



International Commission of Jurists

Submission to European Parliament Temporary Committee on Alleged Use of European countries by the CIA for the Transportation and Illegal Detention of Prisoners (TDIP)

1. INTRODUCTION

The International Commission of Jurists (ICJ) is a global network of judges, lawyers and human rights defenders united by international law and rule of law principles that advance human rights. Using our expertise in law, justice systems and advocacy, we work for victims to obtain remedies, for those responsible for abuses to be held accountable and for justice systems to be independent and active protectors of human rights. We work to change law and policy at the national and international levels when they do not adequately protect people from human rights violations.

The ICJ welcomes the opportunity to provide evidence to the European Parliament Temporary Committee on Alleged Use of European countries by the CIA for the Transportation and Illegal Detention of Prisoners (TDIP) at this important concluding stage in its inquiry. Given the evidence that has come to light of European direct or indirect involvement in operations that amount to gross violations of human rights and international crimes, the TDIP now has a vital role to play in reaffirming European commitment to international human rights standards and the rule of law, values which are at the heart of the European Union legal and political order.¹

The ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, adopted in August 2004, and recognised by the European Parliament,² affirmed the renewed urgency of safeguarding the rule of law in light of the pervasive security-orientated discourse that has prevailed since 2001.³ Since then, the investigations of the TDIP and others have demonstrated the grave dangers of disregard

¹ Treaty on the European Union, Title 1, Article 6.1, (2002, Consolidated Version, 2002/C/325/01)

² European Parliament Resolution on the Annual Report on Human Rights in the World 2004 and the EU's policy on the matter (2004/2151(INI)). Para.105.

³ A copy of the Berlin Declaration is enclosed. See also www.icj.org

of the rule of law in Europe. There is now an urgent need for action at both European and national levels to ensure thorough and independent investigations of involvement in renditions and secret detention; effective law enforcement action to bring to justice those who have been involved in criminal acts; measures to provide reparations to victims of rendition; and reform of laws and procedures to guard against such violations of human rights in the future. The final report of the TDIP can play an important role in ensuring that these steps are taken, and in affirming the importance of upholding international law in counter-terrorism co-operation.

In this short submission, the ICJ will highlight some of the critical legal issues which will be of central concern to the TDIP as it prepares its final report. This submission is not intended to provide a comprehensive analysis of all of the legal issues raised by renditions and secret detention.

2. RENDITIONS AND THE INTERNATIONAL LEGAL OBLIGATIONS OF THE UNITED STATES

The system of “renditions” and secret detentions operated by the United States, and in which European states have been implicated to varying degrees, is in violation of international law.

Although the terms “renditions” and “extraordinary renditions” have no specific legal meaning either in international law or in US domestic law, they have been used to describe the seizure and transfer of suspects, outside of the normal legal procedures of extradition, deportation, expulsion or removal, and without due process safeguards. Since September 2001, their purpose has been to transfer counter-terrorism suspects to places of detention where they are held principally for the purposes of interrogation and are likely to be tortured or subject to cruel, inhuman or degrading treatment. In this paper, the term “renditions” is used to refer to the illegal seizure and transfer of prisoners by US authorities, including, but not limited to, transfer to torture or cruel, inhuman or degrading treatment.

The renditions process may operate in various ways. Some of those who have been rendered have been initially detained during an international armed conflict, for example, that in Afghanistan. Some have been arrested or otherwise lawfully detained, and subsequently handed over to CIA agents, outside of normal legal processes. Some have been kidnapped by CIA agents working outside the US, apparently without the consent of the state in which the seizure took place. However the common factor is that each of these processes, at some point, removes the detained person from the protection of domestic or international law, denying them access to the courts or any other means of redress, or to any means of assessing their guilt or innocence of any offence.

