**Unmasking Extraordinary Renditions in the context of Counter-Terrorism**

**James Gallen**[*]

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**Abstract:**

This Article will show that the term "extraordinary rendition" is of short legal history and that its conception perverts a number of basic international law principles. In doing so, it will be shown that this process is a method counter-productive to long terms goals in the War on Terrorism… We can conclude therefore that both "rendition to justice" and "extraordinary rendition" bear little resemblance to the traditional use of the terms rendition or extradition - the recognised, legal methods of transferring a suspect of a criminal offence from one State to another… the protections of an extradition Treaty and the rights it affords an accused can be seen as inherent justiciable. The use of the extradition process is an expression of State sovereignty, yet the guiding principles of double criminality and specialty ensure that

[*] Non-Foundation Scholar, Trinity College Dublin. The author would like to thank Dr. Gernot Biehler and David Leahy for their valuable assistance and support. Any errors or omissions, however, remain the fault of the author.

the rights of the transferred person are also subject to protection and judicial scrutiny. …It is clear that the nature of enforced disappearances is such as to attempt to avoid any legal process and human rights protection. In addition, it is noted that official denial of this practise as part of counter-terrorist policy and a lack of judicial oversight contribute to the view that U.S. intelligence agencies are aware of the illegality of the practise at international law

**Text:**

An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself. - Thomas Paine[1]

1. **Introduction**

Since the declaration of the War on Terrorism[2], a number of U.S. counter-terrorism practises emerged that have provoked criticism and concern from foreign governments[3], non-governmental organisations[4], and legal scholars[5]. We begin by

[1] Dissertation on First Principles of Government (Paris, July 1795)

[2] Office of the Press Secretary, "President Declares Freedom at War with Fear" http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (last visited Aug. 26, 06)

[3] See *inter alia* Merkel Critical of US Terror Tactics Ahead of Washington Visit; http://www.dw-world.de/dw/article/0,2144,1849687,00.html (last visited Aug. 26, 2006)

[4] Human Rights Watch, Torture – Renditions Campaigns http://www.hrw.org/campaigns/torture/renditions.htm (last visited Aug 26, 2006)

recognising that such practises emerged under the shadow of a constant terrorist threat. By invoking a wartime mentality, the reality of the immediate and consistent terrorist threat is given prominence in U.S. political and intelligence circles. The focus of counter-terrorist activity requires intelligence and police forces to prevent and deter future terrorist attacks, in addition to responding to those already perpetrated.[6] Their commendable and essential efforts continue to thwart attempted acts of terrorism globally and, in particular, on both sides of the Atlantic.

The United Kingdom remains a close ally of the United States in the War on Terrorism, and has, as a result, been the subject of recent attempted attacks on its own soil. Faced with a common global threat, the need for a common and global solution arises. This Article acknowledges that the terrorist threat faced by the United States and its allies is unlike those that have come before. The tactics of suicide bombing and chemical warfare are unlike the relatively conventional methods employed in the twentieth century by the organisations such as the I.R.A. and E.TA. Faced with twenty first century terrorism, a twenty first century solution is required.

The present approach, including extended detention at Guantanamo Bay, has recognised the hybrid nature of the War on Terrorism. By its nature the fight against terrorism is not a conventional war, yet it can be argued that the gravity and nature of terrorist acts require specialist legislation and treaty law for effective prevention and punishment beyond ordinary existing criminal law. As part of the counter-terrorist

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[5] David Weissbrodt and Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis* 19 Harv. Hum. Rts. J. 123 (2006)

[6] See William J. Stuntz *Local Policing After the Terror*, 111 *Yale Law Journal* 2137 (2002)

response of the United States, it has emerged that indicated that U.S. intelligence agencies, in particular the C.I.A., have forcibly removed suspected terrorists from foreign jurisdictions and transported them to other States, for the purposes of interrogation, and to the United States to stand trial. Evidence further suggests that intelligence agencies transfer such suspects to States where it is probable that torture will be used as part of such interrogations.[7] It appears that this practise has occurred without the knowledge of the State from which the individual was taken. This transfer process, including the possibility of torture as part of interrogation, has been termed "extraordinary rendition" in both popular media[8] and legal scholarship.[9]

In 2006, Amnesty International[10], the Venice Commission of the Council of Europe[11], and Senator Dick Marty of the Council of Europe[12] released separate reports detailing

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[7] The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, New York University School of Law, "Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions" (Torture by Proxy) available at www.nyuhr.org/docs/TortureByProxy.pdf (last visited Aug. 26, 2006)

[8] See Jane Mayer, *Outsourcing Torture: The secret history of America's 'extraordinary rendition' program*, in The New Yorker, 14 & 21 February 2005

[9] See Weissbrodt and Bergquist *supra*

[10] Amnesty International U.S.A., "Below the Radar: Secret flights to torture and "disappearance" (Below the Radar), AI Index: AMR 51/051/2006 available at http://web.amnesty.org/library/Index/ENGAMR510512006?open&of=ENG-313 (last visited Aug. 26, 06)

[11] 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 adopted by the Venice Commission at its 66th Plenary Session (Venice), 17-18 March 2006, available at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp (last visited Aug. 26, 2006)

evidence of the "extraordinary rendition" process and outlining the international legal obligations of the United States for its alleged practise and Council of Europe Member States for the possible use of their territory to transport suspected terrorists. It is beyond the scope of this article to contest the factual information presented in such reports. This Article will therefore be confined to discuss of the international legal impact of the "extraordinary rendition" process. This Article will show that the term "extraordinary rendition" is of short legal history and that its conception perverts a number of basic international law principles. In doing so, it will be shown that this process is a method counter-productive to long terms goals in the War on Terrorism as it damages inter-State relations and fails to facilitate a co-operative attitude necessary to prevent a global threat.

This Article will first examine the legality of "extraordinary rendition". It will be shown that the use of "extraordinary rendition" as a legal term and international criminal offence is a misnomer. The practise will be shown to consist of two, pre-existing international offences: abductions and enforced disappearances. It will be

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[12] Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights in the light of reports suggesting that individuals, notably persons suspected of involvement in acts of terrorism, may have been arrested and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive co-operation of States Parties to the Convention or by States Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged; (Marty Report) SG/Inf (2006) 5 28 February 2006, available at https://wcd.coe.int/ViewDoc.jsp?Ref=SG/Inf(2006)5&Sector=secPrivateOffice&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (last visited Aug. 26, 2006)

shown that the domestic U.S. use of these terms facilitates an unwelcome ambiguity in the extent of the power of the U.S. intelligence services. In addition, this Article will show that, in an international context, the creation of a new international crime of "extraordinary rendition" is unnecessary and unhelpful, as this would blur clear, pre-existing international legal boundaries and would damage global co-operation in counter-terrorism.

Second, this Article examines the recognised international offences of abduction and enforced disappearance and shows that both acts are prohibited under conventional and customary international law. This Article shows that when an individual is brought before a court by way of abduction, the appropriate response of that court is to deny itself jurisdiction to hear the case. In the case of enforced disappearances, it will be shown this hybrid offence violates a multitude of human rights and that all States are under positive obligation to investigate and deter the offence. In conclusion, we examine the appropriateness of "extraordinary rendition" as a counter-terrorism measure in the broader context of the War on Terrorism.

