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The Transnational Use of Torture Evidence

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Europäisches und Internationales Recht

herausgegeben von
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To Nicole, Erwin, and Uli

Preface

This book is based on my doctoral thesis, which I defended at the Faculty of Law of the Humboldt University of Berlin in March 2014. I would first like to thank the supervisor of my doctoral thesis, Professor Georg Nolte, who showed particular interest in the topic and provided invaluable academic guidance. I would also like to thank Sir Nigel Rodley, who encouraged me to write a Ph.D. on this topic and Professor James Crawford, who generously shared his thoughts with me on parts of the thesis. I am also grateful to Professor Christian Tomuschat for the prompt redaction of the second academic vote.

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Chapter 1 – Introduction

This book is about the admissibility of the use of evidence allegedly obtained by torture abroad. It tackles the questions whether international law restricts the use of foreign torture evidence[1] by the judiciary as well as the use of such information by the executive branch of States for operational purposes. The problems are exclusively dealt with from an international law perspective. The focus is thus to examine whether States incur responsibility under international law when their judiciary admits evidence allegedly obtained by torture abroad in criminal court proceedings or when their executive organs use such information for preventive measures, for example to avert an imminent attack on their citizens. The analysis does not intend to answer political questions, but rather focuses on the current legal state of affairs. However, the question underlying this book arises from a politicised context, which makes it difficult to discuss the law in an isolated manner.[2]

The nature of the September 2001 attacks was unprecedented and since then the U.S. as well as many other, mainly western States, fear similar attacks on their population. The London and Madrid bombings showed the concerns right: modern terrorism[3] is capable of causing harm of un-

1 Unless indicated otherwise, the term 'torture evidence' will hereinafter refer to evidence allegedly obtained by torture in another State. The question of the burden and standard of proof for this allegation will be discussed in Chapter 2 D) VI) and VII).

2 Georg Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order', Theoretical Enquiries in Law 5 (2004) 111–129, at 112. On the impossibility to strictly dissect politics and international law see Marti Koskenniemi, 'International Law in the World of Ideas' in James Crawford and Martti Koskenniemi (eds.) *The Cambridge Companion to International Law*, (Cambridge: CUP 2012) 47–63.

3 For further reference on the term terrorism see Council of the European Union, Council Framework Decision of 13 June 2002 on combating terrorism, Official Journal L 164, 22/06/2002 P. 0003 – 0007; Parliamentary Assembly of the Council of Europe, 'Human rights and the fight against terrorism', Doc. 12712, 16 September 2011; European Commission for Democracy Through Law (Venice Commission), 'Report on Counter-Terrorism Measures and Human Rights', 4 June 2010, CDL-AD(2010)022, pp. 7 et seq.; Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights, *'Assessing Damage, Urging Action'* (Geneva: International Commission of Jurists, 2009), p. 5. See also Ben Saul, *Defining Terrorism in International Law*, (New York: Oxford University Press, 2006); Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights', European Journal of International Law 15 (2004) 989–1018; August Reinisch, 'Terrorism and Human Rights: EU Anti-Terrorism Measures from an ECHR Perspective', Baltic Year-

precedented scale. States were called upon to take effective actions in order to prevent further, similar large-scale attacks. These actions needed to take into account some features inherent to modern terrorism that is posing specific challenges to the States in that it differs from conflicts with another State as well as from conflicts with national terrorist groups. On the one hand, the threats emanated from a globalised terroristic network, thus from opponents that are less visible and less centralised than a State.[4] Furthermore, terroristic organisations lack the traditional structure of an opposing State, including key personalities that allow for diplomatic efforts in conflict resolution. On the other hand, international terrorism differs from national terrorist groups in that it is even harder to localise its actors, and its fragmented organisational structure considerably complicates the task to understand its modes of operation.

The attacks of 2001 thus increased States' awareness that they could not protect themselves alone and led them to intensify their collaboration, including transnational intelligence cooperation. In this regard, the UN Security Council in its resolution 1373 also called upon States to find ways of increasing and accelerating exchange of operational information, and to cooperate on judicial and administrative matters to prevent further attacks.[5] Equally, international and regional organisations such as the Council of Europe, urged States to increase their communication and undertake joint efforts to combat terrorism, including making their intelligence agencies more permeable for sharing information.[6] This led to

book of International Law 6 (2009) 249–261; Christian Tomuschat, *Der 11. September und seine rechtlichen Konsequenzen*, (Trier: Legal Policy Forum, 2002), pp. 11–12.

