

EXTRAORDINARY RENDITION AND THE SECURITY PARADIGM

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Abstract

This paper deals with a very delicate subject – the extraordinary rendition. The analysis starts from the rendition to justice as a technique by which a suspected person is forcibly abducted in another State, if it is impossible to bring this suspect to stand trial by the normal extradition procedure. In these cases, the forcible abduction can be executed unilaterally by the agents of the forum State or with the cooperation of agents of the State where the person is abducted. The rendition in itself is not a judicial procedure because it lacks a judicial warrant and, in reality, is mostly a highly covert police or military operation, with the risk of infringing upon the State sovereignty of other States (depending on the cooperation with that State). Recently, the rendition to justice practice was applied in a systematic way in dealing with the prosecution of piracy in the Somalia-Gulf of Aden area. Several defendants ended up in criminal trials in European States without any extradition procedure at all. The rendition to justice was widened into a rendition to secure policy and in this way the extraordinary rendition was born. Extraordinary rendition is also a special administrative measure, but one that fundamentally changes the meaning of rendition, as the aim is no longer to adjudicate a person, but to keep him/her in secret detention for interrogation. In this context, the paper observes also the way extraordinary rendition is reflected in The Inter-American Court of Human Rights jurisprudence and in European Court of Human Rights standards.

Keywords: *public law; Criminal Law; criminal justice; national security; extradition; rendition to justice; forcible abduction; extraordinary rendition*

1. FROM PREVENTIVE TO SECURITY DETENTION

In the last decades, aims of preventive detention have been enlarged from a measure of social defence to a measure to protect (national) security, especially in the field of counter-terrorism, and were further delinked from criminal justice and trial. Anticipating risk has also become a driving force in criminal justice, integrating national security into criminal justice¹⁾. Security detention has become

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¹⁾ Hirsch Ballin, M., *Anticipative criminal investigation, Theory and Counterterrorism Practice in the Netherlands and the United States*, T.M.C. Asser Press, The Hague, 2012.

a measure of *Sicherungsverwahrung* [preventive detention]²⁾, of detention of individuals labelled as a danger for public order, public safety or national security because of their conduct or even their profile. The change of paradigm has also affected international cooperation on criminal matters. Traditionally, cooperation between States or judicial authorities related to the arrest and detention of persons, with the aim of criminal adjudication or execution of criminal convictions, has been regulated in and enforced through mutual legal assistance treaties (MLATs) of a bilateral or multilateral character, especially bilateral and multilateral extradition treaties³⁾. The MLATs also contained guarantees against arbitrary extradition, as the request to extradite had to be a judicial one based on reasonable grounds to suspect a person of an extraditable offence in both the requesting and requested country (double criminality provision).

Although the MLATs were aimed at exclusivity for the cross-border arrest, detention and rendition of suspects or convicted persons, some countries have also put in place policies of rendition, or administrative or executive extradition (without involvement of the judiciary at all). Rendition to justice can be described as a technique by which a suspected person is forcibly abducted in another State, if it is impossible to bring this suspect to stand trial by the normal extradition procedure. This means that the rendition is only applied when there is an outstanding arrest warrant for the person and with the aim of criminal adjudication in the abducting State⁴⁾. The forcible abduction can be executed unilaterally by the agents of the forum State or with the cooperation of agents of the State where the person is abducted. The rendition to justice policy is in the rule based on statutory domestic law and, to a certain extent, submitted to administrative judicial review in the courts. Once in the forum country, the abducted person is submitted to ordinary criminal justice, as any other detainee awaiting trial. Rendition to justice applies to a judicial process, as the abducted person is abducted for reasons of criminal justice: to be brought to justice or to execute the criminal conviction. This does not mean that the rendition in itself is a judicial procedure. It lacks a judicial warrant and, in reality, is mostly a highly covert police or military operation, with the risk of infringing upon the State sovereignty of other States (depending on the cooperation with that State). The abduction of Adolf Eichmann by the Mossad in 1960 in Argentina for his rendition to justice in Israel was certainly one of the first and most famous cases. Rendition to justice has been a policy in the US for decades, but goes

²⁾ Nikos Müller, T., *Präventive Freiheitsentziehungen als Instrument der Terrorismusbekämpfung*, Duncker & Humblot, Berlin, 2011; Pösl, M., 'Die Sicherungsverwahrung im Fokus von BVerfG, EGMR und BGH', *Zeitschrift für das Juristische Studium*, Vol. 4, 2011, pp. 132-146.

³⁾ Cherif Bassiouni, M., *International Extradition: United States Law & Practice 1*, Oxford University Press, New York, 2007.

⁴⁾ Nadelmann, E., 'The evolution of United States Involvement in the International Rendition of Fugitive Criminals', *New York University Journal of International Law and Policy*, Vol. 25, 1993, pp. 813-885, at pp. 857-882.

back further in history. It was approved for use against terrorist suspects by Ronald Reagan in 1986⁵⁾, but, in reality, was also used in case of drugs or arms trafficking. The abduction of former president, Manuel Noriega, in Panama City by US military forces to stand trial in the US on drug trafficking charges is the most notorious example⁶⁾. In 1993, George HW Bush authorised specific procedures for rendition in 1993 through *National Security Directive 77*⁷⁾. Bill Clinton signed in 1988 *Presidential Decision Directive 62*, giving leeway for several anti-terror programs, including the one on *Apprehension, Extradition, Rendition and Prosecution*⁸⁾. Although the abduction in foreign sovereignty for the aim of rendition to justice is illegal under international law, the Supreme Court of the US upheld the government's power to prosecute abducted persons irrespective of their legality under international law and also precluded the application of the US Constitutional standards to agents of the US acting outside the US territory (the *Kerr-Frisbie/Alvarez-Machain* doctrine)⁹⁾.

