviction of the SISMI agents. In relation to the investigation into the conduct of the American agents, the Strasbourg Court observed that Italy did not request their extradition and the convictions remained ineffective due to the actions taken by the executive as well as the President of the Italian Republic to maintain State secrecy.[311]

Concerning the material violation of Article 3, the ECtHR considered that Italian authorities failed to prevent Abu Omar from grieving any kind of physical and psychological pain by purposedly exposing him to an evident risk of ill-treatment by letting the CIA capture him in Milan. In addition, Italy also subjected him to the program of extraordinary renditions without seeking any assurances regarding his protection from inhuman treatment upon deportation to Egypt. This was confirmed by

[309] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 228-235.
[310] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 264-274.
[311] Valentino, A. (2016). La sentenza della Corte di Strasburgo sul caso Abu Omar: la tutela dei diritti fondamentali nel rapporto tra i poteri dello Stato. *Osservatorio costituzionale*, 3, 9-10.

a medical certificate which assessed the applicant's clear signs of injuries and post-traumatic disorders.[312] Indeed, the Court recognized that the abduction inflicted significant emotional and psychological distress upon the applicant, leaving him in a state of "total vulnerability" and constant anxiety due to the uncertainty surrounding his future. It was also determined that there was no need to establish whether the Italian authorities were aware or should have been aware of the specific purpose behind the applicant's abduction because the existence of an authorization to abduct Abu Omar coming from senior CIA officials in Milan demonstrated that Italian authorities not only were aware of the operation, but they actively cooperated with the CIA during the preliminary phase.[313]

The Strasbourg Court then established that Italy also violated Article 5, which safeguarded the right to liberty and security, by exposing Abu Omar to the risk of arbitrary detention thus depriving him of his freedom.[314]

Despite the vagueness of the definition of private life contained in Article 8, the Court argued that Italy violated such provision because the petitioner's moral and physical integrity as well as his human dignity were infringed and the interference was not "in accordance with the law", contrary to the exceptions provided by the Article itself.[315]

Lastly, the ECtHR found a violation of Article 13 arguing that the respondent country did not grant Abu Omar the right to an effective and concrete remedy before national authorities because the government's application of State secrecy impaired the investigation as well as the possibility to obtain reparation.[316]

To sum up, the ECtHR rejected the government's objections, declared the application admissible, found a violation of Article 3 ECHR in its material and procedural aspects, as well as violations of Articles 5, 8 and 13 of the Convention, and declared that it was not necessary to examine the alleged infringement of Article 6.

In conclusion, it ordered Italy to pay seventy thousand euros to Abu Omar for non-pecuniary damage, fifteen thousand euros to his wife for non-material damage and

[312] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 284-291.
[313] Valentino, A. (2016). La sentenza della Corte di Strasburgo sul caso Abu Omar: la tutela dei diritti fondamentali nel rapporto tra i poteri dello Stato. *Osservatorio costituzionale*, 3, 11-13.
[314] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 299-303.
[315] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 304-310.
[316] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras. 334-337.

thirty thousand euros to both petitioners for costs within three months from the date in which the judgement was pronounced.[317]

The relevance of the judgment stood out from several reasons: first, it represented an opportunity for the Strasbourg Court to revisit the issue of extraordinary renditions following its decision on El-Masri case; second, it provided an avenue to examine the role of State powers in addressing severe human rights violations, particularly the legitimacy of interference by other powers in the judicial process when fundamental rights violations are at stake; third, it showed the divergent responses from the Courts involved in the case, i.e. the Italian Constitutional Court essentially denied the fundamental rights protection to the applicants while the Strasbourg Court recognized such guarantee.[318]

It must be underlined that the ECtHR, when dealing with cases in which complaints affected the rights enshrined within Articles 8, 9, 10, and 11 of the European Convention, evaluated the proportionality of governmental interference resulting from the imposition of State secrecy. However, in the present case, the Strasbourg Court did not extensively balance the national security requirements against the imposition of secrecy. Indeed, the severe violation of the applicants' human dignity, the clear nature of the concealed evidence, the delayed imposition of secrecy, and the determination of protecting the SISMI agents led the Court to refrain from considering public security needs and powerfully condemn the Italian government's decision.[319]

This sentence has emphasized the Strasbourg Court's limited capacity to counteract the interference of those holding power with the enjoyment of fundamental rights. Although such actions may be condemned at the European level, effective remedies often lack, and monetary compensation may prove to be inadequate in remedying the serious violations committed. Additionally, the ECtHR and the Court of Cassation shared the common view that decisions should be based on all the evidence revealed in domestic proceedings and already present in the public domain, regardless of whether secrecy was invoked. Conversely, the Constitutional Court prioritized the definition of the State powers' scope and the preservation of their discretion, ignoring the recognition of fundamental rights violations. Nevertheless, this case unequivocally

[317] *Nasr and Ghali v. Italy*, No. 44883/09 (ECtHR 2016), paras 343-348.
[318] Valentino, A. (2016). La sentenza della Corte di Strasburgo sul caso Abu Omar: la tutela dei diritti fondamentali nel rapporto tra i poteri dello Stato. *Osservatorio costituzionale*, 3, 2.
[319] Valentino, A. (2016). La sentenza della Corte di Strasburgo sul caso Abu Omar: la tutela dei diritti fondamentali nel rapporto tra i poteri dello Stato. *Osservatorio costituzionale*, 3, 26.

demonstrates that the principle of due process cannot be overlooked, even by the highest State authorities, because acting otherwise would pose a significant threat to the very foundations of the rule of law.[320]

Conclusion

These cases provide several valuable lessons that have far-reaching implications for various domains, including law, security, and ethics. The breadth and depth of knowledge that can be derived from analyzing these cases is substantial and holds significant relevance for the understanding and development in the field of security law.

Maher Arar's experience exposed two different judicial approaches adopted by the United States and Canada. On one hand, US lower Courts, including the District Court for the Eastern District of New York and the Second Circuit Court of the Court of Appeals, dismissed Arar's claims arguing that acting otherwise would have altered the State's national security. In addition, they refused to grant him a declaratory relief and established that the Torture Victim Protection Act could not be applied because Arar was not an American citizen and thus, he was not entitled to benefit from due process rights. Finally, the US Supreme Court refused to review the lower Courts' decisions by not granting a petition for *certiorari,* thus his claims were dismissed again. On the other hand, Canadian authorities set up a special inquiry commission to investigate the case and the Prime Minister apologized and rewarded Arar thus recognizing him as the victim of several violations of fundamental human rights.

What can be learnt from El-Masri's story is that the Courts which heard his case adopted different approaches: first, US Courts dismissed his claims arguing that the US government validly asserted the State secrets privilege; second, although investigations were carried out, the German intelligence sector admitted being aware of his mistaken capture, and arrest warrants were issued for thirteen suspected CIA agents, Germany failed to request their extradition to the United States and the Cologne Administrative Court dismissed El-Masri's allegations; third, the European Court of Human Rights recognized and condemned for the first time the program of extraordinary renditions as well as a European county, namely Macedonia, for having subjecting El-Masri to torture, limiting his freedom, interfering with his private life, and denying him an effective remedy before any national authority thus, violating the European

[320] Valentino, A. (2016). La sentenza della Corte di Strasburgo sul caso Abu Omar: la tutela dei diritti fondamentali nel rapporto tra i poteri dello Stato. *Osservatorio costituzionale*, 3, 27-28.

Convention. Another crucial point that must be mentioned is the expansion of the scope of the right to the truth made by the Strasbourg Court which served the interests of the entire society.

Finally, Abu Omar's case demonstrated that although the Milan Public Prosecutor and the GIP of Milan conducted the investigations which confirmed the Italian agents' involvement in the abduction, the Italian President of the Council of Ministers obstructed them by appealing to the Constitutional Court which ruled that they could not disclose the documents covered by State secrecy. In 2009, the Milan Court became the first judicial authority to prosecute agents involved in the program of extraordinary renditions including the Head of the CIA office in Milan Robert Seldon Lady. After an internal judicial debate on whether to condemn these individuals, the Constitutional Court established that the accused agents should have not been indicted because the safety of the State prevailed over any other interest and the President of the Republic granted pardon to some of them. However, Italy was condemned by the Strasbourg Court for having violated Abu Omar and his wife's rights safeguarded under Articles 3, 5, 8 and 13 of the ECHR.

CONCLUSION

Over a long period of time, the use of extraordinary renditions has resulted in multiple flagrant abuses of fundamental human rights and freedoms recognized by most international legal frameworks. As it was seen, the main issues involved in these secret operations were the prohibition of torture and ill-treatment, the principle of *non-refoulement* and the prohibition of arbitrary arrest and secret detention together with all the connected principles such as the right to liberty and security of the person, the right to an effective remedy and the right to a fair trial.

Unexpectedly, governments and legal authorities across the world not only ignored these violations, but also refused to hold those involved accountable for their conduct, recognize the rights of victims, and put an end to this practice. Indeed, domestic Courts in most of the cases analyzed in this dissertation opted to prioritize the preservation of State secrecy, which was frequently used to justify the use of coercive measures by the executive branch, over the acknowledgement and correction of these severe infringements. This prioritization not only maintained a culture of impunity, but it also worsened the deterioration of the rule of law by creating a sort of "black hole" within it. This approach essentially permitted secrecy and security considerations to take precedence over the requirement of preserving human rights, weakening the basic underpinnings of justice and accountability within these legal systems.

Contrary to how domestic Courts behaved when dealing with cases of extraordinary renditions, the European Court of Human Rights was the only one which adopted the opposite approach by condemning the countries, namely Macedonia and Italy, which contributed to the suffering of the detainees involved in such practice.

