

EXTRAORDINARY RENDITIONS IN THE FIGHT AGAINST TERRORISM. FORCED DISAPPEARANCES?

Patricio Galella and Carlos Espósito*

If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.¹

1 Introduction

After the attacks of September 2001, U.S. President George W. Bush declared a global ‘war’ against international terrorism (BUSH, 2001) in which, eluding the usual channels of international cooperation, he authorized a program of abductions, detentions, and transfers of presumed terrorists to secret prisons in third-party States. It is suspected that torture was used as a means of interrogation there, with the aim of obtaining information about future terrorist attacks. This practice of secret detentions, abductions on foreign territory, and transfers without respect for the minimum guarantees of due process has been given the name “extraordinary rendition” (SADAT, 2005; WEISSBRODT; BERQUIST, 2006).²

As Judge Antônio Cançado Trindade indicated in his reasoned opinion in the *Goiburú* case, Extraordinary Renditions is reminiscent of the transnational practices of Operation Cóndor (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006, Voto razonado, párra. 55), a program that constitutes a clear case of State terrorism according to the Inter-American Court of Human Rights (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006, párra. 66). Operation Cóndor was plotted by military regimes in South America in the 1970s, and included a secret plan for information sharing, illegal detention, torture, forced disappearance and extrajudicial executions of political opponents based on the doctrine of national security. We acknowledge that there are many differences between these two situations

*We are grateful to Alejandro Chehtman and Pietro Sferrazza for their comments on a previous version of this work.

regarding their justifications, their methods, and their ends. Nevertheless, the comparison is useful to demonstrate how the evolution of international law makes it possible for some detentions to be qualified as forced disappearances under the definition of the term ‘extraordinary rendition.’ In fact, the Extraordinary Renditions program includes cases in which the presumed terrorists were secretly detained and sent to ‘black holes’ without any information or record of their fate or whereabouts due to the authorities systematically denying any such detentions.

In this paper, we maintain that, under certain conditions, Extraordinary Renditions goes beyond the concept of arbitrary detention and, as a consequence, shows similarities to the concept of forced disappearance of persons. This distinction is relevant, among other reasons, because cases of Extraordinary Renditions that can be qualified as forced disappearances could constitute a violation of the norms of *ius cogens*, generating an aggravated international responsibility for those States who commit these illegal acts and the possibility of trial for crimes against humanity for individual perpetrators.

2 Forced disappearances in international law

The concept of forced disappearance of persons first appears in Hitler’s “Night and Fog Decree” of December 17, 1941 which stated that any person who, in territories occupied³ by Germany, threatened the security of the German State or of the occupying forces should be transported in secret to Germany where, without further ado, they would disappear. At the same time, it was strictly forbidden to give information on the fate of these people, thereby creating a situation of despair and uncertainty not only for the family of the person who had disappeared but also for the general population. (ESTADOS UNIDOS DE AMÉRICA, 1942).

This phenomenon resurfaced as a policy of systematic state repression in the 1960s, when Guatemalan security forces used forced disappearance as part of its campaign against the insurgency. This strategy was subsequently picked up by other countries on the continent when military regimes were installed in Argentina, Brazil, Chile, and Uruguay (NACIONES UNIDAS, 2002, p. 7). As of this time, forced disappearance acquired international pre-eminence and attention.

The United Nations (UN) first included the subject in its agenda in the 1970s, but it was only in 1980 that it approved the creation of a Working Group designed to act as a link between the victims’ families and the States. This was the first thematic procedure of the Commission on Human Rights.⁴ On February 13, 1975, encouraged by the situation in Cyprus, the UN Commission on Human Rights urged the States to make efforts to locate people whose whereabouts were unknown (NACIONES UNIDAS, 1975). Due to it being an armed conflict ruled by international humanitarian law, the term used was ‘missing persons’ or ‘persons unaccounted for’ (NACIONES UNIDAS, 2002, párra. 12). But in 1977, with regards to Chile, the UN General Assembly expressed its concern over the “disappearance of people for political reasons” (NACIONES UNIDAS, 1977) and on December 20, 1978, with Resolution 33/173, it made reference to the “forced or involuntary disappearance of people due to excesses committed by authorities charged with law enforcement or security, or by analogous organizations.”

These events signified the beginning of a codification process of forced disappearances in international law. Concerned about the phenomenon's persistence, the UN General Assembly took the first step in 1992 by approving the Declaration on the Protection of all Persons from Enforced Disappearance. In 1994, the Organization of American States approved the first legally-binding instrument on the matter: the Inter-American Convention on the Forced Disappearance of Persons. The issue was taken further in 1998 when the Chairperson-Rapporteur of the Working Group on the administration of justice at the UN presented a Preliminary Draft Convention inspired by the 1992 Declaration and the Convention against Torture. The process was concluded in 2006 with the adoption of the Protection of all Persons from Enforced or Involuntary Disappearance by the UN General Assembly of the International Convention (GALELLA, 2011).

According to Article 2 of the International Convention, every forced disappearance contains at least three constitutive elements and a direct consequence. The first element is the privation of freedom, whichever way this is carried out. Although in most disappearance cases the privation of freedom is produced without following legal procedures, detention can also be carried out following a judicial order. In this case, it is only after the authorities take detainees to secret detention centers that they refuse to provide information or make the person available to the judicial authorities. The difference between arbitrary detention and forced disappearance lies precisely in that in the latter, the State refuses to either recognize its participation in the detention or facilitate information on the fate of the detained person (OTT, 2011, p. 32). The second characteristic element is the participation of the State,⁵ whether directly, through its agents, or by its acquiescence in allowing the practice within its borders by people outside of state institutions. The necessary participation of the State in any of these forms is the defining and characteristic element and this has been upheld by civil society organizations that do not recognize the existence of a forced disappearance without State participation. If the State does not participate, we must use the concept of illegitimate privation of freedom, which should be challenged by the State. This difference is reflected in the International Convention, which establishes the obligation of investigation and punishment of cases committed by non-State agents in Article 3. The third element is the refusal by the authorities to provide information on the whereabouts and fate of the missing person. This refusal affects not only the missing person, but also their families, causing anguish and despair. The refusal extends to the actual existence of the detention and to the release of information regarding the whereabouts of the missing person. This refusal leads to the direct consequence mentioned above: the removal of the person from the protection of the law. This is the case because it automatically carries with it the impossibility of the victim and their family questioning the legality of the person's detention before a competent judge and of having access to the guarantees of due process inherent to a State governed by the rule of law. Through forced disappearance, the State not only takes away the freedom, and, in most cases, the life of the detainee, but it is also done secretly, leaving no trace. When the State has no intention of demonstrating that the person is effectively missing, it leaves the victim in a state of total defenselessness (GOMEZ CAMACHO, 2007, p. 28-29).

3 International cooperation in criminal matters and its deviations

Information and intelligence sharing as well as the coordination of strategies in the fight against terrorism has as its ultimate goal the prevention of terrorist threats from becoming a reality. If these materialize and those responsible are outside the jurisdiction of the State affected, cooperation procedures can be used, such as extradition, deportation, or transfer of a person with the aim of proceeding to their judgment or the fulfillment of an existing conviction (EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, 2006).

Extradition is the most important example of international cooperation in judicial terms. It consists of the handing over of a fugitive from justice by one State to another State for their judgment or to comply with the execution of a sentence that has been previously handed down. This is a formal procedure regulated by various international treaties. In the European sphere, there is the European Convention on Extradition, made in Paris on December 13, 1957, the Convention relating to the simplified extradition procedure between member States of the European Union of March 10, 1995, and the Extradition Convention between the member States of the European Union made in Dublin on September 27, 1996. On June 13, 2002, the European Union approved a framework decision adopting the European arrest warrant (CONSEJO EUROPEO, 2002), which is intended to replace the above-mentioned instruments and the purpose of which is to speed up the handing over of persons requested by another State in the European Union for the prosecution of criminal charges or for the execution of a custodial sentence or security measure. In the Americas, extradition is regulated by the Inter-American Convention on Extradition of 1981, made in Caracas on February 25, 1981.