Several European countries, for instance France and Spain, practiced the same policy as part of their counter-terrorism strategy against persons suspected of being involved in Basque Homeland and Freedom (ETA) activities. The so-called 'extradition administrative' was applied in order to circumvent the cumbersome and lengthy extradition proceedings and also to circumvent the guarantees of the MLAT's provisions on extradition. It was executed under the scheme of informal police cooperation, without any statutory frame. In practice, the police authorities and intelligence officers surrendered the concerned person at the State borders to the foreign authorities. There was, however, one substantial difference with the prescribed rendition to justice policy of the US. In the European countries, the administrative extradition was the result of bilateral cooperation between the police and intelligence authorities of the States. In the US, however, the rendition to justice was the result of a unilateral and extra-territorial abduction by US officials in foreign territory.

Recently, the rendition to justice practice was applied in a systematic way in dealing with the prosecution of piracy in the Somalia-Gulf of Aden area. Several defendants ended up in criminal trials in European States without any extradition procedure at all¹⁰⁾.

⁵⁾ Cameron Findlay, D., 'Abducting Terrorist Overseas for Trial in the United States: Issues of International and Domestic Law', *Texas International Law Journal*, Vol. 23, No. 1, 1998, pp. 1-54.

⁶⁾ *United States vs Noriega*, 746 f. supp. 1506, 1511 (S.D.Fla.1990).

⁷⁾ Is listed as a classified document.

⁸⁾ Is listed as a classified document.

⁹⁾ *Frisbie vs Collins*, 342 U.S. 519 (1952), *Ker vs Illinois*, 119 U.S. 436 (1886) and *United States vs Alvarez-Machain*, 504 U.S. 655 (1992). Stark, R., 'The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and United States Sponsored Kidnapping of Foreign Nationals Abroad', *Connecticut Journal of International Law*, Vol. 9, No. 1, 1993, pp. 113-163, at p. 161.

¹⁰⁾ Geiss, R. and Petrig, A., *Piracy and Armed Robbery at Sea – The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford University Press, Oxford, 2011, p. 344.

Precisely under the Clinton presidency, the procedures for rendition to justice were changed. Several persons were captured and abducted by the US military in the mid-1990s in Bosnia and Albania and transferred to Egypt. The first known case of such a rendition was the case of Tal`at Fu`ad Qassim, abducted in Bosnia, transferred to a US navy ship for interrogation and transferred to Egypt for further detention and interrogation. Qassim was reportedly executed while in Egyptian custody¹¹⁾. Rendition for justice was converted under the Clinton administration to rendition for interrogation and intelligence gathering in security detention. Former CIA Director George Tenet estimated that the Agency had abducted more than 80 persons before September 11 2001¹²⁾.

This means that the Clinton administration transformed the rendition to justice policy, being a criminal law enforcement technique, into a preventive goal. The rendition to justice was widened into a rendition to secure policy. The extraordinary rendition was born¹³⁾. The CIA, in cooperation with the Department of Defence and the FBI, became responsible for a counter-terrorist programme by which State (sponsored) abduction of persons in foreign countries occurred. These persons were abducted by US agents, with or without the cooperation of the government of that country and were subsequently transferred to another country for detention and interrogation. Despite articles in the *Washington Post* in 2002 on the practice of outsourcing interrogations of terrorists, it was only in 2006, in the aftermath of the Supreme Court ruling on *Hamdan vs Rumsfeld*, that the existence of the extraordinary rendition programme was confirmed by George W Bush. He called it a separate programme operated by the CIA to detain and interrogate individuals who were suspected of being the key architects of the September 11 attacks; attacks on the *USS Cole*; and bombings of US embassies in Kenya and Tanzania, as well as individuals involved in other attacks that have taken the lives of innocent civilians across the world. He admitted publicly what had been suspected for some time, being that the US government administers a global programme on secret detention of enemy combatants. A Presidential Directive, signed on September 17 2001, created the legal authority for the CIA to execute the extraordinary rendition programme¹⁴⁾. After the Supreme Court ruling on

¹¹⁾ Human Rights Watch, 'Black Hole: The Fate of Islamist rendered to Egypt', 10 May 2005, E1705.

¹²⁾ Statement at Panel One, Day Two of the Public Hearing of the National Commission on Terrorist Attacks Upon the United States.

¹³⁾ Satterthwaite, M., 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', *The George Washington Law Review*, Vol. 75, Nos. 5-6, 2007, pp. 1333-1420, at p. 1372; Johnson, R., 'Extraordinary rendition: a wrong without a right?', *Richmond Law Review*, Vol. 43, No. 3, 2009, pp. 1135-1174, at p. 1136.

