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The Practice of Shared Responsibility in relation to Extradition

Aristoteles Constantinides[*]

1. Introduction: Extradition and related transfers as cooperative action

Extradition is a formal interstate process by which an accused or a sentenced person is transferred by the requested/sending state to the custody of the requesting/receiving state, to enable the latter to exercise jurisdiction over that person. The legal basis for extradition may be a bilateral or multilateral extradition treaty, an *aut dedere aut judicare* clause in a multilateral treaty of international or transnational criminal law, or – in the absence of any applicable treaty – reciprocity, comity, or domestic legislation.[1]

A complex set of international and domestic rules regulates the actions of the cooperating states and the treatment of the individuals involved in the various phases of the extradition process. The complexity of this legal scheme increases the likelihood of wrongful acts by one or both cooperating states, as well as harmful outcomes for the requested persons. If this involves wrongful acts by both states, such harmful outcomes can give rise to shared responsibility.

In addition to the formal process of extradition, the transfer of a requested person may – and often does – take place through informal cooperation between the two states ('atypical extradition') or by deportation of the individual ('disguised extradition'). This may occur, inter alia, when there is no applicable extradition treaty, when the courts of the requested state have refused extradition, or if the two states transfer the individual notwithstanding such a treaty. These kinds of transfer outside the (formal) extradition framework ('alternatives to extradition') lack the safeguards surrounding the extradition process, and their legality is subject to controversy. The crucial element for present purposes is that there is some involvement of the judiciary in the cooperative (sometimes concerted) actions of the states concerned. Such judicial involvement differentiates those transfers from the so-called

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[1] M.C. Bassiouni, *International Extradition: United States Law and Practice*, 5th edn (Oxford University Press, 2007), 1, 7-26.

'extraordinary renditions',[2] which are not discussed in the present chapter.[3]

This chapter will also address issues of shared responsibility in the context of deportation/expulsion, which are akin to extradition, since both practices result in removing the person concerned to the receiving state. Deportation of an individual with or without any cooperation from the receiving state may also give rise to shared responsibility if the individual suffers some harm in that state. In that situation it is worth exploring whether the sending state can also be held responsible for its contribution to the injury.

Shared responsibility of the cooperating states in the context of extradition or deportation may thus arise from a variety of scenarios involving harm inflicted on an individual by the cooperating states as a result of breach of that person's rights under international human rights law (section 2.1) or under extradition law (section 2.2). The main issues that will be explored then are the scope and legal basis of each state's responsibility (section 3.1) as well any remedies indicated to both cooperating states (section 3.2). The chapter will also examine any available processes for addressing the responsibility of cooperating states (section 4), before concluding with some remarks on the potential of the practice and case law of extradition to contribute to the further refinement of shared responsibility. The analysis is not concerned with all possible breaches that may occur during extradition and related transfers, but with those that result from, or bear upon, the cooperative action of both the sending and the receiving states.[4]

[2] Extraordinary renditions take place through the cooperation of the executive organs (police, army or intelligence) of two or more states outside the normal legal system, in the absence of any arrest warrant and without judicial involvement. In *Dzhurayev* v. *Russia*, App. No. 31890/11 (ECtHR, 3 October 2013), the ECtHR noted that the operational procedures in that case regarding the applicant's abduction in Russia and forcible transfer to Tajikistan differed in many respects from those of 'extraordinary renditions' (para. 204). See Chapter 5 in this volume, H. Duffy, 'Detention and Interrogation Abroad: The "Extraordinary Rendition" Programme', __.

[3] These are examined in Chapter 5 in this volume, Duffy, ibid., ___.

[4] Thus, for instance, all other things being equal (and lawful), an injury (e.g., inhuman treatment) inflicted on an individual by organs of the sending state while carrying out the person's removal during an (otherwise lawful) extradition is not of concern to shared responsibility. See, for example, the facts surrounding the transfer to Russia of some of the applicants in *Shamayev and others* v. *Georgia and Russia*, App. No. 36378/02 (ECtHR, 12 April 2005), paras. 373-386 (acts of violence by the Georgian special forces to overcome the applicants' resistance and effect their removal). Likewise, the complaint often made that extradition might result in severance of family ties and thus breach the right to family of the requested person also does not implicate the receiving state and does not concern us here.

2. Factual scenarios, primary rules and case law

2.1 Obligations of the cooperating states under international human rights law

There is a wide range of factual scenarios that can give rise to shared responsibility of the cooperating states in relation to violations of human rights. The following account focuses on those that transpire more often in practice and present the most pertinent issues of shared responsibility.

2.1.1 Death penalty

The main scenario in this category involves an abolitionist state extraditing (or deporting or handing over)[5] an individual facing imposition or implementation of the death penalty to a retentionist state, without seeking and obtaining sufficient assurances that the death penalty will not be imposed or, if already imposed, will not be executed. Shared responsibility may arise if the individual is transferred, sentenced to death and executed in breach of applicable international standards.

The legal situation largely depends on the treaty obligations of the requested and requesting states, since there is no customary rule on the unconditional prohibition of the death penalty. Article 6 of the International Covenant on Civil and Political Rights (ICCPR)[6] does not prohibit the death penalty but, read in conjunction with the obligations of states under Article 2 of the ICCPR to respect and ensure the rights set out in the Covenant, imposes an obligation on the parties not to transfer individuals to a risk of arbitrary deprivation of life[7] unless they have obtained adequate assurances that the death penalty will not be imposed or, if already imposed, will not be executed. The obligation of abolitionist sending states to obtain adequate assurances was first articulated by the Human Rights Committee in *Judge* v. *Canada*, where Canada was found to have violated the complainant's right to life by deporting him to the United States without such assurances and thus 'established the crucial link in the causal

[5] Any reference to extradition in the factual scenarios in this section may also refer to deportation and related transfers.
[6] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).
[7] ICCPR General Comment No. 31, 'Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. A/59/40 (2004), 175, para. 12.

chain that would make possible [his] execution'.[8]

Almost all fully abolitionist states have policies of requiring unequivocal assurances that the death penalty will not be sought.[9] Some states, such as Italy, have gone even further by refusing to extradite a person facing the death penalty, irrespective of any assurances by the requesting state.[10]

With regard to states party to the European Convention on Human Rights (ECHR),[11] the European Court of Human Rights (ECtHR or Court) held in *Al Sadoon and Mufdhi* v. *the United Kingdom* that 'Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another state where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.'[12]

When it comes to receiving states, Article 6 of the ICCPR provides, inter alia, that the death sentence may be imposed only for the most serious crimes (para. 2) and that it shall not be imposed on juvenile offenders nor carried out on pregnant women (para. 5). These prohibitions are considered as customary law[13] and could thus also engage the responsibility of retentionist states not party to the ECHR and/or the ICCPR. The Human Rights Committee has also repeatedly held that the imposition of the death penalty following an unfair trial constitutes an arbitrary deprivation of life in violation of Article 6 of the ICCPR.[14]

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[8] *Judge* v. *Canada*, Communication No. 829/1998, HRC, UN Doc. CCPR/C/78/D/829/1998 (2003), para. 10.6. This was a major departure from the Committee's earlier jurisprudence in *Kindler* v. *Canada*, Communication No. 470/1991, HRC, UN Doc. CCPR/C/48/D/470/1991 (1993), para. 14.6, that such a removal did not amount *per se* to a violation of the right to life and that Article 6 did not necessarily require a sending state to seek assurances that the death penalty would not be imposed.

[9] Report of the Secretary-General, 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty', UN Doc. E/2010/10, (2009), para. 9. Canada, which obtains assurances 'in all but exceptional circumstances', and the residual power of Australia's Attorney General, in ill-defined circumstances, to allow the extradition of a person facing the death penalty, seem to be the exceptions.

[10] In *Venezia* v. *Ministero di Grazia e Giustizia*, Judgment of 27 June 1996, No. 223, the Italian Constitutional Court ruled that it was unconstitutional for any public authority in Italy to help execute punishments that cannot be imposed in Italy.

[11] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights, ECHR, or Convention).

[12] *Al-Saadoon and Mufdhi* v. *the United Kingdom*, App. No. 61498/08 (ECtHR, 2 March 2010), para. 123.

[13] ICCPR General Comment No. 24 (52), 'General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8.

[14] ICCPR General Comment No. 32, 'Right to equality before courts and tribunals and to a fair trial (article 14)', UN Doc. CCPR/C/GC/32 (2007), para. 59; *Conroy Levy* v. *Jamaica*, Communication No. 719/1996, HRC, Views of 3 November 1998, para. 7.3; *Shakurova* v. *Tajikistan*, Communication No. 1044/2002, HRC, Views of 17 March 2006, para. 8.6.

2.1.2 Torture and other cruel, inhuman or degrading treatment or punishment

Shared responsibility in this category would arise from the infliction of torture or other cruel, inhuman or degrading treatment or punishment on an individual by the receiving state, in breach of its customary or treaty obligations, following the individual's extradition by the sending state when the sending state knew or ought to have known that the individual would face a serious risk of being subjected to such treatment, and failed to seek and obtain sufficient guarantees that such treatment would not materialise.