Renditions and secret detentions involve multiple human rights violations. Rights breached in renditions and secret detentions include the right to liberty and security of the person; the freedom from torture and cruel, inhuman or degrading treatment; the right to an effective remedy; and in extreme cases, the right to life. Additionally, renditions may

violate a range of other rights, including freedom of movement, and rights to private and family life. Where rendition leads to secret detention it will amount to an enforced disappearance.

Renditions and secret detentions as practiced by the United States since 2001 violate the right to liberty and security of the person protected by Article 9.1 ICCPR.

Renditions will involve arbitrary detention in breach of the right to liberty and security of the person at some point in the process. The detention will become arbitrary at the point of seizure if the suspect is apprehended by CIA agents acting abroad without legal authority from the authorities of the state in which they operate.⁴ If the suspect is initially lawfully arrested or otherwise lawfully detained by the authorities of the state in which he is present, and subsequently handed over to US authorities for rendition, or detention for interrogation, or another unauthorised purpose, then the detention will become arbitrary at that point. If, as is generally the case, the rendered person does not have access to court to challenge the lawfulness of his detention, there will be a breach of Article 2.3 and Articles 9.3 and 9.4 ICCPR. Secret detentions, where a detainee is held incommunicado and without any information being provided as to whether or where he is detained, will violate Article 9.1, as well as Articles 9.3, 9.4 and 2.3 ICCPR.

Renditions violate the prohibition on torture and cruel, inhuman or degrading treatment.

The prohibition will be violated in two principal ways: first, transfer of persons to states where they face a risk of torture, cruel, inhuman or degrading treatment or other gross human rights violation violates the right to *non-refoulement* (Article 7 ICCPR, Article 3 of the Convention against Torture (CAT)).⁵ Second, the process of rendition is likely to itself involve cruel, inhuman or degrading treatment. In particular, it has recently been affirmed in the views of the Human Rights Committee in *Alzery v Sweden*,⁶ that the “security check” routinely imposed prior to transfer, involving the stripping, restraint and sensory deprivation of the suspect by masked men, itself amounts to cruel, inhuman or degrading treatment. Furthermore, the conditions in which the suspect is transferred subsequent to this “security check” and the anguish and uncertainty involved in transfer, are likely in themselves to amount to cruel, inhuman or degrading treatment. Prolonged incommunicado secret detention will also in itself violate Article 7 ICCPR.⁷

Renditions and subsequent detentions violate the right to an effective remedy and reparations.

Persons held within the system of renditions and secret detentions are left without any legal recourse or redress for violations of their human rights.⁸ Renditions

⁴ *Ocalan v Turkey* App No 46221/99

⁵ See further Berlin Declaration, principle 10.

⁶ Communication No 1416/2005, Sweden 06/11/2006, CCPR/C/88/D/1416/2005.

⁷ Committee Against Torture, Concluding Observations on the United States, CAT/C.USE.CO/2, 18 May 2006, para.17, where the Committee found that secret detention constituted *per se* a violation of the Convention Against Torture.

⁸ Access to court and to remedies for violations of human rights in the course of extra-territorial detention has been severely restricted under the Military Commissions Act: see further enclosed briefing on the Military Commissions Act of 2006. The US courts have dismissed cases brought by victims of rendition

will therefore breach the right to an effective remedy for violations of human rights (Article 2.3 of the International Covenant on Civil and Political Rights (ICCPR)). Persons who have suffered violations of their human rights through renditions and secret detentions are entitled to full reparation for violations of their human rights, including restitution and compensation, and measures of rehabilitation, satisfaction and guarantees of non-repetition.⁹ In this regard, the recently adopted Military Commissions Act, which specifically excludes any remedy or access to court for enemy combatants for any aspect of transfer or detention, is particularly problematic.¹⁰

The system of renditions and secret detentions may entail enforced disappearances.

Where persons are rendered, either to secret detention by the US, or to detention for interrogation in other states, they are often held incommunicado for long periods, with no means of making contact with family members, lawyers, or consular officials. Often, no information is provided to their family or others as to whether or not they are detained, in which State or by which authorities they are held, or whether they remain alive. They do not have the possibility to challenge the legality of their detention and consequently are put outside the protection of the law.

