Extraordinary rendition

A classic example of the USA avoiding ETOs as seen from Europe

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Introduction

A number of European states participated in the US-led War on Terror that followed the attacks in the US on 11 September 2001. Among the activities that the US carried out as part of that 'War' was a Central Intelligence Agency (CIA) led programme of kidnapping, transport, interrogation and torture of persons suspected of having links with terrorism (mainly Al Qaeda). This programme was initiated by a covert action Memorandum of Notification signed by (then) President George W. Bush which authorised the director of the CIA 'to undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to US persons or interests or who are planning terrorist activities'. The programme ended when (then) President Obama signed Executive Order 13491 in January 2009 formally curtailing it. These CIA operations became known as the extraordinary rendition programme.

The programme has had a momentous impact on human rights. First, that a foremost liberal democracy, the USA, would disregard its international human rights commitments (in particular the UN Convention against Torture, Inhuman or Degrading Treatment or Punishment 1984) was a shock to the whole UN human rights system. The prohibition on torture was and continues to be considered by eminent jurists as a *jus cogens* obligation *erga omnes*, the highest level of prohibited state action. That the USA should disregard it was a very serious blow to the whole system. Secondly, the USA's example opened the way for other states also to disregard their international human rights obligation to prevent torture. It is towards this second aspect of the challenge which the CIA extraordinary rendition programme presented to the international community that this chapter is focused on. The fact that a US agency was requesting assistance in the 'War on Terror' was undoubtedly an important factor that led numerous European states to throw caution to the wind and become embroiled in the programme. It is not likely that a similar flexibility would be shown by those same states to a similar request should it have been made by the Russian Federation. However, the utter lack of care by state authorities regarding the practices which were being carried out on their territory was monstrous. Not surprisingly, as evidence of the programme began to leak to the press and the involvement of European states as well, damage limitation became a key priority. The judicial venue which became central to the search for remedies by the victims was the European Court of Human Rights. The European

Convention on Human Rights (of which the European Court of Human Rights (ECtHR) is the court charged with determining complaints) is the founding convention of the Council of Europe which is composed of 47 states in Europe. No state can be a member of the Council of Europe without ratifying the ECHR and accepting the jurisdiction of the ECtHR to hear both state and individual complaints against it. However, even at the time of writing, states that have been formally condemned by the European Court of Human Rights for their involvement continue to deny that the events ever took place.

The extraordinary rendition programme was highly secretive, complex and expensive. These negative characteristics, however, were offset by one key advantage – avoiding the jurisdiction of the US courts. The CIA had a problem with US law in at least three ways. Firstly, kidnapping (taking charge of a person without a duly issued warrant) by the competent authorities is a crime. Secondly, detaining people without due process of law is a crime. Thirdly, torturing people is a crime. The solution that the CIA came up with was to seek to avoid the jurisdiction of the US courts by carrying out these crimes in other countries, beyond the reach of the US courts. The possibility that the criminal justice systems of the countries where the criminal activities took place would investigate and charge those responsible was a risk. But as the US Senate documents, which evidence the programme, reveal (see below), the CIA was confident that bribery to local officials would be sufficient to diminish that risk.

As can be seen from the evidence, European states were very sensitive to publicity about their actions hosting black sites. A New York Times article implicating a European state (Poland) was sufficient to cause the authorities of that state to terminate its involvement immediately (Feinstein Report 2014). Enthusiastic participation by European states rapidly shifted to absolute denial of involvement. Yet, parts of European states still shield CIA agents from the legal consequences of their actions such as the Italian central authorities which continue to refuse to transmit the international arrest warrants for 23 named individuals (all CIA officers) who are alleged to have been at the centre of the kidnapping of Mr Nasr (one of the victims of the programme). The warrants were issued after extensive judicial consideration by the competent Italian courts. One of the constant findings of the European Court of Human Rights in the extraordinary rendition cases is a failure by the implicated states to carry out an effective investigation into the events and the prosecution of those responsible. This would seem to confirm the CIA's view that they could buy their way out of local scrutiny.

