NATIONAL, REGIONAL OR STATE SECURITY ISSUES?

JUDIT TÓTH

EU Member States Complicity in Extraordinary Renditions

The existence of secret CIA prisons in Europe was first reported by the *New York Times* and Washington Post in November 2005.[1] Following media and civil reports,[2] on 7 November 2005 the Parliamentary Assembly appointed Senator Dick Marty, a Swiss former prosecutor, to conduct a parliamentary inquiry into "alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states." Council of Europe Parliamentary Assembly (PACE) President René van der Linden declared: "This issue goes to the very heart of the Council of Europe's human rights mandate."[3]

According to a report of the Legal Affairs Committee of PACE adopted on 8 June 2007,[4] the so-called US "high-value" detainees (HVD) were held in secret CIA detention centres in Poland and Romania between 2002 and 2005. The report was based on the cross-referenced testimonies of over 30 serving and former members of intelligence services in the US and Europe as well as on a new analysis of computer "data strings" from the international flight planning system. It describes in detail the scope of the US's "high-value detainees"

1 http://jurist.law.pitt.edu/currentawareness/rendition.php, and Dana Priest: CIA Holds Terror Suspects in Secret Prisons, 02.11.2005.

2 Amnesty International http://web.amnesty.org/library/pdf/pol300032006 with reference to HRW, ABC News 05.11.2005.

3 The investigation into secret detentions in Europe: a chronology,www.coe.int

4 Committee on Legal Affairs and Human Rights: Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report (Rapporteur: Mr. Dick Marty, Switzerland, ALDE) http://assembly.coe.int

programme; it indicates that the program was set up by the CIA "with the co-operation of official European partners belonging to Government services" and kept secret for many years thanks to strict observance of the rules of confidentiality stipulated by NATO's framework. The committee declared that the programme "has given rise to repeated serious breaches of human rights," including the torture of detainees.

Due to information released in the press, in December 2005 the European Parliament also launched an investigation into the alleged secret prisons. In a report[5] (14 February 2007), the European Parliament comes to similar conclusions to Mr. Marty, saying EU countries "turned a blind eye" to extraordinary renditions across their territory and airspace. The European Parliament adopted a resolution based on the own-initiative report drafted by Giovanni Claudio Fava on the Temporary Committee's findings on alleged use of European countries by the CIA for the transportation and illegal detention of prisoners. The report – which deplores the passivity of some Member States in the face of illegal CIA operations, as well as the lack of co-operation from the EU Council of Ministers – was approved with 382 votes in favour, 256 against with 74 abstentions. The second report of Fava (17 June 2007)[6] maintains prior suspicions and urges closing the prisoners' camp in Guantanamo. The plenary session of the European Parliament shall decide, by approval or denial of the report, whether the whole case will be closed or if it will continue to be scrutinized. The EP has not limited by a deadline the work of the Temporary Committee, so it is probable that the case will continue up to February 2008.

A comparision of the EP's Report with PACE's reveals that the EP's report does not designate 14 responsible states; rather, it discusses two concrete cases: a kidnapping in Italy and a rendition and transport of a German citizen that could not have happened without the prior knowledge of territorial authorities. EP's report considers less probable that "certain governments or secret services" could not be aware of actions going on in their own territories or airspace.

5 EP Report on the alleged use of the European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) Temporary Committee on the alleged use of the European countries by the CIA for the transportation and illegal detention of prisoners Rapporteur: G.C.Fava (A6–99999/ 2007) final

6 http://origo.hu/nagyvilag/20060612elfogadta.html

Although the Parliamentary Assembly of the Council of Europe and the European Parliament have strong commitments to the European Convention of Human Rights and democratic control, the transparency of their reporting systems in regards to all relevant information on the mechanisms of secret service, intelligence and anti-terrorist alliance of states that endanger the rule of law, human rights and liberal democracy is questionable. Furthermore, there are numerous ramifications of these secret actions on domestic policy and transatlantic relations, capacity and action potential of COE or the EU towards own members, protection of human rights and legality of combating terrorism. This article intends to describe how states that are directly or indirectly responsible explain their actions instead of facing this human rights crisis.

What is the most effective weapon against terrorism?

US Defence Secretary Robert Gates who spoke at the Munich Security Conference about the West's defeat of totalitarianism in the 20th century and our opposition to extremist ideologies now. He said: "*Our most effective weapon then and now has been Europe's and North America's shared belief in political and economic freedom, religious toleration, human rights, representative government and the rule of law. Those values kept our side united*."[7] This unity of values and principles has own legal toolkit as follows:

1. Inviolability of human dignity means as *ius cogens* the prohibition of torture, degrading or inhuman treatment or punishment (for instance, the Convention against Torture and ECHR). For this implementation, the prevention of torture is mandatory for party states of Convention on Prevention of Torture by the COE.
2. Right to life, liberty and security is based on the UN International Covenant on CPR and ECHR.
3. Right to protection against removal, expulsion or extradition taking into account the non-refoulement and right to access to international legal protection also comes from the UN International Covenant on CPR, Geneva Convention (1951) and ECHR.