## 2. Defining "Extraordinary Rendition": An Unnecessary Exercise

The United States officially denies the existence of an "extraordinary rendition" program. Details of the "extraordinary rendition" process have come to light primarily through journalistic and non-governmental investigation. In the absence of official confirmation, academics[13] and non-governmental organisations[14] have variously

[13] See Torture by Proxy *supra*

defined the term "extraordinary rendition." It is noted that some discrepancy exists among such definitions, in addition to a further difference in the popular use of the term[15]. This ambiguity has lead commentators to describe the term as "euphemistic"[16]. The official denial and covert nature of the practise also contributes to a lack of coherence and clarity.

As a preliminary issue, it will be necessary to examine the use of the terms "rendition" and "extraordinary rendition" as they occur in U.S. intelligence and military circles. The United States have acknowledged the existence of a practise of "rendition to justice", whereby suspected terrorists are forcibly taken to the United States for the purposes of facing trial. The process appears to have been initiated under the Reagan Administration[17] and continued under the Clinton Administration. Presidential Decision Directive 39 states:

> If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the

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[14] Below the Radar, Section 1.1 Renditions

[15] In particular, the terms "rendition" and "extraordinary rendition" have been used loosely and in some instances interchangeably.

[16] Herbert, *It's Called Torture* 28-02-05 Spiegel Online http://service.spiegel.de/cache/international/0,1518,344019,00.html (last visited Aug. 26, 2006)

[17] Torture by Proxy, at 15

procedures outlined in NSD-77, which shall remain in effect.[18]

The differences between "renditions to justice" and "extraordinary rendition" must be emphasised. We should remember that "Extraordinary rendition" is a process not officially by the United States government. It appears that while "renditions to justice" result in a trial in due course of law, it is suggested that "extraordinary renditions" appear to be primarily for the purposes of interrogation, and carry a risk of torture or cruel, inhuman and degrading treatment.[19] It is unclear whether either foreign governments or U.S. security agents carry out such interrogations. The existence of further and alternative purposes of the detentions is also unclear. It appears that detention in this context has also been used in a preventative fashion. The term "extraordinary rendition" has been used exclusively in the context of counter-terrorism, and it is argued that the term is insufficiently distinct from "renditions to justice" and the traditional terms relating to the international transfer of an individual to facilitate conceptual clarity.[20] It is suggested that the ambiguity in this area of the law has allowed intelligence agencies considerable discretion and freedom to act in the international sphere without recognisable powers or clearly defined limits to such powers.

To attempt to clarify the legal nature of the process, it is proposed to examine the pre-existing legal concepts and terms relevant to the transfer of an individual suspect from

[18] Presidential Decision Directive 39 U.S. Policy on Counterterrorism; available at http://www.fas.org/irp/offdocs/pdd39.htm (last visited Aug. 26, 2006)

[19] Torture by Proxy, at 13

[20] Id.

one State to another. We will conclude that the term "extraordinary rendition" is an inappropriate description of the process.

Rendition can be defined as "the return of a fugitive from one State to the State where the fugitive is accused or convicted of a crime."[21] This definition can be seen to describe the core process involved in all relevant forms of inter-State transfer, including extradition and abduction. An example of the traditional use of the term "rendition" is the transfer of individuals between territories of the British Commonwealth.[22] The Commonwealth Scheme for the Rendition of Fugitive Offenders, 1966 as amended 1990[23] governs the transfer of accused persons between States of the British Commonwealth. This scheme is not a formal Treaty, but an informal arrangement between Commonwealth States, relying upon the comity of nations.[24] Nonetheless it is possible, first, to recognise the correct legal use of the term "rendition" and, second, to emphasise reciprocal obligations and co-operation between States as the basis of the procedure.

Extradition can be defined as "the official surrender of an alleged criminal by one state or nation ("the host State") to another ("the forum State") having jurisdiction

[21] Black's Law Dictionary 1298 (7th ed. 1999)

[22] See Patrick L. Robinson, The Commonwealth Scheme Relating to the Rendition of Fugitive Offenders: A Critical Appraisal of Some Essential Elements (1983) 33 ICLQ 614

[23]The Commonwealth Scheme for the Rendition of Fugitive Offenders, 1966 as amended 1990 available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf (last visited Aug. 26, 2006)

[24] Robinson criticises the scheme (as amended) in this regard, citing the lack of reciprocal obligations in the absence of a treaty. See Robinson, *supra,* at 617 – 624.

over the crime charged."[25] Extradition is governed through bi-lateral Treaty agreement and is subject to the two general principles of specialty and double criminality. It can be seen that rendition and extradition are similar and related processes. Both are governed by a form of Treaty or legislation[26] and occur with the consent and knowledge of both State parties to the transfer. While one can acknowledge some similarity to the "rendition to justice" and "extraordinary rendition" processes detailed in the introduction, a number of key differences must now be outlined.

First, both processes appear to have taken place on the territory of foreign States without the consent or knowledge of the affected States. This itself constitutes a breach of international law, as it both violates the sovereign equality of States[27] and can be seen as interference in the internal affairs of that State.[28] It is also evident no formal bilateral or multilateral agreement governs either process. It can therefore be seen to constitute a unilateral action, involving the use of force in foreign jurisdictions. It will be shown that both the "rendition to justice" process and the inter-State aspect of "extraordinary renditions" can be accommodated within the pre-existing offence of abduction. This offence gives rise to State responsibility, creates human rights obligations and disrupts the public world order. This Article concludes that both practises are an inappropriate response to terrorism as a result of these issues. The unilateral nature of the processes and fundamental violations of

[25] Black's Law Dictionary 605 (7th ed 1999)

[26] In the case of the British Commonwealth, extradition is based in the Extradition Act 2003; rendition can be found in the Fugitive Offenders Act, 1967

[27] U.N. Charter, art. 2, para. 1.

[28] U.N. Charter, art. 2, para. 7

international law provide an inappropriate basis in international law for the practise and fuel the terrorist and political accusation that the United States intelligence services act in a lawless and arbitrary fashion.

Second, since the terrorist attacks of 11th September 2001, it appears that the primary practise has been for the purposes of interrogation and prevention, as opposed to bringing individuals to trial[29], namely "extraordinary rendition." This article shows that this practise can be accommodated under the international wrong of "enforced disappearances" and is not a novel concept. In addition, the threat or use of torture as part of this interrogation removes any legitimacy that could attach to the process and separates the individual from judicial scrutiny and the protection of the law. Evidence has shown that trials of detainees have occurred in some post 9/11 instances before the individual "reappeared."[30] This element of the practise can also be accommodated under the pre-existing international crime of abduction.

