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The Story of *El-Masri v. Tenet*: Human Rights and Humanitarian Law in the “War on Terror”

Margaret L. Satterthwaite*

***The Apprehension and Transfer of Khaled El-Masri*¹**

Khaled El-Masri had been on the bus for many hours by the time he was asked to exit at the Macedonian border. A German national, El-Masri had left his home town of Senden the day before and was heading to Skopje, Macedonia for a short vacation. Things had recently become difficult at home; El-Masri was unemployed and lived in a small apartment with his wife and four small children. He planned to get away for a bit to clear his mind, and he thought Macedonia would be an inexpensive and interesting place to visit.

* Certain sections of this Chapter draw significantly on a series of articles I have published on the topic of rendition, including Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007); Margaret Satterthwaite, *Extraordinary Rendition and Disappearances in the “War on Terror,”* 10 GONZ. J. INT’L L. 70 (2006); and Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 THE LONG TERM VIEW 52 (2006). Work on this Chapter was supported by the Filomen D’Agostino Research Fund at New York University School of Law. I am grateful to Alison Nathan, Steven Watt, Ben Wizner, and Maria LaHood for comments on draft versions of this Chapter, and to Tafadzwa Pasipanodya (NYU J.D. ’08) and Mitra Ebadolahi (NYU J.D. ’08) for their impeccable research assistance and editing suggestions. Thanks also to Shannon Kunath (NYU J.D. expected ’09) and Ryan Gee (NYU J.D. expected ’10) for research help.

1. Unless otherwise noted, the facts in this section are taken from: Declaration of Khaled El-Masri in Support of Plaintiff’s Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), *aff’d sub nom.* *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007), *available at* http://www.aclu.org/pdfs/safefree/elmasri_decl_exh.pdf [hereinafter Declaration of Khaled El-Masri]. A brief note on the Arabic transliterations used in this Chapter: “El-Masri” has been adopted because this is the spelling used by Mr. El-Masri. For consistency, I capitalize “Al” and “El” in other Arabic names used in this Chapter.

The bus ride had been uneventful as it crossed through Germany, Austria, Slovenia, Croatia, and Serbia. It was about 3:00 pm when El-Masri was asked to step off the bus at the Macedonian border to talk to border officials. The officials asked what he planned to do in Macedonia, and how long he would be there. After El-Masri explained that he planned to stay about a week in Skopje, the border official allowed him to climb onto the bus again, and it headed off toward the city. After a few minutes, El-Masri asked the bus driver for his passport; the driver replied that he did not have it, and turned the bus around to allow El-Masri to retrieve it at the border crossing. The border officials told El-Masri that they could not return his passport, since there was a problem that would take some time to resolve. Unable to wait for him, the bus drove on to Skopje, leaving El-Masri behind with the border officials.

El-Masri was interrogated by Macedonian officials from about 6:00 pm until 10:00 pm that night—New Year’s Eve, December 31, 2003. He was asked about his home town—whether there were mosques in his neighborhood, who attended services there, and whether he had been invited by anyone to participate in Islamic activities. El-Masri was also asked whether he belonged to any Islamic groups and whether he prayed and fasted. El-Masri explained that although he had heard of some of the organizations mentioned, he did not belong to any of them. A while later, he was taken outside. It was a dark, foggy night. Some of the border guards were drunk in anticipation of the new year.

El-Masri was driven to Skopje and taken to a hotel. At the hotel, he was interrogated until the early morning hours. Although he could not speak the language well, El-Masri’s captors questioned him in English. Things continued like this for days. El-Masri was under constant surveillance; a team of nine men rotated on six-hour shifts. He was never left alone and was never allowed any privacy. Despite the fact that he obviously could not leave, when El-Masri asked if he was under arrest, the guards replied sarcastically: “Can you see handcuffs?”² El-Masri asked to see a lawyer, to call the German embassy, to call his family. His captors refused each of these requests. At one point El-Masri attempted to escape. One of the men forced him to stop by pointing a gun at his head.

After about a week, two officials arrived. They offered El-Masri a deal: if he admitted to being a member of Al Qaeda, they would return him to Germany. El-Masri refused. A few days later one of the officials returned to the room and told El-Masri that his case had been referred to the President of Macedonia. El-Masri again asked to see a representative of the German government. This request was again refused. A few days later, El-Masri stopped eating to protest his detention.

2. James Meek, “*They beat me from all sides*,” *GUARDIAN* (LONDON), Jan. 14, 2005.

One evening, El-Masri's captors demanded that he speak into a video camera. They told him to state his name and say that he had been treated well. El-Masri had been in the hotel room for twenty-three days. His captors told him that they were returning him to Germany, and they escorted him out of the building.

As soon as he was outside, two men approached El-Masri and grabbed his arms. Another man then handcuffed and blindfolded him. El-Masri was shoved into a vehicle and driven to a location where he was made to sit on a chair for some time.

Eventually, he was taken into a room where he was beaten, his clothes were sliced off silently, and he was thrown to the ground.³ He was subjected to a forceful anal probe and then made to stand. The blindfold was removed for a moment and photos were taken; during this time, El-Masri was able to see seven or eight men surrounding him. These men were dressed head to toe in black, with masks covering their heads and faces, and gloves covering their hands. The men diapered El-Masri, dressed him in new clothes, and blindfolded him again. They shoved earplugs into his ears and placed a hood over his head. Headphones were placed over his ears. His cuffed hands were chained to his waist, and his feet were shackled.

El-Masri was forced aboard a plane, shoved to the floor, and his legs and arms were secured in a spread-eagle position. He received two injections—one in each arm. Something was placed over his nose. El-Masri lost consciousness at some point. Although he was not alert the entire time, he thought the flight lasted about four hours. The plane made one stop. When the plane landed for the final time, El-Masri was taken outside and forced into a vehicle. After travelling for about ten minutes, El-Masri was pulled down a flight of stairs into a building. He was led into a cell, thrown onto the floor, and was beaten and kicked. His chains were removed and his blindfold was taken off.

El-Masri was left alone in the tiny, dirty cell made of concrete. Once his eyes had adjusted to the dim light, he could see graffiti on the walls written in Arabic, Urdu, and Farsi. When he looked around he saw one blanket, a pillow, some old clothes, and a bottle of fetid water. Though he had already been detained for more than three weeks, El-Masri's ordeal had just begun.

The Development of the Extraordinary Rendition and Secret Detention Program

Although he did not know it at the time, El-Masri's apprehension, transfer, and detention was part of a secret program that was approved

3. *Id.*

by President George W. Bush after the attacks of September 11, 2001.⁴ Aimed at taking terrorism suspects “off the streets,”⁵ the extraordinary rendition and secret detention program (“the Program”) reportedly⁶ involves the covert approval of “kill, capture or detain” orders for specific individuals.⁷ As the name implies, such “K–C–D” orders reportedly allow U.S. agents—secretly and without warning to those targeted—to apprehend, imprison, and perhaps even target for death those individuals who are determined to be eligible for the Program.

“Rendition to Justice” Becomes Extraordinary Rendition

While the term “extraordinary rendition” is newly in use, its cousin—“rendition to justice”—has been official U.S. policy for several decades. Rendition to justice was approved for use against terrorism suspects by President Ronald Reagan in 1986.⁸ Rendition was apparently authorized along with a variety of other procedures in National Security Decision Directive 207, which formalized U.S. policy to fight terrorism.⁹

4. See generally President George W. Bush, President Discusses Creation of Military Tribunals to Try Suspected Terrorists (Sept. 6, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>) [hereinafter President’s Sept. 6, 2006 Address]; President George W. Bush, Press Conference of the President (Sept. 15, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>). The authorization for the Program is discussed later in this Chapter.

5. President’s Sept. 6, 2006 Address, *supra* note 4.

6. Because the Program under discussion in this Chapter is by its very nature secretive, I will use terms such as “reportedly” and “apparently” where specified facts have not been plainly established.

7. See Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, ¶ 64, Doc. No. 11302 rev. (2007), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> [hereinafter *Council of Europe June 2007 Report*].

8. D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT’L L.J. 1, 2–3 (1988); see also Dana Priest, *CIA’s Assurances on Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A01; Shaun Waterman, *Analysis: Rendition a Routine Practice*, UNITED PRESS INT’L, Mar. 9, 2005 (citing a former intelligence official knowledgeable about rendition who explained that rendition was approved in 1986 by President Reagan along with the establishment of the Counterterrorist Center). It should be noted that rendition to justice has also been used since the 1980s to bring individuals suspected of drug trafficking or arms dealing to the United States to face trial. See *United States v. Noriega*, 746 F.Supp. 1506, 1511 (S.D. Fla. 1990), *aff’d*, 117 F.3d 1206 (11th Cir.1997) (where U.S. military forces arrested former Panamanian leader Manuel Noriega in Panama City and transferred him to the United States for trial on drug charges).

9. See U.S. Gen. Accounting Office, GAO/NSIAD-99-135, *Combating Terrorism: Issues to be Resolved to Improve Counterterrorism Operations 3* (1999). President Ronald Reagan’s National Security Decision Directive 207 has only been partly declassified; the sections discussing rendition have not been made public. See National Security Decision

According to reports, when it was first approved, rendition to justice involved the apprehension of suspected terrorists by U.S. agents in (1) countries in which no government exercised effective control (i.e., “failed states” or states in chaos because of civil war or other massive unrest); (2) countries known to plan and support international terrorism; or (3) international waters or airspace.¹⁰ These were locations where the U.S. government could not expect to obtain custody over an individual suspected of a crime using the traditional method of international extradition.

Extradition is a “formal process by which a person is surrendered by one state to another.”¹¹ It is the usual method for transfer of suspects and fugitives, and it is designed to protect the sovereignty of the nation where the suspect has taken refuge while also allowing the requesting state to obtain jurisdiction over an individual who is suspected of committing a crime subject to its criminal jurisdiction.¹² Under U.S. law, extradition requires a valid treaty authorizing the representative of a foreign state to request the transfer of a named individual.¹³ The request is followed by a judicial proceeding in which a federal judicial officer determines whether the crime is one covered by an extradition treaty, and whether there is probable cause to sustain the charge.¹⁴ Once these prerequisites are satisfied, the judicial officer certifies the individual as extraditable to the Secretary of State.¹⁵ The Secretary of State must then decide whether to surrender the alleged fugitive to the requesting foreign state.¹⁶

During the 1980s, the United States expanded the reach of its criminal law to cover a host of crimes against U.S. nationals or U.S. interests that occurred outside of U.S. territory.¹⁷ At the same time, the United States experienced significant difficulties obtaining jurisdiction over suspected terrorists, in part because the United States did not have

Directive 207: The National Program for Combating Terrorism (Jan. 20, 1986), *available at* <http://www.fas.org/irp/offdocs/nsdd/index.html>.

10. Findlay, *supra* note 8, at 3 (citing a classified annex to a Presidential report on renditions to justice).

11. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE* 1 (5th ed. 2007).

12. Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 *LOY. L.A. INT'L & COMP. L. REV.* 369, 371–72 (2003).

13. *See* 18 U.S.C. § 3184 (2006).

14. *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986).

15. 18 U.S.C. § 3184.

16. *Id.* §§ 3184, 3186; *see also* 22 C.F.R. § 95.2(b) (1999).

17. *See* Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 *GEO. WASH. INT'L L. REV.* 1 (2007), for an overview of this issue.

valid extradition treaties with the countries most commonly harboring terrorists, and in part because those states sometimes asserted that the suspects were not eligible for extradition, since their crimes were “political” crimes, acts that have traditionally been excluded from extradition arrangements.¹⁸ The rendition to justice policy was born of this frustration with what one former intelligence official has called “the enormously cumbersome and sometimes impossible process” of extradition.¹⁹

When carrying out renditions to justice, U.S. agents would apprehend the individual (sometimes luring suspects to the chosen location through elaborate ruses²⁰) and would then forcibly transfer the person to the United States, where the individual would face indictment on criminal charges for specific acts of terrorism aimed at the United States or its citizens.²¹ In sum, renditions to justice were a forcible means of obtaining personal jurisdiction over an individual who was sought on regular criminal charges.²² While some cases of rendition involved allegations of mistreatment during abduction or interrogation, it has never been suggested that the purpose of this program was to subject the detainees to torture or cruel, inhuman or degrading treatment, or to hold them secretly. Once in the United States, the rendered individual would be treated like any other federal detainee awaiting trial.