These treaties regulate extradition and establish a series of material requirements for its authorization, such as the existence of events giving cause for extradition and the exclusion of political crimes, among others. But in addition, the States must take into account certain factual circumstances before authorizing an extradition request. One of the most important restrictions consists of the obligation of the requested State to refuse the extradition request when there are legitimate grounds to believe that in the requesting State the life or safety of the person requested will be in endangered. This limitation is known as the principle of *non refoulement* or non-return and was originally included in Article 33(1) of the Convention Relating to the Status of Refugees, drawn up in Geneva on July 28, 1951, to be applied to refugees. Over time, the principle has been extended to other areas of international law and has been recognized in other international instruments as shown in Article 3(1) of the International Convention against Torture, made in New York on December 10, 1984, Article 16(1) of the International Convention for the protection of all persons against enforced disappearance, made in New York on December 20, 2006, Article 22(8) of the American Convention on Human Rights, made in San José on November 22, 1969, and the Inter-American Convention for the prevention and punishment of torture, made in Cartagena, Colombia on September 12, 1985. Although the International Convention on Civil and Political Rights does not contain a specific provision, the Human Rights Committee, in its General Comment No. 20 on Article 7 of the Covenant, pointed out that “States Parties must not expose individuals

to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement” (NACIONES UNIDAS, 1992, p. 35). Therefore, as was affirmed by the European Court of Human Rights in the case of *Soering vs United Kingdom* in 1989 (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1989a, p. 33-36), the requested State must abstain from authorizing an extradition when there are legitimate grounds for believing that the requested person will be the victim of torture or other inhuman treatment or that his or her life will be at real risk.

Extradition is the classic international cooperation procedure in judicial matters, but it is not the only one, nor does it prevent the use of alternate methods of handing over an individual (REMIRO BROTONS et al., 1997, p. 497). One practice used is the requested individual’s deportation or expulsion to speed up transfer or even to avoid the requirements of the extradition process. Deportation consists of the expulsion from a State’s territory of a foreigner whose presence is unwanted or considered prejudicial to the State, in accordance with its laws. In general, this involves civil procedures decided by the executive rather than the judicial power. Although this procedure must be carried out respecting a series of formalities, it is not as demanding as extradition (FINDLAY, 1988, p. 7). One of the most well known cases is that of Klaus Barbie, expelled from Bolivia in 1982 and detained by the French authorities for subsequent trial in France, where there were criminal proceedings open against him for his part in the Second World War. In 1974 France had requested extradition from Bolivia, but this had been denied on the basis of there being no extradition treaty between the two countries. At his trial, Barbie sustained that his deportation had been illegal, but the French court rejected this claim. Barbie took his case to the old European Commission on Human Rights, which determined that Barbie’s deportation to France had been legal, and had not infringed Article 5 of the European Convention on Human Rights regarding a person’s right to liberty and security (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1984, p. 230).

Another practice used for capturing a suspect or a criminal and forcibly transferring them to another State’s territory for trial is international abduction. If a State carrying out the operation on foreign territory does this with the consent of the territorial State, there is no violation of the territorial State’s sovereignty, as it will have negotiated consent for the incursion into its territory; it is, therefore, a form of cooperation between States. This does not, however, present an obstacle to the eventual responsibility of those taking part in the abduction for the violation of the abductee’s human rights. On the other hand, if the incursion has not had the consent of the territorial State, the State undertaking the abduction or capture will have also violated the State’s sovereignty and incurred international responsibility. This is, for example, what happened with the abduction of Adolf Eichmann on Argentine territory and his subsequent transfer and trial in Israel. The action was organized in secret by Israeli forces and without the consent of the Argentine State. The UN Security Council demanded that the Israeli government make suitable amends to Argentina (NACIONES UNIDAS, 1960), which considered the case closed as soon as Israel officially presented its apologies. The illegality of Eichmann’s detention was not, however, considered by the Israeli court an impediment to his trial (ISRAEL, 1962, párra. 4).

The Israeli court applied the principle of *male captus bene detentus* (wrongly captured, properly detained), the most well known precedent of which goes back to the case of *Ker vs. Illinois* in 1886 in the United States. In this case, a racketeer had escaped to Peru and the U.S. government decided to hire a detective agency to detain and transfer him to its territory for trial. Despite the agency having the request and all the documents needed for negotiating the extradition in cooperation with the Peruvian authorities in its possession, Ker was abducted and transferred against his will and without the participation of the Peruvian authorities. The agency justified its actions by saying that as a consequence of the occupation of Lima by Chilean forces at the time, there was no authority with which to negotiate the extradition process. The accused, for his part, sustained that his arrest had been illegal because the extradition treaty in effect between the United States and Peru had been violated. The Supreme Court ruled that the method by which the accused had been brought before it was irrelevant as long as the laws of the United States had not been broken, and convicted Ker (ESTADOS UNIDOS DE AMÉRICA, 1886). This ruling was broadened in the case of *Frisbie v Collins* (1952) to include cases in which the laws of the U.S. had also been broken (ESTADOS UNIDOS DE AMÉRICA, 1952).

Other courts, however, have interpreted the subject differently. In 1991, the South African Court of Appeal decided on a case concerning a member of the African National Congress (ANC) to Swaziland. Once there, he was abducted by South African agents, repatriated, put on trial for treason, and condemned to 20 years in prison by the court. In the appeal, the Court held that the abduction had constituted a serious injustice that violated the right of person not to be detained illegally or abducted. It also affirmed that persons were protected against illegal detentions, that the impartiality of the justice system had to be upheld, and that sovereignty and territorial integrity had to be respected (SUDAFRICA, 1991). As a result, the Court of Appeal annulled the original decision. Another example can be found in the case of *R. v Horseferry Road Magistrates Court, ex parte Bennett*, which was deliberated by the House of Lords in 1994. In this case, the accused had been forcibly abducted and transferred from South Africa to the United Kingdom without going through the corresponding extradition process for trial. The accused was convicted, but appealed the decision before the House of Lords, which in turn decided that it was empowered to analyze the legality of the actions by which a person had been brought before British justice, and finally upheld the appeal (REINO UNIDO, 1994). In accordance with this decision, the court decided it was therefore empowered to refuse trial, which confirmed the ruling of *male captus bene detentus* as long as there was no national or international prohibition on pursuing the trial (CHEHTMAN, 2010).

In the United States, recourse to abductions of persons abroad has been practiced by the Administrations of Presidents Reagan, Bush (senior), Clinton, and Bush (junior). In 1986, for example, Reagan authorized the CIA to abduct suspects of certain crimes abroad for trial in the United States (FINDLAY, 1988, p. 7; DOWNING, 1990, p. 573). In 1989, as part of the American intervention in Panama, President Bush ordered the capture of Noriega⁶ for his subsequent trial in the case brought against him in U.S. courts for drug trafficking. Another relevant case is the abduction on Mexican territory of Humberto Álvarez Machaín for the murder

of a Drug Enforcement Administration (DEA) agent (ESPÓSITO, 1995).⁷ In this case, the U.S. Supreme Court recognized that the forced abduction of a person in another State constituted a violation of international law, but defended its right to try the person responsible for having violated the criminal laws of the United States. President Clinton, in turn, authorized a program for the capture of presumed terrorists (ESTADOS UNIDOS DA AMERICA, 1995) for the purpose of sending them to countries where there were criminal proceedings pending against them, which could be, but not necessarily, in the territory of the United States (FISHER, 2008). In a court appearance before Congress on April 17, 2007, Michael Scheuer, in charge of the program from 1995 to 1999, stated that the purpose was to capture presumed terrorists or participants in an attack against the United States or its allies, obtain documentation, and try them in the country that had started criminal proceedings against them. But he added that the goal of detention was not to submit them to interrogation (ESTADOS UNIDOS DE AMÉRICA, 2007, p. 12). As we will see later, these practices intensified with the ‘war’ on terror declared by the Bush (junior) Administration.

4 Extraordinary rendition

After the attacks of September 11, 2001, the United Nations Security Council approved resolution 1373 of September 28, 2001, which strongly condemned the terrorist acts and imposed a series of obligations on States aimed at strengthening international cooperation in the prevention and fight against terrorism. The States assumed, among other things, the obligation of sharing information with other governments about groups committing acts of terrorism, or planning to commit them, and of cooperating with other governments in the investigation, detection, detention, and prosecution of those taking part in such acts. The Security Council also created a Committee charged with oversight of the application of this resolution and increasing the ability of States in the fight against terrorism.

At the same time, the United States government authorized a national strategy to avoid terrorist attacks on its territory or against American citizens or installations abroad. This strategy included the holding of presumed terrorists in recognized or secret detention centers that were controlled by the U.S. but located outside its territory, and managed by third-party countries “representing” the United States. The detentions did not allow for basic guarantees of due legal process and were in violation of international law (SADAT, 2005; WEISSBRODT; BERQUIST, 2006; AMNESTY INTERNATIONAL et al., 2009).

