

EXTRAORDINARY RENDITION: ILLEGAL LIMBOS, LEGAL SAFEGUARDS AND INTERNATIONAL RESPONSIBILITY.

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First of all, I want to express my gratitude to Professor Chandra Lekha Sriram for hosting me today at the Centre of Human Rights in Conflict, and I want to warmly thank Dr. Carmen Draghici for having invited me to participate in this expert seminar.

I. DEFINING AND UNDERSTANDING EXTRAORDINARY RENDITION.

A careful study of extraordinary rendition is a complex one due to several facts. One of them is the vagueness of the notion of extraordinary rendition. I will therefore start my address by attempting to define this form of transfer as opposed to other procedures such as extradition or rendition to justice.

EXTRADITION is the traditional legal procedure for transferring a person suspected of, or convicted of, a crime.

It occurs pursuant to a valid international treaty. A State requests another State the transfer of a named individual. A judicial officer or magistrate must then certify the transfer, but must decide first whether the crime is extraditable.

Once the person is considered by the competent judge to be extraditable, a Government authority (Secretary of State, Minister of Foreign Affairs) must decide whether to surrender that person to the requesting State. When deciding over the issue, one of the most important ministerial duties is to ponder whether the individual is at risk of torture if surrendered.

RENDITION TO JUSTICE is a situation in which one State obtains custody over a person suspected of involvement in serious crimes, but such custody is obtained in the territory of another State without the legal process and judicial oversight that take place in case of extradition. Rendition to justice is a covert procedure, a deviation from normal legal mechanisms for the transfer of individuals. In spite of this, several States have asserted their right to

apprehend a suspected terrorist on foreign territory in order to bring him to justice, in particular when it could not be done through international judicial cooperation. This form of inter-state transfer could be lawful, it is argued, if its object is to bring a suspect within a judicial process respectful of human rights. The principle *male captus, bene detentus* is normally invoked in these cases. However, we must bear in mind that rendition to justice is an extra-legal transfer that lacks the protection of the transferee's rights provided by forms of legal transfer such as extradition, deportation or removal. In particular, when rendition to justice occurs, the rendered individual lacks the opportunity to challenge the transfer on the basis that torture may ensue. Rendition to justice typically lacks a regulated method for challenging the transfer on the grounds of fear of torture¹.

EXTRAORDINARY RENDITION OR MERE RENDITION stands in contrast with extradition and rendition to justice. It is the transfer of individuals from one country to another, by means that bypass all judicial and administrative due process. Crucially, its object is not to bring suspects to justice, but to gather intelligence through interrogation. Extraordinary rendition can thus be seen as a deviation and development of the practice of rendition to justice. In the context of counter-terrorism strategies, the policy of extraordinary rendition has been mainly initiated by the United States and carried out with the collaboration or acquiescence of other States.

It is worth noting that rendition to justice and mere rendition are not entirely post-September 11 practices:

1. **Before September 11, 2001**, rendition was understood as a means of returning suspected terrorists to the United States for trial. It was practiced by the Clinton Administration which, in turn, inherited it from the Bush the elder Administration.

¹ Center for Human Rights and Global Justice, NYU School of Law: *Beyond Guantánamo: Transfers to Torture. One Year after Rasul v. Bush*, 2005, p. 13.

2. **After September 11, 2001**, the focus of this practice shifted, and rendition to justice evolved and hardened into extraordinary rendition. Its purpose is no longer to bring suspects to stand trial but:
- a) To hand individuals over to foreign governments for interrogation. When such governments employ interrogation methods that include torture and other ill-treatment, this practice has been labelled as Outsourcing Torture.
 - b) Increasingly, the purpose is to keep individuals in US custody on foreign sites. The nature of rendition leads to the need to cloak such sites in secrecy. Thus the label of Black Sites attached to these foreign detention facilities. Black Sites are covert prisons set up by the CIA in several countries. Their inmates are known as Ghost Detainees or Ghost Prisoners, held without record by their jailers, their whereabouts unknown by their families or their government.