Rendition to justice came to be seen as an imperative method for bringing suspected terrorists to the United States for trial during the 1990s. Although the document itself remains classified, President George H.W. Bush authorized specific procedures for renditions in 1993 through National Security Directive 77 (“NSD-77”).²³ President Clinton followed the lead of Presidents Reagan and H.W. Bush by continuing the rendition program.²⁴ President Clinton signed Presidential Decision Directive 62 (“PDD-62”) on May 22, 1998, setting up streamlined responsibilities

18. See Findlay, *supra* note 8, at 6–15.

19. See Waterman, *supra* note 8.

20. Consider, for example, the case of Fawaz Yunis, who was lured into international waters by undercover FBI agents posing as drug traffickers and then arrested and transferred to an American munitions ship. The D.C. Circuit rejected Yunis’ legal objections to this method of gaining jurisdiction over him. See *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (upholding jurisdiction to try Yunis); *United States v. Yunis*, 859 F.2d 953, 957 (D.C. Cir. 1988) (describing arrest).

21. Findlay, *supra* note 8, at 3–4.

22. See generally Findlay, *supra* note 8.

23. See Fed’n of Am. Scientists, National Security Directives (NSD) [Bush Administration 1989–1993], available at <http://www.fas.org/irp/offdocs/nsd/index.html> (listing NSD-77 as classified).

24. See Fed’n of Am. Scientists, Presidential Decision Directives [PDD] Clinton Administration 1993–2000, available at <http://www.fas.org/irp/offdocs/pdd/index.html> (containing the unclassified segments of PDD-39).

for ten major anti-terror programs, the first of which was called “Apprehension, Extradition, Rendition, and Prosecution.”²⁵ Then–CIA Director George Tenet testified in 2000 that the CIA had rendered more than two dozen suspects between 1998 and 2000;²⁶ in 2004, he estimated the agency had conducted more than eighty renditions before September 11, 2001.²⁷

Two important Clinton-era renditions must be included in this historical overview because they mark the beginning of an important shift in approach: the cases of Tal’at Fu’ad Qassim and the Tirana Cell. According to Human Rights Watch, Qassim was an Egyptian national who had been granted asylum in Denmark and traveled to Bosnia in the mid–1990s, reportedly to write about the war.²⁸ Concerned by the increasing globalization of terrorism and the radical Islamists who the United States saw as the central players, the United States demanded that the Bosnian government expel militants found inside its territory during the war. When the Bosnian government failed to do so, the U.S. government targeted Tal’at Fu’ad Qassim for rendition—to Egypt, not to the United States. According to news reports, Qassim was taken aboard a U.S. navy ship and interrogated before being transferred to Egyptian custody in the Adriatic Sea.²⁹ As Human Rights Watch reports, “Qassim’s case is the first known rendition by the U.S. government to a third

25. PDD–62 has not been declassified. It is discussed in Nat’l Comm’n on Terrorist Attacks Upon the U.S., Staff Statement No. 5: Diplomacy (2004), available at http://govinfo.library.unt.edu/911/staff_statements/staff_statement_5.pdf. An unclassified summary of PDD–62 states: “To meet these challenges, President Clinton signed Presidential Decision Directive 62. This Directive creates a new and more systematic approach to fighting the terrorist threat of the next century. It reinforces the mission of the many U.S. agencies charged with roles in defeating terrorism; it also codifies and clarifies their activities in the wide range of U.S. counter-terrorism programs, from apprehension and prosecution of terrorists to increasing transportation security, enhancing response capabilities and protecting the computer-based systems that lie at the heart of America’s economy.” Press Release, The White House, Fact Sheet: Combating Terrorism: Presidential Decision Directive 62 (May 22, 1998), available at <http://www.fas.org/irp/offdocs/pdd-62.htm>.

26. See Waterman, *supra* note 8.

27. Panel I Day Two of the Eighth Public Hearing of the National Commission on Terrorist Attacks Upon the United States 30 (Mar. 24, 2004) (remarks of George Tenet, Director of Central Intelligence), available at http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf.

28. HUMAN RIGHTS WATCH, BLACK HOLE: THE FATE OF ISLAMISTS RENDERED TO EGYPT 19 (2005), available at <http://hrw.org/reports/2005/egypt0505/egypt0505.pdf>. Unless otherwise noted, the facts in this paragraph are taken from this publication.

29. *Id.* at 20 (citing Anthony Shadid, *Syria is Said to Hang Egypt Suspect Tied to Bin Laden*, BOSTON GLOBE, Nov. 20, 2001, at A1; Andrew Higgins & Christopher Cooper, *Cloak and Dagger: A CIA-Backed Team Used Brutal Means to Crack Terror Cell*, WALL ST. J., Nov. 20, 2001, at A1).

country with a record of torture.”³⁰ Qassim was reportedly executed while in Egyptian custody. Three years later, the CIA worked with Albanian secret police to monitor the activities of a suspected terrorist cell made up of Egyptian nationals living in Tirana. After determining to their satisfaction that the men were engaged in terrorist activities, the Albanian police apprehended four men and handed them to the CIA, which in turn rendered the men to Egypt. Within a month, the CIA rendered another Egyptian national from Bulgaria to Egypt. The men were tried as part of a mass trial and alleged that they had been severely abused while in pre-trial detention. According to a former intelligence official discussing this new kind of rendition, in which suspected terrorists were transferred to third states instead of being taken to the United States: “[t]he only requirement was that there be some kind of legal process (to which the rendered person would be subject)’ in the receiving country.”³¹

The model had been created. In the aftermath of 9/11, the complete transition would be made: intelligence-gathering, not trial, would become the purpose for transfer; the legal process requirement would be dropped; countries with a record of torture or secret CIA prisons hidden from the world would become the sites of detention; and rendition to justice would become extraordinary rendition.

El-Masri: Life in a CIA Prison in Afghanistan³²

On the second night of his imprisonment in Afghanistan, Khaled El-Masri was interrogated by four masked men. One of the men asked him if he knew where he was. He replied, “Yes, I know, I’m in Kabul.”³³ The man then replied, “It’s a country without laws. And nobody knows that you are here. Do you know what that means?”

The men accused him of having been to a terrorist training camp in Afghanistan, and said that he was Egyptian; that his German passport had been forged. El-Masri suggested that the men speak with the German authorities, who would explain that he was in fact a German citizen. El-Masri was interrogated only three or four times while being held in Afghanistan; each time, he asked to see a representative of the German government. Two of the men who interrogated him identified themselves as Americans.

30. *Id.* It is impossible to confirm whether this was the first such transfer, since such actions were covert. One former intelligence official told UPI that this form of rendition was common, and even qualified “rendition to justice” in the United States as the exception to the norm of rendition to third states. *See* Waterman, *supra* note 8.

31. Quoted in Waterman, *supra* note 8.

32. Unless otherwise noted, the facts in this section are taken from: Declaration of Khaled El-Masri, *supra* note 1.

33. *See* Meek, *supra* note 2.

El-Masri discovered that he could communicate in a rudimentary way with other prisoners through the cell walls. It was through these communications that El-Masri learned he was in Afghanistan.³⁴ In March, he and others began a hunger strike, demanding that their basic human rights be respected. After refusing food for twenty-seven days, El-Masri was taken to meet with an American man who claimed to be the prison director, along with three other men. When asked why he was on hunger strike, El-Masri explained that he was protesting his abduction and detention without charge or contact with the outside world, and the inhumane conditions of his confinement. Claiming that he did not have the authority to release El-Masri, the prison director admitted that he knew El-Masri had not committed any crimes. On April 10, after thirty-seven days without food, El-Masri was force-fed; the next day he became very ill and was treated with antibiotics.

A few weeks later, El-Masri was taken to see an American man who said he was a psychologist; this man said he had come from Washington, D.C. to see El-Masri. After their conversation, the man told El-Masri that he could expect to be released soon. A few days later, the prison director came to see El-Masri with a man in uniform who spoke German and identified himself as "Sam." This man interrogated El-Masri, asking the same kinds of questions the Americans had asked. Although he would not answer when asked if he was a German official³⁵, from the way he looked and from his accent, El-Masri was certain that Sam was German.³⁶ Before Sam left, he told El-Masri that the authorities would now decide whether to release him, and that this assessment could take a week.

The next day, El-Masri resumed his protest hunger strike. That night, the German official, the American prison director, and a doctor came to his cell. They informed El-Masri that he would be released within eight days.

The Scope and Authorization of the Extraordinary Rendition Program

In many respects, the stories of men like Khaled El-Masri are among the main sources of information about the U.S. extraordinary rendition and secret detention Program. Although official acknowledgments about the Program continue to emerge, the U.S. government has

34. See Mirjam Gehrke, *German Seized by CIA Says He Feared for His Life*, DEUTSCHE WELLE, Jan. 21, 2006, available at <http://www.dw-world.de/dw/article/0,2144,1862861,00.html>.

35. See Meek, *supra* note 2.

36. See Christine Pöhlmann, *German Describes CIA Ordeal in Afghanistan*, AGENCE FRANCE-PRESSE, June 22, 2006.

not released comprehensive information about rendition and secret detention; still unconfirmed are the exact number and identities of people subject to “K–C–D” orders, the number and identities of people rendered to third countries for interrogation, and the number and identities of individuals held in secret CIA “black sites.”

Concerning transfers to foreign governments, CIA Director Hayden has said that the number of individuals subject to rendition since 2001 is “mid-range, two figures,” and investigative journalist Dana Priest has reported that her sources estimate that about seventy detainees have been subject to extraordinary rendition.³⁷ In an oft-cited 2005 *New Yorker* article, Jane Mayer estimated that there had been between 100 and 150 transferees.³⁸ Other estimates reach several thousand.³⁹ The Egyptian government alone has stated that approximately sixty to seventy detainees had been transferred to its custody between September 11, 2001, and May 2005.⁴⁰ Because of the confusion over definitions and the related practices involved in the U.S. government’s “War on Terror” strategy, it is impossible to know with any certainty how many people have been subject to extraordinary rendition. One explanation for the range in estimates is that it appears likely that a larger number of individuals were secretly transferred to the custody of foreign governments, while comparatively few were held directly by the CIA in “black sites.”

A presidential directive signed on September 17, 2001—less than one week after the attacks of September 11—purportedly provided the

37. See Council on Foreign Relations, *A Conversation with Michael Hayden*, Sept. 7, 2007, available at <http://www.cfr.org/publication/14158/>; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate is Growing within Agency about the Legality and Morality of Overseas System Set up After 9/11*, WASH. POST., Nov. 2, 2005, at A1. For a comprehensive account of publicly available information about the Program, see CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ON THE RECORD: U.S. DISCLOSURES ON RENDITION, SECRET DETENTION, AND COERCIVE INTERROGATION (2008), available at <http://www.chrgj.org/>.

38. See Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106, 107 (citing Scott Horton); see also CIA ‘Outsourcing Torture,’ AGENCE FRANCE PRESSE, Feb. 7, 2005, available at <http://www.commondreams.org/headlines05/0207-12.htm> (“Scott Horton—an expert on international law who has examined CIA renditions—estimates that 150 people have been picked up in the CIA net since 2001.”).

39. See CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE (CHRGJ), NYU SCHOOL OF LAW, BEYOND GUANTÁNAMO: TRANSFERS TO TORTURE ONE YEAR AFTER *RASUL v. BUSH* 3 (2005), available at <http://www.chrgj.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf> (quoting Jane Mayer: “One source knowledgeable about the rendition Program suggested that the number of *renditions* since September 11, 2001 may have reached as high as several thousand” (citation omitted)).

40. Shaun Waterman, *Terror Detainees Sent to Egypt; Official, U.S. Deny Torture is Condoned*, WASH. TIMES, May 16, 2005, at A4 (quoting the Prime Minister of Egypt).

CIA with legal authority for the Program.⁴¹ Although the directive remains classified, the Council of Europe and the media have reported that it greatly expanded the CIA's authority to operate independently and to apprehend, transfer, detain, or even kill individuals designated for such treatment.⁴² Attorneys from the Department of Justice, the CIA, and the Administration are reportedly involved in the designation of individuals who become eligible to be captured, detained, or even killed.⁴³

On September 6, 2006, President Bush officially acknowledged that the U.S. government had created what he called a "separate program operated by the Central Intelligence Agency" to detain and interrogate individuals who were suspected of being "the key architects of the September the 11th attacks, and attacks on the USS Cole, an operative involved in the bombings of our embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians across the world."⁴⁴ In a companion fact sheet, the Office of the Director of National Intelligence set out key facts concerning the Program.⁴⁵ It is important to note that these disclosures—and the information that has cumulated since—did not include anything about authorization to "kill" designated suspects, and what is known about this element of the Program, assuming there is such an element, remains obscure.