One of the authorized practices combined the detention, abduction, and international transfer of presumed terrorists – without negotiating an extradition procedure, deportation, or expulsion – to third party countries to be interrogated using techniques equivalent to torture, inhuman or degrading treatment. This combination has received the name of extraordinary rendition, even though such a term does not exist as a concept in international law (SANDS, 2006). We are not dealing here with detaining and abducting criminals for subsequent prosecution (SANTOS VARA, 2007, p. 177-178), as had been used by the Reagan, Bush (senior), and

Clinton administrations, but rather the abduction or arbitrary detention of presumed terrorists in the territory of one State for their interrogation in another and relying on, in some cases, methods prohibited by international law.⁸ The program, known as the 'High Value Terrorist Detainee Program,' was designed to detain certain members of Al Qaeda considered to be of high value to the United States secretly and for long periods of time.

In general, the detention or capture was carried out with the consent, knowledge, and cooperation of the secret services of the State where the presumed terrorist was found (FOOT, 2007, p 24-25).⁹ The executing body of the U.S. was a special CIA unit known as the Special Removal Unit (HERBERT, 2005). Once detained, high value prisoners would be transferred, secretly and without respect for minimum guarantees, to third-party countries for interrogation. In 2005, Secretary of State Condoleeza Rice tried to justify and give a pretence of legality to the use of rendition when she stated that, for decades, the United States and other countries had used it for transporting supposed terrorists from the country where they had been found to their country of origin or another country to be interrogated, detained, or brought to justice. She also said that in certain cases, extradition was not effective and that rendition was a valid alternative allowed by international law. As one of the precedents for rendition, Rice pointed to the case of Carlos "The Jackal," who was abducted by the French authorities with the consent of Sudan (the country in which he was found), and tried for the murder of two French agents (ESTADOS UNIDOS DE AMÉRICA, 2005b). However, the Secretary General of the Council of Europe forcefully refuted this comparison by recalling that the detention of Carlos "The Jackal" had proceeded based on an existing detention order and that once detained, he had been brought before the judge with all the guarantees of due process (DAVIS, 2006), a situation that does not occur in the case of extraordinary rendition. In fact, as a result of the use of extraordinary detentions, some presumed terrorists have spent years without being accused of any crime and, in other cases, they have disappeared.

From the perspective of international human rights law, Extraordinary Renditions presents a series of serious anomalies. First, it is an assault on an individual's right to liberty and security, including even the life of the detainees, which affects the guarantees of due process. This is not a case of detaining and then extraditing a convicted person or one who is about to be tried. Rather, it is a preventive detention, carried out in secret with no intention of initiating criminal proceedings against the person.

Second, it is believed that presumed terrorists were transferred to third-party countries to be interrogated by methods prohibited by international law. According to news reports and articles, individuals were transferred to countries with a high risk of torture, such as Jordan, Syria, Egypt, and Morocco, and all countries that the U.S. State Department has criticized for their violations of human rights (ESTADOS UNIDOS DE AMÉRICA, 2008). In the case of confirmation that these individuals were submitted to this type of treatment,¹⁰ rendition would also constitute a violation of the prohibition on torture, which is a *ius cogens* and therefore obligatory for all States (BUTTON, 2007) and an infringement of the principle of *non refoulement* recognized in common and conventional international law. This principle is absolute

and unwavering, even in emergency situations.¹¹ In addition, the obligation to non refoulement extends to all types of transfer, that is, whether deriving from a process of extradition, expulsion, or deportation (ARBOUR, 2006) when there are grounds to believe that the person will be tortured or submitted to inhuman or degrading treatment. It is relevant, also, that in the case of Chahal and also that of Saadi, the European Court of Human Rights stated the absolute nature of this prohibition.

Third, the person who is detained arbitrarily and taken to a secret detention center is deprived of the opportunity to question the legality of their detention or to know on what charges they have been detained. In some cases, the detainees have disappeared without a trace (SADAT, 2005, p. 324) and are denied any contact with their families. No records exist of their detention or any acknowledgement by any government (WEISSBRODT; BERQUIST, 2006, p.127). During their entire secret detention, the detainees are victims of the crime of enforced disappearance of persons (SADAT, 2005, p. 322; INTERNATIONAL COMMITTEE OF THE RED CROSS, 2007, p. 24).

5 Extraordinary Renditions as forced disappearance

At the end of 2005, the Center for Human Rights and Global Justice at New York University published a list of persons detained in the war against terrorism whose whereabouts were unknown. The list, based on articles and reports in the press and investigations made by various NGOs, is divided into three categories:

1. Persons confirmed to be or to have been held in secret detention centers in the United States or in installations on foreign territory controlled by the United States.
2. Persons presumably held by the United States and who are probably held in secret detention centers controlled by the United States or in installations on foreign territory but controlled by the United States.
3. Persons who may be held by the United States and who may be held in secret detention centers controlled by the United States or in installations on foreign territory but controlled by the United States.

In category 1, the U.S. has admitted at some point that these persons have been detained by their authorities. Nevertheless, there has been no information on their fate or whereabouts. In categories 2 and 3, the U.S. has not admitted the detention and the difference between these categories lies in the degree of certainty over the detention. Cases in category 2 include substantial evidence of secret detention by the U.S. while in cases of category 3, there is only inconclusive evidence.

However, are the three elements present in these categories? That is: (i) the arrest, detention, abduction, or any other form of deprivation of liberty; (ii) the carrying out by agents of the State or by persons acting with the authorization, support or acquiescence of the State; and (iii) the concealment of the fate or whereabouts of the missing person and the consequent removal of the person from the protection of the law?

5.1 Arrest, detention, abduction, or any other form of deprivation of liberty

The first component of extraordinary detention is the detention or abduction of the presumed terrorist. It is public knowledge today that the United States has developed a strategy of detention for presumed terrorists in officially unacknowledged centers where they can remain for long periods of time. As we mentioned, the executing body of the U.S. government has been a special CIA unit known as the Special Removal Unit (HERBERT, 2005). This unit would be charged with capturing the presumed terrorists and transferring them to a “black site” directed by U.S. authorities or third-party countries, although always with the cooperation of the United States. The organizations Amnesty International and Human Rights Watch have published lists with the names of the persons supposedly detained arbitrarily in Iraq, Afghanistan, Pakistan, Indonesia, Thailand, Uzbekistan, and whose whereabouts are still unknown (AMNESTY INTERNATIONAL et al., 2009). Since these are secret detentions, there are no official records or acknowledgement by the authorities, resulting in the difficulty demonstrating the existence of these detentions and their duration. Nevertheless, it is useful to remember that the Committee on Legal Affairs of the Council of Europe Parliamentary Assembly has proven that, as part of the fight against terrorism, the U.S. government prepared a plan of abductions and transfers of presumed terrorists to various parts of the world. In its opinion, while some detainees were victims of arbitrary detention in the absence of any legal protection, others had simply disappeared for indefinite periods of time and were held in secret locations, including in the territories of member States of the Council of Europe, such as Poland and Romania (CONSEJO DE EUROPA, 2007, p. 7). The Polish authorities have denied any participation in cases of Extraordinary Renditions or the existence of secret detention centers on its territory. Nevertheless, in September of 2008, an ex-intelligence officer of this country confirmed that between 2002 and 2005 the CIA had held presumed terrorists in the Stare Kiejkuty base in northeast Poland (EASTON, 2008). The Romanian authorities have also refuted such accusations and said that their country did not maintain any secret detention centers during the fight against terrorism (EARTH TIMES, 2009).

5.2 The work of agents of the State or by persons acting with the authorization, the support, or the acquiescence of the State

According to Article 4 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, the conduct of any State organ shall be considered an act of the State under international law, whether this organ exercises a legislative, judicial or other function. In the case study, if it is irrefutably proven that Extraordinary Renditions was carried out by a special CIA unit and therefore by an organ of the United States government (BUTTON, 2007, p. 544), the logical consequence shall be to attribute the conduct of this unit to the United States of America.