4 For a discussion of a potential new concept of transnational conflicts, departing from the traditional dichotomy of international and non-international armed conflicts to include terrorist crimes, see Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', Journal of Conflict & Security Law 15 (2010) 245–274. On the general challenges on how to deal with terrorism in law see Thomas Weigend, 'Terrorismus als Rechtsproblem' in Rainer Griesbaum (ed.) *Strafrecht und Justizgewährung, Festschrift für Kay Nehm*, (Berlin: Berliner Wissenschafts Verlag, 2006) 151–166 and Michael Pawlik, *Der Terrorist und sein Recht. Zur rechtstheoretischen Einordnung des modernen Terrorismus*, (Munich: Beck 2008).

5 United Nations Security Council Resolution 1373 adopted on 28 September 2001, UN Doc. S/RES/1373, paras. 3 (a) and (b).

6 See, for example, Parliamentary Assembly of the Council of Europe, 'Need to intensified co-operation to neutralise funds for terrorist purposes', Recommendation 1548 (2002), 18 November 2002.

an internationalisation of the intelligence gathering process, also making available new sources of evidence for court proceedings.

Both subjects of the present inquiry touch upon issues traditionally dealt with at the national level: the regulation of judicial proceedings and national security policies. First, the existence and the scope of a judiciary exclusionary rule under international law for evidence allegedly obtained by torture elsewhere, meaning a ban on introducing such information as evidence in court proceedings, will be examined. Secondly, it will be carved out which limits States may encounter in the operational sector regarding the use of such information. Many domestic legal systems have foreseen a judiciary exclusionary rule for torture evidence before it came into being in international law, therewith providing defendants with a domestic tool to challenge incriminating evidence against them. Equally, the regulation of institutions tasked with issues of national security, including information gathering and the use of information for preventive purposes, is one of the core competencies of national States. However, the aforementioned intensified cooperation between States has drawn these problems onto the international plane, making it important to know whether international law provides for a common standard, harmonising the powers of States regarding the use of foreign torture evidence. In the affirmative, this standard can serve as a benchmark to review whether States, at the domestic level, provide for sufficient (procedural) guarantees to fulfil their international obligations. Furthermore, an international law rule on the use of evidence supposedly obtained by torture is necessary for dealing with it in international *fora*, such as the international criminal tribunals.

A) Contextualisation of the Problem in International Law

The issue of the legality of the use of evidence allegedly obtained by torture abroad stands between two well-established principles of international law. On the one hand, States have an obligation to protect their population from criminal acts, including terrorism.[7] In this sense, the ECtHR in *Osman v. UK* considered that a State failed to comply with its obligation under Article 2 ECHR if its 'authorities knew or ought to have known [...] of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[8] States thus are under an obligation to secure public safety, including the security of its organs and the safety of its population, 'if necessary at high cost'.[9]

On the other hand, the legality of the efforts undertaken in view to comply with this obligation finds its limits in absolute rules of international law, such as the prohibition of torture.[10] The prohibition of torture has a specific status in international law. Today it is widely agreed to be *jus cogens*, that is it cannot be departed from, unless by a rule of equal status.[11]

7 Council of Europe Committee of Ministers, 'Guidelines on human rights and the fight against terrorism', 11 July 2002, Preamble [f].

8 *Osman v. UK*, No. 23452/94, Judgment of 28 October 1998, 1998-VIII no. 95, para. 116.

9 Venice Commission, 'Report on Counter-Terrorism Measures and Human Rights' (fn. 3), para. 11.

10 For a thorough assessment of what constitutes torture in international law see Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, (New York: Oxford University Press 2009), pp. 82–143 and Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (New York: Oxford University Press, 2010). The present work will employ the term 'torture' as defined in Article 1 UNCAT.

11 See amongst many others *Prosecutor vs. Furundžija* (1998), ICTY judgment of 10 December 1998, paras. 147–57; *Al-Adsani v. United Kingdom*, No. 35763/97, Judgment of 21 November 2001, Reports of Judgments and Decisions 2001-XI, para. 61; *R v. Bartle and the Commissioner of Police for the Metropolis and Other ex parte Pinochet* (No. 3), 39 International Law Materials (2000) 581, at 589; *Siderman de Blake v. Republic of Argentina*, 965 F 2d 699, at 717 (9th Cir, 1992); Human Rights Committee, *General Comment* 24, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 10. For further reference

