

Germany's Involvement in Extraordinary Renditions and Its Responsibility under International Law

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As investigative journalists and nongovernmental organizations (NGOs) increasingly uncover the nature and scope of a U.S. government program known for transferring terrorist suspects outside of normal legal and administrative channels, the role of European states has come under scrutiny. To a large degree, these states have erected a “wall of fog,” as a report from the German Institute of Human Rights describes it, blocking access to information that would allow for independent assessments of the human rights implications of the counterterrorism practice known as “extraordinary rendition.”¹

This article examines the situation in the Federal Republic of Germany (FRG) following press revelations and NGO reports of possible official German involvement in two cases of “extraordinary rendition” concerning Muslim German citizens, as well as a third case regarding the use of a U.S. military airbase in Germany for transporting an Egyptian suspect. How has Germany participated in human rights violations by U.S. intelligence services? What responsibility would it bear under international law, and what steps it has taken to rectify the situation? Next, the article discusses general strategic differences in the American and German approaches to counterterrorism and the rights of detainees and supplies a brief introduction to the three cases discussed here: Khaled el-Masri, Mohammed Haydar Zammar, and Hassan Mustafa Osama Nasr (a.k.a. Abu Omar). The third section outlines the international law framework that elucidates Germany's responsibility under international law to prevent

human rights violations by foreign intelligence services. Finally, I assess official reactions in Germany to the public furor caused by the revelations of possible national cooperation in these three extraordinary rendition cases and examine the function of international human rights law in this context. The conclusion suggests that investigations into the German role in Central Intelligence Agency (CIA) abductions are unlikely to yield concrete sanctions, but the discussion within the government and among the public regarding the responsibilities of states providing assistance in such counterterrorism matters could lead to increased safeguards against human rights abuses and effectively hinder the capacity of the CIA to ignore international norms in Germany and Europe.

Intersections and Divergences in the U.S. and German Counterterrorism Strategies

Intelligence services in the FRG and the United States have a long and close working relationship fostered during the Cold War years when they made common cause against the communist threat.² In recent years, they have been natural allies in international counterterrorism—it was no surprise when both the German government and public expressed solidarity with the United States following the attacks on the World Trade Center and the Pentagon.³ With its large Muslim population, coupled with the realization that participants in the 11 September 2001 attacks had belonged to a terrorist cell located in Hamburg, the Federal Republic could hardly imagine that it was immune from the threat of Islamist terrorism.⁴ In fact, roughly twenty Islamic organizations comprised of 32,000 members were already under observation by German authorities that year.⁵

Despite longstanding and continuing cooperation, differences in the way the two countries approached the terrorist threat increasingly became pronounced. The United States went to war against Iraq, claiming a dangerous link between Saddam Hussein and the al Qaeda terrorist network. Invoking emergency wartime powers, the Bush administration declared terrorist suspects enemy combatants and oversaw a reinterpretation of the law aimed at giving wider latitude to intelligence services.⁶ It honed a restrictive definition of

torture and set about creating a system of secret prisons in Asia, the Middle East, and Europe for the purpose of incarcerating terrorist suspects without the impediments of due process.⁷

The groundwork for the Bush administration's secret program for transferring terrorists was laid in an earlier era. In the late 1980s, the United States had faced difficulties apprehending suspects in foreign countries with which it had no bilateral extradition treaty, in which an extradition treaty was suspended due to a break in diplomatic relations, or in which there was virtually no law enforcement (as in Lebanon during its civil war).⁸ The extension of the American government's law enforcement powers to foreign states was sanctioned in two administrative opinions drafted by Assistant Attorney General William Barr in 1989.⁹ Circumventing the normally long, expensive, and uncertain process of extradition, in the early 1990s the U.S. government transferred thirteen suspected international terrorists to stand trial in the United States for planned or completed acts of terrorism against American citizens. Government officials acknowledged on the record the "rendition to justice" program that delivered those suspects to U.S. jurisdiction, and afforded detainees the due process crime suspects normally receive in that country.¹⁰

"Rendition" in the post 9/11 world evolved into a different type of beast, however, whose existence is much more shadowy. Backed by Department of Justice legal memoranda, Bush administration officials consistently have maintained that foreign nationals detained by the United States outside its sovereign territory are unprotected by federal or international law.¹¹ Policies have been crafted to "allow ... agents of the United States to detain foreign nationals without any legal process, and primarily through counterparts in foreign intelligence agencies, to employ brutal interrogation methods that would be impermissible under federal or international law, as a means of obtaining information from suspects."¹² Even in the wake of widespread revelations of intelligence abuses, U.S. courts have been reluctant to define the terms of the CIA mandate or otherwise delineate the boundaries of the agency's authority.¹³

Some forms of what is now known as "extraordinary rendition" amount to little more than "a form of jurisdiction shopping that enables so-called liberal states to commit human rights violations by proxy or to take advantage of 'hospitality' arrangements with less

liberal states,” according to Human Rights Watch.¹⁴ In other cases, suspects have been transferred into U.S. custody at secret facilities known as “black sites” run by the CIA at the U.S. military base at Guantánamo Bay in Cuba, in Iraq, Afghanistan, or even Europe.¹⁵ Estimates of the number of people abducted under this policy run as high as 150.¹⁶ The CIA reportedly is investigating some three dozen cases where people were detained based on flawed evidence or confusion over names.¹⁷

In contrast to the United States, Germany has publicly emphasized the importance of upholding the rule of law in the fight against Islamist terrorism. This approach has been shaped in reaction to the abuses of power experienced under the Nazis, which made the Federal Republic conscious of the need to limit state power and guarantee personal freedom.¹⁸ Moreover, the FRG’s own experience with terrorism in the 1970s and 1980s influenced the legal foundations of the government’s counterterrorism strategy. Between 1970 and 1985, the Red Army Faction and similar groups were responsible for 1,601 attacks with thirty-one people killed, ninety-seven injured, and 163 taken hostage.¹⁹ The German government’s unleashing of the full power of the police and paramilitary forces during this period stirred a broad debate about the proper balance between security and liberty.²⁰ It was the explicit goal of these homegrown terrorists to provoke the state into a repressive, antidemocratic stance.²¹ Therefore, the government stood to gain in the strategic struggle by adhering to democratic principles. Gradually, the FRG developed a long-term incremental strategy relying on extensive police and intelligence work that placed emphasis on prevention.²²

