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The Council of Europe Addresses CIA Rendition and Detention Program

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*By Monica Hakimi**

In November 2005, the U.S. media reported that the Central Intelligence Agency was operating secret detention facilities in a handful of foreign countries, including two in eastern Europe, and that detainees were often transferred between those facilities and states known to engage in torture.[1] The news that terrorism suspects may have been denied their human rights in member states of the Council of Europe caused concern within the Council and triggered several responses. Within days of the media reports, the Council's Parliamentary Assembly appointed a rapporteur to investigate the extent to which member states were participating in the CIA program.[2] The rapporteur, in turn, asked the Venice Commission to prepare a legal opinion on the member states' related international obligations.[3] On the basis of that opinion, and the rapporteur's finding that a fair number of member states *had* acquiesced or participated in the CIA program, the Parliamentary Assembly adopted a resolution and a recommendation intended to safeguard against such conduct in the future.[4] Separately, the secretary general of the Council invoked his authority under Article 52 of the European Convention on Human Rights (ECHR) to survey member states on relevant aspects of their domestic legal systems, including whether those systems contain controls on foreign state conduct deemed to infringe ECHR rights.[5]

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[1] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; *see also* Human Rights Watch, Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe (Nov. 7, 2005), *available at* <http://hrw.org/english/docs/2005/11/07/usint11995.htm> (identifying the eastern European countries as Poland and Romania). The U.S. government has acknowledged that it participates in renditions to combat terrorism but asserts that it does not transfer individuals from one country to another for the purpose of interrogation using torture. Condoleezza Rice, Remarks upon Her Departure for Europe (Dec. 5, 2005), *available at* <http://www.state.gov/secretary/rm/2005/57602.htm>. The U.S. government now also acknowledges that the CIA has secretly detained certain terrorism suspects for purposes of interrogation and incapacitation. John R. Crook, Contemporary Practice of the United States, 100 AJIL 936 (2006).

[2] On November 4, the president of the Parliamentary Assembly asked the Committee on Legal Affairs and Human Rights to look into the matter. Council of Europe, *PACE Committee on Legal Affairs to Examine Secret Detention Centre Allegations* (Nov. 4, 2005), *available at* <http://assembly.coe.int> (then search "secret detention"). On November 7, the Committee on Legal Affairs appointed Dick Marty of Switzerland as rapporteur. Council of Europe, *PACE to Examine Alleged Secret CIA Detention Centres* (Nov. 7, 2005), *available at id.*

[3] The Venice Commission is an organ of the Council of Europe known more formally as the European Commission for Democracy Through Law. The members of the Venice Commission who participated in the legal opinion on the CIA program were Iain Cameron (Sweden), Pieter van Dijk (the Netherlands), Olivier Dutheillet de Lamothe (France), Jan Helgesen (Norway), Giorgio Malinverni (Switzerland), and Georg Nolte (Germany).

[4] Eur. Parl. Ass. Res. 1507, Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States (June 27, 2006), *available at* <http://assembly.coe.int/ASP/Doc/ATListing_E.asp?offset=60>; Eur. Parl. Ass. Recommendation 1754, Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States (June 27, 2006), *available at id.*

[5] Article 52 of the ECHR provides: "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR].

To be sure, the Council of Europe is not the only international actor to have considered the lawfulness of the CIA program or certain aspects of it. Since the program became public, it has been scrutinized by other international institutions,[6] national organs,[7] the media,[8] and international legal scholars.[9] Yet the activities of the Council of Europe—an international body devoted to human rights—manifest a unique combination of relevance, breadth, and (with the opinion issued by the Venice Commission) legal rigor. The Council of Europe's response to the CIA program thus warrants particular attention.

This essay reviews that response, focusing primarily on the legal opinion issued by the Venice Commission. That opinion is significant for its determination that member state participation in the CIA program is incompatible with the ECHR, for its interpretation of the ECHR as requiring member states to police the conduct of states not party to that Convention, and for its effective imputation of ECHR obligations to those nonstate parties.