¹⁴⁾ For official sources, see: 'U.S. Policy on Counterterrorism', available at: www.fas.org/irp/offdocs/pdd39.htm; 'Protection Against Unconventional Threats to the Homeland and Americans Overseas', available at: www.fas.org/irp/offdocs/pdd-62.htm; 'Extraordinary

Hamdan vs Rumsfeld, Congress passed in 2006 the *Military Commission Act*, providing a legal basis for detaining, interrogating and trying ‘unlawful enemy combatants’. The Bush administration presented the *Military Commission Act* as a sufficient legal basis for the extraordinary rendition programme, although specific clauses in the Act are lacking and it is not certain that all abducted persons are formally labelled as ‘unlawful enemy combatants’. The Obama administration promised to scrutinise the practice of extraordinary rendition, but did not bring it to an end and did not formalise it as a covert policing of enemy combatants either.

Although rendition to justice and extraordinary rendition are both special administrative measures (SAMs) that deviate from the judicial extradition procedure, putting ‘extraordinary’ in front of rendition changed the meaning fundamentally. A process formerly bound by statutory and treaty law and reinforced by certain procedural safeguards in court had now entered the realm of discretionary executive policy. In the US, the executive labelled extraordinary rendition as transfer of enemy combatants, by which the president was considered free from *ex ante* constitutional and domestic law constraints on his ability to transfer detainees held outside the US to the custody of foreign nations¹⁵⁾.

2. EXTRAORDINARY RENDITION: CASES AND FIGURES

The practice of extraordinary rendition was widely unknown until 2005-2006. Thanks to formal investigations, informal inquiries (both by the press and by NGOs) and the political oversight in Europe¹⁶⁾, the scope and magnitude of the extraordinary rendition programme has become clear. The exact number of cases is unclear, as sources go from several hundreds to several thousands. The cases in which European States have been involved are widely documented, but the cases in the Asian region are rarely unveiled.

To visualise the practice of the extraordinary rendition scheme, I would like to mention here two emblematic cases, in which European countries have been involved. The first case is the one of Hassan Mustafa Osama Nasr, also called Abu Omar. Abu Omar, a Muslim of Egyptian descent was an imam in Milan, suspected of radicalising the Muslim community. He was abducted in 2003 by a joint operation between CIA agents and Italian intelligence agents and transferred to Egypt via a military airport in Germany. In Egypt, he was held in secret detention for two months and under house arrest for near to four years and

rendition in U.S. counterterrorism policy: the impact on transatlantic relations, *available at*: foreignaffairs.house.gov/110/34712.pdf; the substantive content remains classified.

¹⁵⁾ For an in-depth analysis, see Yoo, J., ‘Transferring Terrorists’, *Notre Dame Law Review*, Vol. 79, 2003, pp. 1183-1235, at p. 1184.

¹⁶⁾ See: ‘The Fava Inquiry of the European Parliament’, *available at*: www.europarl.europa.eu; ‘The Dick Marty Report of the Council of Europe’, *available at*: assembly.coe.int/main.asp; ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, *available at*: assembly.coe.int.

submitted to interrogations, part of which is suspected to have been torture. After four years of detention, he was released. No arrest warrant, charge or *habeas corpus* procedure had ever been in place. The perpetrators of the abduction in and from Italian soil have been prosecuted in Italy for several offences. The Milan judicial authorities came across the identity of the perpetrators during an in-depth judicial inquiry, arrested the Italian intelligence officers and asked for the extradition of the CIA agents. The request for extradition was never sent by the Italian executive (both the Prodi government and the Berlusconi government) to the US. The Berlusconi government used the public interest immunity of State secrecy in order to avoid the use of evidence obtained at the intelligence authorities' premises¹⁷). The Italian Constitutional Court approved the use of the executive privilege, which excluded a substantial part of the evidence from the trial setting. In November 2009, the Italian court convicted 22 CIA agents, an Air Force pilot and two Italian secret agents of criminal liability for the extraordinary rendition of Abu Omar on Italian soil and imposed prison sentences of up to eight years on the leaders of the operations. However, some of the charged persons were not convicted because of diplomatic immunities. The Italian criminal trial and convictions have been the first convictions, and thus far the only ones, against people involved in the CIA's extraordinary rendition program. In September 2012, the Italian Supreme Court upheld the extraordinary rendition convictions for the 22 CIA agents, the Air Force pilot and the Italian secret agents, but has also ordered that the Italian secret agents who had previously been acquitted on State secrecy immunities should be retried in the Milan Court of Appeal.

The second case is the *Al-Masri* one. Khaled El-Masri is a German citizen. He was born in Kuwait and is a Muslim of Lebanese descent. He moved to Germany in 1985. In 2003, he travelled to Skopje in Macedonia for a brief holiday. At the Macedonian border, he was detained by local intelligence authorities, interrogated for several hours and then driven to a hotel in Skopje where he was detained for 23 days under armed guard, without an arrest warrant, access to a lawyer, charge and so on. He was continuously interrogated. There had also been information exchanged between the local authorities in Macedonia and the German municipal and police authorities during the interrogation. After the detention, he was transferred to Skopje Airport in Macedonia and handed to a CIA rendition team. The plane flew to Afghanistan and he was kept in secret detention for another four months, until the authorities found out that he probably was the wrong person (he had a similar name to that of a man connected to a 'Hamburg cell' of Al-Qaeda). In order to cover up the mistake, he was flown back to Albania in a 'reverse extraordinary rendition'. In Macedonia, administrative and criminal investigations were opened, but did not progress and had to be closed due to the statutory time