In the 1990s, unified Germany overcame resistance to restricting the right of privacy, as Verena Zöllner has suggested, possibly in reaction to the loss of stability in the international order following the fall of the Soviet Union.²³ Then, following the 11 September 2001 attacks, the federal government acted swiftly to increase the powers of the security services and broaden their range of activities amid concerns that the country was serving as a “safe haven” for terrorists.²⁴ In the succeeding months, the parliament passed two “security packages” designed to ensure that terrorist activities are detected early.²⁵ In advancing counterterrorism goals, Germany arguably has placed strains on a constitutional order that puts personal autonomy

at the apex of its value system.²⁶ The shift in the balance between security and liberty nonetheless has occurred within an established legal framework, subject to public debate.

German intelligence agents also have been given less discretion than their American counterparts. A 2004 report by the Congressional Research Service on “Germany’s Role in Fighting Terrorism” notes that “German law enforcement and intelligence communities face more bureaucratic hurdles, stricter constraints, and closer oversight than those in many countries.”²⁷ The three main intelligence services, the Military Counterintelligence Service (*Militärischer Abschirmdienst*), the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, *BfV*) and the Federal Intelligence Service (*Bundesnachrichtendienst*, *BND*) are subject to a complex system of parliamentary control, because intelligence is “considered an integral part of government work, possessing unique characteristics which make it more prone to abuse.”²⁸ A coordinator of secret services (*Geheimdienstkoordinator*) in the federal chancellery is responsible for oversight,²⁹ while a Parliamentary Oversight Committee of nine parliamentary “specialists” (*Parlamentarisches Kontrollgremium*) regularly examines different intelligence activities to ensure that they fall within the regulations.³⁰

The U.S. government’s characterization of the fight against terrorism as a “war on terrorism” has not been favored in Germany.³¹ Given their different historical perspective, Germans take a broader view of the threat. They are less focused on extirpating an evil than on getting at the social, economic, and political roots of terrorism.³² In the run up to the 2002 Bundestag election, then Chancellor Gerhard Schröder made a tactical decision to oppose German participation in the impending war in Iraq, rejecting the premise that an attack on Iraq was equivalent to an attack on global terrorism, capitalizing on the public mood that was critical of American unilateralism.³³ Judicial reinterpretation of the law is strongly discouraged by Germany’s civil law system and by the constitutional framework which creates strong political and legal limits on the ability of the executive branch to reinterpret the law.³⁴ Schröder continued to adhere to a criminal justice model of counterterrorism—his administration, in contrast to its American counterpart, did not use the new nature of the global threat to justify extrajudicial interrogation and detention of

suspects. Notably, in cases involving terrorist suspects, German courts consistently have upheld rules of due process and the presumption of innocence, despite political pressures after September 11.³⁵

In spite of their differing approaches to counterterrorism, the intelligence activities of the United States and Germany necessarily converge at points. The CIA is an active presence on German territory: German intelligence officials estimate that over one hundred CIA officials are currently working in the country in a variety of capacities.³⁶ At times, the two countries act jointly, but often the Germans are kept in the dark about CIA operations on their territory.³⁷ American agents were discovered, for example, carrying out surveillance on the Abu Musab al-Zarqawi cell, without officially informing the German intelligence agents engaged in the very same task. When confronted, the CIA went so far as to deny its actions.³⁸ Sometimes the Germans simply turn a blind eye or help their ally to maintain its cover. When the CIA worked jointly with the BfV to arrest a Tunisian terrorist suspect in Berlin, for example, its role in the affair was never mentioned in court.³⁹

Three Extraordinary Rendition Cases Involving Germany

German intelligence services apparently were aware of the U.S. government's developing interest in the area near the city of Ulm where Khaled el-Masri lived, around the time the CIA probably chose him as a target. German intelligence analysts worked "hand in hand" with their American counterparts, and would have likely passed on information about what was happening there even without official requests, according to Stephen Grey.⁴⁰ Jihadists had begun to move northeastward into that area, and when an Egyptian-born German, Reda Seyam, arrived in the city "it immediately set off alarm bells in Langley," because he was viewed as one of the most influential proponents of *jihad*.⁴¹ Both Seyam and el-Masri frequented a multicultural center in Neu-Ulm on which American agents had focused. Further suspicion was attached to el-Masri, according to the report of a U.S. commission investigating the 9/11 attacks, because the name Khalid al-Masri had been mentioned by a key al Qaeda figure.⁴²

The man who attracted the interest of the CIA was an unemployed, erstwhile truck driver and car salesman. The story of his abduction has been told vividly in the press and in the complaint of a 2005 suit he filed unsuccessfully in federal district court in Alexandria, Virginia against former CIA Director George Tenet, charging violations of U.S. and universal human rights.⁴³ His saga began at the end of December 2003, when el-Masri, a naturalized German of Lebanese descent, abruptly decided to travel by bus to Macedonia, allegedly to take a break from marital disputes and life with five children in close quarters. At the border between Serbia and Macedonia, law enforcement officials confiscated el-Masri's passport and detained him until he was transferred by armed plainclothes officers to a hotel in Skopje, where he was kept under guard in a hotel, unable to contact a lawyer, translator, consular official, or his family in Germany. Although pressed to admit to involvement with al Qaeda and contacts in Afghanistan, he refused to do so, starting a hunger strike to protest his unlawful detention. Blindfolded, shackled, and rendered unconscious by an injection, el-Masri was transported by plane to a location thought to be a CIA-run facility in an abandoned brick factory in Afghanistan used for the detention of some high level terror suspects and known as the "Salt Pit." During the four months that he was kept there in a small, dirty cell without a bed, el-Masri was pushed, kicked, and threatened by interrogators wanting information about Palestinian training camps and 9/11 conspirators.

