

# **Corneliu Bjola “The Ethics of Secret Diplomacy: A Contextual Approach,” *Journal of Global Ethics*, (2014)**

**10: 1**

## **ABSTRACT:**

Under what conditions is secret diplomacy normatively appropriate? Drawing on pragmatic theories of political and ethical judgement, this paper argues that a three dimensional contextual approach centred on actors’ reasoning process offers an innovative and reliable analytical tool for bridging the ethical gap of secret diplomacy. Using the case of the U.S. extraordinary rendition program, the paper concludes that secret diplomacy is ethically unjustifiable when actors fail to invoke normatively relevant principles of justification, inappropriately apply them to the context of the case and when the actors’ moral reasoning process suffers from deficient levels of critical reflection concerning the broader implications of secret engagements for diplomatic conduct.

## **INTRODUCTION<sup>1</sup>**

On January 8, 1918, President Woodrow Wilson delivered his famous Fourteen Points speech to a joint session of the United States Congress. On top of the list, Wilson called for “open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view” (Wilson 1918). Wilson’s idea that all international treaties should be transparently negotiated and ratified by parliaments like all other domestic laws was informed by an well-established American political creed “that it was possible to apply to the conduct of external affairs, the ideas and practices which, in the conduct of internal affairs, had for generations been regarded as the essentials of liberal democracy” (Nicolson 1988: 84). What made the idea of “open covenants of peace” more acceptable to sceptical Europeans was World War I (WWI), which

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<sup>1</sup> The author would like to thank the editor and the anonymous reviewers for their constructive comments and suggestions.

was largely blamed on the constellation of secret alliances concluded by European Great Powers before the war. The unprecedented devastation brought about by WWI simply made the political pendulum swing in favour of transparency and accountability. The expectation was the latter “would not bring Utopia, but it would make diplomacy honest, straightforward, clean; it would make almost impossible the chicanery, fraud, intrigue that for centuries have deluged Europe in blood and brought misery” (Low 1918: 220).

By calling for diplomatic relations to be conducted in conditions of transparency and accountability, Wilson’s “new diplomacy” has been credited with fundamentally reshaping the norms of diplomatic conduct (Bjola and Kornprobst 2013: 28-43). At the same time, the original promise that “diplomacy shall proceed always frankly and in the public view” has arguably remained unfulfilled. It is not that foreign policy lacks parliamentary oversight in democratic countries, but rather that the scrutiny of diplomatic decision-making is primarily done behind closed doors, with little or no formal input from the public. This invites the question of whether a certain degree of “democratic deficit” is not actually necessary for diplomacy to be effective and if yes, where should the line be drawn between secrecy and transparency? In other words, what are the ethical boundaries of secret diplomacy? Wilson himself had to confront this dilemma. Faced with the prospect of a protracted and fruitless peace conference (Kissinger 1994: 232), Wilson had to backtrack on his promise to have an “open conference” in Paris and allowed great powers to take control of the conference proceedings and conduct all negotiations in closed meetings.

The question of the ethics of secret diplomacy is not, of course, a matter only of historical interest. Media investigations of the secret diplomacy of the United States (US) extraordinary rendition program, the release of various unclassified diplomatic cables by Wikileaks or

Edward Snowden's revelations about the U.S. global surveillance network have forcefully restated the case in the public arena. For many diplomats and governmental officials, media transgressions of the confidentiality of diplomatic activities could severely disrupt relationships between countries or even put the life of diplomats at risk. For others, the secrecy of diplomatic engagements is a recipe for abuse, ineffectiveness and even conflict. What seems therefore to be lacking is a compelling framework for assessing the ethical value and limitations of secret diplomacy. Drawing on theories of political and ethical judgment, this article bridges this analytical gap by developing an innovative approach to normative analysis focused not on the outcome of secret diplomacy, but on its context of application.

I will pursue this argument in four steps. First, I will discuss a number of reasons and situations in which – despite the international trend towards openness in diplomacy – secret diplomacy may still be advantageous to the diplomatic process. Second, I will review the oft-heard critique of such practices concerning its effect on societal relations, diplomatic interaction, and democratic objectives. Third, I will advance a contextually-grounded approach to the ethical analysis of secret diplomacy centred on three dimensions: the normative relevance of the general principles of justification, the factual grounding of these principles to the case at hand, and the level of critical reflection actors demonstrate in their moral reasoning process. Fourth, I will empirically apply this framework to the case of the secret diplomacy of the U.S. extraordinary rendition program. I will conclude by asserting that secret diplomacy remains an effective instrument of international engagement provided that it follows a minimum set of normative constraints.

## I. THE CASE IN SUPPORT OF SECRET DIPLOMACY

Secret diplomacy is characterised by “the total isolation and exclusion of the media and the public from negotiations and related policy-making” (Gilboa 1998: 213). It assigns state officials a high level of discretion in international negotiations, while it leaves the wider public and its opinion ignorant of the main diplomatic events or courses of action. Conceptually, secret diplomacy covers a wide spectrum of positions ranging from quasi- formalized forms such as the back-channel diplomacy often used by the leadership of opposing groups as an adjunct to front-channel negotiations (Pruitt 2008: 37-8) to highly-deniable methods such as the clandestine diplomacy conducted by secret intelligence services (Scott 2004: 330-1).