A number of extraordinary renditions did occur under the **Clinton Administration**. However, these early renditions appear to have been subject to some form of legal process. Thus, the receiving country had to have an arrest warrant for the person. Each rendition was subject to careful administrative scrutiny before it was approved by senior government officials. Finally, the local government was notified. It reduced the risk of subjecting innocent people to extraordinary rendition. Above all, renditions were pursued out of expediency, not because they were considered the best policy. Under the **Bush Administration** the practice of rendition has accelerated and expanded, in a context where the high priority was not the criminal prosecution of terrorists, but rather the prevention of terrorist attacks against civilians. In order to achieve this goal, the strategy of rendition is aimed at quickly obtaining information from suspected terrorists, and disregards the rights of suspects. The system is designed to gather intelligence in a manner that is free from any legal restriction or judicial oversight.

In its present form, extraordinary rendition may involve a series of connected human rights violations, such as:

1. Illegal arrest and indefinite detention.
2. Abduction.
3. Denial of access to any legal process, including the ability to challenge the decision to transfer because of the risk of torture.
4. Enforced disappearance.
5. Torture and other ill-treatment.

The **strategic target** of the CIA rendition programme has been, and still is, Al Qaeda. Al Qaeda is perceived as a global terrorist network, consisting of a collection of terrorist cells scattered in countries around the world. The nature of the threat posed by networks like Al Qaeda has led some experts, the current US Administration and other governments to view the risk of terrorist attacks through the lens of a new paradigm. In this vision, the “war against terrorism” is a new kind of war, wholly different from the traditional clash between nations adhering to the laws of war. This new paradigm would render obsolete the strict limitations imposed by international humanitarian law and human rights law on the treatment and questioning of prisoners. Extraordinary rendition is one of the means employed to fight this new kind of war. Because of the secrecy surrounding this practice, its scale is extremely difficult to estimate. The Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly estimates the number of victims of rendition to be in the hundreds. It appears that most of the prisoners held in CIA facilities have now been transferred to military detention at Guantánamo Bay

II. EXTRAORDINARY RENDITION UNDER INTERNATIONAL LAW.

Extraordinary rendition is a hybrid human rights abuse that simultaneously breaches several norms of international law.

1. Starting with Human Rights Law, rendition violates numerous international human rights standards.

First of all, the ***Universal Declaration of Human Rights***, some of whose provisions have attained the status of international customary law, as is the case of freedom from torture, the right to liberty or the right to a fair trial.

Extraordinary rendition also violates the ***International Covenant on Civil and Political Rights***, which codifies in an international treaty many of the provisions of the UDHR that constitute a minimum common standard.

We must first read **Article 2** of the Covenant in connection with the practice of rendition. The language of this provision suggests that States Parties must respect the Covenant rights of all persons who may be within their territory and of all persons subject to their jurisdiction. The Human Rights Committee has determined that the rights laid down in the Covenant must be respected in relation to anyone “within the power or effective control of that State Party”, even if not located within its territory. This means that once a State Party takes a person in custody through rendition, that detaining State is required to afford the detainee the rights enshrined in the Covenant, which in turn would require rendition to end. This provision, so interpreted, is particularly relevant because CIA officials who conduct this type of transfers never bring detainees into US territory.

Rendition is against **Article 7**, which outlaws torture and other forms of cruel, inhuman or degrading treatment or punishment. According to the Human Rights Committee, this prohibition extends to transfers when there is *a real risk of abusive treatment*. Rendition is also a breach of **Article 9**, prohibiting arbitrary arrest or detention, and the deprivation of liberty except in accordance with a procedure established by law, which is lacking when rendition is carried out. Rendition also implicates **Article 10**, which requires States Parties to the Covenant to treat everyone deprived of liberty “with humanity and with respect for the inherent dignity of the human person”. Apart from interrogation techniques that amount to torture and degrading treatment, the situation of total domination of the individual that usually follows rendition is in itself disrespectful to the dignity of human beings. Total domination objectifies individuals: it takes them away from the realm of persons and places them in that of things, of mere means for the attainment of the ends of others. As for **Article 13**, it is relevant

whenever rendition affects an individual who is a lawful alien in the territory of a State Party. Such a person can only be expelled from that country “in pursuance of a decision reached in accordance with law”, and has the right to have his case reviewed by a competent authority, “except where compelling reasons of national security otherwise require”. Rendition can also be said to violate **Article 14**, which proclaims several procedural guarantees associated with a fair trial, the right to be promptly informed of charges in particular.