I. FACTUAL FINDINGS OF THE RAPPORTEUR

The rapporteur appointed by the Parliamentary Assembly issued his final report on June 12, 2006, concluding that the United States had created a "spider's web" of flight routes to transport terrorism suspects to detention facilities in Europe and around the world,[10] and that it was "only through the intentional or grossly negligent collusion of the European partners that this

[6] *See, e.g.*, Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. A6-0020/2007 (2007) [hereinafter EU Report], *available at* <http://www.europarl.europa.eu/recherche/ResultatsAbreges.cfm> (report of a committee of the European Parliament in large part mirroring the legal and factual findings of the Council of Europe); Eur. Parl., CIA Activities in Europe: European Parliament Adopts Final Report Deploring Passivity from Some Member States (Feb. 14, 2007), *available at* <http://www.europarl.europa.eu/news/expert/tous_les_themes_press/default/default_en.htm> (press release on adoption by the European Parliament of the committee's report); Amnesty Int'l, USA: The Secretive and Illegal US Programme of 'Rendition' (n.d.), *available at* <http://web.amnesty.org/pages/stoptorture-050406-feature-eng>.

[7] *See, e.g.*, EU Report, *supra* note 6, para. 15 (noting judicial actions in Italy, Germany, and Spain); Richard Owen, *CIA Agents Must Be Charged over 'Kidnap and Torture', Says Judge*, TIMES (London), Feb. 17, 2007, at 39 (reporting on case-specific proceedings in Italy and Germany); *World Briefs: Portugal Probes CIA Flights*, NEWSDAY, Feb. 7, 2007, at A22 (reporting on a criminal investigation in Portugal into the operation of CIA flights there); Scott Shane, *Torture Victim Had No Terror Link, Canada Told U.S.*, N.Y. TIMES, Sept. 25, 2006, at A10 (reporting on case-specific investigation in Canada).

[8] *See, e.g.*, Neil Mackay, *Torture Flights: The Inside Story*, SUNDAY HERALD (UK), Oct. 16, 2005, at 20; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, *available at* <http://www.newyorker.com/printables/fact/050214fa_fact6>. For ongoing online coverage, see JURIST LEGAL NEWS & RES., <http://jurist.law.pitt.edu/currentawareness/rendition.php>; GUARDIAN UNLIMITED, <http://www.guardian.co.uk/usa/rendition>.

[9] *See, e.g.*, A. John Radsan, *A More Regular Process for Extraordinary Rendition*, 37 SETON HALL L. REV. 1 (2006); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. (forthcoming 2007), *available at* <http://ssrn.com/abstract=945711>; David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

[10] Eur. Parl. Ass., Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States, Doc. No. 10957, para. 280 (2006) [hereinafter Rapporteur's Report], *available at* <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>. The report bases this conclusion on a review of routine flight routes of aircraft operated or suspected of being operated by the U.S. government. The rapporteur acknowledges that most of these flights were not engaged in the transport of terrorism detainees, but he finds that a small percentage of them were. *See id.*, paras. 49–50.

'web' was able to spread . . . over Europe."[11] To support these conclusions, the report reviews nine cases (involving seventeen individuals) in which terrorism suspects may have been unlawfully detained or transferred. The cases are described in differing degrees of detail, and the evidence presented for each varies in reliability. But each case involves allegations that an individual was captured far from any conventional battlefield and subsequently transported either to a detention facility operated by the United States or to an Arab country that then engaged in torture. Allegations of torture or other inhuman or degrading treatment are common to almost all the cases.

The role that Council of Europe member states played in the alleged acts appears to range from minimal to extensive. Some of the cases reviewed apparently do not involve any member state at all, except for the possibility that an aircraft carrying a detainee stopped in or flew over a member state's territory. In other cases, a member state may have contributed intelligence leading to the capture of a detainee or may have obtained intelligence once the detainee was in custody. In still other cases, a member state itself may have captured the detainee and then handed him over to the United States. And finally, the evidence suggests that two member states—Poland and Romania—hosted secret detention facilities in their territories. In the end, the rapporteur names fourteen member states that may have participated (knowingly or unknowingly) in the CIA detention and rendition program.[12]

II. LEGAL OPINION OF THE VENICE COMMISSION

The Venice Commission issued its legal opinion on member state responsibility before the rapporteur finished developing these findings. The commission thus assessed the legality of the conduct at issue—secret detentions and interstate transfers—in the abstract, without reference to specific facts. In the opinion, the commission makes clear that it considers the ECHR to apply without qualification or specification by international humanitarian law.[13] The commission does not consider humanitarian law to apply to counterterrorism measures taken outside the territorial bounds of a traditional armed conflict. It does not, in other words, believe that humanitarian law applies to all measures taken in the global war on terror.[14] Applying the ECHR, the commission first concludes that the conduct at issue is incompatible with rights set forth in that instrument. It then addresses the scope and nature of ECHR obligations, and the steps that member states must take to escape responsibility for encroachments on ECHR rights arising out of the CIA program.