The clearest acknowledgement of the existence of a plan to secretly detain presumed terrorists was given by the President of the United States, George Bush (junior), in a 2006 speech. On this occasion, he spoke of the need to secretly detain certain terrorists considered of high value to be interrogated by experts, and when appropriate, prosecuted. He, in turn, recognized that, in a limited number of cases, locations outside the territory of the United States had been used (BUSH, 2006). At the same time, some authors affirm that on September 17, 2001, Bush signed a decree – which has not yet been made public – authorizing the use of Extraordinary Renditions of presumed terrorists and their transfer to other States for detention or interrogation (MARGULIES, 2006, p. 189). Lastly, the conclusions presented by the Council of Europe report on the existence of secret detention centers directed by CIA agents in Poland and Romania between 2003 and 2005 confirm the existence of a plan for detentions and interrogations outside the territory of the United States (CONSEJO DE EUROPA, 2007, párra. 7).

It is important to remember that certain European States have also participated in Extraordinary Renditions. The cases of Abu Omar, Khaled El Masri,¹² Al-Rawi, El-Banna, El-Zari and Agiza are the most well-known and reflect the coordination of the secret services of Italy (SISMI), the United Kingdom (MI5) and Sweden (SÄPO) with the CIA in Extraordinary Renditions (NINO, 2007, p. 125 and ss). Furthermore, the European Parliament has opened investigations into the use of European airports for the detention and illegal transfer of presumed terrorists by the CIA (EUROPEAN PARLIAMENT, 2006).

5.3 Concealment of the fate and whereabouts of the missing person

A secret detention may occur not only in an officially unacknowledged location, but also in one that is acknowledged but has secret installations or sections. What determines the secret character of a detention center is whether or not the authorities of the State disclose the place of detention, any information on the fate of the detainee (NACIONES UNIDAS, 2010, p. 12) or deny its actual existence. If the detention centers in Guantánamo Bay and Abu Ghraib prison are very well-known, there are other installations, some of them secret, which have been used in the fight against terrorism. Some media reports even say that for some time, an airplane (BOLLYN, 2004) and a ship (IRUJO, 2008) on the high seas have been used as itinerant secret prisons.

In 2004, the Washington Post newspaper published various articles in which it affirmed that the U.S. government was secretly holding presumed terrorists in Iraq. The articles said that then U.S. Secretary of State, Donald Rumsfeld, had ordered the officials in charge not to include the records of certain detainees considered to be of high value to prevent monitoring by the International Committee of the Red Cross (CIRC) (TAGUBA, 2004, párra. 33) and, at the same time, not to disclose information to the enemy (SCHMIT; SHANKER, 2004). The number of ghost detainees (HUMAN RIGHTS WATCH, 2004, p. 8), that is, those whose detention had not been acknowledged, supposedly held in unofficial centers and without their families' notification, numbered over 30, although it is still very difficult to determine the

exact number as there are no records of these detentions (SCHMIT; JEHL, 2004; LINZER, 2009a) or the records have been modified, as Rumsfeld's order confirms.

For its part, Human Rights Watch has stated that the U.S. government has methodically refused to provide information on the fate or whereabouts of high value detainees (HUMAN RIGHTS WATCH, 2004, p. 8; LINZER, 2009a). The 2006 address of President Bush (junior) here becomes especially relevant because, by acknowledging the existence of a plan for secret detentions, he also acknowledged that the detention centers used could not be disclosed for reasons of security (BUSH, 2006).

An interesting case is that of the Spanish citizen of Syrian origin, Mustafa Setmariam Nassar, detained in 2005 in Pakistan by forces of that country and suspected to have taken part in the September 11 attacks. According to a report from the Council for Human Rights, he was held by the Pakistani authorities for some time before being handed over to the United States. Since, at this time, there has been no official acknowledgement of his fate or whereabouts, it is thought he was detained on the island of Diego García and that currently he is now in a secret detention center in Syria (NACIONES UNIDAS, 2010, p. 67). In response to a request by a Spanish judge (YOLDI, 2009) for information on the fate of Mr. Nassar, the FBI replied in June 2009 that the person mentioned was not in the U.S. at that time, without clarifying whether he was in the custody of the United States or indeed where he was. Furthermore, in response to various requests from NGOs, the CIA has replied that it could neither confirm nor deny the existence of files on the subject (NACIONES UNIDAS, 2010). The whereabouts of Mr. Nassar continue to be a mystery (GUTIÉRREZ, 2011).

6 Consequences in international law

Article 12 on the international responsibility of the State for wrongful acts stipulates that a violation of a State's international obligation occurs when an act of a State is not in compliance with that required of the State by the obligation, no matter what the origin or nature of this obligation. Every violation of an international obligation, therefore, results in international responsibility.

Extraordinary Renditions usually begins with the detention, abduction, or capture of an individual in the territory of a State, continues with the forcible transfer to a third-party State, and is completed with the application of interrogation methods prohibited by international law. In a certain number of cases, the detentions are not officially recorded or acknowledged by any authority, thereby constituting possible cases of forcible disappearance.

Extraordinary Renditions, as internationally wrongful acts, bring with them the international responsibility of the State for the violation of an international obligation. In the first place, if the abduction or the detention occurs without the consent of the territorial State, this State's sovereignty has been violated and it is entitled to suitable redress from the State that committed the violation. In the *Lotus* case, the Permanent Court of International Justice held that carrying out police operations in the territory of another State without its authorization constitutes a basic violation of sovereignty (CORTE PERMANENTE DE JUSTICIA, 1927) and the affected State has the right of redress from the State committing the violation. The

old European Commission of Human Rights said that an arrest by the authorities of one State in the territory of another, without its prior consent, not only results in the responsibility of one State toward the other, but also constitutes a violation of the right to security recognized in article 5 (1) of the Convention on Human Rights (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1989a, p. 26). Recall, however, that the wrongfulness of the detention does not impede the exercise of the jurisdiction of the courts of this State in prosecuting the individual, as the cases of *Ker*, *Eichmann*, and *Álvarez Machaín* have shown.

Second, if it is proven that the territorial State has cooperated actively or passively in the execution of extraordinary rendition, it becomes complicit (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 2004, párra. 318). This acquires special relevance in the case of presumed terrorists held in secret detention centers in Thailand (CONSEJO DE EUROPA, 2007, párra. 7; NACIONES UNIDAS, 2010, p. 54), Afghanistan, Iraq, Romania (WHITLOCK, 2006), Poland (GOETZ; SANDBERG, 2009), Macedonia, and Lithuania (COLE, 2009), because it would be extremely difficult to believe that the governments implicated had no knowledge that a detention center had been installed on their territory, that arbitrary detentions and, in some cases, forcible disappearances were taking place. Furthermore, every State has the obligation to act with diligence to prevent its territory from being used to commit wrongful acts. If, for example, as stated by Dick Marty's report to the Council of Europe, Romania and Poland allowed CIA agents to carry out secret arrests in their territories, these States will have violated their obligation to ensure that nobody is detained either arbitrarily or secretly in the territory under their jurisdiction. They should, therefore, be answerable in court for these violations and the victims should be given access to effective justice and obtaining suitable redress that includes restitution, rehabilitation, and fair compensation (CONSEJO DE EUROPA, 2006b). Similar statements would extend to those countries that allowed airplanes carrying presumed terrorists subjected to Extraordinary Renditions to refuel at their airports, if they knew or should have known that this airplane was being used for this purpose.

Article 16 of the CDI draft stipulates that a State providing help or assistance to another State in committing an internationally wrongful act is internationally responsible for providing this help or assistance if was aware of the circumstances of this internationally wrongful act. The act itself shall be internationally wrongful if it is committed by the State that has provided the help or assistance. In the commentary to this Article, the Commission differentiates between the responsibility of the State committing the wrongful act and that of the State helping or assisting the former, and in which case it is only be responsible to the extent that its own behavior caused or contributed to the internationally wrongful act. The Commission adds that if the wrongful act would have occurred anyway, whatever the case, the responsibility of the State giving assistance shall not include the obligation of indemnity for the act itself. The Commission defined providing assistance as facilitating the abduction of a person on foreign territory (NACIONES UNIDAS, 2001, p. 116).

Third, if the presumed terrorists were transferred to countries with a risk of torture and the States knew of this situation, they would also be responsible for having violated the principle of non-refoulement because, despite having sufficient

grounds for believing the person would be tortured once transferred, they did not abstain from doing so. In the case of *Soering*, the European Court of Human Rights declared that the request for extradition of a person to a State not part of the European Convention, and where it was probable that they would suffer inhuman or degrading treatment or punishment, results in a violation of Article 3 of the Convention by the State granting the extradition (TRIBUNAL EUROPEO DE DERECHOS HUMANOS, 1989a, p. 33-36). If, therefore, responsibility is applied in cases in which there is at least a formal procedure such as extradition, it would also apply to extraordinary rendition, characterized as it is by secrecy and lack of a formal procedure.