The essential elements of an enforced disappearance as defined in international law are:

- arrest, detention, abduction or other deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State;
- a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person;
- resulting in the person being placed outside the protection of the law.¹¹

on grounds of secrecy: *Maher Arar v Ashcroft* CV-04-0249 (DGT)(VVP), 16 February 2006; *Khaled El-Masri v Tenet* Case No 1:05cv1417.

⁹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law, A/60/509/Add.1, 21 March 2006, Principle XI. Human Rights Committee, General Comment 31, The nature of General Legal Obligations imposed on States Parties to the Covenant, 26/05/04, CCPR/C/21/Rev.1/Add.13, para.15.

¹⁰ The Military Commissions Act in section 7 (a) states: “Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

¹¹ The United Nations Convention on Enforced Disappearances, adopted by the Third Committee of the UN General Assembly on 13 November 2006, in Article 2, defines disappearances as: “the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” See further the UN Declaration on the Protection of all persons from Enforced Disappearance, preamble, para.3, Inter-American Convention on Forced Disappearance of Persons, Article II.

Disappearances are to be distinguished from incommunicado detention, which may be justified under certain special and restricted conditions for a short period prior to trial, but which will otherwise breach the right to liberty,¹² and which, if prolonged, may amount to cruel, inhuman or degrading treatment.¹³ The UN Working Group on Enforced and Involuntary Disappearances (WGEID) addressed the question of when incommunicado detention becomes an enforced disappearance, in regard to South African legislation authorising administrative incommunicado detention and denying access to information about deprivation of liberty to the relatives. The WGEID considered that incommunicado detention for an indefinite period of time does not constitute per se an enforced disappearance if the authorities acknowledge that the person is in detention. However, in several cases where the South African authorities did not provide any information about the deprivation of liberty, the WGEID considered that there had been an enforced disappearance.¹⁴ Therefore, where a rendered person is held in secret detention or held for interrogation by authorities of other states, with no information provided to family or others regarding the detention, it is likely to amount to an enforced disappearance.

Enforced disappearances involve multiple human rights violations. The UN Declaration on the Protection of All Persons from Enforced Disappearances recognises that such disappearances involve violations of “the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.”¹⁵ It is established that an enforced disappearance will also breach the freedom from inhuman and degrading treatment of family members of the disappeared person.¹⁶ Where a person is disappeared for a prolonged period, and there are indications that his life may be in danger, there is likely to be a violation of the right to life.¹⁷ Where enforced disappearances are used in a widespread or systematic way, then it is recognised that they amount to a crime against humanity.¹⁸

¹² *Brogan v UK*, (1989) 11 EHRR 117 where four days incommunicado detention was held not to be justified; *Aksoy v Turkey* (1997) 23 EHRR 553 where fourteen days was held to be impermissible, despite a derogation from Article 5 ECHR under Article 15 ECHR.

¹³ Human Rights Committee: *El-Megreisi v. Libya*, Comm. No.440/1990, UN Doc.CCPR/C/50/D/440/1990 (1994)

¹⁴ UN. Doc. E/CN.4/1435; UN. Docs. E/CN.4/1492; E/CN.4/1983/14.

¹⁵ Article 1.2, Declaration on the Protection of all Persons from Enforced Disappearances, Adopted by GA Resolution 47/133 of 18 December 1992.

¹⁶ *Kurt v Turkey* (1999) 27 EHRR 373.

¹⁷ Article 6 ICCPR; Article 2 ECHR. *Timurtas v Turkey*, (2001) 33 EHRR 6; *Bazorkina v Russia*, Application No 69481/01, 27 July 2006. Article 1.2, Declaration on the Protection of all Persons from Enforced Disappearances.