President Bush's September 6, 2006 statement came during a legislative battle in which he sought explicit authorization for military commissions to try suspected terrorists. The President sought such explicit authorization because the Supreme Court had—a few months earlier—struck down the existing military commissions system. In *Hamdan v. Rumsfeld*, the Court held that the commission created to try

41. The Presidential Directive has not been declassified, but the CIA admitted its existence during the course of a lawsuit by the ACLU. See *Leahy 'brushed off' on Secret Terror Docs*, UNITED PRESS INT'L, Jan. 3, 2007; Press Release, Am. Civil Liberties Union, CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad (Nov. 14, 2006), available at <http://www.aclu.org/safefree/torture/27382prs20061114.html>.

42. See *Council of Europe June 2007 Report*, *supra* note 7, at 11–12; TYLER DRUMHELLER, ON THE BRINK: AN INSIDER'S ACCOUNT OF HOW THE WHITE HOUSE COMPROMISED AMERICAN INTELLIGENCE 35 (2006). With respect to killing, see Barton Gellman, *CIA Weighs 'Targeted Killing' Missions: Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists*, WASH. POST, Oct. 28, 2001, at A01.

43. See *Council of Europe June 2007 Report*, *supra* note 7, at 12.

44. President's Sept. 6, 2006 Address, *supra* note 4.

45. See Office of the Director of National Intelligence, Summary of the High Value Terrorist Detainee Program (Sept. 6, 2006), available at <http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf>; see also Office of the Director of National Intelligence, Biographies of High Value Terrorist Detainees Transferred to the U.S. Naval Base at Guantánamo Bay (Sept. 6, 2006), available at <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>.

individuals held at Guantánamo “lack[ed] power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.”⁴⁶ In reaching this holding, the Court also signaled that Article 3 (“Common Article 3”)—common to all four of the 1949 Geneva Conventions⁴⁷ and designed to provide minimum guarantees of humane treatment for all individuals detained in connection with any type of armed conflict—operates as a minimum floor for the treatment of individuals apprehended in the “War on Terror,” at least those initially detained in Afghanistan. Soon after the *Hamdan* decision, the media reported that the White House believed the CIA to be bound by Common Article 3 under the *Hamdan* rule; the CIA did not comment on the issue.⁴⁸

The CIA emptied out its “black sites”—at least temporarily—following the *Hamdan* decision. In his September 6 speech, President Bush announced the transfer of fourteen named “High-Value” detainees from CIA custody to the base at Guantánamo and stated that “[t]he current transfers mean that there are now no terrorists in the CIA program.”⁴⁹ Human rights groups later reported on the cases of two individuals who had been held in “black sites” until soon after the *Hamdan* decision, when they were returned to their states of nationality.⁵⁰ Media reports of CIA agents purchasing insurance protection from potential lawsuits connected to the Program surfaced.⁵¹ Government officials believed the extraordinary rendition and secret detention Program to be in jeopardy at this time. Explaining the need for the Program, the President said that “as more high-ranking terrorists are captured, the need to obtain

46. 548 U.S. 557 (2006).

47. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

48. See Mark Mazzetti & Kate Zernike, *White House Says Terror Detainees Hold Basic Rights*, N.Y. TIMES, July 12, 2006. For a discussion of the debate within the Administration concerning the applicability of Common Article 3 to terrorism suspects, see Tim Golden, *Detainee Memo Created Divide in White House*, N.Y. TIMES, Oct. 1, 2006, at A1.

49. President’s Sept. 6, 2006 Address, *supra* note 4.

50. See, e.g., AMNESTY INT’L, UNITED STATES OF AMERICA: A CASE TO ANSWER: FROM ABU GHRAIB TO SECRET CIA CUSTODY: THE CASE OF KHALED AL-MAQTARI 26 (2008) [hereinafter THE CASE OF KHALED AL-MAQTARI]; HUMAN RIGHTS WATCH, GHOST PRISONER: TWO YEARS IN SECRET CIA DETENTION 24 (2007).

51. See, e.g., Georg Mascolo & Matthias Gebauer, *Milan’s Extraordinary Renditions Case: The CIA in the Dock*, SPIEGEL (HAMBURG), Jan. 10, 2007; Mayer, *supra* note 38; R. Jeffrey Smith, *Worried CIA Officers Buy Legal Insurance: Plans Fund Defense In Anti-Terror Cases*, WASH. POST, Sept. 11, 2006, at A01.

intelligence from them will remain critical—and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.’⁵²

Congress would have to authorize the Program if it was to continue. Weeks after President Bush announced the existence of the Program, Congress passed the Military Commissions Act⁵³ (MCA), which sets out procedures for detaining, interrogating, and trying “unlawful enemy combatants” as defined in the Act.⁵⁴ President Bush considered the MCA sufficient approval of the Program,⁵⁵ although there is in fact no authorization for secret detention or extraordinary rendition in the law.⁵⁶ In July 2007, President Bush issued an executive order explicitly affirming that the CIA runs “a program of detention and interrogation.”⁵⁷ In the last few years, a number of individuals have been held secretly by the CIA before being transferred to Guantánamo, and the CIA has acknowledged that the Program continues.⁵⁸

In addition to the facts that were made public in September 2006, careful observers have been able to piece together a picture of the system based on a variety of sources, including: reports about released detainees;⁵⁹ investigations conducted by inter-governmental organizations such

52. President’s Sept. 6, 2006 Address, *supra* note 4.

53. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28 U.S.C.).

54. For a summary of the MCA’s troubled relationship to international law, see John Cerone, *The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and U.S. Law*, ASIL Insights, Nov. 13, 2006, available at <http://www.asil.org/insights/2006/11/insights061114.html>.

55. See President George W. Bush, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> (stating that “This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives.”).

56. In October 2006, John Bellinger, Legal Adviser to the Department of State, stated that that “[t]he act itself does not specifically address the CIA program.” See John B. Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing on the Military Commission Act of 2006 (Oct. 19, 2006), available at <http://fpc.state.gov/fpc/74786.htm>.

57. Exec. Order 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

58. See Press Release, Human Rights Watch, U.S.: Close CIA Prisons Still in Operation (Apr. 27, 2007), available at <http://hrw.org/english/docs/2007/04/27/usdom15795.htm> (discussing the CIA’s secret detention and subsequent transfer of Abd Al-Hadi Al-Iraqi); see also *The Charlie Rose Show: Interview with Director Michael Hayden* (PBS television broadcast Oct. 22 & 23, 2007) (transcript available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/interview-with-charlie-rose.html>) (in which CIA Director Michael Hayden explains the continuation of the U.S. Program of rendition and CIA detention).

59. THE CASE OF KHALED AL-MAQTARI, *supra* note 50, at 26; AMNESTY INT’L, USA: BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND “DISAPPEARANCE,” (2006); CHRGGJ, SURVIVING THE DARKNESS: TESTIMONY FROM THE U.S. “BLACK SITES” (2007), available at <http://www.chrgj.org/projects/docs/survivingthedarkness.pdf>; Human Rights Watch, *supra* note 50, at 24.

as the Council of Europe and the European Union;⁶⁰ statements about specific aspects of the Program by various governmental agencies;⁶¹ and documents released through litigation.⁶²

What follows is a snapshot of the functioning and scope of the Program, based on these sources. The extraordinary rendition and secret detention Program is made up of three main components: apprehension and transfer operations, CIA “black sites,” and sites in foreign countries where individuals are held at the behest of the United States. Apprehension and transfer involves a “rendition team” made up of individuals dressed entirely in black and wearing face masks. These individuals forcibly strip the detainee, subject him to a body cavity search, photograph him while naked, and dress him in a diaper before putting him in a new outfit. Detainees have reported being subjected to beatings during this process. The team next restrains the prisoner using handcuffs, ankle shackles, and chains, and deprives the detainee of sensory perception by covering his ears and eyes. Detainees are then placed aboard a plane (often a small, erstwhile civilian plane) and flown—sometimes for great distances.

Detainees are taken either to a secret CIA prison—a so-called “black site”—or delivered to a foreign government. Some detainees have experienced both fates. In the “black sites,” guards dress in black and wear face masks, and detainees are often subjected to sensory manipulation including the use of excruciatingly loud music, horrifying sounds, pitch dark conditions, and sensory deprivation (e.g., through the use of constant white noise). Some detainees have been subjected to waterboarding—simulated drowning—and other “enhanced interrogation techniques” (or, as President Bush has called them, an “alternative set of procedures”⁶³) reportedly approved for use on “high-value detainees.”⁶⁴

60. See Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, Doc. No. AS/Jur (2006) 03 rev. (2006), available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf [hereinafter *Council of Europe January 2006 Report*].

61. For a detailed catalog of facts concerning the secret detention and extraordinary rendition Program that have been acknowledged by the U.S. government, see CHRGJ, *supra* note 37.

62. Press Release, Am. Civil Liberties Union, Newly Released Army Documents Point to Agreement Between Defense Department and CIA on “Ghost” Detainees, ACLU Says (Mar. 10, 2005), available at <http://www.aclu.org/safefree/general/17597prs20050310.html>. The declassified documents are available at American Civil Liberties Union: Torture FOIA, available at <http://www.aclu.org/intlhumanrights/gen/13794res20050429.html>. See also Press Release, Amnesty International, Center for Constitutional Rights & CHRGJ, Rights Groups Challenge CIA for Failure to Release More than 7000 Documents Relating to Secret Detention, Rendition, and Torture Program (June 26, 2008), available at <http://www.chrgj.org/projects/detainees.html#Disappearances>.

63. See generally President’s Sept. 6, 2006 Address, *supra* note 4.

Detention in foreign facilities involves confinement in maddeningly small spaces (such as in the notorious *Far Falestin* prison in Syria⁶⁵) and the use of torture such as *falaka* (beatings on the soles of the feet, reportedly used in Jordan⁶⁶), sexual abuse (reportedly used in Jordan and Egypt⁶⁷), and electric shocks (reportedly used in Egypt⁶⁸). Whether in black sites or in foreign facilities, detainees are not given access to the outside world; they are not formally charged with any crime; and they are not allowed to seek the assistance of their governments.

El-Masri: Release⁶⁹

On May 28, 2004, El-Masri was again handcuffed, shackled, and blindfolded. He was driven to an airstrip, and his blindfold was removed. His suitcase was returned to him, and he was allowed to change into his own clothes before his captors placed him in handcuffs, shoved earplugs into his ears, and covered his ears and eyes. He was led aboard a plane and strapped to a seat. During the flight, El-Masri became convinced that he was being taken to another country for execution. The German official who had visited him in prison accompanied him on this flight, and removed El-Masri's headphones during the flight. He told El-Masri that one of the reasons there had been such a long delay in releasing him was that the U.S. authorities wanted to ensure there was no evidence that he had been imprisoned by them in Afghanistan.⁷⁰ The official told El-Masri that he was being taken to a European country that was not Germany.

64. For admissions concerning waterboarding by former CIA Officer Daniel Kiriakou, see *CIA man defends "water-boarding,"* BBC NEWS, Dec. 11, 2007, available at <http://news.bbc.co.uk/2/hi/americas/7137750.stm>; Darius Rejali, *5 Myths About Torture and Truth*, WASH. POST, Dec. 16, 2007, at B03; and Joby Warrick & Dan Eggen, *Waterboarding Recounted: Ex-CIA Officer Says It 'Probably Saved Lives' but Is Torture*, WASH. POST, Dec. 11, 2007, at A01. For a description of the six "enhanced interrogation techniques that were reportedly approved for use on 'high-value'" detainees, see Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

65. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of Professor Stephen J. Toope, Fact Finder* 13–17 (2005), available at http://www.ararcommission.ca/eng/ToopeReport_final.pdf (describing Maher Arar's detention in *Far Falestin* prison).

66. See, e.g., AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2007: THE STATE OF THE WORLD'S HUMAN RIGHTS 155 (2007), available at <http://report2007.amnesty.org/document/15>.

67. *Id.*

68. See Letter from Abu Omar while in an Egyptian prison, *translated in Abu Omar, This is How They Kidnapped Me*, CHI. TRIB., Jan. 7, 2007, available at <http://www.chicagotribune.com/news/nationworld/chi-cialetter-story,1,2033270.story>.