Although he barely understood English, el-Masri was not provided with a translator during his detention. Nor did he receive medical care during his thirty-seven day hunger strike, in which he lost more than sixty pounds. By early May 2004, Condoleezza Rice, then President George W. Bush's National Security Advisor, had been informed that the CIA was detaining an innocent German citizen, and personally ordered his release. After being informed that he would soon be released, el-Masri was visited several times by a German-speaking man who identified himself as "Sam" and questioned him further regarding alleged associations with extremists in Neu-Ulm. When el-Masri finally was released on 27 May 2004, his captors let him off in Albania, forcing him to make his own way back to his German hometown.

The case of Khaled el-Masri gained sympathetic attention in Germany, undoubtedly in part because the alleged victim of CIA abuses in an Afghan prison appears innocent of any terrorist connections. His five-month detention abroad under deplorable conditions was perhaps a case of mistaken identity, although it is possible that the interrogators simply hoped to use el-Masri to gain information about others, as Stephen Grey suggests in his account of the case.⁴⁴ Since his release from U.S. custody in May 2004, questions have arisen as to when the illegal detention came to the attention of German authorities, and why they failed to act in a timely fashion to protect the rights of a German citizen who had been denied access to a lawyer. Given that German intelligence agencies were focused on the multicultural center in Neu-Ulm at the time of his capture, it appears odd that they would not have noticed the disappearance of the German citizen. If the United States mistakenly assumed that el-Masri was a high level terrorist suspect, questions arise as to why American agents would not have asked the Germans for information regarding his identity.

The media attention focused on the unemployed Lebanese-German's extraordinary tale revived interest in two earlier cases which point to German involvement in unsavory or illegal CIA actions. Mohammed Haydar Zammar, a dual German-Syrian national, was a personal friend of the 9/11 hijackers and considered an advocate of holy war. During the 1990s, the Federal Criminal Police Office (Bundeskriminalamt, BKA) already had Zammar under surveillance.⁴⁵ Brought before a German court after the World Trade towers attacks, the suspect was promptly released for lack of evidence to hold him, an occurrence that suggests again that the German government may have had greater qualms about arbitrary detention in the counterterrorism context than the U.S. government. Then, in October 2001, Zammar left for Morocco, traveling on a German passport. The BKA informed the CIA—which had been following Zammar's activities—that Zammar was in Morocco and when he intended to return. When Zammar, tried to return home, he was taken into custody at the Casablanca airport by a Moroccan task force. Two weeks later he was reportedly transferred to Damascus by means of a CIA-chartered jet, where he was held in solitary confinement in an underground cell believed to be 185 cm long, less than 90 cm wide, and under two

meters high. In interviews with Amnesty International, people who had been detained in the same prison as Zammar spoke about deplorable conditions there, including the presence of rats and lice, extremely limited access to fresh air and water, and inadequate nutrition. It appears now that information from German sources facilitated the kidnapping by American intelligence agents in Morocco. Further controversy has arisen over the Germans' decision to send representatives of the intelligence services to Syria to interrogate Zammar, despite inhumane conditions in the prison there.

The case of Hassan Mustafa Osama Nasr (a.k.a. Abu Omar), an Egyptian cleric who was residing in Italy, indicates more tangential German involvement, but is important because it raises significant issues about the use of European airspace and airport facilities for the purpose of extraordinary rendition. Abu Omar disappeared from Milan in February 2003, and was heard from fifteen months later, when he called his family in Italy, claiming that he had been kidnapped by U.S. and Italian forces and flown to Egypt, where he was tortured.⁴⁶ The Italian government launched an investigation, and prosecutors are seeking the extradition of CIA agents from the U.S.⁴⁷ The case is significant for Germany primarily because the U.S. military airbase in Ramstein likely was used for the CIA-led transfer.⁴⁸ Following a request by the Left Party representatives in the Bundestag, the federal aviation agency put together a list of 437 CIA flights in Germany since 2001, all of which were registered as involving private airplanes.⁴⁹

Taken together, the alleged facts of these three cases do not necessarily point to the direct responsibility of German agents in extraordinary rendition practices, including abduction and illegal transfers of suspects, arbitrary detention, and harsh, coercive interrogation. They do, however, raise questions about German complicity, prior knowledge, and failure to investigate.

The Responsibility of Assisting States for Human Rights Violations

In light of reports that abductions had taken place in Europe and that European airport facilities and airspace had been used for trans-

ferring suspects to locations where harsh forms of interrogation could take place away from the public eye, the issue of responsibility of assisting states came to the surface of public discussion in Europe.⁵⁰ Concern has been voiced in the press, NGO reports, and the European Parliament about Germany's failure to control U.S. agents acting on its territory, or to investigate effectively reports of abuses inflicted upon its own citizens by the CIA. The "Draft Articles on Responsibility for Internationally Wrongful Acts" (Draft Articles) laid out by the International Law Commission of the United Nations and subscribed to by 189 countries including all European states and the U.S., provide a framework for understanding the international obligations of European states in regard to the activities of foreign intelligence services within their jurisdiction.⁵¹ Article 16 addresses the situation in which one state assists another primarily responsible for an internationally wrongful act. These situations where one state bears responsibility for the actions of another are considered exceptions to the principle of independent responsibility.

According to the Draft Articles, the assisting state's derivative responsibility exists only where it is bound by the obligations that are breached by the offending state, if it has knowledge of the circumstances surrounding the internationally wrongful act. In the context of extraordinary renditions, such acts could include violations of bans contained in international legal instruments on torture; cruel, inhuman and degrading (CID) treatment; and refoulement. Germany is a party to both the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT) and the International Convention on Civil and Political Rights (ICCPR).⁵² The CAT Article 1 prohibits both torture and CID treatment, including conduct undertaken for the purposes of obtaining information.⁵³ Ill-treatment short of torture is also prohibited under CAT and the ICCPR (Article 7). Article 1 of CAT does not define CID treatment, but the jurisprudence of the CAT Committee makes clear that CID punishment or treatment is on a continuum with torture, as Article 16 requires ratifying States to prevent other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.⁵⁴ The prohibition against torture, in addition to being articulated in CAT and ICCPR, has been recognized as a norm of international customary law and a *jus cogens* norm, nonderogable in times of war and peace.⁵⁵

