NOTE

COMPLIANCE WITH NEW INTERNATIONAL LAW:
A STUDY OF VENICE COMMISSION OPINION NO. 363/2005 ON THE INTERNATIONAL LEGAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES IN RESPECT OF SECRET DETENTION FACILITIES AND INTER-STATE TRANSPORT OF PRISONERS

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I. INTRODUCTION

In November of 2005, reports in the U.S. media that the Central Intelligence Agency (CIA) was operating secret overseas detention facilities, including two located in eastern Europe, and was routinely transporting detainees between those facilities and states known to engage in torture, sparked grave concern in the halls of the Council of Europe (COE).1 Within days, the council’s Parliamentary Assembly had appointed a rapporteur to investigate the extent to which council member states were participating in the CIA program.2 The rapporteur released a report, hereinafter Rapporteur’s Report, detailing his findings in June of 2006.3 Before doing so, he requested a legal opinion on COE member states’ international legal obligations with respect to the reported CIA program from the European Commission for Democracy through Law, a COE organ known more familiarly as the Venice Commission.4

The resulting opinion, hereinafter referred to as the Venice Commission Opinion, seeks to provide a legal foundation for requiring COE member states to enforce provisions of the European Convention for the Protection of Human Rights and Funda-
mental Freedoms (ECHR)—a convention to which the United States is not a party—against the United States in the course of its anti-terror activities in Europe. In doing so, the Venice Commission Opinion may serve as a model for attempts to contain the international behavior of the United States through legal means. An analysis of the Opinion’s implications may highlight the advantages and disadvantages of seeking to address the War on Terror, and particularly international actions taken by the United States in support of that war, through the use of international law.

This Note assesses whether the legal reasoning embodied in the Venice Commission Opinion applies with equal force to sources of international law other than the ECHR and whether the application of such legal reasoning serves as an effective or desirable check on U.S. anti-terror operations abroad, particularly those implicating the practice of extraordinary rendition. This Note assesses how the Venice Commission Opinion fits with other sources of international law by applying relevant theories of international law compliance to the enforcement regime described by the Venice Commission Opinion. Part II.A describes these theories. Part II.B provides a brief description of the operation of the U.S. extraordinary rendition program in Europe. Part II.C surveys three sources of international legal authority that claim some relevance to the U.S. rendition program.

Part III.A examines the arguments as to what obligations these authorities impose on the states that have endorsed them, including the legal arguments contained in the Venice Commission Opinion. Part III.B examines the workability of the Venice Commission’s approach to enforcing international law. It concludes that a legal method of addressing the human rights concerns

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6. See discussion infra Part II.B-C.

7. See discussion infra Part III.B-C. This Note uses the term “rendition” or “extraordinary rendition” to describe the process whereby the United States gains custody of a terrorist suspect abroad and transfers, or directs another state to transfer, that suspect to a third party state for interrogation or imprisonment. See discussion infra Part II.B.

8. See discussion infra Part III.C.

9. See discussion infra Part II.A.

10. See discussion infra Part II.B.

11. See discussion infra Part II.C.

12. See discussion infra Part III.A.

13. See discussion infra Part III.B.
raised by the CIA rendition program is reasonable and that the legal arguments and conclusions of the Venice Commission Opinion are potentially applicable to bodies of international human rights law other than the ECHR. Part III.C assesses the likelihood that the Venice Commission's approach will be effective in achieving greater compliance with international legal norms in the context of theories of state compliance with international law. It weighs the pressures exerted by the Venice Commission Opinion in favor of U.S. compliance with ECHR human rights standards against those factors that would tend to reduce such compliance under the relevant theories of international law compliance. Part IV concludes that the approach taken by the Venice Commission Opinion is unlikely to be effective in promoting increased compliance with international legal standards.

This Note is concerned particularly with the application of international human rights law to the U.S. program of detention and rendition of terror suspects in Europe. It therefore assumes the applicability of international human rights law, rather than international humanitarian law, to that program. Given its concern with issues of the enforceability of international law, especially with the possibility of enforcing international human rights law against the United States through the policing of U.S. behavior by COE member states, this Note does not deal at length with the direct application of international law against the United States itself. Rather, it focuses on the application of international law against COE member states which may be in some way connected to the U.S. rendition program, particularly the possibility that these states may be found in violation of international law if they do not hold

14. See discussion infra Part III.B.
15. See discussion infra Part III.C.
16. See discussion infra Part III.C.
17. See discussion infra Part IV.
19. For a more thorough discussion of the United States' responsibilities under international law with regard to its rendition programs, see generally A. John Radsan, A More Regular Process for Irregular Rendition, 37 Seton Hall L. Rev. 1 (2006); Weissbrodt & Bergquist, supra note 18.
the United States accountable under international standards for its behavior within their jurisdictions.\textsuperscript{20}

II. DISCUSSION

A. Theories of International Law Compliance

A lack of the enforcement mechanisms commonly associated with domestic systems of law—a centralized court system capable of ordering sanctions for its violation and state-sponsored police with the power to impose those sanctions—has caused some commentators to question the degree to which international law even qualifies as “law” in a strict sense.\textsuperscript{21} Indeed, scholars have expended a great deal of energy attempting to understand why, in the absence of traditional enforcement mechanisms, states continue to comply with international law.\textsuperscript{22} Several distinct theories of compliance have emerged.\textsuperscript{23} Two of the most influential theoretical models might be termed the “state interest” theory and the “international norms” theory.\textsuperscript{24}

“State interest” theories of compliance regard state interest, however it may be defined or ascertained, as the key factor determining state behavior in the international system.\textsuperscript{25} Such an approach is exemplified by Professors Goldsmith and Posner, who contend that states comply with international law when it is in their interest to do so, and that “international law emerges from states acting rationally to maximize their interests.”\textsuperscript{26}

Goldsmith and Posner recognize that state interests are not always easy to determine but assert that a state is nonetheless able to “make coherent decisions based upon identifiable preferences, or interests.”\textsuperscript{27} They further maintain that “it is natural and common to explain state action on the international plane in terms of the primary goal or goals the state seeks to achieve.”\textsuperscript{28} State inter-

\textsuperscript{20} See discussion infra Part III.A.
\textsuperscript{22} See, e.g., \textit{Goldsmith \& Posner, supra} note 21, at 3; Thomas M. Franck, \textit{Legitimacy in the International System}, 82 \textit{Am. J. Int'l L.} 705, 705 (1988).
\textsuperscript{24} See \textit{id.} Professor Sloss also discusses a “domestic politics” theory grouping.
\textsuperscript{25} \textit{Id.} at 159.
\textsuperscript{26} \textit{Goldsmith \& Posner, supra} note 21, at 3.
\textsuperscript{27} \textit{Id.} at 6.
\textsuperscript{28} \textit{Id.}
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ests, under this conception, do not necessarily, or even usually, describe the policy that would maximize the public good within the state, but rather are variable according to context.