¹⁸ Inter-American Convention on Forced Disappearance of Persons, preamble, 6th para., Declaration on the Protection of All Persons From Enforced Disappearance, preamble, 4th para; Res. No. 828 of 1984 of the Parliamentary Assembly of the Council of Europe; Resolutions of the General Assembly of the Organization of American States, AG/Res.666 (XIII-0/83) of 1983, AG/Res.742 (XIV- 0/84) of 1984, AG/Res.950 (XVIII-0/88) of 1988, AG/Res. 1022 (XIX -0/89)of 1989, AG/Res.1044 (XX-0/90) of 1990. Report of the International Law Commission on the work of its forty-eighth session – 6 May/ 26 July 1996.Supplement No.10 (A/51/10)pp.100-111.

United States obligations under international human rights law apply to all detainees in its custody, whether they are held within or outside US territory.

The US continues to maintain, in regard to extra-territorial detentions and rendition of detainees, that its international human rights obligations, including in particular the ICCPR and several provisions of CAT, do not apply to detentions outside of the national territory of the United States.¹⁹ These arguments have been rejected by the UN Human Rights Committee as well as the Committee Against Torture.²⁰ The Human Rights Committee has clearly affirmed that states 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.”²¹ Furthermore, the International Court of Justice has interpreted the ICCPR as imposing extra-territorial obligations. It held that “... the drafters of the Covenant did not intend to allow states to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their state of origin, rights that do not fall within the competence of that State, but of that of the state of residence.” This approach is consistent with that of the caselaw under the European Convention on Human Rights.²²

It is therefore clear that international human rights law obligations apply beyond the borders of the state, to centres of detention over which that state has *de facto* control.²³ To adopt a more restrictive interpretation would seriously undermine the protection afforded by the Covenant, and would be inconsistent with its object and purpose.

In some cases, renditions may breach the Geneva Conventions, and may amount to grave breaches of those Conventions. The majority of renditions in Europe do not take place within the context of an international or non-international armed conflict. However, some of those who have been transferred through Europe have been captured in the course of an international armed conflict, and are therefore entitled to protection either as prisoners of war under Geneva Convention III or as civilians under Geneva Convention IV. Others have been captured in the course of a non-international armed conflict and are therefore entitled to the protection of Common Article 3 of the Geneva Conventions and

¹⁹ These arguments are based on an interpretation of the text of Article 2.1 ICCPR, which requires states to protect the rights of those “within its territory and subject to its jurisdiction”, criteria which the US maintains should be read cumulatively.

²⁰ Concluding observations of the HRC on the United States of America, 28 July 2006, CCPR/C/USA/CO/3 para. 10. Concluding observations of CAT on the USA, 18 May 2006, CAT/C/USA/CO2, para.15. See further concluding observations of the HRC on Israel, CCPR/C/79/Add.93, Concluding Observations of the HRC on Israel, CCPR/CO/78/ISR.

²¹ General Comment No. 31, op cit, para. 10.

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, advisory opinion of 9 July 2004, General List, No.131 § 109. All fifteen judges of the ICJ, including Judge Burgenthal of the U.S., agreed that the ICCPR and other human rights treaties apply extraterritorially.

²³ This approach is consistent with the ECHR jurisprudence: see in particular *Issa v Turkey*, App. No.31831/96; and the application of the ECtHR jurisprudence by the UK Court of Appeal to the case of prisoners held overseas in *R (Al-Skeini) v Secretary of State for Defence* [2005] EWCA 1609.

customary international law.²⁴ All such persons retain the protections of international human rights law, as well as international humanitarian law.²⁵ Torture or ill-treatment,²⁶ or secret detention,²⁷ of protected persons under the Geneva Conventions will violate international humanitarian law, and renditions may lead to grave breaches of the Geneva Conventions where an individual is subjected to torture or ill-treatment in the course of the rendition or secret detention.²⁸ In addition, states retain residual responsibility under international humanitarian law where they transfer a person to a state where their rights under the Conventions will not be protected.²⁹ Transfer to face torture or ill-treatment may in some cases amount to aiding or abetting a grave breach of the Geneva Conventions.