Moreover, under the provisions of Articles 21 and 22 of the Convention against Torture, a party State to this Convention may, at any time, declare that it recognizes the competence of the Committee to receive and consider communications from another State alleging violation of the Convention (Article 21) or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of the Convention by a State (Article 22). The United States, as well as Poland, Italy, Spain, Sweden, and the United Kingdom, among others, have accepted the Committee's jurisdiction under Article 21 that there is no legal obstacle to a State presenting a claim against them for violation of the principle of non-refoulement. It is interesting to consider that the United States government itself has recognized that in 28 cases, it has authorized the use of "advanced" interrogation methods against certain detainees and that, in three cases, the technique used has been that of simulated drowning or waterboarding (ESTADOS UNIDOS DE AMÉRICA, 2005b).

Is it possible to appeal to the recently ratified International Convention against Enforced Disappearances? If we abide by the letter of Article 35 and a literal interpretation, the answer would be no, given that the Committee's competence applies only to those cases that began soon after it came into effect. Furthermore, not all States have accepted the jurisdiction under Articles 31 and 32. Nevertheless, enforced disappearance is a permanent crime, that is, one that continues to be committed as long as the fate or whereabouts of the victim remains unknown. As a permanent crime, the Convention may be applicable on certain occasions; for example, not against the United States directly since it has not ratified it, but against those States that have accepted the Committee's competence. In any case, the question has not been settled in case law.

6.1 Aggravated responsibility

Is a regime of aggravated responsibility applicable to extraordinary rendition? Several obligations are owed to the international community as a whole¹³ and when serious, that is systematic and flagrant, violations of these obligations are committed consequences that arise in addition to those deriving from ordinary wrongful acts (GAETA, 2010, p. 421; CRAWFORD, 2010, p. 410-411). These obligations derive from norms prohibiting certain acts threatening the survival of the States, their peoples, and the most basic human values.

A serious violation of an obligation to the international community as a whole results in an obligation of the State responsible to cease committing the wrongful

act, proceed with the fulfillment of its obligation, make amends, and if appropriate, give guarantees and assurances of non-repetition. This also generates obligations for the rest of the States and triggers a regime of aggravated responsibility. Article 41 provides that in the case of serious violation of a peremptory norm, three particular obligations result for all States, whether affected or not: to cooperate in ending it; to abstain from providing help or assistance that upholds the situation; and to abstain from recognizing the situation created by the violation as lawful. The interest of the States does not derive from having suffered harm, but rather from the fact that a peremptory norm has been violated and the collective interest has been seriously affected. Article 48 states that every State has the right to invoke three consequences for the violation of this norm: a) the cessation of the situation of wrongfulness; b) the guarantee of non-repetition; and c) redress. The cessation of the wrongful situation and the guarantee of non-repetition are rights held by every state, even if the violation does not threaten them individually. Article 48(2) (b) provides that every State may also request compliance with the obligation of redress for the State suffering injury or for the beneficiaries of the violated obligation (VAURS-CHAUMETTE, 2010, p. 1027).

The prohibition of torture has acquired the classification of *ius cogens* norm (NACIONES UNIDAS, 2006, p. 17), as confirmed by national and international courts (ESTADOS UNIDOS DE AMERICA, 1992, p. 471; REINO UNIDO, 1996, p. 540-541; REINO UNIDO, 1999, p. 841). The same peremptory nature in international law should be applied to the prohibition of enforced disappearances. This opinion is supported in the jurisprudence of international courts, such as the Inter-American Court of Human Rights,¹⁴ in opinions of national judges at the highest levels (ARGENTINA, 2005)¹⁵ and of regional human rights organizations (CONSEJO DE EUROPA, 2006b, párra. 71). The acceptance of the peremptory categorization of the prohibition of enforced disappearances would make the States responsible for enforced disappearances unable to be excluded from responsibility simply because they are not bound by a treaty and they would be submitted to the above-mentioned regime of aggravated responsibility.¹⁶ This is an important confirmation for international law, even if, in practice, it would be improbable that a State, upon feeling jeopardized by the actions of the United States or its allies in the fight against terrorism, would call for their acknowledgement of responsibility for this serious wrongful conduct.¹⁷

6.2 *Individual responsibility*

The Statute of the International Criminal Court (ICC), the Inter-American Convention against forced disappearances, the draft articles of the International Law Commission on Crimes against the Peace and Security of Humanity, and the International Convention consider forced disappearance to be a crime against humanity. Article 7 of the Statute of the International Criminal Court defines it in a more restrictive way, and includes the need to demonstrate the intention of leaving the victims outside the protection of the law for a prolonged period of time. Moreover, a crime is against humanity when it has been committed as part of a systematic or generalized attack against the civilian population and with knowledge of the aforesaid attack. In the case of *Kunarac and others*, the Court for ex-Yugoslavia described what it considered to be the systematic and

generalized nature of a violation. For the Court, the expression “generalized” refers both to an attack committed on a large scale and to the number of victims, while the phrase “systematic” is related to the planning of the violent acts and the lack of probability of them having occurred by accident (TRIBUNAL INTERNACIONAL PARA LA EX YUGOSLAVIA, 2002; NACIONES UNIDAS, 2001, p. 271).

Are these assumptions present in cases of extraordinary rendition? We are dealing with extremes that are very difficult to prove, especially in the case of forced disappearance, which feeds on secrecy, informality, and denial. Even so, a first approximation to its systematic character could be derived from the ‘high value detainees’ program whereby the detention of presumed terrorists considered to be of high value in secret locations outside the territory of the United States were authorized and clearly recognized by President Bush in 2006 (ESTADOS UNIDOS DE AMERICA, 2006). Likewise, the Bush Administration’s approval decrees authorizing the use of reinforced interrogation techniques (ESTADOS UNIDOS DE AMÉRICA, 2005a) and the memoranda that have been publicly disclosed in which it was stated that the Convention against torture was applicable only inside, and not outside, the territory of the United States. The ex-special United Nations rapporteur against torture, Manfred Nowak, has stated in an interview that Extraordinary Renditions violated the principle of non-refoulement and that, lamentably, it was a systematic practice of the Bush administration (THAROOR, 2007). Regarding its generalized character and according to information from the press, the number of persons detained in secret centers amounted to 100 (SCHMIT; JEHL, 2004); of these, at least 35 (AMNESTY INTERNATIONAL et al., 2009; LINZER, 2009b) are still missing. Another obstacle would be the classification of presumed terrorists as civilians. Civilians are considered to be those that do not participate in hostilities and are therefore protected. Could it be considered that the fact of having contact with terrorists makes a person a combatant?

Even if it is shown that the disappearances really constitute a crime against humanity by proving irrefutably the existence of a systematic and generalized practice against the civilian population, in reality, since the United States is not a party to the Rome Statute (and if we also take into account bilateral agreements it has signed with various States excluding the jurisdiction of the International Criminal Court) it would be very difficult, although not impossible, for its nationals to be tried by the Court. A way out could be if those responsible are found in the territory of a signatory State of the Rome Statute that also has been the host of disappearances or territory through which flights have traveled when there is no bilateral agreement with the United States to exclude the Court’s jurisdiction. It should be remembered, also, that in February 2010, a formal complaint was made to the officer of the International Criminal Court to initiate a prosecution for crimes against humanity against President Bush (junior), Richard Cheney, Donald Rumsfeld, George Tenet, Condoleezza Rice and Alberto Gonzales for their Extraordinary Renditions policy perpetrated to the detriment of 100 individuals. Although the United States is not party to the Rome Statute, the accused authorized Extraordinary Renditions in the territory of the Statute’s party States, some of them in Europe. According to Article 12 of the Rome Statute, it is within the ICC’s jurisdiction to judge nationals of States not party to the Statute when they have committed crimes on the territory of a party State or a State that has

accepted the Court's jurisdiction in this crime. However, the question has not been settled in case law (MORRIS, 2001; AKANDE, 2003; CHEHTMAN, 2010) and it has been noted that the confirmation of the jurisdiction of the Court over nationals of States not party to the Statute results in a violation of the Vienna Convention on the Law of Treaties in the sense that obligations would be imposed on non-party States without the consent of that State (LEIGH, 2001, p. 124). It has also been affirmed that States do not have the power to delegate jurisdiction over non-nationals to an international criminal court unless the State of that nationality has given consent (MORRIS, 2001). Another counter argument is that the International Criminal Court would be acting illegally if it exercised jurisdiction over non-party State nationals that acted in the application of an official policy of the non-party State, converting the case into a dispute between States over the legality of policies used (WEDGWOOD, 2001, p. 193-199; MORRIS, 2001, p. 20-21). Despite the criticism of the Court's jurisdiction, others have noted that once the decision was made to create the Court, it would be intolerable that the court know about crimes committed in the territory of a member State and its citizens but exclude the same crimes committed in the same territory by citizens of a non-member State. Lastly, such a situation would constitute a serious limitation to the right of the territorial State to judge crimes committed on its territory (AKANDE, 2003, p. 649) and would generate a situation of impunity, exactly the opposite of the International Criminal Court's goal.