The prohibition of torture is well established in international law. It is absolute and non-derogable and is also a rule of *jus cogens*.[15] In addition to the prohibition of inflicting torture themselves, states have an explicit obligation under Article 3 of the Convention against Torture (CAT)[16] not to 'expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The *non-refoulement* obligation is also inherent in the prohibition of torture in Article 7 of the ICCPR,[17] as well as in regional instruments, most notably Article 3 of the ECHR.[18] The protection from *refoulement* in these two provisions is broader than in Article 3 of the CAT, by covering the risk not only of torture but also of inhuman or degrading treatment or punishment.[19] Unlike the prohibition of *refoulement* under the 1951 Refugee Convention,[20] which is limited to refugees, *non-refoulement* under international human rights law applies to every person.[21] *Non-refoulement* is also an obligation under customary law,[22] while it has also been argued, less convincingly, that it is a rule of *jus cogens*.[23]

[15] *Prosecutor* v. *Furundžija*, Judgment, ICTY Case No. IT-95-17/1-T, 10 December 1998, paras. 139, 153; E. de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens' (2004) 15 EJIL 97.
[16] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (Convention against Torture or CAT).
[17] Human Rights Committee, General Comment 20, 'Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment', A/47/40 (1992) 193, para. 9.
[18] *Soering* v. *the United Kingdom*, App. No. 14038/88 (ECtHR, 7 July 1989) (*Soering*), para. 91. This was reaffirmed in numerous other judgments concerning both extradition and expulsion.
[19] Ibid., para. 88.
[20] Convention relating to the Status of Refugees, Geneva, 25 July 1951, in force 22 April 1954, 189 UNTS 137.
[21] K. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerpen: Intersentia, 2009), 531.
[22] E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, 2003), 87, 163-164. In *Mann* v. *Republic of Equatorial Guinea*, Case No. CA 507/07 [2008] ZWHHC 2 (23 January 2008), the Harare High Court held that although Zimbabwe was not a party to the CAT, the obligation of *non-refoulement* was applicable to Zimbabwe by operation of customary international law.
[23] J. Allain, 'The *jus cogens* Nature of *non-refoulement*' (2001) 13(4) IJRL 533, at 538. This has been rejected by at least two domestic courts. See *C and others* v. *Director of Immigration*, First instance, (2008) 2 HKC 165;

When examining a requested state's compliance with its *non-refoulement* obligations, the ECtHR and treaty bodies assess the existence of a foreseeable, personal and real risk of torture or other ill-treatment of the transferee in the receiving state, which the sending state knew or ought to have known at the time it made the removal decision.

Most cases before United Nations (UN) treaty bodies, the ECtHR, and domestic courts involve the *non-refoulement* obligations of sending states and have been decided either before or after their actual transfer of the individual. Some cases concern the responsibility of the receiving state for the ill-treatment. Fewer cases have been brought against both cooperating states before the same body and none of them has resulted in holding any sending state responsible for breach of its *non-refoulement* obligations.

One of the cases involving the responsibility of the receiving state was *Karimov and Nursatov* v. *Tajikistan*, where the Human Rights Committee found a violation of various provisions of the ICCPR, including Article 7, as a result of Mr Karimov's ill-treatment by Tajikistan following his extradition from Russia.[24] The obligations and responsibility of Russia were not discussed.

The responsibility of the sending state has been established in many cases. In *Boily* v. *Canada*,[25] the Committee Against Torture found that Canada had violated Article 3 of the CAT by extraditing the Canadian complainant to Mexico, where he faced a serious risk of torture and was ultimately tortured despite Mexican diplomatic assurances to the contrary. The Committee did not address the obligations and responsibility of Mexico.

An interesting case involving the responsibility of both the requested and requesting states was that of Mr Iskandarov, who was abducted in Russia and transferred to Tajikistan, where he was ill-treated, despite the Russian courts' refusal to grant his extradition. The ECtHR found in *Iskandarov* v. *Russia* that Russia was responsible for the abduction and violation of his rights under Articles 3 and 5 of the ECHR,[26] while the Human Rights Committee concluded in *Iskandarov* v. *Tajikistan* that Tajikistan had violated his rights under Article 7 of

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ILDC 1119 (HK 2008); *Attorney-General* v. *Zaoui and Inspector-General of Intelligence and Security*, Appeal to Supreme Court, (2005) NZSC 38; ILDC 81 (NZ 2005), 21 June 2005, para. 51.

[24] *Karimov and Nursatov* v. *Tajikistan*, Communications Nos. 1108/2002 and 1121/2002, Human Rights Committee, UN Doc. CCPR/C/89/D/1108&1121/2002 (2007), para. 8.

[25] *Boily* v. *Canada*, Communication No. 327/2007, UNCAT, Decision of 14 November 2011, UN Doc. CAT/C/47/D/327/2007 (2011).

[26] *Iskandarov* v. *Russia*, App. No. 17185/05 (ECtHR, 23 September 2010), paras. 134-135, 151-152.

the ICCPR.[27] This is a rare case of separate findings of (independent) responsibility of the cooperating states by two different bodies, without however any of them dealing with the responsibility of the other state.

In these types of cases, diplomatic assurances can be relevant for assessing and possibly mitigating the risk of torture.[28] They are not confined to torture but may also aim at reassuring that the returnee will not be subjected to various forms of proscribed conduct. Their absence is a strong indication that there was no proper assessment by the state of the risk of torture.[29] To the extent that diplomatic assurances are relevant to the determination of the initial breach of the substantive rule, they should be considered as part of the primary obligation of *non-refoulement*. Thus diplomatic assurances have been found in several cases, sometimes controversially, to have reduced the risk of torture or other ill-treatment to an acceptable level and have served as a green light for the transfer.[30]

Assurances against torture do not dispose of state obligations not to transfer individuals to a risk of torture outright, and thus do not necessarily absolve them of any responsibility should torture or other ill-treatment eventually occur. This is because such assurances are not always effective in the face of the secret methods of torture and its endemic nature in many receiving states. What is more, they are often not effectively enforceable, especially when post-return monitoring is either non-existent or too weak, which is quite common in many receiving states.[31] In many cases, diplomatic assurances were indeed found to be incapable of mitigating the serious risk of torture.[32]

After an initial piecemeal approach to diplomatic assurances, the ECtHR has formulated a

[27] *Iskandarov* v. *Tajikistan*, Communication No. 1499/2006, HRC, UN Doc. CCPR/C/101/D/1499/2006 (2011), para. 6.2.

[28] For an overview of relevant case law see A. Constantinides, 'Transjudicial Dialogue and Consistency in Human Rights Jurisprudence: A Case Study on Diplomatic Assurances against Torture', in O.K. Fauchald and P.A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart, 2012), 267, at 281-290.

[29] See e.g. *Garabayev* v. *Russia*, App. No. 38411/02 (ECtHR, 7 July 2007), para. 79.

[30] Controversial cases where assurances were found to mitigate the risk of torture include *Mamatkulov and Askarov* v. *Turkey*, App. Nos. 46827/99 and 46951/99 (ECtHR, 4 February 2005); and *Attia* v. *Sweden*, Communication No. 199/2002, UNCAT, UN Doc. CAT/C/31/D/199/2002 (2003).

[31] M. Nowak, '"Extraordinary Renditions", Diplomatic Assurances and the Principle of Non-Refoulement', in W. Kälin et al. (eds.), *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs* (Leiden/Boston: Martinus Nijhoff, 2010), 107. See also Report of the Committee Against Torture to the General Assembly, UN Doc. A/67/44 (2012) for critical comments on the use of diplomatic assurances in the concluding observations on Albania, Armenia, Czech Republic, Germany, and Morocco.

[32] E.g. *Ryabikin* v. *Russia*, App. No. 8320/04 (ECtHR, 19 June 2008) (extradition to Turkmenistan); *Gaforov* v. *Russia*, App. No. 25404/09 (ECtHR, 21 October 2010) (extradition to Tajikistan); *Umirov* v. *Russia*, App. No. 17455/11 (ECtHR, 18 September 2012), para. 121 (extradition to Uzbekistan); *Makhmudzhan Ergashev* v. *Russia*, App. No. 49747/11 (ECtHR, 16 October 2012), paras. 74-75 (extradition to Kyrgyzstan).

'checklist' for assessing the quality, credibility, and sufficiency of assurances in their practical application in each case.[33] Sending states are thus better alerted to their own risk of incurring responsibility in case the person concerned is subjected to torture or other ill-treatment.

2.1.3 Denial of justice and (un)fair trial

Scenarios giving rise to shared responsibility for denial of justice would involve a patently unfair trial of an individual in a receiving state following her/his extradition by a sending state, despite the foreseeable and serious risk of such a trial, and without sufficient guarantees that the individual would not be denied justice. A related scenario would involve the transfer of the individual to the receiving state to serve a prison sentence that was imposed following a patently unfair trial.

The right to a fair trial is well established in both universal and regional human rights instruments.[34] When it comes to requested states, Article 3(f) of the UN Model Treaty on Extradition, which reflects similar provisions in numerous bilateral treaties, provides that extradition shall not be granted '[i]f the person whose extradition is requested … has not received or would not receive the minimum guarantees in criminal proceedings', as contained in Article 14 of the ICCPR.[35]

Under the case law of the ECtHR, an extradition decision could in exceptional circumstances give rise to an issue under Article 6 of the ECHR, if the requested person has suffered or risks suffering a flagrant denial of a fair trial in the requesting state, which the requested state knew

[33] Thus the Court considers, inter alia, the following factors: first, whether the assurances are specific or general and vague; second, who has given them and whether that person can bind the receiving state; third, whether they have been given by a contracting state; fourth, the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances; fifth, whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms; and sixth, whether there is an effective system of protection against torture in the receiving state, including whether the state is willing to cooperate with international monitoring mechanisms and non-governmental organisations etc. See *Othman* (*Abu Qatada*) v. *the United Kingdom*, App. No. 8139/09 (ECtHR, 17 January 2012), para. 189; *Labsi* v. *Slovakia*, App. No. 33809/08 (ECtHR, 15 May 2012), para. 120.

[34] Article 14 ICCPR, n. 6; Article 6 ECHR, n. 11; Article 8 of the American Convention on Human Rights, 'Pact of San José, Costa Rica', 22 November 1969, in force 18 July 1978, 1144 UNTS 123; and Article 7 of the African Charter on Human and Peoples' Rights, 27 June 1981, in force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, (1982) 21 ILM 58.

