

IN THE EUROPEAN COURT OF HUMAN RIGHTS

**EL-MASRI
V.
THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

Application no. 39630/09

WRITTEN COMMENTS BY

INTERIGHTS

THE INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN RIGHTS

pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules
of the European Court of Human Rights

I. Introduction

1. This case presents an opportunity for the Court to recognize as impermissible the system of violations, which became known as ‘extraordinary rendition’, and to determine the responsibility of states under the European Convention for Human Rights and Fundamental Freedoms (hereinafter ‘the Convention’) for their involvement in extraordinary renditions carried out by other states. These comments¹ aim to assist the Court in this important task.

2. ‘Extraordinary rendition’ has been described by UN and European experts as an extra-judicial practice whereby terrorist suspects are seized and transferred from one state to another outside the national and international legal procedures applicable to extradition, deportation, expulsion or removal,² and which inherently involves the risk of torture and ill-treatment, and prolonged and secret detention.³

3. Any interpretation of the Convention must be consistent with states’ obligations under broader international law. In interpreting the responsibility of the State Parties for cooperating in extraordinary renditions, particular account must be taken of the nature of the relevant rights, which are absolute, enjoy *jus cogens* status, and are fundamental to the Convention, and require vigorous measures of protection.

4. Although a system devised by the US, the role of many other states in extraordinary renditions has been crucial. If it were not for other states’ participation and cooperation, the extraordinary rendition programme could not have taken place on such a large scale. In addition to having facilitated renditions, many of the cooperating states to this day continue to conceal or deny their involvement in renditions.⁴ This extreme secrecy has created immense difficulties for the victims to achieve knowledge of the precise circumstances of their rendition and to obtain justice and closure.

¹ Submitted pursuant to leave granted by the President of the First Section of the Court under Rule 44 § 3 of the Rules of Court (letters by Section Registrar Søren Nielsen to INTERIGHTS dated 22 and 28 Feb.2011).

² See 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*, no. 363/2005, 17 March 2006, § 30, available at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf); and *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 while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Working Group on Arbitrary Detention; and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, 19 February 2010 (‘UN Experts Joint Study on Secret Detention’), § 36.

³ See Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (‘Special Rapporteur on counter-terrorism and human rights’), 4 February 2009, A/HRC/10/3, § 51.

⁴ Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, Rapporteur Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, doc. 11302 rev., 11 June 2007, §§ 272-334.

II. Human rights violations involved in the extraordinary rendition practices

A. Enforced disappearance

5. Abduction, rendition and detention of a person in secret and without notification of their family amount to enforced disappearance. The International Convention for the Protection of All Persons from Enforced Disappearance ('CED')⁵ considers 'enforced disappearance' to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁶

6. Renditions are recognized as enforced disappearances by many international bodies,⁷ even where the disappeared person has subsequently been released or their whereabouts have become known. These practices also amount to 'disappearances' under the Convention.⁸ States are not allowed to invoke any exceptional circumstances as justification for practicing enforced disappearance.⁹ In addition, the widespread or systemic practice of enforced disappearance constitutes a crime against humanity.¹⁰

B. Secret and arbitrary detention

7. The arrest and detention of a person outside any legal process and without contacts with the outside world plainly violates the right to liberty and security of the person guaranteed by all relevant international and regional human rights instruments.¹¹ More specifically, these acts amount to *secret detention*, where the person is not permitted any contact with the outside world ('incommunicado detention'), and where the authorities do not disclose the place of detention or information about the fate of the detainee ('unacknowledged detention').¹²

8. The Working Group on Arbitrary Detention held that detention under the CIA rendition programme fell within category I of *arbitrary detention*, that is, when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.¹³ In the context of renditions, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ('Special Rapporteur on counter-terrorism and human rights')

⁵ Adopted on 20 December 2006, during the sixty-first session of the General Assembly by resolution A/RES/61/177. The CED was signed by the Respondent State on 6 February 2007.

⁶ Art. 2 CED.

⁷ See e.g., UN Committee Against Torture: Conclusions and Recommendations, United States of America, 25 July 2006, UN Doc. CAT/C/USA/CO/2, § 18; and UN Experts Joint Study on Secret Detention, cit., § 28.

⁸ See *Varnava and Others v. Turkey*, Grand Chamber judgment of 18 September 2009, (nos. 16064/90, 16065/90 and others), § 148.

⁹ Art. 1 (2) CED.