We can conclude therefore that both "rendition to justice" and "extraordinary rendition" bear little resemblance to the traditional use of the terms rendition or extradition - the recognised, legal methods of transferring a suspect of a criminal offence from one State to another. These practises are more appropriately accommodated under pre-existing offences. It is clear from the decisions of the United States Supreme Court, the English House of Lords, and the Australian High Court that forcible transfer from one State to another for the purposes of bringing a

[29] Below the Radar, Section 1.4 Rendition Practise since September 2001

[30] Below the Radar, Section 1.7 Secret detentions and secret transfers: the case of Muhammad Bashmilah, Salah Qaru and Muhammad al-Assad

suspect to trial has been recognised as the offence of abduction. This process best describes the "rendition to justice" process and those "extraordinary renditions" where an individual "reappeared." The word 'rendition" has been show to be of legal definition prior to the practise at issue. The word "extraordinary" in this context "is being stretched here to include more sinister meanings that your dictionary will not provide: secret; ruthless; and extrajudicial."[31] The lack of trial resulting from the "extraordinary rendition" process renders it fundamentally different to "rendition to justice". The phrase "extraordinary rendition" is therefore an inappropriate description of the process in question. This article argues this difference compels one to conclude that "extraordinary rendition" is in fact and in law an enforced disappearance.

A number of advantages exist in recognising two distinct, pre-existing offences. The development of a prohibition of abduction and enforced disappearance under international customary law adds clarity to the international responsibility and human rights obligations of offending States. In addition, the correct classification of this practise under these offences would signify the inherent illegality of the acts in question. Clarity in this area would facilitate a more open and co-operative environment in the context of counter-terrorism, ensuring clearly defined limits to counter-terrorism practise for both the United States and its allies. The delineation of such limits would reverse the use of the term "extraordinary rendition" in the manner applied by the U.S. intelligence community, which adds to the ambiguity surrounding

[31] Salman Rushdie, "Ugly Phrase conceals an uglier truth" 10 January 2006 The Sydney Morning Herald; http://www.smh.com.au/news/opinion/ugly-phrase-conceals-an-uglier-truth/2006/01/09/1136771496819.html (last visited Aug. 26, 2006)

the process and further distances the process from international scrutiny and accountability. In addition, such limits would further curtail the possibility of abductions by enemies of the United States and their allies in the War on Terror on the principles of clarity of offences and reciprocity. It is now proposed to examine the substantive content of the two offences, so as to emphasise the similarity of the practises in question to the offences discussed.

## 3. Abduction[32]

Extradition has been described above as "the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged."[33]. The process of abduction has been used to circumvent the extradition procedure, as it occurs without the consent of the host State. Abduction can be seen to be the forcible transfer of an individual from one State to another without the knowledge or consent of the host State. Abduction is a crime of long and infamous history, yet not one explicitly prohibited by international instruments. Abduction has been employed as a method of acquiring jurisdiction in a number of scenarios. First, abduction has been used where the extradition agreement would have prevented the requested transfer[34]. Second, abduction has been used where there has been no extradition agreement in place between States[35]. Finally, and most importantly for present purposes, some States have used abduction as a method of extending jurisdiction and obtaining

[32] See generally M. Cherif Bassiouni, International extradition: United States law and practice (Dobbs Ferry, New York: Oceana Publications, Inc., 2002.)

[33]Black's Law Dictionary 605 (7th ed. 1999)

[34] United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990)

[35] R v. Horseferry, *ex parte* Bennett [1994] 1 AC 42 (H.L.) (appeal taken from Eng.) (U.K.)

custody, in response to international terrorism and crime[36], despite the presence of existing extradition agreements. "Renditions to justice" can be seen to fall within this later category for the reasons outlined above. While "renditions to justice" pursue a valid and important counter-terrorism objective discussed below, the process violates international law as a form of abduction.

Abduction breaches international law in various ways. First, by not seeking or requiring the consent or knowledge of the host State, abductions constitute forcible action on the territory of another State. This breaches the sovereignty and territorial integrity of the State[37] from which the individual was abducted, in addition to the obligation of non-interference in the internal affairs of another State.[38] The Permanent Court of Justice in *The Lotus* case stated "the first and foremost restriction imposed by international law upon a State: … that failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[39] It is suggested that the international law violation is of fundamental importance, and weighs heavily against the counter-terrorism objectives pursued.

Second, a number of individual human rights violations can be demonstrated in the case of abduction. The extradition process is designed to protect the rights of accused person by procedural safeguards and principled restrictions to the extraditable

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[36] United States v. Verdugo-Urquidez 494 U.S. 259 (1990)

[37] U.N. Charter, art. 2 para. 4

[38] U.N. Charter, art. 2 para. 7

[39] The Case of the S.S. "Lotus" (France v. Turkey) PCIJ, Ser. A., No. 10, 1927, at page 18

offences. In particular, an exception exists for political offences, which are extraditable at the discretion of the host State. This maintains the sovereignty of the host State and emphasises extradition as an expression of that sovereignty. Abduction disregards the safeguards and restrictions and infringes the rights of the abducted person without legal warrant. Therefore the liberty, security of person, and freedom of movement are among the rights violated by abduction.[40] These violations would be avoided by the use of the extradition process, the use of which would not be contrary to the pursuit of terrorism. In addition, renewed use of the extradition process would strengthen international relations in the counter-terrorist context.

Third and related to the benefits of use of extradition, abductions constitute a disruption of world public order.[41] By ignoring pre-existing extradition agreements and acting without the consent of the host State, the practise of abductions undermines the rule of law and disrupts the trust and comity between States. In the context of the War on Terrorism, unilateral abduction such as "rendition to justice" has a deleterious effect on the legitimacy of counter-terrorist actions as well as the sustainability of regional alliances and dialogue with affected and hostile States. As will be discussed below, unfettered executive counter-terrorist action is not and should not be removed from judicial scrutiny and this lack of legitimacy and disruption to the comity between courts can be remedied through the judicial process.[42]

[40] *ex parte Bennett* [1994] 1 AC 42, at 62

[41] M. Cherif Bassiouni, *supra*, 252

[42] *ex parte Bennett* [1994] 1 AC 42, 76

The illegality of abductions for the purposes of bringing an individual to trial in the abducting State was confirmed in the abduction of Adolf Eichmann, who was abducted from Argentina by agents of the Israeli State. In response to the abduction, the UN Security Council issued a Resolution[43], condemning the practise and warning that such actions "may, if repeated, endanger international peace and security." Such language suggests that if the practise was repeated it could provoke the use of Security Council powers under Articles 41 and 42 of the U.N. Charter. Therefore we can conclude that even despite imperative policy objectives and absolute prohibitions of competing offences, such as genocide, abduction continues to constitute a violation of international law and the human rights of the abducted person. In particular, extradition exists as an expression of State sovereignty; the decision to extradite the individual remains at the discretion of the host State. In the absence of an extradition agreement, the host State is under no obligation to extradite. Abductions can be seen to override such discretion.

This Article proposes that even in counter-terrorist and wartime scenarios, abduction is an inappropriate and illegal measure. The case of *S. v. Ebrahim*[44] is used to show that even in extreme political or military situations, it is open and incumbent upon the judiciary to maintain the rule of law and deny jurisdiction to cases resultant from abductions. In the pursuit of terrorists, this Article therefore concludes that an approach must be adopted, which accords with international law and fosters co-operation and diplomacy between States.