State authorities are uniquely well-placed to hide their tracks. This is particularly so when those tracks lead to very serious charges of human rights abuses. It is exactly this wall of silence by the states that participated in the CIA's programme which has made accountability so difficult. Not only have state authorities denied that the programme was ever hosted on their territory, notwithstanding overwhelming evidence to the contrary, but they have also colluded with US authorities to ensure that those investigating the allegations do not have access to the victims. This extends to refusing assistance to the European Court of Human Rights to have access to detainees at the US military base and detention centre in Cuba, Guantanamo Bay. The willingness of a number of European states to assist the CIA's extraordinary rendition programme has, nonetheless, had numerous unintended consequences and serious political ramifications for the leaders who took the decisions to participate. Little of this, however, has been the result of serious inquiries by the relevant governments or parliaments and even less sparked by legal proceedings at the national level (Bigo, Carrera, Guild and Radescu 2015, pp. 34–46). The heavy lifting in terms of determining the facts and law has primarily fallen on the UN Human Rights Treaty Bodies and the European Court of Human Rights.

While the US judiciary has been outspoken about the nature of detention in the US military installation in Guantanamo Bay (US Supreme Court 2004), it has been silent on compensation

for persons tortured by CIA operatives in various black sites around the world (Reed 2014, p. 131; Johnston 2007, p. 357). This has resulted in a displacement of responsibility from the principal state which authorised the programme of kidnapping and torture to other states which were complicit in the actions because of their political determination to support the USA in its fight against terrorism (Geyer 2007, pp. 1–15). In the first instance, the struggle for redress was driven by the need to establish the facts. A number of international non-governmental organisations have been outstanding in achieving what seemed likely to be impossible at the start – tracing the lines of responsibility for human rights abuses. Among the most impressive has been the Bureau of Investigative Journalism. The Justice Initiative of the Open Society Foundations, Amnesty International and Human Rights Watch have all been meticulous and exceptionally persistent in their work on the subject. Yet, the mechanisms through which redress has been sought and provided have been primarily international and supranational. Two exceptions stand out. Firstly, Canada: a Commission of Inquiry was established to determine the facts relating to the transport and torture of Maher Arar (a Canadian citizen) in Syria. The report issued in 2006 confirmed that Canadian intelligence had been responsible for the harm caused to him as a result of the exchange of information about him between Canadian and US intelligence services. The Canadian Government offered Mr Arar Can\$10.5 million in damages. Secondly, Omar Khadr, a Canadian child who was detained for 10 years at the US military installation at Guantanamo Bay on terrorism charges until he was transferred to Canada for further imprisonment until 2015 when he was released. The Canadian Supreme Court found that Khadr's human rights have been violated during his detention in Guantanamo Bay and that the Canadian authorities were complicit (Khadr was also offered CAN\$10.5 million in compensation). Secondly, the US Senate Select Committee on Intelligence produced an outstanding study on the CIA's detention and interrogation programme, commonly called the Feinstein Report after the chair of the Committee which produced it (Feinstein 2014). The full report is still confidential, but the Executive Summary and Findings and Conclusions were released and published, running to more than 500 pages (Guild 2018, pp. 10–29; Guild and Bigo 2018, p. 210). This is a particularly rich source of information about the programme which only became available in December 2014.

The programme

The CIA extraordinary rendition programme developed from the end of 2001, commencing from the Memorandum of Notification signed by (then) President George W. Bush on 17 September that year. From the European perspective, the European Court of Human Rights described the programme as follows: 'On an unspecified date following 11 September 2001 the CIA established a programme in the Counterterrorist Center ("CTC") to detain and interrogate terrorists at sites abroad. In further documents the US authorities referred to it as "the CTC program" but, subsequently, it was also called "the High-Value Detainee Program" ("the HVD Program") or the "Rendition Detention Interrogation Program" ("the RDI Program")' (ECtHR 2018b). The programme ended in 2009. At the start, it was fairly rudimentary as the Agiza and Alzery cases indicate (see below) – mainly involving asking allies to identify people who might be engaged in Al Qaeda related activities and on receiving information about identities and whereabouts to turn up with planes and colleagues and kidnap the individuals taking them to a country willing to detain and torture them. In the early cases, the victims were taken to Syria (Arar), Egypt (CAT 2005; Alzery – where both had been resident and from which both feared persecution) and Afghanistan (ECtHR 2012). The US controlled bases in Afghanistan would appear regularly throughout the whole period of the programme. The CIA prisoners were categorised into two groups: the High-Value Detainees (HVD, 17 in number)