Germany also could be considered responsible for U.S. actions in transferring detainees to third countries, where such a transfer violates the international prohibition on refoulement. This prohibition against transferring individuals to another state where there are substantial grounds for believing that she/he would be in danger of being subjected to torture is contained in CAT article 3(1). The objective component of “likelihood” can be made out in the context of extraordinary renditions by consulting the U.S. Department of State’s annual human rights reports.⁵⁶ In addition, the Human Rights Committee has interpreted the ICCPR to prohibit refoulement of individuals to states where they may face a “real risk” of torture or CID treatment or both, a standard higher than that of CAT.⁵⁷

The issue of airspace and airport use raises unique questions concerning the responsibility of assisting states. The commentaries on the Draft Articles provide examples from state practice supporting the proposition that international responsibility may be assigned to a state that deliberately participates in internationally wrongful conduct on the part of another state through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting state.⁵⁸ For example, when the government of the Federal Republic of Germany allegedly participated in an armed attack by allowing U.S. military aircraft to use airfields in its territory in connection with the intervention of the United States in Lebanon in 1958, the FRG denied that the measures taken by the U.S. and U.K. in Lebanon constituted intervention, but “nevertheless seem[ed] to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.”⁵⁹

Notably, the commentaries point out that “[t]he obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force.”⁶⁰ Among the examples given is that of providing material aid to a state that uses the aid to commit human rights violations⁶¹—here the reference is to supplying arms and military assistance, but the general principle could be extended to offering use of airspace. A caveat is included in the commentaries, however, that “the particular circumstances of each case must be

carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.”⁶²

Knowledge and intent are difficult to discern in the context of rendition flights through German airspace. The Chicago Convention on International Civil Aviation,⁶³ which establishes the rules governing use of airspace, plane registration, and safety for 189 contracting states, allows private, noncommercial flights over a country as well as technical stops in a country’s territory without prior authorization or notification.⁶⁴ In contrast, state aircraft, by the terms of the convention those “used in military, customs and police services,” are subject to greater restraints, including specific authorization to fly over the territory of another state or use its airports.⁶⁵ The CIA has commonly circumvented the constraints placed on state aircraft by chartering civilian planes from private companies, sometimes dummy corporations, as alleged, for example, in the *el-Masri v. Tenet* case.⁶⁶ An argument could be made that function should determine whether an aircraft is categorized as state or civil, such that planes used for intelligence gathering would be classified as military planes.⁶⁷ Arguably, the Chicago Convention would not allow a state to disguise the nature of the aircraft in order to circumvent the terms of the convention.⁶⁸ A state party might suggest that it has no authority to interfere with flights, or question the reasons for a flight. The Chicago Convention, however, gives every state the right to require that an aircraft flying over its territory land at a designated airport for inspection where there are “reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the convention.”⁶⁹

If Germany provided an essential facility for or otherwise aided the abduction of persons on foreign soil, Germany could incur the responsibility of an assisting state, according to the commentaries to Draft Article 16. An important limitation is included, in that the assisting state in such a situation will be responsible only to the extent that its own conduct has caused or contributed to the internationally wrongful act.⁷⁰ International responsibility also does not adhere where the assisting state is unaware of the circumstances in which its aid or assistance is intended to be used—circumstances making the conduct of the assisted state internationally wrongful.⁷¹ Finally, the

state responsibility rules require that the aid or assistance be given with a view to facilitating the commission of, or contributing significantly to, the internationally wrongful act.⁷² In sum, a close connection must exist between the act of the assisting state and that of the state committing an internationally wrongful act: “the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State.”⁷³

Germany's status as a party to the European Convention on Human Rights (ECHR) imposes further responsibilities in regard to preventing human rights violations by foreign intelligence agents. The issue of possible active or passive cooperation with the CIA in depriving terrorist suspects of their liberty prompted the Secretary General of the Council of Europe (COE), Terry Davis, to make an inquiry in late 2005 under Article 52 of the ECHR directed at the forty-six states parties to that convention.⁷⁴ In particular, the inquiry focused on what measures the states had taken to implement the ECHR since 1 January 2002 (or from the moment of entry in force of the Convention, if that occurred at a later date) in light of news reports about secret detention centers in Europe and the possible involvement of officials of states parties in the unacknowledged detention of individuals and their rendition by aircraft using airspace and airport facilities of states parties. Whereas U.S. Secretary of State Condoleezza Rice spoke of a new situation requiring new methods, and referred to extraordinary renditions as “a way of protecting our citizens,”⁷⁵ the COE Secretary General notably emphasized in his report on the results of the inquiry that “[t]he human rights obligations under the Convention also apply in the current context of the fight against terrorism,” calling this standpoint “a moral and political necessity.”⁷⁶

The specific elements of the ECHR at issue in the inquiry were those implicated in extraordinary rendition scenarios, particularly safeguards against deprivation of liberty (Article 5), restrictions on freedom of movement (Article 2 of Protocol 4), and prohibitions against torture or inhuman and degrading treatment or punishment (Article 3). Under the ECHR, the activities of foreign agencies cannot be attributed directly to states parties, but, presupposing general knowledge of abuses related to detention and transfer issues, the COE Secretary General was willing to ascribe responsibility:

There can be little doubt that aid and assistance by agents of a State Party in the commission of human rights abuses by agents of another State acting within the former's jurisdiction would constitute a violation of the Convention. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State Party's responsibility under the Convention.⁷⁷

Lack of knowledge would not necessarily exculpate countries that assist foreign agents regarding activities that would be considered violations of the ECHR if committed by a state party. The state party could still incur responsibility under the Convention on account of its failure to protect individuals or its failure to investigate violations where subsequent information brings them to light. The COE Secretary General, who cited deficits in European national policies that impaired the ability of competent authorities to detect illegal activities and act with the necessary resolution to investigate or prevent them, declared plainly that “[n]ot knowing is not good enough.”⁷⁸

Member states are additionally obliged to take measures to protect all individuals under their jurisdiction from unlawful interferences with their rights and freedoms under the ECHR.⁷⁹ Even where the role of the state is limited, it has a positive obligation to take reasonable measures to prevent a real and immediate risk to the life of an identified individual or individuals posed by the criminal acts of a third party.⁸⁰ This obligation exists even where there is only constructive knowledge, and extends, according to the COE report, to the situation where states parties confront an arguable claim that a person has been taken into custody by foreign agencies operating in its territory and has not been seen since.⁸¹

Moreover, the COE report makes clear that positive obligations extend to some degree to U.S. military bases in Germany, despite the fact that they are only to “a very limited extent” under that country's jurisdiction. This is because the agreements applicable to the use of the bases do not cover intelligence activities in violation of internationally recognized human rights standards. Such activities would be considered an unlawful exercise of jurisdiction by the United States.⁸² The questions that the state responsibility rules and international legal obligations impose in this context thus relate to how much German government officials knew about wrongful acts of the Americans, whether their own acts were linked causally to international legal violations, and if so, whether the state actors on the

German side intended the link or acted to prevent it. All of these elements remain to a degree controversial.