¹⁰ Art. 5 CED, and Art. 7 of the Rome Statute of the International Criminal Court.

¹¹ E.g., Art. 5 of the Convention; Art. 9 of the International Covenant on Civil and Political Rights (ICCPR); Art. 17 CED.

¹² See UN Experts Joint Study on Secret Detention, cit., § 8.

¹³ Working Group on Arbitrary Detention, *Mr. Ibn al-Shaykh al-Libi and 25 other persons v. United States of America*, Opinion No. 29/2006, UN Doc. A/HRC/4/40/Add.1 at 103 (2006), § 22.

qualified as arbitrary detention any situations where persons are detained for a long period of time for the sole purpose of intelligence-gathering.¹⁴

9. Similarly, the Convention prohibits secret and arbitrary detention and disappearance.¹⁵ Detention of a person merely for intelligence gathering purposes and without intention to bring criminal charges, is prohibited by Article 5 of the Convention which stipulates an exhaustive set of exceptions to the right to liberty and security.¹⁶ In addition, by its nature, secret detention entails that the detainee does not have an opportunity to challenge the lawfulness of their detention contrary to the *habeas corpus* right under Article 5 (4).

10. There is strong support for the *jus cogens* nature of the prohibition of arbitrary detention.¹⁷ In particular, the UN Human Rights Committee ('HRC') endorsed this position and confirmed that although the right to liberty itself was not among the non-derogable rights under the International Covenant on Civil and Political Rights ('ICCPR'), no derogations were allowed in respect of abductions or unacknowledged detention.¹⁸ It also considered that it was inherent in the protection of rights explicitly recognized as non-derogable (including the right to life, freedom from torture and others) that they must be secured by procedural guarantees, including, often, judicial guarantees.¹⁹ The Working Group on Arbitrary Detention supported the view of the HRC that the right to *habeas corpus* must prevail even in states of emergency.²⁰ This Court has recognized the particular importance in a democratic society of the right to liberty and of the basic fair trial guarantees included under Article 5 (4) of the Convention.²¹ Therefore, it is submitted that although Article 5 of the Convention itself is derogable, some of the guarantees contained therein are of such importance and have achieved such a high international legal status that they are not subject to derogations, namely the right to *habeas corpus*.

C. Torture and ill-treatment

11. The treatment of the rendered persons in preparation for or during the rendition process (including so-called 'capture shock' treatment),²² and the use of coercive interrogation methods may amount to torture and/or ill-treatment.²³ The practice of secret detention facilitates the

¹⁴ Report of the Special Rapporteur on counter-terrorism and human rights, cit. § 38.

¹⁵ *Kurt v. Turkey*, (no. 24276/94), judgment of 25 May 1998, § 124; *Imakayeva v. Russia*, (no.7615/02), judgment of 9 November 2006, § 164.

¹⁶ See *Brogan and Others v. the United Kingdom*, (nos. 11209/84; 11234/84; 11266/84; 11386/85), judgment of 29 November 1988, § 53.

¹⁷ See, L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status* (Helsinki, 1988), pp. 425 ff.; T. Meron, "On a Hierarchy of International Human Rights", 80 (1986) *AJIL* 1, *Restatement (Third) of the Foreign Relations Law of the United States*, 702.

¹⁸ See HRC, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add. 11 (2001), § 11 and 13.

¹⁹ *Ibid.*, § 15.

²⁰ See, e.g., Working Group on Arbitrary Detention Opinions No. 43/2006, 2/2009 and 3/2009. See also UN Experts Joint Study on Secret Detention, cit., § 47.

²¹ E.g., *Kurt v. Turkey*, cit. § 123.

²² See Central Intelligence Agency, Memo to the Department of Justice Command Centre – Background Paper on CIA's combined use of Interrogation Techniques, 30 December 2004, available at <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf>.

