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THE RESPONSIBILITY OF STATE-PARTIES TO THE ECHR FOR THE CONDUCT OF FOREIGN AGENTS – BUILDING ON THE 'SOERING DOCTRINE' OR A GENERAL REGIME OF INTERNATIONAL STATE RESPONSIBILITY? *EL-MASRI V. "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"*, APP. NO. 39630/09, ECTHR JUDGMENT OF 13.12.2012

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1. Introduction

The European Court of Human Rights (hereinafter referred to as "the Court" or "the ECtHR") has a long history of adjudicating cases which involve state actions seeking to counteract terrorism. Such actions formed the background of the Court's first case – *Lawless v. United Kingdom* (judgment of 1.7.1961), and the well-known *Ireland v. United Kingdom* case (judgment of 18.1.1978) or the *McCann v. United Kingdom* case (judgment of 27.9.1995). Understandably, the compliance of anti-terrorist measures with the standards set out in the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter as

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"Convention" or "ECHR") has also been the subject of the Court's scrutiny following the events of 9/11, particularly in the context of assessing the admissibility of deportation or extradition orders, ill-treatment, detention and procedural guarantees[1].

At least since 2006, there has been much interest on the part of the Council of Europe (CoE) in investigating the co-operation of certain CoE Member States with the Central Intelligence Agency of the United States of America, insofar as such co-operation resulted in the establishment of secret detention facilities within the jurisdiction of those Member States. Another aspect of the CoE's investigation concerned allegations of "extraordinary renditions", i.e. transferring suspected terrorists into the hands of the CIA, which in turn placed them in detention at so-called "black sites" outside the jurisdiction of the US government or European states.[2] This practice utilized so as to enable terrorist suspects to be subjected to interrogation techniques which are qualified as torture under international human rights law.

Against this background, the Court's judgment in the *El-Masri v. the former Yugoslav Republic of Macedonia* case can be perceived as a leading precedent regarding the assessment of "extraordinary renditions" in the context of the Convention's standards. It is not hard to foretell that any rendition which places an individual at risk of ill-treatment is to be considered a violation of Article 3 of the ECHR. It is equally obvious as regards 'detention incommunicado' which falls short of basic procedural guarantees enshrined in Article 5 of the Convention. Nonetheless, the *El-Masri* judgment deserves some attention due to the methodology applied by the Court in attributing state responsibility under the ECHR to the Macedonian government. Furthermore, the *El-Masri* judgment seems

[1] See „Factsheet – Terrorism" (April 2013) – a list of cases with a short description thereof, compiled by the Registry of the Court and available at the Court's website: www.echr.coe.int

[2] The ECtHR has defined "extraordinary rendition" as "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" (Babar Ahmad and Others v. the United Kingdom, ECtHR decision regarding admissibility of 6.7.2010, § 113). This definition was borrowed from the reports of the United Kingdom Intelligence and Security Committee (cf. *ibidem* and § 81 of the Babar Ahmad decision).

to be of crucial significance when adjudicating other cases of a similar nature, and in particular the *Al-Nashiri v. Poland* case communicated by the Court in 2012[3].

2. Facts of the Case

The applicant was a German national of Lebanese origin who was detained by the Macedonian authorities on 31.12.2003, following an attempt to cross the Macedonian border. The applicant's deprivation of liberty took place in a hotel room in Skopje for twenty-three days. During that time, the applicant was repeatedly interrogated and constantly observed. He was not allowed to contact the German embassy at any time. It has been established that, on 23.1.2004, the applicant was blindfolded and taken to Skopje Airport, where he was beaten, stripped, sodomized, shackled and hooded which resulted in his total sensory deprivation. He was then forcibly taken aboard a CIA aircraft and flown to Afghanistan, where he was detained for five months. It was only on 29.5.2004 that the applicant was transferred back to Germany via Albania.