Extraordinary rendition must be seen, too, through the lens of the ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***. **Article 2** of this treaty codifies the absolute and non-derogable prohibition of torture, stating that no exceptional circumstances whatsoever, including a state of war, may be invoked as a justification of torture. The ideal scenario for torture is prolonged incommunicado detention or enforced disappearance in secret places, which are precisely the situations that normally result from rendition. Additionally, when the transfer consists in the handing over of individuals by US officials to foreign governments for interrogation, **Article 3** applies. Article 3 prohibits *refoulement*, that is, the return of persons to any State where there are substantial grounds for believing that they would be in danger of being tortured. Such substantial grounds exist, for instance, when the State concerned shows a pattern of gross, flagrant or mass violation of human rights. Article 3 must be understood in light of its drafting history and the jurisprudence of the Committee against Torture. It now covers all measures by which a person is physically transferred to another State. This is particularly relevant given the US practice of rendering suspected terrorists to countries known for their records of systematic torture, a policy that can be seen as a strategy to circumvent the absolute prohibition, involving other States in the practice of torture by outsourcing it to foreign officials.

But this, in turn, is also unlawful under international law, for the principle of *non-refoulement* imposes upon States the absolute and unconditional obligation not to transfer any person to a country where they risk torture or other ill-treatment. It is a customary law, *jus cogens* obligation that applies to all States, irrespective of whether they are Parties to the relevant treaties. The principle of

non-refoulement permits no exceptions arising from exceptional circumstances and is on an equal footing with the prohibition of torture itself.

Moreover, States orchestrating or participating in renditions depart from the standards settled by the Convention against Torture when they attempt to obtain **diplomatic assurances** that the receiving State will not subject transferred detainees to torture, particularly when that State has a record of systematically practising torture. In such cases, as the Special Rapporteur on Torture has affirmed², States must strictly observe the principle of *non-refoulement* and not resort to diplomatic assurances.

The violation of this principle seems particularly blatant when US officials transfer detainees for interrogation to countries cited by State Department reports on human rights as engaging in torture, such as Egypt, Syria, Saudi Arabia, Pakistan or Uzbekistan. It is hard to see how in these cases the State conducting renditions can have no “substantial grounds” for believing that the rendered person is in danger of being tortured.

2. International Humanitarian Law. Rendition is not excluded from the purview of the **Geneva Conventions**, which are the core of the customary laws of war. Several provisions of these Conventions are relevant when rendition takes place in the context of an international armed conflict, like those of Afghanistan or Iraq. The Geneva Conventions require that both prisoners of war and civilian detainees be treated humanely. They forbid secret detention sites. They articulate several prohibitions which we must now briefly examine:

- a. The prohibition on torture and inhuman treatment of prisoners of war (**Third Geneva Convention**).
- b. The prohibition on forcible transfer of civilians during occupation (**Fourth Geneva Convention**).
- c. The prohibition on torture and other ill-treatment under **Common Article 3**.

² U.N. Doc. A/59/324, 1 September 2004, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, p. 37

On many occasions, terrorists will not meet the requirements established by Article 4 of the Third Geneva Convention and will not be entitled to POW treatment. But then they fall under the purview of the **Fourth Geneva Convention** which protects civilians in time of war. According to Pictet's authoritative commentary of the Conventions, whenever members of resistance movements are, for whatever reason, denied POW status, such persons must be considered to be protected by the Fourth, or Civilian, Geneva Convention. It is worth recalling Pictet's observation that the drafters of the Geneva Conventions decided to protect *irregular combatants* who act deliberately outside the laws of warfare. The reason was that terms such as espionage, sabotage, intelligence with the enemy or terrorism "have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave these detainees at the mercy of those detaining them".

The Fourth Geneva Convention protects civilians held during armed conflict from torture and other ill-treatment (Article 32), that is, civilians who find themselves in the hands of a Party to the armed conflict or of an Occupying Power of which they are not nationals.

Moreover, **Article 49** of the Fourth Geneva Convention prohibits the individual or mass transfers or deportations of civilians from occupied territory to the territory of the Occupying power, or to that of any other country, regardless of their motive. This provision is relevant in view of certain cases of rendition that have taken place during the occupation of Iraq, notably that of Rahman Rashul, an Iraqi national who was captured in 2003 by Kurdish forces and handed over to CIA agents who, in turn, flew him to Afghanistan for interrogation. US officials have argued that forcible transfer of civilians from occupied territory is not always a violation of Article 49, which would permit short-term transfers out of the occupied territory for the purpose of interrogation. This interpretation, nevertheless, ignores the very wording of Article 49 which prohibits forcible transfers *regardless of their motive*, the only exception being when an Occupying Power evacuates an area for security or military reasons. Otherwise, the prohibition against deportation and forcible transfer is absolute and permits

no exceptions. Therefore, rendition of civilians from occupied territories is a grave breach of the Fourth Geneva Convention.