[35] UNGA, Model Treaty on Extradition, UN Doc. A/RES/45/116 (14 December 1990), as amended by UNGA Res. 52/88, UN Doc. A/RES/52/88 (4 February 1988).

or ought to have known at the time of extradition.[36] A 'flagrant denial of justice' implies a breach of the principles of fair trial so fundamental as to amount to a nullification, or destruction, of the very essence of the right to a fair trial.[37]

This threshold of the ECtHR refers in essence to third states that are not party to the ECHR,[38] where any damage suffered would be irreparable, unlike in contracting states where individuals may avail themselves of the ECHR's guarantees and protection mechanism.[39] The threshold is quite high because, as the ECtHR explained in *Drozd and Janousek* v. *France and Spain*, states party to the ECHR are not required to impose the Convention's standards on third states and thus verify whether trial proceedings there are compatible with all requirements of Article 6 of the ECHR.[40] It took the Strasbourg Court quite a long time to find, for the first time, in *Othman* v. *the United Kingdom*, that the applicant's removal to Jordan would be in violation of Article 6 due to the real risk of the admission of evidence obtained by torture at his retrial in Jordan.[41]

Some domestic courts do not require such a high threshold and also do not *a priori* exclude states party to the ECHR from its scope of application. For instance, the Constitutional Court of Spain has refused to extradite an Italian citizen to Italy on the ground that he was convicted *in absentia*, which was considered to amount to a 'flagrant denial of justice' in breach of the right to fair trial under international law (the ICCPR and the ECHR).[42]

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[36] See e.g. *Mamatkulov and Askarov* v. *Turkey*, n. 30, para. 90; *Muminov* v. *Russia* (Merits), App. No. 42502/06 (ECtHR, 11 December 2008), para. 113 (expulsion to Uzbekistan).

[37] E.g. *Ahorugeze* v. *Sweden*, App. No. 37075/09 (ECtHR, 27 October 2011), para. 115.

[38] Such differentiation is not without discontents. See, for instance, the case of Mr Da An Chen, a UK citizen, who was convicted of murder in Romania in 1995 without his knowledge and was sentenced to 20 years imprisonment. In *Chen* v. *Romania* [2006] EWHC 1752 (Admin), 23 June 2006, the UK High Court disregarded the Romanian practice of not granting retrial and interpreted the relevant statutory discretionary power of Romanian courts in the light of Romania's fair trial obligations under the ECHR as actually guaranteeing a right to retrial. Mr Chen was thus extradited in 2006 but was eventually refused a retrial. See House of Lords and House of Commons Joint Committee on Human Rights, 'The human rights implications of UK extradition policy: fifteenth report of Session 2010-2012', HL Paper 156, HC 767 (2012), at 21.

[39] This point was clearly made, inter alia, in *Cenaj* v. *Greece and Albania*, App. No. 12049/06 (ECtHR, 4 October 2007).

[40] *Drozd and Janousek* v. *France and Spain*, App. No. 12747/87 (ECtHR, 26 June 1992), para. 110.

[41] *Othman*, n. 33, para. 285. This ruling was also endorsed by the Court of Appeal of Ontario, Canada, in *France* v. *Diab*, 2014 ONCA 374, 15 May 2014, para. 238.

[42] *Domenico Paviglianiti* v. *República de Italia*, Judgment No. 91/2000, 30 March 2000, BOE núm. 107. Suplemento (4 May 2000), ILDC 2113 (ES 2000), at 111-112. See also the similar ruling of the Supreme Court of Argentina in Case 1292, Cauchi, Augusto s/ extradición, 13 August 1998, which also concerned extradition to Italy.

2.2 Obligations of cooperating states under extradition law

Numerous substantive and procedural safeguards under extradition law aim at ensuring respect for the sovereignty of the cooperating states and the rights of the requested individuals. Depending on the circumstances, the circumvention of the extradition process (subsection 2.2.1) or any breach of such safeguards (subsection 2.2.2) could result in an unlawful transfer, which, in conjunction with any harm (torture, unfair trial etc.) inflicted on the individual by the receiving state, could give rise to shared responsibility.

Some of the substantive and procedural safeguards that derive from extradition treaties and/or domestic extradition law may, in case of breach, also give rise to violations of human rights, in particular the right to liberty and freedom from arbitrary detention, provided the relevant universal or regional human rights treaties are applicable. As human rights violations by the sending states in this respect are inextricably linked with extradition law, they are examined in this section; all the more so since Article 5 – the most pertinent provision of the ECHR – refers back to applicable (national or international) extradition law in the state concerned. Other safeguards provided in extradition treaties (subsection 2.2.3) do not normally give rise to human rights obligations. Their observance thus falls within the competence of domestic courts.

2.2.1 Extradition as guarantee of the rule of law: the (il)legality of atypical extraditions, disguised extraditions and abductions

According to the ECtHR, interstate cooperation outside the framework of an extradition treaty does not necessarily result in an unlawful transfer of the person concerned. Thus, atypical or disguised extraditions are not contrary to the ECHR as such, provided that the legal basis for the person's arrest is an arrest warrant issued by that person's state of origin and that the transfer results from the cooperation between the states concerned.[43] Some disguised extraditions have been found to be lawful,[44] while others have not.[45] Much depends on the

[43] *Öcalan* v. *Turkey*, App. No. 46221/99 (ECtHR, 12 May 2005), paras. 86-87 and 89; *Adamov* v. *Switzerland*, App. No. 3052/06 (ECtHR, 21 June 2011), para. 58.
[44] E.g., *Klaus Altmann (Barbie)* v. *France* (Decision), App. No. 10689/83 (EComHR, 4 July 1984), at 233 ('even if the applicant's extradition could be described as a disguised extradition, this would not, as such, constitute a breach of the Convention'); also, *Ilich Sánchez Ramirez* v. *France* (Decision), App. No. 28780/95 (EComHR, 24 June 1996), at 162.
[45] E.g., *Bozano* v. *France*, App. No. 9990/82 (ECtHR, 18 December 1986), para. 60; *Josu Arkauz Arana* v.

particular circumstances of each case. The main argument against the legality of disguised extradition is that it violates the due process rights of the person concerned by circumventing the judicial and other guarantees of the formal extradition process.

The following factual scenarios are illustrative of shared responsibility that may arise when requested persons are transferred to the requesting state by circumventing extradition. In *Şarupici* v. *Moldova and Ukraine*,[46] the applicant complained that he had been unlawfully arrested in Ukraine and was handed over in breach of the correct extradition procedure to Moldovan police officers who drove him to Moldova, where he was ill-treated whilst in detention. In *Bozano* v. *France*,[47] the French courts had refused the applicant's extradition to Italy, where he had received a life sentence *in absentia*, but the French police allegedly circumvented this refusal by colluding with the Swiss authorities to deport him to Switzerland, where he would be (and ultimately was) extradited to Italy to serve his sentence.[48] In *Kasymakhunov* v. *Russia*[49] (one among several similar cases), although the applicant's removal from Russia was stayed by the ECtHR, he was abducted by unknown persons in Russia and was secretly transferred to Uzbekistan, where his whereabouts were unknown.

An atypical extradition is considered as arbitrary and therefore in breach of Article 5(1) of the ECHR if it takes place without the consent, and thus in violation of the sovereignty, of the requested state.[50] In such a case, it can amount to (forcible) abduction of the individual in the foreign jurisdiction in violation of international law. In the series of cases involving abductions and secret transfers of individuals from Russia to states of Central Asia, the

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France, Communication No. 63/1997, UNCAT, UN Doc. CAT/C/23/D/63/1997 (2000), paras. 11.5 and 12.

[46] *Şarupici and others* v. *the Republic of Moldova and Ukraine* (Decision), App. No. 37187/03 (ECtHR, 11 June 2013). This application was, however, declared inadmissible for having been lodged outside the six-month time limit and hence the ECtHR missed an opportunity to possibly make a pronouncement on the shared responsibility of the cooperating states.

[47] *Bozano* v. *France*, n. 45.

[48] Mr Bozano's separate applications against Switzerland (No. 9009/80) and against Italy (No. 9991/82) were dismissed by the European Commission of Human Rights as inadmissible on the same day of 12 July 1984. In *Bozano* v. *Switzerland*, the applicant had claimed that by detaining him on French territory, the Swiss police authorities had unlawfully cooperated and given assistance to the French authorities, which detained and deported him in violation of both French and international law. The Commission found that the Swiss police entry into French territory to take hold of the applicant was not unlawful (at 69). In *Bozano* v. *Italy*, the Commission rejected the applicant's complaint that the Italian authorities had colluded with the French and the Swiss authorities in order to secure his return to Italy and held that '[f]or a State Party to the Convention to ensure that convictions by judicial authorities are enforced is a legitimate purpose recognised in the Convention' (at 157).

[49] *Kasymakhunov* v. *Russia*, App. No. 29604/12 (ECtHR, 14 November 2013).

[50] *Al-Maoyad* v. *Germany* (Decision), App. No. 35865/03 (ECtHR, 20 February 2007), para. 81.

ECtHR has been quite resolute against the legality of such practices.[51] The Human Rights Committee and some domestic courts have also considered such abductions to be unlawful for violating the human rights of the abducted individual, not only when conducted without the cooperation or acquiescence of the host state,[52] but also when conducted with the latter's cooperation[53] or acquiescence.[54]

Depending on the circumstances, an unlawful transfer of the person concerned could vitiate the proceedings in the receiving state[55] and could give rise to shared responsibility if the ensuing detention is considered to be unlawful or arbitrary under international law. Courts in some receiving states have maintained however that their jurisdiction and ensuing proceedings are not affected by any irregularities pertaining to the transfer under the old and controversial doctrine *male captus bene detentus*. Be that as it may, even if the application of the doctrine were considered by a domestic court to be in conformity with international law, and thus not to engage the responsibility of the respective receiving state, the person concerned might still suffer additional harms in that state (e.g., torture, unfair trial etc.), which, in conjunction with the unlawful transfer, may trigger shared responsibility.