The analysis that has been pursued in this dissertation provides an opportunity to understand and reflect over the Courts' approach to the violations coming from the victims of extraordinary renditions, explore the boundaries of State secrecy in a democratic society and assess the delicate balance between individual liberties and security imperatives in the post-9/11 era.

As it was seen, several lawsuits filed against the United States and its allied governments in federal Courts have not culminated in definitive convictions because the systematic and substantial human rights violations related to CIA secret detention and extraordinary rendition operations have not been acknowledged or addressed adequately. On one hand, the executive branch has strongly invoked the State secrets

privilege and has additionally asserted sovereign immunity for the individuals involved. On the other hand, the judiciary, with a few exceptions, has not taken any measures to contest the legal foundation behind the executive's systematic reliance on State secrecy.[321]

Indeed, even though Maher Arar was never charged with any crime, the US Courts demonstrated a security-oriented approach by dismissing his claims and declining to hold any US officials involved accountable for their actions. This attitude prioritized national security concerns over potential violations of Arar's rights or any potential misconduct by US officials. The Courts effectively shielded the officials from legal repercussions, reflecting a focus on security considerations rather than addressing potential wrongdoing or providing redress to Arar.[322]

The approach to El-Masri's allegations by the US Courts also exemplifies the substantial deference given to the executive authority, emphasizing its utmost significance. This occasion demonstrated a misinterpretation of the State secrets privilege, which effectively prevented a fair trial and ultimately led to a significant denial of justice and thus, an unequivocal violation of fundamental rights.[323]

In the Abu Omar case, the Italian Constitutional Court acknowledged that the authority to invoke secrecy rests solely with the President of the Council of Ministers and limited its own ability to make decisions regarding secrecy by explicitly ruling out any judicial scrutiny, specifically regarding the determination of when and how it should be invoked.[324]

The relationship between extraordinary renditions and secrecy was deeply intertwined, raising significant concerns about transparency, accountability, and the protection of human rights. Indeed, extraordinary renditions have been shrouded in secrecy from multiple angles.

Firstly, the planning and execution of extraordinary renditions heavily relied on intelligence information, which was often gathered covertly, utilizing sensitive sources and methods. The use of State secrecy in this context served to safeguard classified

---

[321] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 892.
[322] Lobel, J. (2008). *Extraordinary rendition and the constitution: The case of Maher Arar*. Rev. Litig., 28, 479.
[323] Andreau, E. (2011). *The ECHR and the Right to Remedy for the Victims of Extraordinary Renditions: The Case of Khaled El-Masri.*
[324] Messineo, F. (2009). "Extraordinary renditions" and State obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy. *Journal of International Criminal Justice*, 7(5), 1023-1044.

information and protect the identities of intelligence assets involved in identifying potential targets. While the protection of intelligence sources is crucial for effective counterterrorism efforts, the challenge lies in striking the right balance between national security imperatives and the need for transparency and accountability. [325]

Secondly, State secrecy veiled the entire operation of extraordinary renditions, including the detention sites where the suspected terrorists were held, in fact, the locations and conditions of these secret facilities, commonly referred to as black sites, were shielded from public scrutiny. This opacity hampered accountability and raised concerns about potential human rights abuses, as detainees were held outside the purview of domestic and international legal frameworks.[326]

The extensive use of State secrecy in the context of extraordinary renditions has resulted in a lack of transparency and accountability regarding the actions and responsibilities of government officials. Indeed, one of the main problems with invoking State secrecy is its potential to impede the proper functioning of democratic systems. In a democratic society, the principle of transparency and the rule of law are crucial for maintaining public trust and holding government officials accountable. However, when State secrecy is invoked, it often creates a shroud of opaqueness that hampers the ability of the public and even other branches of government to scrutinize the actions and decisions of those in power. Over the years, Western governments have invoked State secrecy to block criminal proceedings and civil suits related to extraordinary renditions, creating a conflict between national security interests and the rule of law. This has limited the ability to hold those involved accountable for potential violations of human rights and impeded access to justice for the victims.[327]

Efforts should be made to enhance transparency regarding extraordinary renditions, including the disclosure of relevant information to the public, appropriate judicial oversight and the implementation of legislative measures that clarify the limits and justifications for invoking State secrecy in these operations. Additionally, international cooperation and coordination among governments are crucial to address the extraterritorial aspects of extraordinary renditions and ensure that shared

[325] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 888.
[326] Sadat, L. N. (2005). Ghost prisoners and black sites: extraordinary rendition under international law. *Case W. Res. J. Int'l L.*, 37, 309.
[327] Guild, E., Bigo, D., & Gibney, M. (Eds.). (2018). *Extraordinary rendition: addressing the challenges of accountability*. Routledge.

intelligence is used in a manner consistent with human rights principles. Ultimately, striking the right balance between State secrecy and accountability is paramount to maintain the rule of law, protect human rights, and preserve public trust in democratic institutions. By addressing the challenges posed by State secrecy in the context of extraordinary renditions, societies can work towards a more transparent, accountable, and rights-respecting approach to counterterrorism operations.[328]

Consequently, the relationship between extraordinary renditions and State secrecy highlighted the need for robust oversight mechanisms and safeguards to ensure transparency and accountability. It is essential for governments to strike a delicate balance between protecting national security and upholding human rights, with a clear framework for oversight and accountability. This includes the establishment of independent mechanisms to review the invocation of State secrecy, ensure compliance with international human rights standards, and provide avenues for redress in cases of abuses. While some countries have mechanisms in place to review and challenge the invocation of secrecy, these checks are often insufficient or ineffective. The decision-making process surrounding State secrecy is often centralized within the executive branch, leaving little room for independent scrutiny or oversight. As a result, there is a risk that the invocation of State secrecy becomes a tool to shield government officials from accountability for their actions, including potential human rights violations.[329]

Despite the substantial differences between the parliamentary system in Italy and the presidential system in the United States, both Courts stressed the necessity of involving the legislative branch to scrutinize the invocation of secrecy by the executive: US federal Courts emphasized the importance of congressional oversight in relation to State secrecy claims made by the executive branch in civil suits while the Italian Constitutional Court called for the involvement of the Italian Parliament.[330]

As a matter of fact, Italian law incorporates a parliamentary oversight mechanism to counterbalance the assertion of State secrecy and mitigate potential abuses, where the outcome may even lead to the resignation of the executive through a vote of no confidence. However, despite the presence of this system, the Italian

---

[328] Sulyok, M., & Pap, A. L. (2010). *The role of NGOs in the access to public information: extraordinary renditions and the absence of transparency*. In Mapping Transatlantic Security Relations (pp. 162-197). Routledge.
[329] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 910.
[330] Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 910.

Parliament does not possess the authority to modify the decisions made by the President of the Council of Ministers regarding State secrecy issues, even if it disagrees with the justifications put forth for invoking the privilege. Consequently, the President of the Council of Ministers retains exclusive control over State secrets and the institutional mechanisms designed to examine the use of secrecy and assess its compatibility with the rule of law prove to be ineffective.[331]

The comparative analysis conducted in Chapter III has brought to light the exclusive authority of the executive branch to invoke State secrecy without facing any meaningful checks and balances: the oversight of secrecy by representative assemblies is notably unsatisfactory and domestic Courts have exhibited significant self-restraint when dealing with matters of State secrecy. This lack of effective political or judicial oversight over the use of secrecy has led to security concerns taking precedence over individual liberties and human rights. In the end, situations arise in which public officials or intelligence agents who engage in severe human rights violations escape accountability for their actions thus there is a lack of meaningful redress or recourse for these crimes.[332]

In addition, the current trend of normalizing emergency powers in response to the terrorist threat by advanced democracies necessitates the implementation of adequate institutional and political mechanisms to maintain a proper balance. While formal emergencies are designed to impose temporary and limited measures, this new form of normalizing emergencies effectively justifies permanent constraints on civil liberties. To prevent potential abuses and ensure the preservation of the rule of law, these restrictions on civil liberties should undergo rigorous scrutiny.[333]

Judges, as experts in law and guardians of justice, have a crucial role to play in upholding the principles of legality and human rights. They have the responsibility to reject secret detention and the use of torture and inhuman treatment consistently and firmly as a violation of fundamental rights and international legal standard by advocating for transparency, accountability, and adherence to the rule of law. They possess the expertise and knowledge to challenge the excessive use of secrecy in legal proceedings and advocate for the protection of due process rights. They can highlight

---

[331] *Ibid*.
[332] Guild, E., Bigo, D., & Gibney, M. (Eds.). (2018). *Extraordinary rendition: addressing the challenges of accountability*. Routledge.
[333] Kreuder-Sonnen, C. (2019). *Emergency powers of international organizations: Between normalization and containment*. Oxford University Press.

the detrimental effects of secrecy on the integrity of legal systems and public trust. By actively engaging in litigation, advocacy, and public awareness campaigns, judges can raise awareness about the importance of transparency and accountability in counterterrorism efforts. In addition, they can leverage their legal expertise to ensure that individuals subjected to secret detention and torture have access to justice and avenues for redress. Finally, they can work towards strengthening domestic and international legal frameworks to prevent and address human rights abuses and can contribute to a shift in public opinion by challenging the idea that secrecy is necessary or justifiable in the pursuit of national security.[334]

[334] Voeten, E. (2008). The impartiality of international judges: Evidence from the European Court of Human Rights. *American Political Science Review*, 102(4), 417-433.