²³ See also HRC, *Alzery v. Sweden*, Communication no. 1416/2005, UN Doc. CCPR/C/88/D/1416/2005, (2006), and CAT, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), where the complainants suffered ill-treatment at the hands of the US agents during their removal from Sweden.

commission of acts of torture;²⁴ on the other hand, prolonged isolation and denial of contact with the outside world are in themselves inhuman and degrading treatment, harmful to the psychological and moral integrity of the person.²⁵

12. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments,²⁶ and no derogations, limitations or exceptions are ever permitted in relation to the prohibition of torture.²⁷ The absolute nature of the prohibition of torture under treaty law is reinforced by its higher, *jus cogens* status under customary international law.²⁸ The prohibition of torture also imposes obligations *erga omnes*, and every state has a legal interest in the adherence to such obligations which are owed to the international community as a whole.²⁹

D. Refoulement

13. The extraordinary rendition practices inherently involve the removal of a person from one state to another where there is a real risk of torture or inhuman or degrading treatment. Such removal is prohibited by the principle of *non-refoulement* which has been recognized in the jurisprudence of this Court,³⁰ as well as in international treaty³¹ and customary international law.³² This obligation applies to all forms of transfer from the jurisdiction, and *a fortiori* to transfers outside the established domestic and international legal process.³³ Where the rendered person is denied any opportunity to challenge the transfer, the sending state also violates its procedural obligations under the *non-refoulement* rule.³⁴ As the prohibition of torture is absolute, peremptory and non-derogable, the principle of *non-refoulement* under customary international law shares its *jus cogens* and *erga omnes* character.³⁵

²⁴ UN Experts Joint Study on Secret Detention, cit., § 33.

²⁵ *Ibid.*, § 34.

²⁶ Universal Declaration of Human Rights (Article 5); ICCPR (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and Peoples' Rights (Article 5); Arab Charter on Human Rights (Article 13), UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT') and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

²⁷ E.g., Article 15 ECHR, Article 4 (2) ICCPR; Articles 2 (2) UNCAT.

²⁸ See, e.g., the first report of the Special Rapporteur on Torture to the UNHCR (1997, § 3); International Criminal Tribunal for former Yugoslavia ('ICTY') judgments *Prosecutor v. Delalic and others* (1998), *Prosecutor v. Kunarac* (2001, § 466), and *Prosecutor v. Furundzija* (1998); and comments of this Court in *Al-Adsani v. the United Kingdom* (2001).

²⁹ See International Court of Justice (ICJ) Reports: *Barcelona Traction, Light and Power Company, Limited*, Second Phase (1970, § 33); *Case Concerning East Timor* (1995, § 29); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1996, § 31). See also ICTY case *Prosecutor v. Furundzija*, (1998, § 151); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2000, § 155); and HRC General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, (2004), § 2.

³⁰ *Soering v. UK*, (no. 14038/88), judgment of 7 July 1989, §§ 90-91; *Saadi v. Italy*, (no. 37201/06), Grand Chamber judgment of 28 February 2009, § 125.

³¹ See Art. 3 (1) UNCAT. From the UN Treaty Bodies, see HRC, General Comment no. 20, UN Doc. A/47/40 (1992), § 9, and General Comment No. 31, cit., § 12.

³² Lauterpacht & Bethlehem, *Opinion: the Scope and Content of the Principle of Non-Refoulement*, UNHCR (2001), §§ 196-216.

³³ *Cruz Varas v. Sweden*, (no. 15576/89), judgment of 20 March 1991, § 70.

³⁴ See HRC, *Alzery v. Sweden*, cit., § 11.8; CAT, General Comment 2, UN Doc. CAT/C/GC/2, (2008), § 19.

³⁵ See, e.g., HRC General Comment No. 20, cit., § 9.

14. Removal involving the real risk of certain other violations of fundamental human rights is also prohibited. Article 16 of the CED prohibits removal to a country where there is a risk of enforced disappearance. The Working Group on Arbitrary Detention has deemed unlawful *refoulement* to arbitrary detention, which includes secret detention.³⁶ As evident from their jurisprudence, neither the HRC nor this Court excludes in principle the prohibition of transfer to countries where there is a real risk of other violations than torture or right to life breaches.³⁷ Therefore, it is submitted that the international law obligation of *non-refoulement* applies beyond situations where there is a real risk of torture and ill-treatment and right to life breaches, to situations involving a real risk of other serious violations of the most fundamental human rights, including arbitrary detention and flagrant denial of a fair trial.