No domestic investigation was launched in Macedonia, despite the applicant's criminal complaints. An internal inquiry by the Macedonian authorities denied the applicant's allegations. An investigation was undertaken by the German prosecuting authorities and by a parliamentary commission in *Bundestag*. The version of events presented by Mr El-Masri was verified and confirmed in both German proceedings. The applicant's account was also appraised as credible in reports drawn-up by special rapporteur Dick Marty, who was appointed in this capacity by the Parliamentary Assembly of the Council of Europe to investigate "alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe member States" (the so-called "Marty report" published on 12.6.2006). Having reviewed a plethora of direct and indirect evidence corroborating the applicant's version of events, the Court considered that "it can draw inferences from the available

[3] Application no. 28761/11, communicated on 10.7.2012. See also *Al-Nashiri v. Romania,* application no. 33234/12, communicated on 18.9.2012.

material and the authorities' conduct and find the applicant's allegations sufficiently convincing and established beyond reasonable doubt." (§ 167 of the judgment).

While it is barely relevant for a legal evaluation of the facts at hand, it represents a dreadful and bitter irony that, according to the source material, Mr. El-Masri was wrongfully mistaken for a suspect terrorist whose name happened to be similar to his own. It was nothing more than a case of mistaken identity.

3. Judgment of the Court

The Court found that the FYR of Macedonia had violated Article 3 of the Convention by failing to carry out an effective investigation into the applicant's allegations of ill-treatment, and by virtue of the inhuman and degrading treatment to which the applicant was subjected while being held in the hotel in Skopje. The ECtHR also attributed to Macedonia the applicant's ill-treatment at the hands of the CIA agents at Skopje airport, and found that this amounted to torture within the meaning of Article 3 of the Convention (§ 5 of the operative part of the judgment).

Furthermore, the Court ruled that "the responsibility of the respondent State is engaged with regard to the applicant's transfer into the custody of the United States authorities despite the existence of a real risk that he would be subjected to further treatment contrary to Article 3 of the Convention" (§ 6 of the operative part of the judgment). Moreover, violations of Article 5 of the Convention were established with respect to the applicant's detention in the hotel for twenty-three days, as well as the "applicant's subsequent captivity in Afghanistan". The Court also ruled that the FYR of Macedonia failed to carry out an effective investigation into the applicant's allegations of arbitrary detention. In addition, the Court concluded that violations of Articles 8 and 13 of the Convention had taken place.

The applicant was awarded EUR 60,000 in respect of non-pecuniary damage.

4. Evaluation

It could be argued that the facts of the case – as established by the Court – leave little, if any, room for undermining the Court's conclusions as regards the violation of substantive provisions of the Convention. However, it is worth taking a closer look at the Court's reasoning as regards the attributability of state conduct which led to the violations of Article 3 and 5 of the Convention. The *El-Masri* judgment provides an opportunity to raise significant issues as regards the scope of State Parties' responsibility for acts of other states. In particular, the case is illustrative of the Court's readiness to attribute a wrongful act committed by a non-State party to a State-party which directly contributed to – or even aided or assisted in – the commission of an internationally wrongful act. While the attribution of another state's conduct is legally possible under the international law of state responsibility, and not unheard of in international practice, it is useful to enquire whether the Court was willing to apply the concepts developed within the general regime of state responsibility or whether it preferred to go its own way.

For the sake of clarity, it should be distinguished between activities involving Macedonian officials and those which were undertaken by foreign agents. It is undisputed that the applicant was detained on 31.12.2003 by Macedonian authorities, although the detention itself at the border post was, in fact, not considered contrary to Article 5 of the Convention. Following the detention, the Macedonian officials were directly involved in: (1) taking the applicant to the Skopje hotel, (2) guarding and interrogating the applicant there, (3) transferring the applicant to Skopje airport and handing him over to the CIA rendition team. Conversely, the US agents were involved in: (1) mistreating the applicant at Skopje airport, (2) removing him from Macedonian territory by plane on 23.1.2004 and (3) interrogating and mistreating the applicant while keeping him in custody between his removal from Macedonia until 28.5.2004.

In view of the above, it comes as no surprise that the actions of the Macedonian security forces led to the state's responsibility regarding the applicant's treatment at the hotel and his exposure to ill-treatment

following his rendition to CIA officers. The conduct of Macedonian officials at the hotel was considered as inhuman and degrading treatment (§ 204 of the judgment), whereas the measures applied against the applicant following his rendition to the CIA were qualified as torture (cf. para 211 of the judgment). Although the latter measures and techniques were *de facto* performed by CIA agents, the Court was absolutely correct to indicate that Macedonian agents "actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring" (*ibid.*).