¹⁷) See: Illuminati, G. (ed.), *Nuovi Profili del segreto di stato e dell'attività di intelligence*, G. Giappichelli Editore, Torino, 2010.

limit expiring. In 2004, a German Prosecuting Magistrate in Munich opened an investigation into allegations that El-Masri had been unlawfully abducted, detained, psychically and psychologically abused, and interrogated in Macedonia and Afghanistan. In 2005, letters rogatory were sent out to Macedonia and, in 2007, international arrest warrants against 13 suspected CIA agents and/or personnel were issued. The Macedonian authorities refused to cooperate and the German executive authorities refused to send out the extradition requests to the US. During civil proceedings in the US, under the Alien Tort Statute, El-Masri was confronted with the use of State secrets privilege by the US administration. Both the District Court and the Court of Appeals for the Fourth Circuit decided that the case could not be set forth without revealing State secrets. The Supreme Court was not willing to review the case. The American Civil Liberties Union filed a petition with the Inter-American Commission of Human Rights (IACoMHR) in 2008. A Soros Foundation filed in 2009 a petition with the ECtHR versus Macedonia. The former procedure is *lis pendens* and still awaiting the formal opinion of the US. In the latter, the Grand Chamber of the ECtHR gave its judgment on 13 December 2012¹⁸⁾. The role of European States and agents, or officials of European States in the extraordinary rendition programme can take several forms. It goes from abduction of the persons (at the demand of the US) to direct participation in the abduction and transfer, establishment and use of secret detention facilities, or certain types of facilitation of the program (through exchange of intelligence information, facilitating secret CIA flights and so on). This is how several European States have orchestrated, cooperated or facilitated the extraordinary rendition program. The extent to which European States have been involved in the extraordinary rendition programme has become in the last decade a very sensitive political topic.

3. EXTRAORDINARY RENDITION UNDER THE INTER-AMERICAN COURT OF HUMAN RIGHTS (IACtHR) AND ECtHR STANDARDS

Both rendition to justice and extraordinary rendition are non-existing legal terms under international law. When it comes to an assessment of the practice of extraordinary rendition under international human rights law, we have to face a hybrid set of possible human rights violations, such as arbitrary arrest and detention, enforced disappearance, forcible transfer, torture, denial of access to consular offices, and denial of access to independent and impartial tribunals/*habeas corpus*. In this contribution, I would like to focus on the secret detention as a method and aim of the extraordinary rendition program and tackle the question of if and to what extent both international human rights law instruments accept a specific category of security detention, especially in the field of counter-terrorism. A question related to it is whether international human rights

¹⁸⁾ See section 4, *infra*.

law applies specific standards to extradition or rendition to justice or extraordinary rendition (SAMs) in that respect.

3.1. SECURITY DETENTION AND THE CASE LAW OF THE IACOMHR AND THE IACTHR

The case law does not declare security detention as such a breach of the Convention, especially of Article 7 of the American Convention on Human Rights (ACHR) on personal liberty. Security detention is treated as any detention. It is only in line with the ACHR if it is not arbitrary and is based on grounds previously established by law. This includes ensuring against arbitrary arrest and detention by strictly regulating the grounds and procedures for arrest and detention under law. It also includes ensuring prompt and effective judicial oversight. To avoid risks of this nature, the Commission has suggested that a delay of more than two or three days in bringing a detainee before a judicial authority will generally not be considered reasonable¹⁹⁾. The Commission has, however, recognised that the deprivation of an individual's liberty may also be justified in connection with the administration of State authority beyond the investigation and punishment of crimes where measures of this nature are strictly necessary. Nevertheless, the Commission has emphasised that any such detention must in all circumstances comply with the requirements of pre-existing domestic and international law, including the requirement that the detention be based on the grounds and procedures clearly set forth in the constitution or other law and that it be demonstrably necessary, fair and non-arbitrary. Detention in such circumstances must also be subject to supervisory judicial control without delay and, in instances when the State has justified continuing detention, at reasonable intervals²⁰⁾.

The Court has strictly reviewed detention cases on legality and arbitrariness. In the case *Gangaram-Panday vs Suriname*²¹⁾, the Court came to the conclusion that Surinam had violated the Convention because of illegal detention. Gangaram-Panday was arrested by the military police in the airport of Paramaribo in Suriname, coming from Amsterdam under a deportation procedure. He was detained for three days in military confinement, without judicial control and was declared to have committed suicide. The IACTHR moreover concluded that while the right to personal liberty and security is derogable, the right to resort to a competent court under Article 7(6), which by its nature is necessary to protect non-derogable rights during criminal or administrative detention, such as the right to humane treatment, may not be the subject of derogation in the Inter-American system. The Commission has held that there are other related components of the right to liberty that can never be denied. These include the requirement that the

¹⁹⁾ See, for example: IACommHR, McKenzie *et al.* (Jamaica), 13 April 2000 (Case 12.023).

²⁰⁾ 'The Right to Life and Terrorism', available at: www.cidh.oas.org/Terrorism/Eng/part.d.htm; see also: IACommHR, Ferrer Mazorra *et al.* (United States), 4 April 2001 (Case 9903).

²¹⁾ IACTHR, *Gangaram-Panday v. Suriname*, 21 January 1994 (Series C, No. 16).

grounds and procedures for the detention be prescribed by law; the right to be informed of the reasons for the detention; as well as certain guarantees against prolonged *incommunicado* or indefinite detention, including access to legal counsel, family and medical assistance following arrest.