E. Other rights violated by extraordinary rendition

15. Extraordinary renditions clearly interfere with the right of an individual to respect for their private and family life and physical and moral integrity under Article 8 of the Convention,³⁸ as well as with certain rights of their family members. Where the person is detained in secret and their fate is unknown, the right to family life of their close relatives is clearly violated, and, in certain circumstances, this situation may amount to inhuman and degrading treatment of the relatives.³⁹

F. A continuing violation

16. The enforced disappearance of a person begins at the moment of apprehension and/or transfer and continues for as long as the person is detained in such circumstances.⁴⁰ The Court's jurisprudence confirms that disappearances give rise to a continuing violation.⁴¹ As a matter of general international law, a wrongful act may be described as continuing if it "extends over the entire period during which the act continues and remains not in conformity with the international obligation."⁴² A breach consisting of a series of actions and omissions also falls within the category of continuing situation.⁴³

³⁶ See Report of the Working Group on Arbitrary Detention, 9 January 2007, A/HRC/4/40, § 47. See also *supra* section II.B.

³⁷ HRC General Comment no 31, cit., § 12; *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2, and *G.T. v Australia*, Communication No. 7061/1996, UN Doc. CCPR/C/61/O/706/1996, (1997) § 8.7. In respect of Art. 5 of the Convention, see *Tomic v. UK*, (no. 17837/03), decision on admissibility of 14 October 2003, § 3; *F. v. UK*, (no. 17341/03), decision on admissibility of 22 June 2004, § 2. *M.A.R. v. UK*, (no. 28038/95), decision of 16 Jan. 1997. Regarding Article 6: see *Soering v. UK*, cit., § 113; *Baysakov v. Ukraine*, (no. 54131/08), judgment of 18 February 2010, § 61.

³⁸ *X. and Y. v. the Netherlands*, (no. 8978/80), judgment of 26 March 1985, § 22.

³⁹ See, e.g., *Kurt v. Turkey*, cit., paras. 131 & 133. Also, HRC, *Quinteros v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2.

⁴⁰ See Working Group on Enforced or Involuntary Disappearance, General Comment on Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance.

⁴¹ *Varnava and Others v. Turkey*, cit., § 148. Also, the former European Commission for Human Rights characterised as "a continuing situation" the *expulsion* of a person, *X v. Switzerland*, Appl. No. 7601/75, Commission decision of 12 July 1976.

⁴² Art. 14 (2), Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission ('ILC'), UN Doc. A/56/10 (2001).

⁴³ *Ibid.*, Art. 15. This Court has recognised the principles enshrined in Art. 14 (2) and Art. 15 of the ILC Articles on State Responsibility in *Ilascu and Others v. Moldova and Russia*, (no. 48787/99), Grand Chamber judgment of 8 July 2004, paras. 320-321.

III. Responsibility of states in the face of renditions by other states

A. States' responsibility for cooperating in extraordinary renditions

a) Obligations to refrain from complicity or participation in violations under international human rights law

17. In addition to the general duty not to commit the violations inherent in extraordinary renditions, states have particular obligations not to cooperate with, or facilitate, other states in committing those violations. For example, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT') not only prohibits torture, but also prohibits 'complicity' or 'participation' in acts of torture.⁴⁴ The CAT has held that this prohibition covers any acts that amount to "directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture."⁴⁵

18. The existence of responsibility for complicity, participation or other cooperation in violations is confirmed by other international human rights instruments and practice. Thus, the CED in its Article 6 (1) also requires criminalisation of complicity and participation to enforced disappearance. In a recent case against the Russian Federation, this Court has found a violation of the duty to investigate the possible complicity of law-enforcement staff in the abduction of the applicant's brother by non-state actors.⁴⁶ In addition, the practice of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), as well as most national criminal laws also recognize the existence of accomplice liability.⁴⁷

19. The notion of 'participation' suggests a high level of cooperation; *i.e.* co-perpetration of the violation. A *joint operation* where two states combine through their intelligence authorities to exchange information, abduct and transfer an individual to a place where they are at risk of torture or ill-treatment⁴⁸ will clearly fall within the meaning of 'participation'. However, the meaning of 'complicity' under UNCAT is broader, and includes both active cooperation where one state provides concrete support to another state to commit acts of torture, and passive cooperation by giving tacit consent and acquiescence.⁴⁹

20. Various forms of collaborative conduct have been found to have existed in the context of extraordinary renditions. Well documented cases include states providing logistical support for rendition flights, entering into agreements for hosting 'black sites' and allowing such sites to

⁴⁴ See Art. 4 (1) UNCAT.

⁴⁵ CAT General Comment No. 2, cit., § 17.

⁴⁶ *Tsechoyev v. Russia*, (no.39358/05), judgment of 15 March 2011, § 153.