Furthermore, it is phrased in absolute terms in the extensive set of treaties including it.[12] It follows from these terms that violations cannot be

see 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, para. 374; Michael O'Boyle, 'Torture and Emergency Powers under the European Convention in Human Rights: *Ireland v. United Kingdom*', AJIL 71 (1977) 674, at 687–88; Antonio Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' in Ronald Macdonald, Franz Matscher, and Herbert Petzold (eds.) *The European System for the Protection of Human Rights* (Dordrecht: Nijhoff, 1993), p. 225; Andreas Zimmermann, 'Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks', Michigan Journal of International Law 16 (1993–1994) 433, at 438; Hans Danelius, 'Protection against Torture in Europe and the World' in Macdonald et al. (eds.), *The European System for the Protection of Human Rights*, pp. 263–275; Philip Leach, *Taking a Case to the European Court of Human Rights*, (Oxford: Oxford University Press, 2005), p. 203; Andreas Zimmermann, 'Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters' in Christian Tomuschat and Jean-Marc Thouvenin (eds.) *The Fundamental Rules of the International Legal Order*, (Leiden: Nijhoff, 2006), at 337–38; Clare Ovey and Robin White, *The European Convention on Human Rights*, (Oxford: Oxford University Press, 2005), p. 74. Even the commentators who remained reluctant to confirm the peremptory nature of the prohibition of torture have today dropped their concerns. See, for example, the position taken in Chapter 1 and 2 by Nigel Rodley, *The Treatment of Prisoners under International Law*, (2nd ed.) (Oxford: Oxford University Press, 1999) as opposed to the position taken in the following edition (3rd ed., 2009) (fn. 10).

12 On the international level it is included in the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNDAT), adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX); the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), adopted and open for signature and ratification New York 4th February 1985 (GA Res. 39/46, 10 December 1984); Article 7 International Covenant for Civil and Political Rights (ICCPR), (GA Res. 2200A(XXI), 16 December 1966); Article 5 Universal Declaration of Human Rights (UDHR), (GA Res. 217A(III), 10 December 1948). On the regional level it is included in Article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (4 November 1950); The European Court of Human Rights (ECtHR) has repeatedly confirmed the absolute nature of the prohibition of torture. See amongst many others: *Selmouni v. France*, 28 July 1999, (2000) 29 EHRR 403, para. 95; in the Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (26 November 1987); Article 5(2) American Convention on Human Rights (ACHR) (22 November 1969); Inter-American Convention to Prevent and Punish Torture (December 1985, OAS); Article 5 African Charter on Human and Peoples' Rights (June 1981); Article 13 Arab Charter on Human Rights (15 September 1994); Common Article 3(1)(a) of the 1949 Geneva Conventions.

justified and that there are no exceptions to it.[13] Furthermore, the torture prohibition is non-derogable. That is, it can never be restricted, regardless of the circumstances, even in a case of national emergency.[14] Finally, it is customary international law.[15]

13 In this sense, then Secretary General Kofi Annan stated 'Recent times have witnessed an especially disturbing trend of countries claiming exceptions to the prohibition of torture based on their own national security perceptions. Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror. [...] The international community must speak forcefully, and with one voice, against torture in all forms.' Message on Human Rights Day, UN Doc. SG/SM/10257 HR/4877 OBV/533, 10 December 2005. See also Theo van Boven, 'The Prohibition of Torture: Norm and Practice' in Pierre-Marie Dupuy et al (eds.), *Common Values in International Law, Essays in Honour of Christian Tomuschat*, (Kehl: Engel, 2006), 91–102. The reason that there are no exceptions to the prohibition of torture is that the treatment is believed to go against human dignity. See thereon Winston Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement', Harvard Human Rights Journal (Harv. HRJ) 4 (2001) 88–121, at 88; Susan Marks, 'Apologising for Torture', Nordic Journal of International Law 73 (2004) 365; Michael Moore, 'Torture and the Balance of Evils', Israel Law Review 23 (1989) 280; Henry Shue, 'Torture' in Sanford Levinson, *Torture*, (New York: Oxford University Press, 2004) 47–60; Malcolm Evans, 'Torture', European Human Rights Law Review (EHRLR) (2006), pp. 101–09; Seumas Miller, 'Is Torture Ever Morally Justifiable?', International Journal of Applied Philosophy 19 (2005) 179–192; David Sussman, 'What's Wrong with Torture?', PPA 33 (2005) 1–33; Fritz Allhoff, 'Terrorism and Torture', International Journal of Applied Philosophy (IJAP) 17 (2003) 105–118; Michael Walzer, 'The Problem of Dirty Hands', PPA 2 (1973) 160–180; Michael Davis, 'The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment', IJAP 19 (2005) 161–178. For further reference on the meaning and importance of the term 'human dignity' on the international plane see Eckart Klein, 'Human Dignity – Basis of Human Rights' in Holger Hestermeyer et al (eds.) *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, (Leiden: Nijhoff, 2012), pp. 437–52, arguing that legal norms need a moral underpinning to consist in the long run. Human dignity, according to Klein, is an ethical kernel inherent in the system of international human rights and has become an implicit legal principle that may produce legal effects.