In terms of the general rules of state responsibility, the applicant's rendition *per se* can be qualified as an act of aiding and assisting in the commission of an internationally wrongful act[4]. The relevant provision of the *ILC Articles on State Responsibility for Internationally Wrongful Acts* (hereinafter as: *ILC Articles*) was included in the "relevant law" section of the judgment (see § 97) but the Court's reasoning, in fact, does not refer to this at all. From the perspective of the Convention, the prohibition of torture and other inhuman and degrading treatment or punishment was clearly violated within the Macedonian jurisdiction. The Court itself reminded that respondent states are responsible under the Convention for acts performed by foreign officials on their territory with the acquiescence or connivance of their authorities (§ 206 of the judgment). Thus, there was no doubt that the Macedonian authorities were fully responsible for the events which took place both at the Skopje hotel and within the airport.

However, according to the El-Masri judgment, the responsibility of Macedonia under the Convention did not stop there. The applicant's removal from Macedonian territory was deemed to constitute a violation of Article 3 of the Convention, in accordance with the *Soering* doctrine[5]. It is well-established in the Court's case-law that even the very risk of exposing an applicant to treatment abroad which contravenes Article 3 (e.g. following extradition or deportation) gives rise to a violation on the part

[4] Cf. Article 16 of the *ILC Articles on State Responsibility for Internationally Wrongful Acts*, adopted on 3.8.2001 ('Yearbook of the International Law Commission' 2001, Vol. II). The relevant provision stipulates: *A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.*

[5] Soering v. United Kingdom, judgment of 7.7.1989.

of the transferring state. Consequently, the decision allowing the removal of Mr El-Masri – notwithstanding the absence of any legal basis therefor (§ 102 of the judgment) – and his actual removal from Macedonian soil, had to be considered as engaging Macedonia's responsibility under Article 3 of the Convention. However, in accordance with the 'classic' *Soering* doctrine, such responsibility results from the actions of the ECHR state-party and does not cover the actions of the requesting state.

Expressing his comments on the El-Masri judgment, A. Nollkaemper alleges that it is rather ambiguous to consider Macedonia as *responsible under the Convention for acts performed by foreign officials on its territory*[6]. The author observes that the Court in fact attributed the CIA's conduct to Macedonia, which raises the question whether it is legally permissible to consider a State responsible for acts that it has actually *not* undertaken. The idea that the principle of international state responsibility may be applicable even though the responsible state did not commit the wrongful act might, indeed, seem rather unorthodox. Nevertheless, that is actually not the kind of situation we are dealing with here. It could reasonably be argued that the wrongful act of Macedonia which gave rise to its responsibility under the Convention consisted in directly permitting torture to take place on its soil and within its jurisdiction, thus violating the prohibition enshrined in Article 3 of the Convention. Needless to say, the conduct of the CIA agents at Skopje airport should also be considered as amounting to a violation of international law, even if it falls outside the jurisdiction of the Court.

Having regard to the above, the Court did not err in attributing the applicant's torture at Skopje airport to the Macedonian authorities, since it was the latter which, in fact, made the torture possible. The Court's reasoning in this regard is sound, even though a more direct reference to the general rules of state responsibility, and in particular to the concept of aiding and assisting enshrined in Article 16 of the *ILC Articles*, should have been included in the Court's line of argument. A more explicit and extensive reliance on the *ILC Articles* would dispel doubts concerning the legal concept of state responsibility under the ECHR for acts performed

[6] Cf. E. Nollkaemper, *The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?,* 'EJIL Talk' available at www.ejiltalk.org, published on 24.12.2012, PDF version, at p. 3.

by foreign officials. Let us reiterate that this concept does not seem to differ in its essence from that adopted in the general regime of state responsibility, i.e. a breach of an international obligation and its attribution to the state leads to the international responsibility of that state. There is nothing unusual in considering that a state breached its obligations by directly exposing an individual to torture, even if the latter was physically perpetrated by third parties (foreign agents in this case) rather than by the respondent State itself. Why not, then, call such conduct 'by name' and identify it as 'aiding and assisting in the commission of an internationally wrongful act'?