and the lower level detainees. The Justice Initiative has found that at least 136 persons were subject to rendition or secretly detained by the CIA and at least 54 governments participated in the CIA programme.

The Memorandum of Notification did not refer to interrogations or interrogation techniques, these would be dealt with later, but it gave the CIA authority to capture and detain people at will, without the objective of a criminal investigation and charges. By November 2001, the CIA determined that it would need to detain its victims outside the USA in order to avoid US oversight of detention facilities (Feinstein Report 2014, p 12.). So, the chase was on to find willing partners for the programme. Further, as one of the objectives of the programme was to obtain intelligence – to extract it from the detainees, the issue of interrogation arose. Until October 2001, CIA policy followed the US Department of the Army Field Manual ‘Intelligence Interrogation’. CIA policy was not to participate in the use of force, mental or physical torture, extremely demeaning indignities or exposure to inhumane treatment etc. But on 26 November 2001, the CIA’s General Counsel proposed a defence for CIA officers against charges of carrying out torture: that the torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm (Feinstein Report 2014, p. 12). In January 2002, the US authorities argued that the Geneva conventions relative to the treatment of Prisoners of War 1949 did not apply to their detainees, thus excluding the competence of the International Committee of the Red Cross. One particular detainee, Abu Zubaydah, was the first on which the enhanced interrogation techniques (EITs) were developed and used. According to the European Court of Human Rights, by August 2002 the US Justice Department had given a legal opinion to the CIA setting out the following ten EITs which could be used on detainees:

- 1 The attention grasp consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
- 2 During the walling technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
- 3 The facial hold is used to hold the detainee’s head immobile. The interrogator places an open palm on either side of the detainee’s face and the interrogator’s fingertips are kept well away from the detainee’s eyes.
- 4 With the facial or insult slap, the fingers are slightly spread apart. The interrogator’s hand makes contact with the area between the tip of the detainee’s chin and the bottom of the corresponding earlobe.
- 5 In cramped confinement, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than 2 hours and in the larger space it can last up to 18 hours.
- 6 Insects placed in a confinement box involve placing a harmless insect in the box with the detainee.
- 7 During wall standing, the detainee may stand about 4–5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
- 8 The application of stress positions may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45-degree angle.

- 9 Sleep deprivation will not exceed 11 days at a time.
- 10 The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilised, and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation (ECtHR 2014). The constant case law of the European Court of Human Rights has found such measures, singly and together, breaches of Article 3 ECHR (the prohibition on torture) (ECtHR 1979–80).

As mentioned above, it is apparent that the CIA was fairly confident that the ten EITs would be crimes if committed in the USA. Thus, it needed to use the territory of other states for these purposes. The CIA is not an agency of a state bound by the ECHR, so the territory of the 47 Council of Europe states was an option. The actions of its agents would only be subject to the ECHR standards when carried out in a state bound by the convention, such as in the case of *Nasr* (see below). The CIA began a search for venues where it could carry out the EITs on its victims. These came to be known as black sites. In the *Feinstein Report*, each site is allocated a colour, providing a bizarre rainbow image of torture centres (*Feinstein Report* 2014).