69. Unless otherwise noted, the facts in this section are taken from Declaration of Khaled El-Masri, *supra* note 1.

70. Meek, *supra* note 2.

After the plane landed, the German official told El-Masri that some other people would help him get back to Germany. He was taken to a waiting vehicle, still blindfolded and handcuffed. This vehicle drove for more than three hours over winding, mountainous roads. During a brief stop, El-Masri was able to hear three men leaving the vehicle, and then three men getting into the vehicle. They drove for another three hours on what seemed to be both paved and unpaved roads. When the vehicle stopped for the last time, El-Masri was removed from the car and made to turn around; one of the men removed his blindfold, took off the handcuffs, and handed El-Masri his suitcase and passport. The man told El-Masri to walk down a path and not to look back.

Terrified that he was about to be shot in the back, El-Masri walked into the dark night; he heard the car leave. Soon, El-Masri encountered three armed men who asked for his passport. Seeing that he did not have a visa, the men accused El-Masri of being in Albania illegally; this was the first time El-Masri was told where he was. He was taken to a building where another official asked him why he was in Albania. El-Masri explained that he had been abducted in Macedonia and imprisoned in Afghanistan. The official laughed, saying that no one would believe such a story. The official told El-Masri that the officers would take him to the airport and put him on a flight to Germany.

Sure enough, officials accompanied El-Masri to the airport and took him through customs and immigration control. He boarded a plane that took him to Frankfurt International Airport. When he landed at 8:45 am on May 29, 2004, Khaled El-Masri was sixty pounds lighter than he had been when he left home almost six months before; he had grown a beard and now had long hair. Almost unrecognizable, El-Masri made his way home.

Is this Legal? Extraordinary Rendition and International Human Rights Law

Although there have been vigorous debates in the United States about the legality of the extraordinary rendition and secret detention Program, intergovernmental organizations such as the Council of Europe, the European Parliament, and numerous United Nations bodies have stated unequivocally that the Program contravenes international human rights law binding on the United States.⁷¹

⁷¹. See U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999: Addendum: United States of America*, ¶ 5, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) [hereinafter *U.S. Second Periodic Report to Committee Against Torture*] (considering U.S. report submitted May 6, 2005); U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); *Council of Europe June 2007 Report*, *supra* note 7;

The relevant human rights norms protecting against extraordinary rendition and secret detention include the following: the prohibition of *refoulement*, which proscribes transfers to a risk of torture; the prohibition of enforced disappearances, which prohibits the concealment of the fate and whereabouts of individuals deprived of their liberty; and the norm against torture and cruel, inhuman or degrading treatment.⁷² This section will briefly summarize these norms in the context of the extraordinary rendition and secret detention Program.

The prohibition of *refoulement* is set out in a wide variety of human rights instruments.⁷³ Most relevant to the United States and its partners in the Program are the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment (“Torture Convention” or “CAT”) and the International Covenant on Civil and Political Rights (“ICCPR”), which the U.S. government has ratified. CAT article 3 prohibits the transfer of individuals to states where they may be in danger of torture: “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 7 of the ICCPR prohibits torture and cruel or degrading treatment; this article has been understood to implicitly include a *non-refoulement* rule. Both of these articles have been interpreted to apply to all forms of inter-state transfer of individuals, and therefore should be read to apply to informal transfers such as rendition. When extraordinary rendition involves transfer to a country where an individual is at real risk of torture or cruel, inhuman or degrading treatment, the transfer is prohibited by binding international human rights law.

Transfers to secret detention are likewise prohibited, in part because prolonged incommunicado detention of the type that detainees experience in CIA “black sites” has itself been found to constitute cruel and inhuman treatment or torture. In addition, secret detention is itself unlawful under international human rights law. The U.N. Committee Against Torture has found that secret detention is a *per se* violation of

Council of Europe June 2006 Report, supra note 60; Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007 (2007), available at http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf; Draft Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur.Parl. Doc. A6-0213/2006 (2006), available at <http://www.statewatch.org/cia/reports/ep-cia-interim-report-english.pdf>.

72. Also relevant but not addressed here are, *inter alia*, rights against arbitrary detention, rights to consular access, and due process rights.

73. See Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantánamo and Refoulement*, Chapter 10 in this volume, for a discussion of the principle of *non-refoulement* as it applies to the United States in the refugee context.

the Torture Convention.⁷⁴ Further, when carried out in the manner used in the Program, secret detention amounts to enforced disappearance. The recently-concluded International Convention for the Protection of All Persons from Enforced Disappearance (adopted by the General Assembly in December 2006) defines enforced disappearance as:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, 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. (Article 2)

While the United States has not ratified this convention, it is bound by the customary international law norm prohibiting enforced disappearance. In addition, a wide variety of other human rights norms are violated through rendition and secret detention, including: the prohibition on arbitrary detention; rights to due process and judicial guarantees; and the right to be free from cruel, inhuman and degrading treatment.

The U.S. government has focused a great deal of energy in the last several years on efforts to carve out legal space for its actions in the “War on Terror.” Indeed, it has systematically produced legal arguments—pursuant to both international and domestic law—to support its actions. In relation to the extraordinary rendition and secret detention Program, the strategy has been to try to clear a space for actions free of international legal constraints.

The first argument is that human rights law only applies within the territory of a ratifying state—in other words, that human rights norms do not apply extraterritorially. In its reports to the United Nations treaty bodies monitoring the implementation of human rights treaties, the United States has consistently maintained that, unless explicitly specified otherwise, it is bound by human rights treaties only in activities it conducts within U.S. territory.⁷⁵ In other words, if you are outside

74. See Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture; United States of America*, ¶ 17, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) (finding that detaining individuals in secret sites constitutes a “per se” violation of the Convention), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf).

75. See, e.g., U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of States Parties Due in 1995: Addendum: United States of America*, ¶¶ 183–88, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (considering U.S. report submitted Oct. 15, 1999), available at http://www.bayefsky.com/reports/usa_cat_c_28_add.5_1999.pdf. The U.S. government has made this argument

the United States but under the control of the U.S. government, you are unprotected by the human rights norms set out above.

While this argument may have traction under U.S. law, it ignores the relevant jurisprudence of international and regional human rights bodies.⁷⁶ Broadly speaking, human rights bodies have determined that treaties apply to two separate extraterritorial situations: cases where states have effective control over territory, and cases where states have power over an individual.⁷⁷ Under the effective control doctrine, human rights treaties would apply to places abroad that are under the control of the United States, as well as to the physical territory of the state itself. This means that human rights treaties would apply to U.S. conduct at Guantánamo and other locations where the United States has detention centers. If this were the only scenario in which human rights apply extraterritorially, human rights treaties would protect people in those spaces but not individuals transferred or detained by U.S. authorities in territories not under U.S. control (e.g., El-Masri's capture and rendition from Macedonia). The second scenario, however—governed by the personal control doctrine—extends to protect *all* individuals who are within the *personal control* of U.S. agents, no matter where they happen to be in the world.

The personal control doctrine is especially suitable to cases of transfer and detention, which involve physical custody of individuals by state agents. This reading ensures that human rights treaties fulfill their object and purpose—to protect those vulnerable to state abuses—instead of letting states avoid their duties by moving individuals farther and farther away from the protection of courts, oversight bodies, and humanitarian agencies. Under the personal control test, human rights law applies to all individuals who are apprehended and transferred by a

consistently in reports to the U.N. filed in recent years. See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) at 1351–1354 [hereinafter Satterthwaite, *Rendered Meaningless*].

76. Although the U.S. Supreme Court has rejected the extraterritorial application of the *non-refoulement* rule set out in the United Nations Convention Relating to the Status of Refugees, see Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantánamo and Refoulement*, Chapter 10 in this volume, the extraterritorial application of the Convention Against Torture is a separate issue. Congress has passed legislation implementing the Convention's *non-refoulement* obligation, setting out U.S. policy as follows: "the United States [shall] not . . . expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note (2000) (emphasis added). For an in-depth discussion of this issue, see Satterthwaite, *Rendered Meaningless*, *supra* note 75, at 1376–1379.

77. For citations and in-depth discussion of the doctrines discussed in this paragraph, see Satterthwaite, *Rendered Meaningless*, *supra* note 75, at 1351–1375.

state—here the United States. International human rights law therefore prevents transfers to countries where the individual is at risk of torture or secret detention.

In the instances in which the United States has directly defended aspects of the Program, it has emphasized the promises—so-called “diplomatic assurances”—that it obtains from cooperating countries concerning humane treatment of the detainees it transfers. Very little is known about the process for obtaining diplomatic assurances as part of the Program. Anonymous officials have told the media that CIA-initiated transfers have routinely been accompanied by assurances. One intelligence official specified that assurances are used whenever renditions were carried out with the purpose of delivering the detainee for interrogation, and not for trial. Recently retired CIA officers have said that verbal assurances are required by the CIA’s Office of General Counsel whenever a rendition is carried out. Far from reducing the risk of torture, however, these assurances were known to be “a farce,” according to a CIA officer who participated in the rendition Program.⁷⁸ The U.S. government has explained to the United Nations’ human rights bodies that it relies on such assurances “as appropriate”; assurances are balanced against concerns that the individual may be at risk of torture in the custody of the country’s officials.⁷⁹ This balancing approach is out of line with human rights standards concerning diplomatic assurances, which focus on safeguards that must accompany any use of assurances.⁸⁰ U.S. practice is in blatant violation of these safeguards.

Worse, if renditions are being conducted with the intent of subjecting an individual to coercive interrogations, the incentive structure is classically and horribly perverse: the sending country has an investment in the receiving country’s abusive practices, and both states want those abuses to remain secret. As one official told *The Washington Post*, “They say they are not abusing them, and that satisfies the legal requirement, but we all know they do.”⁸¹

At War with Al Qaeda? Extraordinary Rendition and International Humanitarian Law

As the case of Khaled El-Masri demonstrates, extraordinary rendition often takes place far from any traditional battlefield. Whether these operations qualify as part of an armed conflict that is governed by

78. Priest, *supra* note 8.

79. United States, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America: Response of the United States of America, at 32–37, available at <http://www.usmission.ch/Press2006/CAT-May5.pdf> (submitted to the Comm. Against Torture).

80. Satterthwaite, *Rendered Meaningless*, *supra* note 75, at 1379–86.

81. Priest, *supra* note 8.

humanitarian law⁸²—either its authorizing norms or its limiting rules—is hotly contested.⁸³ Briefly, the heart of the matter is this: humanitarian law authorizes—or at least accepts—the use of lethal force by privileged combatants (armies and militias that follow the rules of war), and limits the use of force and coercion in relation to protected persons (including prisoners of war, civilians, and those placed *hors de combat* because of injury or sickness). In relation to extraordinary rendition, the question is what law applies to the transfers and secret detention of individuals the United States asserts are unlawful combatants in a new kind of war.

Among the most controversial arguments the United States has made is that it is engaged in an armed conflict against Al Qaeda—or more broadly, against terrorism⁸⁴—in which the entire world is literally a battlefield where unlawful combatants are subject to being killed, cap-

82. International humanitarian law—the law of armed conflict—is made up of both treaty law and customary international law. The most important treaties governing the treatment of individuals during times of armed conflict are the four Geneva Conventions of 1949. These treaties—which have been ratified by every state in the world—together set out basic rules of humane treatment. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

83. In launching its attacks on Afghanistan, the Administration declared that it was engaged in an international armed conflict. At first, this approach was largely accepted by the international community, and the legality of the U.S. resort to force was, on the whole, accepted: the magnitude of the attacks on the World Trade Center and the Pentagon were deemed sufficient to trigger the inherent right of self-defense, and few countries argued that it was unlawful or inappropriate to target the Taliban as well as Al Qaeda in response. The controversy began when the United States declared that detainees picked up on the battlefield in Afghanistan were not entitled to protection under the Geneva Conventions—neither Geneva III (which protects prisoners of war) nor Geneva IV (which protects civilians). *See, e.g.*, Memorandum from Alberto Gonzales on Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban to the President, (January 25, 2002), *reprinted in* THE TORTURE PAPERS 118–19 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) (“In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning and renders quaint some of its provisions . . .”).