At the heart of the practice of secret diplomacy is a crucial question about information control: who knows what, when and especially, to what purpose? Machiavelli, for instance, evaluated the performance of ambassadors by their ability to secretly gather relevant information about “matters in course of negotiation”, “matters that are concluded and done”, and especially about “matters yet to be done” (Berridge 2004: 41-2). The rise and consolidation of the modern territorial-sovereign state intensified the concern for gathering and protecting information (Hamilton and Langhorne 1995: 75) to the point that the “old diplomacy” became tantamount to secrecy and formality. While becoming less prominent since the end of the First World War, secret diplomacy still remains a preferred method of diplomatic interaction for a number of reasons.

First, secret diplomacy may serve to unlock peace negotiations by insulating leaders against grandstanding and providing a conducive environment for constructive talks. As Abba Eban – former Ambassador and Foreign Minister of Israel – noted, “[t]he hard truth is that the total

denial of privacy even in the early stages of a negotiation has made international agreements harder to obtain than ever in past history” (Eban 1983: 347). For the negotiating parties as well as for mediators, partaking in secret negotiations ensures a minimum level of security, informality and the opportunity to “save face”. Anwar Sadat’s visit to Jerusalem in 1977, which led to the conclusion of a formal peace agreement between Egypt and Israel, was facilitated, for instance, by the secret meeting between the Israeli Foreign Minister Moshe Dayan and the Egyptian Deputy Minister Hassan Tuhamy (Gilboa 1998: 213). Similarly, without secrecy there would have been no Oslo Accord in 1993 since neither Israel nor the Palestine Liberation Organization (PLO) would have chosen to negotiate openly due to each leadership’s internal political constraints (Lieberfeld 2008: 136-8)

Second, secret diplomacy may prove beneficial for normalizing relationships with former adversaries. Protracted relations of enmity generally require significant political capital to break, which leaders might not be willing to entertain unless the benefits are clear and tangible. Henry Kissinger credited, for example, the dramatic shift in the American foreign policy and the historic visit of President Nixon to China in 1972 to his secret diplomatic contacts with the Chinese leadership: “Sino-American relations moved from strident hostility and isolation to *de facto* alliance” in barely a year and a half, enabling “the Nixon Administration to put in place [...] a new structure of peace” (Kissinger, 1994: 729). Both the United States and China required the rapprochement as a diplomatic leverage against the Soviet Union and both had leaders that were willing to spend political capital on normalizing the relationships between the two countries.

Third, secret diplomacy may prevent dangerous escalations by protecting the reputation of a government from political embarrassment or damage. Indeed, if a government has publicly proclaimed policy preferences or advocated particular stances on international affairs,

negotiating agreements that go against these statements may significantly undercut their credibility. Such considerations undoubtedly influenced the Soviet Union's decision to resort to secret diplomacy in its interaction with China concerning the issue of the Chinese Eastern Railway (CER) in the 1920s. In these diplomatic encounters, the Soviet Union renewed control over the Russian-built CER despite a 1919 Soviet manifesto promising the return of the railway to China without compensation. This territorial expansion "flew in the face of Soviet propaganda, which repeatedly called on the other great powers to follow the USSR's lead and give up their concessions in China" (Elleman 1994: 459). At the same time, Beijing could not publicly protest against the enforcement or violation of existing treaties, because this would have exposed its agreement to a secret protocol in which they actually recognised the former unequal treaties, a fact that could have seriously undermined the legitimacy of the then Chinese government (Elleman 1994: 469).

Finally, secret diplomacy may help increase the diplomatic stature of small states. Certainly, the latter have various other means by which to enhance their diplomatic profile, particularly through their work in international organizations (Cooper and Shaw 2009). However, small states possess two critical assets that are uniquely important for the conduct of secret diplomacy: the perceived lack of international visibility of the negotiation venue and the restricted scope of their global or regional aspirations. Hungary, for instance, functioned as an effective intermediary between Washington and Hanoi during the thirty seven-day pause in the US bombing campaign against North Vietnam in December 1965–January 1966 (Szöke 2010). As noted above, Pakistan played a major role in facilitating secret contacts between the US and China, but only after the secret diplomatic backchannel facilitated by Poland had failed to yield satisfactory results (Kissinger 1994: 726). More recently, Qatar has helped establish a secret channel of communication between the United States and Taliban representatives, which

allows the two parties to discuss preliminary trust-building measures in anticipation of more comprehensive talks about how to end the war in Afghanistan (Rubin 2012).

## II. THE CASE AGAINST SECRET DIPLOMACY

Despite these advantages, the practice of secret diplomacy has been severely criticised by scholars and practitioners alike. Indeed, it is often argued that a number of “vices” plague the practice of secret diplomacy. First of all, secrecy is a potent cause for continued distrust, fear and hate. Describing the international diplomatic arena in the pre-WWI period, Reinsch observed that: “[d]istrust is planted everywhere. There is no assurance of what is the truth; true reports are questioned; false reports, believed. All motives are under suspicion. The public conscience and will are beclouded; nothing stands out as reliable but stark military force” (Reinsch 1922: 6). This type of concerns has prompted Bok to argue there should be no secrecy about the fact that negotiations are under way, or about who the parties to the negotiations are, and especially, about the terms of the settlement agreed upon (Bok 1984: 186). Otherwise, secret engagements can turn diplomacy against itself by undermining the very *raison d'être* of diplomatic interactions that is, the building of trust and confidence among parties and the facilitation of international cooperation.