2.2.2 Detention with a view to extradition or expulsion: procedural and substantive safeguards

According to the ECtHR, any detention for purposes of extradition or expulsion in the sending state should conform to the substantive and procedural rules of its national law, including rules of public international law (*vide* any applicable extradition treaty), and should

[51] *Abdulkhakov* v. *Russia*, App. No. 14743/11 (ECtHR, 2 October 2012), para. 156; *Dzhurayev* v. *Russia*, n. 2, para. 204, where the Court referred to the possible collusion of state agents.
[52] *Domukovsky et al.* v. *Georgia*, Communication No. 623, 624, 626, 627/1995, HRC, UN Doc. CCPR/C/62/D/623, 624, 626, 627/1995 (1998), para. 19 (abduction from Azerbaijan and transfer to Georgia without the knowledge of Azerbaijani authorities).
[53] *Celiberti de Casariego* v. *Uruguay*, Communication No. 56/1979, HRC, UN Doc. CCPR/C/OP/1 at 92 (1984), para. 9 (arrest of the Uruguayan complainant in Brazil by Uruguayan officials with the connivance of Brazilian police officers and transfer to Uruguay, where she was ill-treated, constituted arbitrary arrest and detention).
[54] *State* v. *Ebrahim*, 1991 (2) SA 553, Supreme Court of South Africa (Appellate Division) (abduction of the defendant by agents of South Africa from Swaziland, without Swaziland's protest).
[55] Note however that, according to *Öcalan* v. *Turkey*, n. 43, para. 90 and *Drozd and Janousek*, n. 40, para. 110, a requesting state (party to the ECHR) as well as the ECtHR are not required to question the conformity of the requested person's detention in the requested state with the domestic law of that state or with the Convention's standards, unless that state is a party to the ECHR. Conversely, in *Belozorov* v. *Russia and Ukraine* (Decision), App. No. 43611/02 (ECtHR, 16 October 2012), the requested state (Ukraine) was a party to the ECHR. The applicant was arrested in Ukraine by a Ukrainian and two Russian police officers, which escorted him to the airport on a flight to Moscow, where he was formally arrested and detained. His complaints about the actions of the Russian and Ukrainian authorities under Article 5(1) of the ECHR, n. 11, were held admissible, but the judgment on the merits was still pending at the time of writing.

not be arbitrary.[56] The sending state's legislation should provide for a sufficiently accessible, precise, and foreseeable extradition or deportation procedure to avoid the risk of arbitrary detention pending removal.[57] There should be clear legal provisions and time limits for detention,[58] which should not be applied inconsistently and should not be a source of confusion.[59] Detention pending extradition or deportation will be acceptable only for as long as the relevant proceedings are conducted with due diligence.[60]

Any breach of these rules may vitiate the transfer and ensuing detention of the person concerned in the receiving state, and could give rise to shared responsibility if the detention is considered to be unlawful or arbitrary under international law and/or if the individual suffers any additional harm (torture, unfair trial etc.) in the receiving state.

2.2.3 Grounds for refusing extradition in extradition treaties

Extradition treaties contain certain common grounds for refusing extradition. The main examples are so-called 'political offences'; conduct that is not criminalised and punished in both the requesting and requested states (double criminality); and offences for which the requested person has already been tried in the requested or the requesting state (*ne/non bis in idem*). Shared responsibility can arise if the requested state knowingly extradites an individual in breach of any of the above treaty safeguards, and the requesting state tries that person for a political offence or for an act that is not criminalised in both states or for an offence for which she/he has already been tried in any of the cooperating states.

Extradition treaties also commonly provide that the requesting state can only prosecute and punish the extradited individual for the crime(s) for which she/he was extradited, and that penalties conform to any limitations established by the requested state (principle of specialty or speciality). The requested state may waive specialty and allow the prosecution of the extradited individual for crimes other than those included in the extradition request.[61] As a consequence, shared responsibility is unlikely to arise for its breach: the requested state will

[56] See e.g. *Toniolo* v. *San Marino and Italy*, App. No. 44853/10 (ECtHR, 26 June 2012) (*Toniolo*), para. 44.
[57] See e.g. *Soldatenko* v. *Ukraine*, App. No. 2440/07 (ECtHR, 23 October 2008), para. 114; and *Kaboulov* v. *Ukraine*, App. No. 41015/04 (ECtHR, 19 November 2009), para. 140.
[58] *Garayev* v. *Azerbaijan*, App. No. 53688/08 (ECtHR, 10 June 2010), para. 99.
[59] *Nasrulloyev* v. *Russia*, App. No. 656/06 (ECtHR, 11 October 2007), paras. 76-77.
[60] *Saadi* v. *Italy*, App. No. 37201/06 (ECtHR, 28 February 2008), para. 74; *Kasymakhunov* v. *Russia*, n. 49, para. 165.
[61] Bassiouni, *International Extradition: United States Law and Practice*, n. 1, 541.

either be unaware of the requesting state's intentions and eventual breach of specialty, and will thus not bear any responsibility, or it will be aware of and acquiesce to the requesting state's conduct, in which case there can be no breach of the primary rule and hence no responsibility.

None of these safeguards fall as such within the competence of the ECtHR or the UN treaty bodies. Thus, to the extent that the violation of the treaty does not amount to a breach of some right protected under the ECHR or the ICCPR, the question arises whether the injured individual has standing to raise the breach of the extradition treaty before any (domestic) court. This question has been answered both in the affirmative and in the negative, as particularly shown in the case law of US courts, where the federal circuits are split on the issue.[62] If the individual has no standing there is no chance of adjudicating the (shared) responsibility of any of the cooperating states.

3. Secondary rules

3.1 Disentangling the responsibility of the cooperating states

In view of the complex interplay of primary obligations governing extradition and alternatives to extradition, it is crucial to discern the scope and legal basis of the responsibility of the cooperating states, as determined in international and domestic case law. This section will first examine whether the requested state may also be held responsible for any wrong when acting upon an unlawful extradition request of the requesting state (subsection 3.1.1). It will then explore the legal basis on which courts and treaty bodies have grounded the responsibility of sending states for contributing to the harm inflicted on the individual by the receiving states. Some have relied on the concept of attribution (subsection 3.1.2). None seem to have resorted to the rules on complicity under Article 16 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[63] (subsection 3.1.3). This is so because the primary obligations of sending states have been broadened in the case law of the ECtHR and treaty bodies so as to substitute for any derived responsibility they could have incurred as a result of the transfer (subsection

[62] See e.g. C. Blakesley, 'Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond – Human Rights Clauses Compared to Traditional Derivative Protections such as Double Criminality' (2000) 91 JCLC 1, at 55-8, with numerous references.
[63] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

3.1.4).

3.1.1 Responsibility for unlawful extradition requests

A line of judgments of the ECtHR seems to conflate the requesting state's instigation/direction to the requested state when issuing an (unlawful) extradition request with the exercise of extraterritorial jurisdiction by the requesting state. The latter state then is held responsible for the ensuing violation, such violation being 'attributed' to the requesting state. The main case in point is *Stephens* v. *Malta*. The British applicant was arrested and detained in Spain following an extradition request by the Maltese authorities, which was found to be invalid for lack of competence of the issuing court. Mr Stephens lodged an application before the ECtHR against both Spain and Malta. His complaints against Spain were struck out of the list. As the Court explained in the merits phase, 'a requested State should be able to presume the validity of the legal documents issued by the requesting State'.[64] The ECtHR referred to its case law on extraterritorial jurisdiction, thus implying that through the arrest warrant Malta had exercised control over the applicant when he was arrested in Spain. The Court explained that 'the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities';[65] 'the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be *attributed* to Malta notwithstanding that the act was executed in Spain'.[66]

Apart from being criticised for failing to give any (principled) explanation as to why the applicant was within the jurisdiction of Malta,[67] this reasoning is at variance with Article 8 of the ARSIWA on attribution (referring to instructions and direction of control over *non-state* actors), as well as Article 17 of the ARSIWA on direction and control, which would have resulted in holding both Malta and Spain responsible.[68]

[64] *Stephens* v. *Malta (No. 1)*, App. No. 11956/07 (ECtHR, 21 April 2009), para. 52.
[65] Ibid., para. 51.
[66] Ibid., para. 52 (emphasis added).
[67] See the critical remarks voiced in *Smith, R (on the application of)* v. *Secretary of State for Defence & Anor* [2010] UKSC 29 (30 June 2010), para. 46 (Lord Philips) and para. 280 (Lord Collins). See also M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011), 204-205.
[68] M. den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) 60 NILR 411, 425.

Nonetheless, the ECtHR reaffirmed this reasoning in *Toniolo* v. *San Marino and Italy*.[69] Thus it would seem that the ECtHR is developing its own *lex specialis* on the responsibility of requesting states for unlawful extradition requests on the basis of the attribution concept. In *Toniolo*, however, unlike Malta in *Stephens*, Italy's extradition request to San Marino was valid as a matter of Italian law, both substantive and procedural, and Italy was not held responsible for the applicant's detention in San Marino.[70]

Indeed, it follows from the admissibility decisions in *Wedler* v. *Poland*[71] and *Beniashvili* v. *Russia and Georgia*[72] that when issuing a valid extradition request, the requesting state may not be held responsible for the individual's ensuing detention and any violations surrounding the detention or the extradition proceedings in the requested state, provided that such detention pending extradition remains within the exclusive jurisdiction of the requested state.