The venues

By early 2002, a black site known as *Cats Eye* had been established in Bangkok, Thailand, but it had to be closed on short notice (presumably at the behest of the Thai authorities) and the victims moved elsewhere. The USA was not an option (see above). US military bases abroad seemed like an option but other than the base in Guantanamo Bay where the CIA negotiated with the US military to have its own 'private' area for detention and interrogation, the US military did not appear willing to participate (*Feinstein Report* 2014). It is not entirely clear what relationship the CIA black sites in Afghanistan had with the US military.

For European states, the venue where the CIA found partners was within NATO. One key criterion for the CIA was to avoid publicity and any form of parliamentary or other oversight. This requirement was met, it appears, by military intelligence organisations in a number of Central and Eastern European states, which, as one investigator put it (*Marty* 2007, p. 36), had come through democratisation unscathed by any form of parliamentary oversight. From 2002 onwards, it seems that CIA black sites were being prepared to receive victims in Lithuania, Poland, Romania and Thailand, though they opened and closed at different times and as a result of various pressures, internal and external (*Feinstein Report* 2014). The first to be closed was the one in Thailand which apparently resulted in victims being moved to Poland. As the programme developed and the EITs were signed off, the CIA took control of the interrogation but needed places where they could carry out the torture. As mentioned above, one NGO identified 54 governments which assisted the CIA in its extraordinary rendition programme. That complicity varied substantially. In the case of Sweden and the countries condemned by the ECtHR, the assistance was explicit and intense including hosting black sites, in others it was logistical and somewhat easier to hide. Even among European states which hosted black sites, there are variations of complicity at least as identified by the European Court of Human Rights. While the ECtHR is highly critical of Poland which hosted a site when the most extreme use of the EITs were being practiced by the CIA, it reserved slightly less criticism for Romania where the site was established later and the conditions were less horrific (ECtHR 2014; ECtHR 2018b).

The quest for accountability

Extraordinary rendition before the UN treaty bodies

Chronologically, the cases of Agiza and Alzery against Sweden regarding their rendition to US and Egyptian authorities in Sweden and transfer to Egypt were the first European ones to be dealt with by international Treaty Bodies (Agiza by the UN Committee against Torture and Alzery by the UN Human Rights Committee), both of which found violations of their relevant convention (International Covenant on Civil and Political Rights 1966 and UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984). Agiza was an Egyptian national who applied for asylum in Sweden in 2000 on account of his treatment in Egypt. His asylum application was rejected on 18 December 2001 without the possibility of any appeal with suspensive effect because of the national security ground on which the decision was taken. On the same day, according to a Swedish television broadcast of 10 May 2004 entitled 'Kalla Fakta' examining the circumstances of the expulsion of the complainant and another individual (Alzery): the two men had been handcuffed when brought to a Stockholm airport; a private jet chartered by the USA had landed and the two men were handed over to a group of special agents by Swedish police. The agents stripped the clothes from the men's bodies, inserted suppositories of an unknown nature, placed diapers upon them and dressed them in black overalls. Their hands and feet were chained to a specially designed harness, they were blindfolded and hooded as they were brought to the plane. They were taken to Egypt where they were handed over to Egyptian authorities, imprisoned and tortured. The UN Committee against Torture found that Sweden had breached Article 3 – the prohibition of sending someone to a country where there is a real risk he or she would suffer torture (CAT 2005).

The case of Alzery was brought before the UN Human Rights Committee and determined in 2005 (HRC 2006). The facts are largely similar to those of Agiza. But by the time the case came before the Committee, the Swedish Parliamentary Ombudsman had published his report on the events on 21 March 2005. According to the Human Rights Committee, the Ombudsman criticised:

The failure of the Security Police to maintain control over the situation at Bromma airport, allowing foreign agents free hand in the exercise of public authority on Swedish soil. Such relinquishment of public authority was unlawful. The expulsion was carried out in an inhuman and unacceptable manner. The treatment was in some respects unlawful and overall had to be characterized as degrading. It was questionable whether there was also a breach of article 3 of the European Convention. In any event, the Security Police should have intervened to prevent the inhuman treatment.