One interest that will be present in any situation in which a state actor is considering whether to comply with a rule of international law is a general preference by the state for complying with international law. Regardless of whether such a general preference for compliance will ever outweigh a preference for other goods like security or economic growth when a state, in attempting to calculate its interests, perceives the two to be in opposition, there will be many situations in which a state might perceive that complying with international law will further its other interests and that violating international law will harm those interests.

States operating within the international system will be intimately concerned with principles of respect and reputation. "Respect is a foundational principle in societies based on individual autonomy and personal dominion, free exchange, and enforceability of private autonomy and agreements with both individuals and governments . . . . [I]n relationships between governments, 'respect' is a penetrating philosophical and pragmatic concept . . . ." In international relations, respect describes a trust or understanding on the part of one state that another state shares some common principle on which a relationship may be built and that this common understanding or commitment will govern the relationship between the states. The level of respect enjoyed by a state can have practical consequences: "[m]uch like contract law, nations would be unlikely to enter into trade agreements with other states if they did not have respect that the obligations would be honored."

29. Id. at 6-7.
30. But see id. at 9 (rejecting a preference for complying with international law as a basis for state interests and state action). Professors Goldsmith and Posner recognize that such a general preference for compliance exists and that state leaders may act based on that preference, but they decline to factor the preference into their theory of international law. Id. They acknowledge that a preference for international law compliance would have to be weighed against state preferences for other goods, such as security or economic growth, but posit that citizens and leaders care about the latter goods more intensely than they do about international law compliance. Id.
31. See id. at 9.
33. Id.
34. See id. at 349-50.
35. Id. at 353.
Similarly, "[i]nternational law can affect state behavior because states are concerned about the reputational and direct sanctions that follow its violation."\textsuperscript{36} A failure to follow international law hurts a state's reputation among the international community because it signals that the state is prepared to breach its international obligations.\textsuperscript{37} In the international system, lacking as it does traditional enforcement mechanisms, "a state's commitment is only as strong as its reputation. When entering into an international commitment, a country offers its reputation for living up to its commitments as a form of collateral."\textsuperscript{38} The value of its reputation, then, is a good that a state will rationally be interested in preserving.\textsuperscript{39} Preserving a good international reputation by consistently complying with international law allows a state to "enjoy long term relationships with other cooperative states, provides a greater ability to make binding promises, and reduces the perceived need for monitoring and verification."\textsuperscript{40} Failure to maintain a good reputation, on the other hand, makes a state's future commitments less credible and may thereby place the state at a disadvantage in its dealings with the international community.\textsuperscript{41}

The related concept of reciprocity also assumes a high degree of importance in the international system, where no external authority exists to enforce rules or agreements.\textsuperscript{42} Although there are many different situations in which the principle of reciprocity may factor into a state's decision to comply with or violate international law, reciprocity generally involves a state returning like behavior to the other states with which it deals on the international stage.\textsuperscript{43} Particularly, reciprocity "is a critical concept in the future enforcement of agreements and the maintenance of civil relations" between nations.\textsuperscript{44} When a state declines to comply with its international obligations, it will have reason to fear like behavior from other states with which it deals.\textsuperscript{45}

\textsuperscript{36} Andrew T. Guzman, \textit{A Compliance-Based Theory of International Law}, 90 CAI. L. REV. 1823, 1825 (2002).
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 1849.
\textsuperscript{39} \textit{See id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{See id.} at 1849-50.
\textsuperscript{42} \textit{See Francesco Parisi & Nita Ghei, The Role of Reciprocity in International Law, 36 CORNELL INT'L L.J. 93, 93 (2003).}
\textsuperscript{43} \textit{Id.} at 94.
\textsuperscript{44} Kochan, \textit{supra} note 32, at 356.
\textsuperscript{45} \textit{See Parisi & Ghei, supra} note 42, at 94.
“International norms” theories, in contrast to “state interest” theories, assert that states tend to manifest a significant level of day-to-day compliance with international law even when it is not in their short-term self interest to do so—and that therefore something other than mere state interest must explain that compliance. International norms-based theories posit that the character of a particular rule of international law will have an effect on state compliance with that rule. Professor Franck has elaborated a theory that the “legitimacy” of a particular rule of international law exerts on states a “pull towards compliance”—the more legitimate the rule, the stronger the pull toward compliance will be.

Legitimacy, under Franck’s formulation, is “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.” Franck identifies four distinct indicators of rule legitimacy: determinacy, symbolic validation, coherence, and adherence. To the extent that particular rules of international law exhibit these properties, he posits, states perceive the rules to be legitimate, and thus the rules “appear to exert a strong pull on states to comply with their commands.”

B. The U.S. Rendition Program

A great deal remains unclear about the United States’ practice of extraordinary rendition in Europe, including how many renditions have occurred and the length of time that they have been taking

46. See, e.g., Franck, supra note 22, at 705.
47. See, e.g., THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990); id.
48. FRANCK, supra note 47, at 16.
49. Franck, supra note 22, at 706.
50. Id. at 712. A rule’s determinacy has to do with the literary properties of its text, specifically “the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning.” Id. at 713. Symbolic validation, on the other hand, relates to the perceived authenticity of a rule rather than its content. Winer, supra note 21, at 21. A rule’s symbolic validity, according to Franck, refers to its ability to communicate its own authority, “the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication.” Franck, supra note 22, at 725. A rule is coherent when it relates rationally and in a principled way to other rules of the same system or, in other words, if it is “connected to a network of other rules by an underlying general principle.” Id. at 741. Finally, adherence refers to “the vertical nexus between a single primary rule of obligation (‘cross on the green; stop on the red’) and a pyramid of secondary rules about how rules are made, interpreted, and applied.” Id. at 752.
51. Franck, supra note 22, at 712.
place. Some reports have described a U.S. program to render terror suspects to third-party states in effect as early as 1995. In just four years after the September 11, 2001 attacks, estimates of the number of persons rendered in some form by the United States ranged into the hundreds. A variety of investigations, however, including some undertaken by the media, have shed light on the various forms U.S. rendition has taken. The COE Parliamentary Assembly Rapporteur's Report purports to document a clandestine "spider's web" sponsored by the CIA whose elements include:

[A] world-wide network of secret detentions on CIA "black sites" and in military or naval institutions; the CIA's program of "renditions," under which terrorist suspects are flown between States on civilian aircraft, outside the scope of any legal protections, often to be handed over to states who customarily resort to degrading treatment and torture; and the use of military airbases and aircraft to transport detainees as human cargo to Guantanamo Bay in Cuba or to other detention centres.