7 Cited by Sarah Ludford (MEP, UK) in the debate about alleged CIA renditions prior to the vote on the final report (REF: 20070208IPR02898, 14/02/2007)

4. Right to the effective remedy and a fair trial including the habeas corpus is inserted into the UN International Covenant on CPR and ECHR.
5. Geneva Conventions on humanitarian law shall be implemented in warfare and armed conflicts. These define the right of an imprisoned war combatant enemy to be visited by humanitarian organisations; thus, their total isolation from the external relations means a violation of IHL.
6. Rules on International Civil Aviation are determined in the Chicago Convention. It establishes the principle that a party state has complete and exclusive sovereignty over the airspace above its territory, including responsibility for any violation of human rights by another state or authority. Moreover, use of civil aviation for any other purpose – such as covered military or police flight – is inconsistent with aims of the Convention. Moreover, it comes from the standard of good faith in the practice of commitments and law.
7. Respect for bilateral agreements regarding mutual assistance in the fight against organised crime and legal aid in criminal matters (including extradition, surrender) as well as on military bases are required. As the Venice Commission (European Commission for democracy through Law) underscored recently, this means that territorial states must be able to exercise sufficient power in order to fulfil their human rights obligations.
8. Right to privacy and protection of personal data as part of respect for human dignity are defined separately in UN International Covenant on CPR and ECHR.
9. Exceptions from human rights obligations shall remain within the legal framework: in case of emergency or severe danger to the nation, the limitations or derogations shall be temporary, determined in mandatory law, necessary and proportional without violation of racial, religious, gender, linguistic or social origin based discrimination. Furthermore, the most fundamental rights are not derogated or suspended (such as, in accordance with Art. 4 of UN International Covenant of CPR and 15 of ECHR, the right to life, religion, respect for human dignity and nullum crimen and nulla poena sine lege).
10. In case of violation of human rights the state shall launch an investigation and ascertain liability, including that officials, in judicial proceedings and compensation of victims shall be provided.

11. Civil and political scrutiny cannot operate without publicity, right to free press, and obtaining information in the public interest.
12. Adequate democratic control on executive power including security services is a requirement of constitutionalism and rule of law, which are common values in the EU. Moreover, Art 6–7 of the EU Treaty refers to the respect of fundamental rights and provides sanctions for severe, mass violations committed by a Member State, Art 21 and 39 regulate police and judicial co-operation in criminal matters; there is also a separate mechanism of CFSP.

This non-exhaustive list provides a set of common values and principles that could overcome totalitarian regimes; in spit of it, the extraordinary renditions and secret detentions could have still occurred.

Is there an alternative toolkit?

"*The traditional systems of justice do not work*"- summarised C. Rice, the Secretary of State,[8] when discussing a possible new approach. This system covers how to extract information from (alleged) terrorists at whatsoever cost including torture, incommunicado, kidnapping or covert flights via third countries or "through outsourcing, decentralised Quantanamo" – as referred on Ethiopia J. Shifton, the director of Human Rights Watch.[9] This "franchised illegal practice" means that suspected persons without a criminal charge before the court and without criminal procedural guarantees are in detention, tortured and interrogated in circumstances of extraordinary renditions. It can be labelled as a Cold-War heritage: aggressive, unilateral, militant responses as the best way to avoid catastrophe[10] to incipient threats or used as preventive interrogations. However, these actions prove the expansion of executive power and, in parallel with this, the denigration of court and international law.

Combating terrorism seems to be the axel of contemporary transatlantic relations that causes human rights crises. Speaking about human rights language, does this mean a clandestine implementation of illegal

8 Raymond Bonner: The CIA's Secret Torture. *The New York Review*, 11 January, 2007.

9 *AP News*, 6 April, 2007.

10 Kim Lane Scheppele: Law in a Time of Emergency. *University of Pennsylvania Law School, Scholarship at Penn Law*, 2004, May, Paper 55, 1–77.

instruments? Or on the basis of "Jesuit approach," is it an implementation of the exceptional power, in the national interest, to provide effective protection? "Sovereign is who decides on exception" – wrote C. Schmitt in 1922 but exception relates to the existence of a normal, rationale, and coherent legal system. As noted above, exceptions are allowed in the UN International Covenant of CPR and ECHR but this derogation must remain within the ius cogens. Five rights can never be the subject to derogation: right to life with the exception of the lawful act of war, the prohibition on torture, inhuman or degrading treatment, the prohibition on slavery or servitude, the prohibition on retrospective criminal laws. The legality of derogation by a Party State under the ECHR is not a decision which is purely internal to the state: it shall be communicated to the Secretariat of the COE and, if challenged by another state or an individual,[11] be subjected to supranational scrutiny by the European Court of Human Rights. Naturally, the legal conclusions shall be based on fact-finding, which is practically impossible due to secrecy, uncontrolled security services and absence of formal criminal proceedings. For this reason also, a political sociology would be better situated to analyze the internal logic of wars on terror in a globalised world, where rejected migrants and transnational diasporas[12] have come to replace interstate wars and military clashes. "Governing terror" does not merely reference the present massive global security effort against terrorist activities. It can also be observed how western security practices are themselves now also governed by a *widespread fear of terror* – so much so that the biopolitical term is also applicable.[13] Kofi Annan expressed his concern regarding this when he stated the following: "War on terror – in its excesses – has produced a serious and *dangerous erosion of human rights and fundamental freedoms."* [14]

In September 2006, President Bush publicly acknowledged that secret prisons exist.[15] He asserted that since the 1990s the extraordi-

11 Elspeth Guild: *Security and European Human Rights: protecting individual rights in times of exception and military action*. Wolf Legal Publishers, Challenge for European Law: The Merging of internal and external security, Nijmegen, 2007.

12 Didier Bigo and Rob Walker: International, Political, Sociology – editorial introduction. *International Political Sociology*, Nr. 1, 2007. 1–5.

13 Michael Dillon: Governing terror: The state of emergency of biopolitical emergence. *International Political Sociology*, Nr. 1, 2007. 7–28.

14 *Washington Post Foreign Service*, May 21, 2005.