Germany's Role in CIA Extraordinary Renditions: Official Reactions and Probable Consequences

The degree of Germany's awareness at the time of the extraordinary renditions, and the extent to which its participation was an essential causal link in the abductions and interrogation of terrorist suspects, have become subjects of official investigations by the criminal police and the Bundestag. The procedural and substantive requirements for investigations of potential ECHR violations have been laid out by the European Court on Human Rights, the human rights bodies of the Council of Europe, and the United Nations. In general, they call for prompt, effective, and not merely perfunctory investigations, which are, where possible, open to the public.⁸³ Measures designed to protect the identity of members of the security forces should be minimized.⁸⁴

Significant questions remain about whether the German response meets these criteria, as the government appeared for a long time too easily satisfied by vague explanations. El-Masri himself expressed disappointment with the lack of fervor originally exhibited by officials responsible for investigating his case.⁸⁵ His lawyer, Manfred Gnjidic, complained that Germany, "stood by like a little schoolboy, watching what was going on with my client and doing nothing."⁸⁶ Indeed, the German investigators assigned to examine el-Masri's allegations did not request information about the case from the U.S. authorities until the autumn of 2004, even though he had been released in late May.⁸⁷ Under pressure from el-Masri's lawyer to provide answers in June of 2004 the government withheld them.⁸⁸ According to Germany's response to the Council of Europe Article 52 inquiry, officials did not contact Macedonia regarding investigation of the el-Masri case until 2005,⁸⁹ although the apparently innocent detainee had been held in Macedonia for over three weeks in late 2003 and early 2004.

Upon el-Masri's release from detention, government and intelligence agencies in Germany issued vehement denials of knowledge about the case.⁹⁰ The parliamentary oversight committee given the

task of investigating the case denied any awareness of his abduction before it was reported in the press. A senior Macedonian official claimed, however, that the German Embassy was told of el-Masri's detention within days of his abduction.⁹¹ An uproar ensued in the German press when it emerged that then Interior Minister Otto Schily was told by then American ambassador Daniel Coats in May 2004 that a German citizen had been apprehended mistakenly and would soon be released.⁹² Schily thus knew of el-Masri's arbitrary detention prior to his release, but neither made it public nor ordered an investigation, apparently keeping a promise to the Americans not to discuss the case.⁹³ It seems unlikely that Schily can be exculpated based on his own theory that he had received no information in May 2004 that would have put him in a position to prevent a German citizen from coming to harm, or based on his avowal that he knew nothing about clandestine CIA flights or secret prisons.⁹⁴

Subsequently, the German government became openly critical of the United States for its role in the abduction of el-Masri. Newly elected Chancellor Angela Merkel demanded an explanation of the incident from U.S. Secretary of State Rice when they met in Berlin in December 2005.⁹⁵ Yet, her insistence seemed more ritualistic than politically significant. Rice has not denied the existence of the rendition program to which el-Masri fell victim; and, after being challenged by the German chancellor to take responsibility for the el-Masri blunder, she conceded that "any policy will sometimes result in errors,"⁹⁶ without commenting on the specifics of el-Masri's allegations. Merkel took this to be an apology, but U.S. officials later conveyed to journalists that this was hardly Rice's meaning.⁹⁷

Only belatedly did the Germans broaden their criminal inquiry into the el-Masri abduction to investigate whether their own government had worked secretly with the United States in the practice of extraordinary rendition.⁹⁸ The public prosecution offices in Zweibrücken and Munich now have ongoing investigations into el-Masri's abduction,⁹⁹ and, in January 2007, pressed charges against thirteen alleged CIA counterterrorism operatives using their aliases.¹⁰⁰ Extradition of the agents appears unlikely to occur, however, as the Americans already have turned down a request by the Munich prosecutors for assistance in the investigation¹⁰¹ and have shown no willingness to extradite the twenty-five CIA agents indicted by the Italians in the Abu Omar case.¹⁰²

In conjunction with the el-Masri inquiry, questions have arisen about whether Germans had direct involvement in the “extraordinary rendition,” particularly whether the German speaker named “Sam” was a German official. Even if there was no direct cooperation, el-Masri’s allegations have raised the issue regarding when exactly German intelligence services and the government became aware of the kidnapping, and whether measures could have been taken to protect the abducted citizen. In February 2006 after much public debate, the government presented the parliamentary oversight committee with a lengthy report on the activities of the BND that had raised questions about cooperation with extraordinary renditions.¹⁰³ Arguing that the standing parliamentary intelligence oversight committee already had answered adequately all questions,¹⁰⁴ both government parties, the Christian Democratic Union and the Social Democratic Party, objected to the formation of a new parliamentary committee, which convened to investigate possible official involvement in CIA flights through German airspace and the renditions of el-Masri and Zammar, as well as recently revealed activities of the BND in support of the Americans in Iraq during the war.¹⁰⁵ After much interparty struggle, the three opposition parties, Alliance 90/Greens, the Free Democratic Party, and the Left Party managed to gain the necessary support—at least 25 percent of the parliamentary representatives—for forming the committee, convened on 7 April 2006.¹⁰⁶ The committee is meant to clarify the political framework in which the intelligence services were acting, and the supervision mechanisms.