The form of rendition with which this Note is particularly concerned is the practice whereby U.S. officials gain custody of a terrorist suspect abroad and transfer, or direct another state to transfer, that suspect to a third state, particularly when the third state has a record of torture or mistreatment of prisoners. Third-party states to which the United States has reportedly frequently rendered terrorist suspects include Egypt, Jordan, Morocco, Saudi Arabia, Yemen, and Syria. The U.S. State Department has implicated each of these states as having engaged in torture during interrogation.
European states have reportedly cooperated in the U.S. rendition program in a variety of ways. The Rapporteur’s Report lists eight separate forms of COE member state “collusion” with the United States. Several of these forms of behavior clearly run afoul of various provisions of international human rights law. Of particular interest, however, are incidents of COE member states permitting civilian aircraft being used to transport detainees to states known to engage in torture to initiate their operations from an airport within the member state, to stop over at such an airport to refuel, or simply to pass through the member state’s airspace. The relevant international human rights law does not explicitly prohibit these forms of complicity. The Venice Commission Opinion, however, explicitly found that member states engaging in any of these activities would be violating their obligations under the ECHR.

60. See Rapporteur’s Report, supra note 3, ¶ 10-10.8.

61. Id. The eight forms include: (1) “secretly detaining a person on European territory for an indefinite period of time, whilst denying that person’s basic human rights and failing to ensure procedural legal guarantees such as habeas corpus;” (2) “capturing a person and handing the person over to the United States, with the knowledge that such a person would be unlawfully transferred into a U.S.-administered detention facility;” (3) “permitting the unlawful transportation of detainees on civilian aircraft carrying out ‘renditions’ operations, traveling through European airspace or across European territory;” (4) “passing on information or intelligence to the United States where it was foreseeable that such material would be relied upon directly to carry out a ‘rendition’ operation or to hold a person in secret detention;” (5) “participating directly in interrogations of persons subjected to ‘rendition’ or held in secret detention;” (6) “accepting or making use of information gathered in the course of detainee interrogations, before, during, or after which the detainee in question was threatened or subjected to torture or other forms of human rights abuse;” (7) “making available civilian airports or military airfields as ‘staging points’ or platforms for rendition or other unlawful detainee transfer operations, whereby an aircraft prepares for and takes off on its operation from such a point;” and (8) “making available civilian airports or military airfields as ‘stopover points’ for rendition operations, whereby an aircraft lands briefly at such a point on the outward or homeward flight, for example to refuel.” Id.

62. Secretly detaining a person without ensuring procedural legal guarantees, capturing and handing a person over to the United States with knowledge that he would be transferred to a U.S.-administered detention facility or rendered to a state known to engage in torture, and participating directly in the interrogation of persons held in secret detention would seem to be clear violations of the International Covenant on Civil and Political Rights and the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. See discussion of international legal authorities relevant to the U.S. rendition program, infra Part II.C.

63. The Venice Commission Opinion specifically addresses these situations. See Venice Commission Opinion, supra note 5, ¶ 159(h)-(k).

64. See discussion infra Part II.C.

65. Venice Commission Opinion, supra note 5, ¶ 159(h)-(i).
C. Relevant International Legal Authorities

It has commonly been argued that international human rights law regarding torture does not clearly prohibit all instances of state cooperation in or facilitation of torture.\(^6\) Indeed, the question whether international human rights law prohibitions on torture impose more than a mere negative duty on states to refrain from themselves committing torture, and if so, what steps states are legally obligated to take to prevent torture, has been hotly and lengthily debated.\(^6\) The following international legal authorities each contain similar prohibitions on torture, and each may (at the very least) be plausibly read to impose on states an affirmative obligation to take positive steps to prevent the commission of torture, even torture committed by third parties not affiliated with the states upon whom the duty rests.\(^6\)

1. International Covenant on Civil and Political Rights

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) explicitly prohibits both torture and cruel, inhuman, or degrading (CID) treatment: “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment.”\(^6\) Article 9 directs that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”\(^7\) Article 10 requires that all persons deprived of liberty “shall be treated with humanity and with respect for the inherent dignity of the human person.”\(^8\) Article 2 requires that each state party to the ICCPR “undertake[e] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . .”\(^9\) Article 3 provides a similar broad requirement: “The States Parties to the present Covenant undertake to ensure the equal

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\(^6\) See Shah, supra note 52, at 596.
\(^6\) See, e.g., id. at 601-04.
\(^6\) ICCPR, supra note 68, art. 7.
\(^6\) Id. art. 9(1).
\(^6\) Id. art. 10(1).
\(^6\) Id. art. 2(1).
right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

The ICCPR does not directly prohibit extraordinary rendition, but the U.N. Human Rights Committee has interpreted Article 7 to impose a requirement that state parties “must not expose individuals to the danger of torture or cruel, inhuman, or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement.” Indeed, the Human Rights Committee has explicitly stated its position that the ICCPR imposes a legal obligation “both negative and positive in nature.” The Human Rights Committee goes on to assert that state parties’ obligations under the ICCPR are fulfilled only “if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights . . .” The Committee’s Comment contemplates circumstances in which state parties “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private persons or entities” would give rise to violations by those state parties.

2. U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or

73. Id. art. 3.
74. Torture by Proxy, supra note 55, at 55. Non-refoulement is a principle of international law providing that a government may not eject a refugee from its territory and return, or refouler, that person to any place where he or she might be exposed to torture or persecution. See Aoife Duffy, Expulsion to Face Torture? Non-Refoulement in International Law, 20 INT’L J. REFUGEE L. 373, 373 (2008).
76. Id. ¶ 8.
77. Id.
acquiescence of a public official or other person acting in an official capacity.\textsuperscript{78}

The CAT requires each state party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”\textsuperscript{79} The CAT does not specifically define CID treatment, but Article 16 explicitly requires each state party to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture . . . .”\textsuperscript{80}

Other CAT provisions apply directly to the practice of rendition.\textsuperscript{81} Article 3 dictates that 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.”\textsuperscript{82} Scholars have interpreted Article 3 as making clear that a state must refrain from exposing a person to serious risks outside of its own territory by handing him over to another state that might be expected to treat him contrary to CAT requirements.\textsuperscript{83}