15 While the rendition programme was built as one of the central instruments of the American war against terror after 11/09, the CIA set up own detention centres.

nary renditions and secret detention programme that were led by the CIA and pursued outside the US has yielded vital information that has been shared with other countries. In January 2007 the UK admitted its prior knowledge of a CIA prison network. Spain conceded in September 2006 that CIA planes transporting detainees to secret prisons in Europe may have stopped over on its soil; earlier this month, Portuguese officials opened a probe into allegations that CIA planes landed in Portugal en route to Guantanamo Bay, among other destinations. According to public records, after 9/11 implementation of the conditional Art 5 of North Atlantic Treaty was agreed upon (12 September 2001).[16] Despite declared collective measures in a war on terror, secret unilateral actions have been extended in order to secure agreements with certain countries to host "black sites" for HVDs. Reluctance of these governments and leading personalities in co-operation with EP Temporary Committee to provide answers to the questions of the Secretary General of the Council of Europe may, under Art.52 of the European Convention on Human Rights,[17] be organic part of the secret game of the governments. The fact-finding was supported by journalists and NGOs, and the secret actions were released in part. Thus, the "dynamics of truth"[18] requires European States to muster a collective spirit in acknowledging the truth about the past and regrouping to face the considerable challenges of the future.

(06.09.2006) http://www.whitehouse.gov/news/releases/2006/09/

16 "If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty." The assessment of NATO Allies on its determination was unanimous. (NATO Press Release, 2 October 2001.)

17 The question refers to an explanation of the manner in which internal law ensures the effective implementation of any of the provisions of the ECHR: (1) Adequate controls over acts of officials of foreign agencies within the State's jurisdiction i) Police and judicial cooperation in criminal matters, ii) Security Services, iii) Military personnel, and iv) Flights allegedly used for rendition purposes. (2) Adequate safeguards to prevent unacknowledged deprivation of liberty (3) Adequate provisions to deal with alleged infringements of Convention rights, (4) Have any public officials been involved in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty? Are there any official investigations completed or under way?

18 Committee on Legal Affairs and Human Rights: Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report (Rapporteur: Mr. Dick Marty, Switzerland, ALDE) http://assembly.coe.int

How extraordinary renditions are explained

The passive or active complicity of European states to a US-led war on terror cannot be explained only by regulations, but from territorial states' point of view, such an attempt may be acceptable. Naturally, the enumerated explanations (or rather legalistic evasions) form various combinations, and the cumulative effects of these reasons, as noted below, may appear in statements or policies.

No jurisdiction

Involvement of third countries (flight stopovers, secret detention and places of interrogation) means an *illusion of extraterritorial effect* of officials' activities. This uninnovative research is managed on board a ship or at Guantanamo-like facilities (as Bagram Airfield or Abu Gharib facility), places that remain territorially distinct from the country while remaining effectively within its control. These are areas that numerous of American courts have determined are not US sovereign territory, yet the US has effective and sole control there. The unlawful practice in international transit zones means a "*toolkit of restrictions outside the ordinary structure of migration law.*" Transit zones cannot be considered as an extraterritorial exception from human rights obligations. People residing inside the transit zone are subject to jurisdiction of the territorial state which remains bound by its international obligations to human rights[19]; however, they are treated *in a distinct way when compared to ordinary legal regimes,* at least in four aspects: (1) *detention or limitation of liberty and free movement* intends to prevent their irregular/unlawful entry into the territory, (2) less guarantees are available in *accelerated procedures* concerning the substantial evaluation of non-refoulement and asylum that would exclude feelings of security and stability for migrants in need of protection, (3) *absence of publicity* – for instance access of civil organisations and journalists to the transit zones – is almost excluded, and (4) *physical conditions of accommodation are backward* in transit zones in general avoiding further "pull factor effect" and keeping up their provisional residence.[20] Naturally, people subjected to extraordinary rendition were not rejected migrants, but they were criminalised as

19 See ECHR, Amuur v. France, 19776/92, Reports of Judgement and Decisions, 1996-III, No.11, 25 June, 1996.

20 On transit zones – European Parliament, Briefing, 2006. (J. Tóth)

refused foreigners without criminal procedures, legal guarantees, or publicity and were kept in unknown conditions on ships or in scheduled sections of airbases. This analogy allows us to suppose that the conditions of kidnapped, carried or tortured persons were if not physically then at least in psychically detrimental. Furthermore, they were not officially entered in the territory of transit and/or destination states. What consequences will the territorial state face for trespassing human rights obligations – for instance for right to request international protection – if there is no sanction for violation of the Geneva Convention? We have to add that refoulement and removal of a protection seeker has a chance to be sanctioned, for instance, against Sweden.[21]

In modern bureaucracy persons without official registration do not exist by law. If entry of a CIA flight and persons on board this flight have never been documented, how and against whom can participation in interrogation or torture of apprehended persons be proved?

The legal basis of *missing jurisdiction* can be valid on the basis of international treaties. The USA concluded bilateral agreements with new democracies – referencing NATO membership and security co-operation – excluding by law or in discretional power the jurisdiction of the territorial state for crimes committed by a US agent or military staff. The personal scope is also absent, developing a special military tribunal with lower level of suspicion and derogated guarantees of protection for detainees.[22] Moreover, CIA agents rejected appearance at proceedings in the Milan Courts when request for their extradition was issued.[23]

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21 UN Human Rights Committee's and CPT decisions against Sweden for asylum seeker's expulsion would be an example. CCPR underlines, that "at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party [of the Convention]" CCPR Communication No.1416/2005 (6 November, 2006.)