(HRC 2006)

Further, the way in which the Security Police had dealt with the case was characterised throughout by passivity – from the acceptance of the offer of the use of an American aircraft until completion of the enforcement. One example cited was the failure of the Security Police to ask for information about what the security check demanded by the Americans would involve. The Ombudsman also criticised inadequate organisation, finding that none of the officers present at Bromma airport had been assigned command of the operation. The officers from the Security Police who were there had relatively subordinate ranks. They acted with remarkable deference to the American officials. Regarding the foreign agents, the Ombudsman considered that he lacked legal competence for initiating prosecution (HRC 2006).

The European Court of Human Rights (ECtHR) and extraordinary rendition

There have been five cases decided by the European Court of Human Rights (ECtHR) since 2012 on the subject of European state complicity in the CIA extraordinary rendition programme and one case is still pending at the time of writing. The countries in respect to which judgments have been handed down are Macedonia, Poland, Lithuania, Italy and Romania. In each case, the ECtHR found multiple human rights violations and ordered compensation to the victims.

- *El Masri v. Macedonia*. A German national of Lebanese origin was stopped by border guards when entering Macedonia by bus on 31 December 2003 on suspicion about the genuineness of his passport. He was detained by Macedonian authorities in a hotel for 23 days and mistreated including in interrogation about links with Al Qaeda. He was then handed over to a CIA shock capture team which tortured him in Macedonia and then took him to a base in use by the CIA in Afghanistan where he was tortured again, until on 28 May 2004 when he was ‘dumped’ in Albania from where he found his way back to Germany. The ECtHR found Macedonia had violated Article 3 (prohibition on torture, inhuman and degrading treatment or punishment): (1) on account of the treatment in the hotel in Macedonia; (2) on account of his treatment at the airport in Macedonia (by the CIA team); (3) on account of handing him over to the CIA, thus exposing him to further torture (outside Macedonia) and (4) for failing to carry out an effective investigation into his torture. It further found a violation of Article 5 (right to liberty and security): (1) on account of his detention in the Macedonian hotel; (2) on account of his detention in Afghanistan which was attributable to Macedonia and (3) on account of a failure to carry out an effective investigation. It also found violations of Article 8 (respect for private and family life) and 13 (right to an effective remedy). The ECtHR awarded Mr El Masri €60,000 in non-pecuniary damage.
- *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*: These two cases are broadly similar. Al Nashiri was ‘captured’ (or kidnapped) in Dubai in October 2002 and transferred to CIA custody by November 2002. He was transferred to a CIA detention centre in Afghanistan, then to Thailand and from there to a CIA detention site in Poland where he was kept from December 2002 until June 2003. Subsequently, he was transferred to Morocco and then to the CIA site at the US military installation at Guantanamo Bay. He was tortured in every site, though the ECtHR is concerned only with the events at the Polish site and subsequent torture thereafter (as the state hosting the black site knew or ought to have known that there was a real risk that onward transfer by the CIA elsewhere would entail further torture of the victim). Abu Zubaydah was kidnapped in Pakistan in March 2002. He was transferred to Thailand where he was held and tortured until he was moved to Poland in December 2002 until September 2003 where again he was tortured. He was then transferred to the CIA site at the US military installation at Guantanamo Bay. In respect of both men, the ECtHR found that Poland had violated Article 3 (prohibition on torture, inhuman and degrading treatment or punishment) in respect of both men; Article 5 (right to liberty and security); Article 8 (respect for private and family life); Article 13 (effective remedy); Article 6(1) (right to a fair trial); and in respect of Al Nashiri, a violation of Article 2 (the right to life) and Articles 3 and 1 of Protocol 6 (abolition of the death penalty) as Poland knew or ought to have known that he was being transferred to face charges in respect of which the death penalty was applicable. It awarded each man €100,000 in non-pecuniary damages.