The CAT thus contemplates an affirmative duty on the part of signatory states to take steps to prevent acts of torture within their jurisdictions.\textsuperscript{84} Each state party is directed, among other things, to ensure that all acts of torture are prohibited by its domestic criminal law,\textsuperscript{85} to take certain measures to establish its jurisdiction over torture-related offenses,\textsuperscript{86} to investigate and prosecute torture-related offenses within its jurisdiction,\textsuperscript{87} to fully train and educate its law enforcement personnel and any other officials who may be involved in the custody or interrogation of an arrested or detained individual about the prohibition on torture,\textsuperscript{88} and to systematically review its interrogation rules, methods, and practices “with a view to preventing any cases of torture.”\textsuperscript{89} Under Article 16, each state must similarly seek to prevent any acts of CID treatment or punishment, to train and educate law enforcement officials against CID

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\textsuperscript{78} CAT, \textit{supra} note 68, art. 1(1).
\textsuperscript{79} \textit{Id.} art. 2(1).
\textsuperscript{80} \textit{Id.} art. 16(1).
\textsuperscript{81} \textit{See} \textit{id.} art. 3.
\textsuperscript{82} \textit{Id.} art. 3(1).
\textsuperscript{83} \textit{See} TORTURE BY PROXY, \textit{supra} note 55, at 37.
\textsuperscript{84} \textit{See} CAT, \textit{supra} note 68, art. 2.
\textsuperscript{85} \textit{Id.} art. 4(1).
\textsuperscript{86} \textit{Id.} art. 5.
\textsuperscript{87} \textit{Id.} arts. 6-7, 12.
\textsuperscript{88} \textit{Id.} art. 10.
\textsuperscript{89} \textit{Id.} art. 11.
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treatment, and to investigate allegations of CID treatment within its jurisdiction, among other requirements.90


The ECHR, like the ICCPR and the CAT, contains an explicit prohibition on torture: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."91 It also declares that "[n]o one shall be deprived of his liberty [except] . . . in accordance with a procedure prescribed by law," and goes on to set out six cases in which deprivation of liberty, in accordance with procedure prescribed by law, is permissible.92 Specifically, Article 5 states that everyone deprived of liberty by arrest or detention "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."93 Article 2 establishes that "[e]veryone's life shall be protected by law," and that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."94 Article 6 provides that "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."95 Article 1 imposes an obligation on all contracting parties to respect the human rights set forth in the ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."96

III. Analysis

A. Application of Legal Authorities to European States' Cooperation in the U.S. Rendition Program

The implications of the human rights law set out above for cooperation in the U.S. rendition program are not definite.97 Each of

90. Id. art. 16.
91. ECHR, supra note 68, art. 3.
92. Id. art. 5(1).
93. Id. art. 5(4).
94. Id. art. 2(1).
95. Id. art. 6(1).
96. Id. art. 1.
97. See Shah, supra note 52, at 601-04. Were international humanitarian law found to apply to a subject of U.S. rendition, its implications for such cooperation are similarly cloudy. Id. While the applicable human rights law clearly contains more than a mere
the sources of international human rights law described above contains more than just a basic torture prohibition.\textsuperscript{98} Under these authorities, a state must prevent and investigate a torture violation, even one inflicted by a third party, and must respect and ensure the rights of any individual under its power or control, even if that individual is not within the territory of the state.\textsuperscript{99}

Thus, when state officials are involved with transferring a suspected terrorist to another state, the CAT obligation under Articles 2 and 16 on the officials' state to prevent the infliction of torture or CID treatment is clearly implicated if the transfer of custody takes place within the state's territory.\textsuperscript{100} Even if the transfer of custody occurs outside of the state's territory, the state's non-refoulement obligation may come into play.\textsuperscript{101}

A state that permits a secret CIA detention facility within its jurisdiction has an obligation under Article 12 of the CAT to investigate any substantiated claim of torture or CID treatment taking place at that facility.\textsuperscript{102} A state is not permitted, under Article 1, to allow the use of torture or CID treatment within its jurisdiction, even when undertaken by a third party.\textsuperscript{103}

The legal position of a European state that allows the CIA to use a civilian airport or military airfield within its jurisdiction as the starting point for a flight on which a terrorist suspect is being rendered to a third state that may engage in torture, or permits such a flight to land and refuel within its jurisdiction, or simply permits such a flight to traverse its airspace, is not as clear under the plain text of the applicable human rights law.\textsuperscript{104} In these instances, the Venice Commission Opinion attempts to provide some clarity as to the international legal obligations of such states.\textsuperscript{105} In doing so, it

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  \item prohibition on torture, a much stronger argument can be made that humanitarian law does no more than prohibit a state from itself engaging in torture. \textit{Id.}
  \item \textsuperscript{98} \textit{See discussion supra Part II.C.}
  \item \textsuperscript{99} \textit{See Shah, supra note 52, at 601.}
  \item \textsuperscript{100} \textit{Id. at 602-603.}
  \item \textsuperscript{101} \textit{Id. at 602.} The United States has consistently argued that such is not the case. For example, in 2006, John Bellinger, the State Department's legal advisor, stated, "[n]either the text of the [CAT], its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the CAT applies to persons outside the territory of the United States." Radsan, \textit{supra} note 19, at 12. Whether or not Article 3 of the CAT applies to U.S. renditions of terror suspects from European countries, however, the CAT clearly applies to the European countries from which the suspects are removed to the extent that those countries' officials participate in the transfer of custody. \textit{See id.}
  \item \textsuperscript{102} CAT, \textit{supra} note 68, art. 12.
  \item \textsuperscript{103} \textit{See id. art. 1.}
  \item \textsuperscript{104} \textit{See ICCPR, supra note 68, arts. 7, 9-10; CAT, supra note 68, arts. 1-7, 10-12, 16.}
  \item \textsuperscript{105} \textit{See Venice Commission Opinion, supra note 5, ¶159(h)-(k).}
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interprets the ECHR in such a way as to impose on COE member states a requirement to police affirmatively the activities of third parties, including officials of other states, within their own jurisdictions.  

The Venice Commission Opinion makes clear from the outset that it considers the ECHR to apply to COE member states’ involvement with the U.S. rendition program. International humanitarian law, under the opinion’s framework, is entirely inapplicable:

[S]poradic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an “armed conflict” in the sense that they trigger the applicability of International Humanitarian Law.

After satisfying itself that the ECHR is the applicable law, the Venice Commission Opinion proceeds to assess the legality of interstate transfers of detainees under the ECHR. The commission relies heavily on Article 5.1 in its consideration of this question. Under the commission’s analysis, the transfer of a prisoner by the government of State B from State B to the custody of State A is unlawful under Article 5 when it is done via a procedure not set out in law—meaning it is not extradition, deportation, transit, or transfer with a view to sentence-serving. The Venice Commission Opinion describes the term “rendition” as “a general term referring more to the result—obtaining of custody over a suspected person—rather than the means. Whether a particular ‘rendition’ is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law.” The fundamental question, under the commission’s analysis, is whether the detainee being transferred is eventually provided with any form of judicial process or whether the particular transfer occurs completely outside of any legal process.