Reliance on attribution for acts of another state (albeit at odds with the ARSIWA) should not come as big surprise, since the idea of state responsibility for the conduct of another state does present some analogy to attribution. This analogy was used by James Crawford to defend the inclusion of the rules on derived responsibility in the ARSIWA as secondary rules.[73]

3.1.2 Responsibility of sending states on the basis of attribution

The similarity between the rules on derived responsibility for the conduct of another state and the concept of attribution may also account for the reliance by some domestic courts on the language of attribution to refuse extradition requests that would result in contributing to human rights violations in foreign jurisdictions. Thus the Constitutional Court of Spain has repeatedly held that violations of fundamental rights by foreign authorities may be *imputed* to

[69] *Toniolo*, n. 56.
[70] Ibid., para. 56.
[71] *Wedler* v. *Poland* (Decision), App. No. 44115/98 (ECtHR, 27 May 2003).
[72] *Benihasvili* v. *Russia and Georgia* (Decision), App. No. 39549/02 (ECtHR, 13 March 2012), para. 47.
[73] In his Second Report on State Responsibility, UN Doc. A/CN.4/498/Add.1 (1999), para. 167, Crawford linked attribution to derived responsibility in the following terms: 'it may be justified to *attribute* the wrongfulness of State A's conduct to State B, which is implicated in that conduct because of assistance given or direction or coercion exercised' (emphasis added).

the Spanish courts if the latter authorise extradition in full knowledge of such violations.[74] Likewise, the Constitutional Court of Peru has held that any infringement on the right to life resulting from the imposition of the death penalty by a court in China would be *imputable* to Peru for not having made adequate and reasonable assessment of the relevant guarantees offered by China.[75]

3.1.3 The (ir)relevance of complicity under Article 16 ARSIWA

Reliance on the concept of attribution, instead of the rules on derived responsibility under the ARSIWA, can arguably also be explained by the stringent conditions of complicity under Article 16 of the ARSIWA that could have provided a legal basis for shared responsibility.

In principle, extradition and related transfers can be a form of aid or assistance within the meaning of Article 16 of the ARSIWA,[76] in the sense that the transfer can facilitate the denial of the person's rights by the receiving state.[77] The transfer does not simply make it materially easier for that state to inflict harm on the extradited individual; it can make it possible. In *Mohamed and Another* v. *President of the Republic of South Africa and Others*, a case of disguised extradition, the reasoning of the Constitutional Court of South Africa was particularly telling:

> The causal connection is clear between the handing over of Mohamed to the FBI for removal to the United States for trial without securing an assurance against the imposition of the death sentence and the threat of such a sentence now being imposed on Mohamed … The removal … could not have been effected without the cooperation of the South African immigration authorities. [78]

However, Article 16 of the ARSIWA is quite narrow in scope, as it requires both (actual) knowledge of the circumstances in which aid or assistance is intended to be used by the acting

[74] Constitutional Court of Spain, Judgment No. 13/1994 of 17 January 1994, Recurso de amparo 3368/1993, BOE núm. 41. Suplemento (17 February 1994), at 61; Judgment No. 141/1998 of 29 June 1998, Recurso de amparo 2018/1997, BOE núm. 181. Suplemento (30 July 1998), at 27.
[75] *Lamas Puccio (on the application of Wong Ho Wing)* v. *Permanent Criminal Chamber of the Supreme Court of Justice of the Republic of Peru*, Appeal to the Supreme Court of Peru, Case No. 02278-2010-PHC/TC, ILDC 1886 (PE 2011), 24 August 2011, para. 8.
[76] H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2013), 225.
[77] Cf. *Tarakhel* v. *Switzerland*, App. No. 29217/12 (ECtHR, 4 November 2014) (Joint Partly Dissenting Opinion of Judges Casadevall, Berro-Lefèvre and Jäderblom).
[78] *Mohamed and Another* v. *President of the Republic of South Africa and Others*, CCT 17/01 [2001] ZACC 18, Judgment of 28 May 2001, paras. 54 and 61.

state[79] and intention to facilitate the commission of the wrongful conduct, which must actually occur.[80] Thus a sending state can only be complicit under this Article if it *actually* knew that the receiving state would inflict some harm to the transferred individual, and *intended* to facilitate or contribute to it. Attempts to also include constructive knowledge (that the complicit state *should* have known that it was assisting in the commission of an internationally wrongful act) in Article 16 of the ARSIWA were resisted.[81]

This double condition (actual knowledge and intention) is rather unlikely to be met in extradition cases.[82] It implies some form of connivance that is not characteristic of the cooperation typically exhibited in the context of extradition, given the substantial involvement of the judiciary, which is (or should be) independent from the executive, let alone the executive of the requesting state. On the other hand, it should not be forgotten that in many states the final decision to extradite falls on the executive. Diplomatic assurances can be relevant here for those sending states wishing to prove that they did not intend to facilitate the commission of the wrongful act. Such a scenario is however not unlikely to materialise in atypical extraditions (and, *a fortiori*, in the case of abductions with the cooperation or acquiescence of the host state), where various branches of the executive take a leading role and the role of the judiciary is deliberately circumvented.

3.1.4 Risk-based responsibility under primary obligations of sending states

The difficulty in relying on Article 16 of the ARSIWA to deal with most complicity scenarios in the context of extradition and related transfers has been remedied by resort to primary rules that can take precedence as *lex specialis* (as per Article 55 of the ARSIWA). The case law of human rights courts and treaty bodies has broadened the scope of substantive (negative and positive) obligations under international human rights law.[83] Such obligations are more far-reaching than Article 16 of the ARSIWA, and cure some of its deficiencies.[84]

[79] Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 16, para. 4.
[80] ARSIWA Commentary, ibid., Commentary to Article 16, para. 5.
[81] J. Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 406.
[82] See also B. Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62 ICLQ 523, 527 with respect to abolitionist states and the death penalty.
[83] M. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions*

Under the doctrine first articulated by the ECtHR in *Soering* v. *the United Kingdom*, a sending state may be held responsible if it removes a person to a receiving state where there are substantial grounds for believing that she/he will face a real risk of being subjected to treatment contrary to Article 3 of the ECHR.[85] In such a case, Article 3 implies an obligation not to extradite or deport the person concerned to that country.[86] In a similar vein, the Constitutional Court of Spain spoke of an obligation of Spanish courts to *prevent* violations of fundamental rights by foreign authorities.[87] Likewise, the Ontario Superior Court of Justice in Canada refused extradition to the United States of an individual who had suffered serious human rights violations during his detention in Pakistan at the instigation of the US authorities, with a view to '*preventing* similar abuse in the future' and '*dissociating itself* with the conduct of the requesting State'.[88] Thus the responsibility of the sending state may arise from the violation of such primary obligations and does not depend on whether the rights of the individual are eventually violated by the receiving state.

As clarified by the ECtHR and the Human Rights Committee, what is at issue is not whether the receiving state has violated or is likely to violate the human rights of the transferee, but whether by removing the individual the sending state exposes that person to a real risk of proscribed ill-treatment in the receiving state, and it can bear responsibility for the foreseeable consequences of the transfer that are (to be) suffered outside its own jurisdiction as a result of treatment inflicted in the receiving state.[89] Despite the inevitable assessment of conditions in the receiving state, 'there is no question of adjudicating on or establishing [that state's] responsibility, whether under general international law, under the [ECHR] or otherwise'.[90] Such cases are not about extraterritorial application and are therefore not inadmissible *ratione loci*.[91] Insofar as any responsibility is incurred, it is the responsibility of the sending state for action within its jurisdiction – that is, its decision to remove the individual – which has as a

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(Oxford: Hart, 2004), 140. See also J. Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 ILSA JICL 525.

[84] Aust, *Complicity and the Law of State Responsibility*, n. 76, 415-416.

[85] *Soering*, n. 18, para. 88; *Mamatkulov and Askarov* v. *Turkey*, n. 30, para. 68.

[86] *Vilvarajah and others* v. *the United Kingdom*, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991), para. 103; *Saadi* v. *Italy*, n. 60, para. 125.

[87] *Domenico Paviglianiti* v. *República de Italia*, n. 42, at 106; also Judgment No. 13/1994, n. 74, at 61 (emphasis added). In *Ryabikin* v. *Russia*, n. 32, para. 120 (emphasis added), the ECtHR also stressed that assessing the conditions of the applicant's prospective detention in Turkmenistan should take place prior to the decision on extradition in order to *prevent* the ill-treatment from occurring.

[88] *The Attorney General of Canada* v. *Khadr*, 2010 ONSC 4338, 4 August 2010, para. 151 (emphasis added).

[89] *Kindler* v. *Canada*, n. 8, para. 13.1; cf. *Soering*, n. 18, paras. 85 and 91.

[90] *Soering*, ibid., para. 91.

[91] *Iskandarov* v. *Russia*, n. 26, para. 120; Milanovic, *Extraterritorial Application of Human Rights Treaties*, n. 67, 9.

result or direct consequence the individual's exposure to a real risk of proscribed ill-treatment in another jurisdiction.[92]

It becomes obvious that such pronouncements involve the responsibility of sending states for potential violations by the receiving states. The ECtHR took this rather uncommon path 'in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by [Article 3]'.[93] Risk-based responsibility is thus justified by reference to the values underpinning the ECHR: that is, the 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Convention's Preamble refers.[94]

On a somewhat different note, the Human Rights Committee has based the responsibility of sending states on their (positive) obligation under Article 2 of the ICCPR to ensure and guarantee the rights of all persons within their territory and subject to their jurisdiction.[95] In the case law of the Human Rights Committee (as well as in that of the ECtHR),[96] this legal basis is particularly used when an individual faces a real risk of being subjected to the death penalty in the receiving state.[97]

The person concerned is not required to establish with certitude that she or he will be tortured or ill-treated, which is an eventuality that cannot be proven; the individual is required to show a high likelihood of ill-treatment.[98] The existence of such risk must be assessed in each individual case with reference to those facts that were known *or ought to have been known* to the sending state at the time of the transfer.[99]

The disconnection with the actual infliction of ill-treatment by the receiving state is apparent in numerous cases. The fact that it is impossible to establish whether the applicant was actually subjected to ill-treatment following her/his return has no bearing on the Court's