- *Nasr and Ghali v. Italy*: In February 2003, Nasr was kidnapped in Milan by a group of unidentified men who took him to the United States Air Forces in Europe, USAFE, in Aviano from where he was taken to Egypt. In Egypt he was tortured in secret detention for several months. His wife, the second applicant, notified the Italian authorities of the disappearance of her husband and the prosecutor undertook a detailed investigation and brought charges against the CIA officers (and their Italian counterparts who participated in the matter) which resulted in convictions. The Italian Government refused to allow extradition requests issued by the Italian courts to be sent to the US authorities for the delivery of the US nationals who had been convicted. The ECtHR found that Italy had violated Article 3 (prohibition on torture, inhuman or degrading treatment or punishment) on account of treatment during the kidnapping and on account of his rendition to Egypt in circumstances where the Italian authorities could not but be aware that he would be tortured again. It also found a violation of Article 5 (right to liberty and security) for the events in Italy and Egypt, Article 8 (respect for private and family life) and Article 13 (effective remedy) in respect of Articles 3 and 8. It found that the Italian authorities had used the principle of 'state secrets' to ensure that those responsible did not have to answer for their actions. It awarded €70,000 in non-pecuniary damages to Nasr and €15,000 to his wife (Ghali) in non-pecuniary damages.
- *Abu Zubaydah v. Lithuania*: In February 2005 Abu Zubaydah was transferred from Poland (see above) to the CIA site in Guantanamo Bay. But in anticipation of the US Supreme Court judgment in *Rasul v. Bush*, 542 US 466 (2004), all the so-called high-value detainees were removed from Guantanamo Bay (where the judgment might have given them rights under the US constitution) and sent to black sites elsewhere. Abu Zubaydah, on a rather circuitous route, ended up at a CIA site in Lithuania from February 2005 to March 2006 where he was tortured. The ECtHR found Lithuania had violated Article 3 (prohibition on torture, inhuman and degrading treatment or punishment) on account of its failure to investigate his allegations and on account of its complicity with the CIA in the detention and torture of Abu Zubaydah. It also found a violation of Article 5 (right to liberty and security) on account of his detention in Lithuania and Articles 8 and 13 (effective remedy). On the facts the ECtHR found that Lithuania had hosted a CIA back site at which Abu Zubaydah had been detained and tortured, it awarded him non-pecuniary damages of €100,000.
- *Al Nashiri v. Romania*: Like Abu Zubaydah, Al Nashiri was rotated out of the CIA site at Guantanamo before the *Rasul* judgment of the US Supreme Court. From April 2004 until October or November 2005, Al Nashiri was held at a CIA black site in Romania where he was tortured. The ECtHR found that the black site had existed and that Al Nashiri had been held and tortured there. It held that Romania had violated Article 3 (prohibition on torture, inhuman or degrading treatment or punishment) on account of the treatment in Romania as well as the onward transfer of Al Nashiri and the failure to investigate his allegations. Article 5 (right to liberty and security) was also violated alongside Articles 8 (respect for private and family life) and 13 (effective remedy in respect of Articles 3, 5 and 8). The right to fair trial (Article 6(1)) was also violated and Articles 2 (right to life) and 3 in conjunction with Article 1 Protocol 6 (abolition of the death penalty). It awarded him non-pecuniary damages of €100,000.
- *Al-Hawsawi v. Lithuania* Application Number 6383/17 (pending). Al Hawsawi, a Saudi national, was kidnapped in Pakistan and handed over to the CIA. He was transferred first to Afghanistan where he was tortured, then moved to Morocco and then to Guantanamo Bay. As result of CIA concerns about the US Supreme Court (see above), he was moved at short notice to Lithuania where again he was tortured.