22 For instance, US military hearings on whether 14 top terror suspects formerly held in CIA secret prisons qualify as "enemy combatants" began 9 March 2007 at Guantanamo Bay (Combatant Status Review Tribunals). http://www.statewatch.org/rendition/rendition.html

23 Italy has asked the Italian Constitutional Court to cancel the indictments of 34 American and Italian intelligence officials in connection with the 2003 kidnapping and rendition of Egyptian cleric and suspected terrorist Osama Moustafa Hassan Nasr from Italy. Lawyers for the state say prosecutors exceeded their authority by using evidence that was protected by the state-secrets privilege. Prosecutor Armando Spataro has alleged that 25 Americans working for

Double standard

Although dual value system against aliens or/and actions abroad is not necessary new,[24] exceptionalism and emergency in a war on terror may be used to explain why terrorists are treated in a different manner from ordinary people First, they are frequently foreigners, third country nationals, and because of this, they tend to have less protection and rights. If they have obtained citizenship, they are naturalised nationals whose nationality and loyalty are questionable; the withdrawal of citizenship is possible (e.g. in case of dual nationality or by formal procedure as a legal consequence of abuse).[25] Moreover, alleged terrorists can be neither nationals nor settled, long-term resident migrants; thus, their legal standings are rather vulnerable. Moreover, it is suggested that fewer human rights guarantees are enough for a terrorist, and a stronger intelligence-collaboration is more necessary than even these few guarantees – as supported by the German Minister of the Interior Mr. Schauble believes that "Civil rights in period of terror" should mean that information extracted through interrogation or torture by foreign services can be implemented in criminal proceedings that seek to combat terrorism. He urges a new, mutual interpretation of security and liberty and, since

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the Central Intelligence Agency, one United States Air Force colonel, and five Italians from Italy's Military Intelligence and Security Service (SISMI) colluded to kidnap Nasr from Milan. Nasr was then allegedly transferred to Egypt and turned over to Egypt's State Security Intelligence (SSI), where he was allegedly tortured before being released on February 12. In response to US refusals to extradite the agents, Spataro has vowed to hold a trial in absentia (Lisl Brunner, 16 March, 2007.) http://jurist.law.pitt.edu/currentawareness/rendition.php

24 For example, in 1998 the Wall Street Journal reported on five terror suspects who were arrested by the CIA in Albania and taken to Egypt, where two of them had already been condemned to death by an Egyptian court in absentia. This judgement was carried out after the prisoners were handed over. It is cited by Simon Koschut in "Germany and the USA in the 'War against Terror': Is Extraordinary Rendition Putting Transatlantic Cooperation under Strain?" *Internationale Politik und Gesellschaft*, Friedrich Ebert Stiftung, Nr. 3, 2007. 36–52.

25 For instance, in Poland dual citizenship is not tolerated, even if there is formal withdrawal; while in Hungarian law, nationality may be withdrawn only if a person who has acquired nationality by naturalisation has violated the law on nationality by misleading the authorities by submitting false data or omitting data or facts. Ten years after naturalisation, Hungarian nationality may no longer be withdrawn. (R.Bauböck, B. Perchinig and W.Sievers (eds.): *Citizenship policies in the New Europe*, Amsterdam University Press, 2007.)

results cannot be obtained without it, a stronger co-operation between the American and European security services. "Europe is neither judge nor teacher of the United States."[26]

Finally, citizens of third country nationals, stateless or protection seekers at the EU external borders enjoy less rights and freedoms. (In parallel, the Military Commission Act (2006) clearly reflects requested "distinctions between United States citizens and non-citizens, strips away the time-honoured right of detainees to challenge the basis for their detention (habeas corpus), and insulates US service personnel from prosecution for violations of Common Art 3 of the four Geneva Conventions. The process that lay ahead for captured terrorist suspects was thereby mapped out, whilst the Administration tried to cover the tracks that led them there").[27]

While the aforementioned differences in legal status are lawful, equal treatment and strict human rights or diplomatic protection failed in practice in the following cases: German citizens, the Turkish citizen living in Germany, the Spanish citizen, Egyptians residing in Austria and the Turkish citizens detailed in the EP Report. This dual ethic and policy can be observed towards Muslims, if they are alleged terrorists without criminal procedural guarantees, as well as Gypsies in the eastward enlargement process.[28]

State incapacity

State incapacity is a all-encompassing term regarding legalistic evasions and the pretexts for rationalising why state control of air traffic – for instance in Poland and Romania – has favoured American flights at Szymany airport or at Kogalniceau airport. The "creeping co-operation" of the USA with Romania and Poland goes beyond the multilateral NATO framework (for instance in form of supplementary agreement

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26 Held by the Marshall Foundation and Bertelsman Foundation, Bruxelles (28 April, 2007.) MTI, www.index.hu

27 Committee on Legal Affairs and Human Rights: Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report (Rapporteur: Mr. Dick Marty, Switzerland, ALDE) http://assembly.coe.int

28 Frank Hoffmeister: Monitoring Minority Rights in the European Union. In G. Toggenburg (ed.): *Minority Protection and the Enlarged Union – The Way Forward*. Budapest: Open Society Institute, 2004; Balázs Vizi: The Unintended Legal Backlash of Enlargement? The Inclusion of Rights of Minorities in the EU Constitution *Regio,* Vol. 8, 2005. 95–104.

to NATO SOFA). Why does this happen in these states? The fragile democracy means weak parliamentary and public control, a strong affiliation to bilateralism due to lack of familiarity with multilateral games, and less knowledge about international law.[29] The Polish government, which has not been especially co-operative with the Council of Europe, has gathered fees between 2000 and 4000€[30] for landing these "secret flights." The other states in securing these agreements – such as Macedonia – do not, in fact, share the common values behind the agreements; for numerous reasons, they agree only at a rhetorical but only at rhetoric level; thus, it is possible to assume that alliances may be based on the desire to break-out of isolation or economic segregation, too. Among European governments, it was only Bosnia-Herzegovina that accepted formal responsibility for illegal actions and participation in the extraordinary rendition of Algerians.