In light of its conclusion that interstate transfers may violate substantive rights secured by the ECHR, the Venice Commission con-

106. See id.
107. See id. ¶ 78.
108. Id.
109. See id. ¶¶ 24, 29.
110. Id. ¶ 29.
111. Id. ¶ 24.
112. Id. ¶ 30.
113. See id.; see also Hakimi, supra note 1, at 446.

siders questions of COE member state responsibilities. The commission interprets Article 1 of the ECHR to require member states to do more than merely prevent themselves from committing a violation of the rights secured in Section I of the ECHR:

The duty of State parties under Article 1 ECHR to “secure” to everyone within their jurisdiction “the rights and freedoms . . . of this Convention” is not limited to the duty of state organs not to violate these rights themselves. This duty also includes positive obligations to protect individuals against infringements of their rights by third parties, be they private individuals or organs of third States operating within the jurisdiction of the State party concerned. . . . The European Court of Human Rights has, in particular, recognized positive obligations which flow from the prohibition of torture and inhuman treatment, the right to life, and the right to freedom and security. Such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.

Thus, the commission’s interpretation of the word “secure” in Article 1 of the ECHR is the key to its holding that COE member states have an affirmative duty to protect individuals within their jurisdictions from violations by third parties.

The Venice Commission Opinion seems to fall short of establishing a coherent legal standard for when a foreign state’s actions may give rise to member state responsibility under the ECHR. The opinion includes a statement to the effect that a member state “retains its full jurisdiction within the meaning of Article 1 ECHR over any place on its territory . . . including any ad hoc detention facilities,” and that the member state is “therefore responsible for any infringement of the ECHR in relation to any suspect treated in violation of Articles 3 and 5 . . . .” Shortly thereafter, the opinion holds that no member state responsibility applies for a secret detention that is “carried out . . . without the territorial state actually knowing it,” but continues to maintain that the territorial state “must take effective measures to safeguard against the risk of disappearance and must conduct a prompt and effective investigation into a substantiated claim that a person has been taken into unacknowledged custody.” A few paragraphs later, the opinion holds that if a state:

115. Id.
116. Id.
119. Id. ¶ 127.
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[I]s informed or has reasonable grounds to suspect that any persons are held incomunicado at foreign military bases on its territory . . . its responsibility under the European Convention on Human Rights is still engaged, unless it takes all measures which are within its power in order for this irregular situation to end.120

With regard to COE member states' responsibilities concerning interstate transfer of prisoners, the Venice Commission Opinion comes to some far-reaching conclusions.121 It emphasizes that member states are under an obligation to prevent prisoners' exposure to the risk of torture,122 and mandates that the assessment of the reality of the risk be carried out "very rigorously."123 Significantly, the opinion holds that the "requirement of not exposing any prisoner to the real risk of ill-treatment also applies in respect of the transit of prisoners through the territory of [COE] member States: member States should therefore refuse to allow transit of prisoners in circumstances where there is such a risk."124

This requirement has significant implications for situations in which a COE member state may suspect that an airplane crossing its airspace is carrying prisoners with the intention of transferring them to third-party states in which the prisoners would be at risk for treatment in violation of Article 3 of the ECHR.125 In such a situation, the member state's responsibilities differ depending on whether the plane in question is a civil or a state aircraft.126 The Venice Commission Opinion mandates that a member state must require a civil aircraft to land and search it.127 The member state must additionally protest through appropriate diplomatic channels.128 In the case of a state aircraft, which must necessarily have sought and obtained overflight permission, the opinion notes that a member state may not search the plane without the consent of its captain.129 It also notes, however, that a member state may refuse further overflight clearances or impose the duty to submit to

120. Id. ¶ 130 (emphasis in original).
121. See id. ¶¶ 143, 159(j)-(k).
122. Id. ¶ 139.
123. Id. ¶ 140.
124. Id. ¶ 143.
125. See id. ¶ 159(j)-(k).
127. Venice Commission Opinion, supra note 5, ¶ 159(j).
128. Id.
129. Id. ¶ 159(k).
searches as a condition on approving any further overflights by the flag state.\textsuperscript{130}

In the wake of the Venice Commission Opinion and the Rapporteur’s Report, the European Parliamentary Assembly adopted a resolution asserting that the existence of documented cases of secret detentions and unlawful interstate transfers of persons in Europe required “in-depth inquiries and urgent responses” from the executive and legislative branches of “all the countries concerned.”\textsuperscript{131} The resolution urges COE member states to take several steps, including, among other things, taking “effective measures” to prevent renditions and rendition flights through member states’ territory and airspace, ensuring that no person is arbitrarily detained on a member state’s territory, undertaking a critical review of the legal framework that regulates the intelligence services with an eye toward strengthening accountability mechanisms against abuse, and undertaking a review of bilateral agreements between the United States and COE member states, “particularly those on the status of US forces stationed in Europe and on the use of military and other infrastructure,” to ensure that these agreements are in conformity with applicable international human rights norms.\textsuperscript{132}

\section*{B. Broader Application of the Reasoning of the Venice Commission Opinion}

In a broad sense, the legal conclusion arrived at by the Venice Commission in its interpretation of the ECHR—that the convention imposes positive legal duties on member states including a duty to take steps to disrupt the operation of the CIA rendition program within their jurisdictions—may be equally applicable to both the ICCPR and the CAT.\textsuperscript{133}

\section*{1. International Covenant on Civil and Political Rights}

The ICCPR contains two broad statements of the duties of state parties to the covenant that may be read analogously to Article 1 of the ECHR—the provision on which the Venice Commission founded its holding that the ECHR mandated that COE member

\textsuperscript{130} Id.


\textsuperscript{132} Id. ¶ 19.

\textsuperscript{133} See discussion infra Part III.B.1-2.
states protect individuals in their jurisdictions from third-party violations of their ECHR rights.\textsuperscript{134} Article 2 of the ICCPR obligates a state party "to respect and to ensure" the rights recognized in the covenant to every individual within its jurisdiction,\textsuperscript{135} and Article 3 similarly requires a state party to "ensure" to men and women equally "the enjoyment of all civil and political rights" set out in the covenant.\textsuperscript{136} The word "ensure" in the ICCPR is certainly susceptible to a reading similar to that given by the Venice Commission to the word "secure" in the ECHR.\textsuperscript{137} A reading of positive obligation into the word "ensure," as the U.N. Human Rights Committee has done, would, as a matter of logic, impose that positive obligation on state parties regardless of whether individuals' ICCPR rights were being threatened by "private persons or entities"\textsuperscript{138} or by agents of a foreign state.