Second, secret diplomacy is vulnerable to precarious transgressions between legitimate diplomatic conduct and covert action. To be sure, modern diplomacy and espionage have evolved in close proximity to each other to the extent that often times the same people have coordinated both areas of activity. Metternich, for instance, possessed one of the most reputed intelligence services. At the Congress of Vienna, the ability of his agents, diplomatic couriers and embassy servants to gather relevant information provided him with a crucial negotiation



advantage (Hamilton and Langhorne 1995: 122). However, many diplomatic and intelligence agents have since then come to realize the conflation of diplomatic interaction with covert action may be detrimental to both. As Hicks points out, maintaining the boundary between covert action and diplomacy is critical for the protection of the credibility and reputation of intelligence services (Hicks 2005: 248). The same holds true for diplomats, as their reputation rests on their ability to be recognized as truthful and reliable. Occasional collusions between covert action and diplomacy are inevitable, but as a former intelligence officer wisely argued covert action should not be used as the “lazy country’s way of avoiding hard diplomatic work” (Stempel 2007: 132).

Third, secret diplomacy goes against fundamental norms and principles of democratic rule such as the obligation of elected leaders to represent the public and to stand accountable for their decisions. This requires that affairs that are of domestic concern should not be determined by “a board of trustees in secret conclave”, but should rather be made part of the public debate (Reinsch 1922: 4). This raises an important ethical issue: is it allowed for officials to lie to the public for the “greater good”? As Habermas long pointed out, the formation of modern democratic societies has been intimately connected to efforts of establishing a vibrant public sphere in which reasoned argumentation rather than appeal to tradition and secrecy constitutes the ultimate authority for settling political differences (Habermas 1989). It therefore stands to reason that excessive state secrecy can become a mark of pollution for any democratic regime, which can only be removed through an act of “purification” in the public sphere (Ku 1998:181). In addition, while the insulation of negotiators can facilitate success at the bargaining table, the lack of democratic accountability may come at a price. Secret diplomacy can make negotiators overestimate what they can implement amid domestic opposition once the agreement enters

the public domain, an argument that has been generally credited for the failure of the Oslo agreement (Lieberfeld 2008: 140).

Fourth, secret diplomacy has become increasingly impractical due to developments in communication technology and the growing demand for public accountability. There is no coincidence that secret diplomacy was prevalent in a historical period in which communication between diplomats was slow, fragmented and uncertain. This is no longer the case. Not only are diplomats constantly forced to react to the 24/7 news cycle, but they increasingly find themselves in the situation to compete for public attention in a media-saturated environment (Archetti 2012: 193). “At the same time, greater accountability, access to information, and open dialogue are increasingly seen as essential norms for the conduct of foreign policy (Hicks, 2005: 259). The fiasco of the Iraqi weapons of mass destruction has made the demand for great transparency and accountability of foreign policy decision-making even more stringent (Fisher 2003). One is therefore left wondering, as a German diplomat concluded, whether there is “next to nothing left of the traditional role of secrecy in formulating foreign policy and in conducting diplomacy” (von Staden 1987: 51).

### III. CONTEXTUAL ETHICS: SEIZING THE MIDDLE-GROUND?

Thus far I have shown that a good case can be made both in favour and against secret diplomacy. What is less clear, of course, is whether the gap between diplomatic secrecy and transparency can be bridged and if yes, under what ethical conditions? The question goes to the heart of the classical “dirty hand” problem which takes place “in extreme circumstances where there is a choice between two evils and whatever decision is taken a moral principle is violated” (Ramsay 2011: 628). In the case of secret diplomacy, the moral paradox of dirty hands decisions arises because the lesser evil choice (the practice of deception) remains morally disagreeable even if it is judged to be politically necessary and justified on strategic of national security reasons.

Part of the difficulty to answer this question lies with the ambiguous moral connotations of the term “secrecy” itself. As Bok points out, the term “secrecy” carries with it not only a neutral connotation of “professional confidentiality“, but also a more problematic and endemic aspect of “stealth and furtiveness, lying and denial” (Bok 1984: 6). In addition, secrecy is morally constrained by the requirement of equality. If the right to secrecy is granted to an individual, should the same right be extended, in the absence of special considerations, to everyone else in a similar position (Bok 1984: 27)? By association, the concept of secret diplomacy trades on both aspects to the extent that it often becomes difficult to ascertain when one connotation should be epistemically privileged over the other. Did President Kennedy demonstrate professionalism or dishonesty when he secretly negotiated the removal of nuclear missiles from Turkey during the Cuban missile crisis? Similarly, should the same right be unreservedly granted to all U.S. presidents regardless of the circumstances?

In an attempt to illuminate these tensions, I argue that an “ethics without ontology” (Putnam 2004) offers the appropriate epistemic framework for making sense of the normative parameters of secret diplomacy. More specifically, successful ethical analysis of secret diplomacy requires an understanding of the concrete situations within which the demand for secret diplomacy arises and of the contextual considerations informing the reasoning process and the value formation through reflection of the actors involved. I defend this claim in two steps: first, by explaining why a contextually-grounded ethics is necessary for understanding the normative limits of secret diplomacy and second, by discussing how such an ethical analysis can be conceptualized and executed.