In other words, effective sovereignty covers not only the respect for human rights but also airspace, international airports, air traffic and control on coordination with foreign intelligence services. Legal cases related to ECHR Art 6 and Inter-American Commission contain rich examples on both shores of the Atlantic Ocean.

Uncontrolled power

Due to EP Temporary Committee's initiative, Parliamentary or other scrutiny systems regarding executive power and the monitoring of lawful operation of security services was set up in many member states. There is no similar system in Austria; parliamentary scrutiny of security services exists in Ireland, while Poland rejected it. In other states, the judicial proceedings on liability was not launched. In Romania, for example, an ad hoc inquiry committee in the Senate operates but manages neither investigation nor initiates judicial procedure.

29 Mr.Frunda, György said during the PACE Plenary Debate (June 2006): "We did not and do not know who [transported] persons are because, do not forget, the aircraft are under the authority of the countries where they are registered. The countries in which the airports are located do not have legal instruments to see what happens on board." (27 June, 2006.) PACE Report http://assembly.coe.int

30 EP Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners Rapporteur: G.C.Fava (A6–99999/ 2007) final

Civil control and public discourses cannot work without respected and developed institutions with the right to obtain data and information of public interest. Although security and intelligence services are not necessarily transparent, the methodology and legal instruments regarding control of foreign agencies and operation of international networks of security services are missing.

How to avoid complicity

The extraordinary renditions can happen with active and passive complicity of European (EU, non-EU) and more distant states under the umbrella of counter-terrorism. This joint goal of public policy remains, but its legality requires avoiding complicity with unlawful, degrading actions on the basis of a dual ethic against alleged or genuine terrorists. Outlined lessons from the Reports of the EP and PACE shall be accompanied with a study on relevant international documents, democratic control and public debates.

At a universal level, only three tracks can be mentioned. The UN International Convention for the Protection of All Persons from Enforced Disappearance adopted on 20 December 2006 provides no exceptional circumstances (war, threat of war, internal instability or public emergency) that may be invoked as a justification for enforced disappearance of an individual regardless of his/her nationality, social status or an incitement. Accordingly enforced disappearance – as actor or as a supporter in silence – constitutes a crime. In certain circumstances in international law, it is a crime against humanity.[31] Latin-American and Stalinist dictators implemented this type of enforced disappearance instead of an ordinary criminal trial. If there is trust among states and the judicial authority in concern, efficiency of traditional justice can be upgraded with numerous lawful instruments. Kidnapping, secret renditions and detentions, clandestine stopovers, and covert flights does not provide the required mutual trust. The PACE also adopted relevant documents on enforced disappearances

[31] For the purposes of this Convention, "'enforced disappearance' is considered to be 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 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 law. (Art.2)

and unlawful detentions in connection with uncontrolled security services.[32] Ratification of this Convention would be important for states with strong commitments to human rights and those whose nationals are victimised.[33] Until its ratification, the COE Resolution on enforced disappearance lays down a number of points pertaining to the definition of enforced disappearance, safeguards against impunity, offers preventive measures, and secures the victims' right to reparation and the monitoring mechanisms which it considers essential.[34] Among the recommendations, it contains (a) the recognition of close relatives as victims in their own right and grants them a "right to the truth"; (b) effective measures against impunity (c) appropriate preventive measures (e.g. appropriate training of law enforcement, for instance the Guidelines on human rights and the fight against terrorism)[35], (d) a comprehensive right to reparation including restitution, rehabilitation, satisfaction and compensation, and (e) a strong international monitoring mechanism including an urgent intervention procedure.

Other preventive measures are the recognition of the jurisdiction of the international judicial forum and surrender of the persons concerned to this body. The USA is not alone in its reluctance to recognize the International Tribunal, and some of its partners perhaps even follow the US's example. For this reason ratification of the Statute has been strongly supported by the EU in each Member State.

At the EU level, the list of preventive steps and political recommendations is long[36] and includes an upgrade in EU-USA dialogue on secu-

32 Report on enforced disappearances (2005), Report on the control of internal security services in Council of Europe member states (1999), Report on the lawfulness of detentions by the United States in Guantánamo Bay (2005)

33 Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance: (a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is one of its nationals; (c) when the disappeared person is one of its nationals and the State Party considers it appropriate. [Art.9 (1)]

34 Doc. 10679 (19 September 2005) Enforced disappearances. The Report of the Committee on Legal Affairs and Human Rights was made by the rapporteur Mr. hristos Pourgourides (Cyprus, Group of the European People's Party)

35 It was adopted by the Committee of Ministers on 11 July, 2002.

36 Florian Geyer: Fruit of the poisonous Tree (Member Stets Indirect use of extraordinary rendition and the EU Counter-terrorism strategy. *CEPS Working Document,* Nr.263, April, 2007.

rity matters, follow up procedure to the Resolution or trust and capacity building as a sign of judicial progress in the third pillar. Beyond this resistance, F. Frattini's statement regarding the possible implementation of Art.7 of the EU Treaty looks too futuristic[37] as an optional implementation for a justice-safeguard closure of the Accession Treaty for Romania and Bulgaria, since reluctant combat against corruption is more realistic.[38]

The Hungarian case – instead of conclusions

The concluding report of the Council of Europe rapporteur Dick Marty likewise contains few concrete proofs of the participation of European states in the practice of renditions. Certainly, neither the EP nor the COE was able to force member states to provide information but was strongly dependent on the voluntary co-operation of governments. In this context domestic political discourses and scrutiny procedure would contribute some contours to the depiction of the co-operation among the security and intelligence services at global level as (dis)trustful.