3. THE HUMAN RIGHTS OBLIGATIONS OF EUROPEAN STATES

European states which actively co-operate in renditions or secret detentions, or fail to take adequate steps to protect against them, violate their human rights obligations under international law. Where a state knowingly provides aid or assistance in the seizure, transfer or illegal detention of a person held within the renditions system, it will be internationally responsible for the violations of human rights involved.³⁰ European states which actively assist in renditions or secret detentions will breach their obligations under the ICCPR, as outlined above, as well as their equivalent obligations under the European Convention on Human Rights. Furthermore, officials of European states may incur criminal responsibility where they aid or assist in renditions or secret detentions that involve international crimes, including grave breaches of the Geneva Conventions or other war crimes.³¹

European States have a positive obligation to protect against renditions and secret detentions. It is a fundamental principle of European human rights law that states have a

²⁴ Including Article 75 of Additional Protocol 1, which forms part of customary international law and which informs the protection afforded by Common Article 3. See for example *Hamdan v Rumsfeld*, US Supreme Court, 29 June 2006, p.70. <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>

²⁵ Human Rights Committee, General Comment No.31, op cit, para.11.

²⁶ Geneva Convention III; Geneva Convention IV; Common Article 3 of the Geneva Conventions.

²⁷ Geneva Convention III Section V; Geneva Convention IV Article 76 and Chapter VII. Article 5 of Geneva Convention IV allows for an exception: A protected person “under definite suspicion of activity hostile to the security of the Occupying Power” shall be regarded as having forfeited rights of communication under the Convention where “absolute military security so requires”. The ICRC commentary on Article 5 notes however that under this provision: The Detaining Power is, however, in no way released from its obligation to notify the arrest to its official Information Bureau for transmission to the official [p.58] Information Bureau of the country of which the person concerned is a national. The Protecting Power too will have to be notified in accordance with Articles 71 Database 'IHL - Treaties & Comments', View '1.Traités \1.2. Par Article' and 74 Database 'IHL - Treaties & Comments', View '1.Traités \1.2. Par Article' in case of proceedings being instituted."

²⁸ Article 130 Geneva Convention III; Article 147 Geneva Convention IV.

²⁹ Article 12 Geneva Convention III; Article 45 Geneva Convention IV.

³⁰ International Law Commission, Articles the Responsibility of States for internationally wrongful acts, General Assembly Resolution A/RES/56/83, 28 January 2002, Article 16.

³¹ Article 25 (3) Rome Statute of the International Criminal Court

duty to do more than refrain from actively interfering with the rights of individuals, they have a duty to protect, a “positive obligation” to ensure that the rights of individuals are not violated by third parties.³² The doctrine of positive obligations has its roots in Article 1 ECHR, which requires states to “secure” the Convention rights to all those within its jurisdiction, and has been applied to rights including the right to life, the right to freedom from torture and the right to liberty. It requires states to protect those who they know, or ought to know, are at risk of breach of their Convention rights: to ensure that there is a sufficient civil and criminal law framework in place to protect their rights, and to enforce the law effectively. Under the doctrine of positive obligations, states must take effective steps to protect persons against rights including freedom from torture, inhuman and degrading treatment, and freedom from arbitrary deprivations of their liberty in breach of Article 5 ECHR.³³ These obligations to take positive steps to protect rights and investigate allegations of their breach are reflected under CAT,³⁴ the ICCPR,³⁵ and the Geneva Conventions.³⁶

European states have an obligation to investigate allegations of renditions and secret detentions, to bring to justice those responsible, and to provide reparations where they have participated in a rendition or secret detention. International human rights law requires states to take effective steps to enforce the criminal law against violations of human rights within their jurisdiction, including by instituting thorough criminal investigations and bringing to justice those responsible.³⁷ Renditions and secret detentions may involve gross violations of human rights and international crimes, including the crime of torture, crimes against humanity and war crimes.³⁸ Impunity for such crimes committed by officials of the state or of a foreign state, cannot be justified. While classified information may be protected, classification of information and state secrecy must not prevent effective investigation of violation of human rights in renditions and secret detention. Furthermore, where a European state has been contributed to a rendition, the obligation to provide reparations, including compensation, to the victim of the rendition, will also apply to that State.