BIBLIOGRAPHY

ACLU (2007). *Biography of Plaintiff Ahmed Agiza*. http://www.aclu.org/national-security/biography-plaintiff-ahmed-agiza.

ACLU of Virginia (2005). *CIA's use of "Extraordinary Rendition," El-Masri v. Tenet*. See at https://www.acluva.org/en/cases/el-masri-v-tenet.

Al-Ahsan, A. (2008). Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC's Cairo Declaration of Human Rights. *Journal of Law and Religion*, Cambridge University Press, 24(2), 569-597. https://doi.org/10.1017/s0748081400001715.

Amnesty International (2003). Iraq: Continuing failure to uphold human rights. *Press Release No. 176*, 1-2.

Amnesty International (2006). *United States of America, Below the radar: Secret Flights to torture and 'disappearance'*. International Secretariat, United Kingdom, 7-30.

Amnesty International (2011). *Annual Report 2011: The State of the World's human rights*.

Amnesty International (2011). *Finland must further investigate U.S.A. rendition flights*.

Andreau, E. (2011). *The ECHR and the Right to Remedy for the Victims of Extraordinary Renditions: The Case of Khaled El-Masri.*

Anzon Demming, A. (2012). La Corte abbandona definitivamente all'esclusivo dominio dell'autorità politica la gestione del segreto di Stato nel processo penale ([Osservazione a] Corte cost., 23 febbraio 2012, n.40). *Giurisprudenza costituzionale*, 57(1), 535.

Anzon Demming, A. (2014). Disarmonie tra Corte costituzionale e Corte di cassazione in tema di segreto di Stato. *Giurisprudenza costituzionale*, 59(2), 1927-38.

Arsanjani, M. H. (1999). The Rome Statute of the International Criminal Court. *American Journal of International Law*, 93(1), 22-43.

Badey, T. J. (2006). US counterterrorism: Change in approach, continuity in policy. *Contemporary Security Policy*, 27(2), 308-324.

Bakker, E. (2015). *Terrorism and counterterrorism studies: Comparing theory and practice*. Leiden, The Netherlands: Leiden University Press.

Bayefsky, A. F. (2000). *American Declaration of the Rights and Duties of Man*. The UN Human Rights Treaty System in the 21st Century, 1013-1018.

Bolz Jr, F., Dudonis, K. J., & Schulz, D. P. (2016). *The counterterrorism handbook: Tactics, procedures, and techniques*. Crc Press, 28.

Bonzano, C. (2010). La Consulta suggerisce una tutela oggettiva ed assoluta del segreto di Stato nel processo penale. *DIRITTO PENALE E PROCESSO*, 16(3), 301-314.

Casale, D. (2008). EU institutional and legal counter-terrorism framework. *Defence Against Terrorism Review*, 1(1), 61-62.

Cassese, A. (2006). The multifaceted criminal notion of terrorism in international law. *Journal of International Criminal Justice,* 4(5), 933-958.

CBC News (2015). *RCMP charges Syrian officer in Maher Arar torture case*. See at https://www.cbc.ca/news/politics/maher-arar-rendition-development-rcmp-1.3211088

Center for Constitutional Rights (2010). *60,000 People Ask President Obama for Apology to Torture Victim Maher Arar.* See at https://ccrjustice.org/home/press-center/press-releases/60000-people-ask-president-obama-apology-torture-victim-maher-arar

Center for Constitutional Rights (2010). *Canadian RCMP Conducting Criminal Investigation of U.S. and Syrian Officials for Maher Arar's Rendition to Torture*. See at https://ccrjustice.org/home/press-center/press-releases/canadian-rcmp-conducting-criminal-investigation-us-and-syrian

Central Intelligence Agency Inspector General (2004). *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003).* Office of Inspector General. https://irp.fas.org/cia/product/ig-interrog.pdf.

Committee Against Torture (1994). *Report of 50th Session*. Supp. No. 44, 45, Annex V.

Committee Against Torture (2006). *Press Release of the United Nations Office at Geneva, CAT Concludes Thirty-Sixth Session.*

Committee Against Torture (2012). *General Comment No. 3*. para. 1.

Comunicato del Presidente della Repubblica (2015). *Il Presidente Mattarella ha firmato tre decreti di concessione di grazia*. See at https://www.quirinale.it/elementi/2194.

Dilanian, K. (2011). Terrorism suspects secretly held for two months. *Los Angeles Times.*

Dozier, K. (2011). Afghanistan Secret Prisons Confirmed by the US. *Associated Press.*

Duffy, A. (2008). *Expulsion to Face Torture? Non-refoulement in International Law*. 382

Duffy, H. (2017). *Detention and Interrogation Abroad: The 'Extraordinary Rendition' Programme*. Cambridge University Press, 89-127.

Dzehtsiarou, K. (2011). European consensus and the evolutive interpretation of the European Convention on Human Rights. *German Law Journal*, 12(10), 1730-1745.

Engel, J. A. (2010). A Better World . . . but Don't Get Carried Away: The Foreign Policy of George H. W. Bush Twenty Years On. *The Journal for the Society for Historians of American Foreign Relations (SHAFR)*, Wiley Periodicals, Inc. 34(1).

Engel, S. (1964). The new charter of the organization of central American States. *American Journal of International Law*, 58(1), 127-138.

Engelberg, S. (1986). US is Said to Weigh Abducting Terrorists Abroad for Trials Here. *The New York Times*.

Esmailzadeh, Y. (2023). *Defining Terrorism: Debates, Challenges, and Opportunities*. Lulu Press, 6-89.

European Parliament (2006). *Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*. European Parliament, 6-12.

European Parliament (2007). *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*. Procedure 2006/2200(INI). https://www.europarl.europa.eu/doceo/document/A-6-2007-0020_EN.html.

Executive Order 13491 (2009). *Ensuring Lawful Interrogations*. Federal Register, 74 (16), 1-3. http://www.therenditionproject.org.uk/

Executive Order 13492 (2009). *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*. Federal Register, 74 (16), 1-4. http://www.therenditionproject.org.uk/

Executive Order 13493 (2009). *Review of Detention Policy Options*. Federal Register, 74 (16), 1-2. http://www.therenditionproject.org.uk/

Fabbrini, F. (2014). The European Court of Human Rights, extraordinary renditions, and the right to the truth: Ensuring accountability for gross human rights violations committed in the fight against terrorism. *Human rights law review*, 14(1), 85-106.

Fanchiotti, V. (2008). Sequestri, servizi, segreti: il caso Abu Omar e le sue anomalie. *Sequestri, servizi, segreti*, 1000-1018.

Finkelman, P (1979). *Prigg v. Pennsylvania and Northern State Courts: An Anti-Slavery Use of a Pro-Slavery Opinion*. 25 Civil War History 5, 7-8.

Garcia, M. J. (2009). *UN Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*. Library of Congress Washington DC Congressional Research Service.

Garcia, R. A. (2002). The General Provisions of the Charter of Fundamental Rights of the European Union. *European Law Journal*, Blackwell Publishers Ltd, 8(4), 492-514.

Gettleman, J., Mazetti, M., & Schmitt, E. (2011). US Relies on Contractors in Somalia Conflict. *The New York Times.* http://www.nytimes.com/2011/08/11/world/africa/11somalia.html?pagewanted=all.

Ginther, K. (1991). The European Convention for the prevention of torture and inhuman or degrading treatment or punishment. *European Journal of International Law*, 2, 123.

Giupponi, TF (2007). Il conflitto tra governo e procura di Milano nel caso Abu Omar. *Quaderni costituzionali*, 27 (2).

Goldman, A., & Apuzzo, M. (2010). Guantánamo captive's interrogation tapes found under CIA desk. *Huffington Post.*

Goldman, R. K. (2009). History and action: The inter-American human rights system and the role of the Inter-American Commission on Human Rights. *Human Rights Q.*, 31, 856.

Grey, S. (2007). *Ghost Plane: The True Story of the CIA Rendition and Torture Program*. St. Martin's Griffin.

Grimmett, R. F. (2006). *Authorization for use of military force in response to the 9/11 attacks (PL 107-40): Legislative history*. Library of Congress Washington DC Congressional Research Service.

Guild, E., Bigo, D., & Gibney, M. (Eds.). (2018). *Extraordinary rendition: addressing the challenges of accountability*. Routledge.

Hanley, C. J. (2003). AP Enterprise: Former Iraqi detainees tell of riots, punishment in the sun, good Americans, and pitiless ones. *Associated Press*. https://web.archive.org/web/20140503221406/http://legacy.utsandiego.com/news/world/iraq/20031101-0936-iraq-thecamps.html.

Hillebrand, C. (2009). *The CIA's extraordinary rendition and secret detention programme: European reactions and the challenges of future international intelligence cooperation*. Netherlands Institute of International Relations Clingendael, 1-77.

Hogan, D. E., Waeckerle, J. F., Dire, D. J., & Lillibridge, S. R. (1999). Emergency department impact of the Oklahoma City terrorist bombing. *Annals of emergency medicine*, 34(2), 160-167.

Human Rights Watch (2004). *The United States "Disappeared": The CIA's Long-Term "Ghost Detainees"*.

Human Rights Watch (2005). *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*. 57-60.

Human Rights Watch (2009). *Libya/U.S.: Investigate Death of Former CIA Prisoner*.

Izzo, A. (2016). The Abu Omar case European Court of Human Rights vs State secret doctrine. *Student's Social Science Journal*, 1(1), 134.

Kreuder-Sonnen, C. (2019). *Emergency powers of international organizations: Between normalization and containment*. Oxford University Press.

