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Litigating Extraordinary Renditions

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In the aftermath of the 11 September 2001 attacks the CIA extraordinary rendition programme accelerated and included dozens of states all over the world. Fundamental international standards have been violated. Many individuals have been seriously harmed. Judicial scrutiny of the extraordinary rendition programme commenced in 2003 and is far from approaching the end or even a first respite.

The transnational character of extraordinary renditions and the complicity of many countries and their authorities, among them secretly acting intelligence services, causes problems. However, it also bears new possibilities. Usually, a crime committed by members of the USA armed forces or the secret services in a third country will not be prosecuted if the political will within the USA and the third country is lacking. But the rendition system involved citizens and territories of many countries. Therefore, international lawyers are able to use many different instruments and mechanisms available in national, regional and international judicial systems to investigate the extraordinary rendition programme, to bring the perpetrators to justice and to compensate the victims.

This article focuses on case selection, case building and current factual and legal obstacles in proceedings on extraordinary renditions.

Where and How to Litigate Rendition Cases

Legal actions against extraordinary rendition flights have been taken in more than a dozen European countries. First and foremost all states directly involved in a rendition case are under scrutiny. As described in the two reports by Dick Marty,[1] the involvement of states can consist of several forms such as assisting in the act of abduction, providing for airspace, airplanes and airports or maintaining secret prisons.[2] In a comprehensive case, every state should scrutinise the conduct of its officials and authorities to reveal their involvement, to compensate for their complicity and to hold the responsible individuals criminally liable. Therefore, in general, every state is a target for bringing a case. Obviously, information about the involvement of one state or the other is essential to initiate any proceedings at all. The principle of territoriality permits in general the exercise of jurisdiction and, for e.g., in cases of war crimes and torture, triggers an obligation to investigate and prosecute. But the domestic legal order of each state is another crucial point in the considerations of lodging a complaint, and amongst other requirements of relevance is the presence of the accused person in the jurisdictional state. As in the Italian case against those involved in the kidnapping of Abu Omar, a conviction of 25 individuals was reached *in absentia*.[3] In comparison, in the German case against CIA agents for the abduction of Khaled El-Masri, a German citizen, 13 arrest warrants were issued by the local court in Munich.[4] Since the German legal order does not provide for trials *in absentia*, the continuation of the proceedings depends on the extradition of the defendants. However, and this is equal to both countries, the governments have so far refused to request extraditions.

The choice between different forms of complaints, civil or criminal, depends on different considerations. Generally, a civil complaint aims for compensation of the victim and the criminal complaint aims for the prosecution of the perpetrator. Therefore, a combination of both is often favoured. One consideration is the expectation of being successful in filing a complaint. Being successful might mean having revealed some of the circumstances of abduction. The revealed information can then be used in other proceedings in the same country or in another country which often means that the judiciary will be concerned with a case for many years. However, filings to courts for compensation are only a last resort. In some cases the victim will have already been compensated by an inquiry commission with the competence to order compensations or by friendly settlement with the state involved.[5]

Coming back to the denials by the Italian and German governments for extradition requests, administrative applications were also brought with the aim to pressurise and force public authorities to request the extradition. Another form of administrative application seeks to reveal documents related to rendition programmes. Based on the national freedom of information acts important documents and information are gathered, strengthening and facilitating further investigations.[6]

Several additional mechanisms and instruments can be used to reveal the truth and to strengthen the pressure on states to investigate, prosecute and compensate. Complaints were brought to the United Nations Committee Against Torture for the violation of the Convention Against Torture by states who have not investigated their own involvement in extraordinary renditions.[7] In other cases applications were filed to human rights

bodies and regional courts.[8] The reports and decisions delivered by these bodies are an important and valuable tool that can be used to argue against state decisions and to push for further investigations or prosecutions.

Other means to push for investigation and prosecution can be via Parliaments. Prosecution can be the result of investigations by parliamentary inquiry commissions or other reports conducted by different organs. These commissions have the competence to summon witnesses and thus produce evidence by their testimonies that can later be used in court trials. However, the mandate of such parliamentary bodies varies. The Canadian inquiry commission had a very strong mandate and was even able to compensate the victim, Maher Arar.[9] The German parliamentary inquiry commission did not possess this competence. Furthermore, state secrecy was often invoked during the German inquiry, so that the outcome was – compared to the Canadian one – of little value.