A more peculiar line of reasoning was applied by the Court with respect to issues falling to be decided under Article 5 of the Convention, i.e. the arbitrary deprivation of liberty. Whilst attributing the applicant's arbitrary detention between 31.12.2003 and 23.1.2004 to the Macedonian authorities was based on normal standards, the applicant's captivity following his surrender to the CIA agents was attributed to Macedonia on the basis that this exposed the applicant to a real risk of a flagrant breach of Article 5 of the Convention. Again, instead of referring to the concept of aiding and assisting, the Court preferred to use its own concept, which could be regarded as an expanded version of the *Soering* doctrine. The "original" doctrine did not imply that the responding state is responsible for material breaches of the Convention which actually took place following a person's surrender to the requesting state. However, in the El-Masri case, the Court was determined to consider as a violation of Article 5 not only the very act of removing the applicant and exposing him to a flagrant breach of that provision, but also the subsequent detention itself (at the CIA's black site in Afghanistan). According to the Court,

> the Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to be aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004[7].

[7] § 239 of the judgment.

Interestingly, the Court used the concept of a composite act, within the meaning of Article 15 of the *ILC Articles*, to support its conclusion regarding Macedonia's responsibility for the violation of Article 5 of the Convention in the period following the applicant's rendition (cf. § 240)[8]. This is a good example of applying the concepts of the general law of state responsibility to establish the temporal scope of the breach at hand.

However, it should be pointed out that the Court did not go so far as to also attribute to the Macedonian authorities the applicant's ill-treatment during his detention in Afghanistan. A. Nollkaemper was correct to observe that this might be seen as a lack of consequence[9]. It may appear as if the Court abruptly stopped in the middle of its way: on the one hand, it was ready to consider the whole period of the applicant's enforced disappearance as attributable to Macedonia whereas, on the other hand, it seemed unprepared to declare that, by allowing the applicant's extraordinary rendition, Macedonia actually aided or assisted in the applicant's mistreatment by US agents. Nevertheless, legally speaking, would it not be too far-stretched to attribute to Macedonia the applicant's treatment while he was being held in Afghanistan by foreign state agents? The Court had already established Macedonia's responsibility for submitting the applicant to the risk of ill-treatment, applying the 'classic' *Soering* doctrine. Would it be correct to assume – from a legal perspective – that, by surrendering a person to foreign agents, the transferring state accepts responsibility under the ECHR for any human rights violations which might occur during the person's detention by the receiving state? This does not seem to be the case, as it would entail an expansion of the Convention's scope far beyond the state parties' jurisdiction (cf. Article 1 of the Convention) and it would depart from the existing framework of state responsibility for an internationally wrongful act. In particular, it cannot be argued that the applicant's ill-treatment while in CIA captivity

[8] Article 15 of the ILC Articles reads as follows: 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

[9] *Ibidem*.

in Afghanistan is part and parcel of a composite act attributable to Macedonian authorities.

Conclusions

In summary, the El-Masri judgment can be perceived as an example of the Court's progressive approach towards attributing to a State Party a violation of Article 5 of the Convention which results directly from an extraordinary rendition. This concept has been applied by the Court with little reliance on the 'aiding and assisting' model expressed in Article 16 of the *ILC Articles*. Instead, the Court preferred to expand the *Soering* doctrine and to utilize the concept of a 'composite act', while doing so only with respect to the right to freedom and security, and not as regards the prohibition of torture and other ill-treatment. Accordingly, the *El-Masri* case has created a precedent and may exert a strong influence on how other cases involving extraordinary rendition are adjudicated. The Court's reasoning concerning the attributability of conduct in violation of Article 5 will most probably be used in the *Al-Nashiri v. Poland* case, although it appears that Polish agents were not directly involved in the latter applicant's apprehension and ill-treatment. Nevertheless, in both the El-Masri and Al-Nashiri cases, it is the principle of state jurisdiction in terms of Article 1 of the Convention which is pivotal to the examination of the case. Irrespective of the above, a more comprehensive reliance on the general principles of state responsibility in the Court's case-law would certainly contribute to its clarity and legal value.