3.2. SECURITY DETENTION AND THE CASE LAW OF THE ECtHR²²⁾

The ECtHR has a much more protective application of the right to liberty. The Court has continuously underlined the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. For that reason, the Court applies a lawfulness test and a test of arbitrariness. The Court prohibits security detention under Article 5 of the ECHR, as no general power of preventive detention can be found in Article 5(1)(b)²³⁾. This means that Article 5(1)(c) does not authorise ‘a policy of general prevention directed against an individual or a category of individuals who, like *mafiosi*, present a danger on account of their continuing propensity to crime’²⁴⁾. Article 5 (1)(c) can only be used in the context of security detention related to crime prosecution. In that case, the right of *habeas corpus* in Article 5(4) does apply, which means prompt review by an independent and impartial tribunal established by law is required. This remedy is available irrespective of the basis for detention. The procedural guarantees and scope of review, however, differ according to the type of liberty at stake. ‘Speedily’ is more lenient than ‘promptly’, but it is clear from the case law of the Court (*Al-Nashif vs Bulgaria*, *Öcalan vs Turkey* and *Salik vs Turkey*) that there must be an effective remedy within one week at least. In *Brogan*, the Court acknowledged the relevance of these considerations in the pursuit of terrorist crime, but found that all judicially unauthorised detentions in excess of four days did not satisfy the ‘promptness’ criterion. In standing case law, the Court has rejected on a systematic basis *incommunicado* or unacknowledged detention in the complete absence of safeguards contained in Article 5 and labelled them as most grave violations of the right to liberty and to security (*Kurt vs Turkey*²⁵⁾ *Çakici vs Turkey*²⁶⁾ and *Luluyev and others vs Russia*²⁷⁾).

²²⁾ For a more in-depth analysis, see: Sottiaux, S., *Terrorism and the limitations of Right: The ECHR and the US Constitution*, Hart Publishing, Oxford, 2008.

²³⁾ ECtHR, *Lawless v. Ireland*, 14 November 1960 (Appl. no. 332/57), at para. 14.

²⁴⁾ ECtHR, *Guzzardi vs Italy*, 6 November 1980 (Appl. no. 7367/76), at para. 102.

²⁵⁾ ECtHR, *Kurt v. Turkey*, 25 May 1998 (Appl. no. 24276/94).

²⁶⁾ ECtHR, *Çakici v. Turkey*, 8 July 1999 (Appl. no. 23657/94).

²⁷⁾ ECtHR, *Luluyev and others v. Russia*, 9 November 2006 (Appl. no. 69480/01).

4. INTERNATIONAL HUMAN RIGHTS LAW STANDARDS AND EXTRAORDINARY RENDITION

4.1. IACtHR

In 2006, the Court ruled on a landmark case on transnational abduction and forced disappearance in which it was confronted with joint State responsibility. In the case of *Goiburú et al. vs Paraguay*²⁸⁾, the Court had to assess the practice of the ‘Operación Condor’, being a joint criminal enterprise of abduction, detention, torture and forced disappearance by military and intelligence officers of Chile, Argentina, Bolivia, Paraguay and Uruguay, under their respective military dictatorships. The aim of the joint enterprise was to combat subversive activities by exchange of information, abduction, preventive detention, targeted killing and so on. At stake in the complaint against Paraguay was the systematic practice of arbitrary detention, torture, extra-judicial execution and disappearances perpetrated by the intelligence and security forces under the dictatorship of Alfredo Stroessner, under ‘Operación Condor’. In paragraph 66, the Court qualifies the responsibility of the State of Paraguay as a clear situation of ‘State terrorism’, as it has been verified that the State’s power was orchestrated as a means and resource to violate rights that should have been respected and safeguarded, and actions were implemented using the inter-State collaboration²⁹⁾. In other words, the State became the principal factor in the grave crimes committed. Furthermore, the Court declared that the prohibition of forced disappearance, perpetrated with the collaboration of authorities of other States of the continent, and the corresponding obligation to investigate and punish, have attained the status of *jus cogens* and are thus non-derogable provisions of international law³⁰⁾, establishing a broad scope of international obligations *erga omnes*³¹⁾. The Court was not only looking at the human rights violations of rights and liberties, but also at the violations of positive duties to investigate, prosecute and punish, including obligations derived from international law on extradition in cases of grave human rights violations. The Court made a direct nexus between the *erga omnes* obligations and the positive duty. The full exercise of justice imposed on Paraguay was the compulsory obligation to have requested the extradition of the accused promptly and with due diligence. The inexistence of extradition treaties does not constitute a motive or justification for failing to institute a request of this type³²⁾.

In a separate opinion, Judge Antônio Cançado Trindade underlined that States perpetrated State crimes in a transborder or inter-State scale and by doing so committed grave violations of peremptory international law (*jus cogens*) and

²⁸⁾ IACtHR, *Goiburú et al. v. Paraguay*, 22 September 2006 (Series C, No. 153).

²⁹⁾ *Ibidem* at para. 66.

³⁰⁾ *Ibidem* at para. 84.

³¹⁾ *Ibidem* at para. 129.

³²⁾ *Ibidem* at para. 130.

serious human rights violations. In these types of cases, both the international responsibility of the State and the international criminal responsibility of the individual (perpetrator of the atrocities) are at stake³³). He concluded his opinion with a parallel between these inter-State practices of abductions and forced disappearances in Latin America and the international extraordinary rendition program of the US.