Drawing on the work of John Dewey, Putnam refuses to endorse the idea the main function of ethics is to arrive at “universal principles” of human conduct. For him, the “primary aim of the ethicist [is not to] produce a ‘system’, but to contribute to the solution of practical problems” (Putnam 2004: 4). At the core of his argument in favour of “pragmatic pluralism” (Putnam 2004: 21) lies an original interpretation of the fact/value dichotomy, which is particularly relevant for the ethical analysis of secret diplomacy. Putnam strongly disagrees with the logical positivist view that values are immune to scientific analysis (House 2001: 313) and instead insists that factual descriptions and normative evaluations are inevitably entangled. More specifically, he defends the position that “knowledge of facts presupposes knowledge of values” to the extent that “i) that the activity of justifying factual claims presupposes value judgments, and ii) that we must regard those value judgments as capable of being right [...], if we are not to fall into subjectivism with respect to the factual claims themselves” (Putnam 2002: 137). In other words, for Putnam values always come into play when we make factual statements about the world, an insight that has two important implications for the normative study of secret diplomacy.

First, it explains why prudential reasoning is an unsatisfactory normative defence of secret diplomacy. To justify a particular behaviour as prudent requires an instrumental assessment of the benefits and drawbacks of the intended action. Such a prudential evaluation would nevertheless fail to yield sound ethical insights as it would lack a theory to compare the values informing the factual “benefits” and “drawbacks” of such an action. This is why the second analytical contribution of Putnam’s critique of the fact/value dichotomy is also relevant to the current discussion. Moral judgements are not made in the abstract, but through engagement with concrete and problematic situations. Any moral inquiry has both “factual” and “value” presuppositions and it is only through experimentation and reflection that we discover which ones are better and which worse (Putnam 2002: 97). New moral paradigms are thus formed over time that shift the equilibrium that has hitherto been maintained. In other words, what Putnam tells us is that without understanding the context of the situation, we cannot ascertain the facts and values that are relevant to the case and by extension, the ethical implications their entanglement may have on the conduct of secret diplomacy.

If Putnam is right, then a key issue requires clarification: how does the fact/value entanglement actually work? How do facts inform the selection of values and how do the latter, in turn, subsequently frame new factual descriptions of the case? More specifically, how does the context inform actors about what values to consider when deciding on a particular course of action and how the selected values shape actors’ subsequent reading of the context? Drawing on ground-breaking studies of cognitive psychology, Dworkin argues that individuals go about making moral judgements by recognizing patterns on the basis of various cues and features, which they have stored in memory from previous experiences. Prior to being confronted with a particular case, we have built up a series of moral judgements in paradigm cases through socialization and practical experience. When faced with a moral situation, we search for the

appropriate ethical paradigm that bears relevance for the case and make a judgement accordingly (Dworkin 1995: 234-6).

Kornprobst's theory of political judgment takes Dworkin's argument a step further. Drawing on theories of social action, Kornprobst argues that individual actors figure out what to do in their engagement with the world by "subsuming the particulars of the situation [...], under selected universals of political life" (Kornprobst 2011: 81-2). Universals are the "tool kit" of taken-for-granted ideas that individuals acquire through socialization and which assist them in making sense of political life, such as causal and constitutive relationships, standards of behaviour or norms of social status (Kornprobst 2011: 78). The case of secret diplomacy serving to unlock peace negotiations, normalize relationships or by contrast, fuel distrust or undermine democratic principles are, for instance, examples of universals that diplomats learn to include in their repertoire of background knowledge through socialization, training or practical experience.

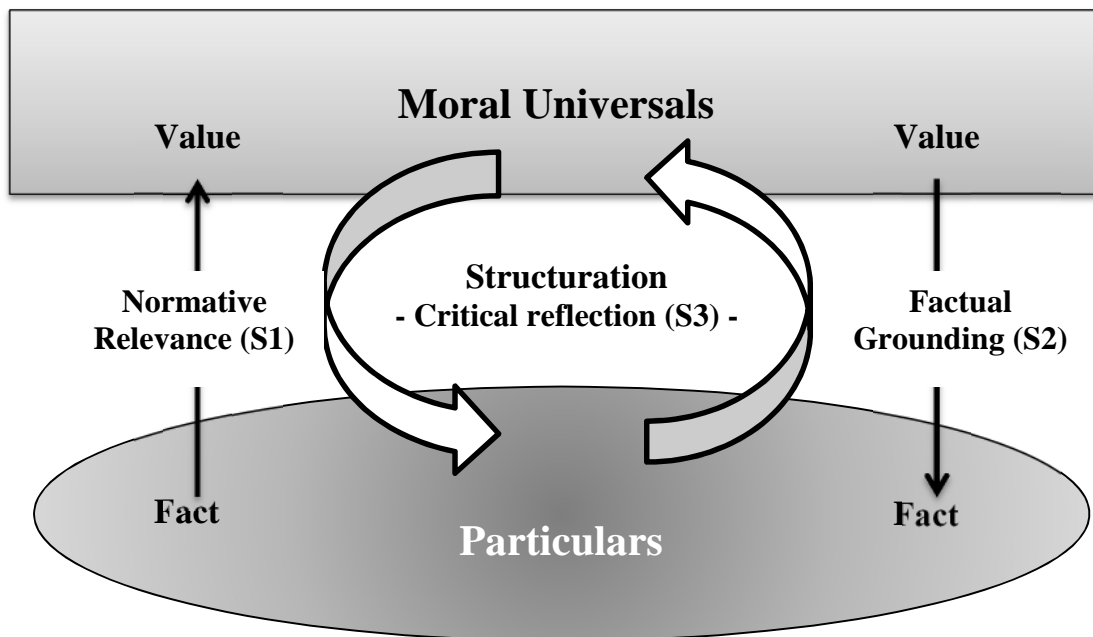
Particulars, on the other hand, are much more specific. While they do not exist without universals, they help translate the latter into social action. In other words, particulars are the concrete ideational lens through which individuals interpret social circumstances in light of appropriate universals and learn to orient themselves in a given political situation (Kornprobst 2011: 78). For example, the particulars (P) of a negotiation setting become intelligible to a diplomat because she finds a universal category (U) - such as, for instance, the notion of negotiation breakthrough -, which is familiar to her and she interprets P to be an instance of U. In short, U contains the clues for how to make sense of P and as a result the diplomat subsumes P under U through an creative act (Kornprobst 2011: 78).