Lastly, if Extraordinary Renditions – considered as forced disappearances of persons – effectively constitute a crime against humanity, the possibility should not be excluded that a State, in exercising the principle of universal jurisdiction, would exercise its competence to judge those responsible for the crimes. In November 2004, a group of lawyers in Berlin, using the principle of universal jurisdiction acknowledged in its legal system, began prosecuting officials of the Bush administration for the tortures in Abu Ghraib. The cases were dismissed.

As a counterpoint to this obstacle-filled scenario, we should mention the case of Italy, where the judicial system condemned 23 CIA agents in November 2009 for their participation in the kidnapping of the cleric Abu Omar in Milan. The judgment was given in the absence of the accused and with the application of the principle of territorial jurisdiction, since the kidnapping was carried out in Italian territory. The judge Oscar Magi sentenced Robert Seldon Lady to eight years in prison and the rest of the accused to five years, including an Air Force colonel. In March of the same year, the Constitutional Court of Italy said that all evidence that showed coordination between the Italian secret services and the CIA violated the rules of State secrecy and was therefore inadmissible at trial. (ITALIA, 2009). In dealing with a trial based on the principle of territoriality, it would have been more feasible to undertake a real investigation as to what happened. Judge Magi granted Abu Omar damages of 1.45 million dollars and his wife 750,000 dollars for their suffering. (DONADIO, 2009). Lastly, even though the judgment was given in absentia, it set an important precedent because the condemned men, if they should decide to travel to a country of the European Union, run the risk of being served with an order for their detention and surrender, or if they decide to travel to other countries, they must concern themselves with whether the State to which they are going has an extradition treaty with Italy.

7 Conclusion

Extraordinary Renditions constitutes a serious violation of obligations internationally assumed by States and is an assault on the basic human rights of persons, among them the right to life, liberty, and the security of the person. In this paper we have held that Extraordinary Renditions should not be treated as merely arbitrary detention because these acts also violate obligations of *ius cogens* because they cover up the deliberate practice of torture and enforced disappearances of persons, resulting in a regime of aggravated international responsibility for States and the possible determining of individual responsibility for crimes against humanity.

REFERENCES

Bibliography and Other Sources

- AKANDE, D. 2003. The jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits. *Journal of International Criminal Justice*, v. 1, p. 618-650.
- AMNESTY INTERNATIONAL. et al. 2009. **Off the Record U.S. Responsibility for Enforced Disappearances in the “War on Terror”**. Amnesty International USA (AIUSA), Cageprisoners, The Center for Constitutional Rights (CCR), The Center for Human Rights and Global Justice (CHRGJ) at NYU, Human Rights Watch, and Reprive.
- ARBOUR, L. 2006. In Our Name and On Our Behalf. *British Institute of International and Comparative Law*. London: 15 Feb. p. 511-526.
- BOLLYN, C. 2004. ‘Ghost Planes’ Make Suspects Disappear. *Americanfreepress.net*, 14 Jan. Available at: <http://www.americanfreepress.net/html/ghost_planes.html>. Last accessed on: Apr. 2012.
- BUSH, G.W. 2001. **Address to Congress and the American People following the Sept. 11, 2001 Attacks**, 20 Sept.
- _____. 2006. **President’s Speech on the Global War on Terror**. The White House, Office of the Press Secretary, 6 Sept. Available at: <<http://www.america.gov/st/texttransenglish/2006/September/20060906155503eaifas0.8319666.html#ixzz0sWmUvTet>>. Last accessed on: Apr. 2012.
- BUTTON, J. 2007. Spirited Away (Into a legal Black hole?): The Challenge of invoking state responsibility for extraordinary rendition. *Florida Journal of International Law*, v. 19, n. 3, p. 531-568.
- CASSESE, A. 2010. The Character of the Violated Obligation. In: CRAWFORD, J.; PELLET, A.; OLLESON, S. (Ed.). **The Law of International Responsibility**. Oxford Commentaries on International Law. Oxford: Oxford University Press. p. 415-420.

- CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE. 2005. **Fate and Whereabouts Unknown: Detainees in the “War on Terror”**. New York School of Law, 17 Dec.
- CHEHTMAN, A. 2010. **The Philosophical Foundations of Extraterritorial Punishment**. Oxford: Oxford University Press. 208 p.
- CHEVIGNY, P. 2004. La represión en los Estados Unidos después del atentado del 11 de septiembre. *Sur*, Revista Internacional de Derechos Humanos, año 1, n. 1, p. 152-171.
- COLE, M. 2009. Officials: Lithuania Hosted Secret CIA Prison To Get “Our Ear”. *ABC News*, 20 Aug.
- CONSEJO DE EUROPA. 2006a. Asamblea parlamentaria. **Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states**. Resolution 1507.
- _____. 2006b. Informe del Secretario General. **Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies**, 28 feb.
- _____. 2007. Asamblea Parlamentaria. **Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report**, 11 June, Doc. 11302 rev, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Dick Marty. Available at: <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/doc11302.pdf>>. Last accessed on: Apr. 2012.
- CONSEJO EUROPEO. 2002. **Decisión Marco del Consejo, de 13 de junio de 2002, relativa a la orden de detención europea y a los procedimientos de entrega entre Estados miembros**, 2002/584/JAI. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:ES:HTML>>. Last accessed on: Apr. 2012.
- CRAWFORD, J. 2010. International Crimes of States. In: CRAWFORD, J.; PELLET, A.; OLLESON, S. (Ed.). **The Law of International Responsibility**. Oxford Commentaries on International Law. Oxford: Oxford University Press. p. 405-414.
- DAVIS, T. 2006. Carlos the Jackal and the Extraordinary Renditions. *The Wall Street Journal*, 27 June.
- DONADIO, R. 2009. Italy convicts 23 Americans for CIA renditions. *The New York Times*, 5 Nov.
- DOWNING, R. 1990. The Domestic and International Legal Implications for the Abduction of Criminals from Foreign Soil. *Stanford Journal of International Law*, v. 26, n. 2, p. 573-599.
- DUGARD, J. 1996. Abduction: Does the Appellate Division Care About International Law? *South African Journal of Human Rights*, v. 12, n. 2, p. 324-328.
- EARTH TIMES. 2009. Romania denies new reports of hosting secret CIA prisons. *Earth Times*, 13 Aug.
- EASTON, A. 2008. Polish agents tell of CIA jails. *BBC News*, 6 Sept. Available at: <<http://news.bbc.co.uk/2/hi/europe/7601899.stm>>. Last accessed on: Apr. 2012.
- ESPÓSITO, C. 1995. *Male captus, bene detentus*: A propósito de la sentencia del Tribunal Supremo de Estados Unidos en el caso Álvarez-Machain. **Lecciones y Ensayos** (Revista de la Facultad de Derecho de la Universidad de Buenos Aires), n. 62. p. 17-48.