Krstevska, K. (2016). Case of El-Masri v. Republic of Macedonia – with a special focus to the violation of Article 3 of the European Convention for the Protection of Human

Rights and Fundamental Freedoms. *ЕВРОПСКЕ ИНТЕГРАЦИЈЕ: ПРАВДА, СЛОБОДА И БЕЗБЕДНОСТ* Том 2, 81.

Langley, E. E. (2010). The loss of American values in the case of erroneous irregular rendition. *Georgetown Law Journal,* 98(5), 1441-1480.

Lasch, C. N. (2013). Rendition resistance. *North Carolina Law Review*, 92(1), 163-164.

Lichtblau, E., & Schmitt, E. (2011). US Widens Inquiries Into 2 Jail Deaths. *The New York Times*.

Lobel, J. (2008). *Extraordinary rendition and the constitution: The case of Maher Arar. Rev. Litig*., 28, 479.

Lowenfeld, A. F. (1990). *US Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 *AJIL*. 444-461.

Masferrer, A. (Ed.). (2012). *Post 9/11 and the state of permanent legal emergency: security and human rights in countering terrorism (Vol. 14).* Springer Science & Business Media.

Mayer, J. (2005). Outsourcing Torture: The secret history of America's 'extraordinary rendition' program. *The New Yorker*, Annals of Justice, 2005 Issue, 1-26.

Mayer, J. (2008). *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals.* Anchor.

Mazza, C. (2012). The Abu Omar Case and the" Extraordinary rendition" Program. *Central European Journal of International & Security Studies*, 2(6).

Messineo, F. (2009). "Extraordinary renditions" and State obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy. *Journal of International Criminal Justice*, 7(5), 1023-1044.

Nadelmann, E. A. (1993). The Evolution of United States Involvement in the International Rendition of Fugitive Criminals. *New York University Journal of International Law and Politics*, 25(4), 820.

Nash Leich, M. (1984). Four Bills Proposed by President Reagan to Counter Terrorism. *The American Journal of International Law.* Cambridge University Press, 78(4), 915-928.

Nordstrom, L. (2012). Egyptian deported by CIA gets residency in Sweden. *Associated Press*.

Nowak, M. et al. (2006). *Situation of detainees at Guantanamo Bay*. Commission on Human Rights, UN Economic and Social Council, 4-26.

Nyadera, I. N., & Bincof, M. O. (2019). HUMAN SECURITY, TERRORISM, AND COUNTERTERRORISM. *International Journal on World Peace*, 36(1), 7-32.

Office of the Director of National Intelligence (2006). *Biographies of High Value Terrorist Detainees Transferred to the U.S. Naval Base at Guantanamo Bay*.

Open Society Foundations (2010). *Regional Policy Initiative on Afghanistan and Pakistan, Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*. 3.

Open Society Foundations (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. Open Society Justice Initiative, 4-120. https://www.justiceinitiative.org/publications/globalizing-torture-cia-secret-detention-and-extraordinary-rendition

Orlandi, R. (2012). Una pervicace difesa del segreto di Stato ([Osservazione a] Corte cost., 23 febbraio 2012, n.40). *Giurisprudenza costituzionale*, 57(3), 2327-2333.

Pace, A. (2014). Le due Corti e il caso Abu Omar. *Giurisprudenza costituzionale*, 1.

Panetta, A. (2015). 'This is the wrong guy': Former spy reveals CIA debate over arrest, torture of Maher Arar. *The Canadian Press*. See at https://www.theglobeandmail.com/news/national/this-is-the-wrong-guy-former-spy-reveals-cia-debate-over-arrest-torture-of-maher-arar/article23799416/

Parachini, J. V. (2000). *The World Trade Center Bombers (1993).* Toxic terror: Assessing terrorist use of chemical and biological weapons, 185-206.

Parliamentary Assembly (2006). *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. Committee on Legal Affairs and Human Rights, Parliamentary Assembly, 9-56.

Parliamentary Assembly (2007). *Secret detentions and illegal transfers of detainees involving Council of Europe Member States: second report.* Committee on Legal Affairs and Human Rights, Parliamentary Assembly.

Pellom, B. L., & Hansen, J. H. (1997). *Voice analysis in adverse conditions: the centennial Olympic Park bombing 911 call*. Proceedings of 40th Midwest Symposium on Circuits and Systems, Dedicated to the Memory of Professor Mac Van Valkenburg, 2, 873-876.

Priest, D. (2004). CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review. *The Washington Post.*

Priest, D. (2005). Wrongful Imprisonment: Anatomy of a CIA Mistake. *The Washington Post.*

Priest, D., & Gellman, B. (2002). U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities. *The Washington Post 26*, p. A01.

Ramcharan, B. G. (2002). *Condemnation of Terrorism Resolution 1189 (1998).* The Security Council and the Protection of Human Rights, 219-220.

Ramraj, V. V., Hor, M., & Roach, K. (Eds.). (2009). *Global anti-terrorism law and policy*. Cambridge University Press.

Rice, C. (2005). *Remarks Upon Her Departure for Europe*. https://2001-2009.state.gov/secretary/rm/2005/index.htm.

Roach, K. (2007). Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry. *Cardozo L. Rev.,* 29.

Roberts, A. (2005). The 'war on terror' in historical perspective. *Survival*, 47(2), 101-130.

Russo, A. (2008). *I metodi antiterrorismo al vaglio della Corte costituzionale: brevi riflessioni sulla Decisione N. 337 del 2007 e sulla riforma del Segreto di Stato*. Amministrazione in Cammino.

Sadat, L. N. (2005). Ghost prisoners and black sites: extraordinary rendition under international law. *Case W. Res. J. Int'l L.*, 37, 309.

Sage, M. V. (2006). The exploitation of legal loopholes in the name of national security: case study on extraordinary rendition. *California Western International Law Journal*, 37(1).

Scahill, J. (2014). The CIA's Secret Sites in Somalia. *The Nation.*

Schmid, A. P., & Jongman, A. J. (1988). *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*. New Brunswick, NJ: Transaction Books.

Schmitt, E. (2009). US Shifts, Giving Detainee Names to the Red Cross. *The New York Times*. http://www.nytimes.com/2009/08/23/world/middleeast/23detain.html.

Scovazzi, T. (2016). Segreto di Stato e diritti umani: il sipario nero sul caso" Abu Omar". *Diritti umani e diritto internazionale*, (1), 157-184.

Shannon, E. (1988). *Desperados: Latin Drug Lords, US Lawmen and the War America Can't Win*. 231-244.

Singh, A. (2012). *European Court Probes for Truth on CIA's Secret Prison in Poland*.

Solomon, R. (1979). The Development and Politics of the Latin American Heroin Market. *9 J. Drug Issues*, 349-363.

Spaaij, R. (2010). *The Enigma of Lone Wolf Terrorism: An Assessment, Studies in Conflict & Terrorism*. 33(9), 854-870.

Spalek, B. (2012). *Counterterrorism*. Community-Based Approaches to Preventing Terror.

Special Rapporteur on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (2004). *Report delivered to the General Assembly*.

Spiegel International (2007). *Germany Drops Pursuit of CIA Kidnappers*. Spiegel Online. See at http://www.spiegel.de/international/germany/0,1518,507455,00.html.

Stefanovska, V. (2021). The importance of the "right to the truth" in El-Masri case: Lessons learned from the extraordinary rendition. *Torture Journal*, 31(3), 65-66.

Stohl, M. (1987). States, and State Terrorism: The Reagan Administration in the Middle East. Arab Studies Quarterly, *Pluto Journals*, Terrorism, and the Middle East: Context and Interpretations, 9(2), 162-172. https://www.jstor.org/stable/41857905

Sulyok, M., & Pap, A. L. (2010). *The role of NGOs in the access to public information: extraordinary renditions and the absence of transparency*. In Mapping Transatlantic Security Relations (pp. 162-197). Routledge.

Taguba, A. M. (2004). *Article 15-6 Investigation of the 800th Military Police Brigade*. Bernan Assoc, United States Central Command.

The Federal Constitutional Court (2009). *Limited grant of permission to testify and refusal to surrender documents to BND committee of inquiry partly contrary to constitutional law*. Press Release No. 84/2009 of 23 July 2009. See at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-084.html.

The New York Times (2023). *The Guantanamo Docket, profile: Abu Zubyadah*. http://projects.nytimes.com/guantanamo/detainees/10016/documents/11.

Toaldo, M. (2012). The Reagan Administration and the Origins of the War on Terror: Lebanon and Libya as Case Studies. *New Middle Eastern Studies 2*, 1-17.

Umozurike, U. O. (1983). The African Charter on Human and Peoples' Rights. *The American Journal of International Law*, Cambridge University Press, 77(4), 902-912. http://www.jstor.com/stable/2202548

UN Human Rights Committee (2001). *General Comment No. 29*. paras. 11 and 13.

UN Human Rights Committee (2006). *Concluding Observations on the United States of America*. paras. 12-16.

US Defense Department (2011). *DOD Announces Charges Sworn Against Detainee Nashiri*.

US Justice Department (2009). *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees*. http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html.

US Justice Department (2012). *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*. http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html.

US Justice Department Office of General Counsel (2005). *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General.

US Justice Department Office of Legal Counsel (2002). *Interrogation of an Al Qaeda Operative*. Memorandum for John Rizzo, Acting CIA General Counsel, from Assistant Attorney General Jay S. Bybee.

US Justice Department Office of Legal Counsel (2002). *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*. Memorandum for Alberto Gonzales, Counsel to the President, from Assistant Attorney General Jay Bybee. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf.

US Justice Department Office of Legal Counsel (2004). *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, 1-2.