While Putnam provides the broader epistemic justification for a contextual approach to the ethics of secret diplomacy, Dworkin's and especially Kornprobst's model offer an original theoretical anchor for conducting the ethical analysis. Formally stated, a contextually-grounded ethics of secret diplomacy can be expressed as follows: *secret diplomatic actions are normatively justified if they are supported by morally relevant principles (S1), which have a reasonably factual bearing on the case at hand (S2) and actors are critically reflective about the broader implications of their actions for the conduct of diplomacy (S3)*. In other words, not any type of value/fact entanglement is ethically justifiable for engaging in secret diplomacy, but only those observing the conditions stipulated in statements S1-3. Three important assumptions are embedded in this definition. First, the process by which actors reason their normative justifications in favour of secret diplomacy is an essential component of the ethical analysis. In line with Putnam's "ethics without ontology" approach, the ethical theory I propose is not informed by abstract normative principles applicable to any circumstances and at any time. Instead, it draws on the actors' own ethical beliefs and practical experiences to probe the normative relevance of the arguments they propose (S1).

Second, the context of the case and the moral principles to guide the application of secret diplomacy are connected with each other in a manner that both reinforces and challenges the value/fact entanglement that frames the reading of the case. While actors draw moral inspiration from various taken-for-granted ideas, as Dworkin and Kornprobst argue, the application of these normative principles in practice must speak to the facts of the case in a consistent and effective manner (S2). Third, the statement takes note of the fact that the fundamental role of diplomacy is to mediate relations of separateness between political communities (Sharp 2009: 89-92; Bjola 2013). This function is made possible by a complex set of norms developed over time for the purpose of facilitating peaceful dialogue and

international cooperation (Bjola and Kornprobst 2013). Therefore, the resort to secret diplomacy should follow a process of critical reflection about whether the intended actions may actually undermine fundamental principles that make diplomacy possible in the first place (S3).

**Fig 1:** Contextual framework of ethical analysis



Three conceptual clarifications are necessary for operationalizing the contextual ethical framework described above (see Fig 1). First, we need a *value statement* to compare the validity of the moral universals invoked by parties in support of their decision to engage in secret diplomacy. While parties may find difficult to escape their past, they nevertheless have some discretion in selecting the relevant universals by which to interpret a particular situation as appropriate for secret diplomacy.<sup>2</sup> As Dworkin points out, moral reasoning is not simply a

<sup>2</sup> For example, if justifications of secret diplomacy are anchored in taken-for-granted understandings about advancing peace talks, such as those between the United States and North Vietnam (Kissinger 1994: 684) in early 1970s, one should also critically consider the extent to which Kissinger’s secret diplomacy really helped put an



matter of “seeing” that two cases are similar. It is also important that this process involves the search for paradigms that may give different results (Dworkin 1995: 236), hence the need for careful reflection, deliberation and adjudication. The application of normative relevance as a benchmark for contextual ethical analysis would therefore allow us to examine the extent to which parties are right to invoke certain universals and whether the parties’ repudiation of more transparent methods of diplomatic engagement is reasonably justified in view of past experiences.

Second, we need a *factual statement* to compare the validity of the factual descriptions to result from the actors’ transposition of the selected universals to the case at hand. While normative relevance covers one side of the fact/value entanglement such as how *general* factual descriptions of the case inform the selection of moral universals, factual grounding addresses the reverse trajectory that is, how the selected universals frame, in turn, justifications of *specific* particulars to arise from the case. As Kornprobst points out, political leaders cannot attach just any meaning to a particular situation as they are constrained in doing so by the contextual elements of the circumstances they face (Kornprobst 2011: 86). Factual grounding thus serves as a second and critical level of confirmation of the appropriateness of the moral universals invoked in support of secret diplomacy. Obviously, no transposition is ever fully accurate since the context of application of the selected universals may noticeably vary from case to case, but excessive deviation between particulars and universals calls into question the integrity of actors’ reasoning and by that, the ethical foundation of the case.

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end to the war as well as whether the context of the case really replicates the strategic environment during which the talks between the U.S. and North Vietnam occurred (e.g., the Cold War).

Third, we need an *interactionist statement* to compare the structuration validity of the normative standards generated by the value/fact entanglement. Contextual reasoning is not static as it does not merely involve an act of juxtaposing taken-for-granted universals shaped by past judgements to the specific circumstances of the case. It also has a “structuration effect” in the sense that it helps create “new universals out of already existing ones, out of particulars, or out of linkages between universals and particulars” (Kornprobst 2011: 86-7). This is important because universals “travel” and may become part of the broader diplomatic repertoire of public, social, and legal resources by which state behaviour is understood, justified, and argued over. In other words, the ethical analysis of secret diplomacy must also pay attention to the level of critical reflection that actors demonstrate, or fail to do so, about the broader implications of secret diplomacy. To what extent, do they consider, for instance, that a particular method of secret diplomacy may serve to undermine the authority of important “public” universals (e.g., *jus cogens* norms), or by contrast to legitimize new universals that may even turn diplomacy against itself in the form of anti-diplomacy.