- ESTADOS UNIDOS DE AMERICA. 1942. **Memorandum from the High Command of the Armed Forces to Office Foreign Countries, Counter Intel/Dept. Abwehr**. Re: Prosecution of offenses against the German State of Occupying Power in the occupied territories, Feb. 2, 1942. Available at: Nazi conspiracy and aggression, v. 7, p. 872 en: <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi_Vol-VII.pdf>. Last accessed on: Apr. 2012.
- _____. 1989. **George H. W. Bush, Address to the Nation on Panama**. 20 Dec. Available at: <<http://millercenter.org/scripps/archive/speeches/detail/3422>>. Last accessed on: Apr. 2012.
- _____. 1995. **Presidential Decision Directives, Memorandum form President Clinton to the Vice President and Others**, 21 June. Available at: <<http://www.fas.org/irp/offdocs/pdd39.htm>>. Last accessed on: Apr. 2012.
- _____. 2005a. **Stephen Bradbury, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees**, 30 May. Available at: <http://www.washingtonpost.com/wp-srv/nation/pdf/OLCmemo_May30_Part1.pdf>. Last accessed on: Apr. 2012.
- _____. 2005b. **Secretary Condoleezza Rice, Remarks Upon Her Departure for Europe**, Andrews Air Force Base, 5 Dec. Available at: <<http://merln.ndu.edu/archivepdf/terrorism/state/57602.pdf>>. Last accessed on: Apr. 2012.
- _____. 2006. **President's Speech on the Global War on Terror**, The White House, Office of the Press Secretary, September 6, 2006. Available at: <<http://www.america.gov/st/texttransenglish/2006/September/20060906155503eaifas0.8319666.html#ixzz0sWmUvTet>>. Last accessed on: Apr. 2012.
- _____. 2007. **Extraordinary Renditions in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations**, Joint Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on Europe of the Committee on Foreign Affairs, House Of Representatives, One Hundred Tenth Congress, First Session April 17, 2007, Serial n. 110-28, Statement of Mr. Michael F. Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency.
- _____. 2008. Departamento de Estado. **Country reports on human rights practices**. Available at: <<http://www.state.gov/g/drl/rls/hrrpt/2008/>>. Last accessed on: Apr. 2012.
- EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). 2006. **Opinion on the International Legal Obligations of COE Member States in Respect of Secret Detention facilities and Inter-State Transport of Prisoners**, n. 363/2005, CD-AD (2006)009, 17 Mar.
- EUROPEAN PARLIAMENT. 2006. **Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners**. Working document n. 3 on victims Rapporteur: Giovanni Claudio Fava, 1 jun.
- FINDLAY, D.C. 1988. **Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law**. *Texas International law Journal*, v. 23, n. 1, p. 2-49.
- FISHER, L. 2008. **Extraordinary rendition: the price of secrecy**. *American University Law Review*, v. 57, p. 1405-1452.

- FOOT, J. 2007. The Rendition of Abu Omar. **London Review of Books**, v. 29, n. 15, p. 24-25, 2 Aug. Available at: <<http://www.lrb.co.uk/v29/n15/john-foot/the-rendition-of-abu-omar>>. Last accessed on: Apr. 2012.
- GAETA, P. 2010. The character of the breach. In: CRAWFORD, J.; PELLET, A.; OLLESON, S. (Ed.). **The Law of International Responsibility**. Oxford Commentaries on International Law. Oxford: Oxford University Press. p. 421-426.
- GALELLA, P. 2011. La Convención Internacional para la protección de todas las personas contra las desapariciones forzadas. Un gran paso hacia una mayor protección en la lucha contra este fenómeno. **Revista Jurídica de la UAM**, v. 21, p. 77-100.
- GOETZ, J.; SANDBERG, B. 2009. New Evidence of Torture Prison in Poland. **Spiegel online**, 27 Apr.
- GOMEZ CAMACHO, J.J. 2007. La desaparición forzada de personas: avances del derecho internacional. **Revista Mexicana de Política Exterior**, México, n. 66, p. 27-49.
- GUTIÉRREZ, O. 2011. Creo que Setmarian se encuentra en Siria. **El País**, Madrid, 7 abr.
- HERBERT, B. 2005. Torture, American Style. **The New York Times**, New York, 11 Feb.
- HUMAN RIGHTS WATCH. 2004. The United States “Disappeared”. The CIA’s long term “Ghost detainees”. **A Human Rights Watch Briefing Paper**, Oct.
- INTERNATIONAL COMMITTEE OF THE RED CROSS. 2007. Regional Delegation for the United States and Canada. **ICRC report on the treatment of the Fourteen “High Value Detainees” in CIA custody**, Feb.
- IRUJO, J.M. 2008. El limbo en el mar de la CIA. **El País**, Madrid, 20 jul.
- JAMIESON, R.; MC EVOY, K. 2005. State Crime by Proxy & Juridical Ordering. **British Journal of Criminology**, v. 45, p. 504-527.
- LEIGH, M. 2001. The United States and the Statute of Rome. **AJIL**, v. 95, p. 124-131.
- LINZER, D. 2009a. Dozens of Prisoners Held by CIA Still Missing, Fates Unknown. **ProPublica**, 22 Apr.
- _____. 2009b. List of Likely CIA Prisoners Who Are Still Missing. **ProPublica**, 22 Apr.
- MARGULIES, J. 2006. **Guantanamo and the Abuse of Presidential Power**. New York: Simon & Schuster. 336 p.
- MAYER, J. 2005. Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program. **New Yorker**, 14 Feb.
- MC SHERRY, J.P. 2002. Tracking the Origins of a State Terror Network: Operation Condor. **Latin American Perspectives**, v. 29, n. 1, p. 38-60.
- MORRIS, M. 2001. High Crimes and Misconceptions: The ICC and non-party states. **Law and Contemporary Problems**, v. 64, n. 1, p. 13-66.
- NACIONES UNIDAS. 1960. Consejo De Seguridad. **Resolución de 23 de junio n. 138**.
- _____. 1975. Comisión De Derechos Humanos. Resolución 4 (XXXI) de 13 de febrero de 1975 sobre la **Cuestión de los Derechos Humanos en Chipre**.
- _____. 1977. Asamblea General de Las Naciones Unidas. **Resolución 32/118** de 17 de diciembre.

- _____. 1992. Comité de Derechos Humanos. **Observación General n. 20.**
- _____. 1998. Comisión de Derecho Internacional. **Responsabilidad del Estado por hechos internacionalmente ilícitos.** Texto del proyecto de artículos con sus comentarios.
- _____.2001. Consejo de seguridad. 2001. **Resolución de 28 de septiembre. 1373.**
- _____. 2002. **Report submitted by the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances,** Doc. ONU E/CN.4/2002/71.
- _____.2006. Comisión de Derechos Humanos. **Los derechos económicos, sociales y culturales. Los derechos civiles y políticos. Situación de los detenidos en la bahía de Guantánamo,** Doc. ONU E/CN.4/2006/120.
- _____. 2010. Consejo de Derechos Humanos. **Joint Study on global practices in relation to secret detention in the context of countering terrorism,** Doc. ONU A/HRC/13/42, 19 February.
- NINO, M. 2007. The Abu Omar case in Italy and the effects of CIA Extraordinary Renditions in Europe on law enforcement and intelligence activities.**Revue Internationale de droit pénal,** v. 78, p. 1-2.
- OTT, L. 2011. **Enforced Disappearance in International Law.** Cambridge, Antwerp, Portland, Intersentia. 326 p.
- PELLET, A. 1999. Can a State Commit a Crime? Definitely, Yes! **EJIL,** v. 10, n. 2, p. 425-434.
- REMIRO BRÓTONS, A. et al. 1997. **Derecho Internacional.** Madrid: McGraw-Hill. 1269 p.
- SADAT,L.N. 2005. Ghost Prisoners and Black Sites: Extraordinary Renditions under International Law.**Case Western Reserve Journal of International Law,** v. 37, p. 309-342.
- SANDS, P. 2006. When will this abuse of human rights end? **The Observer,** Sunday, 14 May.
- SANTOS VARA, J. 2007. El desafío de las “entregas extraordinarias” a la protección internacional de los derechos humanos: la responsabilidad de los Estados Europeos. **Revista Española de Derecho Internacional,** Madrid, v. LIX, n. I, p. 175-196.
- SCHMIT, E.; JEHL, D. 2004. CIA hid more prisoners than it has disclosed, Generals say. **The Washington Post,** 9 Sept.
- SCHMIT, E.; SHANKER, T. 2004. The Reach of War: Prison abuse; Rumsfeld issued an order to hide detainee in Iraq. **The Washington Post,** 17 June.
- TAGUBA, A. 2004. **The “Taguba Report” On Treatment of Abu Ghraib Prisoners In Iraq.** ARTICLE 15-6 Investigation of the 800th Military Police Brigade, May 2. Available at:<<http://news.findlaw.com/wp/docs/iraq/tagubarpt.html>>. Last accessed on: Apr. 2012.
- THAROOR, K. 2007. What to do about torture? Manfred Nowak interviewed. **Open Democracy,** London, 15 Jan. Available at:<http://www.opendemocracy.net/conflict-terrorism/nowak_4249.jsp> Last accessed on: Apr. 2012.