Finally, **Common Article 3**, as Pictet again points out, contains the rules of humanity considered to be essential by civilized nations and to be applicable automatically, “without any condition in regard to reciprocity”. It requires that persons no longer taking part in hostilities be treated humanely in all circumstances, prohibiting:

- a) Violence to life and person, in particular murder, mutilation, cruel treatment and torture;
- b) Outrages upon personal dignity, in particular humiliating and degrading treatment.

Although Article 3 refers literally to non-international conflicts, I agree with the common view that it must be respected in all cases of armed conflict. It represents the minimum which must be applied in the least determinate of conflicts, internal ones. It must therefore be applied in international conflicts proper, where all the provisions of the Geneva Conventions are binding, for the greater obligation implies the lesser. Article 3 is contained in and implied by the other provisions of the Conventions, of which it is a substantive distillation, a reduction to essential, non-derogable principle. Common Article 3 protects any person who, in any conflict, takes no further part in the fighting. Thus rendition violates this provision if it constitutes a means to cause or facilitate torture and other ill-treatment of those no longer taking part in the fighting.

The previous legal analysis has not covered all the international norms implicated by the practice of extraordinary rendition³, a task that surpasses the scope of my presentation. I have merely focused on those rules and principles that bear relation to the most basic aspects of human dignity, which constitute legal safeguards against this form of transfer and the human rights abuses

³ For a thorough and comprehensive analysis of all the international instruments of a universal character violated by the practice of extraordinary rendition, *vide* WEISSBRODT, D. & BERGQUIST, A.: “Extraordinary Rendition: A Human Rights Analysis”, *Harvard Human Rights Journal*, Vol. 19, p. 123, 2006. My own presentation is indebted to these authors and the work referred to in this footnote.

related to it. I contend that, in this realm, no matter the amount of legal parsing we exercise upon international treaties and custom, no matter how sophisticated our reasoning, there is no way to cast human beings outside the law. The attempt to place suspected terrorists into a legal limbo is fundamentally flawed and futile. Taken together, the human rights and humanitarian principles and standards form an organic, integrated whole that protects the ultimate dignity of all human beings under any circumstances. The law protecting human dignity has no gaps or black holes and practices such as extraordinary rendition create mere *de facto*, illegal limbos.

III. PARTICIPATION OF OTHER STATES IN EXTRAORDINARY RENDITION

Although extraordinary rendition is a policy designed and carried out by the US Administration, other States have been involved in activities connected with it. Such involvement or assistance includes:

1. Participating in the interrogation of persons held by the US in third countries, in circumstances that may amount to torture or cruel, inhuman or degrading treatment.
2. Complicity in the apprehension of persons, through illegal arrests or abductions.
3. Hosting secret prison facilities run by or with the involvement of the US.
4. Allowing CIA flights to use a State's airspace and its airports for the rendition of suspected terrorists. These particular allegations have emerged in respect of a number of European countries, such as the United Kingdom, Ireland, Portugal, Spain, Italy, Greece, Germany or Sweden, to name but some of them.

Extraordinary rendition and the human rights abuses connected with it are internationally wrongful acts that entail the international responsibility of the State conducting or orchestrating this form of illegal transfer. As for other States that have been involved in rendition, they can be held responsible of internationally wrongful acts if they have aided or assisted the US in conducting

renditions, and have done so with knowledge of the circumstances of the human rights violations that derive thereof.

Of particular interest in this respect is the case of States that are members of the European Union or of the Council of Europe or both. In this respect, a European Parliament resolution⁴ considers it far-fetched that certain European Governments were not aware of activities linked to extraordinary rendition taking place on their territory. It is very unlikely that hundreds of CIA flights through the airspace of European States could have taken place without knowledge of the security or intelligence services. The same can be said of a considerable number of movements in and out of European airports. It is also unlikely that senior officials from those services were not questioned about possible links between CIA flights and the practice of rendition. Especially when senior US officials have always claimed to have acted with respect for the national sovereignty of European countries.