These three statements allow us to make a well-judged appraisal on the overall normative value of secret diplomatic actions. First, no secret diplomatic engagement can be ethically justified if none of the three conditions is met. This is so because if actors cannot invoke relevant moral principles in support of their intended strategy, they fail to factually connect moral justifications to the context of the case, and they expose reflective casualness in assessing the broader implications of their actions for diplomatic conduct. Second, if the action enjoys normative relevance and factual grounding then a sufficient claim of normative appropriateness can be invoked in support of the respective action. While the consequences of the action may look detrimental to diplomacy in hindsight, the actors nevertheless deserve normative credit for drawing on relevant moral principles in favour of the action and for properly transposing

them, through accurate factual descriptions, to the context of the case. Third, a strong ethical case in favour of secret diplomacy can be made if, in addition to the meeting the previous two conditions, parties demonstrate a good level of critical reflection regarding the broader consequences of secret diplomacy. The intended action is not only properly justified from a moral and factual viewpoint, but the likely negative implications for the general practice of diplomacy are being carefully assessed in view of the available information.

#### **IV. THE SECRET DIPLOMACY OF EXTRAORDINARY RENDITIONS: A CASE STUDY**

The secret diplomacy of the U.S. extraordinary rendition program will be used as a background case on account of three factors. First, the case involved highly controversial considerations regarding the benefits and limitations of resorting to secret diplomacy in support of a high-profile objective, national security. Second, secret extraordinary renditions were made possible by the close diplomatic collaboration between the United States and a wide range of actors in Europe, the Middle-East and Asia. Third, by directly challenging some important international conventions, the secret diplomacy of extraordinary renditions (SDER) calls attention to the significance of its structural impact.

The secret program of extraordinary rendition operated by the Central Intelligence Agency (CIA) in the past decade, had its roots in the 1986 scheme of “rendition to justice” of the US government authorizing the apprehension of suspected terrorists whose acts had traditionally been excluded from extradition arrangements (Satterthwaite 2008: 28-9). By late 1990s, it was further developed as an intelligence-gathering program involving the transfer of foreign nationals suspected of involvement in terrorism to detention and interrogation in countries where US federal and international legal safeguards did not apply (ACLU 2005). Following the terrorist attacks on Sept 11, 2001, President Bush signed a classified Presidential Finding granting the CIA new competences relating to its covert actions, including the so-called “Kill, Capture or Detain” orders, or “K-C-D orders”, for high-value targets (HVT) (Council of Europe 2007: 15). The finding did not specify how captives should be handled during interrogation, but the Bush administration issued a pair of secret memos to the CIA in 2003

and 2004, which explicitly endorsed the agency's use of “enhanced interrogation techniques” (Warrick 2008).

Technically speaking, SDER was an intelligence not a diplomatic operation, but the implementation of the program required extensive diplomatic collaboration and coordination, at different levels, between the US Administration and other governments around the world.<sup>3</sup> For example, the CIA’s key operational aspects of the rendition program were multilaterally developed with the European allies under the framework of the North Atlantic Treaty Organisation (NATO) or through bilateral agreements (Council of Europe 2007: 18, 24). Article 5 of the North Atlantic Treaty became the legal-diplomatic platform on the basis of which a number of close US allies, including Italy, Germany, UK, Sweden, provided direct or indirect support for the apprehension and transport of HVT (European Parliament 2007).<sup>4</sup> Bilateral agreements also proved successful in securing the support of several democracies in Eastern Europe, such as Poland, Romania and Lithuania, for hosting a number of secret facilities (a.k.a “black sites”) between 2001-2005 (BBC 2009). Most importantly, information about the extraordinary rendition system was kept secret from the public, being available only to a handful of officials in the United States as well as to the head of state and a few top intelligence officers in each host country (Priest 2005).

To begin with, the particulars of the post 9/11 environment (e.g., the public anxiety inspired by the possibility of new terrorist attacks on American soil, especially given the broader strategic

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<sup>3</sup> Due to space constraints, non-U.S. justifications of the SDER program cannot be included in this article. It is nevertheless important to note that it was the U.S. which approached and sought the collaboration of its allies and also the one to coordinate logistically the entire operation.

<sup>4</sup> According to former US officials, the C.I.A. had flown 100 to 150 suspected terrorists between 2001 and 2005, from one foreign country to another, including to Egypt, Syria, Saudi Arabia, Jordan and Pakistan. Each of those countries has been identified by the State Department as habitually using torture in its prisons (Jehl and Johnston 2005).

context of the US military interventions in Iraq and Afghanistan) triggered, among US decision-makers, a search for moral universals applicable to the case. This search involved a collective recollection effort of similar encounters and experiences, underlying the first segment of the fact/value entanglement. The objective was not to debate in the abstract the value of competing normative justifications in support of SDER, but rather to identify broader moral considerations derived from socialization and practical challenges that could best subsume the general factual descriptions of the existing situation. Indeed, a careful analysis of the political statements made by key U.S. decision-makers involved in the coordination of SDER, reveals how their justifications eventually coalesced around two important sets of practical guidelines or “universals” (in Kornprobst’s parlance, see above), separated by slightly different degrees of normative relevance.