Despite heightened attention to the el-Masri case, the identity of “Sam” remains uncertain. The German government has denied that the figure in question was an employee of a federal agency.¹⁰⁷ Suspicion fell on a chief detective at the BKA, but when called before the parliamentary oversight committee, the accused man exculpated himself by providing records of his activities during the period in question and providing substantiating bank receipts from Berlin.¹⁰⁸ It may well turn out that the German-speaking interrogator in Afghanistan was a CIA employee—prosecutors in Munich are now following a lead to that effect.¹⁰⁹

After a *New York Times* report claimed that Macedonian officials had informed the German embassy in Skopje of el-Masri’s detention shortly after he was taken into CIA custody there, the BND main-

tained that the service was unaware of the case until after his release in May 2004.¹¹⁰ Only much later did it emerge that a mid-level BND employee with knowledge of the case had not been questioned. The employee admitted that only a few days after el-Masri's abduction he had heard over breakfast in the cafeteria of the Macedonian Interior Ministry that a German citizen named el-Masri had been arrested as a terrorist suspect at the Skopje airport. He claims that he did not pass on the information, as it did not bear on his sphere of duties. This breakdown in communication caused the BND much embarrassment and put agency procedures under scrutiny. Hans-Christian Ströbele, a Green party member of the committee investigating the BND, stressed in a newspaper interview that it was intolerable for a BND employee to know about the abduction of a German citizen and keep it to himself.¹¹¹

Ostensibly, the German government first learned of Mohammed Zammar's arrest and detention through the media and subsequently ordered intelligence agents to locate and interrogate him. Previously unpublished classified documents from the files of the CIA, Federal Bureau of Investigation, and BKA reveal, however, that detailed information from Germany had facilitated Zammar's capture in Morocco in 2001.¹¹² In August 2002, the BKA handed over records to the Syrians; three months later, six German intelligence agents arrived in Damascus, questioning Zammar for three days in a prison notorious for its torture practices.¹¹³

Further damning evidence emerged early in 2006. The former president of the BND, August Hanning, confirmed before the Bundestag that a high-level delegation of Syrian intelligence officials had met with their counterparts in Germany in the summer of 2002 at the invitation of the BND.¹¹⁴ The point of the conference was, in part, to exchange information in the fight against terrorism.¹¹⁵ For the German government, the meeting (preceding the interrogation of Zammar in Syria) was embarrassing, due not merely to the cooperation it demonstrated with a state known for its infamous torture prisons, but also because the leader of the Syrian delegation is now suspected of murdering the former prime minister of Lebanon, Rafik al-Hariri.¹¹⁶ Even if the German interrogators were not directly guilty of torture or CID—and there are no allegations to this effect—there still would be issues of liability for having conducted interrogations

under circumstances amounting to CID, insofar as the Germans could be presumed to have known that the Syrian prisons are notorious for their ill-treatment of prisoners. It is unlikely that officials were unaware of the human rights situation in the prison. In its 2002 country report, the U.S. State Department noted accounts of torture methods including:

administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine.¹¹⁷

Following the revelations about the high level meeting between German and Syrian intelligence agents, the German government made some effort to investigate Zammar's situation, filing eight successive *notes verbales* seeking clarification of the reasons for his detention and seeking a lawyer for him. The Syrian government ignored these requests.¹¹⁸ In the special committee of the European Parliament formed to investigate CIA activities in Europe, accusations have flown that the previous German government did too little for the prisoners from Germany and even helped facilitate abductions. Mohammed Zammar's attorney, Gül Pinar, then described contacts between the German authorities and the Syrian secret service, which were underscored by answers the federal government had given to parliamentary inquiries.¹¹⁹ Pinar also reported that a deal had been made to terminate six proceedings against Syrians in Germany in exchange for permission for German investigators to interrogate Zammar in a Syrian prison.¹²⁰

For a long period Zammar's whereabouts remained unknown and uncertainty existed about whether he was dead or alive. In 2006, he resurfaced in a Syrian courtroom where he was being tried for membership in the banned Muslim Brotherhood organization, attending training camps in Afghanistan and Bosnia, and pursuing jihadist ambitions. The Syrian government had waged a fierce crackdown on the Muslim Brotherhood in the early 1990s, during which thousands died, and in which the standard penalty for membership was death.¹²¹ Some of the incriminating evidence used to prosecute Zammar in Syria is alleged to have come directly from Germany where

capital punishment has been abolished. German diplomats in Damascus rushed to provide the prisoner with a defense attorney and consular assistance, after he had already been deprived of legal counsel for almost five years.¹²² The suspicion has been raised that the Muslim Brotherhood charge was made because there was no evidence linking Zammar with the 9/11 terrorist acts.¹²³ On 11 February 2007, Zammar was convicted of membership in the Muslim Brotherhood, although he claimed that he had never been a member and no evidence of his membership was presented during the trial.¹²⁴ His death sentence has been commuted to twelve years, in accordance with recent practice by the Syrian Supreme State Security Court.¹²⁵

In the Zammar case, German agents took part in interrogations that could be considered violations of international law—despite the agents’ lack of direct involvement in Zammar’s ill-treatment—if they were indeed aware of the CID conditions in the Syrian prison. To some minds, however, the need to question a vital suspect provides a strong justification for their presence. Certain representatives of the German government favor cooperation with intelligence services run by dictatorships using methods that violate human rights, because the information gathered could be used to fight terrorism. Former Foreign Minister Joschka Fischer, for example, has defended the interrogations in the Damascus prison as fundamentally correct.¹²⁶

BfV President Heinz Fromm has also argued for using statements made in connection with torture if they are obtained from foreign intelligence services and are relevant for prevention of a terrorist incident in Germany.¹²⁷ Federal Interior Minister Wolfgang Schäuble has defended the interrogation of Zammar as proper, stressing that even if information had been obtained by means of torture, German intelligence agents could legitimately use it.¹²⁸ While supporting the absolute prohibition on torture, Bavarian Interior Minister Günther Beckstein also would consider using relevant information to prevent dangers regardless of its origins. For her part, Minister of Justice Brigitte Zypries defended the proposition that investigators could be sent to Syria to question a suspect but emphasized that “no German civil servant may torture—no matter where—and admissions of guilt that were gained through torture—regardless of who was torturing—could not be used in a German court.”¹²⁹ In contrast, the opposition Greens advocated legislation that would provide explicit guidelines

for the interrogation by the BND and BfV of suspects incarcerated abroad that would exclude the interrogation of persons being tortured or the use of statements made under torture by German officials. It did not pass.¹³⁰