4.2. ECtHR

Although the Court has traditionally declined to consider extradition or deportation as part of civil obligations or as a criminal charge under Article 6 of the ECHR, and thus has declined to apply the fairness of proceedings test³⁴), it has dealt in a couple of cases with the situation of circumvention of extradition by abduction and transfer under Article 5(1) of the ECHR. Already in 1987, the Court had to deal with rendition in relation to extradition in the case *Bozano vs France*³⁵). Lorenzo Bozano, an Italian citizen, was sentenced *in absentia*. The Italian authorities did ask France to extradite Bozano, but the request was refused by a court decision, because of the *in absentia* sentencing, considered to be incompatible with French public order. Afterwards, he was deported by French police to Switzerland, based upon a French executive deportation order (danger for public order) and subsequently extradited from Switzerland to Italy. The ECtHR examined the lawfulness of the detention, which implies the absence of arbitrariness. The facts that Bozano was unable to use remedies against the deportation order and could not contact family or a lawyer contributed to the conclusion of the Court: the deprivation of liberty by France was neither lawful, within the meaning of Article 5(1), nor compatible with the right to security of the person. Depriving Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative decision on the extradition request³⁶).

In the case *Iskandarov vs Russia*³⁷), the Court was faced with the abduction of Mukhamadruzi Iskandarov, after an extradition request by the Tajik authorities had been dismissed by the Russian Prosecutor General's Office. The abduction in

³³) See also: Cançado Trindade, A.A., 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited', in: Ragazzi, M. (ed.), *International Responsibility Today – Essays in Memory of O. Schachter*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 253-269.

³⁴) In ECtHR, *Mamatkulov and Askarov v. Turkey*, 4 February 2005 (Appl. no. 46827/99), in the context of complaints about the fairness of Turkish extradition proceedings, the ECtHR reiterated, at para 82, that 'decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention'.

³⁵) ECtHR, *Bozano v. France*, 2 December 1987 (Appl. no. 9990/82).

³⁶) *Ibidem* at para. 60.

³⁷) ECtHR, *Iskandarov v. Russia*, 23 September 2010 (Appl. no. 17185/05).

Moscow and his transfer to Tajikistan was committed by Tajik and Russian agents. The Court underlined that the detention must not only be legal (in conformity with national law), but also compatible with the notion of non-arbitrariness. The notion has been assessed by the Court on a case-by-case basis, but it is clear that bad faith, deception or lack of judicial authorisation for a long time without grounds for doing so are clearly arbitrary to the Court. In the case of Iskandarov, the Court considered that it was deeply regrettable that such opaque methods were employed by State agents and that the deprivation of liberty was in pursuance of an unlawful removal designed to circumvent the dismissal of the extradition request and thus the detention was not necessary in the ordinary course of action taken with a view to deportation or extradition.

On 2 October 2012, the Court delivered its judgment in a Russian extradition-extraordinary rendition case: *Abdulkhakov vs Russia*. The case concerned the kidnapping in Moscow and transfer to Tajikistan of an Uzbek refugee. The Russian judicial authorities, including the Supreme Court, agreed to the extradition request by Uzbekistan. The extradition order was not, however, enforced, as a result of an indication by the ECtHR of an interim measure under Rule 39 of the Rules of the Court. Several weeks later, the refugee was secretly abducted and transferred to Tajikistan, where he was put into custody with a view to his extradition to Uzbekistan. The Court concluded that the right to individual petition had been violated, since the illegal transfer in effect frustrated the purpose of an interim measure imposed on Russia earlier not to transfer him. In addition, the Court also found a violation of Article 3 of the ECHR, since the lack of any assessment by Russia of whether the applicant would face a real risk of torture in Tajikistan, all the more so since the transfer was conducted secretly and outside any legal framework which could have provided safeguards³⁸⁾. The Court also reiterated the following on renditions:

[A]ny extra-judicial transfer or extraordinary rendition, by its deliberate circumvention of due process, is an absolute negation of the rule of law and the values protected by the Convention. It therefore amounts to a violation of the most basic rights guaranteed by the Convention³⁹⁾.

The Court has not only dealt with cases of extradition and deportation from the point of view of Article 5(1) of the ECHR, but it has also generated interesting case law on extradition and deportation in relation to Article 3 of the ECHR. In a lot of transnational cases, security detention goes hand in hand with the risk of

³⁸⁾ See A. Buyse, 'Extraordinary rendition, forced labour, and evidence obtained by torture', available at: ukhumanrightsblog.com/2012/10/16/extraordinary-rendition-forced-labour-and-evidence-obtained-by-torture-antoine-buyse/.

³⁹⁾ ECtHR, *Iskandarov v. Russia*, 23 September 2010 (Appl. no. 17185/05), at para. 156.

violating Article 3 of the ECHR. In the case of *Soering v the UK*⁴⁰⁾, it established the principle that a State would be in violation of its obligations under the ECHR if it extradited an individual to a State, in this case the US, where that individual was likely to suffer inhuman or degrading treatment, or torture. In such a case, there would be a situation of a flagrant denial of justice⁴¹⁾. *Obiter dicta* in that case extended this principle to cover the possibility of a serious and flagrant breach of fair trial rights under Article 6 of the ECHR. These principles bind each and every signatory to the ECHR and must apply to extradition between signatories to the Convention to the same extent as they apply to extradition from a signatory State to a third State.