By adopting such a reading, a judicial body interpreting the ICCPR would be in a position, although perhaps not be required, to elaborate on the positive obligations that document imposes on state parties.\textsuperscript{139} It might then, as the Venice Commission sought to do, specify particular acts that a state party would be obligated to take or refrain from taking with regard to the functioning of the CIA rendition program (or any other foreign state activity) within its jurisdiction.\textsuperscript{140} Failure to follow such judicially-imposed requirements would then subject the state party to liability under the ICCPR.\textsuperscript{141}

\textsuperscript{134} See ICCPR, \textit{supra} note 68, arts. 2-3.
\textsuperscript{135} \textit{Id.} art. 2.
\textsuperscript{136} \textit{Id.} art. 3.
\textsuperscript{137} Indeed, as discussed in Section II.C.1 above, the U.N. Human Rights Committee has adopted such a reading, affirming "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights." U.N Human Rights Comm., \textit{supra} note 75, ¶ 8.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} This is the approach taken by the Venice Commission Opinion in, for example, paragraphs 139, 140, 143, and 159(j)-(k). \textit{See supra} note 5.
\textsuperscript{140} \textit{See} Venice Commission Opinion, \textit{supra} note 5, ¶¶ 143, 159(j)-(k).
\textsuperscript{141} A member state might, however, be in a position to assert one or more defenses to such liability. For example, the ICCPR provides that in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," a state party may take "measures derogating from [its] obligations under the present Covenant to the extent strictly required by the exigencies of the situation." ICCPR, \textit{supra} note 68, art. 4(1). This exception does not permit any derogation from certain Articles, however, including Article 7. \textit{Id.} art. 4(2).
2. U.N. Convention Against Torture

The CAT does not carry as broadly-worded an obligation to ensure or secure the positive rights of individuals within a state party's jurisdiction as Articles 2 and 3 of the ICCPR or Article 1 of the ECHR.\textsuperscript{142} Rather, Article 2 of the CAT merely requires that a state party take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."\textsuperscript{143} An interpretation of this Article purporting to find in it a positive obligation broad enough to be violated by a state party's failure to take steps to prevent the transport of a person from or through its territory to a state where he would be at risk for torture would seem to be a strained reading of the Article's language, which requires only that a state party prevent torture within its own jurisdiction.\textsuperscript{144} Similarly, the language of Article 3's prohibition against a state party expelling, returning, or extraditing a person to a state where that person would be in danger of being subjected to torture would not seem to reach a situation in which a state party passively acquiesces to a transfer by agents of another state.\textsuperscript{145}

Other Articles, however, might provide an alternate route to the conclusion that the CAT provides such a positive obligation.\textsuperscript{146} Article 4 mandates that each state party ensure that all acts of torture are prohibited under its criminal law.\textsuperscript{147} "The same shall apply," it continues, "to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."\textsuperscript{148} Article 5 goes on to require that a state party take "such measures as may be necessary" to establish jurisdiction over Article 4 offenses "in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 . . . ."\textsuperscript{149}

The phrase "complicity or participation in torture" in Article 4, if read broadly, could be construed to cover a situation in which an agent of a state party permitted the transporting of an individual from or through the state to a state known to commit torture.\textsuperscript{150}

\textsuperscript{142} See CAT, supra note 68, art. 2(1).
\textsuperscript{143} Id.
\textsuperscript{144} See id.
\textsuperscript{145} See id. art. 3.
\textsuperscript{146} See id. arts. 4-5.
\textsuperscript{147} Id. art. 4(1).
\textsuperscript{148} Id.
\textsuperscript{149} Id. art. 5.
\textsuperscript{150} See id. art. 4.
Under this reading of the convention, a state party might be required to criminalize such inaction or acquiescence.\textsuperscript{151} Similarly, the behavior of a person actually participating in the transportation of an individual to a state known to commit torture would have to be criminalized under the convention.\textsuperscript{152} Under Article 5, a state party would be required to take all necessary measures to establish its jurisdiction over an offense in any case where the alleged offender is present in territory under its jurisdiction and the state party does not extradite him.\textsuperscript{153} Thus, the CAT might plausibly be read to impose, at the least, a requirement that a state party criminalize the procedures involved in the CIA rendition program and take steps to assert its jurisdiction over related offenses.\textsuperscript{154}

C. The Venice Commission Approach is Unlikely to Promote Increased Compliance With International Law

The Venice Commission Opinion may be understood as an attempt to circumvent the traditional limitation on the enforceability of international law—its lack of traditional mechanisms of enforcement.\textsuperscript{155} The United States has consistently taken the position that many of its human rights obligations do not apply outside of its own territory.\textsuperscript{156} While various international bodies, judicial and otherwise in nature, have disagreed with that position,\textsuperscript{157} they have lacked any effective mechanism for enforcing their view against the United States.\textsuperscript{158}

The Venice Commission Opinion, by requiring that COE member states enforce the human rights standards of the ECHR against the United States within their jurisdictions, would seem to render

\textsuperscript{151}. See id.
\textsuperscript{152}. See id.
\textsuperscript{153}. See id. art. 5(2).
\textsuperscript{154}. See id. arts. 4-5.
\textsuperscript{155}. See Hakimi, supra note 1, at 449-50.
\textsuperscript{156}. See id. at 449.
\textsuperscript{158}. See Hakimi, supra note 1, at 449.
the lack of an international enforcement mechanism irrelevant.\textsuperscript{159} Individual COE member states have traditional means of law enforcement at their disposal that they might bring to bear on U.S. agents or officials within their jurisdictions.\textsuperscript{160} The degree to which the Venice Commission Opinion may be expected to actually promote U.S. compliance with international law, however, will depend in large part on the extent to which COE member states are willing and able to comply with the legal requirements that the opinion imposes on them.\textsuperscript{161} Whether member states will comply with these obligations is a separate question to which compliance theory may be applied—one that may be illuminated by considering the reputational consequences of their failure to do so, their fear of reciprocity, and the "legitimacy" and "compliance pull" of the legal obligation.\textsuperscript{162}

1. Effect of Reputational Consequences

A state will naturally be concerned with its reputation in the international community.\textsuperscript{163} It will typically perceive a great deal of value in being viewed as a member in good standing of the global community and will seek to avoid the international condemnation that may accompany a violation of international legal obligations.\textsuperscript{164} Furthermore, national leaders may be concerned that international condemnation will reflect a lack of competence or judgment on the part of their government and thus carry with it domestic political consequences.\textsuperscript{165}

The Venice Commission Opinion's approach to enforcing international law would tend to diffuse the adverse reputational consequences of noncompliance with international human rights standards.\textsuperscript{166} By explicitly making COE member states who fail to

\textsuperscript{159} See \textit{id}. at 449-50. Of course, the question remains whether, accepting that they are internationally obligated to police U.S. activity in Europe, COE member states will themselves comply with that international obligation. See \textit{infra} Part III.C.1-3.