[11] *Id.*, para. 284.

[12] *Id.*, paras. 288–89 (naming Bosnia-Herzegovina, Cyprus, Germany, Greece, Ireland, Italy, Macedonia, Poland, Portugal, Romania, Spain, Sweden, Turkey, and the United Kingdom).

[13] Venice Commisson, Opinion No. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners, Doc. CDL-AD(2006)009, paras. 78–85 (2006) [hereinafter Legal Opinion], *available at* <http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp>.

[14] The commission does not address whether the conduct at issue could be deemed permissible acts of self-defense under the rules governing the use of force, or, if it could, whether international humanitarian law would then apply.

ECHR Rights

The Venice Commission concludes that both secret detentions—which it defines as detentions without the possibility of judicial review or of contacting a lawyer[15]—and interstate transfers implicate the right to liberty and security of person set forth in Article 5 of the ECHR.[16] The commission also concludes that this conduct may implicate rights set forth in Articles 2 (right to life), 3 (right not to be tortured or subjected to inhuman or degrading treatment), and 6 (right to a fair hearing).[17]

With respect to secret detentions, the commission explains that Article 5(1) of the ECHR prohibits any detention unless it falls within one of the specified exceptions set forth in that paragraph and is "in accordance with a procedure prescribed by law."[18] The commission suggests that secret detentions may not fall within any of the specified exceptions,[19] but it focuses its analysis on the provision of Article 5 requiring a procedure prescribed by law. On that issue, the commission concludes that secret detentions are "clearly not 'in accordance with a procedure prescribed by law' of any of the member States of the Council of Europe, if alone because the detention is not subject to judicial review."[20] Here, the commission appears to conflate the Article 5(1) requirement that a detention be in accordance with a procedure prescribed by law with the Article 5(4) requirement that a detainee be entitled to judicial review on the lawfulness of his detention. This conflation undermines the commission's legal analysis but not its overall conclusion that secret detentions are inconsistent with Article 5. By the commission's own definition, individuals who are detained secretly are not afforded the Article 5(4) right to judicial review.

The Venice Commission also focuses on the provision of Article 5(1) requiring a procedure prescribed by law to address the legality of interstate transfers.[21] According to the commission, an interstate transfer may be based on a procedure prescribed by law, and therefore lawful, in one of only four circumstances: (1) where an alien is deported; (2) where a person is extradited to stand trial or to serve a criminal sentence; (3) where a person transits a state's territory; and

[15] Legal Opinion, *supra* note 13, para. 124. The commission appears to use the phrase "secret detention" interchangeably with the phrase "*incommunicado* detention." *See, e.g.*, *id.*, para. 125. This essay uses the phrase "secret detention" throughout, except when quoting the commission.

[16] *Id.*, paras. 29, 121.

[17] *Id.*, paras. 121, 138, 146. In addition to considering the lawfulness of secret detentions and interstate transfers, the Venice Commission considered the lawfulness of arrests by a foreign state not party to the ECHR made in the territory of a Council of Europe member state. This essay does not consider the commission's (brief) treatment of that issue because information disclosed since the rapporteur asked the Venice Commission to address it suggests that the CIA coordinated any arrests in member state territories with officials of the relevant state. *See, e.g.*, EU Report, *supra* note 6, para. 10 (noting confirmation by members of the European Parliament that the CIA program had been conducted in a way that respected the sovereignty of the countries involved); Owen, *supra* note 7 (reporting that the CIA almost certainly worked with Italian intelligence officials to abduct Abu Omar in Milan, an operation on which there had previously been speculation that the CIA had acted unilaterally).

[18] ECHR, *supra* note 5, Art. 5(1).

[19] Legal Opinion, *supra* note 13, para. 50.

[20] *Id.*, para. 124.

[21] In this context, the commission does not specifically cite the provision of Article 5(1) requiring a procedure prescribed by law. Nevertheless, the commission asserts that interstate transfers are unlawful if predicated on "a procedure not set out in law," *id.*, para. 24, and explains, when assessing interstate transfers, that "[i]f there is no legal basis for an active measure (arrest, handing over etc) under national law, then there will be in such cases a breach of national law on arrest, and consequently also a breach of Article 5," *id.*, para. 29.