84. As Marco Sassòli explains:

Astonishingly . . . the administration proceeded to declare that it was engaged in a single worldwide international armed conflict against a non-State actor (Al Qaeda) or perhaps also against a social or criminal phenomenon (terrorism) if not a moral category (evil). This worldwide conflict started—without the United States characterizing it as such at that time—at some point in the 1990s and will continue until victory.

tured or detained without notice (hence the potential to issue “K-C-D” orders).⁸⁵ This argument is aimed at legitimating the Administration’s use of military or military-like techniques against a non-state enemy, while insulating its actions against that enemy from assessment under international humanitarian or human rights law. The argument proceeds generally as follows: the United States is engaged in an international armed conflict against a non-state enemy (Al Qaeda, a transnational terrorist network and its affiliates). As such, the conflict is not regulated by the protective norms of humanitarian law, which apply either to armed conflicts between nations (“international armed conflict,” as described by Common Article 2 of the 1949 Geneva Conventions),⁸⁶ or to intrastate armed conflict (“non-international armed conflict,” as described by Common Article 3 of the Geneva Conventions).⁸⁷ Because this new kind of armed conflict is not covered by the “quaint” provisions of international humanitarian law,⁸⁸ the United States is

Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 *LAW & INEQ.* 195, 197–98 (2004).

85. The President determined on February 7, 2002, that the Geneva Conventions applied to the “present conflict with the Taliban,” but found that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under article 4 of [the Third] Geneva [Convention].” Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees to the Vice President, *reprinted in* THE TORTURE PAPERS, *supra* note 83, at 134 (determining that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . .”). This decision was based on a series of memos prepared by Bush Administration officials, the State Department, and the military concerning the proper interpretation of several technical provisions of Geneva III. *See generally* memoranda *reprinted in* THE TORTURE PAPERS, *supra* note 83, at 138–43.

86. *See* Geneva III art. 2 (stating that the Convention shall apply to “all cases of declared war or of any other armed conflict”).

87. Before the June 2006 *Hamdan* ruling, the United States denied that even Common Article 3 standards applied to detainees it determined were unlawful combatants, apparently concluding that such individuals are not protected by the Geneva Conventions at all, but instead, that as “enemy combatants” they essentially fall outside the laws of war. *See generally* memoranda *reprinted in* THE TORTURE PAPERS, *supra* note 83, at 138–43. This decision has been widely critiqued on the basis that—to use the words of the ICRC, writing in 1958:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.

INT’L COMM. OF THE RED CROSS, COMMENTARY: IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (1958) (*principally authored by* Oscar M. Uhler & Henri Coursier; *edited by* Jean S. Pictet).

88. *See, e.g.,* Memorandum from Alberto R. Gonzales, *supra* note 83 (“In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning and renders quaint some of its provisions . . .”).

entitled to adapt its techniques to the circumstances without running afoul of the rules. One of these adaptations is the use of extraordinary rendition and secret detention.

In its interactions with United Nations human rights bodies, the United States has asserted that it is engaged in a “War on Terror” that is governed exclusively by the laws of armed conflict.⁸⁹ In making this assertion, the United States has argued that international humanitarian law is the applicable *lex specialis*,⁹⁰ i.e., that humanitarian law provides the relevant substantive rules regarding the treatment of individuals in the “War on Terror.” In combination, the Administration’s reference to the *lex specialis* rule⁹¹ and its argument that it can “render” suspected terrorists as part of its “War on Terror,” seem to indicate that the U.S. government believes that no law applies to protect individuals against such transfers. The legal vacuum is constructed as follows: since the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al Qaeda members, however, are unprivileged combatants, and thus unprotected by rules found in the Geneva Conventions concerning the transfer of prisoners of war or other protected persons. Finally, the argument concludes, the rules of human rights law do not apply either, since humanitarian law operates as *lex specialis* to oust such rules from application. For this reason, suspected terrorists may be informally transferred from place to place without those transfers being unlawful, since no law applies.

A similar—though more textual—argument has been made in relation to secret detention. In the few instances in which the United States has defended the practice, it has alleged that certain individuals who pose a threat to security are not protected by the Geneva Conventions’ provisions concerning access by the International Committee of the Red Cross (“ICRC”) to detainees.⁹² Simultaneously, the United States implies that the Geneva Conventions are the only relevant source of any obligations to allow access to detainees or to disclose the location of such detainees held in the context of armed conflict. In other words, the United States indicates that because such individuals are not covered by

89. See UNITED STATES, REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE U.N. SPECIAL RAPPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA 16 (2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> (“The United States is engaged in a continuing armed conflict against Al Qaeda, and customary law of war applies to the conduct of that war and related detention operations.”).

90. *Id.* at 22.

91. The international law rule *lex specialis derogat legi generali* means that a special rule prevails over a general rule. See MALCOLM N. SHAW, INTERNATIONAL LAW 116 (5th ed., 2003).

92. See, e.g., Steven R. Weisman, *U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret*, N.Y. TIMES, Dec. 10, 2005, at A10.

the Convention provisions concerning access to detainees, they are not protected against secret detention.⁹³ The ICRC has repeatedly sought access to detainees held in secret locations, and has expressed concern publicly about the practice.⁹⁴ Further, the ICRC has determined that enforced disappearance is unlawful under customary international humanitarian law, which binds all states as a general matter.⁹⁵

With respect to international humanitarian law, there are three main responses to the Bush Administration's "War on Terror" approach to extraordinary rendition and secret detention. All begin with the common agreement that the current struggle against Al Qaeda and other transnational terrorist groups is not neatly governed by the laws of war. This is because international humanitarian law applies only to situations of armed conflict, and the definition of "armed conflict" is not easy to apply to the disparate circumstances of the "War on Terror" in a uniform manner.⁹⁶ Beyond cases in which two or more states' armies face off on a traditional battlefield, an armed conflict exists for the purposes of international humanitarian law only under the following circumstances:

93. See, e.g., Sean McCormack, Spokesman, Dep't of State, Daily Press Briefing (May 12, 2006) (transcript available at <http://www.state.gov/r/pa/prs/dpb/2006/66202.htm>) ("Look, there are—under the Geneva Conventions there is a certain category of individual, and this is allowed for under the Geneva Conventions, individuals who forfeit their rights under Geneva Convention protections, and they do this through a variety of different actions. So there are a group of—there are allowances in the Geneva Convention for individuals who would not be covered by that convention and, therefore the party holding them would not be subject to the Geneva Conventions in providing access to those individuals.").

94. See ICRC, *U.S. Detention Related to the Events of 11 September 2001 and its Aftermath—The Role of the ICRC*, May 14, 2004, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/73596F146DAB1A08C1256E9400469F48> (noting that the ICRC has "repeatedly appealed to the American authorities for access to people detained in undisclosed locations. . . . Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations.").

95. See INTERNATIONAL RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 340–343 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

96. Common Article 2 provides for the following rule of application: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." See art. 2 of Geneva I, Geneva II, Geneva III, and Geneva IV, *supra* note 82. The ICRC *Commentary* explains that the term "armed conflict" was chosen to avoid the potentially "endless" arguments that would arise if the word "war" was instead used; the emphasis was to be on the factual situation—the Conventions should apply to "[a]ny difference arising between two States and leading to the intervention of members of the armed forces"—not on the legal circumstances for such intervention. ICRC, COMMENTARY: III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 26 (1960) (prepared by Jean de Preux; edited by Jean S. Pictet).

a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified.⁹⁷

When these characteristics are absent, international humanitarian law treaties are not the controlling law, since their minimum threshold of applicability will not have been reached. These characteristics, which are drawn from treaty and customary law governing non-international armed conflicts, are not uniformly present in the “War on Terror.”⁹⁸

In the face of this mismatch, the Administration suggests that there is a legal vacuum. International legal scholars and advocates reject this approach, and tend to make three alternative arguments. The first asserts that the laws of war are not applicable to the “War on Terror,” but human rights law continues to apply. A second argument posits that although the law is not perfectly suited to the current situation, the United States’ conflict with Al Qaeda is best viewed as a non-international armed conflict, to which only the minimum rules applicable to such conflicts apply. The final argument accepts the administration’s view that the United States is engaged in a new type of war. Rather than accepting that international humanitarian law is silent about this new form of conflict, however, this line of reasoning asserts that international humanitarian law should be read in conjunction with other rules of international law to protect the basic rights of all—including suspected terrorists. In the end, the problem with the Administration’s arguments is that extraordinary rendition and secret detention are illegal under any of these paradigms—they violate both human rights law *and* international humanitarian law.

After *Hamdan*, the U.S. government appears to have accepted that its “War on Terror” activities are governed by Common Article 3.⁹⁹

97. Gabor Rona, Legal Advisor, ICRC, Presentation at Workshop on the Protection of Human Rights While Countering Terrorism, Copenhagen: When is a War Not a War? The Proper Role of the Law of Armed Conflict in the “Global War on Terror” (Mar. 16, 2004) (available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5xcmnj?opendocument>).

98. Of course, certain campaigns or operations in the “War on Terror” plainly entail armed conflict, including the wars in Afghanistan and Iraq. Those operations are limited in space and time, however, and are distinct from the concept of a “War on Terror” that is not limited by geography.

99. Soon after the Supreme Court delivered its judgment in *Hamdan*, Deputy Defense Secretary Gordon England issued a memo stating that “[t]he Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda.” Memorandum from Gordon England, Deputy Def. Sec’y, to the Secretaries of the Military Departments (July 7, 2006), available at http://graphics8.nytimes.com/packages/pdf/politics/060711pentagon_memo.pdf. Although Secretary England stated that all Department of Defense operations other than the military

While there was some confusion concerning the application of Common Article 3 to the CIA's activities,¹⁰⁰ the issue was settled on July 20, 2007, when President Bush issued an executive order stating that Common Article 3 "shall apply to a program of detention and interrogation operated by the Central Intelligence Agency."¹⁰¹ After "reaffirming" that terrorism suspects are "unlawful combatants" not eligible for protection as prisoners of war, President Bush "determine[d] that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section."¹⁰² While this would seem to bring the United States closer to compliance with international legal standards, the Order also purports to peg the humane treatment standards of Common Article 3 to standards set out in domestic law, and concludes that the CIA's detention and interrogation Program is compliant with relevant law, including Common Article 3 as defined in the Order. While the Order certainly has some domestic legal effect, it plainly did not clarify U.S. compliance as a matter of international law.¹⁰³

Common Article 3 protects all individuals who have been detained from—among other things—"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment." This language should be interpreted to prohibit secret detention, since—as discussed above—undisclosed detention, in itself, has been found to violate norms against torture and cruel, inhuman or degrading treatment. The humane treatment provisions in Common Article 3 should also be read to include protection against transfer to a

commissions found to be impermissible by the Supreme Court were in line with Common Article 3, he ordered Department of Defense officials to review all policies and directives to ensure they were in compliance with this provision. *Id.*; see also Donna Miles, *England Memo Underscores Policy on Humane Treatment of Detainees*, AM. FORCES PRESS SERVICE, July 11, 2006, available at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=114>. John Bellinger, Legal Adviser to the Department of State, has indicated that his Department understands the *Hamdan* decision to have extended Common Article 3 to the general "conflict with al Qaeda." John B. Bellinger, Legal Advisor, Dep't of State, Foreign Press Center Briefing: The Military Commission Act of 2006, at 1 (Oct. 19, 2006), available at <http://fpc.state.gov/fpc/74786.htm>.

100. See Mark Mazzetti & Kate Zernike, *White House Says Terror Detainees Have Basic Geneva Rights*, N.Y. TIMES, July 12, 2006, at A1. For a discussion of the debate within the Administration concerning the applicability of Common Article 3 to terrorism suspects, see Tim Golden, *Detainee Memo Created Divide in White House*, N.Y. TIMES, Oct. 1, 2006, at A1.

101. Exec. Order 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

102. *Id.*

103. For a comprehensive discussion of the ways in which this executive order condones activities that contravene international law, see AMNESTY INT'L, USA: LAW AND EXECUTIVE DISORDER: PRESIDENT GIVES GREEN LIGHT TO SECRET DETENTION PROGRAM (2007).

country or location where the individual is at risk of torture or cruel treatment. Applying the same logic used by international bodies interpreting human rights treaties, the protection against torture and cruel or degrading treatment in Common Article 3 should be interpreted to include a protection against *non-refoulement* to the same kind of treatment; this is necessary to ensure the prohibition on torture, and the humane principles on which it is built, has real meaning.¹⁰⁴ Further, the fact that Common Article 3 does not include an explicit *non-refoulement* rule is not dispositive: at the time it was drafted, this provision was largely designed for application in the context of civil wars and other intra-state conflicts.¹⁰⁵ Extraordinary rendition and secret detention are therefore both prohibited by Common Article 3.¹⁰⁶

104. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at ¶ 88 (1989) (holding that “[i]t would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.”); see also Satterthwaite, *Rendered Meaningless*, *supra* note 75, at 1357 n. 141 and accompanying text (discussing Human Rights Committee’s construction of Article 7 of the ICCPR).