⁴⁷ See *infra*, note 49.

⁴⁸ See Special Rapporteur on counter-terrorism and human rights, 2009 Report, cit., §§ 51- 53.

⁴⁹ See *infra*, section III.B. Also, the notion of 'complicity' in UNCAT echoes the similar notion in national law, and also has been linked to the concept of 'aiding and abetting' in the context of the two international crimes of torture - the war crime of torture under Article 8 (2)(a)(ii) and the crime against humanity of torture Article 7 (1)(f) of the Rome Statute of the International Criminal Court. However, 'complicity' under UNCAT has a wider meaning, as it suffices that the state authorities have had only constructive knowledge of the acts of torture, while in the ICTY's interpretation the 'knowledge' test is satisfied only where there is actual knowledge of acts of torture (*Prosecutor v. Furundzija*, cit.).

operate free from scrutiny and interference, supplying information on the basis of which a person is abducted, participating in interrogations, ensuring the safety of the US agents operating on the country's territory, and others.⁵⁰ An example of such practice is the case of the rendition of the Canadian citizen Maher Arar. According to the findings of the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar in the case, Canadian agents supplied their CIA counterparts with information of his suspected link with Al-Qaeda. On the basis of this – entirely groundless – information, Mr Arar was abducted by the CIA from New York and was sent to Syria where he was repeatedly tortured and detained for a year in abject conditions.⁵¹

21. In the context of the present case, seizure and interrogation of a person with a view to intelligence gathering; delivering the information gathered as a result to foreign agents; giving technical assistance during the transfer of the person by supplying airport facilities, escort to the airport, and ensuring the security of foreign agents - are all types of actions which directly and concretely enable the supported state to apprehend the person and subject them to torture and secret and arbitrary detention.

22. Responsibility for complicity, participation or other cooperation in extraordinary renditions will arise where the state authorities knew or ought to have known that the violations involved in renditions were being committed.⁵² In similar vein to the foreseeability test under the *non-refoulement* prohibition or the more general positive obligation to prevent abuse of rights, this test requires that the state was aware or ought to have been aware that there was a real risk of, for example, secret detention or torture and ill-treatment; no certainty regarding the future acts of torture, ill-treatment or secret detention is required. Therefore, if the state has assisted another state in committing the violations described *supra* in section II, and has known or should have known of the risk of these violations taking place, the assisting state will be responsible for its contribution to the eventual violations.

23. Furthermore, it is not necessary for high-ranking state officials to have been aware of the circumstances of renditions. The state will be responsible even where its intelligence services have acted without the government's knowledge.⁵³

24. The concepts of complicity and participation also include acts amounting to *concealment* after the violations have been committed.⁵⁴ Therefore, the state is under a duty to prohibit, as well as investigate and prosecute all acts and/or omissions aimed at concealing the impermissible act, for example where the state has sought to cover up the ill-treatment of a person by coercing him to record false statements as to his treatment and detention.

⁵⁰ See Dick Marty's second report, cit.; also Report of the Special Rapporteur on counter-terrorism and human rights (2009), cit.

⁵¹ Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations, Ottawa, Minister of Public Works and Government Services, 2006, available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf#53.

⁵² E.g., CAT General Comment No 2, cit. § 18.

⁵³ See, e.g., Venice Commission Opinion, cit., § 126 referring to the Court's judgment in *Ilascu and Others v. Moldova and Russia*, cit., § 319.

⁵⁴ Manfred Nowak, Elizabeth McArthur, *The United Nations Convention against Torture. A Commentary*, Oxford University Press, 2008, pp. 247-248.

b) Obligations not to aid or assist wrongful acts under general international law

25. In parallel to the responsibility for complicity and participation in violations, under general international law a state can be held responsible where it renders *aid or assistance* to another state in the commission of an internationally wrongful act. As discussed above (in Part II), torture, enforced disappearances, secret and arbitrary detention and *refoulement* all constitute internationally wrongful acts under the ICCPR, CED, UNCAT, and regional human rights treaties, including the Convention. Under Article 16 of the Articles on State Responsibility adopted by the International Law Commission ('ILC'), a state is responsible for providing aid or assistance to another state in breach of that state's international obligations if it does so (i) with knowledge of the circumstances of the internationally wrongful act of that state, and (ii) if the act would be internationally wrongful if committed by the accessory state.⁵⁵ The International Court of Justice ('ICJ') has recognized that the rules of Article 16 reflect customary international law.⁵⁶