(4) where a person is transferred to serve a sentence.[22] "Renditions" are not included in the list of permissible transfers because, in the view of the commission, that term is not a term of art under international law. The commission explains:

> The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. "Rendition" is thus a general term referring more to the result—obtaining of custody over a suspected person—rather than the means. Whether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law.[23]

The commission thus determines that "rendition" is a generic term for the various processes—some of them lawful, some of them unlawful—by which a state may take custody over a person.

Notably, the commission recognizes that an interstate transfer may be lawful even if conducted informally (i.e., not pursuant to any treaty) but, again, only so long as it is based on a procedure prescribed by law.[24] The lawfulness of a transfer turns, therefore, not on whether the procedures for it are themselves legally prescribed, but on whether the transferee's case is at some point subjected to legal process. Indeed, interstate transfers have been deemed compatible with the ECHR—and, presumably, based on a procedure prescribed by law—even when carried out in the absence of any treaty, where the state requesting the transfer has issued a warrant for the person's arrest or where that state tries the person in a manner compatible with the ECHR.[25] In these instances, the person's case is ultimately subjected to legal process, even if the procedures on which the transfer is based are developed informally and not prescribed by law. The commission's concern about the CIA rendition program, then, is not that persons are transferred only on the basis of informal state cooperation, but that the transfers occur completely outside any legal process.[26]

[22] *Id.*, paras. 10, 24. Here, the commission appears to use the word "transfer" in category (4) as a term of art that distinguishes it from extraditions in category (2). The word "transfer" is often used in prisoner transfer treaties to refer to the interstate transport of a person to his or her state of nationality for purposes of serving a sentence imposed by a foreign state. *See, e.g.*, Convention on the Transfer of Sentenced Persons, Arts. 2, 3, Mar. 21, 1983, Eur. TS No. 112, 1496 UNTS 91, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm>. Extraditions, by contrast, entail the interstate transport to a state that has charged or sentenced a person for purposes of standing trial or serving a sentence in that state.

[23] Legal Opinion, *supra* note 13, para. 30.

[24] *See id.*, paras. 51–52.

[25] *See id.*, para. 52; *cf.* Öcalan v. Turkey, 41 Eur. H.R. Rep. 45, para. 89 (2005) ("[P]rovided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention") (citation omitted); Ramírez Sánchez v. France, 86-B Eur. Comm'n H.R. Dec. & Rep. 155, 162 (1996) (determining that the interstate transfer of "Carlos the Jackal" was not inconsistent with the ECHR, given that an arrest warrant was lawfully issued by the state requesting the rendition).

[26] U.S. government officials have argued that the CIA rendition program is consistent with the understanding of the ECHR advanced by the European Commission of Human Rights, in that the commission has recognized the legality of renditions conducted in the absence of any treaty. *See, e.g.*, Rice, *supra* note 1; John Bellinger, State Department Legal Advisor Examines U.S.-European Counterterrorism Cooperation (Sept. 11, 2006), *available at* <http://useu.usmission.gov/Dossiers/US_EU_Combat_Terrorism/Sep1106_Bellinger_Rome.asp>. The rapporteur of the Parliamentary Assembly responded to this argument by noting that a rendition conducted in the absence of any treaty has been considered lawful only where the person rendered was later subjected to a legal process compatible with the ECHR. Rapporteur's Report, *supra* note 10, para. 261 n.227. The rapporteur's response in this regard underscores that the ultimate concern with the CIA program is the absence of any legal process.

Finally, the commission underscores that, under the *Soering* doctrine,[27] Council of Europe member states are prohibited from transferring an individual to another state if that transfer "create[s] a real risk of a violation" of certain ECHR rights, including the Article 3 right not to be subjected to torture or to inhuman or degrading treatment or punishment.[28] The determination of whether a particular transfer creates a "real risk of violation" depends, according to the commission, on the circumstances of each case.[29]

Member State Responsibility

Having determined that secret detentions and interstate transfers may violate substantive ECHR rights, the Venice Commission turns to questions of state responsibility. If a member state itself infringes on ECHR rights, there is little doubt that its responsibility is engaged. In many cases, however, a member state may merely have acquiesced in the encroachment on ECHR rights by another state, or may not have been aware of the encroaching conduct at all. The Venice Commission thus considers the nature of the member states' obligations under the ECHR, and the extent to which conduct of a foreign state not party to the ECHR may give rise to member state responsibility.