105. Unlike Geneva III and IV, which contain explicit rules concerning inter-state transfer of protected persons, therefore, Common Article 3 contains only the most basic guarantees required for situations of non-international armed conflict. Although it was not envisioned at the time that states would transfer among themselves fighters in non-international armed conflicts, this failure of imagination should not be taken as a limitation on the protection against *refoulement*.

106. A comparatively more difficult question is whether the United States is *obliged to apprehend instead of killing* suspected Al Qaeda operatives under Common Article 3. In other words, even if certain ways of carrying out the “capture” and “detain” parts of a “K-C-D” order are unlawful, is the U.S. government within its rights to instead kill designated individuals? This question must be addressed because non-state fighters are not protected against attack when they are taking an “active part in the hostilities” in a non-international armed conflict. Serious debate rages over what types of activities trigger this loss of immunity and whether individuals deemed to be “enemy combatants” by the U.S. government have, by definition, been found to have taken such an active part, making them legitimate targets for military marksmen or CIA drones. In other words, under humanitarian law, the application of Common Article 3 standards to the “War on Terror” may not bar the United States from killing members of Al Qaeda in situations of armed conflict, even if the United States had not attempted to arrest or detain them. However, reading international humanitarian law together with human rights law produces a rule that does require states to prefer the apprehension of terrorist suspects over killing them. For a discussion of these issues, see, e.g., Philip B. Heymann & Juliette N. Kayyem, *Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism* (2004), available at <http://www.mipt.org/pdf/Long-Term-Legal-Strategy.pdf>;

Further, international authorities have found that international humanitarian law must be read in conjunction with international human rights law. The International Court of Justice explained the relationship between humanitarian law and human rights law in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*,¹⁰⁷ where it stated plainly that international human rights law continues to apply in times of armed conflict. The *lex specialis* rule, operating as a conflicts-of-law norm, requires that when rights have incongruous content in times of armed conflict, humanitarian law must necessarily inform the interpretation of such rights. When a conflict arises between norms, the *lex specialis* rule requires preference of international humanitarian law. In such cases, international humanitarian law allows for the justification of what would otherwise be a violation of human rights law. A soldier shooting an enemy on the battlefield looks like a human rights violation (the deprivation of life without due process) until the international humanitarian law rule is applied (privileged combatants may kill other combatants, or civilians taking a direct role in hostilities). In the context of extraordinary rendition, there is no conflict between norms: the rules of non-international armed conflict prohibit torture and cruel treatment. Human rights law prohibits the same kind of treatment, but also provides more specific—and harmonious—content, prohibiting not only torture and cruel treatment, but also adding precision by prohibiting *refoulement* to such treatment.

El-Masri: The Search for Justice¹⁰⁸

“Those responsible have to take responsibility, and should be held to account.”

—*Khaled El-Masri*¹⁰⁹

At first, Khaled El-Masri did not tell anyone about the ordeal he had suffered. It would sound too outlandish, he thought, and he worried

Emmanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect its Citizens*, 15 TEMP. INT’L & COMP. L.J. 195, 245–46 (2001); see also Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President’s Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT’L L. 1029 (2005).

107. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996).

108. Unless otherwise noted, the facts in this section are taken from Declaration of Khaled El-Masri, *supra* note 1; Declaration of Manfred Gnjidic in Support of Plaintiff’s Opposition to the United States’ Motion to Dismiss, or in the Alternative, for Summary Judgment, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), *aff’d sub nom.* *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007), available at http://www.aclu.org/pdfs/safefree/gnjidic_decl_exh.pdf; Declaration of Steven Macpherson Watt in Support of Plaintiff’s Opposition to the United States’ Motion to Dismiss, or in the Alternative, for Summary Judgment, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (No. 1:05cv1417), available at <http://www.aclu.org/safefree/torture/25530lg120060511.html>; Cameron Abadi, *Disappeared but Not Silenced*, AMNESTY INT’L MAGAZINE, Spring 2007, available at <http://www.amnestyusa.org/spring-2007/disappeared-but-not-silenced/page.do?id=1105397&n1=2&n2=19&n3=397> (interview with Khaled El-Masri); and interviews

109. See note 109 on page 563.

that no one would believe him. More importantly, those detaining him had threatened him. If he told his story, he worried that he would be kidnapped again. His house was empty when he returned; he learned that his wife had gone to Lebanon with their children to stay with her family when El-Masri had not returned from his vacation.¹¹⁰ The family was soon reunited in Germany, and El-Masri told his wife what had happened to him.¹¹¹

Despite his fears, El-Masri made an appointment with a lawyer named Manfred Gnjudic. On June 3, 2004—only a week after he was released—El-Masri told Gnjudic his story. Gnjudic asked El-Masri to write out his story, to make drawings of the hotel room in Macedonia and the facility in Afghanistan, and to gather all the physical evidence he had that might help prove that he was telling the truth. Gnjudic also wrote a letter to German Chancellor Gerhard Schroeder and the German Minister of Foreign Affairs. In response to these letters, the Office of the Public Prosecutor opened an investigation into the kidnapping, and contacted Gnjudic to set up an interview with El-Masri. Under German law, the Office of the Public Prosecutor is under an obligation to investigate suspected crimes; the prosecutor's office interviewed El-Masri numerous times and performed a radioactive isotope analysis of his hair. By confirming that El-Masri had been in a South Asian country and that he had been deprived of food, the analysis lent support to his story of a hunger strike while in detention in Afghanistan.

In June 2005, Steven Watt, an attorney with the American Civil Liberties Union (“ACLU”) in New York, travelled to Germany to meet with El-Masri and Gnjudic. He had learned of El-Masri's ordeal several months earlier, and had spent time investigating the case and potential claims that El-Masri might have under U.S. and international law.¹¹² Watt was impressed with El-Masri's resolve and bravery in light of the legal obstacles Watt explained they would face if El-Masri decided to go

with Steven Watt, Senior Staff Attorney, ACLU Human Rights Program, and Ben Wizner, Staff Attorney, ACLU National Security Program, in New York City, N.Y. (Aug. 24, 2007). Quotes from Steven Watt and Ben Wizner, as well as information about legal strategy are drawn from interviews, *supra*.

109. Meek, *supra* note 2.

110. *Id.*

111. *Id.*

112. El-Masri's story was first told in a major U.S. news publication in Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. TIMES, Jan. 9, 2005, at 11.

forward with a U.S. case. Knowing that the case would be stymied by a number of significant legal and political challenges, Watt explained the situation several times to his potential new client, eager to ensure El-Masri understood what they were up against so that he could make an informed choice about the lawsuit. “In many ways, he understood better than I did,” Watt said. “He knew the case was an opportunity to tell his story and he wanted to do it for that reason.”¹¹³ El-Masri made clear that his goals were not monetary; instead, he sought an acknowledgment from the U.S. government that it had wrongly detained him, and an apology from those responsible.¹¹⁴

After meeting with El-Masri, Watt felt sure that the case presented the opportunity Watt and his colleagues had sought for years—the ability to directly challenge the extraordinary rendition of an individual through kidnapping on foreign soil. Before moving to the ACLU in November 2004, Watt had worked at the Center for Constitutional Rights (“CCR”), and he had been on the legal team representing Canadian citizen Maher Arar, who was apprehended and rendered to Syria while changing planes at JFK International airport in New York in September 2002.¹¹⁵ Working closely with Canadian lawyers who were pressuring the Canadian government to create a commission of inquiry into the Arar case, CCR attorneys filed suit on behalf of Arar in the U.S. District Court for the Eastern District of New York on January 22, 2004, while Watt was still at CCR.¹¹⁶ The suit named then-Attorney General John Ashcroft, then-Deputy Attorney General Larry Thompson, then-FBI Director Robert Mueller, as well as other U.S. immigration officials as defendants. It alleged that these defendants had violated Arar’s constitutional due process rights and had conspired in his torture in Syria in contravention of the Torture Victim Protection Act. Although the case was dismissed by the district court,¹¹⁷ it brought a great deal of attention to the extraordinary rendition policy and sparked a national

113. Interview with Steven Watt, Senior Staff Attorney, ACLU Human Rights Program, in New York City, N.Y. (Mar. 25, 2008).

114. *Id.*

115. For a comprehensive accounting of the Arar case, see Comm’n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, (2006), available at http://www.ararcommission.ca/eng/AR_English.pdf [hereinafter *Arar Commission of Inquiry Final Report*].

116. Attorneys central to the case have included David Cole, Maria LaHood, Jules Lobel, Barbara Olshansky, and Steven Watt.

117. At the time of writing, the case was still pending before the Second Circuit. See 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff’d* by Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008), *reh’g en banc granted* by Order of the Second Circuit Court of Appeals of Aug. 12, 2008 (on file with author).

debate that until then had not included the important focal point of a human story.

El-Masri's experience was similar to Arar's in many respects: both men were spirited away without charge on suspicions of having ties to Al Qaeda that later evaporated;¹¹⁸ both were citizens of Western democracies that were allies of the United States; both had experienced ill-treatment and horrible conditions of confinement; and both men sought justice. Each man, however, represented a different side of the extraordinary rendition and secret detention Program: Arar had been transferred from the United States to Syria, where he was tortured by Syrians at the behest of the United States. El-Masri had been abducted abroad—in Macedonia—and was sent to a secret CIA prison in Afghanistan, where he was ill-treated by U.S. agents.

Moreover, like Arar, no evidence tied El-Masri to terrorism. In fact, as was apparent from the questions that interrogators asked El-Masri while he was in detention, it appeared that the reason behind El-Masri's abduction was a terrible mistake: the similarity of his name (Khaled El-Masri) with a suspected Al Qaeda leader (Khalid El Masri or Khalid al Masri).¹¹⁹ Where the German El-Masri had been born in Kuwait to Lebanese parents in 1963, the Egyptian El Masri had been an associate of the Hamburg Cell in Germany in the lead-up to 9/11.¹²⁰

For Watt and his colleagues at the ACLU, these facts underlined the importance of El-Masri's story. Here was someone who could speak for

118. Commissioner Justice Dennis O'Connor of the Inquiry into the Actions of Canadian Officials in Relation to Maher Arar stated:

I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada. The public can be confident that Canadian investigators have thoroughly and exhaustively followed all information leads available to them in connection with Mr. Arar's activities and associations. This was not a case where investigators were unable to effectively pursue their investigative goals because of a lack of resources or time constraints. On the contrary, Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities. They did so over a lengthy period of time, even after Mr. Arar's case became a cause célèbre. The results speak for themselves: they found none.

Arar Commission of Inquiry Final Report, *supra* note 115, at 59. Media accounts indicate that both then-CIA Director George Tenet and then-National Security Council Director Condoleezza Rice ordered El-Masri's release once they realized he was innocent. See Lisa Myers, Aram Roston & NBC Investigative Unit, *CIA Accused of Detaining Innocent Man: If the Agency Knew He Was the Wrong Man, Why Was He Held?*, MSNBC, April 21, 2005, available at <http://www.msnbc.msn.com/id/7591918>.

119. See Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A01.

120. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 165–66 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

the reported several dozen CIA mistakes or “erroneous renditions”—here renditions to secret detention in a CIA prison.¹²¹ As ACLU attorney Ben Wizner emphasized, here was someone who was utterly innocent, but who had nonetheless been disappeared by the U.S. government for months.¹²² While both Watt and Wizner strongly believe that extraordinary rendition is wrong regardless of the individual’s culpability, both also emphasize the important role of the “innocent victim” in test case litigation. Because they sought to make El-Masri the “face” of extraordinary rendition—the symbol of U.S. violations in the “War on Terror”—the lawyers felt it was important to ensure that he had not committed any crimes of terrorism. An innocent victim would disarm the legal team’s opponents by focusing the public’s attention on the lack of safeguards in the system, and by making impotent the argument that rendition and torture are “necessary” to stop a hardened enemy.