US Senate Committee on the Judiciary (2009). *Testimony of Ali Soufan*.

US State Department (2002). *Patterns of Global Terrorism 2001*. 131, Appendix D.

Valentino, A. (2016). La sentenza della Corte di Strasburgo sul caso Abu Omar: la tutela dei diritti fondamentali nel rapporto tra i poteri dello Stato. *Osservatorio costituzionale*, 3, 2-28.

Vedaschi, A. (2016). *Cronaca di una condanna annunciata: Abu Omar a Strasburgo, l'ultimo atto*. DPCE Online, 25, 3.

Vedaschi, A. (2018). The Dark Side of Counterterrorism: Arcana Imperii and Salus Rei Republicae. *The American Journal of Comparative Law*, 66(4), 877-926.

Voeten, E. (2008). The impartiality of international judges: Evidence from the European Court of Human Rights. *American Political Science Review*, 102(4), 417-433.

Weissbrodt, D., & Bergquist, A. (2006). Extraordinary Rendition: Human Rights Analysis. *Harvard Human Rights Journal*, 19, 123-160.

Whitlock, C. (2012). Renditions Continue Under Obama, Despite Due Process Concerns. *The Washington Post.*

Working Group on Arbitrary Detention (1997). *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment.* Para. 8, 54th Session.

World Policy Council (2006). *The centenary report of the Alpha Phi Alpha World Policy Council*. Alpha Phi Alpha Fraternity, 21-22. https://issuu.com/apa1906network/docs/world_policy_council_2006.

Zagaris, B. (1989). *Canada Extradites Ng Without Seeking Death Penalty Assurances*. 5 International Enforcement Law Report, 420.

LEGAL CASES

Agiza v. Sweden, No. 233/2003 (Committee Against Torture 2003).

Al Nashiri v. Poland, No. 28761/11 (ECtHR 2011).

Al Nashiri v. Romania, No. 33234/12 (ECtHR 2012).

Alzery v. Sweden, No. 1416/2005 (UN Human Rights Committee 2006).

Arar v. Ashcroft, 414 F. Supp. 2d 250 (Eastern District of New York 2006).

Arar v. Ashcroft, 532 F.3d 157 (Second Circuit of the US Court of Appeals 2008).

Arar v. Ashcroft, 585 F.3d 559 (Second Circuit of the US Court of Appeals 2009).

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (US Supreme Court 1971).

El-Masri v. Tenet, 437 F. Supp. 2d 530 (US District Court for the Eastern District of Virginia 2006).

El-Masri v. the former Yugoslav Republic of Macedonia, No. 39630/09 (ECtHR 2012).

Frisbie v. Collins, No. 342 U.S. 519 (US Supreme Court 1952).

Hamdan v. Rumsfeld, No. 548 U.S. 557 (US Supreme Court 2006).

Judgement for Conflict of Attribution Between State Powers, No. 106/2009 (Italian Constitutional Court 2009). See at https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2009&numero=106

Judgement for Conflict of Attribution Between State Powers, No. 24/2014 (Italian Constitutional Court 2014). See at https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=24

Judgement of the Court of Milan, No. 12428.

Judgement on Abu Omar, No. 46340/12 (Italian Court of Cassation 2012).

Kentucky v. Dennison, No. 65 U.S. 66 (US Supreme Court 1861).

Ker v. Illinois, No. 118 U.S. 436, 444 (US Supreme Court 1886).

Nasr and Ghali v. Italy, No. 44883/09 (ECtHR 2016).

Prigg v. Pennsylvania, No. 41 U.S. 539 (US Supreme Court 1842).

Puerto Rico v. Brandstad, No. 483 U.S. 219 (US Supreme Court 1987).

Soering v. United Kingdom, No. 161 (ECtHR 1989).

Sosa v Alvarez Machain, No. 542 U.S. 692 (US Supreme Court 2004).

United States v. Alvarez Machain, No. 504 U.S. 655 (US Supreme Court 1992).

EXECUTIVE SUMMARY

Introduction

Although there is no single and widely accepted definition of what constitutes terrorism, national and supranational authorities must adopt measures to prevent and combat it through intelligence collection, antiterrorism, counterterrorism, and consequence management strategies. To avoid the infringement of fundamental rights or international legal norms, counterterrorism must strike a delicate balance between the needs of security and the protection of human rights and civil liberties.

Recent administrative and legislative actions taken to combat international terrorism have shown their very restrictive nature by placing significant restrictions on fundamental freedoms. In this context of increased security concerns, the widespread use of secrecy in the name of national security has increasingly emerged, particularly within mature democracies, becoming the rule rather than the exception. Although secrecy and democracy may appear irreconcilable, transparency is necessary to keep the executive branch responsible since, in the end, the people are the ones who have the power.

This dissertation aims at describing, explaining, and analyzing the program of extraordinary renditions carried out by the CIA in collaboration with foreign countries to arrest, detain, transfer, and interrogate suspected terrorists involved in the 9/11 terrorist attack. As opposed to other anti-terrorist measures, this practice was the most brutal one because it was unjustifiably used by a well-established democracy such as the United States. Thus, it is noteworthy to understand whether Courts all over the world were able to do something when dealing with these secret operations which entailed a blatant violation of fundamental rights and principles on which a democracy is usually founded.

In order to do so, the first Chapter will discuss extraordinary renditions, their historical antecedents up through the George W. Bush program's extension and the associated human rights issues. The most infamous examples, the Obama administration's counterterrorism strategy, and how the program of extraordinary renditions was made public in the United States and Europe are all covered in the second Chapter. To expose the US Courts' approach to victims of extraordinary renditions, describe the legal interpretation of the European Court of Human Rights, and demonstrate the various perspectives on the role of European States involved in the

secret CIA program adopted by national and supranational judicial bodies, the final Chapter will analyze in detail the three most significant cases from a judicial point of view, namely Maher Arar, Khaled El-Masri, and Abu Omar.

Chapter I - Extraordinary Renditions: Origins, Evolution, and Limits

In response to the 9/11 terrorist attack, President George W. Bush launched the War on Terror, which included an expansion of the program of renditions that were already used by US authorities to arrest and prosecute terrorists before US Courts during the Clinton administration. Indeed, they became "extraordinary renditions" and consisted in the State-sponsored capture of suspected terrorists and deportation of high-value detainees from one country to another to detain and interrogate them without any legal process, meaning that their right to legally challenge their imprisonment before a judicial authority was not guaranteed. This new program was mainly carried out by the CIA in collaboration with other States which arrested them or harbored detention centers as well as non-State actors such as private companies which organized the flights to relocate detainees. Within these operations, the CIA developed the so-called "enhanced interrogation techniques" to obtain relevant information to disrupt terrorist organizations which consisted in the use of physical means that inflicted physical and psychological pain to detainees. These corrective and coercive methods included waterboarding or simulated drowning, uncomfortable positions, confinement in a box for many hours, insulting, slapping, beating, forced nudity, sleep deprivation, exposure to extreme temperatures, dietary restraints, wall standing and many others.

The legal concept of rendition in the United States has always been combined with the notion of extradition within Article 4, section 2 of the US Constitution and is defined as the legal procedure of surrendering or handing over a fugitive by a jurisdiction to another for law-enforcement purposes, such as charging him or her with a crime.

The US Supreme Court was called to adjudicate a case of rendition to another State for the first time in 1886: Ker, a citizen of Illinois charged with criminal records that escaped to Peru, was captured by Chilean authorities, and sent back to his State of origin where he was kept in custody. Therefore, he appealed to the Supreme Court claiming that the Illinois Court could not exercise its jurisdiction because he was arrested in Peru and then brought to the United States without having invoked the 1870 extradition treaty between the two countries. First, the Supreme Court agreed to set

aside jurisdiction over this case simply because of the mere physical presence of the defendant before the Court regardless of how he was brought there. Then, it decided that his transfer from Peru to the United States for prosecution, without invoking the extradition treaty, did not infringe US law.

In 1952, the Supreme Court confirmed its previous jurisprudence in *Frisbie v. Collins* arguing that, first, the State could capture an individual to take him from one jurisdiction to another to be tried and the Court's power to prosecute him could not be impeded by the fact that the abduction was forcible. Collins was sentenced to life because of a murder and was forcibly abducted to Michigan for trial. Indeed, he filed a *habeas corpus* petition alleging a violation of the Fourteenth Amendment of the US Constitution and the 1932 Federal Kidnapping Act to a US District Court, which rejected it. This case has been recalled by the Supreme Court in other cases arguing that any conviction could be nullified because the perpetrator was illegally arrested by State authorities. Indeed, the Ker-Frisbie doctrine developed according to which any erring person could not escape prosecution simply by the fact that he was brought to trial unwillingly.

Finally, in 1992 the Ker-Frisbie doctrine was further implemented by the US Supreme Court in *United States v. Alvarez Machain*, where it decided that detainees subjected to forcible abduction from Mexico could be tried before US Courts for breaches of US criminal law although there was an extradition treaty with that State. This case regarded the conviction of a Mexican national, Alvarez Machain for his involvement in the killing of a US agent. Francisco Sosa, who was a Mexican policeman collaborating with DEA's agents, illegally arrested and deported him to Texas where he was captured by US authorities. The Supreme Court ruled that the extradition treaty was not violated by the abduction of Machain and that any US Court could exercise its jurisdiction over this case despite the breach of international law coming from the illegal arrest.