The duty of *non-refoulement*, being the duty on States not to return a person to another State where there is a serious risk she/he will be subjected to serious ill-treatment, has been extended by the Court to other areas, such as refugee law and migration law. The most significant authority confirming the application of the *Soering* principle to deportation cases is *Chahal vs UK*. In that case, the ECtHR found that there was sufficient evidence of a real risk of ill-treatment and underlined that to return a person in these circumstances would be a breach of Article 3. The application of Article 3 is absolute. It contains no exceptions within it, nor can it be derogated from in time of national emergency under Article 15.

The Court's own case law has shown that, in practice, there may be little difference between extradition and other removals. Second, in an extra-territorial context, it makes no sense to make a distinction between torture and inhuman or degrading punishment, as, in this context, a prospective assessment is required, in which it is not always possible to determine whether the treatment will end up as one or the other. Third in these types of cases, there is no proportionality test. The only assessment that has to be made is whether the minimum level of severity has been met for the purposes of Article 3. This can only be assessed independently of the reasons for removal or extradition.

Very recently, the ECtHR has widened its *refoulement* doctrine to an Article 6 case, when it delivered its judgment in *Othman (Abu Qatada) vs UK*, a case concerning the deportation of a terrorism suspect from the UK to Jordan⁴²⁾. The applicant, Omar Othman, fled Jordan to the UK in 1993. He alleged that he had been detained and tortured by the Jordanian authorities and requested asylum. Being recognised as a refugee in 1994 and granted temporal leave to remain in the UK, he applied in 1998 for indefinite leave to remain there. While his application was still under consideration, in 2002, he was arrested and taken into detention under the *Anti-terrorism, Crime and Security Act* of 2001. In 2005, he was served with a notice of intention to deport. Othman challenged his possible deportation,

⁴⁰⁾ ECtHR, *Soering v. United Kingdom*, 7 July 1989 (Appl. no. 14038/88).

⁴¹⁾ *Ibidem* at para. 88.

⁴²⁾ See Smet, S. 'Othman (Abu Qatada) v. the United Kingdom: Questioning Gäfgen?', available at: strasbourgobservers.com/2012/02/08/othman-abu-qatada-v-the-united-kingdom-questioning-gafgen/.

alleging that there was a real risk that he would be subjected to torture upon his return to Jordan, in violation of Article 3 of the ECHR. He also feared that he would face a retrial for terrorist offences for which he had been convicted in Jordan *in absentia* in 1999. He claimed, *inter alia*, that there was a real risk that evidence obtained by torture either of him, his co-defendants or other prisoners would be admitted against him during the retrial, in violation of Article 6 of the ECHR⁴³⁾. The ECtHR ruled that Article 6 of the ECHR would be violated if the applicant were to be deported to Jordan because there would be a real risk that evidence obtained through torture of his co-defendants would be used against him during his retrial. Because the admission of such evidence would make the whole trial completely unreliable in its outcome, as well as immoral and illegal, the Court held that it would constitute a flagrant denial of justice. The Court used striking and clear language to emphasise its findings in *Othman*. One passage is particularly notable:

No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself⁴⁴⁾.

As the Court pointed out, this is the first time that it has ever held that an expulsion would violate Article 6, thereby underlining that the ‘flagrant denial of justice’ test is a stringent test of unfairness. This wording is presumably included in the judgment to alleviate any concerns the UK or any other Member State might have about the reach of the judgment, as well as to counter any criticism the Court might face in the aftermath of its delivery. In other words, it does not exclude the possibility that similar considerations might apply in respect to evidence obtained by other forms of ill-treatment which fall short of torture. The flagrant denial of justice test has a high threshold, but is applicable to transnational situations which might prevent the core values of the ECHR from remaining protected in situations of secret detention.

In its very recent judgment of 13 December 2012, in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*⁴⁵⁾, the Grand Chamber gave its first judgment on the extraordinary rendition scheme⁴⁶⁾. The ECtHR had held the Grand Chamber hearing on 16 May 2012. The applicant had claimed violations of Article

⁴³⁾ *Idem*.

⁴⁴⁾ ECtHR, *Soering v. United Kingdom*, 7 July 1989 (Appl. no. 14038/88), at para. 264.

⁴⁵⁾ See Section 2 of this text (*supra*) for the facts of the case.

⁴⁶⁾ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* (Grand Chamber), 13 December 2012 (Appl. no. 39630/09).

3 and Article 5 (abduction and *incommunicado* detention, transfer to Afghanistan and secret detention there, torture and disguised reverse rendition to Albania) and of Article 13 (effective remedy) and lack of an effective (judicial) investigation related to the positive duty to protect. What in reality has been a transnational organised abduction and forced disappearance by a coordinated operation of the authorities of Macedonia, the US, Afghanistan and maybe Germany is assessed under the Convention in the light of the obligations of Macedonia. The Venice Commission for the Council of Europe issued a draft opinion in which the obligations of the territorial States to take effective measures to safeguard against the risk of disappearance and to conduct a prompt, effective investigation into a substantiated claim that a person has been taken into custody and has not been seen since are underlined⁴⁷⁾. Although the Venice Commission came to the conclusion that the ECHR does not guarantee a right not be extradited or deported, it also underlines that, according to the Soering doctrine, a State may be held responsible for a violation of Articles 2 and 3. In flagrant cases, a State may also be responsible for a possible violation of Articles 5 and 6 ECHR, if its decision, permission or other actions have created a real risk of a violation of these rights by the State to which the prisoner is transferred. It is of no relevance in such cases whether the State on which territory the violation will or could ultimately take place is also bound by the ECHR. The Venice Commission concluded that Council of Europe Member States have infringed several international legal obligations by infringing human rights, including Article 5, and by not respecting their duty to protect and to secure (duty to investigate, prosecute and adjudicate).