The first set of practical guidelines drew on the idea that secret and forcible abduction of foreigners for standing trial for their crimes was an evolving yet controversial legal practice. The tepid international opposition to the kidnapping of Adolph Eichmann by Israeli agents from Argentina in 1960, the capturing of Antonio Noriega by U.S. troops in 1992, or the abduction and rendition of “Carlos the Jackal” from Sudan by the French in 1994 reveal an emergent pattern in international politics in favour of compulsory rendition of individuals involved in high crimes. As regards the legitimacy of the practice, the US Supreme Court held in 1992, echoing the century old Ker-Frisbie doctrine, that the government could kidnap people from foreign countries to try them in the United States (Fisher 2008: 1415). In a similar fashion, the European Commission of Human Rights rejected “Carlos the Jackal’s” claim that his rendition from Sudan was unlawful (Miller 2009: 1244). In short, according to this line of reasoning, extraordinary rendition was not a violation of international law, but part of an evolving yet controversial customary legal norm, as repeatedly maintained by the US Attorney

General at the time, Alberto Gonzales (Smith 2005 ; Onikepe 2006). To be absolutely clear, the point about extraordinary rendition being an evolving customary legal norm is not discussed here from a legal perspective (e.g., whether this is legally accurate or not), but from an ethical perspective: whether the US decision-makers were normatively right to draw on this interpretation in light of previous experiences and public knowledge on the matter.

The second set of practical guidelines goes to the heart of the utilitarian claim regarding the effectiveness of the extraordinary rendition program. As argued by the US Secretary of State at the time, Condoleezza Rice, “renditions take terrorists out of action, and save lives” (Rice 2005). The callousness of the Sept 11 attacks made the issue of effectiveness imperative in the eyes of US top-decision makers, even at the cost of crossing into the “dark side”. As Vice-President Dick Cheney explained shortly after the attacks, the US response to terrorist attacks would have to undergo a radical transformation in comparison to the pre 9/11 context: “We’ll have to work sort of the dark side, if you will’ [...]A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies – if we are going to be successful.” (cited in Mayer 2009: 9-10). It stands to reason that the removal of suspected terrorists “off the streets” may weaken terrorist organizations and thus prevent further terrorist acts, but SDER also involved a crucial element of coercive extraction of “actionable intelligence” from the detainees for the purpose of preempting terrorist plots.

The second rationale of the effectiveness universal had a much more controversial track record. For example, the CIA’s Phoenix program, which allegedly combined brutal interrogations with extrajudicial executions during the Vietnam war, was subsequently seen as an intelligence-generating failure The torture-terror counterinsurgency models refined in Vietnam were later

exported, with ambiguous results, to Latin America through Project X, a secret training program of Army Intelligence for police and militaries (Hajjar 2009: 324). Arguably, the second universal enjoyed much weaker normative relevance than the first, on account of its less consistent track record. Again, the argument about effectiveness is discussed here not from an instrumental perspective (e.g., whether torture really works or not), but from an ethical perspective: whether parties were right to make such a claim in light of their previous experiences and public knowledge on the matter.

What is less clear, though, is the level of factual grounding of the two universals that is, the second side of the fact/value entanglement. In other words, what we also need to establish is whether the transposition of the two universals to the particular situation of the suspected Al-Qaeda sympathisers makes a good case for the implementation of the extraordinary rendition program through secret diplomacy. Rice's claim that the United States and other countries have used renditions for decades to transport terrorist suspects to countries where they could be questioned, held, or brought to justice (Rice 2005) was, for instance, technically in line with the prescriptions of the first universal, but rather in a misleading way. The two examples she mentioned, Ramzi Youssef and "Carlos the Jackal", referred to individuals who were brought to court to face public charges, trial and sentencing and not taken to secret interrogation centres, outside the judicial process, and subjected to torture (Fisher 2008: 1426). In addition, Rice ignored important recommendations of the State Department, which concluded in an internal memo in 2002 that the Bush Administration's disregard of the Geneva Conventions was "untenable," "incorrect," and "confused" (Mayer 2005).<sup>5</sup>

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<sup>5</sup> For example, Rice's claim that the U.S. policy on enhanced interrogation was consistent with U.S. obligations under the Convention Against Torture, obscured that fact that "consistent with" was not the same as being in compliance. The former invites administrative choice and discretion instead of a legal obligation (Fisher 2008: 1428).



The effectiveness of extracting actionable intelligence by means of “enhanced interrogations” was praised by the US Vice-President, Dick Cheney, for keeping the nation safe (Cheney 2008), but strongly disputed by agents in the field. For example, a former FBI agent involved in the interrogation of HVTs testified in front of the US Senate Judiciary Committee that harsh methods of interrogation actually proved contra-productive in eliciting valuable information from the detainees (Hajjar 2009: 331). Others confirmed torture and lesser forms of physical coercion were effective in producing confessions, but these confessions were not necessarily true. Three of the Guantanamo detainees confessed, for example, that they had appeared in a blurry video, obtained by U.S. investigators, which documented a group of acolytes meeting with Osama bin Laden in Afghanistan. However, British officials subsequently presented evidence that the accused men had been living in England at the time the video was made. The detainees then told British authorities that they had been coerced into making false confessions (Mayer 2005).

By exposing a critical gap in the transposition of the two universals to the particulars involving the treatment of suspected terrorists, these examples seriously call into question the integrity of actors’ moral reasoning. However, could SDER’s legitimacy be enhanced by the new contextual elements generated by the post 9/11 environment? The risk of new attacks, even biological or nuclear, was perceived as sufficiently credible at the time to justify radical actions. The campaign against al Qaeda was therefore seen not as a simple matter of law enforcement, but an international armed conflict governed by the laws of war (Yoo 2004: 1235). The possibility of new normative standards emerging out of the interplay between the selected moral universals and the particulars of the case that is, the SDER’s structuration effect, thus brings up the issue of “critical reflection” as a measure of SDER’s normative validity.