In the 1980s, Ronald Reagan strengthened national defense by doubling defense spending and introduced a new approach to counter terrorism which entailed a shift from passive to proactive policies based on prevention, pre-emption, and retaliation. Moreover, the President authorized the "renditions to justice" for those suspected of criminal wrongdoing coming from territories in which safe custody could not be provided including countries which had no government control, those that supported international terrorism, airspace, and international waters. They were carried out by US

authorities into US territory. Furthermore, he provided the basis for the subsequent George W. Bush's War on Terror which incorporated the classification of terrorism as a form of warfare, the use of military force, the application of preventive measures and the idea of overthrowing regimes.

In the 1990s, two important events marked Bill Clinton's presidency: the CIA headquarters shooting and the World Trade Center bombing. In response to the latest terrorist attacks, Clinton improved security and passed the 1996 Antiterrorism and Effective Death Penalty Act which changed the rules of *habeas corpus*, aided victims, prohibited international terrorist fundraising and any type of assistance, removed alien terrorists, restricted the use of nuclear weapons, amplified the penalties, and improved the effectiveness of counterterrorism measures. This Act was crucial in limiting the right to *habeas corpus*: State prisoners could not be granted this right before federal Courts and the possibility of claiming new petitions for *habeas corpus* was limited. In 1998, Clinton issued another Directive which mentioned among the "successes" the huge number of renditions of terrorists performed by the United States. In the same year, two groups of suicide bombers detonated against the US embassies in Africa killing CIA's agents and civilians and injuring more than 4000 individuals. Therefore, Clinton launched the Operation Infinite Reach which consisted of cruise missile strikes against Al-Qaeda camps in Afghanistan and Al-Shifa pharmaceutical factory in Sudan suspected to support Bin Laden. This was the first time that a pre-emptive attack was carried out by the United States against a non-State actor.

At the end of the century, since it was not always possible to apply extradition procedures, the US authorities had to find another strategy to fight terrorism: the CIA started to transfer prisoners to foreign States to prosecute them and local countries started to secretly render detainees to the United States or third countries for trial.

The main issue that was involved within the program of extraordinary renditions was the prohibition of torture and cruel, inhuman, and degrading treatment, which is a *jus cogens* rule, that allows no derogation according to international law. Indeed, the prohibition of torture is enshrined in several legal standards at the international level such as Article 5 of the Universal Declaration of Human Rights (UDHR), the Geneva Convention Relative to the Treatment of Prisoners of War and Article 7 of the International Covenant on Civil and Political Rights (ICCPR). The most important international legal standard that includes the prohibition is the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),

which prohibits torture in absolute terms, and, thanks to its adoption, the prohibition of torture became one of the principles of customary international law. Moreover, the prohibition of torture in absolute terms is also contained in several continental human rights instruments, such as Article 3 of the European Convention of Human Rights (ECHR), the Inter-American Convention to Prevent and Punish Torture, Article 5 of the African Charter on Human and Peoples' Rights, the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment and the Cairo Declaration on Human Rights in Islam (CDHRI) and Article 4 of the Charter of Fundamental Rights of the European Union.

Another duty that States retained and could arise when participating in the program of extraordinary renditions was the principle of *non-refoulement*: if there are reasonable grounds to believe that there is an effective risk of torture or inhuman treatment in certain countries, States cannot transfer (or '*refouler'*) individuals there. For instance, Article 3 UNCAT provides that an individual cannot be expelled, returned, or extradited to another country if there is a high risk of torture there and the right to an actual, independent, and fair review of the decision to expel or relocate a person to another country must be guaranteed. Article 7 ICCPR also states that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". This principle is also provided by the ECHR which imposes a positive obligation on its Contracting Parties which must prevent any suffering from torture or degrading treatment committed in Europe and elsewhere.

Another obligation that was involved in the extraordinary rendition program was the prohibition of arbitrary arrest and detention of individuals which is explicitly contained in several provisions including Article 9 UDHR, Article 9 ICCPR, the Cairo Declaration and Article 25 of the American Declaration of the Rights and Duties of Man. Indeed, every human being is entitled to the right to liberty and security thus there could never be any deprivation of such privileges.

These practices directly or indirectly affected several essential human rights: the right to life; the right to liberty, security, integrity, dignity of a person; the right to physical and mental health; the right to consular access; the right to equal protection before the law; the right to create a family or family rights; the right of asylum; the right to fair trial and access to Courts; the right to be recognized as a person before the law; the right to an effective remedy; the right to due process of law; the right to judicial

protection; the prohibition of arbitrary deprivation of property; and freedom of thought, opinion, expression, association and movement.

Chapter II – Extraordinary Renditions: Revelations, Investigations and Key Cases

On 26th December 2002, *The Washington Post* reported the first interviews provided by those who worked at the Bagram Air Base in Afghanistan. The article first acknowledged that prisoners who did not cooperate with authorities in the CIA's interrogation centers were subjected to abusive methods such as standing for hours, sleep deprivation, stress, and painful positions and then transferred to foreign countries that tortured them. Then, it underlined that high-ranking US officials were always present or informed about everything that happened during these operations and revealed that prisoners were rendered to foreign nations, which were known to employ violence or use drugs, such as Egypt and Jordan. The article also reported some relevant data: since 9/11, 3000 suspected Al-Qaeda terrorists were imprisoned all over the world, of which 625 were held at Guantanamo Bay and less than 100 were illegally transferred to foreign countries. Another crucial point that appeared in the article was that, distinct from Guantanamo Bay, the access to the CIA's overseas detention centers was denied to strangers, attorneys, associations and sometimes also to other governments. At the end of the article, the writers revealed that President Clinton started to use the extraordinary rendition policy after the attacks against the US embassies in Kenya and Tanzania in 1998 but the borders of law were respected during prisoners' interrogations.

In February 2006, Manfred Nowak, who served as Special Rapporteur on Torture of the UN Commission on Human Rights, published a report on the conditions of detainees held at Guantanamo Bay. First, the report recalled that, despite the urgent need to fight terrorism, UN Member States, including the United States, were obliged to respect human rights, humanitarian and international law and that derogation from certain rights was not always possible. Second, it argued that the 2001 Military Order which regulated the legal framework in the Guantanamo facility obstructed the rule of law and several rights such as the right to challenge the lawfulness of one's detention, contained Article 9 ICCPR, and the right to fair trial, enshrined in Article 14 ICCPR, because it allowed for an indefinite detention without trial before an impartial judge.

In April 2006, Amnesty International discovered how detainees were treated at Far' Falastine, which was a prison in Damascus known for employing 40 different acts of torture: prisoners were isolated for days, kicked, not allowed to see the sun, to go to

the toilet when they needed or to eat enough food. The NGO listed the planes and airports connected with the rendition policy and noticed that the CIA used planes provided by private companies to render detainees.

On 14th February 2005, *The New Yorker* published its annual issue containing an article by Jane Mayer who was the first to reveal that some Council of Europe's Member States cooperated with the United States in the rendition of captives during Clinton's presidency: Croatia captured Talaat Fouad Qassem and gave him to US agents in 1995 while Albania arrested some suspects and rendered them to Egypt in 1998. At the end of the article, Mayer pointed out that the right of detainees to challenge their imprisonment before a judicial authority was impaired because the Combatant Status Review Tribunals (CSRT), which were established to check whether the classification of detainees as "enemy combatants" was correct in non-public hearings, were used to reject claims of innocence.

In December, one of the Parliamentary Assembly's members called Dick Marty was appointed as Rapporteur by the Council of Europe to start investigations into the existence of CIA's black sites and the violations committed by European nations. On 7th June 2006, Mr. Marty released his first report which confirmed that 14 European countries assisted the United States in the extraordinary rendition and secret detention programs thus violating not only international law but also European legal standards. Then, he criticized the 2001 Military Order because it deprived several individuals of their liberty by establishing a legal framework which contrasted international, European and US domestic law. Afterwards, the report enlisted the number of flights directed by the United States and the airports involved in these operations as well as the European States active in the extraordinary rendition program: Sweden, Bosnia-Herzegovina, United Kingdom, Italy, Macedonia, Germany, and Turkey.

On 6th September 2006, President Bush for the first time publicly admitted that he was aware of the rendition policy and recognized that about 100 detainees were secretly held by the CIA and that only 14 high-value detainees were kept in CIA custody before being deported to Guantanamo Bay.

However, several details remained classified, and Mr. Marty was asked again to investigate the issue, and, on 7th June 2007, another report was published and explained that the CIA's secret operation to arrest, transfer and interrogate terrorist suspects was called the "High-Value Detainees (HVD) Program", which approved the "Kill, Capture or Detain" (KCD) orders through which the CIA decided whether to arrest, imprison or

kill high-value targets. To start these covert programs, the CIA needed permissions from the US government, which established transnational agreements with its foreign allies' military apparatuses for the creation of military connections and the authorization to freely travel by military means of transportation. In addition, Marty argued that the CIA's secret operations led to a dehumanization process in which detainees were referred to as "aliens" or "ghost prisoners" who were entitled to have no rights and disappear. The author defined this system as a "legal apartheid" because these operations were designed only for non-American individuals.

At the beginning of 2006, the European Parliament created the Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners (TDIP), whose Rapporteur was Claudio Fava, which reminded that it was impossible that European governments were not aware of the renditions performed in their lands, skies, and airports as well as of the high risk of torture in the receiving countries such as Egypt.

On 20th July 2007, President Bush signed the Executive Order 13440 through which he re-authorized the CIA's programs under specific conditions: torture or any similar act was not tolerated, isolation and interrogation could be used only for Al-Qaeda's members or those withholding crucial information, basic needs were provided to detainees, the CIA Director wrote down the policies that direct all the activities, which had to be lawful.