The ECtHR ruled in full unanimity that Macedonia had violated Article 3 (torture) both from a procedural and substantial view. The detention, abduction and transfer of El-Masri also amounted to a ‘particularly grave’ violation of Article 5, a violation of Article 8 and a violation of Article 13 ECHR.

It was the first time that El-Masri obtained justice, since his proceedings in Macedonia were not taken seriously; his judicial actions in the US were blocked for lack of jurisdiction or for reasons of state secrecy privilege; and since his complaint before the American Commission of Human Rights has been pending since 2008.

5. CONCLUSION

5.1. ABDUCTION AND SECURITY DETENTION: NEGATIVE AND POSITIVE OBLIGATIONS

The analysis of international human rights case law has clearly shown that security detention related to special administrative measures, deviating from the ordinary extradition procedures, does not belong to the free realm of the executive

⁴⁷⁾ European Commission for Democracy Through Law (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, [http://www.venice.coe.int/webforms/documents/CDL-AD\(2006\)009-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2006)009-e.aspx).

branch of government. Security detention must be lawful and used in a matter that does not lead to arbitrariness or abuse of power. Moreover, it must be submitted to prompt and effective judicial review (*habeas corpus*). Extraordinary rendition is also a special administrative measure, but one that fundamentally changes the meaning of rendition, as the aim is no longer to adjudicate a person, but to keep him/her in secret detention for interrogation. The States involved in extraordinary rendition have to apply the requirements of international human rights law, including those related to security detention. For this reason, the judgment of the ECtHR in *El Masri v. Macedonia* and the cases pending before the ECtHR (*Al Nashiri v. Poland* and *Al Nashiri v. Romania*) are of the utmost importance and will set the standards for the future.

5.2. TRANSNATIONAL DIMENSION OF THE NEGATIVE AND POSITIVE INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

The extraordinary rendition programme is *de facto* a programme of transnational enforced disappearance, but the European human rights law obligations are, although having universal status and some of them with *jus cogens* and *erga omnes* value, applied within the jurisdiction of a State Party to the international human rights law Conventions. Within regional political organisations, such as the EU, transnational standards are put in place. A good example is Article 19(2) of the EU Charter on Fundamental Rights: ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’⁴⁸⁾.

The positive international human rights law obligations and content of the duty to investigate, prosecute and adjudicate serious breaches of international human rights law, being serious criminal offences, are still underdeveloped in relation to the transnational cooperation on criminal matters. Although the UN adopted in 2006 an International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in 2010, this Convention does not contain specific obligations related to international cooperation on criminal matters⁴⁹⁾. A first shy step can be found in the case law of the IACtHR. The Court qualified the duty to cooperate in bringing the perpetrators to justice as an *erga omnes* obligation⁵⁰⁾.

In light of this international human rights law case law, it is surprising to see that it has been very difficult to open judicial investigations in European countries

⁴⁸⁾ European Union, Charter of Fundamental Rights of the European Union, solemnly proclaimed 7 December 2000, 2000/C 364/01, Art. 19(2).

⁴⁹⁾ Vermeulen, M.L., *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Intersentia, Antwerp, 2012.

⁵⁰⁾ IACtHR, *La Cantuta v. Peru*, 29 November 2006 (Series C, No. 162). at para. 160.

on the practice of extraordinary rendition and that it has been even more difficult to gather the evidence because of lack of cooperation of executive authorities⁵¹⁾ and cross-border limitations. It is also surprising that in the US, no criminal judicial investigations at all have been opened, although the government is duty bound to investigate extraordinary renditions⁵²⁾. As there is a lack of international enforcement mechanisms, it is high time to generate, both in legislation and in international human rights law, more specific provisions about the positive duty in relation to cooperation on criminal matters. Serious obstacles, such as public interest immunity, State secrecy or personal immunities, should be removed. *Locus standi* under domestic proceedings should be guaranteed. It is astonishing to see how many obstacles can be raised in the US under the *Alien Tort Statute*, the *Torture Victim's Protection Act* and so on, leading to non-accountability for violations of established international human rights law standards. State authorities should be obliged to use the mutual legal assistance (MLA) instruments effectively, and not to set them aside for political considerations, as happened with the judicial MLA requests in Italy and Germany in relation to judicial investigations into extraordinary rendition. Diplomatic relations should not prevail when it comes to the most serious violations of human rights and human dignity; otherwise, they exist in a veil of impunity and flagrant denial of justice.

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⁵²⁾ The Association of the Bar of the City of New York urges in its recommendations criminal investigation into alleged acts of extraordinary rendition, see: 'Torture by Proxy: International and Domestic Law applicable to "extraordinary renditions"', available at: www.chrgj.org/docs/TortureByProxy.pdf, at p. 8.

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