Law vs Politics: Factual and Legal Obstacles in Rendition Cases

As the Italian case showed, one obstacle is diplomatic immunities. The Italian court acquitted three USA officials because of their diplomatic immunity, among them the alleged head of the kidnapping operation, Jeffrey Castelli, the CIA Rome station chief. Such immunities should be waived at least in cases of *jus cogens* violations, such as torture. The purpose of immunities is not to shield perpetrators of grave human rights violations who are being prosecuted by a foreign court.

Another obstacle in the Italian case, as well as in a case brought before the USA courts seeking compensation, is the inadmissibility of evidence because of state secrecy.[10] In Italy, the inadmissibility of evidence because of state secrecy led to the acquittal of five Italian officials, among them former Italian military intelligence service (SISMI) head Nicolò Pollari. The Italian Government argued and the Constitutional Court in the last instance upheld the view of the inadmissibility of the evidence in this trial. In the USA, the case of El-Masri for compensation was in both instances rejected because of state secrecy invoked by the USA Government. The state secrecy defence should not be invoked in cases of serious human rights violations. In these cases the public should know what happened. Repetitions should be avoided by full disclosure of the facts and circumstances of cases to the public. Furthermore, the compensation of the victims of severe human rights violations should have priority over state secrecy.

A further obstacle to bringing justice to rendition victims is the refusal of governments, like in the German El-Masri case, to request an extradition of suspects. Governments are intentionally disrespecting decisions of their highest courts and refusing to request the extradition of suspects or even convicted individuals. Therefore, pressure on these governments by their people is essential. An additional instrument in these circumstances is an application to an administrative court, claiming that there is a duty for governments to request the extraditions for grave human rights violations.

Conclusion

National and international mechanisms and instruments must be used to tackle extraordinary rendition. Since there are such a large number of actors and states involved, only investigations in most of the involved states or international procedures can shed light on the secrecy of the extraordinary rendition programme. States take different approaches when investigating, prosecuting and compensating extraordinary renditions. Many states, like the UK, Macedonia and, partly, Germany, are very reluctant to acknowledge their involvement even in the face of strong evidence. Other states like Canada in the Arar case partly acknowledge their involvement, apologise and compensate. The main actor, the USA, and those states that still block attempts seeking for justice for the victims should be especially targeted by the international community. From the perspective of the victims, the attitude of several states to their involvement in the extraordinary rendition programme amounts to an additional severe violation of their fundamental rights.

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1 A Swiss politician who was appointed by the Council of Europe to investigate allegations of extraordinary rendition by the CIA in Europe.

2 Marty, D., *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, doc. 10957, Committee on Legal Affairs and Human Rights/Council of Europe Parliamentary Assembly, 7 June 2006, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, doc. 11302 rev., Committee on Legal Affairs and Human Rights/Council of Europe Parliamentary Assembly, 11 June 2007.

3 See, e.g., Whitlock, C., 'Italian court convicts 23 Americans in CIA rendition case; extradition undecided', *The Washington Post*, 4 November 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/04/AR2009110400776_pf.html>.

4 See, e.g., 'Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case', *Spiegel Online*, 31 January 2007, available at <http://www.spiegel.de/international/0,1518,4633385,00.html>.

5 See, e.g., Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, Ottawa, Minister of Public Works and Government Services, 2006.

6 See, e.g., *Amnesty International USA, Center for Constitutional Rights, Inc. and Washington Square Legal Services, Inc. v Central Intelligence Agency, Department of Defense, Department of Homeland Security, Department of Justice, Department of State, and their components*, United States District Court for the Southern District of New York, 7 June 2007, all documents available at <http://ccrjustice.org/GhostFOIA>.

7 See, e.g., United Nations Committee Against Torture (CAT), *Agiza v Sweden*, UN doc. CAT/C/34/D/233/2003, 24 May 2005.

8 See, e.g., United Nations Human Rights Committee (HRC), *Alzery v Sweden*, UN doc. CCPR/C/88/D/1416/2005, 6 November 2006; *El-Masri v Tenet*, see <http://www.aclu.org/human-rights_national-security/document-resources-el-masri-v-tenet#lgl>.

9 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *supra* note 5.

10 *El-Masri v Tenet*, *supra* note 8.