A state retains its positive obligations to protect human rights, where it grants exclusive use or control of parts of the national territory to another state, including

³² *Osman v UK*, (2001) 29 EHRR 245; *X and Y v the Netherlands*, (1985) 8 EHRR 235.

³³ *Storck v Germany* App No 61603/00, 16 June 2005 See also *Kurt v Turkey* op cit para.124. Opinion of the Venice Commission for Democracy through Law, 17 March 2006, Opinion No 363.2005, para.53: “Article 5 must be seen as requiring the authorities of the territorial State to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into a substantial claim that a person has been taken into custody and has not been seen since.”

³⁴ Article 2 CAT.

³⁵ Article 2 ICCPR. UN Human Rights Committee General Comment 20 (1992) on Article 7 ICCPR, (the right to freedom from torture or cruel, inhuman or degrading treatment or punishment); General Comment 31 of the Human Rights Committee, para.8, para.15.

³⁶ Article 1, Geneva Convention III and IV.

³⁷ *Aydin v Turkey* (1997) 25 EHRR 251; CAT Articles 5, 6, 12 and 13; HRC, General Comment 31, The nature of General Legal Obligations imposed on States Parties to the Covenant, 26/05/04, CCPR/C/21/Rev.1/Add.13, Paras. 15 and 18.

³⁸ Rome Statute of the International Criminal Court, Article 7, Article 8.

under a Status of Forces Agreement (SOFA). Under the European Convention on Human Rights, where a State transfers powers to another State or an international organisation, it retains responsibility for securing the Convention rights in the exercise of the powers transferred.³⁹ Furthermore, the European Court of Human Rights has held that:

“where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation ... it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.”⁴⁰

In such a situation, it is the positive obligations of the state, to protect the individual from acts of third parties in violation of their Convention rights, that would apply.⁴¹ In order to fulfil these obligations, the Court held that:

“the State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign states and international organisations, to continue to guarantee the rights and freedoms defined in the Convention.”

In relation to a military base subject to a SOFA, where there were allegations of secret detentions, positive obligations under the ECHR would require the State to take all possible measures within the SOFA to investigate the allegations of detentions. Where the base was subject to a SOFA, or other legal agreement, which prevented entry on, search of, or otherwise inhibited effective investigation of the allegations, the positive obligation on the State would include an obligation to seek renegotiation of the agreement, or where this was not possible, to refuse to renew the agreement on terms which failed to allow for effective investigations.

4. THE CONSEQUENCES OF THE RENDITIONS SYSTEM FOR COUNTER-TERRORISM CO-OPERATION

Serious violations of human rights in counter-terrorism operations conducted by the United States, and involving many other states, place constraints on European States' policies of co-operation with them. States may be held internationally responsible where they knowingly render aid or assistance in the commission of internationally wrongful acts, including violations of human rights obligations.⁴² Furthermore, additional obligations apply since the prohibition on torture is a norm of higher international law (*jus cogens*) and the obligation to protect against and sanction torture is an obligation

³⁹ *Matthews v UK*, App No 24833/94, *Bosphorus v Ireland*, App No 45036/98, *M and Co. v Germany*, App No 13258/87.