26. According to Article 16, the assisting state is responsible only for its own conduct by which it assists the acting state to breach an international obligation. Although it is not responsible as such for the act of the assisted state, in cases where the assistance is a necessary element in the wrongful act in the absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting state.⁵⁷

27. There are different forms of accessory responsibility, including, for example, joint conduct, independently wrongful conduct involving another state (such as *Soering*-type responsibility), assistance in or after the commission of a wrongful act, conduct of two or more states separately causing aspects of the same harm and other forms.⁵⁸ These situations are not mutually exclusive but can combine in different ways.⁵⁹

B. Positive obligations to prevent and remedy violations resulting from extraordinary renditions

28. The existence of positive obligations to prevent violations of human rights has been widely recognized by human rights courts and bodies, including this Court.⁶⁰ Positive obligations have been found to arise not only in respect of violations by state actors, but also by third parties, including agents of foreign states operating within the jurisdiction of the impugned state.⁶¹ Positive duties on the state to protect against and respond to violations of Convention rights are most likely to apply, and where they do apply are heightened, in regard to the most fundamental Convention rights such as the ones discussed *supra* in section II.⁶²

⁵⁵ See Art. 16 ILC Articles on State Responsibility.

⁵⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, § 420.

⁵⁷ See ILC Commentaries to Art. 16 of the ILC Articles on State Responsibility.

⁵⁸ James Crawford, Special Rapporteur, Second report on State responsibility, ILC 51 Session, A/CN.4/498/Add.1, 1 April 1999, § 159.

⁵⁹ *Ibid.*, § 160.

⁶⁰ CAT and ICCPR both require the state to prevent harm caused by torture and CID treatment. For this Court's practice, see, e.g., *X. and Y. v. the Netherlands*, cit., § 23.;

⁶¹ *Ilascu and Others v. Moldova and Russia*, cit., § 318; Human Rights Committee, *Alzery v. Sweden*, cit., § 11.6.

⁶² In respect of Art. 2 of the Convention, see *Osman v. UK*, (no. 23452/94), Grand Chamber judgment of 28 October 1998, § 116; Art.3 - *M.C. v. Bulgaria*, (no. 39272/98), judgment of 4 December 2003, §§ 149-50; Art. 5 - *Storck v.*

29. The jurisprudence of this Court regarding the content of the obligation of ‘due diligence’ reflects the case-law of other human rights courts and bodies.⁶³ The state will be responsible where a) it ‘*knew or ought to have known*’ that b) there was a *real and immediate risk* to rights, and c) the state failed to take *measures of prevention reasonably within its power*.⁶⁴ Whether the test is satisfied will depend on an assessment of what is reasonable and proportionate in light of all relevant facts and circumstances at hand.⁶⁵

30. The failure to prevent is most flagrant where the state has given its *consent* to the acts of the foreign agents, which violate the rights at stake.⁶⁶ Not only explicit consent, but also *acquiescence* or *connivance* in the acts of the foreign agents may engage the state’s responsibility, where the actions and/or omissions of the territorial state in some way or another permit the prohibited activities to occur or continue.⁶⁷

31. A clear failure to prevent an extraordinary rendition from taking place also occurs when, for example, state authorities have been present at the scene of events but have not taken appropriate measures to protect the individual. In the case of *Alzery v. Sweden* before the HRC, the complainant, an asylum seeker suspected of involvement in terrorism, was transferred from Sweden to Egypt by US agents who, at the airport, and in the presence of the Swedish officials, used force against him. The HRC found a breach of the prohibition of ill-treatment under Article 7 ICCPR on account of the violence that the complainant suffered at the airport and which was performed with the consent or acquiescence of the Swedish authorities.⁶⁸

32. In a case before CAT, which arose in very similar circumstances to *Alzery*, the Committee held that the suspicions of the Swedish authorities that the complainant was at real risk of torture if returned to Egypt, were confirmed when, at the airport, “immediately before expulsion he was subjected on the State Party’s territory to treatment in breach of, at least, [the prohibition of ill-treatment] by foreign agents but with the acquiescence of the State party’s police.”⁶⁹

33. In addition to the general obligation to prevent renditions, the state has a specific duty of *non-refoulement*, as discussed *supra* in section II.D. The state plainly violates its *non-refoulement* obligations where it transfers a person outside the applicable national and international legal

Germany, (no. 61603/00), judgment of 16 June 2005, §102; *Orhan v. Turkey*, (no. 25656/94), judgment of 18 June 2002, § 369.