Hungarian public opinion and press has been silent about CIA actions. Discourses are limited only to harsh, domestic political debates on governance while transatlantic relations, security policy or counterterrorism are neither issues of discussions nor targets of investigative reports. This is in spite of constitutional rights and statutory laws that

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37 April 15, 2007: Wiesenthal Centre Annual Report Notes Rise in Number of Convictions of Nazi War Criminals During Past Year. This contains a classification of states' activities for investigating war crimes. Accordingly Category A: Highly Successful Investigation and Prosecution Program, Category B: Ongoing Investigation and Prosecution Program Which Has Achieved Practical Success, Category C: Minimal Success That Could Have Been Greater, Additional Steps Urgently Required, Category D: Insufficient and/or Unsuccessful Efforts, Category E: No known suspects, Category F-1: Failure in principle, Category F-2: Failure in practice and Category X: Failure to submit pertinent data. On this classification the "rank o states" are as follows: A: United States, B: Italy, C: Denmark, Hungary, Serbia, D: Romania, E: Bosnia, Finland, Slovakia, Uruguay, F-1: Norway, Sweden, Syria, F-2: Australia, Austria, Canada, Croatia, Estonia, Germany, Great Britain, Latvia, Lithuania, Poland, Ukraine, X: Argentina, Belarus, Belgium, Bolivia, Brazil, Chile, Colombia, Costa Rica, Czech Republic, France, Greece, Luxemburg, Netherlands, New Zealand, Paraguay, Russia, Slovenia, Spain, Venezuela.

38 F. Frattini warned about the possible implementation (30 May, 2007.) due to the slow speed of reform in judicial systems and minimal progress in anti-corruption fights. The progress report is available on 27 June with a possible proposal on introduction of the closure. www.transindex.ro

provide to access to relevant public information that is supervised by the Ombudsman for Data Protection and Public Information.[39] On the other side, the terms "state secret" or "service secret" and "security interest" mean lawful and almost unchecked legal restraint in the ability to access all relevant data on security services and clandestine operation of the organizations under investigation.[40] The parliamentary control of civil and defence security services has meant a Committee consisting of 11 MPs while the Government (through the Minister of Defence and Minister without portfolio or Prime Minister's Office) has directed those strongly hierarchical, militant organisations since 1990. Due to their isolation and ability to avoid being genuinely debated, public opinion is minimally interested in the regular operation, efficiency and public finance of these services, unless these offices provide information about a terror threat in the country.

The democratic legitimization is pre-supposed by regulation and direction by the Cabinet; thus, its systematic scrutiny by the 11 MPs of the Parliamentary Committee is rather formal. Only two sessions were held exclusively on information access.[41] Furthermore, only the directors of civil intelligence services are involved in this exchange with the MPs of the parliamentary opponent and the governing power. Numerous stop-overs and use of Hungarian air-space by CIA flights were only confirmed by the Committee, but other actions, involvement, incapacity or ignorance of secret services were neither directly nor indirectly released to the public. We add that legal framework, bilateral agreements or entitlement were not implemented in the MPs' scrutiny at all.

The CIA actions and EP Report appeared only briefly in the news[42] adding that "there is no authentic evidence" about secret detentions without echo. While security services and investigating authorities (Police, Border Guard, Customs Office, Taxation Office, Public Prosecutors Office) have gradually extended their competence against potential ter-

39 Art.59 (2) of the Constitution, and Act LXIII of 1992 on personal data protection and accession to public information, Act CII of 2005 on freedom to access electronic information, Act LIX of 1993 on Ombudsman.

40 Act LXXVI of 1995 on state and service secrets and Act CXXV of 1995 on National Security

41 15 November, 2005. and 27 June, 2006. The latter was public, thus its Protocol is available (Nbb-1236/2006/23)

42 A CIA-jelentéssel egyetért az EP, de bizonyíték nincs [EP agrees to the report on the CIA, but there is no evidence] *Magyar Hírlap,* 15 February, 2007.

rorists in recent years, democratic and legal control has not been followed nor balanced it.[43] Furthermore, the same entitlements or instruments of law do not form a coherent system to combat serial killers, organised crimes, war crimes or crimes against humanity. These organisations are relatively inactive – at least according to the Wiesenthal Centre[44] – in the investigation of previous war crimes. More over, not only prior events are unavailable to researchers; they are also denied access to the actual operation, rules or structure of security services.

The basic motivation for secrecy is, naturally, immanently given: the enemy must not know what we know. But to this, a procedural secrecy is quickly added: the enemy must not know the illegal procedures undertaken in order to gain information, etc. This becomes in itself a potential cause of conflict. And this problem is, once more, doubled in democratic society: the public must not know (too much) about the methods used because this may delegitimize democracy's own laws and ideals. These constraints have led to a violent growth in the use of the three classic grades of secrecy: confidential, secret and top secret. Too much secrecy not only entails that the organisation may loose its grasp on its own information; it may, furthermore, lead to the widespread misunderstanding that just because something is marked 'Top Secret' it is eo ipso true. In fact, even today, after the fall of the party state, the files and the empirical data archives that are essential to analytical research are only accessible in part because of rules pertaining to state archives, security services' interest and the qualified documents.[45] In other words, gradual development of democratic control follows the limited freedom of science on security services. By the way, accountability of intelligence and security services does not necessarily include accession for academics.[46]

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43 Szikinger, István and Tóth, Judit: Efforts for building lawful enforcement, security and balance in public law of Hungary. *Working paper*, 2006; and Szikinger, István: The Police Act and the National Security Act in Service of the Fight against Terrorism. *Working paper*, 2006. www.mtaki/challenge.hu

44 *Népszabadság,* 11 June, 2007.