⁴⁰ *Ilascu v Moldova and Russia* App. No 48787/99

⁴¹ *ibid*, para.333

⁴² International Law Commission, Articles the Responsibility of States for internationally wrongful acts, General Assembly Resolution A/RES/56/83, 28 January 2002, Article 16.

erga omnes, an obligation which is owed to all states.⁴³ Where there is a violation of obligations *erga omnes*, or a systematic violation of a norm of *jus cogens*, all States have duties:

- not to recognise the situation as lawful including by refraining from acts which imply recognition;
- not to render aid or assistance in the violation;
- to co-operate with other states to bring the situation in violation of human rights to an end.⁴⁴

Applying these duties in light of the system of renditions and arbitrary detentions, including secret detentions, operated by the US, European states may breach their international law obligations in co-operating in this system, in particular where they knowingly:

- Provide information leading to a rendition of a suspect to face arbitrary detention or interrogation under torture or cruel, inhuman or degrading treatment;
- Send officials to question persons held by another state where the interrogation takes place under torture or cruel, inhuman or degrading treatment;
- Send officials to question persons held in conditions which amount to arbitrary detention or cruel, inhuman or degrading treatment, when the presence of the officials implies recognition of, or provides support to or encouragement of, a system in violation of these human rights;
- Provide questions to be put to persons known or likely to be interrogated by the authorities of another state under torture or cruel, inhuman or degrading treatment;
- Provide questions to be put to persons held in arbitrary detention or conditions which amount to cruel, inhuman or degrading treatment, where this practice provides recognition, support or encouragement to a system of interrogation in violation of these rights;
- Fail to take adequate measures to protect against the reliance in law enforcement or intelligence operations of information known or likely to have been obtained by torture or cruel, inhuman or degrading treatment, and thereby provide recognition, support or encouragement to continued use of torture and cruel, inhuman or degrading treatment.
- Allow evidence (other than exculpatory evidence) to be admitted in any judicial or quasi-judicial proceedings where it is obtained by torture (Article 15 CAT) or other treatment subject to an absolute prohibition under Article 7 ICCPR.

The obligations of European states are also affected by the enactment of the Military Commissions Act of 2006, which, though it applies Common Article 3 of the Geneva Conventions to US extra-territorial detentions of counter-terrorism suspects, does not

⁴³ *Prosecutor v Furundjija* (1988) ICTY 3; *Barcelona Traction case*, ICJ reports 1970 32.

⁴⁴ *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Articles 40 and 41, International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, op cit.

advance protection of human rights or the rule of law in regard to such detentions. The Act entrenches the system of extra-territorial detentions in US domestic law and severely limits access to courts in respect of such detentions, as well as the accountability of US officials for violations of human rights associated with such detentions. One effect of the Act is to permit the system of CIA secret detentions to continue. Furthermore, the Act includes narrow definitions of torture and cruel treatment, which could permit many of the “enhanced interrogation techniques” used by the CIA, including some likely to fall within the international law prohibition on torture or cruel, inhuman or degrading treatment, to continue. **In light of the systematic nature of the breaches of norms of higher international law, including the prohibition against torture, involved in the system of renditions and secret detentions, there are obligations on European states, not only to refrain from co-operation with or recognition of this system, but to take co-operative measures to bring the situation to an end.**

5. CONCLUSION: EFFECTIVE COUNTER-TERRORISM ACTION AND THE RULE OF LAW

There is a clear international law obligation on states to take effective action to combat terrorism. This obligation arises not only from resolutions of the Security Council,⁴⁵ but also from human rights law. The ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism reaffirmed that there is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. Both duties form part of a “seamless web” of human rights protection. International human rights law places a strong obligation on states to protect against the serious violations of human rights caused by terrorist attacks. However, if there is to be effective action to counter terrorism, it must take place within the existing legal framework of criminal justice and counter-terrorism co-operation, in respect for human rights standards. The programme of renditions and secret detentions, in subverting these essential principles, undermines effective international action to combat terrorism. The Member States of the European Union should take urgent individual and collective action to ensure that they do everything possible to counter such practices, both within Europe, and worldwide.

⁴⁵ Security Council Res 1373 of 2001. Adopted by the Security Council at its 4385th meeting, on 28 September 2001.