Between June 2005 and December 2005, the ACLU attorneys worked with Manfred Gnjidic and Khaled El-Masri to prepare a legal challenge to the rendition and secret detention Program. This preparatory work involved the development of a media strategy, investigative work, and legal drafting. By December 2005, the case was ready to be filed. Khaled El-Masri agreed to travel to the United States for the filing of the suit. When his airplane arrived in Atlanta from Germany on December 3, 2005, however, El-Masri was refused entry and sent back to Germany. The expulsion reportedly was carried out on the basis of information that customs officials received “from other American agencies”¹²³—presumably the CIA. El-Masri later told reporters that the experience was very frightening: “My heart was beating very fast,” he said, “I have remembered that time, what has happened to me, when they kidnapped me to Afghanistan. I have remembered and was afraid.”¹²⁴

El-Masri v. Tenet was filed on December 6, 2005 in the U.S. District Court for the Eastern District of Virginia.¹²⁵ The complaint named former CIA director George Tenet and other CIA officials as defendants,

121. See Priest, *supra* note 119.

122. Ben Wizner explained the importance of innocence this way: “Unless we had an innocent person, the debate would not have been about the rule of law. It would have been about whether torture works.” Interview with Ben Wizner, *supra* note 108.

123. Scott Shane & Souad Mekhennet, *German Held in Afghan Jail Files Lawsuit*, N.Y. TIMES, Dec. 7, 2005, at A25 (citing U.S. Customs & Border Protection spokesperson Kristi Clemens).

124. *Id.*

125. The facts in this paragraph are drawn from the complaint in *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), *aff’d sub nom.* *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007), available at <http://www.aclu.org/safefree/extraordinaryrendition/222111gl20051206.html>.

alleging that they violated both U.S. and international law when they abducted El-Masri. More specifically, the complaint alleged, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹²⁶ that the CIA agents violated El-Masri's Fifth Amendment due process rights by subjecting him to treatment that "shocks the conscience" and by detaining him absent legal process. The complaint also alleged that the CIA agents arbitrarily detained him, tortured him, and subjected him to cruel, inhuman or degrading treatment cognizable under the Alien Tort Statute. With respect to Tenet, the complaint alleged that because he had actual and constructive knowledge of these actions, he—at a minimum—expressly and tacitly authorized the unlawful conduct of his subordinates, making him liable; it also alleged that he affirmatively ordered or condoned the abuse, and that he was responsible for the policy of extraordinary rendition, through which such abuse was authorized. The suit also named three corporations as defendants, claiming that—because they owned and operated the plane used to transfer El-Masri and because they knew or should have known what would befall him in Afghanistan—these corporations had colluded in the violation of his human and civil rights. Specifically, the complaint alleged that the airplane companies conspired and/or aided and abetted in the arbitrary detention, torture, cruel, inhuman, and degrading treatment that El-Masri suffered.

One of the greatest advocacy successes of the lawsuit was the media cascade that was created when the complaint was filed concurrently with a visit that Secretary of State Condoleezza Rice was making to Europe. This visit was scheduled in wake of revelations—most notably those published in an article by investigative journalist Dana Priest in *The Washington Post*¹²⁷—of an archipelago of secret detention sites run by the CIA, some of them in Eastern Europe. Before she set off on December 5, 2005, Secretary Rice made a statement defending the policy of rendition:

The United States and many other countries are waging a war against terrorism. For our country this war often takes the form of conventional military operations in places like Afghanistan and Iraq. Sometimes this is a political struggle, a war of ideas. It is a struggle waged also by our law enforcement agencies. Often we engage the enemy through the cooperation of our intelligence services with their foreign counterparts. . . . One of the difficult issues in this new kind of conflict is what to do with captured individuals who we know or believe to be terrorists. . . . The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or

126. 403 U.S. 388 (1971).

127. Priest, *supra* note 37.

military justice, which were designed for different needs. We have to adapt.¹²⁸

While aimed at quelling European protests against extraordinary rendition, this statement merely stoked the flames. After a meeting with Chancellor Angela Merkel in Germany, Rice was asked about the El-Masri case. She declined to comment. Chancellor Merkel was not so circumspect. “The American administration has admitted that this man was erroneously taken,” she said through an interpreter.¹²⁹ Although the statement would later be retracted by her aides, in many ways the Chancellor was merely confirming something that had been reported a few days earlier in *The Washington Post*: that a U.S. official had informed the German interior minister “that the CIA had wrongfully imprisoned one of its citizens, Khaled Masri, for five months, and would soon release him. . . . There was also a request: that the German government not disclose what it had been told, even if Masri went public.”¹³⁰ A few days later, the German Interior Ministry publicly confirmed that it had been informed by the U.S. government in May 2004 that the CIA may have mistakenly abducted El-Masri.¹³¹ What followed was a flurry of media accounts covering the El-Masri case and probing the wisdom of the extraordinary rendition policy. In many ways, the filing of the suit itself was a huge victory: it allowed El-Masri to tell his story, it prompted media coverage and further investigation by journalists of both the particulars of El-Masri’s experience and the Program more generally, and it “forced powerful people to answer uncomfortable questions,” according to Wizner.¹³²

Things did not go so well in court. On March 8, 2006, the United States filed a statement of interest and assertion of a formal claim of state secrets privilege along with a motion to stay court proceedings pending resolution of the privilege claim; Judge Ellis granted the motion. The next week, the United States filed a motion to intervene as defendant in the case and to dismiss the case as precluded by the state secrets privilege (or, in the alternative, for summary judgment). The government filed two declarations by Porter Goss as Director of the CIA: one public and one classified. In his public declaration, Goss argued that the claims alleged by El-Masri, and the potential defenses against those

128. Condoleezza Rice, U.S. Sec’y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005) (transcript available at <http://www.state.gov/secretary/rm/2005/57602.htm>).

129. Glenn Kessler, *Rice to Admit German’s Abduction Was an Error*, WASH. POST, Dec. 6, 2005, at A18.

130. Priest, *supra* note 119.

131. Jeffrey Fleishman, *U.S. Envoy May Have Told Germany of CIA Error*, FT. WORTH STAR-TELEGRAM, Dec. 8, 2005, at A10.

132. Interview with Ben Wizner, *supra* note 108.

claims would force the CIA to admit or deny the existence of clandestine CIA activities, and that therefore dismissal of the suit was the only proper outcome.¹³³ The court quickly granted the motion to intervene and took under consideration the motion to dismiss.

The state secrets privilege is a common law privilege that is intended to protect against the disclosure of sensitive governmental information during civil litigation. The privilege protects evidence that, if disclosed, would harm national security. Procedurally, the government may intervene in any civil case (even when it is not a party to the suit) to invoke the state secrets privilege through a filing with the court. This filing must include an affidavit by the head of the relevant department or agency invoking the privilege after personal consideration of the matter.¹³⁴

On April 11, the ACLU filed papers in opposition to the U.S. motion to dismiss, arguing that the facts central to the case were not state secrets, that the case should proceed and allow for discovery of non-privileged evidence, and that the court had options for how to proceed with the case in a way that would not require the United States to reveal any state secrets. Along with its motion and memorandum of law, the ACLU filed an extensive declaration by Khaled El-Masri, in which he explained his abduction, detention, and ill-treatment in his own words. The declaration was striking in its detail and clarity. Attorney Steven Watt also filed a declaration setting forth the extensive facts that had already been made public about the extraordinary rendition Program as a general matter, and about El-Masri's experience more specifically. The purpose of both declarations was to demonstrate that the state secrets privilege was inapposite: not only did El-Masri have the right and ability to talk about his own experience in the Program, but the U.S. government had itself admitted the existence of the rendition policy.

The ACLU's filings were unavailing: one month later, on May 12, 2006, Judge Ellis dismissed the case, holding that his hands were tied by existing law on the state secrets privilege:

It is important to emphasize that the result reached here is required by settled, controlling law. It is in no way an adjudication of, or comment on, the merit or lack of merit of El-Masri's complaint. Nor does this ruling comment or rule in any way on the truth or falsity

133. Formal Claim of State Secrets Privilege by Porter J. Goss, Director, Central Intelligence Agency, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), *aff'd sub nom.* *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007), available at <http://www.aclu.org/safefree/torture/255311gl20060511.html>.

134. For more on the state secrets privilege, see LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006), and Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

of his factual allegations; they may be true or false, in whole or in part. Further, it is also important that nothing in this ruling should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either. In times of war, our country, chiefly through the Executive Branch, must often take exceptional steps to thwart the enemy. Of course, reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of those exceptional steps. But what this decision holds is that these steps are not proper grist for the judicial mill where, as here, state secrets are at the center of the suit and the privilege is validly invoked.¹³⁵

Judge Ellis' order concludes with one of the most striking passages in any case brought so far in the "War on Terror":

Finally, it is worth noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.¹³⁶

Attorney Steven Watt vividly recalled the moment that he called Khaled El-Masri to tell him about the judge's ruling; it was undoubtedly one of the most difficult moments for him in the case. When Watt explained that the ACLU was prepared to appeal the case, El-Masri confided in him that—in Watt's recollection of El-Masri's words—"my biggest concern was that you were going to give up on me."¹³⁷ Reflecting on this reaction, Watt explained that El-Masri's words reminded him that the human rights lawyer always needs to ask himself if he is doing more harm than good and if the process of reliving events through interviews, being shut down by the courts, or being under a press microscope is not too much for a survivor-turned-plaintiff.

Watt assured El-Masri of the organization's commitment—and his legal team's personal commitment—to his case. El-Masri was emphatic in his desire to appeal. As the legal team prepared their filings for the Fourth Circuit, they also worked on a strategy that would reach beyond the court. This strategy was buoyed by several important developments in Europe. In April, a Committee of the European Parliament visited

^{135.} Order Granting Motion to Dismiss at 16, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), available at <http://www.aclu.org/safefree/torture/270151gl20060512.html>.

^{136.} *Id.*

^{137.} Interview with Steven Watt, *supra* note 108.

Macedonia to investigate El-Masri's abduction.¹³⁸ On June 7, 2006, the Council of Europe released a report on extraordinary rendition and secret detention following an extensive investigation by Swiss Senator Dick Marty. The report found that El-Masri's account was accurate, and placed the case in the context of European collusion with what it characterized as systematic violations of human rights.¹³⁹ In Germany, the Parliament launched an investigation into the case.¹⁴⁰ In September 2006, German prosecutors said that they were seeking—and receiving—assistance from Spain in tracing the movements within Europe of individual CIA agents believed to be responsible for El-Masri's transfer from Macedonia to Afghanistan.¹⁴¹

By late autumn, the plans were set: El-Masri would again fly to the United States for the appeal. This time, he would be in the courtroom when attorney Ben Wizner argued his case. The ACLU was able to secure assurances that El-Masri would not be turned away at the U.S. border, and he bravely boarded a plane again. El-Masri arrived safely and attended the oral argument of his case before the Fourth Circuit Court of Appeals on November 28, 2006. The next day, he met with Congressional staffers and journalists to discuss the extraordinary rendition Program. This advocacy, aimed at ensuring that the American public understood that rendition was a policy with dire human impact, also had the effect of empowering El-Masri. "He may not have gotten an apology from the Administration," Wizner explained, "but he got a lot of apologies from Hill staffers, people who attended events where he spoke, and even a group of Germans who recognized him in New York City."

On January 31, 2007, while El-Masri awaited the outcome of his federal appeal, German prosecutors issued arrest warrants for thirteen individuals they identified as having been the crew and passengers on the flight from Macedonia to Afghanistan.¹⁴² The individuals were suspected of involvement in the false imprisonment and torture of El-Masri.¹⁴³ The CIA declined to comment on the arrest warrants; the U.S.

138. European Parliament, Temporary Comm. on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Notice to Members No. 2: Report of the TDIP Committee Delegation to the Former Yugoslav Republic of Macedonia (June 6, 2006), available at http://www.europarl.europa.eu/comparl/tempcom/tdip/notices/pe374316_en.pdf.

139. *Council of Europe January 2006 Report*, supra note 60.