All this poses a difficult legal problem: that of determining Council of Europe Member States' obligations in respect of rendition, in particular as regards flights over their territory. This complexity has two sources: first, the fact that, in practice, it is difficult to secure the rights protected by the European Convention on Human Rights for persons that are transiting the airspace of a State or are in a military base for foreign forces on its territory. A second source of complexity is the number of applicable international rules and standards. At any rate, the case-law of the **European Court of Human Rights**⁵ makes it clear that States Parties have the duty to secure Convention rights, regardless of acquiescence or connivance of the State authorities or of *ultra vires* acts of its agents committed without government knowledge. According to the Venice Commission⁶, it can therefore be argued that:

⁴ P6_TA (2006)0316, *Extraordinary rendition, European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee (2006/2027(INI))*, esp. p. 16.

⁵ See, for instance, *European Court of Human Rights, Ilascu and Others v. Moldova and the Russian Federation*, Judgement of 8 July 2004, p. 318-319.

⁶ *European Commission for Democracy Through Law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-State Transport of Prisoners, Opinion no. 363/2005*, 17 March, 2006, 159, esp. i), j), k) and n).

- 1) If one of such States has serious reasons to believe that an airplane crossing its airspace is transferring prisoners to countries where they may face torture or ill-treatment in violation of **Article 3 of the European Convention**, it must take all the necessary measures to prevent it from happening.
- 2) If the state airplane in question has presented itself as a civil plane, it will have not sought prior authorisation to fly over, as required by **Article 3 c) of the Chicago Convention on International Civil Aviation**. The territorial State can then require landing, and search the state airplane. It should also lodge a diplomatic protest through the appropriate channels.
- 3) It may occur that the plane has presented itself as a state plane and has obtained overflight permission without disclosing its mission. In that case, the territorial State cannot search it unless the captain consents. However, the territorial State can refuse to grant future permission to the flag State or impose the duty to submit to searches. If the overflight permission derives from a Bilateral Agreement, or a Status of Forces Agreement, or a Military Base Agreement, the terms of such treaties should be subject to question and review, if they do not allow territorial States to ensure respect for human rights.
- 4) There may be a conflict for States between European Convention obligations and other treaty obligations. The Venice Commission has maintained that there is no international obligation for Council of Europe member States to allow rendition or to grant unconditional overflight permission for the purpose of combating terrorism. If the breach of a treaty obligation originates in the need to comply with a peremptory norm, it does not entail international responsibility. The prohibition of torture is a peremptory norm and States must interpret and comply with their treaty obligations in a manner compatible with their human rights obligations.

IV. CONCLUDING OBSERVATIONS

Extraordinary rendition cannot be said to be either a legitimate or effective tool against terrorism. I will now give two reasons that question the effectiveness of rendition and two reasons that further deny its legitimacy, offering them as possible starting points for a debate.

- 1) From the point of view of effectiveness, secret detention and physical coercion are questionable means of extracting reliable information. Scientific research on the effectiveness of torture and harsh interrogation methods is limited, but many experts believe that the information so obtained is often of little value, because totally dominated, ill-treated individuals tend to give false information to satisfy their interrogators. Though admittedly slow and difficult to put into practice, there are alternative methods for gathering intelligence, such as developing a personal relationship with detainees, infiltration or eavesdropping. At any rate, the secrecy surrounding rendition and related practices precludes the emergence of a public record of achievement that allows a critical assessment of the effectiveness of rendition.
- 2) Extraordinary rendition is part of a strategy that places too much power on the executive branch of government. But the complexity of the threat posed by modern terrorism and the sustained effort required to dismantling networks like Al Qaeda question the wisdom of an executive go-it-alone approach. Reaching out to the legislative branch and seeking international cooperation based on respect for human rights seem more effective strategies in the long run. And the fight against terrorism is still likely to be a long one.
- 3) Rendition and secret detention place individuals in an illegal limbo where detainees are held indefinitely, without charges, without legal counsel and under circumstances that could shock the conscience of a court. Whatever evidence is so obtained will be difficult to use in a criminal trial. Chances of convicting hundreds of suspected terrorists are thus greatly

jeopardized. Formulas like *ad hoc* Military Commissions must be resorted to. This potentially undermines some of the legitimacy of counterterrorism strategies, for such strategies gain popular support not just from the need of security, but from the fact that justice is done and perceived to be done.

- 4) Disregard for human rights of suspected terrorists and detainees does not pay in the long run. It weakens public support of counterterrorism strategies in open, democratic societies such as the United States and many other countries, European or not. And public support is a much needed factor in the long, protracted struggle against terrorism and its supporters.