\textsuperscript{160} These state actors are, of course, possessed of national courts and police forces of the kind that scholars have repeatedly noted are lacking in the international system. See e.g., Franck, \textit{supra} note 22, at 707.

\textsuperscript{161} See discussion \textit{infra} Part III.C.1-3.

\textsuperscript{162} See discussion \textit{infra} Part III.C.1-3.

\textsuperscript{163} See Guzman, \textit{supra} note 36, at 1825.

\textsuperscript{164} See \textit{id}.


\textsuperscript{166} This discussion, of course, presumes some degree of agreement as to the requirements of those international standards. To the extent that such agreement does not exist, or that a state which may be in violation of the standards is able to assert a coherent argument for the international legality of its behavior, the effect of adverse reputational conse-
take the actions required by the Venice Commission Opinion liable as international violators, the Venice Commission Opinion would subject these states, as well as the United States, to the international opprobrium attached to breakers of the law.\textsuperscript{167} In so doing, it might be expected that the Venice Commission Opinion would tend to increase the likelihood of U.S. compliance by increasing exponentially the net amount of reputational pressure brought to bear by the applicable human rights standard.\textsuperscript{168} Not only the United States, but every COE member state in which the United States operates, would be provided with a vested interest in avoiding the adverse reputational consequences of breaking international law by limiting or curtailing the functioning of the CIA rendition program.\textsuperscript{169}

The degree to which this reputational effect would place \textit{added} pressure on COE member states to resist the U.S. program, and thereby added pressure on the United States, however, is not clear.\textsuperscript{170} From the time that the existence of a CIA program of extraordinary renditions first came to light, the revelation “prompted protests and official investigations in countries that work with the United States, as well as condemnation by international human rights activists . . . .”\textsuperscript{171} Indeed, by all accounts the bulk of both public and official opinion among the member states of the COE has been consistently and forcefully opposed to the operation of the CIA program.\textsuperscript{172} In such an environment, the likelihood that a legal requirement similar to that imposed by the Venice Commission Opinion on COE member states would provide those states with significant added incentive to resist the oper-
ation of the program is dubious. Such a requirement might, however, provide member states with an additional, legally justified means of resistance beyond diplomatic or other protests.

2. Fear of Reciprocity

Reciprocity is generally thought to be a powerful force in international relations that tends to promote compliance with international norms. A state will be concerned that, in the event it violates an international obligation, other states will be more likely to respond by undertaking behavior that might harm its interests, including similar violations of that international obligation. Concerns about reciprocity will naturally take into account the power of the state contemplating a violation relative to the power of the other state or states whose reciprocity it fears.

Fear of reciprocity seems unlikely to provide a strong motivation for COE member states to fulfill the Venice Commission Opinion's requirements that they monitor and oppose U.S. rendition. Indeed, generally speaking, human rights obligations are less susceptible to retaliation than other forms of international obligation, such as trade agreements. A COE member state is not likely to have a great deal to fear from other such states should it fail to meet the requirements placed upon it by the Venice Commission Opinion.

On the other hand, a COE member state may entertain a fair amount of trepidation at the prospect of active opposition to a program that the United States maintains is crucial to its national security. By creating a situation in which the onus to enforce one state's international obligations rests on other individual states, the Venice Commission Opinion creates a situation in which fear of reciprocity may have a reverse effect on compliance. A state may fear the consequences of compliance with its obligation to

173. See generally Dai, supra note 165.
174. See generally id.
175. See Parisi and Ghei, supra note 42, at 93.
176. See Kochan, supra note 32, at 356.
177. See id. at 156-57.
178. See id. at 157.
179. See id.
180. Human rights treaties such as the ECHR are not susceptible to retaliation in the same way as other types of international agreements. It makes little sense, for example, for State B to torture someone in response to State A's violation of the CAT. See id.
enforce the law against another state more than it fears the consequences of failure to comply with that obligation.\footnote{By individually seeking to enforce international law against another state, a state will likely be bringing itself into direct conflict with that other state. This conflict might well be perceived as threatening to the state’s interests in security or economic wellbeing, among others. The threat to these interests stemming from conflict with another state may rationally be perceived as more pressing than the consequences of failing to comply with an international obligation to individually enforce the law. \textit{See} \citet{Goldsmith & Posner, supra note 21, at 9.}}

3. “Legitimacy” and “Compliance Pull”

Under Professor Franck’s theory of compliance with international law, an international rule has a high degree of legitimacy, and therefore a relatively strong compliance pull, when it has been properly validated by the international community—in other words, when it has “come into being and operates in accordance with generally accepted principles of right process.”\footnote{\textit{See} \citet{Franck, supra note 47, at 19.}} This theory maintains that a direct relationship exists between both a rule’s determinacy, or clarity, and its coherence, or rationality, and its legitimacy.\footnote{\textit{See} \citet{id.}} Therefore, where rules are vague or incoherent, they will naturally tend to inspire a lower degree of compliance.\footnote{\textit{See} \citet{id.}}

The rule set forth by the Venice Commission Opinion suffers from several problems under Professor Franck’s theory.\footnote{\textit{See} \citet{id.}} Adopted in an advisory opinion of a COE judicial organ, the rule’s origin may not reflect “generally accepted principles of right process.”\footnote{\textit{Id.}} The Venice Commission Opinion does purport to interpret a multilateral convention that has been properly adopted, signed, and ratified by its state parties, but its legitimacy will necessarily be tied to the reasoning of the Venice Commission itself.\footnote{\textit{Id.}} To the extent that the Venice Commission Opinion’s reasoning is perceived as far-reaching or extraordinary, it will not cohere to other generally accepted international rules and may therefore suffer from a legitimacy deficit.\footnote{\textit{See} \citet{Franck, supra note 22, at 725 (tying the authority of the originator of a rule to the rule’s symbolic validity).}} The fact that the Venice Commission Opinion is designed, in practice, to constrain the behavior of the United States, a state not party to or conventionally bound by the international instrument under interpretation, similarly sub-
tracts from its perceived legitimacy, and therefore from its compliance pull.\textsuperscript{190}

Additionally, the Venice Commission Opinion lacks sufficient determinacy to ensure that states, even those attempting to do so in good faith, will be able to follow the rule it sets forth.\textsuperscript{191} The Venice Commission Opinion fails to lay out a unified legal standard for when a foreign state's encroachment may give rise to member state responsibility.\textsuperscript{192} Rather, it sets forth different standards in different parts of the opinion.\textsuperscript{193} This failing similarly detracts from the Venice Commission Opinion's legitimacy, and consequently from its compliance pull.\textsuperscript{194}