As in the Zammar abduction, the transportation of Abu Omar and other likely CIA detainees through German airports and airspace raises the issue of refolement, as the detainee was sent to a country considered to be a place where prisoners are at high risk for torture. The rendition flight carrying Abu Omar supposedly landed at a military airport outside of German jurisdiction, yet analysis of the laws governing international air traffic makes clear that the Federal Republic can require inspections where planes are suspected of being used for any purpose inconsistent with the aims of the convention. Since November 2005 at the latest, when the *Washington Post* reported on secret flights in Europe,¹³¹ Germany has been aware of the CIA's use of European airports and airspace in carrying out extraordinary renditions. Amnesty International has investigated records of nearly 1,000 flights linked directly to the CIA, most of which have involved European airspace, in an effort to document the practice of using front companies to transport terrorist suspects secretly.¹³² For the period between 2001 and 2006 approximately 720 flights via German airports were deemed suspicious by Eurocontrol (the European aviation security organization) in regard to possible connections to illegal CIA renditions.¹³³

The Germans may have been generally aware of the illegal transport of terrorist suspects via airports on their territory, and this may have provided an essential causal link to interrogations in third countries under circumstances amounting to cruel, inhuman or degrading treatment, if not torture. It is nonetheless difficult to establish a definitive link. In a presentation to the European Parliament's ad hoc committee investigating alleged CIA involvement in the illegal detention of prisoners in Europe, nongovernmental organizations put forth considerable circumstantial evidence linking flights over European airspace with the CIA. Anne Fitzgerald of Amnesty International acknowledged under questioning, however, that "the fact that the CIA has been flying planes in and out of Europe is not conclusive: it is indicative."¹³⁴ The German public prosecution office concerned with Omar's abduction to Egypt could not, after

months of investigation, get past identifying the plane that landed at the U.S. military base in Ramstein. Requests from the Zweibrücken prosecutor's office to the United States for help with the investigation have not received replies.¹³⁵ The German government has declared that it has no information about the purposes for which suspicious aircraft were used or their passengers or cargo. Nonetheless, the European Parliament commission in charge of investigating CIA flights through Europe charged Germany, among other states, with negligence in controlling flights through its territory.¹³⁶

Conclusion: German-American Cooperation in Counterterrorism Necessitates Safeguards to Assure German Compliance with International Law

Albeit belatedly, and only in the wake of negative publicity, Germany now seems to be investigating seriously whether there was any official involvement in the U.S. policy of extraordinary rendition. The inevitable conclusion deriving from the slow start of investigations, however, is that there was a lack of will on the part of both the Schröder and Merkel governments to uncover the truth. Much of the relevant information so far has come to light through the efforts of investigative journalists, NGOs, the Council of Europe, and the European Parliament. Germany's outward commitment to the rule of law appears to have wavered in the post 9/11 climate of fear. A troubling picture is taking shape of the government's failure to protect the rights of its Islamic citizens—whether presumably innocent, as in the case of el-Masri, or probably very dangerous, as with Zammar. Nevertheless, within Germany, criminal investigations eventually were undertaken. Chancellor Merkel raised the issue of CIA abductions in Washington shortly after taking office. Moreover, her government delivered a comprehensive report on BND activities to the parliamentary committee responsible for oversight of the intelligence services, and a special parliamentary committee initiated an investigation concerning Germany's role in CIA abductions.

The information that has surfaced through these investigations casts a shadow on the reputation of a state that traditionally has displayed strong support for human rights. It has become evident that

German officials knew of el-Masri's abduction prior to his release and failed to disclose that information, although it is unlikely that any German agents were actively involved in his interrogation. Zammar's abduction apparently was facilitated by tipping off the Americans about his whereabouts. German officials later participated in interrogations in a Syrian prison where the probability is extremely high that Zammar was mistreated. Evidence also suggests that German governments should have discerned that suspicious flights landing at a U.S. airbase in Germany were likely involved in abductions of terrorist suspects such as Abu Omar.

These findings are unlikely to bring about concrete international sanctions against German authorities, however. The international human rights system has limited enforcement capacity, and there is little consensus about what types of enforcement mechanisms should exist. Its function in the context of extraordinary renditions has been primarily to facilitate the disclosure of facts and prompt debate. Yet, no individuals—American or German—have been held accountable for the criminal offenses involved in the abductions of el-Masri, Zammar, and Abu Omar. While efforts on this front will continue, it remains difficult to assign individual responsibility for intelligence abuses.

As Wolfgang S. Heinz has observed, the clarification of issues related to the extraordinary rendition program has taken place at a high level politically in Europe, yet the United States has not been hindered from upholding its practice of "renditions" and the maintenance of secret prisons, and neither the European Union nor NATO publicly made any commitment to abolish these practices.¹³⁷ Hardly any European government has promised to try to prevent CIA abductions on its territory or explained what further control measures it would adopt in the wake of political and media discussions.¹³⁸

The rules of state responsibility do not provide the victims with access to information or justice as a result of the inherent secrecy of intelligence work, but they do provide a framework for considering how to create safeguards against future abuses and create mechanisms of disclosure. In the contemporary context of global terrorism, cooperation among intelligence agencies across borders is a necessity, and yet differing attitudes among states towards the proper balance between human rights imperatives and security concerns become problematic. The Council of Europe has identified potential areas

where human rights are threatened and has recommended: 1) creating a regulatory framework to control activities of foreign secret services; 2) improving the international legal framework for air traffic to prevent abuses of the civil aviation rules; 3) establishing clear exceptions to state immunity in cases of serious human rights abuses; and 4) creating compliance and enforcement mechanisms to insure the compliance of foreign agents with international and national law.¹³⁹

German-American cooperation in counterterrorism efforts will continue to be a necessity in years to come for both sides. The potential benefit of cooperation with the United States—gaining ground on terrorists—may be endangered, however, if Germany wavers in its dedication to the rule of law, including the absolute prohibition on torture. Not only are confessions induced under torture notoriously unreliable, but arbitrary detentions under inhumane conditions damage the image of Western nations such as Germany. The Federal Republic may face insurmountable difficulties holding American agents accountable for past CIA abductions of German citizens, but it can, with the knowledge gained in recent years, reframe its working relationship with foreign intelligence agencies and create more substantial democratic accountability. If the recommendations of the Council of Europe are acted upon, Germany and Europe as a whole could become inhospitable territory for carrying out extraordinary renditions.