The first case that must be mentioned is the one regarding Abu Zubaydah, who was a senior leader of Al-Qaeda and closer collaborator of Osama Bin Laden. He was shot and captured in Pakistan in 2002 by US and Pakistani authorities, deported to a black site in Thailand and then held under CIA custody in Poland for nine or ten months. For four years, he was detained in secret detention centers worldwide until September 2006 when he was transferred to Guantanamo Bay. As it was reported by *The Washington Post* and *The New York Times*, painkillers were given to him during his custody for the purpose of interrogation and 10 interrogation techniques, including waterboarding, were used against him.

Another well-known case of extraordinary rendition concerned Ibn Al-Shaykh Al-Libi, who was a Libyan senior Al-Qaeda member arrested in Pakistan in 2001, handed to the FBI at Bagram Air Base and then kept under CIA custody in Afghanistan. He was given to the CIA which extraordinarily transferred him to Egypt in 2002, interrogated by Egyptian officials and the information he provided to US agents on Al-

Qaeda's efforts to acquire Iraq's weapons of mass destruction was so essential that it was cited by the Secretary of State Colin Powel in his speech to the UN Security Council in 2003. However, Al-Libi confessed that he provided false information to avoid the torturing techniques that were announced to be applied against him and to receive a better treatment. Therefore, his case confirms the theory according to which torture and ill-treatment do not always provide information which can be surely considered reliable.

The cases of Ahmed Agiza and Muhammed Al-Zery, who were both Egyptian nationals living with their families in Sweden, must also be considered. While seeking political asylum, they were arrested in Stockholm by the Swedish Security Police in 2001 and then given to the CIA, which rendered them to Egypt. There, although the country promised not to torture them and Swedish officers visited them temporarily to monitor their conditions, they were tortured and held in the State prison in Nasr City for one year and electric shocks were used against them. In 2005, the UN Committee Against Torture concluded that Sweden violated the UN Convention Against Torture by expulsing Agiza and relying on Egypt's assurances which did not safeguard him from torture. In 2006, the UN Human Rights Committee argued that Sweden violated the absolute prohibition of torture because it did not prevent Al-Zery's ill-treatment, removed him despite it was aware that he would have faced a high risk of torture in Egypt and criminal investigations were not conducted. Therefore, diplomatic assurances and post-transfer monitoring to ensure that torture is not enforced represent an ineffective protection against torture.

The last case of extraordinary rendition that must be examined is the one regarding a Saudi citizen: Abd Al Rahim Al Nashiri. He was arrested in Dubai in 2002, transferred to CIA detention centers of the Salt Pit in Afghanistan and then in Bangkok, where waterboarding was used against him. He was later extraordinarily rendered to a secret Polish black site held by the CIA, where he was subjected to several torturing and humiliating techniques including mock execution, standing naked and hooded, painful positions and threat to sexually abuse his mother. In 2003, Poland and the United States collaborated in a joint secret operation and, in 2006, he was brought to Guantanamo Bay. In 2011, the US military commission prosecutors wanted to impose the death penalty on him because of the suspicion of his involvement in two terrorist attacks in 2000 and 2002. Therefore, he filed an application before the ECtHR against

Poland and Romania since, although most of ill-treatment was inflicted by US officials, they were both Contracting Parties to the European Convention of Human Rights.

Once he became President of the United States, Barack Obama passed three Executive Orders to put an end to the practice of extraordinary renditions: the first revoked President Bush's 2007 Order that re-authorized the CIA's secret detention program, enabled Al-Qaeda and Taliban's detainees to be protected under the Third Geneva Convention and established that Common Article 3 applied to detentions and interrogations thus allowing some of the "enhanced interrogation techniques"; the second called for the closure of Guantanamo Bay's detention center within a year because it was in the interests of the United States; the third set up a Special Task Force with the task to perform a careful evaluation of the existing detention policy options that the US Federal government had to arrest, detain, transfer, release individuals involved in terrorist activities during armed conflicts.

However, renditions were not prohibited, persisted as a lawful counterterrorism strategy, and were just subjected to a closer supervision to ensure a correct treatment of all those involved in this practice. Torture and secret detention were prohibited only for those detainees that were under the effective control of US officers or kept in detention facilities controlled by the United States. In addition, suspected terrorists could be temporarily abducted and detained by the CIA before being transferred to other governments for interrogation or trial and kept under custody by all units within the Department of Defense, as President Bush's 2001 Military Order established.

In July 2010, it was discovered that the Somali citizen Ahmed Abdulkadir Warsame was arrested in international waters between Yemen and Somalia and then imprisoned and interrogated for two months on a US ship by the Obama administration. Then, *The Nation* denounced that a secret site, guarded by Somali agents, under the headquarters of the Somali National Security Agency (NSA) was used by the CIA to detain Kenyans suspected to be connected with Al Shabaab, which was a local Islamist terrorist organization linked to Al-Qaeda, in inhuman conditions. There, the US intelligence service gathered the needed information to capture in Nairobi and extraordinarily rendered the Kenyan national Ahmed Abdullahi Hassan to Somalia to interrogate and imprison him without guaranteeing his right to trial and legal assistance. The case of Hassan suggested that the United States were still involved in CIA secret detention and rendition operations also during the Obama administration although at a lower degree.

Chapter III – Extraordinary Renditions: Judicial Interpretation in the United States and in Europe

Maher Arar, who was a dual citizen born in Syria and residing in Canada, was arrested in September 2002 at the John F. Kennedy airport in New York by US personnel, interrogated, transferred in chains and shackles, and put in solitary confinement. Afterwards, the CIA transferred him to a detention facility in Amman, where he was physically abused by local authorities and then he was extraordinarily rendered to Syria, where he was detained in a very small cell, kicked, tortured, and interrogated in various inhuman ways. Once the Canadian embassy reached Syria to comprehend Arar's conditions, he was no longer interrogated nor tortured and received five visits from Canadian consular officials. In August 2003, he was forced to admit his participation in terrorist activities in Afghanistan and was imprisoned in the Sednaya prison. In October, he was freed under protection of Canadian officials.

On 16th February 2006, the US District Court for the Eastern District of New York delivered its judgement following Arar's decision to file a complaint against US officials who detained and extraordinarily rendered him to Syria. The Court dismissed his four claims arguing that, first, the applicant could not request a declaratory relief, second, he could not prove that he had a feasible cause of action under the Torture Victim Protection Act as he was not a national, third, Bivens could not be invoked for reasons of national security and foreign policy and, fourth, he should have identified those who directly participated in the unlawful procedure exercised on him and the exact harm that he underwent.

In the meantime, the Arar Commission of Inquiry was set up by the Canadian government to investigate the activities carried out by Canadian personnel in relation to Arar's experience. In 2007, the Canadian Prime Minister apologized and compensated Maher Arar and his family with 11.5 million Canadian dollars, thus Canada was the first and only country to follow such behavior in respect of a victim of extraordinary renditions.

In June 2008, a three-judge panel of the Second Circuit of the US Court of Appeals decided that Arar had no due process rights since, first, accepting his claims would have altered US national security, and second, he was a non-national thus his claims were dismissed again.

On 2nd November 2009, the Second Circuit Court of Appeals confirmed the District Court's ruling dismissing Arar's claims. On this occasion, the separation of power principle was respected by the Court since it argued that it was up to the executive branch to decide how extraordinary renditions had to be carried out and to the legislative one to establish whether Arar was entitled to receive compensation from the officers who were involved or directly by the government.

In 2010, the Center for Constitutional Rights brought an action before the US Supreme Court, which did not grant Arar's petition for *certiorari* meaning that the lower Courts' decisions could not be reviewed thus also the Supreme Court dismissed Arar's claims.

Therefore, it is possible to note that, on one hand, Canada examined, acknowledged, apologized, and compensated Arar for what he experienced while, on the other hand, the United States opposed at all costs to his attempts to achieve justice and to admit their responsibility before a Court.

Khaled El-Masri, who was a German citizen of Lebanese origins, was arrested in 2003 at the Serbian-Macedonian border and detained by Macedonian security officers, who imprisoned and ill-treated him. Then, he was held at the Skopski Merak hotel in Skopje where he was put in incommunicado detention, interrogated, and mistreated by the local personnel, who rejected any of his requests to see any lawyer, interpreter, consular official or member of his family. After 23 days, he was surrendered to the CIA, which violently stripped, hooded, kicked, forced him to assume drugs and transferred him to the Salt Pit CIA detention center in Kabul, where he was repeatedly tortured. There, he was interrogated also by US agents on his alleged contacts with Islamic terrorists in Germany. In May 2004, El-Masri was extraordinarily rendered to the Albanian military airbase Berat-Kuçova Aerodrome, and then transferred to Frankfurt. He was later freed without receiving any apology or clarification.

In 2005, El-Masri filed a petition before the US District Court for the Eastern District of Virginia against the former CIA Director George Tenet, CIA agents and other US officials. On 12th May 2006, the Court dismissed his claims and found that "*there was no doubt that the State secrets privilege was validly asserted here*" by the US government because it provided an *ex parte* classified declaration containing the reasons why accepting El-Masri's claims would have threatened national security. In November, the dismissal was appealed before the US Court of Appeals for the Fourth Circuit which confirmed the lower Court's decision by acknowledging the validity of

the State secrets privilege's invocation and dismissing El-Masri's claims in March 2007. After two months, a petition of *certiorari* was requested before the US Supreme Court which refused to review the case.