These deficiencies in the Venice Commission Opinion might, at least to a certain extent, be remedied in subsequent attempts to set out a similar rule.\textsuperscript{195} A legal opinion interpreting an international document applicable across the world, such as the ICCPR or the CAT, would be likely to enjoy automatically a higher degree of legitimacy owing to the more universal nature of the treaty obliga-

\begin{footnotesize}
\textsuperscript{190} As neither the rule under interpretation in the Venice Commission Opinion, the ECHR, nor the body doing the interpreting—the Venice Commission—is capable of binding the United States under any traditional principle of law, the Venice Commission Opinion may tend to lack symbolic validity to the extent that it is perceived as an attempt to bind the United States. \textit{See id.} at 726. Additionally, to the extent that the Venice Commission Opinion is perceived as inconsistent with the existing "pyramid of secondary rules about how [international] rules are made, interpreted, and applied," it will suffer from an adherence deficit. \textit{Id.} at 752.

\textsuperscript{191} \textit{See id.} at 714.

\textsuperscript{192} \textit{See} Hakimi, supra note 1, at 448.

\textsuperscript{193} \textit{See id.} In paragraph 123, the Venice Commission Opinion appears to adopt a standard of strict liability for any foreign encroachment on member state territory, holding that a member state is "responsible for any infringement of the ECHR in relation to any suspect treated in violation of Articles 3 and 5." Venice Commission Opinion, supra note 5, ¶ 123. Later, in paragraph 127, the Venice Commission Opinion seems to suggest the application of an actual knowledge standard for member state responsibility: "no such responsibility applies if the detention is carried out by foreign authorities without the territorial state actually knowing it." \textit{Id.} ¶ 127. Still later, in paragraph 130, the Venice Commission Opinion appears to modify this standard to include constructive knowledge: "If a State is informed or has reasonable grounds to suspect that any persons are held \textit{incommunicado}... on its territory, ... its responsibility... is still engaged." \textit{Id.} ¶ 130 (emphasis in original).

\textsuperscript{194} \textit{See} Franck, supra note 22, at 714 ("Indeterminacy, however, has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance.").

\textsuperscript{195} Even a more determinate standard expressed in an opinion interpreting a more universally applicable source of international law would not be without problems under Franck's theory. To the extent that states perceive it to be out of the ordinary (or inconsistent with an accepted international rule of obligation like state sovereignty) to be required to individually enforce an international human rights standard against another state, such a legal regime will suffer from an adherence deficit under Franck's framework. \textit{See id.} at 752.
\end{footnotesize}
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IV. Conclusion

Scholarly literature has elaborated many theories of international law compliance. Two broad classes of these theories are those focusing on rational state interest and those focusing on the character of the international norm in question. Under either of these theories, the legal regime adopted in the Venice Commission Opinion is unlikely to generate increased compliance with international law.

Under a rational state interest theory, a state can be expected to factor the potential costs of failure to comply with an international law requirement, particularly in terms of its reputation in the international community, into its decision to comply with or violate the law. The Venice Commission Opinion creates a situation in which COE member states confronted with the obligation to enforce the ECHR’s standards against the United States will potentially take into account the negative reputational effects associated with failure to comply with international law. While a regime that multiplies the compliance-inducing effect of reputational consequences by the number of state parties that may be called upon to enforce an international rule might be thought generally to lead to greater pressure in the direction of compliance, the Venice Commission Opinion demonstrates that this effect may not always operate with a great deal of strength. Countervailing pressures in favor of violation, particularly the possibility of direct conflict with the state against which a norm is to be enforced, will necessarily come into play under such a model.

Similarly, such a scheme of international enforcement, particularly in the human rights context, tends to create a reverse fear of

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196. See id. at 726 (“[A] new rule may be taken more seriously if it arrives on the scene under the aegis of a particularly venerable sponsor such as a widely ratified multilateral convention.”).
197. See Venice Commission Opinion, supra note 5, ¶ 123, 127, 130.
198. See Sloss, supra note 25, at 159-60.
199. See id.
200. See discussion supra Part III.C.
201. See Guzman, supra note 36, at 1825.
202. See discussion supra Part III.C.1.
203. See discussion supra Part III.C.1.
204. See discussion supra Part III.C.1.
reciprocity effect.\textsuperscript{205} By creating a situation in which individual state parties are likely to be brought into conflict with one another by attempting to fulfill their obligation to enforce international law, this sort of legal regime may in fact create significant pressure on states not to fulfill the legal obligations it prescribes.\textsuperscript{206}

The Venice Commission Opinion is also problematic under an international norms-based theory of compliance.\textsuperscript{207} Although a legal regime similar to that constructed by the Venice Commission Opinion may be applicable to bodies of international law other than the ECHR,\textsuperscript{208} such a regime is unlikely to promote increased compliance with international law.\textsuperscript{209} Any scheme that requires individual states to monitor the behavior of, and enforce the law against, other individual states suffers from inherent weaknesses that will be difficult to overcome.\textsuperscript{210} Such a regime is not likely to be set out directly in an international treaty and therefore will not be explicitly adopted, signed, or ratified by individual state parties. Rather, such a scheme will likely rely for its elaboration on a legal opinion interpreting such an international document—and therefore the scheme’s legitimacy will be tied to the perception of the judicial organ rendering the opinion.\textsuperscript{211}

Even if states do not contest the legitimacy of the body rendering such an opinion, they will compare the substance of the legal requirements in the opinion with existing generally accepted international rules.\textsuperscript{212} A legal obligation on the part of individual states to enforce international law against other states, given the awkward nature of its fit with international law generally, is not currently likely to be perceived as highly legitimate, and therefore may not exert a strong pull toward compliance.\textsuperscript{213} Thus, an examination of the Venice Commission Opinion under either of the two broad theories of international law compliance suggests that its attempt to require individual states to enforce international obligations against one another is unlikely to be a successful means of promoting increased compliance with international law.

\textsuperscript{205} See discussion supra Part III.C.2.
\textsuperscript{206} See discussion supra Part III.C.2.
\textsuperscript{207} See discussion supra Part III.C.3.
\textsuperscript{208} See discussion supra Part III.B.
\textsuperscript{209} See discussion supra Part III.C.3.
\textsuperscript{210} See discussion supra Part III.C.3.
\textsuperscript{211} See Franck, supra note 22, at 725.
\textsuperscript{212} See id. at 741.
\textsuperscript{213} See discussion supra Part III.C.3.