[43] U.N. S.C. Res. 138 U.N. Doc. S/4349 (22 June, 1960)

[44] State v. Ebrahim 1991 (2) S.A. 553 (a); 31 I.L.M. 888 (1992)

Two distinct schools of thought have emerged as to how best to deal with cases where the individual is produced before a court from a foreign State by means of abduction. The so-called "*Ker-Frisbie*" doctrine prevalent in the United States does not preclude a court from exercising its jurisdiction where the accused has been brought before the court by means of abduction from a foreign jurisdiction. While this position accords with the "renditions to justice" process, it will be shown that this doctrine is inappropriate in the case of international abductions and fails to appreciate the international law and human rights obligations of the United States.

In contrast, an exclusionary doctrine as applied in *S. v. Ebrahim* has been favoured in other common law jurisdictions. It will be shown that the courts in these jurisdictions invoke the supervisory jurisdiction inherent in all common law courts to prevent abuse of process and executive lawlessness. It will be argued that this position best protects the abducted individual respects State sovereignty, and maintains international order and comity. It is argued that the exclusionary doctrine is the appropriate approach in the case of "renditions to justice", as this best protects human rights and strengthens the importance of co-operation in counter-terrorist activities.

### a. The Exclusionary Doctrine[45]

The exclusionary view of abduction recognises both the inter-State international law violation and the human rights violation suffered by the abducted person. The courts

[45] See Stephan Wilske and Teresa Schiller *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of United States v Alvarez-Machain* 5 U Chi L Sch Roundtable 205, 219-229 for an extensive survey of State practise

that have recognised these violations invoke a supervisory power inherent in common law courts and deny the jurisdiction of the said court to hear a case where the accused has been procured by abduction. In doing so, it can be seen that the courts place a high value on the rule of law and the maintenance of judicial integrity. This position can be reconciled with the pursuit of terrorism and can be seen to be consistent with the limited judicial intervention in present U.S. counter-terrorism jurisprudence, noted below.

In *S v. Ebrahim*[46], the appellant was a member of the military wing of the African National Congress. He was abducted from Swaziland and brought into the Republic of South Africa, where he was charged with treason. The appellant argued that the abduction was contrary to international law, and thus deprived the court of jurisdiction. Steyn J. accepted this argument, holding that the South African court had no jurisdiction to try a person abducted by agents of the State from another State. The Court concluded that the abductors were very likely to be agents of the South African State.[47] In addition, Steyn J. took account of the "conduct of modern state affairs" which required delegation of decision-making to lower levels. The Court stated:

> When action is authorised and executed at such a lower level, the state is involved and responsible for the consequences, even if such action is not permitted by the highest state authority. This applies also to the conduct of the security agencies of

[46] State v Ebrahim 1991 (2) SA 553 (a); 31 ILM 888 (1992)

[47] Agents were defined for this purpose as "persons acting under the authority of some State agency".

> the administration. The abduction of the appellant was clearly the work of one or other of these agencies, excluding the police.[48]

This statement is an important recognition of State liability in light of any defence of plausible deniability on the part of the State executive. After examining Roman, Roman-Dutch, and South African law, the Court recognised the multiple issues and legal principles affected by an abduction, stating:

> When the State is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the State itself is involved in an abduction across international borders, as in the present case, its hands are not clean.[49]

The decision in *S v. Ebrahim* is welcome in the context of "renditions to justice" for a number of reasons. First, the decision recognises abduction as an international wrong, and confirms the ability of the Court to rule upon such conduct. Similarly, limited judicial intervention is affirmed in the case of military and political matters regarding inter-State renditions. Third, international law is cited in conjunction with domestic law to conclude that the South African Court should deny itself jurisdiction in the case.

[48] *Ebrahim* 35 ILM 888 (1992), at 891

[49] *Id.,* at 896

*R. v. Horseferry Road Magistrates Court, ex parte Bennett*[50] contains the most recent and authoritative statement on the exclusionary doctrine for international abductions. In confirming the approach taken in *S. v. Ebrahim,* the House of Lords gave its considerable weight and authority to the exclusionary doctrine. The importance of this decision must be read in light of Britain's key position in the War on Terrorism.

The appellant was a citizen of New Zealand alleged to have committed fraud offences in the United Kingdom in 1989. English authorities tracked the appellant to South Africa. There was no pre-existing extradition agreement between the United Kingdom and South Africa.[51] The appellant alleged that, as a result of collusion between UK and South African police forces, he had been abducted from the Republic of South Africa to England.[52] It was alleged that the transfer occurred in defiance of an order of the Supreme Court of South Africa. The Divisional Court held that it had no power to inquire into the circumstances in which the applicant was brought within the jurisdiction.[53]

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[50] Regina v. Horseferry Street Magistrates, ex parte Bennett [1994] 1 AC 42

[51] Special extradition agreements are available under section 15 of the UK Extradition Act, 1989. No extradition proceedings were initiated in this case.

[52] The House of Lords did not enquire into the truth of these allegations, but rather it was assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he was alleged to have committed in 1989.

[53] The Court was presented with two conflicting lines of jurisprudence. In denying jurisdiction, the Divisional Court relied on a number of precedents relied upon in *Ker v Illinois.*

On appeal, the House of Lords held where a defendant has been forcibly brought to the United Kingdom, in disregard of available extradition procedures and in breach of international law, the English courts should take cognisance of those circumstances and refuse to try the defendant. The English courts thus had the power to enquire into the circumstances by which a defendant arrives in the jurisdiction. The court reviewed the conflicting earlier authority. A early line of cases including *Ex parte Scott*[54], which supported the proposition that the role of the court was confined to the forensic process of the case before it and could not enquire into the legality or otherwise of police conduct prior to the case. A more recent line of cases[55] was of the opinion that the English courts maintained a supervisory jurisdiction over the conduct of the executive. His Lordship recognised that a choice existed based both these lines of English precedence and on existing case law of other States. It is instructive to quote the speech at length:

> If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. 
>
> My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to

[54]Ex parte Scott 9 Barn. & C. 446 (1829); Relied upon by the *Ker-Frisbie* doctrine

[55] See in particular Regina v. Bow Street Magistrates, ex parte Mackeson (1981) 75 Cr. App. R. 24

> ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.[56]

Lord Bridge concurred, stating that:

> To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken congnisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken.[57]

Both Lord Griffiths and Lord Lowry quote Lord Devlin in *Connelly v Director of Public Prosecutions*[58] to the effect that "the courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused."[59]

[56] *ex parte Bennett* [1994] 1 AC 42, 62

[57] *ex parte Bennett* [1994] 1 AC 42, 67

[58] Connelly v. Director of Public Prosecutions [1964] A.C. 1254

[59] *Connelly* [1964] A.C. 1254, 1354

The decision in *ex parte Bennett* is to be welcomed for a number of reasons. First, the Court recognises the supervisory jurisdiction of all common law courts. In doing so, the House of Lords emphasised the importance of the rule of law above the desire to pursue criminals. This principled approach echoes the approach taken in the exclusionary rules of evidence and commands application to the area of counter-terrorism. It is suggested that the importance of the rule of law is pronounced in counter-terrorism situations, given the extent of potential human rights violations present in "rendition to justice" and "extraordinary rendition" processes.

Second, the courts upheld the illegality of abductions even where the host State has conspired with the forum State to bring about such an abduction. This can be seen to be an expansive interpretation of the illegality of abductions and is to be welcomed. This position recognises the importance of transparency and accountability in matters of extradition, and is of immediate application to counter-terrorism where effective action through international co-operation can only be fostered through open dialogue and clear process and procedure.