To what extent SDER has helped undermine, for instance, the authority of “public” universals that are critical for the practice of the diplomacy? On this account, the situation is rather mixed. On the one hand, the insistence of the U.S. Administration to extend the scope of extra-judicial prosecution raises serious ethical and legal questions, but mainly for the US judicial system (Aronofsky 2008: 596-7), rather than for the diplomatic method in general. On the other hand, the issue has been considered sufficiently damaging for the US international reputation by President Obama, but despite his original promise to put an end to extra-judicial prosecutions, the matter has remained unresolved to the present day (Guardian 2011). While the Bush Administration consistently defended its policy on extra-judicial prosecutions (Bush 2006), the Congress showed occasional signs of critical reflection on the matter. In a joint hearing held in April 2007, the Congressional Committee on Foreign Affairs acknowledged, for example, the potentially negative impact of SDER on transatlantic relations (House of Representatives 2007). However, the absence of stronger forms of critical reflection among US decision-makers on this matter cannot be considered seriously damaging for the SDER’s normative value as the issue of extra-judicial prosecution does not fundamentally challenge the general practice of diplomacy.

The use of torture, however, even in its “soft” version of “enhanced interrogation”, raises more substantial and damaging issues for the diplomatic practice. The prohibition of torture is presently considered a *jus cogens* norm from which no derogation is allowed as argued in the 1999 Arrest Warrant case of Gen. Pinochet (McCorquodale and Dixon 2003: 149). The restriction of the scope of the norm is possible, but only temporarily on grounds of *ratione personae* (International Court of Justice 2002). Rendition may also place countries on a diplomatic collusion course when matters of legal extra-territorial jurisdiction are involved. The diplomatic tensions triggered by the capturing of suspected terrorists in Italy and Germany

by CIA agents without the consent of the local authorities distinctly reinforces this point (BBC 2007). The fact that US lawmakers raised no formal objections to the use of harsh interrogation methods during the thirty private briefings they received from the CIA at the height of the program (Warrick and Eggen 2007), also denotes an unenviably low level of critical reflection on their part, which in turn casts a long shadow of doubt on SDER's normative value.<sup>6</sup>

To conclude, the secret diplomacy of extraordinary renditions, as pursued by the United States between 2001-2006, faced major ethical limitations on all three dimensions. While the first universal was reasonably relevant for the case, the second universal offered a weak interpretative lens for SDER due to its inconsistent track record. The degree of factual grounding of the two universals was also problematic in light of the inaccurate interpretation of the legal aspects of the rendition program and of the questionable effectiveness of the "enhanced interrogation" methods. Finally, U.S. decision-makers showed a low level of critical reflection about the broader consequences of secret diplomacy, especially those involving the anti-torture *jus cogens* norm. SDER could have still enjoyed normative validity had it been limited only to the capture and rendition of suspected terrorists, in cooperation with local authorities, and in full compliance with the terms of the Geneva Convention against torture.

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<sup>6</sup> Harsh interrogation methods were partially banned by the U.S. Congress through the Detainee Treatment Act in December 2005 and more comprehensively, through the intelligence funding bill in March 2008, the last being subsequently vetoed by President Bush (Associated Press 2008). This demonstrated greater awareness among US lawmakers about the negative impact of torture on the US standing in the world. However, both legislative acts were adopted at the end of the extra-rendition program and largely as a result of the media exposure of SDER.

## V. CONCLUSIONS

The aim of this article was to examine the conditions under which secret diplomacy could be considered normatively justifiable. To this end, I argued that despite its critical liability in reinforcing a self-fulfilling dynamic of distrust and insecurity, secret diplomacy still presents important advantages for the diplomatic process. Drawing on pragmatic theories of political and ethical judgement, I argued that a three dimensional contextual approach centred on actors' reasoning process offers a sharp and reliable analytical tool for bridging the ethical gap of secret diplomacy. Using the case of the U.S. extraordinary rendition program, the paper has shown empirically that secret diplomacy is ethically unjustifiable when actors fail to invoke normatively relevant principles of justification, inappropriately apply them to the context of the case and when the moral reasoning process suffers from deficient levels of critical reflection concerning the broader implications of the intended actions for diplomatic conduct.

Two areas of further investigation deserve special attention if the value-added to this approach is to be consolidated. First, the contextual model indirectly places an extra normative burden on the diplomats from democratic countries as they are expected to have been more extensively exposed and socialized into observing norms of democratic accountability and transparency. This suggests that, from a normative perspective, diplomats representing authoritarian regimes may have broader discretion in engaging in secret diplomacy on account of their limited repertoire of "democratic" universals. The third criteria – critical reflection - is supposed to correct this imbalance, but further work is needed to explain whether and how this correction may actually work.

Second, the scope of application of the contextual model of ethical analysis could be extended from the subject of secret diplomacy to other areas of “open” or “semi-open” diplomacy such as coercive diplomacy, environmental negotiations or UN preventative diplomacy. Theoretically, there is nothing inherent in the model to prevent such a development. By being derived from the actors’ reasoning process as informed by their socialization process and past experiences, all three dimensions of ethical analysis – normative relevance, factual grounding and critical reflection - are perfectly suitable for being applied as theoretical anchors for more extensive normative studies of diplomacy.

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