[92] *Kindler* v. *Canada*, n. 8, para. 13.1; *Umirov* v. *Russia*, n. 32, para. 92. Note here that for the most part the Court has been using the term 'liability' instead of 'responsibility'. *Soering*, n. 18, para. 91; *Mamatkulov and Askarov* v. *Turkey*, n. 30, para. 67; *Saadi* v. *Italy*, n. 60, para. 126.
[93] *Soering*, ibid., para. 90.
[94] Ibid., para. 88.
[95] See Human Rights Committee, General Comment No. 31, n. 7, para. 12.
[96] See e.g. *Kaboulov*, n. 57, para. 99.
[97] *Kindler* v. *Canada*, n. 8, para. 6.2; *G.T.* v. *Australia*, Communication No. 706/1996, HRC, Views of 4 November 1997, para. 8.1.
[98] *Rustamov* v. *Russia*, App. No. 11209/10 (ECtHR, 3 July 2012), para. 117; *Azimov* v. *Russia*, App. No. 67474/11 (ECtHR, 18 April 2013), para. 128; *Yakupova (on behalf of Bauetdinov)* v. *Uzbekistan*, Communication No. 1205/2003, HRC, UN Doc. CCPR/C/92/D/1205/2003 (2008), para. 6.3.
[99] *Cruz Varas and others* v. *Sweden*, App. No. 15576/89 (ECtHR, 20 March 1991), para. 75; *Vilvarajah*, n. 86, para. 107.

findings, as was emphasised in *Iskandarov* v. *Russia*, where the applicant's special distinguishing features '*could and ought* to have enabled the Russian authorities to *foresee* that he *might be* ill-treated in Tajikistan'.[100] Even when the risk of such treatment materialised, as was alleged in *Garabayev* v. *Russia*, it only served to strengthen the conclusion that there had been a violation of Article 3 of the ECHR by reason of Russia's failure to make a proper assessment of the risk prior to the applicant's extradition.[101] The Court's rationale was perhaps most cogently articulated in *Mamazhonov* v. *Russia*. In refuting Russia's submissions that persons previously extradited to Uzbekistan had not been subjected to ill-treatment, the Court invoked the absolute nature of Article 3 of the ECHR and noted that 'the assumption that certain people in a comparable situation might have been fortunate enough to avoid these risks may not lessen the weight attached … to well substantiated claims of a real risk of ill-treatment'.[102] The Committee Against Torture has made similar findings in *Abichou* v. *Germany*[103] and *Sogi* v. *Canada*.[104]

In conclusion, the primary obligation of *non-refoulement* embodies a refusal of sending states to cooperate and thus become complicit in torture and other serious ill-treatment. The high threshold of establishing the responsibility of the sending state under Article 16 of the ARSIWA is thus lowered in two respects: first, the sending state incurs independent responsibility based on the real *risk* of ill-treatment irrespective of the receiving state's actual conduct and responsibility; and second, the responsibility of the sending state is not based on intent but solely on actual or even *constructive* knowledge.

3.2 Remedies

In most extradition and deportation cases, remedies have been indicated either to sending states with a view to precluding the removal of the persons concerned, or to receiving states to remedy any violations suffered by the transferred individuals. These remedies fall outside the scope of the present chapter. The following account is thus limited to those rare cases where

[100] *Iskandarov* v. *Russia*, n. 26, paras. 131-132 (emphasis added).
[101] *Garabayev* v. *Russia*, n. 29, para. 82.
[102] *Mamazhonov* v. *Russia*, App. No. 17239/13 (ECtHR, 23 October 2014), para. 146.
[103] *Abichou* v. *Germany* (Decision), Communication No. 430/2010, UNCAT, UN Doc. CAT/C/50/D/430/2010 (2013), para. 11.7 ('the fact that Onsi Abichou was ultimately not subjected to such [ill-] treatment following his extradition cannot be justifiably used to call into question or minimize, retrospectively, the existence of such a risk at the time of his extradition').
[104] *Sogi* v. *Canada* (Decision), Communication No. 297/2006, UNCAT, UN Doc. CAT/C/39/D/297/2006(2007), para. 10.8.

both states were found responsible, as well as the increasing number of cases where receiving states have one way or another been implicated in implementing the remedies indicated to sending states.

3.2.1 Cessation, guarantees of non-repetition, other specific performance

In *Ng* v. *Canada* and *Judge* v. *Canada*, the Human Rights Committee concluded that the complainant was entitled to an appropriate remedy, which would include Canada making such representations as were possible to the United States to prevent the carrying out of the death penalty.[105] In *Tebourski* v. *France*, concerning the complainant's deportation to Tunisia, the Committee Against Torture wished to be informed of the steps taken by France to determine, in consultation with Tunisia, the complainant's whereabouts and the state of his well-being.[106] Similarly, in *Sogi* v. *Canada*, concerning the complainant's deportation to India, and in *Boily* v. *Canada*, the same Committee requested Canada to consult with India and Mexico, respectively.[107] In the same vein, in *Israil* v. *Kazakhstan*, the Human Rights Committee requested Kazakhstan to put in place effective measures for monitoring the situation of the extradited complainant, in cooperation with the receiving state (China).[108] In *Kalinichenko* v. *Morocco*, the Committee Against Torture urged Morocco to provide redress for the complainant, including establishing an effective follow-up mechanism to ensure that he was not subjected to torture or ill-treatment in the receiving state, Russia.[109] It also welcomed Russia's undertaking to allow the Committee to visit the complainant in prison, and requested Morocco to facilitate the visit.[110]

The ECtHR has been more reluctant to indicate specific measures that would guarantee non-repetition of violations.[111] However, the Court seems to be moving towards softening its very

[105] *Ng* v. *Canada*, Communication No. 469/1991, HRC, UN Doc. CCPR/C/49/D/469/1991 (1994), para. 18; *Judge* v. *Canada*, n. 8, para. 12.
[106] *Tebourski* v. *France*, Communication No. 300/2006, UNCAT, UN Doc. CAT/C/38/D/300/2006 (2007), para. 10.
[107] *Sogi* v. *Canada*, n. 104, para. 12; *Boily* v. *Canada*, n. 25, para. 16.
[108] *Israil* v. *Kazakhstan*, Communication No. 2024/2011, UNCAT, UN Doc. CCPR/C/103/D/2024/2011 (2011), para. 11.
[109] *Kalinichenko* v. *Morocco* (Decision), Communication No. 428/2010, UNCAT, UN Doc. CAT/C/47/D/428/2010 (2011), para. 17.
[110] *Kalinichenko*, ibid.
[111] The Court has repeatedly emphasised that it is not empowered to do so because its judgments are essentially declaratory in nature, and that it falls on the respondent states to decide how to remedy a deficient situation, provided that any measures are compatible with the Court's conclusions. See e.g. *Nasrulloyev* v. *Russia*, n. 59, para. 95, and *Garayev* v. *Azerbaijan*, n. 58, paras. 122 and 125, where the Court refused to request the

rigid approach in its recent case law. In particular, while still stopping short of 'formulating specific orders', in *Dzhurayev* v. *Russia* the ECtHR suggested certain 'general measures to prevent similar violations'.[112]

3.2.2 Restitution

In *Abdussamatov et al.* v. *Kazakhstan*, the Committee Against Torture urged Kazakhstan to provide redress for the complainants, who had already been extradited to Uzbekistan, including their return to Kazakhstan.[113] Likewise, in *X* v. *Sweden*, the Human Rights Committee held that Sweden was under an obligation to provide the complainant with an effective remedy, including facilitating his return to Sweden from Afghanistan, where he had been deported, if he so wished.[114] In the same vein, in *Serrano Sáenz* v. *Ecuador*, the Inter-American Commission on Human Rights recommended Ecuador to 'take the necessary and timely measures, legal and diplomatic, with a view to the return of said person to his country of birth, from where he was arbitrarily deported'.[115]

On the other hand, the ECtHR again has been initially reluctant to indicate specific measures of restitution,[116] let alone measures involving the receiving state. In the early *Bozano* v. *France* case, the Court refused to recommend that France approach the Italian authorities through diplomatic channels with a view to securing either a presidential pardon or a reopening of the criminal proceedings against the applicant in Italy, since such a course of action would amount to recommending France to intervene in the enforcement of final decisions of the Italian courts.[117] In *Iskandarov* v. *Russia*, the Court's reasoning for refusing to require Russia to ensure the applicant's release from the Tajik prison and his return to Russia was particularly telling: 'the individual measure sought by the applicant would require

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respondent governments to amend their legislation governing detention pending extradition.

[112] Such measures included further improvement of domestic remedies in extradition and expulsion cases, effective protection of potential victims against irregular removal, and effective investigation into every breach of such measures: *Dzhurayev* v. *Russia*, n. 2, paras. 258, 262-263. See also *Mamazhonov* v. *Russia*, n. 102, para. 237.

[113] *Abdussamatov et al.* v. *Kazakhstan*, Communication No. 444/2010, UNCAT, UN Doc. CAT/C/48/D/444/2010 (2012), para. 15.

[114] *X* v. *Sweden*, Communication No. 1833/2008, HRC, UN Doc. CCPR/C/103/D/1833/2008 (2011), para. 11.

[115] *Serrano Sáenz* v. *Ecuador*, Inter-American Commission on Human Rights, Case 12.525, Report No. 84/09 of 6 August 2009, para. 80(1).

[116] For example, in *Garayev* v. *Azerbaijan*, n. 58, paras. 122 and 125, the Court refused to order Azerbaijan to release the applicant from detention pending his extradition.