In all cases (except Italy) the defence of the states was to deny that the applicants had been in their country and that their country had hosted a CIA operated black site for torture. The outright denials made the work of those acting for the victims particularly complicated. Firstly, in many cases their clients were in custody in Guantanamo Bay and unable to communicate with them. Secondly, even where communication was possible, the measures taken by the CIA to hide the identity of the country where the victims were being detained were very extensive (privately chartered flights, blindfolds, earmuffs, sensory deprivation and exclusive US control of the black sites – no local personnel permitted at all), thus the victims did not often know where they were. Thirdly, extraordinarily complicated systems of flight arrangements were devised with layer after layer of private sector involvement in the provisioning of flights etc., multiple and contradictory flight information given to flight control centres around the world which was modified during the flights to hide the actual destinations. Fourthly, on arrival at a black site destination airport, complex arrangements were made with border guard authorities and local military to short circuit all normal controls on arrivals. The role of border guard authorities was crucial as they were responsible for ensuring that every foreigner entering the state was subject to an identity check. They had to be convinced not to check any of the victims on the flights, limiting their checks to crew and US personnel. The victims became ghosts. There was no official record of their arrival or departure to or from the black site or the state. Very substantial sums of money (millions of dollars) were handed out by US agents as largesse at these airports to local staff for illusory services provided. The European Court of Human Rights found that evidence of the presence of the victim on the territory was central to all of the cases and hotly disputed by the states.

This led to very sophisticated analysis of records of air traffic controllers across Europe and the identification of the relevant planes which were being used for the rendition flights. In some cases, the identification numbers of some of the planes were changed and in some cases two planes would be involved with a switch of victim from one plane to another at an intermediate stop before arrival at the end destination. These records were particularly rich, not least because of the frequency with which the CIA moved its victims from one place to another, often more than once a year. Evidence was one of the key issues in all of the cases and in the end the air traffic controllers' records were among the most important and considered sufficiently robust by the ECtHR to find that the victims had indeed been subject to torture on the territory of the defendant state. Among the most important sources of information were documents obtained through freedom of information requests in the USA by US NGOs, documents to which US parliamentary authorities were entitled and requested the reports of CIA oversight bodies. It also led to the ECtHR being required to consider non-traditional evidence, clarify its own standards of proof and assess veracity in a highly contested and politically charged legal challenge.

The evidence

In all of the cases which have come before the ECtHR, the question of evidence was central. In every case, the state authorities denied that the events had taken place, that they had any knowledge of the events or that they or their agents were in any way involved in them. In the face of a wall of denial, all of the courts were faced with a heavy evidential burden to resolve. The burden of proof remains on the applicant/complainant until sufficient evidence is produced to displace it onto the state accused of the action. In a number of the cases, as the applicant/complainant was in prison (detention) in the hands of the US authorities or their allies, obtaining evidence from them directly regarding what they know of their experiences was not possible.

The ECtHR was faced with a most unusual situation where the obtaining of evidence was particularly problematic and the states accused of complicity refused to cooperate. This in itself became a ground on which the ECtHR found a breach of Article 38 (obligation to furnish all necessary facilities for the effective conduct of an investigation) of the European Convention on Human Rights in both cases against Poland. In all cases it called on the relevant governments to carry out an effective investigation into the circumstances. In order to establish the facts in the face of such obdurate silence on the part of state authorities, the ECtHR relied in particular on reports and studies which had been prepared by supranational parliamentary bodies. The first source of particular importance for the ECtHR was the Council of Europe itself. The institutions of the Council of Europe include the Council of Ministers (made up of ministers of the member states) and the Parliamentary Assembly, composed of representatives from the national parliaments of the member states. While the Council of Ministers remained silent on the rendition issue, the Parliamentary Assembly became very active and appointed one of its members, Senator Dick Marty (Switzerland) to carry out an investigation into Council of Europe member State complicity in the extraordinary rendition programme. Senator Marty brought together a team of expert researchers who left no stone unturned in their quest for the truth. The sources used were varied and wide, including many US sources as they became available (Black, Clark and Weizman 2015). On 12 June 2006, Senator Marty presented his first report on rendition and secret detention. Two days later, on 14 June 2006, Council of Europe Secretary General, Terry Davis, published his report on rendition and secret detention, largely supportive of the Marty conclusions but rarely referred to by the ECtHR. Senator Marty's second report was presented on 14 June 2007 which included extensive new evidence of CIA 'black sites' in Eastern Europe. This report is most widely used by the ECtHR to establish the facts of the individual complaints.