Third, and related to the first point, the House of Lords recognised that executive power in matters of foreign affairs, including extradition, is not to be unfettered. To deny jurisdiction to challenge the legality of executive action and detention in cases of abduction would be akin to removing the ancient common law right of *habeas corpus*; to do so would be to grant the executive unnecessarily broad powers in these areas; this would be at odds with judicial intervention and recognition of international law principles such as *non-refoulement*. Indeed, the protections of an extradition Treaty and the rights it affords an accused can be seen as inherent justiciable. The use of the

extradition process is an expression of State sovereignty, yet the guiding principles of double criminality and specialty ensure that the rights of the transferred person are also subject to protection and judicial scrutiny.

### b. The *"Ker-Frisbie"* Doctrine

The Supreme Court of the United States has held that there is no bar to prosecution where a defendant was abducted from a foreign country and brought to the U.S. for trial. In doing so, the Court has granted a sizeable degree of deference to Presidential and executive power in matters of foreign affairs and national security. This Article shows that the Court has arrived at this position by the use of inconsistent judicial reasoning and a failure to accept the responsibility to oversee executive action.

In *Ker v. Illinois*[60] the defendant was abducted by a non-State, private agent from Lima, Peru to face charges of fraud in Illinois. The Supreme Court relied upon earlier decisions[61] as authority for the proposition that abduction was an insufficient ground and invalid objection and did not preclude the Court from trying the defendant.[62] It is important to note the lack of direct State action in the abduction in this case and the lack of protest by the Peruvian State.

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[60] Ker v. Illinois 119 U.S. 436 (1886)

[61] Ex parte Scott, 9 Barn. & C. 446, (1829); Lopez & Sattler's Case, 1 Dearsl. & B. Cr. Cas. 525; State v. Smith, 1 Bailey, 283, (1829;) State v. Brewster, 7 Vt. 118, (1835;) Dow's Case, 18 Pa. St. 37, (1851;) State v. Ross, 21 Iowa, 467, (1866;) The Richmond v. U. S., 9 Cranch, 102

[62] *Ker* 119 U.S, at 444

The decision in *Ker* was upheld in *Frisbie v. Collins*[63], where the respondent was charged and convicted of murder. While the respondent was living in Chicago, Michigan officers forcibly seized and transported him to Michigan. Black J stated of the decision in *Ker* and subsequent cases:

> No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[64]

In *United States v. Alvarez-Machain*[65] the *Ker-Frisbie* doctrine was applied to an international abduction, despite the protest of the host State. The decision is of great importance to our study of this limb of the "extraordinary rendition" process and "renditions to justice", as it demonstrates *inter alia* the extent of U.S. judicial deference to the executive. Such deference in matters of foreign affairs is pronounced where coupled with issues of national security and counter-terrorism, matters within executive purview of necessity. This Article argues that despite traditional deference, it is open to the Court to extend a limited set of constitutional rights to all in the custody of U.S. intelligence agents.

[63] Frisbie v. Collins 342 U.S. 519, rehearing denied, 343 U.S. 937 (1952)

[64] *Frisbie* 342 U.S. at 522

[65] United States v. Alvarez-Machain 504 U.S. 655 (1992)

The defendant was a Mexican citizen accused of participation in the murder of an agent of the Drug Enforcement Administration ("D.E.A."). Other D.E.A. governmental agents were found responsible for the abduction the defendant from Mexico[66], despite an extradition treaty between the two States[67]. The United States did not inquire whether Mexico would extradite the defendant, nor did they afford the Mexican State an opportunity to try the defendant in Mexican courts. The District Court and Court of Appeals, Ninth Circuit both held that the court lacked jurisdiction to hear the case as the abduction violated the extradition treaty, but the Supreme Court reversed this decision on appeal.

The Supreme Court began by noting that while the matter was a case of first impression, the Court had ruled on the effect of a violation of an extradition Treaty in *United States v. Rauscher*[68], where the Court implied a term of specialty to an extradition treaty on the basis of the practise of States. The Supreme Court then noted that the decision in *Ker* had been distinguished from *Rauscher* as the applicant had not been returned to the United States by virtue of the extradition treaty. The Court acknowledged the differences between *Ker* and the present case, in particular the lack of governmental involvement in *Ker* and the lack of objection from the government of Peru,[69] but did not find them sufficient to distinguish the case. It is clear that the facts of the case are not directly analogous with those of either *Ker* or *Frisbie.* In *Ker* a private individual abducted the applicant – not a State agent. In addition, in *Ker* the

[66] See United States v. Caro-Quintero, 745 F. Supp. 599, 602-604, 609 (CD Cal. 1990)

[67] Extradition Treaty, May 4, 1978, 1979. United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (Extradition Treaty or Treaty)

[68] United States v. Rauscher 119 U.S. 407 (1886)

[69] *Alvarez-Machain* 504 U.S. at 662

host State Peru did not lodge a formal complaint. In *Frisbie* the abducted occurred in a domestic context and therefore did not involve the issue of State sovereignty that arose in *Alvarez-Machain.* In *Alvarez-Machain* the involvement of State agents was acknowledged. It is suggested that this distinction brings the facts of the case closer to those of *Rauscher* and therefore involves and invokes the extradition treaty, and that the latter should be the relevant and binding case.

In addition to the factual differences overlooked by the majority decision, the dissent noted a critical flaw in majority reasoning. Stevens J. notes that by overlooking this distinction, the Court was able to distinguish *Rauscher* in a fashion that compelled it to apply the *Ker-Frisbie* doctrine inappropriately. Stevens J. stated:

> [A]t the outset of its opinion, the Court states the issue as "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Ante*, at 1. That, of course, is the question decided in *Ker* v. *Illinois*, 119 U.S. 436 (1886); it is not, however, the question presented for decision today.[70]

The requirement of State action had also been noted in *Cook v. United States*[71], which concerned the seizure of a British vessel outside the jurisdiction of the United States, which was found to contain alcoholic beverages during the prohibition era. The Court held that the seizure was not authorised by the relevant Treaty as it had occurred

[70] *Alvarez-Machain* 504 U.S. at 682

[71] Cook v. United States 288 U.S. 102 (1933)

outside the provided distance for boarding rights. The Court, in refuting the applicability of *Ker v. Illinois*, stated:

> The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority.[72]

This Article therefore concludes that the Supreme Court began in error by stating that the primary issue before the court was whether the abduction of the respondent violated the Extradition Treaty. If the Court found that it did not, the rule in *Ker-Frisbie* applied. This difficulty is to be regretted. The Court began by noting the absence of an explicit prohibition on abduction in the terms of the treaty. The Court referred to Article 9 of the Extradition Treaty, noting that neither State was required to extradite its nationals[73], but rather the Treaty imposed a duty on the host State to extradite or prosecute individuals sought for extradition.[74] The respondent had argued that "all the processes and restrictions on the obligations to extradite established by the Treaty would make no sense if either nation were free to resort to forcible kidnapping to gain the presence of the individual for prosecution…"[75] The Supreme Court was of the opinion however that Article 9 did not provide the exclusive means

[72] *Cook* 288 U.S. at 121

[73] Extradition Treaty, art. 9 para. 1

[74] Extradition Treaty, art. 9, para. 2

[75] *Alvarez-Machain* 504 U.S. at 664

of gaining custody of a national of the host State[76], finding that the history of negotiation and practise of the treaty did not support a prohibition on abduction.