In considering these issues, the Venice Commission makes only brief reference to the secondary principles of state responsibility, and particularly those principles relating to responsibility for aiding and assisting the commission of a wrongful act.[30] Instead, the commission focuses almost exclusively on Article 1 of the ECHR, which sets forth the scope of the state parties' obligations under that Convention. Article 1 provides that state parties must "secure to everyone within their jurisdiction the rights and freedoms" defined elsewhere in the Convention.[31] The commission explains that the word "secure" means that member states must do more than simply refrain from violating ECHR rights themselves. They must also prevent third parties from encroaching on those rights and must investigate any substantiated claims of encroachment.[32] According to the commission, these latter obligations apply regardless of whether the encroaching third party is a private entity or a foreign state, so long as the encroachment occurs (or may occur) in the member state's "jurisdiction." It explains: "The European Court of Human Rights has ruled that '. . . the acts of private individuals which violate the Convention rights of other individuals within [a member state's] jurisdiction may engage the State's responsibility under the Convention'. This is even more true in respect of acts of agents of foreign States."[33]

This statement by the commission is a fair interpretation of the text of Article 1, which does not on its face qualify the obligation to secure on the basis of the identity of the potentially encroaching actor. But to determine that the acts of a third party "may engage the [member] State's responsibility" is not to answer the question of when that responsibility will be engaged. Exactly what measures must a member state take in order to satisfy its obligation to secure

[27] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).
[28] Legal Opinion, *supra* note 13, para. 68.
[29] *Id.*, para. 69.
[30] *Id.*, para. 45.
[31] ECHR, *supra* note 5, Art. 1.
[32] Legal Opinion, *supra* note 13, para. 66.
[33] *Id.*, para. 126 (quoting Ilaşcu v. Moldova, 40 Eur. Ct. H.R. 46, para. 318 (2004)).

ECHR rights from encroachments by third parties? And are those measures the same regardless of whether the potentially encroaching actor is a private citizen or a foreign state not party to the ECHR?

To the extent that the commission attempts to address these questions in the abstract, its analysis is not entirely satisfactory. Rather than set forth a coherent legal standard for when a foreign state's encroachment may give rise to member state responsibility, the commission confusingly sets forth different standards in different parts of the opinion. At one point, the commission appears to adopt a standard of strict responsibility for any encroachment in member state territory: "The territorial State retains its full jurisdiction within the meaning of Article 1 ECHR over any place on its territory . . .[;] that State is therefore responsible *for any infringement* of the ECHR in relation to any suspect treated in violation of Articles 3 and 5 . . . ."[34] At other points, the commission treads closer to a knowledge-based standard, although even here it shifts from a standard of actual knowledge to one of constructive knowledge. For example, in addressing member state responsibility for secret detentions, the commission first explains that "no such responsibility applies if the detention is carried out by foreign authorities without the territorial State *actually knowing* it."[35] Shortly thereafter, however, the commission says something slightly different: "If a State is informed *or has reasonable grounds to suspect* that any persons are held *incommunicado* . . . on its territory, . . . its responsibility under the [ECHR] is still engaged . . . ."[36] Finally, the commission makes clear throughout the opinion that a member state may be responsible, even in the absence of knowledge (whether actual or constructive), to the extent that it fails to take appropriate preventive measures.[37]

The Venice Commission is more lucid, however, when it identifies specific measures that member states must take to satisfy their obligation to secure and thus to escape responsibility for the conduct at issue:

- Member states must not cooperate (actively or passively) in any secret detentions,[38] and must not transfer persons by means other than those previously identified by the commission as lawful (i.e., deportation, extradition, transit, or transfer to serve a sentence).[39]
- Member states must not transfer an individual to any state where "substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR."[40]
- If a member state learns or has reasonable grounds to suspect that a foreign state is secretly detaining persons on a military base in member state territory, the member state must take all measures within its authority to cease such detentions.[41] The measures within its authority may be limited by virtue of the terms under which the

[34] *Id.*, para. 123 (emphasis added).
[35] *Id.*, para. 127 (first emphasis added).
[36] *Id.*, para. 130 (emphasis added).
[37] *Id.*, paras. 127, 130.
[38] *Id.*, para. 126.
[39] *Id.*, paras. 137–38.
[40] *Id.*, para. 138.
[41] *Id.*, para. 130.