45 Révész, Béla: *Secret as politics – Research of Secret Services from the Point of view of Politology. Theses of Dissertation of PhD*, Szeged, 2007.

46 See F. Frattini speech on the international symposium of *Accountability of the Intelligence and security agencies and human rights* (The Hague, 7 June, 2007.). He said: "In all our work we need to think carefully about how we protect and promote fundamental rights, not just in policy and legislation, but also in daily practice. The intelligence services' activities, as well as their cooperation – a key factor

The security-services minister is not talkative; however, as the threat of terror was referred to three times during the election campaign, street demonstrations and political assembly led by the biggest opponent party in September-October 2006, the security-services minister had to give an answer as to whether it was a "dirty trick of the Government" against political enemies or true. He said that extremists as rightists forming groups of 2–3000 persons had prepared dangerous actions in public places and that the core 200 people were furnished with hand-made weapons. Their arrest, investigation or control stopped them, but severe mistakes were made by the security service staff. For this reason, the director of National Security Service urged a re-organisation and reform before finally resigning in May 2007. The Government proposes a modification on structure, rationalisation and more restrictive internal screening of officers. Although since 1990 it has been raised more times,[47] the amendment requires Parliamentary consent. We can conclude that the major threat is internal and that services have to face the classical task of protecting the constitutional system – as opposed to international threats.

The news on Fava's Report and its approval (12 June 2007) would inspire public discourses on legality and implications of CIA actions. But accordingly, the internal political party cleavages are deepening through this transatlantic, as well as European, issue. The MEP Magda Kovács (SP) supported the staunchness of the Report that would serve as a proper basis for further decisions and work. She evaluated the motions submitted to the Report as compromises, although there was a basic difference in approach as to whether to accept as facts that CIA actions and involvement of EU member states as violations of human rights inasmuch as these actions cannot be tolerated by law and morale, the existence of secret prisons and to demand their liquidation in accordance with human rights. The opinion of the People's Party MEP György Schöpflin reacted to it in a press conference: the harsh tone of the PACE Report strongly influenced the atmosphere in which the motions were made. The conservative side would not have supported a harsh anti-American critic. The Fava's Report does not appoint guilty, responsible states, and

in combating terrorism – must be conducted with full respect for fundamental rights and the principle of the rule of law."

47 Titkosszolgálati tervek. Szilvásy György a botrányokról és a kijátszott terrorkártyáról [Plans on Security services – Interview with the Minister Szilvásy on scandals and terror] *Népszabadság*, 2 June, 2007.

he added: "Torture, illegal flights are also condemned by the People's Party but evidences are still weak."[48] This short dialogue between the right and left side of the Hungarian EP members may encapsulate at least two aspects of evaluation of the extraordinary renditions: what should be the legal and foreign affairs instruments of lawful, bilateral co-operation with US?

The existing legal instruments providing a fast, regular exchange of information and judicial, investigative co-operation are as follows:

1. International Law Enforcement Academy (Budapest) founded, supported and led by the USA and the Hungarian Ministry of the Interior would provide professional training or analysis of cases.[49]
2. Agreement on mutual legal assistance on criminal matters[50] ensures direct, even oral requests in urgent cases, and inter-ministerial contacts without dual incrimination. It provides confidentiality, personal data exchange not only in criminal proceedings but also "for prevention of severe and direct threat on public security." Entitlement to set up Joint investigation teams or videoconferences etc. was inserted into the text in accordance with EU-US Treaty (2003)[51] and, thereby, upgrading the speed of co-operation.
3. Agreement on extradition[52] provides extradition of offenders in all types of organised, structured or conspiring groups, even when committed in a third country. Upon inter-ministerial request, transfer

48 http://origo.hu/nagyvilag/20060612elfogadta.html

49 165/1996. (XI. 20.) Korm. rendelet a Magyar Köztársaság Kormánya és az Amerikai Egyesült Államok Kormánya között a Nemzetközi Rendészeti Akadémia létesítéséről szóló, Budapesten, 1995. április hó 24. napján aláírt Megállapodás kihirdetéséről [Agreement on ILEA]

50 1997. évi LX. Törvény a Magyar Köztársaság Kormánya és az Amerikai Egyesült Államok Kormánya között a kölcsönös bűnügyi jogsegélyről szóló, Budapesten, az 1994. év december hónap 1. napján aláírt szerződés kihirdetéséről [Agreement on legal aid on criminal matters]

51 2006. évi XL. törvény a Magyar Köztársaság Kormánya és az Amerikai Egyesült Államok Kormánya között a kiadatásról és a kölcsönös bűnügyi jogsegélyről szóló, Budapesten, 1994. december 1-jén aláírt szerződések módosításáról szóló szerződések kihirdetéséről [Modification of extradition and mutual legal aid in criminal matters agreements]

52 1997. évi LXI. Törvény a Magyar Köztársaság Kormánya és az Amerikai Egyesült Államok Kormánya között a kiadatásról szóló, Budapesten, az 1994. év december hónap 1. napján aláírt szerződés kihirdetéséről [Agreement on extradition]

of offender from third country can be permitted, and transferred offender can be kept in detention. Air transfer without planned landing needs no permit. It was also modified taking into account the EU-US Treaty (2003).

4. Memorandum on prevention and suppression of organised crime[53] ensures exchange of data, co-operation in investigation and trans-border actions.
5. Supplementary agreement to NATO SOFA[54] covers residence in and entry of military forces. Hungary entitles the Government to withdraw at its own discretion the transfer of jurisdiction for criminal proceedings when it is in vital interest of the state. Moreover, the military and civil staff is obliged to respect all American and Hungarian regulations. Exceptions of border, customs or alien policing control is applicable only for military and civil staff. Qualified defence data is also protected.[55]
6. The air traffic agreement[56] allows use of the airport and airspace for designated, registered air companies that are obliged to respect all laws upon entry, regardless the nationality of persons on board.