140. See *El-Masri Testifies Before German Parliament*, DER SPIEGEL, June 23, 2006.

141. See *Germany Tracing U.S. Agents Who Seized Masri*, AGENCE FRANCE PRESSE, Sept. 21, 2006.

142. See *German Arrest Warrants for 13 Suspected CIA Agents*, AGENCE FRANCE PRESSE, Jan. 31, 2007.

143. See *El-Masri Kidnapping Case: Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, DER SPIEGEL, Jan. 31, 2007.

Department of Justice refused to assist German investigators in their criminal probe;¹⁴⁴ and the Department of State declined comment.¹⁴⁵ In February, the German government forwarded the arrest warrants to Interpol.¹⁴⁶

There was no legal victory in the American courts, however. On March 2, 2007, the Fourth Circuit published its opinion in the case. In a unanimous opinion, the three-judge panel concluded that because of the classified nature of the extraordinary rendition Program, the facts that El-Masri would need to bring forward to make out his claims, and those the defendants would need to rely upon to defend themselves were reasonably likely to include privileged state secrets information. The Court held that it was not enough to show that El-Masri's experience in the rendition Program had been publicly reported around the world because "the public information does not include the facts that are central to litigating his action."¹⁴⁷ In conclusion, the Court held that the "central facts—the CIA means and methods that form the subject matter of El-Masri's claim—remain state secrets."¹⁴⁸ For this reason, the Fourth Circuit affirmed the district court's dismissal of the suit.

Although the legal team was terribly disappointed about the outcome, they were especially frustrated that neither court had even explored the numerous alternative approaches to proceeding with the case that they had forwarded in their filings. For example, the ACLU had argued that the district court should at least allow for discovery of non-privileged information before determining that the case could not proceed without disclosure of privileged information. They had also presented solutions that other courts had used to protect sensitive information, including *in camera* review of materials, the use of redaction where needed, and the provision of unclassified summaries of relevant information in substitution for direct evidence. Despite this disappointment, the legal team faced this setback in the same spirit as they had greeted the dismissal of the case by the district court. "Our goal has always been to end the extraordinary rendition program" in addition to obtaining redress for Khaled El-Masri, Ben Wizner explained. Preparing a petition for *certiorari* to the United States Supreme Court was "another opportunity for public education."

144. See Mark Landler, Stephen Grey & Mark Mazzetti, *German Court Confronts U.S. on Abduction*, N.Y. TIMES, Feb. 1, 2007, at A1.

145. See *Germany Issues Arrest Warrants for CIA Agent "Kidnappers,"* EVENING STANDARD (U.K.), Feb. 1, 2007.

146. See *U.S. Displeased Over German Hunt for CIA Agents*, DER SPIEGEL, Mar. 5, 2007.

147. *El-Masri v. U.S.*, 479 F.3d 296, 311 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007).

148. *Id.*

As the ACLU worked on the petition, terrible news reached the legal team: Khaled El-Masri had been placed in a psychiatric institution following his arrest on suspicion of arson. Attorney Manfred Gnjdic traced these events directly to the abuse El-Masri had suffered in secret detention. The experience had made El-Masri a “psychological wreck.”¹⁴⁹ The team pressed on, more motivated than ever in light of these developments.

On May 30, 2007, the ACLU filed its petition for *certiorari*. The petition argued that recent cases had “unmoored” the state secrets privilege from its “evidentiary origins” by using the privilege to dismiss cases at the pleading stage.¹⁵⁰ Further, this expansion of the privilege was being used to shield from judicial inquiry grave governmental misconduct.¹⁵¹ Arguing that there was “conflict and confusion in the lower courts” concerning the scope and application of the privilege, the ACLU argued that the time was ripe for Supreme Court review of the doctrine.¹⁵² In its opposition to the petition for *certiorari*, the government argued that the district court and the Fourth Circuit had been correct in their ruling, and that dismissing El-Masri’s complaint was the only proper avenue since litigating the case would require the disclosure of properly privileged state secrets information.¹⁵³

With the dual goals of obtaining Supreme Court review and educating the public, the legal team solicited *amicus curiae* briefs from influential players. *Amici* included the Constitution Project and the New York City Bar Association. One of the most important *amicus* briefs was that filed by Swiss Senator Dick Marty of the Council of Europe. Marty’s brief, prepared by the law firm Lovells LLP, argued that the facts surrounding El-Masri’s case could not be considered state secrets, since they had been revealed and reported through inter-governmental organizations such as the Council of Europe as well as the media and other sources.¹⁵⁴ The brief asserted that the United States’ failure to abide by international law was destroying its standing in the community of nations and focused on the international opprobrium with which the

149. Robert Barnes, *Supreme Court Won’t Review Alleged CIA Abduction*, WASH. POST, Oct. 10, 2007, at A04.

150. Petition for Writ of Certiorari at 12, *El-Masri v. U.S.*, 128 S.Ct. 373 (2007) (No. 06:1613).

151. *Id.* at 10–14.

152. *Id.* at 15–24.

153. Brief for the United States in Opposition, *El-Masri v. U.S.*, 128 S.Ct. 373 (No. 06:1613).

154. Brief for Amicus Curiae Senator Dick Marty, Chairman of the Legal Affairs & Human Rights Committee and Rapporteur of the Parliamentary Assembly of the Council of Europe in Support of Petitioner, *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007) (No. 06:1613), *cert. denied*, 128 S.Ct. 373 (2007).

extraordinary rendition Program had been greeted. Urging the Supreme Court to exercise its power of review, the brief asked the Supreme Court to ensure that El-Masri had an opportunity to obtain justice through law.¹⁵⁵

While the petition for *certiorari* was pending, the German government decided not to request the extradition of the thirteen alleged CIA agents who were the subject of arrest warrants for El-Masri's abduction. Media reports attributed this decision to the German government's desire to avoid "an open conflict with the American authorities."¹⁵⁶ The U.S. Department of Justice declined to comment on the development, telling the Associated Press that the United States does "not discuss whether it has or has not received an extradition request from a given country or our communication with any country with respect to such requests."¹⁵⁷

On October 9, 2007, the Supreme Court rejected the ACLU's petition for *certiorari*. Although this was another great disappointment, the legal team feels that the larger goals of the case were met, outside the courtroom. In the end, Ben Wizner insists, "we did not lose this case; the CIA lost the El-Masri case." Certainly, when Americans think of the extraordinary rendition Program, they think of Khaled El-Masri and the CIA's grave mistake. Almost from the moment the story broke, El-Masri's experience became a cautionary tale that demonstrated the errors built into the system. As Wizner explains, "[T]he only place in the world where Khaled El-Masri's allegations cannot be discussed is in a federal courtroom."

Steven Watt agrees. "This case was ultimately not about winning a lawsuit." It was about speaking the truth, exposing human rights violations, and empowering one individual who had been wronged. From the outset, Khaled El-Masri was hopeful that the very act of bringing the case would help others who were still caught up in the extraordinary rendition and secret detention Program: "I think that we can all benefit from what happens in my case, including others who are still in prison in other parts of the world without the rule of law."¹⁵⁸

155. *Id.*

156. *Germany 'Drops CIA Extradition,'* BBC, Sept. 23, 2007. On June 9, 2008, lawyers from the European Center for Constitutional and Human Rights filed "a lawsuit against the German Government at the Berlin administration court for its failure to demand the extradition of 13 CIA agents suspected of having illegally 'rendered' Mr. El Masri from Macedonia to a US prison in Kabul, Afghanistan." Press Release, Rights groups demand investigation of CIA's Extraordinary Rendition Program, Lawsuits against Germany, US and Macedonia seek justice for Khaled El Masri (June 9, 2008), available at http://www.justiceinitiative.org/db/resource2?res_id=104096.

157. *Id.*

158. Desmond Butler, *Man Who Claims CIA Tortured Him in Secret Prison Recounts Story on Capitol Hill*, ASSOC. PRESS, Nov. 29, 2006.

Conclusion: Internationalizing the Search for Justice

On April 9, 2008, El-Masri's ACLU attorneys filed a petition against the United States before the Inter-American Commission on Human Rights ("IACHR").¹⁵⁹ The petition charged the United States with violating El-Masri's rights to be free from torture, arbitrary detention, and enforced disappearance.¹⁶⁰ The petition also alleged that—due to the application of the state secrets doctrine—El-Masri was deprived of the right of effective access to a court and that his right to a remedy for the human rights violations he suffered had been violated.¹⁶¹ These rights are all protected by the American Declaration of the Rights and Duties of Man ("American Declaration"), which applies to the United States through its membership in the Organization of American States ("OAS").¹⁶² The IACHR may take jurisdiction over petitions that allege violations of the American Declaration by the United States, making it one of the only international human rights venues with jurisdiction over complaints by individuals whose rights are violated by the U.S. government.¹⁶³ Victims may be heard during hearings before the IACHR, and the body may issue written decisions and recommendations to states found to have violated the human rights of petitioners.¹⁶⁴

159. Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits, April 9, 2008, available at <http://www.aclu.org/safefree/torture/348371gl20080409.html>.

160. *Id.* at 39–63, 84–85.

161. *Id.* at 77–85.

162. See American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Int'l Conference of Am. States, 9th Conference, OEA/Ser.L/V/I.4 Rev. XX (May 2, 1948) arts. I, XVII, XXV, XXVI, XXVII, XXVIII.

163. The Commission applies the American Declaration to States that have not ratified the American Convention. The Commission held, in *Roach v. United States*, that the Charter of the O.A.S. indicated the direct application of the Declaration to a Member State which was not a party to the Convention. See *Roach v. United States*, Case 9647, Inter-Am. C.H.R., Rep. No. 3/87, ¶¶ 46–49 (Sept. 22, 1987), available at <http://www.cidh.org/annualrep/86.87eng/EUU9647.htm> ("As a consequence of articles 3j, 16, 51e, 112 and 150 of the Charter, the provisions of other instruments of the OAS on human rights [including the American Declaration of the Rights and Duties of Man] acquired binding force."). The Inter-American Court of Human Rights has approved of this practice, asserting that "given the provisions of Article 29(d) [of the Convention] . . . States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the State Parties thereto." *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion, OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 46 (July 14, 1989).

164. See Rules of Procedure of the Inter-Am. C.H.R., arts. 38, 43, 45, available at <http://www.cidh.org/basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm>.

Despite the ability of the Inter-American Commission to take jurisdiction over human rights cases against the United States, the U.S. government has a long history of largely ignoring the rulings of the IACHR.¹⁶⁵ For this reason, the ACLU's resort to the IACHR was as much an act of creative advocacy as it was a continuation of the search for legal redress. By seeking the assistance of the IACHR—one of two principal human rights bodies of the OAS—the ACLU was invoking the powerful case law that the IACHR and the Inter-American Court of Human Rights had developed to counter abductions and secret detentions carried out by state agencies. Since the 1980s, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have together developed and applied a jurisprudence clearly proscribing enforced disappearances. This jurisprudence developed in response to the abductions carried out by Latin American dictatorships in the 1970s and 1980s, and it began with one of the most celebrated cases ever decided by the Inter-American Court, *Velásquez Rodríguez v. Honduras*.¹⁶⁶ In this case, the Inter-American Court found the state of Honduras responsible for the “disappearance” of Manfredo Velásquez, holding that the abduction and secret detention entailed grave violations of the right to life, personal liberty, and humane treatment.¹⁶⁷

By calling on this jurisprudence in its petition on behalf of Khaled El-Masri, the ACLU was arguing that—regardless of the motive, the identity of the individual secretly detained, and the status of the state responsible—the act of enforced disappearance was a violation of basic human rights guaranteed to every individual. By internationalizing El-Masri's search for justice, the ACLU was working to ensure that the denial of *certiorari* by the U.S. Supreme Court was not the last chapter in his story.¹⁶⁸ Instead, the resort to international human rights advocacy opened a new chapter, one advocates hope will include vindication for El-Masri in his search for justice. They also hope that the IACHR will place the U.S. program of rendition and secret detention in the same category as earlier programs of enforced disappearance. Such a decision

165. See generally Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159–1190 (2002) (discussing U.S. attitude toward the IACHR).

166. Initially filed with the IACHR in 1981, the case was referred to the Court in 1986 and decided by the Court in 1988. See Jo M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 13–18 (2003).

167. See *Velásquez Rodríguez Case*, (Merits), Inter-Am. Ct.H.R., Ser. C, No. 4 (1988) (holding the state of Honduras responsible for the “disappearance” of Manfredo Velásquez, which entailed violations of the right to life, personal liberty, and humane treatment).

168. El-Masri's attorneys have also teamed up with the Open Society Institute and attorneys in Albania and Macedonia to file requests for information about El-Masri's case in both countries, as well as a criminal complaint in Macedonia concerning El-Masri's detention there prior to his rendition to Afghanistan. See Press Release, *supra* note 156.

might—with time and political change—help achieve a transformation in how the United States engages in the fight against terrorism. With pressure from advocates and the moral condemnation of international human rights bodies, the U.S. government might be persuaded that terrorism—a form of lawlessness involving the negation of human dignity—is best fought within the bounds of the rule of law, and through the affirmation of the human rights and dignity of all.

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