If the transfer of individuals is not required outside the terms of the treaty, then it remains at the discretion of the host State. The host and forum States vested their intention and discretion in the extradition treaty. Therefore transfer that occurs outside the terms of the treaty or without the general consent of the host State overrides that discretion. It can therefore be said to violate the terms of the treaty, an expression of that sovereign discretion. By concluding that the treaty did not set out the exclusive means of transfer, it was open to the Court to conclude that abduction was not prohibited. It is urged that this interpretation was not open to the court.

The court then turned to the question of whether the treaty should have a term implied to prohibit forcible abduction. The Court had difficulty with the nature of implied term sought.[77] It concluded that the prohibition sought was too broad for the purposes of the extradition treaty. Chief Justice Rehnquist distinguished the violation of an implied term of extradition treaty in *Rauscher*[78] from the present case. In former case, a term of specialty was implied owing to the practice of nations with regard to extradition treaties. The Chief Justice concluded that to imply a prohibition of abduction in the present case would derive from "principles of international law more generally"[79] and that such an implication was beyond the authority of precedent and

[76] Id.

[77] The respondent had sought suggest that the Extradition Treaty should prohibit one government exercising " its police power in the territory of another State'

[78] *Alvarez-Machain* 504 U.S. at 668

[79] *Id.*

practice. The decision in *Rauscher* was described as “a small step to take”[80] and contrasted with “much larger inferential leap”[81] required in the present case.

Chief Justice Rehnquist came to the conclusion that the term sought to be implied was “general” in nature, in particular the violation of State sovereignty was too broad a concept to be prohibited under the extradition treaty. The Court distinguished the term implied in *Rauscher* as relating to the "practise of nations with regard to extradition treaties.”

In *Rauscher* the term of specialty implied has developed to be a general principle governing the area of extradition. The Court in that case examined State practise and the writings of learned scholars relating to extradition.[82] In the present case, an equally appropriate nexus can be seen. It has been shown above that the term rendition applies to all forms of transfer of an individual from one State to another for the purposes of trial. Therefore it can be said to apply to both abduction and extradition. The Court had stated that its interpretation of the treaty was to be akin to that of a statute. A general principle of interpretation of statutes can be found in the Latin maxim *expressio unius, exclusio alterius.* It can thus be argued that by including terms for a method of extradition as the preferred form of rendition of individuals, the United States and Mexican Governments could not have intended to include alternative forms of rendition. Therefore even on the required nexus to the practise of

[80] *Id*, at 669

[81] Id.

[82] *Rauscher* 119 U.S. at 412-419

states related to extradition set out by Chief Justice Rehnquist[83] an implied term prohibiting abduction is permissible, as the converse to any freedom to abduct.

In addition, it is suggested that the Supreme Court erred in distinguishing *United States v. Rauscher.* There the Court had regard to the practise of nations, limited to extradition treaties, to imply a term of specialty. In *Rauscher* regard was had not only to the explicit terms of the treaty, but to the need to maintain the purpose and spirit of the treaty as well.[84] The narrow reading of the implied term in *Rauscher* in *Alvarez-Machain* is difficult to reconcile with the tenor of the former judgment, and with the broad interpretation given to *Ker v. Illinois,* in particular, the manner in which the factual differences were overlooked and its application to a case where an extradition treaty was present. It therefore appears as if the Supreme Court employed, to some extent, inconsistent forms of judicial reasoning. An initial narrow interpretation of *Rauscher* cannot be reconciled with the broad application of *Ker-Frisbie.*[85]

The Court acknowledged that the abduction was "shocking" and may be in violation of international law[86], but concluded that it was not in violation of the Extradition Treaty and that therefore the *Ker-Frisbie* rule applied. Justices Stevens, Blackmun,

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[83] *Alvarez-Machain* 504 U.S. at 669

[84] *Rauscher* 119 U.S. at 422

[85] It also appears as if the reasoning employed in *Alvarez-Machain* had been considered and rejected in *Rauscher.* 504 U.S. 655 Stevens {dissenting), footnote 10;

It is noted that the treaty in question in that case was silent as to specialty; following the approach of the Court in *Alvarez-Machain,* courts would be free to try an accused for any offence.

[86] The Court suggested that the appropriate recourse for such a violation of international law was through diplomatic channels.

and O'Connor dissented; taking the view that to allow abduction despite the presence of an extradition treaty would transform the latter into "little more than verbiage".[87] The dissent continued by stating that the detailed provisions of an extradition treaty "would serve little purpose if the requesting country could simply kidnap the person"[88]. This Article argues that the view of the dissent is to be preferred. It appears from the decision of Chief Justice Rehnquist that the Supreme Court failed to consider a general supervisory jurisdiction of the court in this matter. In recognising the abduction as "shocking", it is argued that the Court erred in failing to recognise a resultant duty to deny jurisdiction to hear the case, as adopted in *ex parte Bennett* above.

It is suggested that there is no inconsistency in principle between the approach employed by the House of Lords and the decision in *S. v. Ebrahim* and the traditional deference employed by the U.S. Supreme Court in matters of foreign affairs and national security. Judicial intervention in denial of jurisdiction constitutes a limited interference with executive power and is not unknown to U.S. jurisprudence. Limited judicial intervention in the War on Terrorism was recognised in *Hamdi v. Rumsfeld*[89] discussed in section five below. A supervisory jurisdiction has been previously outlined in *United States v. Hastings*[90] where it was held that such a jurisdiction could be exercised in three instances:

[87] 504 U.S. 655, 673

[88] Id.

[89] Hamdi et al v. Rumsfeld et al 542 U.S. 507 (2004)

[90] United States v. Hastings 461 U.S. 499 (1983)

(i) To implement a remedy for violation of recognized rights

(ii) To preserve judicial integrity

(iii) To provide a remedy designed to deter illegal conduct.[91]

It is clear that the facts of *Alvarez-Machain* would satisfy each of these criteria independently. Either a refusal to hear the case or repatriation is both appropriate remedies for the violation of territorial sovereignty and treaty violations. Similarly such remedies would serve to preserve judicial integrity against executive lawlessness and maintain the rule of law.

The decision in *Alvarez-Machain* was greeted with hostility by academics[92], foreign governments[93] and international organizations[94]. It can be seen that the practice of abduction in this context supports the short-term interests of the United States and can be seen to be an effective, if arbitrary, method of obtaining the individuals sought. However the practice could have the effect of weakening regional interests in the fight against terrorism and certainly has the effect of weakening the promotion of human rights and the spread of democracy. The "renditions to justice" process has been shown to be more accurately categorised as abductions. While the U.S. Supreme Court has recognised the illegality of these actions at international law, the Court

[91] *Hastings* 461 U.S. at 505

[92] See *inter alia* Douglas J. Sylvester, *Customary International Law, Forcible Abductions and America's Return to the "Savage State* 42 Buffalo L. Rev. 555

[93] Zaid,Military *Might versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout* 19 Hous. J. Int'l L 829, 841

[94] Aceves, *The Legality of Crossborder Abductions: A Study of United States v. Alvarez-Machain* 3 Sw. J.L. & Trade Am. 101, 117

remains unwilling to counteract such illegality on a domestic level. This Article has confirmed the inherent illegality of abductions and "renditions to justice" at international law, and has urged the United States Supreme Court to adopt the responsibility taken on by their British counterparts, preserve the rule of law and stand as a barrier to executive lawlessness. It has been shown above that to adopt this position would not be to the detriment of counter-terrorist objectives, but would rather support long term goals.