military base was established, but a member state probably "could exercise its powers in respect of registration and control of aliens, and demand identification and movement orders of those present on the military base in question. . . . In addition, appropriate diplomatic channels can be used in order to protest against such practice."[42]

— Finally, member states must refuse to allow their territories or airspace to be used for the transit of a person at risk of torture or other mistreatment.[43] If a member state has reason to believe that a transiting aircraft carries an at-risk detainee, it must take all possible measures to prevent the transit.[44] Possible measures may include limiting overflight clearances of state aircraft and searching planes presented as civil aircraft.[45]

The first two measures identified by the commission are relatively straightforward. Member states must refrain from violating ECHR rights, including the right implicit in Article 3 not to be transferred where there is a risk of torture or other inhuman or degrading treatment or punishment.

The latter two measures, however, are significant and potentially far-reaching. They entail policing the activities of other states and effectively imputing to those other states obligations under the ECHR. According to the commission, member states must now prevent any other state from encroaching on ECHR rights in member state jurisdictions. And they must prevent such encroachments regardless of whether the other, potentially encroaching state itself is bound by any international obligations not to encroach. This is not merely an academic proposition. The United States, at least, has taken the position that many of its human rights obligations do not apply outside U.S. territory.[46] That position has been rejected by various relatively authoritative bodies,[47] but these bodies have not had any effective mechanism at their disposal for enforcing their contrary view against the United States. Now, the United States may find that, because of the policing by Council of Europe member states, it needs to comport itself with the human rights standards of the ECHR, even if it continues to consider its activities in Europe outside the scope of many of its own human rights obligations. Moreover, in some instances the ECHR standards may be more expansive than their analogues in universal instruments to which the United States is a party.[48] Under the commission's interpretation of the

[42] *Id.*, para. 132.

[43] *Id.*, paras. 159(h), (i).

[44] *Id.*, para. 145.

[45] *Id.*, paras. 148, 150.

[46] *See, e.g.*, Human Rights Committee [Hum. Rts. Comm.], Consideration of Reports Submitted by State Parties: United States of America, UN Doc. CCPR/C/USA/3, para. 130 (Nov. 28, 2005) ("[T]he obligations assumed by the United States under the Covenant apply only within the territory of the United States.").

[47] *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, 180, para. 111 (July 9) ("[T]he Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."); Hum. Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10 (2004) ("[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.").

[48] The ECHR, for example, has been interpreted to prohibit *refoulement*, not only where the individual may be subjected to torture, but also where she may be subjected to inhuman or degrading treatment or punishment, or to the flagrant denial of a fair trial, especially where the flagrant denial of a fair trial may result in the imposition of death. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (inhuman or degrading treatment or punishment); *id.*, para. 113 (flagrant denial of a fair trial); Bader v. Sweden, App. No. 13284/04, Judgment, paras.

obligation to secure, member states must hold the United States to the more stringent ECHR standards. In this way the commission effectively imputes obligations under the ECHR to the United States.

Finally, the commission interprets the word "jurisdiction" expansively, such that the obligation to secure requires member states to prevent encroachments on ECHR rights, not only in their territories, but also in their airspace.[49] Member states, in other words, must prevent the transit of any aircraft suspected of carrying an at-risk detainee. According to the commission, this requirement is consistent with international air law in that any plane carrying an at-risk detainee would necessarily be a state aircraft and therefore would not benefit from the overflight rights of civil aircraft.[50] This conclusion, however, is debatable. The commission correctly observes that, under international law, state aircraft must obtain authorization before overflying the territory of another state.[51] One state may thus deny overflight to the state aircraft of another state or, if the aircraft is in that first state's airspace without authorization, may intercept it or require it to divert.[52]

Yet it is far from clear that all aircraft suspected of carrying at-risk detainees should necessarily be characterized as state aircraft. As an initial matter, some aircraft suspected of carrying such detainees may not be carrying detainees at all, and may be lawfully transiting the member state as civil aircraft. Moreover, even when an aircraft is carrying a detainee, it is questionable that the aircraft must present itself as a state, rather than a civil, aircraft. International law and practice in this area are fuzzy.[53] The Chicago Convention defines state aircraft to include those