⁶³ See HRC, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), § 8; CAT, General Comment No. 2, cit. § 18. An example of comparative regional practice is the *Velasquez Rodriguez Case*, judgment of 29 July 1988, of the Inter-American Court of Human Rights (Ser. C) No. 4 (1988).

⁶⁴ See *Osman v. UK*, cit., § 116.

⁶⁵ *Ibid.*

⁶⁶ See HRC, *Alzery v. Sweden*, cit., § 11.6; and the Court’s judgment in *Ocalan v. Turkey*, (no. 46221/99), Grand Chamber, 12 May 2005, § 90.

⁶⁷ See *Ilascu and Others v. Moldova and Russia*, cit., para 318; and HRC, *Alzery v. Sweden*, cit., § 11.6, CAT, *Agiza v Sweden*, cit., § 13.4.

⁶⁸ HRC, *Alzery v. Sweden*, cit. § 11.6. Similar failure of police to intervene was found by this Court to be a violation of the positive obligations under Art. 11 in *Ouranio Toxo and Others v. Greece*, no. 74989/01, judgment of 20 October 2005.

⁶⁹ CAT, *Agiza v. Sweden*, cit., § 13.4.

procedures, and does not afford due process guarantees, including access to court, equality of arms and the right to representation.⁷⁰

34. After the rendition has taken place, the state has an obligation to conduct a prompt and effective investigation into allegations of secret detention and transfer, and to provide reparation, including compensation for non-pecuniary damage flowing from the breach; in addition, there is an increasing international recognition of the right to truth about the circumstances surrounding violations, not only for the benefit of the concerned individual, but for society as a whole.⁷¹

C. Obligations arising for all states from breaches of peremptory norms of international law by another state

35. Under general international law, states have particular obligations in situations where there is a serious breach of a peremptory norm of international law (*jus cogens*),⁷² such as for example the prohibition of torture (see *supra*, section II). A breach is *serious* if it involves a gross or systematic failure by the responsible state to fulfill the obligation arising under such peremptory norms.⁷³ The ILC has recognized that when a serious breach of a peremptory norm of international law occurs, all states “shall cooperate to bring to an end through lawful means” any such breach, and shall not “recognize as lawful a situation created by a serious breach” nor “render aid or assistance in maintaining that situation” (the latter obligation being parallel to that contained in Article 16 ILC Articles on State Responsibility).⁷⁴ Thus, where a state has a policy of systematically detaining outside the reach of law a certain category of terrorist suspects and subjects them to treatment amounting to torture and other violations of rights enjoying *jus cogens* status, other states are obliged not to legitimize such a policy or practice after the fact, for example by concealing or continuing to conceal the acts of torture or arbitrary detention committed by the assisted state.

IV. Conclusion

36. When determining the gravity of the state’s complicity in extraordinary renditions with a view to reparation, account must be taken of the fundamental importance of the rights at stake, and of the extent to which the state’s cooperation has enabled another state to commit the violations or to avoid accountability. By detaining and interrogating a person on behalf of another state, supplying information to foreign intelligence agencies, and providing material assistance during the transfer of the person, the assisting state enables the assisted state to apprehend the person and subject him to enforced disappearance, secret and arbitrary detention, torture and other human rights violations. Such conduct is tantamount to concrete, direct, and significant support to another state’s agents to carry out egregious violations of human rights while in the jurisdiction of the assisting state and beyond. After the fact, the assisting state has a duty to reveal

⁷⁰ See *supra*, note 34.

⁷¹ The present comments will not address in detail these post-rendition obligations, as it is understood that another third-party intervener in the case, Redress, will provide written comments on the subject.

⁷² Arts. 40 and 41, ILC Articles on State Responsibility. See ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136, at p. 200, § 159.

⁷³ Art. 40 (2) ILC Articles on State Responsibility. The ILC Commentaries to Art. 40 define as “gross” violations of a “flagrant nature, amounting to a direct and outright assault on the values protected by the rule,” and as “systematic” violations which are “carried out in an organized and deliberate way.”

⁷⁴ Art. 41 ILC Articles on State Responsibility.

information about the circumstances of the extraordinary rendition of the concerned individual, and it will be responsible where it has acted to conceal its complicity.