### 4. Enforced Disappearances[95]

Since the declaration of the War on Terrorism, evidence has shown that "extraordinary rendition" has pursued an alternative goal than rendering foreign terrorist suspects to the United States to stand trial in a U.S. court. In conjunction with the policy of indefinite detention without trial used for members of Al-Qaeda in Guantanamo Bay, the "extraordinary rendition" process has been used to transport suspects to undisclosed and unacknowledged locations outside of the U.S. for the purposes of interrogation. This process includes transferring such suspects to foreign governments such as Egypt or transporting the suspects to secretive locations known as "black sites"[96], operated by the C.I.A. In both locations, reports have indicated that torture is commonplace during the interrogation process. This Article shows that this process constitutes the international offence of "enforced disappearance."

[95] See generally Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances E/CN.4/2002/71 (Nowak Report)

[96] See Jane Mayer, *Outsourcing Torture: The secret history of America's 'extraordinary rendition' program*, in The New Yorker, 14 & 21 February 2005

The practise of enforced disappearances has been seen in the cases of Nazi Germany[97], in the Indian Punjab[98] and the infamous use in the Soviet Union as part of the "Great Purge"[99]. There is no specific human right not to be subjected to enforced disappearances, but rather the practise is considered a multiple human rights violation. Nowak considers that while the practise can be effectively prohibited by domestic and international criminal legislation and facilitated by universal jurisdiction, gaps remain in the prevention of the practise.[100]

Enforced disappearances have been variously defined in the recent past[101]. The General Assembly adopted the Declaration on the Protection of all Persons from Enforced Disappearance[102] in 1992, which defined enforced disappearances as when:

> Persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, … followed by a refusal to disclose the fate or whereabouts of the persons concerned

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[97] Measures for enforced disappearances were adopted by the *Nacht und Nebel Erlass* (Night and Fog Decree) of 7 December 1941

[98] Kaur, *A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India* 15 Harv. Hum. Rts. J. 269

[99] See generally Conquest, The Great Terror: Stalin's Purge of the Thirties. (London, Macmillan 1968).

[100] In particular, no obligation exists to maintain centralised registers of all places of detention and all detainees. It is suggested that this gap has been exploited by the C.I.A. in the extraordinary rendition process. Nowak suggests that such gaps may be best plugged by an optional protocol to the Convention Against Torture or the International Covenant on Civil and Political Rights.

[101] See Human Rights Watch, The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees" http://www.hrw.org/backgrounder/usa/us1004/index.htm (last visited Aug. 26, 2006)

[102] G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992)

> or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.[103]

It is clear that the distinguishing characteristic of enforced disappearances is manner in which "disappeared" persons are separated from the outside world and any legal protected or oversight. Indeed, Human Rights Watch suggests[104] that each of the recent definitions involves four elements:

(a) Deprivation of liberty against the will of the detainee;

(b) Direct or indirect involvement of government officials;

(c) Refusal to acknowledge the detention or to disclose the fate and whereabouts of the person concerned; and

(d) The removal of the detainee from the protection of the law.

It is clear from the "Below the Radar" report that the "extraordinary rendition" process conforms to these criteria. It is clear that enforced disappearances violate a variety of human rights, including the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law. This Article suggests that the pervasive nature of rights violations caused by this practise outweighs the immediate counter-terrorism objective. In addition, by developing a status as a violator of human rights, the United States contributes to the vindication of the sentiment espoused by enemy

[103] Id.

[104] Human Rights Watch, *supra*, The Definition of "Forced Disappearances" in International Law

organisations such as Al-Qaeda.

It is clear that the nature of enforced disappearances is such as to attempt to avoid any legal process and human rights protection. In addition, it is noted that official denial of this practise as part of counter-terrorist policy and a lack of judicial oversight contribute to the view that U.S. intelligence agencies are aware of the illegality of the practise at international law. Nevertheless, two parallel instruments outline a detailed prohibition of enforced disappearances. First, the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, 1992 contains the definition quoted above, and recognises the multiple human rights violations that occur in the case of enforced disappearances.[105] The Declaration obliges States to take positive action[106] under domestic law to prevent the practise. It must be recognised that the Declaration is soft law and is as such not legally binding. It is however important in a broader context to establishing *opinio juris* to form a customary prohibition of enforced disappearances. Second, the Inter-American Convention on Forced Disappearances, 1994[107] provides support in treaty law for the prohibition of enforced disappearances and is a legally binding instrument. The process is categorised as a crime against humanity[108] and similarly obliges Contracting States to enact measures against and establish jurisdiction over crimes of enforced disappearance.[109]

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[105] G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), art. 1

[106] G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). art. 2-3

[107] Organization of American States, The Inter-American Convention on Forced Disappearance of Persons 33 I.L.M. 1429 (1994)

[108] Id., Sixth preambular paragraph

[109] Id., art IV; Nowak is of the opinion that the Convention provides universal jurisdiction over enforced disappearances for OAS Member States. See Nowak, *Monitoring Disappearances – the*

A full discussion of case law on the issue is beyond the scope of this article[110]. It is proposed to examine the case law of the European Court of Human Rights as the most developed in the area of enforced disappearances. In addition, this Article notes the relevance of this case law for the Council of Europe Member States affected by the extraordinary rendition process by the transfer of individuals through their territory by U.S. intelligence agencies. It must first be recognised that the prohibition of enforced disappearances is an unenumerated right of the European Convention on Human Rights, drawn from a number of explicit provisions.[111] In *Kurt v. Turkey*[112], Uzeyir Kurt was arrested by Turkish security forces and disappeared while in their custody. His mother submitted an application the Strasbourg court on her own behalf and on behalf of her son. The Court found that Article 5 had been violated in the case of Uzeyir Kurt and in addition that Article 3 had been violated in the case of the applicant.[113] Turkey also violated Article 13 by reason of lack of a meaningful investigation into the disappearance.[114]

In *Cyprus v. Turkey*[115], Cyprus claimed, "about 1,491 Greek-Cypriots were still

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*difficult path from clarifying past cases to effectively preventing future ones* 1996 E.H.R.L.R. 348, at 352

[110] See Nowak Report, 10-19

[111] European Convention on Human Rights, art. 1 (general obligation to secure the rights and freedoms defined in the Convention); art. 2 (the right to life); art. 3 (the prohibition of torture, inhuman or degrading treatment or punishment; art. 5 (the right to liberty and security of person; art. 13 (the right to an effective remedy before a national authority)

[112] Kurt v. Turkey 24276/94 1998 ECHR 44 (25 May 1998)

[113] Ibid, at paragraphs 133-134

[114] Ibid, at paragraphs 140-142

[115] Cyprus v. Turkey 25781/94 [2001] ECHR 331 (10 May 2001)

missing 20 years after the cessation of hostilities, these people were last seen alive in Turkish custody and their fate has never been accounted for by the respondent State."[116] As is often necessary in such cases, the Commission proceeded not on the basis of ascertaining the whereabouts of the missing persons, but rather to determine "whether or not the alleged failure of the respondent State to clarify the facts surrounding the disappearances constituted a continuing violation of the Convention."[117] The Grand Chamber found that there had been such a violation under Article 2 of the Convention, citing a failure to conduct an effective investigation. However, in the absence of evidence to suggest that such missing persons were killed in a manner, which engaged the State's liability, the Court concluded that there was no violation of Article 2 in that respect. This case is of relevance given the military nature of the conflict in question, which is analogous to the "War on Terrorism". It is clear from this decision that despite the presence of a military conflict, a prohibition on enforced disappearances and a resultant obligation to effectively investigate claims of the same persist.