42–48 (Eur. Ct. H.R. Nov. 8, 2005), *available at* <http://www.echr.coe.int> (flagrant denial of a fair trial in Syria, resulting in the imposition of the death sentence). By contrast, under the UN Convention Against Torture, *refoulement* is prohibited only where the individual may be subjected to torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, *opened for signature* Dec. 10, 1984, 1465 UNTS 85. And, although the Human Rights Committee has interpreted the International Covenant on Civil and Political Rights to include an implicit obligation of *non-refoulement* where the individual may be subjected to cruel, inhuman, or degrading treatment, *see* Hum. Rts. Comm., General Comment 20: Article 7, UN Doc. A/47/40, Annex VI, at 194, para. 9 (1992), that interpretation is not binding, and the United States, at least, has not accepted it. *See* U.S. Dep't of State, List of Issues to Be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America, para. 10 (n.d.), *available at* <http://www.state.gov/g/drl/rls/70385.htm>.

[49] Legal Opinion, *supra* note 13, paras. 143–45.

[50] *Id.*, para. 91 (adopting a functional test for determining whether an aircraft should be characterized as a state or civil aircraft); *id.*, para. 93 (asserting that state aircraft do not enjoy the overflight rights of civil aircraft). The functional test that the commission adopts is not necessarily wrong, but, as explained below, that test is not always dispositive or illuminating as to whether an aircraft is a state or a civil aircraft. *See infra* notes 54–60 and corresponding text.

[51] Convention on International Civil Aviation, Art. 3(c), Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295 [hereinafter Chicago Convention].

[52] The commission asserts that, where a state aircraft improperly presents itself as a civil aircraft, it loses the immunity resulting from its state status and therefore may be searched by the authorities of the territorial state. Legal Opinion, *supra* note 13, para. 103. A state aircraft that transits a foreign state without authorization will have acted inconsistently with international law, but it is not clear that the appropriate remedy for that violation is the loss of immunity. Assuming that the commission is correct that state aircraft enjoy immunity as a matter of law, *see id.*, para. 95, then the removal of immunity would itself constitute a wrongful act unless consistent with the limitations under international law on the use of countermeasures.

[53] *See, e.g.*, International Civil Aviation Organization, Secretariat Study on "Civil/State Aircraft," ICAO Doc. LC/29–WP/2–I, Attachment 1, para. 1.1 (1994) [hereinafter ICAO Study] ("Currently, there are no clear generally accepted international rules, whether conventional or customary, as to what constitute state aircraft and what constitute civil aircraft in the field of air law.").

used in military, customs, and police services.[54] Experts have debated whether this definition is exemplary or, rather, exhaustive, meaning that aircraft used only in the listed services may be characterized as "state aircraft" for purposes of the application of the Chicago Convention. In a 1994 study, the secretariat of the International Civil Aviation Organization recommended the latter interpretation: that all aircraft used in military, customs, and police services—and only those aircraft—be characterized as "state aircraft."[55] The study then listed a variety of factors to help identify whether a particular aircraft is used in one of the specified services.[56] Under this approach, there is a fairly good argument that the aircraft operated by the CIA were used, not in military, customs, or police services, but in intelligence services, and that they are therefore civil aircraft for purposes of the application of the Chicago Convention (including for purposes of the overflight rights contained therein). Indeed, given the covert nature of intelligence operations, it makes sense for aircraft used in intelligence services to overfly other states as civil aircraft, particularly where the state flying the aircraft has advised intelligence officials of the other state of a mission that must be kept secret from that other state's air traffic controllers.

International practice on characterizing aircraft as state or civil has not become closer to uniform since the ICAO study.[57] The ambiguity in this area of law persists, even if one views the Chicago definition as exemplary (and adopts a functional test for characterizing aircraft), or if one considers the aircraft that transport detainees to be used in military or police services. In international practice not all aircraft used for any state function have been treated as state aircraft, and sometimes even those used in military services—for example, to transport supplies or personnel—fly as civil aircraft.[58] Finally, to the extent that aircraft that transport detainees are state aircraft, the United States may have blanket authorization to overfly member states pursuant to a status-of-forces or other military agreement.[59] In light of all of these considerations, it remains unclear whether it would always be lawful for a Council of Europe member state to deny overflight to a transiting aircraft suspected of carrying an at-risk detainee (unless the ECHR is deemed to supersede the member states' other international obligations). A more thorough analysis of these issues would therefore have been helpful.[60]

[54] Chicago Convention, *supra* note 51, Art. 3(b).

[55] ICAO Study, *supra* note 53, at 16.

[56] *Id.* at 14, 16.