In January 2006, the Munich District Court authorized the surveillance and recording of the telephone and fax lines of El-Masri's lawyer because of the alleged attempt by US officials to negotiate with him to find an informal solution. In April 2007, the 3rd Chamber of the Second Senate of the Federal Constitutional Court in Germany overruled the lower Courts' decisions on the authorization of the surveillance order. Indeed, it established that the telecommunication secrecy was violated because the authorities intercepted the content and the circumstances in which the communications were held without the complainant's consent and found an infringement of the freedom to practice one's profession. In June, the German Constitutional Court found a violation of the Constitution by the government which obstructed the Parliament's role in overseeing and checking the executive's conduct by not collaborating with the parliamentary inquiry. At the end of 2010, El-Masri's lawsuit against Germany's failure to extradite and prosecute the thirteen US officials suspected to be involved in his rendition was dismissed by the Cologne Administrative Court.

On 20th July 2009, El-Masri filed an application before the European Court of Human Rights against Macedonia which arrested, detained, ill-treated, and delivered him to the CIA which extraordinarily rendered him to Afghanistan, where he was tortured for more than four months. After having acknowledged that all the evidence examined supported the applicant's claims, the Strasbourg Court found that Articles 3, 5, 8 and 13 ECHR were violated. Indeed, Macedonia failed "to carry out an effective investigation into the applicant's allegations of ill-treatment" obstructing the right to truth, handed him over to the CIA's custody despite the risk of torture, arbitrarily detained him depriving him of his freedom, interfered with his right to private and family life, and did not provide any effective remedy before any national authority to challenge his imprisonment. This sentence represented a landmark decision for European human rights law because the program of extraordinary renditions was acknowledged and condemned for the first time by a judicial authority, and it was the first documented case of extraordinary rendition that amounted to torture.

Finally, it must be remarked that US Courts have consistently upheld the legitimacy of this privilege, regardless of whether the information in question has been already publicly known or whether it resulted in a denial of justice for serious human

rights violations. In contrast, the European Court adopted a different approach by treating secrecy as an exception that must be strictly interpreted and requiring a higher threshold of legitimacy for assertions of a secrecy privilege.

Hassan Mustafa Osama Nasr, known as Abu Omar, was an Egyptian imam who was arrested in Milan in 2003 and extraordinarily rendered to Cairo, Egypt, on a CIA-operated aircraft. There, he was secretly detained for fourteen months, interrogated, and tortured with electric shocks by Egyptian authorities. Indeed, he was held in inhuman conditions in a cell of two square meters with no window, no toilet, and no water, denied any chance to communicate with the outside or pray towards the direction of Mecca, beaten, physically and mentally abused, threatened, stripped, and forced to reveal fake information. In April 2004, he was freed by the Egyptian State Security Investigations Services (SSIS), but he revealed what he experienced to his wife and friends so Egyptian agents captured, brought him to different locations until the Istiqbal Tora prison and freed him in 2007. After some days after the abduction, the Milan Public Prosecutor's Office started the investigations which then confirmed the guiltiness of the Head of the CIA office in Milan Robert Seldon Lady and nineteen US officials.

On 18th March 2009, the Italian Constitutional Court dealt with three appeals filed by the President of the Italian Council of Ministers against the Public Prosecutor, the GIP of Milan, and the Milan Court for conflict of jurisdiction because they used and divulged documents covered by State secrecy. After having acknowledged the interests protected by secrecy and the executive's discretionary power to check the necessity for secrecy, which cannot be limited by any judicial interference, the Court recognized the *salus rei publicae*, i.e. the safety of the State, as a value of paramount importance. Consequently, it followed that "State secrecy effectively acts as a "barrier" to jurisdictional power".

On 4th November 2009, the Milan Court convicted *in absentia* twenty-two CIA officials and one US military agent because Italy did not request the extradition for them, Robert Seldon Lady for the abduction of Abu Omar and two SISMI members for aiding and abetting. This decision was crucial because the Court of Milan became the first to condemn individuals that violated human rights in the context of the CIA's program of extraordinary rendition. In September 2012 the Court of Cassation confirmed the conviction and, in February 2013, five Italian officials and three American ones were convicted by the Milan Court of Appeal.

Therefore, the President of the Council of Ministers brought two appeals before the Constitutional Court: the first on the conflict of attribution between powers was against the Court of Cassation's interpretation on State secrets in 2012; the second was against the Milan Court of Appeal's choice not to suspend the proceedings. On 14th January 2014, the Constitutional Court admitted the President's first appeal and annulled both the Court of Cassation and the Court of Appeal's sentences arguing that the five defendants should have not been indicted. The Court first argued that the President's discretionary power could not be obstructed by the judges because State security prevailed over the need to establish a "judicial assessment". In addition, it opposed the Court of Cassation's argument on the individual intentions of the SISMI agents to commit the criminal act stating that they acted within the scope of their functions thus, State secrecy covered their conduct. It also added that secrecy covered everything that was related to the relations between the intelligence services.

Afterwards, the five officials filed a petition to challenge the 2013 sentence before the Court of Cassation, which annulled the agents' indictment by applying State secrecy and, in December 2015, the President of the Republic Sergio Mattarella pardoned Medero, whose conviction was cancelled, and Lady, whose condemnation was reduced.

On 23rd February 2016, the ECtHR issued its judgement in favor of the applicants, namely Abu Omar and his wife, in which it first rejected the Italian government's preliminary objections and condemned Italy for having violated Article 3 ECHR in its material and procedural aspects, as well as Articles 5, 8 and 13 of the Convention. Indeed, the Italian government's application of State secrecy obstructed the indictment of the SISMI agents, Italian authorities failed to prevent Abu Omar from grieving any kind of physical and psychological pain by purposedly exposing him to an evident risk of ill-treatment, his rights to liberty, security and private life were also impaired, and the respondent country did not grant Abu Omar the right to an effective and concrete remedy before national authorities. First, the case represented an opportunity for the Strasbourg Court to revisit the issue of extraordinary renditions following its decision on El-Masri case; second, it provided an avenue to examine the role of State powers in addressing severe human rights violations, particularly the legitimacy of interference by other powers in the judicial process when fundamental rights violations are at stake; third, it showed the divergent responses from the Courts involved in the case, i.e. the Italian Constitutional Court essentially denied the

fundamental rights protection to the applicants while the Strasbourg Court recognized such guarantee.

Additionally, the ECtHR and the Court of Cassation shared the common view that decisions should be based on all the evidence revealed in domestic proceedings and already present in the public domain, regardless of whether secrecy was invoked. Conversely, the Constitutional Court prioritized the definition of the State powers' scope and the preservation of their discretion, ignoring the recognition of fundamental rights violations. Nevertheless, this case unequivocally demonstrates that the principle of due process cannot be overlooked, even by the highest State authorities, because acting otherwise would pose a significant threat to the very foundations of the rule of law.

Conclusion

Over a long period of time, the use of extraordinary renditions has resulted in multiple flagrant abuses of fundamental human rights and freedoms recognized by most international legal frameworks.

Unexpectedly, governments and legal authorities across the world not only ignored these violations, but also refused to hold those involved accountable for their conduct, recognize the rights of victims, and put an end to this practice. Indeed, domestic Courts in most of the cases analyzed in this dissertation opted to prioritize the preservation of State secrecy, which was frequently used to justify the use of coercive measures by the executive branch, over the acknowledgement and correction of these severe infringements. This prioritization not only maintained a culture of impunity, but it also worsened the deterioration of the rule of law by creating a sort of "black hole" within it. This approach essentially permitted secrecy and security considerations to take precedence over the requirement of preserving human rights, weakening the basic underpinnings of justice and accountability within these legal systems.

Contrary to how domestic Courts behaved when dealing with cases of extraordinary renditions, the European Court of Human Rights was the only one which adopted the opposite approach by condemning the countries, namely Macedonia and Italy, which contributed to the suffering of the detainees involved in such practice.

The analysis that has been pursued in this dissertation provides an opportunity to understand and reflect over the Courts' approach to the violations coming from the victims of extraordinary renditions, explore the boundaries of State secrecy in a

democratic society and assess the delicate balance between individual liberties and security imperatives in the post-9/11 era.

Indeed, even though Maher Arar was never charged with any crime, the US Courts demonstrated a security-oriented approach by dismissing his claims and declining to hold any US officials involved accountable for their actions. This attitude prioritized national security concerns over potential violations of Arar's rights or any potential misconduct by US officials. The Courts effectively shielded the officials from legal repercussions, reflecting a focus on security considerations rather than addressing potential wrongdoing or providing redress to Arar.

The approach to El-Masri's allegations by the US Courts also exemplifies the substantial deference given to the executive authority, emphasizing its utmost significance. This occasion demonstrated a misinterpretation of the State secrets privilege, which effectively prevented a fair trial and ultimately led to a significant denial of justice and thus, an unequivocal violation of fundamental rights.

In the Abu Omar case, the Italian Constitutional Court acknowledged that the authority to invoke secrecy rests solely with the President of the Council of Ministers and limited its own ability to make decisions regarding secrecy by explicitly ruling out any judicial scrutiny, specifically regarding the determination of when and how it should be invoked.

The extensive use of State secrecy in the context of extraordinary renditions has resulted in a lack of transparency and accountability regarding the actions and responsibilities of government officials. Efforts should be made to enhance transparency regarding extraordinary renditions, including the disclosure of relevant information to the public, appropriate judicial oversight and the implementation of legislative measures that clarify the limits and justifications for invoking State secrecy in these operations.

Consequently, the relationship between extraordinary renditions and State secrecy highlighted the need for robust oversight mechanisms and safeguards to ensure transparency and accountability. It is essential for governments to strike a delicate balance between protecting national security and upholding human rights, with a clear framework for oversight and accountability.