Secondly, the ECtHR relied on a second source of evidence, the reports prepared for the European Parliament (Fava Reports 2006–2007). While the EU consists of 27 Member States, most of those states were among those against which complaints of complicity in the CIA programme were brought (the exception is Macedonia which is not (yet) an EU Member State). Claudio Fava, an Italian Member of the European Parliament, was appointed to carry out the European Parliament's special investigation into the operation of the CIA programme in EU states. On 30 January 2007 the Fava Report was published providing evidence strongly supporting the Marty reports regarding complicity of EU states in the CIA programme. This report is widely used by the ECtHR as a reliable source of evidence regarding EU state complicity.

A third major source of evidence used by the ECtHR is the reports prepared by the UN and in particular the work of the UN Committee on Arbitrary Disappearance. The most comprehensive report which the UN has produced is the 2010 Joint Study on Global Practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms, Martin Scheinin, the Special Rapporteur on Torture, Manfred Nowak, together with the working group on arbitrary detention, vice chair Shaheen Sardar Ali and the working group on enforced or involuntary disappearances, chair Jeremy Sarkin (UN 2010). This report provides a very clear overview of the programme and the states involved in making it possible.

Finally, the Feinstein Report, the executive summary of which was only released in 2014, provides confirmation of many of the facts which the ECtHR had already found in evidence in the earlier judgments. Published in December 2014, it postdates the first three judgments of the ECtHR but is referred to in the next three. It is interesting to note that the ECtHR welcomes the Feinstein Report as an important source of confirmation of facts which it has already determined. It also refers to the code names used in the report for the various sites (each

given a colour in the Feinstein Report to hide its actual identity and the responsibility of the state which hosted it). However, it is clear from the way the ECtHR treats the Report that it is primarily a source of confirmation rather than of new evidence important to the determination of the responsibility of the relevant state.

A summary of the key documents used by the ECtHR to establish the facts of the extraordinary rendition programme is as follows:

- Two Council of Europe reports prepared for the Parliamentary Assembly by Senator Marty from 2005;
- The European Union's Parliament – which carried out a number of investigations (all the European states involved (with the exception of Macedonia) were among the (then) 28 Member states of the EU);
- UN Reports and the work of the UN Special Rapporteurs and Working Group on Arbitrary Disappearance, in particular A/HRC/14/42;
- The Feinstein Report the executive summary of which was released in December 2014;

According to the Feinstein Report, all the prisons were closed by May 2006, and the CIA's detention and interrogation programme ended in 2009.

Conclusions

The European complicity in the CIA's extraordinary rendition programme reflects particularly badly on a number of Central and Eastern European countries whose democracies were young at the time. Most of them had only been established after the fall of the Berlin Wall in 1989. The authorities of these states appear to have been unduly influenced by their respect for the USA as the leader of the free world which they had only recently joined. The status of the victims as non-citizens and somehow underserving of treatment reserved for humans is particularly problematic. The case of El Masri stands out as exemplary of this de-humanisation of the victims. Although he was a German citizen, his ethnicity and implied religion outweighed the quality of that citizenship (Balkan states like Macedonia abuse German nationals at their peril, the German authorities can be depended upon to pursue the rights of their citizens – which, eventually, was the case for El Masri). This chapter of complicity is not yet closed as individuals, NGOs and state oversight bodies refuse to abandon their work in revealing the truth of the human rights abuses of that time.

For the purposes of this book on ETOs, the extraordinary rendition programme is a particularly clear case of a state, the USA, taking exceptional measures to avoid national jurisdiction. The elaborate construction of travel, black sites movement of people all took place because the CIA and its legal advisors were confident that they could avoid ETOs by doing so. So far, it seems that their assessment has been correct (leaving aside the negative opinions of the UN Committee on Arbitrary Disappearance). But, in the European case, it has been those states which collaborated with the CIA programme which have been judged and condemned. While the CIA and its officials, for the moment, seem to successfully escape prosecution, they have left a trail of serious legal problems for their allies.

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