- VAURS-CHAUMETTE, A.-L. 2010. The International Community as a Whole. In: CRAWFORD, J.; PELLET, A.; OLLESON, S. (Ed.). **The Law of International Responsibility**. Oxford Commentaries on International Law. Oxford: Oxford University Press. p. 1023-1028.
- WEDGWOOD, R. 2001. The Irresolution of Rome. **Law and Contemporary Problems**, v. 64, p. 193-212.
- WEISSBRODT, D.; BERGQUIST, A. 2006. Extraordinary Rendition: A Human Rights Analysis. **Harvard Human Rights Journal**, v. 19, p. 123-160.
- WHITLOCK., C. 2006. European Probe Finds Signs of CIA-Run Secret Prisons. **The Washington Post**, 8 June.
- YOLDI, J. 2009. Garzón ordena buscar al terrorista Setmarian, preso en una cárcel secreta de EE UU. **El País**, Madrid, 13 abr.

Jurisprudence

- ARGENTINA. 2005. Corte Suprema Argentina. 14 de junio. **Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad**, voto del Señor ministro don Antonio Boggiano.
- CORTE INTERAMERICANA DE DERECHOS HUMANOS. 2006. Sentencia de 22 de septiembre. **Goiburú y otros v. Paraguay**.
- CORTE INTERAMERICANA DE DERECHOS HUMANOS. 2006. Sentencia de 22 de septiembre. **Goiburú y otros v. Paraguay**, Voto razonado del Juez A. A. Cançado Trinidad.
- CORTE PERMANENTE DE JUSTICIA. 1927. 7 de septiembre, **Caso Lotus**, Series A.
- ESTADOS UNIDOS DE AMERICA. 1886. Suprema Corte. 6 de diciembre, **Ker v. Illinois**, Sentencia 119 U.S. 436.
- _____. 1952. Suprema Corte. 10 de marzo, **Frisbie v. Collins**, Sentencia 342 U.S. 519 No. 331.
- _____. 1992. Tribunal de Apelaciones, segundo circuito, **Siderman de Blake v. Argentina**, I.L.R., vol. 103.
- ISRAEL. 1962. Suprema Corte. **Attorney General of the Government of Israel v. Eichmann**, 36 ILR 277.
- ITALIA. 2009. Corte Constitucional. **Sentencia N° 106 de 2009**, ponente el magistrado Alfonso Quaranta.
- NACIONES UNIDAS. 2005. Comité contra la Tortura. **Agiza v. Sweden**, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, para. 13.8.
- REINO UNIDO. 1994. Cámara de los Lores, 24 de junio, **Regina v. Horseferry Road Magistrates' Court, Ex Parte Bennett**.
- _____. 1996. Tribunal de Apelaciones, **Al Adsani v. Government of Kuwait**, I.L.R., vol. 107.
- _____. 1999. Cámara de los Lores, **R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (N° 3)**, 2 W.L.R. 827.

SUDAFRICA. 1991. Corte de Apelaciones. **S. v. Ebrahim**, Sentencia 553.

TRIBUNAL EUROPEO DE DERECHOS HUMANOS. 1984. Sentencia de 4 de julio, **Klaus Altmann (Barbie) v France**, Aplicación N° 10689/83.

_____. 1989a. Sentencia de **Soering v. United Kingdom**, Aplicación No 14038/88.

_____. 1989b. Sentencia de 12 de octubre, **Stocké v. Germany**, Aplicación 11755/85, Series A no. 199, opinion of the Commission.

_____. 1996. Sentencia de 15 de noviembre, **Chahal vs The United Kingdom**, Aplicación N° 22414/93.

_____. 2004. Sentencia de 8 de julio, **Ilascu and others v. Moldova and Russia**, Aplicación N° 48787/99.

_____. 2008. Sentencia de 28 de febrero, **Saadi v. Italy**, Aplicación N°. 37201/06.

TRIBUNAL INTERNACIONAL PARA LA EX YUGOSLAVIA. 2002. Sentencia de 12 de junio, **Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic** (Appeal Judgment), Causa N° IT-96-23 & IT-96-23/1-A.

NOTES

1. Statement by Bob Baer, an ex-undercover agent who worked for the CIA in the Middle East (JAMIESON; MC EVOY, 2005, p. 516).

2. There is even a movie called *Extraordinary Rendition*, screened in 2007 and directed by Jim Threapleton.

3. The decree applied only to the western occupied countries (Belgium, Holland, France, Norway).

4. The function of the Working Group is to help families of missing persons find out about the fate of victims of disappearance. To do this, it receives complaints from family members and acts as an intermediary between them and governments, carrying out exclusively humanitarian work. The Group's function, however, does not include attributing or determining the international responsibility of the accused State or of the persons responsible, but instead tries to bring the parties together to find out what happened and the fate of the missing persons.

5. Or of a political organization, according to the International Criminal Court Statute.

6. In his speech justifying the invasion of Panama, President Bush recognized that one of the motives was the capture of Noriega.

7. Álvarez-Machain was finally absolved due to lack of evidence.

8. As the technique of simulated drowning is known.

9. The Italian agent Luciano Pironi, who took part in the kidnapping of Abu Omar in Milan by CIA agents, stated that this had been carried out with

the total cooperation of the Italian secret services.

10. As appears to be the case with the recent leaking of classified U.S. documents by the Wikileaks website.

11. In the case of *Agiza v Sweden*, the Commission against Torture reaffirmed that the protection given by the Convention against Torture is absolute, including in the context of situations in which national security is at risk (UNITED NATIONS, 2005, para. 13.8).

12. This case is currently being analyzed by the European Court of Human Rights, based on an accusation by El Masri against Macedonia for complicity in his detention and transfer.

13. According to article 53 of the Vienna Convention a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole and from which no derogation is permitted.

14. As has been stated by the Inter-American Court of Human Rights in the Goiburú case.

15. Vote by Minister Antonio Boggiano (ARGENTINA, 2005).

16. In an opinion by Cassese, the categories of *erga omnes* and *juscogens* obligations coincide inextricably, stating that every peremptory norm imposes *erga omnes* obligations and vice-versa (CASSESE, 2010, p. 417).

17. The question to be asked here is whether States can commit crimes (PELLET, 1999, p. 433-434).

RESUMO

Depois dos atentados em setembro de 2001, o então presidente dos Estados Unidos, George W. Bush, declarou uma “guerra” global contra o terrorismo internacional e autorizou um programa de sequestros, detenções e traslados de supostos terroristas para prisões secretas em terceiros Estados, nos quais há suspeita de utilização de tortura como método interrogatório, com o objetivo de obter informações sobre futuros atentados terroristas. Essa prática, denominada “entregas extraordinárias”, sob certas condições, extrapola a figura da detenção arbitrária e apresenta semelhança com a figura do desaparecimento forçado de pessoas. A distinção tem relevância, entre outros motivos, porque as entregas extraordinárias passíveis de serem qualificadas como desaparecimentos forçados poderiam constituir uma violação de normas de *ius cogens*, gerar uma responsabilidade internacional agravada para os Estados aos quais se atribuísem a autoria desses atos ilícitos e a possível perpetração de crimes de lesa humanidade para os autores individuais.

PALAVRAS-CHAVE

Entregas extraordinárias – Desaparecimentos forçados – *Ius cogens* – Crimes contra a humanidade

RESUMEN

Tras los atentados de septiembre de 2001, el Presidente de EE.UU. George W. Bush declaró una ‘guerra’ global contra el terrorismo internacional y autorizó un programa de secuestros, detenciones y traslados de presuntos terroristas hacia prisiones secretas en terceros Estados, en los que se sospecha que se utiliza la tortura como método interrogatorio, con el objeto de obtener información sobre futuros atentados terroristas. Esta práctica, denominada ‘entregas extraordinarias’, bajo ciertas condiciones, va más allá de la figura de la detención arbitraria y presenta similitudes con la figura de la desaparición forzada de personas. La distinción tiene relevancia, entre otras razones, porque las entregas extraordinarias que pudieran calificarse como desapariciones forzadas podrían constituir una violación de normas de *ius cogens*, generar una responsabilidad internacional agravada para los Estados a los que se atribuyese la autoría de esos actos ilícitos y la posible comisión de crímenes de lesa humanidad para los autores individuales.

PALABRAS CLAVE

Entregas extraordinarias – Desapariciones forzadas – *Ius cogens* – Crímenes contra la humanidad