14 Article 2 (2) UNCAT; *Chahal v. UK*, (1997) ECHR 1996-V, 1831, para. 80; Venice Commission, 'Opinion on the Protection of Human Rights in Emergency Situations' Strasbourg, 4 April 2006, Opinion no. 359/2005, para. 7; Parliamentary Assembly of the Council of Europe, 'Human rights and fight against terrorism', Motion for a resolution presented by Mr. Boswell and others, Doc. 11973, 30 June 2009; Council of Europe, Committee of Experts on Terrorism (CODEXTER), 'World Justice Project: The Rule of Law and Counter-Terrorism', Doc. No. CODEXTER(2010) Inf 4, p. 28.

15 For further reference see Rodley and Pollard, *The Treatment of Prisoners* (fn. 10), p. 74; Herman Burgers and Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Dordrecht: Nijhoff, 1988).

However, in the efforts undertaken in view to respond to the new security situation, some aspects of international human rights law,[16] including the peremptory as well as the absolute nature of the prohibition of torture,[17] have been put into question. In this context, the Council of Europe asserted that many European States engaged in the U.S.-led process of spinning a worldwide 'spider web' of renditions and setting up 'black sites', that is detention centres providing for unacknowledged detentions and frequently allowing for further human rights abuses.[18]

16 Kalliopi Koufa, 'The UN, Human Rights and Counter-terrorism' in Giuseppe Neri (ed.) *International Cooperation in Counter-Terrorism, The United Nations and Regional Organisations in the Fight Against Terrorism*, (Hampshire: Ashgate, 2006) 45–68; Pieter H. Kooijmans, 'Upholding Human Rights in a Tense and Globalising World' in Ineke Boerfijn and Jenny Glodschmidt (eds.) *Changing Perceptions of Sovereignty and Human Rights, Essays in Honour of Cees Flintermann*, (Antwerp: Intersentia 2008) 233–243; Parliamentary Assembly of the Council of Europe, 'Human rights and the fight against terrorism' (fn. 3). For a particularly clear statement on the direct impact of the attacks of 9/11 on operational measures see Cofer Black, the Former Director of the CIA's Counterterrorism Centre in a statement before the 9/11 Commission, http://www.fas.org/irp/congress/2002_hr/092602black.html.

17 On the discussion of an exception to the prohibition of torture see for example Fritz Allhoff, 'Terrorism and Torture' (fn. 14), pp. 105–118; Emanuel Gross, 'Legal Aspects of Tackling Terrorism: the Balance between the Right of a Democracy to Protect Itself and the Protection of Human Rights', UCLA Journal of International Law and Foreign Affairs (UCLA JILFA) 6 (2001–2002) 89–168; Alan Dershowitz, 'Is it Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?', 23 Isr. LR (1989) 192–200; Alan Dershowitz, *Preemption. A knife that cuts both ways*, (New York: Norton and Company, 2006), pp. 220 et seq. For further references on this development see Christoph Flügge, 'Internationale und nationale Kontrollmechanismen im Strafvollzug' in Harald Preusker, Bernd Maelicke and Christoph Flügge (eds.), *Das Gefängnis als Risikounternehmen*, (Nomos 2009) 216–230 and Thomas Bruha and Christian Tams, 'Folter und Völkerrecht', APuZ 36 (2006) 16–23.

18 Parliamentary Assembly of the Council of Europe, 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states Report Committee on Legal Affairs and Human Rights', Doc. 10957, 12 June 2006, pp. 9 et seq. See also Monica Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Programme', American Journal of International Law 101 (2007), 442–452. Extraordinary-rendtions designate the extra judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system. At the destination, there is regularly a real risk of torture or cruel, inhuman or degrading treatment. For further reference see European Centre for Constitutional and Human Rights (ECCHR) (ed.), 'CIA "Extraordinary Rendition" Flights, Torture and Accountability – A European Approach, January 2009'; Amnesty International, 'United States of America – Below the radar: Secret flights to torture and 'disappearance'', 5 April 2006, AMR 51/05/2006.