[57] *See, e.g.*, Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 106–12 (2007) (addressing continued uncertainty with respect to the proper characterization of aircraft used in military services).

[58] ICAO Study, *supra* note 53, at 11 (acknowledging the frequency of this practice).

[59] The commission recognizes this possibility and suggests that member states deal with it by modifying or questioning the terms of any agreements granting blanket overflight authorization to foreign state aircraft. Legal Opinion, *supra* note 13, paras. 150–51.

[60] For instance, it would have been helpful for the commission also to consider the options of Council of Europe member states for policing civil aircraft transiting their airspace with at-risk detainees. The Chicago Convention grants overflight rights only to civil aircraft engaged in nonscheduled services, *see* Chicago Convention, *supra* note 51, Art. 5, and not all states are party to the sister agreement granting overflight rights to civil aircraft engaged in scheduled services, *see* International Air Services Transit Agreement, Art. 1, §1, Dec. 7, 1944, 59 Stat. 1693, 84 UNTS 389 [hereinafter IASTA]. Thus, some civil aircraft may not have overflight rights over some Council of Europe member states (i.e., countries that are not party to IASTA). Moreover, even where overflight rights exist, those rights are subject to (1) the right of the state overflown to request a landing and to search the aircraft; and (2) the aircraft's compliance with certain laws and regulations of the territorial state. *See* Chicago Convention, *supra*, Arts. 11–13; IASTA, *supra*, Art. 1, §2 (incorporating by reference the relevant provisions of the Chicago Convention). Yet here again there is a legal gray area. Although it is clear that the territorial state may require transiting aircraft to comply with certain laws and regulations, it is not clear to what extent the territorial state may impose

III. FOLLOW-UP

The rapporteur included in his report of June 12 a draft resolution and recommendation for approval by the Parliamentary Assembly.[61] On June 27, the Parliamentary Assembly adopted these measures with few modifications.[62] The Assembly's resolution asserts that "[i]t has now been demonstrated undeniably . . . that secret detentions and unlawful inter-state transfers of persons deprived of their rights and involving European countries have taken place, such as to require in-depth inquiries and urgent responses by the executive and legislative branches of all the countries concerned."[63] The resolution and recommendation then call on member states to take various measures to prevent further encroachments on ECHR rights. These measures include reviewing extant agreements with the United States to ensure that they conform to applicable human rights norms; investigating serious allegations of wrongdoing; and launching an international initiative, with U.S. participation, to develop a common, global strategy for addressing terrorist threats while conforming to human rights norms and the rule of law.[64]

Separately, the secretary general of the Council of Europe determined, on the basis of his member state survey under Article 52 of the ECHR, that most member states lack effective controls on the activities of foreign intelligence services in their territories and do not monitor civil air traffic to ascertain whether transiting aircraft are used for purposes incompatible with human rights. On June 30, the secretary general issued a series of recommendations to address these deficiencies. Specifically, he called on European states to develop (1) a legal framework to govern the operation of intelligence services in member state territories; (2) a common approach for monitoring aircraft in European airspace, to be articulated in a new legal instrument or in model clauses that could then be incorporated into overflight arrangements with third parties; and (3) a mechanism by which member states may obtain waivers of state immunity in cases of serious human rights violations, so that perpetrators may be brought to justice.[65]

IV. CONCLUSION

No matter whether any of these recommendations is pursued, the Council of Europe's consideration of the CIA program revealed that several European states acquiesced in the program, or in certain aspects of it, and the Council's strong reaction is likely to complicate future U.S. efforts to engage in intelligence operations in, through, or with Europe.

on such aircraft laws or regulations that bear no relation to civil aviation, and that unduly limit the rights of overflight. Again, a more thorough analysis of these issues would have been welcome.

[61] Rapporteur's Report, *supra* note 10, at 2–5.

[62] Eur. Parl. Ass. Res. 1507, *supra* note 4; Eur. Parl. Ass. Recommendation 1754, *supra* note 4.

[63] Eur. Parl. Ass. Res., *supra* note 4, para. 13.

[64] *Id.*, para. 19; *see also* Eur. Parl. Ass. Recommendation 1754, *supra* note 4, paras. 3, 4.1.

[65] Secretary General of the Council of Europe, Follow-up to the Secretary General's Reports Under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Doc. SG(2006)01 (June 30, 2006), *available at* <http://www.coe.int/t/dc/press/source/20060907_DocSG_en.doc>.