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Notes

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10. Taylor (see note 8), 35-36.
11. American Civil Liberties Union, "Extraordinary Rendition—Fact Sheet," <http://www.aclu.org/safefree/extraordinaryrendition/22203res20051206.html>, accessed on 6 December 2005; hereinafter ACLU Fact Sheet.
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16. ACLU Fact Sheet (see note 11).
17. *Below Radar* (see note 15), 3.
18. Verena Zöllner, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights," *German Law Journal* 5, no. 5 (2004): 472-73.
19. Szabo (see note 3), 70.
20. *Ibid.*
21. Zöllner (see note 18), 472.
22. Szabo (see note 3), 70.
23. Zöllner (see note 18), 473.
24. *Ibid.*, 470.
25. *Ibid.* See also Lepsius (see note 3), 441. "The main purpose of the new regulations was to increase the powers and to enlarge the range of activities of security authorities ... In addition, the exchange of data information between various

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26. Lepsius, (see note 3), 441.
 27. CRS Report (see note 2), 7.
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 29. Heinz (see note 1), 38.
 30. Ibid.
 31. Szabo (see note 3), 69-70.
 32. Ibid., 71, 73.
 33. Ibid., 27-31.
 34. Boyne (see note 25), 80.
 35. Zöllner (see note 18), 469-470.
 36. Dominik Cziesche et al., *Der Spiegel*, 12 December 2005; <http://service.spiegel.de/cache/international/spiegel/0,1518,druck-390084,00.html>.
 37. Ibid.
 38. Ibid.
 39. Ibid.
 40. Grey (see note 7), 99.
 41. Ibid.
 42. Ibid.
 43. The description of events that follows is taken from the ACLU complaint filed in federal district court in Alexandria, Virginia in the lawsuit *El-Masri v. Tenet*, <http://www.aclu.org/safe/free/extraordinaryrendition/22211lg120051206.html>; hereinafter ACLU Complaint. See also Khaled el-Masri. “Ich bin ein Unschuldiger: Interview with Khaled el-Masri,” Nicholas Richter, *Süddeutsche Zeitung*, 9/10 December, 2005, “<http://www.sueddeutsche.de/ausland/artikel/984/65919/2/print.html>”; hereinafter el-Masri Interview in *SZ*.
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 45. Holger Stark, “Berlin ‘Helped CIA’ with Rendition of German Citizen,” *Spiegel online*, 11 January 2007; <http://www.spiegel.de/international/spiegel/0,1518,druck-459075,00.html>. The account of Zammar’s case is drawn also from *Below Radar* (see note 15), 19.
 46. Abu Omar’s disturbing account of his torture in Egyptian prison can be found in: Amnesty International, *Egypt—Systematic Abuses in the Name of Security* (Amnesty International, 2007), <http://web.amnesty.org/library/index/engmdc120012007>.
 47. European Parliament Press Service, “Committee Hears First Testimonies in CIA Case,” http://www.europarl.eu.int/news/expert/infopress_page/015-5512-054-02-08-902-2006022, accessed on 24 February 2006.
 48. Council of Europe, *Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the*

- instigation of foreign agencies*, 8, SC/Inf, Council of Europe, (Strasbourg, 2006):43-44; hereinafter COE Report.
49. Heinz (see note 1), 18.
 50. The existence of the extraordinary rendition program first came to light in the American press. In October 2004 Human Rights Watch published a well-documented briefing paper on “ghost detainees,” and by at least March 2005 there were consistent press reports on the secret rendition and detention policies, particularly an in-depth article published in the Washington Post (2 November 2005). See Human Rights Watch, *The United States’ ‘Disappeared’, The CIA’s Long-Term ‘Ghost Detainee’s* (2004); <http://www.hrw.org/backgrounder/usa/us1004/>. See also Dana Priest, “CIA Holds Terror Suspects in Secret Prisons,” *Washington Post*, 2 November 2005, A1.
 51. *Draft Articles on Responsibility for Internationally Wrongful Acts with commentaries* (United Nations, 2001), http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; hereinafter *Draft Articles and Commentaries*.
 52. “The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,” 10 December 1984, 1465 *United Nations Treaty Ser.* no. 85; hereinafter CAT; “International Covenant on Civil and Political Rights,” 19 December 1996, 999 *United Nations Treaty Ser.* no. 171; hereinafter ICCPR.
 53. CAT, Art. 1; Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* 9 (New York, 2004); hereinafter *Torture by Proxy*.
 54. *Torture by Proxy* (see note 53), 36.
 55. *Ibid.*, 34.
 56. *Ibid.*, 9.
 57. *Ibid.*, 53-56.
 58. *Draft Articles and Commentaries*, (see note 51), 157.
 59. *Ibid.*, 158.
 60. *Ibid.*
 61. *Ibid.*, 159.
 62. *Ibid.*
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 65. *Ibid.*
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 67. *Below Radar* (see note 15), 24.
 68. *Ibid.*
 69. *Ibid.*, 28.
 70. *Draft Articles and Commentaries* (see note 51), 155.
 71. *Ibid.*
 72. *Ibid.*
 73. *Ibid.*, 153.

74. COE Report (see note 48), 5-7. Responses were received from forty-five of the forty-six states parties (*ibid.*, 2).
75. European Parliament Press Service, *Committee Hears First Testimonies* (see note 47).
76. COE Report (see note 48), 5.
77. *Ibid.*, 8.
78. *Ibid.*, 2, 7.
79. *Ibid.*, 9.
80. *Ibid.*, 8-9.
81. *Ibid.*, 9.
82. *Ibid.* This also discusses the situation of foreign intelligence activity at European military bases generally.
83. *Ibid.*, 9. This lists the key principles to be adhered to in investigating claims of abductions by foreign agents.
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