[117] *Bozano* v. *France*, n. 45, para. 65. The Court also pointed out that the applicant's complaints against Italy were not in issue before it, the Commission having declared them inadmissible.

the respondent Government to interfere with the internal affairs of a sovereign state'.[118]

In an apparent sea change in approach, the Court's more recent case law points to 'the current state of development of international law and international relations' which 'does not make it impossible for the respondent state to take tangible remedial measures with a view to protecting the applicant against the existing risks to his life and health *in a foreign jurisdiction*'.[119] While again stopping short of indicating specific measures, the ECtHR directed Russia 'to find out and use in good faith such legal, diplomatic and/or practical means as may be necessary to secure to the maximum possible extent the applicant's right which the Court has found to have been violated'.[120] According to the Court, any difficulties in taking remedial measures in the applicant's favour that arise from the fact that he remains outside Russia's jurisdiction should not exempt the respondent state from its legal obligation to take all measures within its competence in order to put an end to the violation found, and make reparation for its consequences.[121]

3.2.3 Compensation

In *Shamayev and others* v. *Georgia and Russia*, the only extradition case where both respondent states were found responsible for (separate) violations of the ECHR, the Court made separate awards in respect of non-pecuniary damage for each category of violations, and for each state separately. It awarded different amounts of damages (having regard to the gravity of the violations and equitable considerations) with respect to substantive violations by Georgia, procedural violations by Georgia, and procedural violations by Russia.[122] Four of the applicants were awarded damages on all three counts of violations.

The execution of such awards is, however, particularly difficult in the case of applicants who have been removed to the jurisdiction of receiving states that are not party to the ECHR, and whose whereabouts are unknown. In these cases, either the amount is held in trust for the

[118] *Iskandarov* v. *Russia*, n. 26, para. 161.
[119] *Dzhurayev* v. *Russia*, n. 2, para. 254 (emphasis added). The Court referred to its judgments in *Al-Saadoon and Mufdhi*, n. 12, para. 171 and *Othman*, n. 33, paras. 23-24 and 194-205; the Council of Europe Committee of Ministers Resolution CM/ResDH(2012)68 of 8 March 2012; as well as the measures taken by Russia to secure the applicant's return from Turkmenistan in *Garabayev* v. *Russia*, n. 29.
[120] *Dzhurayev*, ibid., para. 253.
[121] Ibid.
[122] *Shamayev and others* v. *Georgia and Russia*, n. 4, para. 525.

applicants by their representatives,[123] or the respondent states are directed to facilitate contact between the applicants, on the one hand, and their representatives and the Committee of Ministers of the Council of Europe, on the other.[124]

It is noteworthy that some applicants (e.g. in *Iskandarov* v. *Russia* and in *Dzhurayev* v. *Russia*) have justified their claims to large amounts on the basis of their ill-treatment and suffering in the receiving state (Tajikistan) following their unlawful transfer.[125] The Court did not comment on the treatment of the applicants in the receiving state, and limited its very brief reasoning of the amount awarded to the violations of the respondent sending state. In clearer terms, in *Bozano* v. *France*, the Court rejected the applicant's claim that France should compensate him in respect of his detention not only in France, but also in Switzerland, where he was handed over by French police officers, as well as in Italy where the Swiss authorities had extradited him. According to the applicant, there was a direct and sufficient causal link between his 'abduction' from France and the foreseeable and intended consequences of the ensuing deprivations of his liberty in Switzerland and Italy. The Court however accepted France's argument that the applicant's deprivations of liberty in Switzerland and Italy did not flow from any action taken by the French authorities.[126]

3.2.4 Satisfaction

In those cases where extradition or expulsion has not taken place, but the ECtHR found that the decision to extradite or expel the applicant would, if implemented, give rise to a violation of Article 3 of the ECHR, the Court considered that its finding in itself amounted to adequate just satisfaction and therefore did not award any pecuniary damages.[127]

Interestingly, in *Boily* v. *Canada* the Committee Against Torture requested that Canada provide effective redress to the complainant, including 'as full rehabilitation as possible by providing, inter alia, medical and psychological care, social services, and legal assistance,

[123] *Labsi* v. *Slovakia*, n. 33, para. 155; *Dzhurayev* v. *Russia*, n. 2, para. 251; *Kasymakhunov* v. *Russia*, n. 49, para. 198.
[124] *Muminov* v. *Russia* (Just Satisfaction), App. No. 42502/06 (ECtHR, 4 November 2010), para. 19; and *Kamaliyevy* v. *Russia* (Just Satisfaction), App. No. 52812/07 (ECtHR, 28 June 2011), para. 14.
[125] *Iskandarov* v. *Russia*, n. 26, para. 153; and *Dzhurayev* v. *Russia*, n. 2, para. 234.
[126] *Bozano* v. *France* (Just Satisfaction), App. No. 9990/82 (ECtHR, 2 December 1987), para. 9.
[127] See, among others, *Saadi* v. *Italy*, n. 60, para. 188; *Umirov* v. *Russia*, n. 32, para. 160; *Rustamov* v. *Russia*, n. 98, para. 194; *Azimov* v. *Russia*, n. 98, para. 181.

including reimbursement for future services and legal expenses'.[128] Such redress would have to be provided by Canada in Mexico, where the complainant would remain in detention. Indeed, in its response to the Committee, Canada explained, inter alia, that it continued to provide the complainant with consular services, including consular visits on a routine basis, as appropriate.[129]

4. Processes

Determinations of multiple responsibility in the context of extradition and related transfers are quite infrequent. As shown above, the case law of the ECtHR and treaty bodies has construed broadly the primary obligations of sending states to cover the prospect of potential violations by the receiving states. The vast majority of relevant case law thus relates to the independent responsibility of one of the cooperating states; that is, for the most part, the sending state. There are many international and domestic judicial, quasi-judicial, and non-judicial bodies that can make determinations of such independent responsibility. The following analysis however relates mostly to the available processes for determining multiple responsibility.

4.1 Multiple responsibility

4.1.1 Scarce formal determinations by a single actor

Courts and treaty bodies face jurisdictional and practical problems in making determinations of shared responsibility involving both the sending and receiving states. To begin with, many receiving states, where individuals have suffered or are facing a serious risk of ill-treatment, are either not party to applicable treaties (e.g. the ECHR)[130] or have not accepted the individual complaints procedure of the UN treaty bodies.[131] Moreover, the rules of procedure of the Human Rights Committee and the Committee Against Torture do not provide for the

[128] *Boily* v. *Canada*, n. 25, para. 15.
[129] UNGA, 'Report of the Committee Against Torture, Forty-seventh session: Forty-eight session', UN Doc. A/67/44 (12 November 2012), at 195.
[130] Applications concerning alleged human rights violations in non-contracting (receiving) states are readily dismissed as incompatible *ratione personae* with the Convention's provisions. See e.g. *Rustamov* v. *Russia*, n. 98, para. 184, for the part of the application alleging human rights violations committed in Uzbekistan.
[131] As of December 2014, more than 110 states were party to the Optional Protocol to the ICCPR and less than 30 states had made the declaration of Article 22 of the Convention against Torture recognising the competence of the respective Committees to consider individual communications.

possibility of submitting a complaint against more than one state. As a consequence, there has been no decision by these Committees against multiple states.

On the other hand, the ECtHR complaint mechanism allows applications against multiple states party to the ECHR.[132] However, given the constraints of the *Soering* formula, there is no question of making any (formal) determination of the responsibility of a non-contracting receiving state, let alone before the individual is extradited. Determinations of responsibility of both the sending and receiving states by the ECtHR in cases of extradition and alternatives to extradition are thus only possible if: a) the individual i) has been unlawfully removed and has been ill-treated in the receiving state or ii) suffered violations by the requested state during her/his detention pending extradition, following an unlawful extradition request by the requesting state (as per *Stevens* v. *Malta*); b) both states are party to the ECHR; and c) in cases of extradition, the two states are not EU member states and thus do not make use of the European Arrest Warrant framework. These conditions, in addition to any procedural requirements that should not be underestimated, account for the rather small number of applications lodged against both the sending and receiving states in extradition cases. Most of them have been found inadmissible against one or both respondent states for non-exhaustion of local remedies, non-compliance with the six-month rule, or for being manifestly ill-founded.[133]

As of the end of 2014, only two extradition cases (*Shamayev and others* v. *Georgia and Russia* and *Toniolo* v. *San Marino and Italy*) had reached the merits phase, and only in the former have both states been found responsible for violations of the ECHR.[134]

[132] Such possibility is not provided in the ECHR, but in Rule 47(1)(c) of the ECtHR Rules of Court, in force 1 July 2014, available at www.echr.coe.int/Documents/Rules_Court_ENG.pdf (last accessed in December 2014).
[133] For instance, in *Manoussos* v. *the Czech Republic and Germany* (Decision), App. No. 46468/99 (ECtHR, 9 July 2002), the applicant's complaint under Article 5 of the Convention that the German authorities, by secretly co-operating with the Czech authorities, were jointly responsible for his allegedly unlawful deprivation of liberty in the Czech Republic, was found to be wholly unsubstantiated and manifestly ill-founded and was dismissed as inadmissible. In *R.D.* v. *Greece and Italy* (Decision), App. No. 22722/93 (EComHR, 11 January 1995), the European Commission of Human Rights dismissed as manifestly ill-founded the applicant's complaint that Greece, by extraditing him to Italy, was also responsible for his allegedly inhuman treatment during his eight-month detention in Italy.
[134] In particular, in *Shamayev and others* v. *Georgia and Russia*, n. 4, Georgia was found, among others, to have breached Article 5(2) and 5(4) and Article 13 ECHR, n. 11, (paras. 423-428, 431-434, 437-467) and Russia was only found to have breached procedural obligations under Articles 34 and 38(1) of the Convention, by obstructing the Court's fact-finding visit and denying access to the applicant detainees in Russia, which had made it impossible for the Court to establish part of the facts and thus properly examine the applicants' claims of alleged violations by Russia of Articles 3 and 6 of the Convention (paras. 491, 504, 517-518).