Finally, the anti-American sentiment can be read from the aforementioned discussion of the EP Report and its follow-up. This internal political game is played by the President of state. His Major functions (Art. 29 of the Constitution) are to represent the unity of the nation and to monitor democratic operations of state organs. He is also the chief com-

53 36/2000. (III. 17.) Korm. rendelet a Magyar Köztársaság és az Amerikai Egyesült Államok Kormánya között a szervezett bűnözés megelőzésére és visszaszorítására vonatkozó információk cseréjéről szóló, Budapesten, 2000. január 13-án aláírt Egyetértési Nyilatkozat kihirdetéséről [Memo of Understanding on organised crime]

54 1997. évi XLIX. Törvény a Magyar Köztársaság Kormánya és az Egyesült Államok Kormánya közötti, az Egyesült Államok Fegyveres Erőinek a Magyar Köztársaság területén történő tevékenységéről szóló Megállapodás, valamint az annak mellékletét képező Végrehajtási Megállapodások megerősítéséről és kihirdetéséről

55 1996. évi XXXIV. törvény a Magyar Köztársaság Kormánya és az Amerikai Egyesült Államok Kormánya között a minősített katonai információk védelme tárgyában Washingtonban, 1995. május 16-án aláírt Biztonsági Egyezmény megerősítéséről és kihirdetéséről [Agreement on qualified defence information]

56 1973. évi 16. törvényerejű rendelet a Magyar Népköztársaság Kormánya és az Amerikai Egyesült Államok Kormánya között Washingtonban, az 1972. évi május hó 30. napján aláírt légügyi egyezmény kihirdetéséről

mander of defence, which is part of a shared defence competence.[57] The ruling president was elected in August 2005.[58] His self-definitions reference becoming a symbolic and merit-based power: "The President shall be in possession of a moralistic power, and s/he can accomplish [his/her] own goals through symbolic gestures and different measures that may carry [their]own message." He represents the actual government's foreign policy, which stresses wide manoeuvring room "where I may stress [my] own points, for instance, in case of my disagreement I reject a visit or participation." Moreover, "I stand for human rights and constitutional values as a civil rights fighter." "Freedoms are guaranteeded by the Constitution. Respect for human rights is our common treasure that shall be guarded. We must not make a concession for a moment." "I am a friend of Europe – supporting deeper integration in the EU although decision making in the EU is not democratic enough thus we have to exploit democracy in a greater extent at home in order to express our opinion in Brussels. The parliamentary scrutiny must be more effective and civil organisations and pressure groups should express [their] own views on European issues stronger."

Because of his firm stand on human rights and democratic control, he had to confront biometrical identification in theory (because as a VIP he did not have to imply it). "I do not travel to the USA – as an academic I have neither done – until I must give fingerprints" This rejection would express the opinion of broad circle of society. "I have chosen this method of protest not for myself. The Hungarian Government has made efforts for longer time[s] [for] visa free entry. The security needs mean no adequate reasons for visa requirements just for Hungarians. Perhaps my harsh and provocative statement would draw attention to this issue … I am looking forward to reactions. In case of visa facilitation or fingerprint giving, I can give also concession." Finally, he travelled to the UN General Assembly in possession of a UN visa to NY (13 September 2005), and he met with G. W. Bush not in US but in Budapest (22 June 2006). He raised: "experiences of democratic changes and the most effective instruments of liberty, democracy and protection of human rights. He underlined the necessity of respect for human

57 S/he is nominated by MPs and elected by the Parliament for 5 years, and his/her competences are implemented upon countersignature of the Government/minister with exceptions related to the operation of the Parliament.

58 Citations from interviews made with the President, see: www.keh.hu

rights even in combating terrorism and in circumstances of upgraded security threats. He emphasized that visa requirement for Hungarian citizens were not reasonable yet due to contacts of alliance."

Also coming from the civil rights fighter's attitude, he rejected the PNR Act. The Parliament passed the Bill on the promulgation of an Agreement between the EU and the USA on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the US Dept. of Homeland Security (20 November 2006). He rejected its signature, and he returned the Act to the Parliament for reconsideration (Art 26 of the Constitution): "In my view the Act does not include all the necessary and possible guarantees related to its subject" coming from the fundamental rights for personal data protection and the Act pertaining to the protection of personal data (1992). Sensitive personal data (such as religion or health of the concerned person) required further guarantees (direct written consent of the concerned person and an adequate level of data protection in the third country). He proposed that the promulgating act would provide a balance in favour of a constitutionally high level of personal data protection: "data transfer on the basis of the Agreement on the condition that the person concerned has explicitly consented to such transfer abroad." Due to rejection and reconsideration, the promulgating act modified the Act on Air Transport (1995) and entitled the Ombudsman of personal data protection and public information to control the implementation of the Agreement.

As lessons from the secret actions, a strong commitment for human rights and constitutional principles by state leaders and the implementation of lawful tools for co-operation with similar foreign services assist us in avoiding similar human rights crises. "Each state shall protect against terrorism that would limit liberty. But each limitation and restriction shall be inevitable, necessary and really appropriate in protection against terrorism. Human dignity must not be limited, derogated or suspended in emergency, and – for instance as a recently appear[ing] conception saying that foreign terrorists or alleged terrorists could be tortured on a constitutional base – it shall be rejected. There is a *need for a new balance* between self-protection of state and respect for fundamental rights. And if public opinion prefers security versus liberty – there are values and principles that shall be represented even against public opinion."