Counter-terrorism legislations and executive measures thus quickly raised doubts as to whether States stroke a fair balance between ensuring public safety through law enforcement and securing individual rights.[19] One of the cornerstones of the debate about the legality of certain States' counter-terrorism strategies is the use of interrogational torture.

19 See Council of Europe, Committee of Ministers, 'Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism', 20 April 2005; Kalliopi Koufa, 'The UN, Human Rights and Counter-terrorism' (fn. 16), pp. 45–68; European Commission for Democracy Through Law (Venice Commission), 'Opinion on the Protection of Human Rights in Emergency Situations' (fn. 14), para. 5; Venice Commission, 'Report on Counter-Terrorism Measures and Human Rights' (fn. 3), para. 12

B) The Context of Intelligence Cooperation

The present book will deal with an area of international law that has yet been little examined: benefiting from the interrogational torture inflicted by others. The issue mainly arose in connection with the extraordinary-renditions-programme as it has been operated under the Presidency of George W. Bush.[20] A large yet unknown number of individuals were arrested, at times abducted, and transferred to another country, where they were often held in unacknowledged detention, without being informed of the charges and without access to a lawyer. They were often held incommunicado, without access to their family and over a lengthy period of time, without being tried before a court of law.[21] Many have been subject to ill-treatment or torture. Renditions have themselves added to the vulnerability inherent in any detention situation. In this sense, the U.S. Supreme Court in *Bin Laden* stressed that a detainee may be subject to improper treatment such as incommunicado detention more easily where he is held in another country.[22] Incommunicado detention facilitates and 'usually accompanies' use of coercive techniques.[23] The extraordinary renditions and the detention programme involving black-sites have blurred the lines of sovereign responsibility, including for abusive interrogation techniques. Increased intelligence cooperation under those circumstances camouflaged to whom certain abuses were attributable. The motives for this programme may have been manifold, but the main incentive was to obtain information on the terrorist groups threatening States. The aim was to better understand their structure, and to obtain information that may allow for the prevention of further attacks. The

20 For an assessment of the changes operated under the Obama administration see 'Joint study on global practices in relation to secret detention in the context of countering terrorism by Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Martin Scheinin and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Manfred Nowak', 19 February 2010, UN Doc. A/HRC/13/42, pp. 86 et seq.

21 Manfred Nowak, 'Das System Guantanamo', APuZ 36 (2006), pp. 23–30.

22 *United States v. Bin Laden*, Decision of 16 February 2001, 132 F.Supp.2d 168 (2001), at 182.

23 *Stein v. New York*, Judgment of 15 June 1953, 346 U.S. 156 (1953) 186, para. 73. See also Jenny-Brooke Condon, 'Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials', Rutgers Law International 60 (2008) 647–704, at 686.

judicial use of such information was a subordinate motive.[24] However, once information has been obtained, e.g. by intelligence agencies, it may be forwarded to law enforcement organs that may then use it in investigations and, ultimately, in court proceedings. Therefore, the judicial use of torture evidence is highly topical, although it is not the primary objective in counter-terrorism interrogations.

These new shapes of transnational cooperation also brought to light an array of different levels of involvement of States in the unlawful acts of other States. This raises questions of how to deal with those situations in terms of responsibility. Does international law prescribe the active gathering of information while taking advantage of coercive environments in another State? And how about the simple unsolicited reception of specific 'neutral' information, that is information without details on how it has been obtained, from a State with well-known torture records? The present analysis neither deals with the accountability of those primarily responsible for the extraordinary renditions and detentions, nor with the legality of interrogations conducted under these circumstances.[25] It deals with those who got involved in view to use information gained in this context. The analysis is constrained to the use of information gained by torture; it therefore dissects this problem from other abuses committed under the rendition programme.[26]

24 Dawid Bartelt and Ferdinand Muggenthaler, 'Das Rendition-Programm der USA und die Rolle Europas', APuZ 36 (2006) 31–38, at p. 33.

25 For further information thereon see European Parliament 'Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee' (2006/2027(INI)), adopted Thursday, 6 July 2006, P6_TA(2006)0316.

26 For further reference see ECCHR, *Extraordinary Rendition*; Amnesty International, *Below the radar* (fn. 18); Parliamentary Assembly of the Council of Europe, 'Alleged secret detentions' (fn. 18).

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