4.1.2 Frequent implicit/informal determinations by a single actor

The ECtHR has always emphasised that there is no question of adjudicating on or establishing the responsibility of receiving states, whether under general international law, the Convention, or otherwise.[135] Nonetheless, the ECtHR has not hesitated to make pertinent determinations on the lawfulness of conduct of receiving states as an indispensable step for pronouncing on the responsibility of sending states.[136] Its case law has developed a rather sophisticated way of assessing the human rights situation in (mostly non-contracting) receiving states with a view to overcoming, in a very pragmatic way, the absence of those states from the proceedings. Such absence still brings the respondent sending state into the rather awkward position of having to defend the human rights situation of the receiving state to avoid its own responsibility for removing the person concerned to the latter state's custody. This is the course of action that domestic courts in several jurisdictions, which still adhere to the doctrine of non-inquiry, refuse to follow.

In its determinations on the general human rights situation in receiving states, the ECtHR routinely relies on reports recently issued by reliable and objective sources, which include UN treaty bodies (especially the Human Rights Committee and the Committee Against Torture), reputable international non-governmental organisations (NGOs) (most often Amnesty International and Human Rights Watch), as well as other contracting or non-contracting states (for the most part, the US Department of State).[137]

In *Shakurov* v. *Russia*, the Court summarised and explained the factors to which it gives consideration in its case law when making determinations concerning receiving states. These include the independence, reliability, and objectivity of the source; the authority and reputation of the author of relevant reports; the consistency of their conclusions and their corroboration by other sources; and the presence and reporting capacities of the author of the material in the country in question (emphasising, in this respect, the ability of diplomatic missions to gather information and the ability of UN agencies to have direct access to the

[135] *Soering*, n. 18, para. 91; *Mamatkulov and Askarov* v. *Turkey*, n. 30, para. 67.
[136] M. den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 JIDS 361, 373.
[137] See e.g. *Ismoilov et al.* v. *Russia*, App. No. 2947/06 (ECtHR, 24 April 2008), para. 120; *Soldatenko*, n. 57, para. 67.

authorities of the requesting country and to carry out on-site inspections and assessments).[138]

For example, with regard to transfers to Uzbekistan, the Court has repeatedly found, with reference to materials from various sources, that the general human rights situation in Uzbekistan was alarming; that the practice of torture against those in police custody was 'systematic' and 'indiscriminate';[139] and has confirmed that 'ill-treatment of detainees remains a pervasive and enduring problem in Uzbekistan'.[140]

4.1.3 Rare determinations by multiple actors

The most important case involving (separate) determinations of multiple wrongdoings by more than one body in the context of extradition and related transfers is that of *Iskandarov* v. *Russia*, dealing with the acts of the sending state (Russia), before the ECtHR. This was followed by *Iskandarov* v. *Tajikistan*, dealing with the acts of the receiving state (Tajikistan), before the Human Rights Committee. The ECtHR examined the human rights situation in Tajikistan as per the formula discussed in the previous section. The Human Rights Committee, however, did not examine the role of Russia in handing over the complainant to Tajikistan.

4.2 The limits/discontents of independent responsibility

Despite the preponderance of independent responsibility in the context of extradition and related transfers, some cases illustrate the limits and discontents of independent responsibility when an individual suffers injury as a result of cooperative action in the fight against crime.

The unfortunate facts of *Panait* v. *Romania* are quite illustrative.[141] The Romanian applicant was arrested and detained in Hungary for almost three weeks before being extradited to Norway on the basis of an extradition request by the Norwegian authorities. The Norwegian

[138] *Shakurov* v. *Russia*, App. No. 55822/10 (ECtHR, 5 June 2012), para. 127; also *Umirov* v. *Russia*, n. 32, para. 99.
[139] See e.g. *Kasymakhunov* v. *Russia*, n. 49, para. 122, with further references to numerous other judgments.
[140] E.g. *Ismailov* v. *Russia*, App. No. 20110/13 (ECtHR, 17 April 2014), para. 85. Likewise, the ECtHR has repeatedly accepted that 'ill-treatment of detainees is an enduring problem in Tajikistan'. See e.g. *Khodzhayev* v. *Russia*, App. No. 52466/08 (ECtHR, 12 May 2010), para. 98; *Khaydarov* v. *Russia*, App. No. 21055/09 (ECtHR, 20 May 2010), para. 105.
[141] *Panait* v. *Romania* (Decision), App. No. 52197/09 (ECtHR, 26 November 2013).

authorities set the applicant free immediately after it was proven that she had been mistaken for another person as a result of inaccurate information given by the Romanian authorities. She lodged an application against Romania for violation of Article 5(1) of the ECHR, alleging that her unlawful detention was the result of negligence and lack of due diligence by the Romanian authorities in giving inaccurate information that formed the basis of the Norwegian arrest warrant. The ECtHR did note that the Romanian authorities had not demonstrated 'exemplary diligence', but dismissed the application as inadmissible because it was not lodged against either Norway, which had issued the arrest warrant, or Hungary, which had executed it.[142] The decision cited *Stephens* v. *Malta*, but by application of this case, as well as *Toniolo* v. *San Marino and Italy*, neither Norway nor Hungary would have been held responsible. The applicant's detention in Hungary had its sole origin in the acts of the Norwegian authorities (as per *Stephens*), which could not bear responsibility for having issued a valid arrest warrant (as per *Toniolo*). Yet it is disturbing to conclude that there had been no violation in the circumstances of the case.

Similarly, the outcome of *Sari* v. *Turkey and Denmark*, which concerned the length of extradition and criminal proceedings (overall more than eight years) against the applicant in the respondent states, was also problematic. The ECtHR accepted that the process of international cooperation between the two states was not prompt at all stages, which was unfortunate but 'inevitable'. However, the Court evaluated the conduct of each respondent state separately and found no violation of Article 6 of the ECHR because any delays resulted from the joint responsibility of Denmark and Turkey and could not be attributed to any of them separately.[143] This case exemplifies the limits of independent responsibility.[144] Such a (rather outlier) scenario of an injury resulting from cumulative conduct not involving independent violation by any of the cooperating states is not covered either by the ARSIWA or by any *lex specialis*.

It is noteworthy that in both *Panait* and *Sari*, the ECtHR made particular reference to the framework of international criminal cooperation within which both states acted,[145] arguably alluding that it would not require any higher standards of due diligence than normally

[142] Ibid., paras. 20-21. The Court noted that Romania could not be held responsible because the Romanian authorities did not participate in the decision process concerning the necessity of depriving the applicant's liberty; mere transmission of information within the framework of international cooperation could not be regarded as assistance or active cooperation in a deprivation of liberty ordered by a third country.
[143] *Sari* v. *Turkey and Denmark*, App. No. 21889/93 (ECtHR, 8 November 2001), paras. 91-92, 96-100.
[144] Den Heijer, 'Shared Responsibility before the European Court of Human Rights', n. 68, 424.
[145] See *Panait*, n. 141, para. 21 and *Sari*, n. 143, para. 92.

exhibited in such situations so as not to inhibit interstate cooperation in this respect. The Court's concern not to frustrate international cooperation in the administration of justice had earlier also been verbalised in *Drozd and Janousek* v. *France and Spain*.[146]

Lastly, while the indispensable parties rule does not preclude determinations of (individual) responsibility by the ECtHR and the UN treaty bodies, it can still be an obstacle to relevant determinations by other organs. A case in point is that of a Bhutanese national who was arrested in Nepal in 1989 and handed over to the Bhutanese authorities on the basis of border agreements on police cooperation between Bhutan and neighboring countries. In considering the legality of his transfer, the Working Group on Arbitrary Detention concluded that it could not accept the allegation in the form in which it was presented because the Nepalese authorities would be implicated.[147]

5. Concluding remarks

Extradition and alternatives to extradition provide a fertile ground for shared responsibility. The cooperating states bear numerous and complex obligations under both international human rights law and extradition law, which have been elaborated and refined in a rich and sophisticated case law of regional and domestic courts, UN treaty bodies, and other actors. This is probably so because the injured party is for the most part the requested individual, who can gain easier access than an injured state to judicial and other bodies that can determine the (shared) responsibility of the cooperating states.

The ease and frequency of such access, coupled with the nature of the rules and values that are at stake in the case of injury (human dignity, absolute prohibition of torture, etc.) and the urgent need for effective protection, also account for superseding the ordinary ILC rules on complicity that are too stringent and can rarely be met in the normal course of extradition. By broadening the applicable primary (*non-refoulement* and positive) obligations of sending states, the ECtHR and treaty bodies have considerably lowered the high threshold of complicity under Article 16 of the ARSIWA, and have construed and accommodated a *lex specialis* functionally similar to complicity.[148] Such *lex specialis* involves the independent

[146] *Drozd and Janousek* v. *France and Spain*, n. 40, para. 110.
[147] UN ECOSOC, Decisions adopted by the Working Group on Arbitrary Detention (Revised Decision No. 3/1996, Bhutan), UN Doc. E/CN. 4/1997/4/Add.1 (1996), para. 7.
[148] Aust, *Complicity and the Law of State Responsibility*, n. 76, 393.

risk-based responsibility of the sending state irrespective of the actual infliction of harm and responsibility of the receiving state. This scheme has proven to be useful in preventing responsibility for complicity and protecting potential victims of torture and other serious human rights violations. Yet, however accommodative, such independent responsibility is not without its discontents in complex factual scenarios, mainly due to concerns not to disrupt unduly interstate cooperation in the fight against crime. Moreover, independent responsibility has also come at the expense of determinations of multiple state responsibility. In this respect, the practice and case law of extradition does not help much to clarify some of the thorny issues of shared responsibility, such as the apportioning of compensation in case of injury.

Indeed, when it comes to remedies, there remain obstacles in the existing scheme that hinder effective redress when, for instance, an individual has been extradited to a state that is beyond the reach of available formal or informal processes. Still, recent shifts in case law indicate the willingness of adjudicative bodies to come up with pragmatic ways of overcoming such obstacles, by involving both states in the process of providing redress to injured individuals. This trend shows that the practice and case law on extradition can be among the subject areas that may contribute to the further refinement of shared responsibility in the near future.