Enforced disappearance has also been categorised as a crime against humanity as part of the Statute of the International Criminal Court, subject to certain criteria.[118] While it is acknowledged that the United States is not a party to the International Criminal Courts, it is also recognised that liability of third States may be engaged in circumstances where individuals subjected to enforced disappearances are transported through their territory and that the Statute is declaratory of customary international

[116] Id., paragraph 20

[117] Id., paragraph 22

[118] Statute of the International Criminal Court, art. 7. Para. 2 (i), July 1, 2002, U.N. Doc. 2187 U.N.T.S. 90

law in some instances. It is also apparent that a number of provisions of international humanitarian law can be seen to protect the rights affected by enforced disappearances.[119] These provisions are of heightened significance under a War on Terrorism justification.

The primary justification envisaged for the "extraordinary rendition" program is the status and nature of the War on Terrorism itself. Traditionally, the American judiciary has granted significant deference to the President in wartime, for decisions made in his Commander-in-Chief function. Despite the international law and human rights concerns detailed above, advocates argue that the courts cannot review the Presidential power authorising the "extraordinary rendition" program, as such a Commander-in-Chief decision. The difficulty with this position is evident from the non-conventional nature of the War on Terrorism. Combating a series of urban terror operations against a civilian terrorist organisation is in stark contrast to the initial military campaign in Afghanistan, or the subsequent invasion of Iraq. While notable deference has been given to the Commander-in-Chief in these instances and the continuing detention of combatants in Guantanamo Bay, the U.S. Supreme Court has recognised a limited set of justiciable rights, including the common law right of *habeas corpus* in *Hamdi v. Rumsfeld et al*[120]. It is now urged that a similar, albeit limited set of rights exist in the case of "extraordinary rendition".

The decision in *Hamdi* characterises the purpose of detaining enemy combatants as

[119] Nowak Report, Section 5 – International Humanitarian Law

[120] Hamdi et al v. Rumsfeld et al 542 U.S. 507; 124 S. Ct. 2633; 159 L. Ed. 2d 578; 2004 U.S. LEXIS 4761; 72 U.S.L.W. 4607; 2004 Fla. L. Weekly Fed. S 486

being to prevent their return to the field of battle and taking up arms once again.[121] This Article has shown above that the purpose of "extraordinary rendition" is malleable; it is primarily for the purposes of interrogation, but has also been used as a preventative measure in the case of "high-value" suspects. The Supreme Court in *Hamdi* found no difficulty with such a principle; the difficulty arose in the case of *indefinite* detention. The Court held that the above rationale lead to the conclusion that "the litigation of this case suggests Hamdi's detention could last for the rest of his life."[122] It is clear that the same rationale would produce a similar result in the case of "extraordinary renditions". The difficulty with this result is heightened by the fact that those subject to the "extraordinary rendition" process remain, primarily, suspected of unspecified terrorist activity and offences. While the value of preventative detention in this context is recognised, the arbitrary nature of this detention compels one to conclude that judicial oversight is required to prevent a reoccurrence of the unfortunate events of the El-Masri incident.[123]

The Court then outlines the limited nature of the rights involved. It is therefore argued that despite the judicial deference to the War on Terrorism, the Supreme Court should extend the minimum rights granted to those in detention as enemy combatants in Guantanamo Bay to all those subject to indefinite detention under "extraordinary rendition" and facilitate the right of *habeas corpus*. This proposal does not infringe the Presidential power as Commander-in-Chief to a disproportionate degree; in this regard, the considerations applied to granting enemy combatants this core of rights applies equally to "extraordinary rendition" detainees.

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[121] *Hamdi* 542 U.S., at 531

[122] Id., at 520

[123] Amnesty International, Below the Radar, 9

In conclusion, this Article emphasises that the United States Supreme Court has refuted the possibility that the President has Congressional approval for indefinite detention under the Authorisation for Use of Military Force ("the AUMF"). Justice O'Connor stated, "Hamdi contends that the AUMF does not authorise indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purposes of interrogation is not authorised."[124] The practise of "extraordinary renditions" awaits official acknowledgment and judicial ruling. It is hoped that the U.S. Supreme Court will continue to recognise the significance of the rule of law in the War on Terrorism.

## 5. Conclusion

The new world order of post-Soviet politics has left one State with the status of "superpower", with the capacity and leadership to shape international law and policy in a sweeping fashion. By reason of this status and other causes, the United States above all other States has been the constant target of terrorist attacks and ideological hatred. Its allies have also been subject to increasing terrorist attacks as part of a broader ideological conflict. This Article began by recognising this radical and unprecedented threat posed by terrorism in the twenty first century and the need for an innovative and precise counter-terrorist response. While recognising the developments required by the nature of terrorism, this Article has argued that there is no justification in removing the safeguards guaranteed by due process of law or human rights obligations. To suggest otherwise would lead, it is submitted, to arbitrary and unprincipled choices, and give unchecked power to investigative and executive agents.

[124] Id., 13

This Article has shown that the counter-terrorist responses of "renditions to justice" and "extraordinary rendition" are unprincipled and inadequate to face the present terrorist threat on a long-term strategic basis. The present responses fail to accommodate respect for allies and other States and act in an isolationist and unilateral fashion. This approach is ill suited to a more complex and innovative response required as a result of the non-conventional nature of the War on Terrorism. In addition, dramatic failure to respect human rights creates difficulties in subsequent prosecutions of terrorists in U.S. courts, as difficulties continue with the alternative of military tribunals.

It is suggested that a new approach is required, facilitating a global response to a global threat. It is difficult to reconcile the present divergent approaches of the United States and the United Kingdom faced with a common threat and subject to similar attacks. It is proposed that a transparent, judicial and principled response to the terrorist threat is required, involving the co-operation and diplomacy of all affected States, to counteract the effect of terrorism on both domestic and international levels. This Article has shown that the present approach is singularly inadequate to achieve this result. To conclude, it is instructive to remember the famous words of Lord Atkin in his celebrated dissent in *Liversidge Appellant v. Sir John Anderson*[125]:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on

[125] *Liversidge Appellant v. Sir John Anderson* [1942] AC 206 (H.L.) (appeal from Eng.) (U.K.)

recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[126]

[126] Id., 244