



INTERNATIONAL COMMISSION OF JURISTS

INTERIGHTS' INTERVENTION BEFORE THE EMINENT JURISTS PANEL

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Contents:

- I. Introduction
 - i) About INTERIGHTS
 - ii) Focus of the intervention

- II. Discrete issues which have arisen in our work:
 - i) Attacks on the absolute nature of the torture prohibition
 - ii) Responsibility of European states for complicity to the US renditions and secret detentions
 - iii) Questions of applicability of due process rights to transfer proceedings
 - iv) Post-rendition duties of states who have assisted the rendition
 - v) Restricted access to evidence by victims
 - vi) Threshold and burden of proof in *refoulement* and torture evidence cases
 - vii) Restrictive approach to extraterritorial applicability of human rights law

- III. Conclusion

- IV. Annexes
 - INTERIGHTS and other NGOs' third party intervention in *Ramzy v the Netherlands*;
 - UK and other governments' third party intervention in the *Ramzy v the Netherlands*;
 - Additional observations of the Government of the Netherlands in the *Ramzy v the Netherlands*, 27 January 2006;
 - Additional observations of the Government of the Netherlands in the *Ramzy v the Netherlands*, 10 April 2007.

I. Introduction

i) About INTERIGHTS

INTERIGHTS is an international human rights law centre, based in London. It works to promote the effective realisation of international human rights standards through law, and has a strategic focus on counter-terrorism and human rights. INTERIGHTS provides advice on the use of international and comparative law, assists lawyers in bringing cases to international human rights bodies, disseminates information on international and comparative human rights law and undertakes capacity building activities for lawyers and judges. In the context of counter-terrorism and human rights, INTERIGHTS seeks to promote the rule of law through upholding compliance with international human rights law applicable to the area of counter-terrorism, principally through targeted human rights litigation; where appropriate, we also seek to strengthen the legal framework by promoting the adoption of more progressive legal standards.

ii) Focus of the intervention

This brief submission is made with reference to questions 13 and 15 of the call for submissions by the Panel, which enquires as to:

13. The impact of terrorism and counter-terrorism on asylum and immigration law and practice and on the rights of asylum seekers, refugees and non-nationals, including in the use of immigration detention and deportations;

15. Alleged involvement of European states in renditions and secret detentions by the United States and complicity in human rights violations resulting from these operations.

As INTERIGHTS is not a monitoring organization, we do not purport to provide an analysis of impact of law and practices in general. We will however try to outline certain legal issues and some challenges arising from our current portfolio of work of relevance to the Panel's considerations. Given the current focus of this Panel, we will refer only to our work in European context, notably by reference to the European Convention for Human Rights (the European Convention) and litigation before the European Court of Human Rights (the European Court).

II. Discrete issues which have arisen in our work

This section will address three groups of challenges which we have identified through our work, namely the restrictive interpretation of the prohibition of torture and other ill-treatment, the procedural obstacles to international judicial oversight, and the cross-cutting difficulty of restrictive approach to applicability of human rights law.

i) *Attacks on the absolute nature of the torture prohibition*

One of the general challenges is maintaining the absolute nature of the torture prohibition, and the positive obligations that give effect to it. As the Panel is no doubt aware, the case of *Ramzy v the Netherlands*, pending before the European Court, illustrates attempts by some states to dispute the absolute character of the prohibition. The case concerns the proposed deportation of Mr. Ramzy, who was declared an undesired alien and a threat to Dutch national security, to Algeria where he alleges that he would be exposed to a “real risk” of torture or other prohibited ill-treatment in violation of Article 3 of the European Convention.

Significantly, the UK led several European governments, including Lithuania, Portugal, and Slovakia in an intervention before the European Court, inviting the Court to overturn established case-law (*Chahal v the UK*) prohibiting a balancing of the interests of individual not to be subject to torture or ill-treatment against national security interests. As the attached submission shows, INTERIGHTS intervened with a group of seven international NGOs, to reject this proposal and to uphold the absolute character of the torture prohibition and the *non-refoulement* prohibition as an essential aspect of it. At a time when torture and ill-treatment – and transfer to states renowned for such practices – are arising with increasing frequency, and the absolute nature of the torture prohibition itself is increasingly subject to question, the European Court’s determination in this case (which is expected later this year).

The Grand Chamber of the European Court will soon have an opportunity to consider the issue of deportation to torture of individuals suspected of being threat to national security, and the relevance of diplomatic assurances, in the case of *Saadi v Italy* (a hearing in that is scheduled for 11 July 2007). The *Saadi* and the *Ramzy* cases are likely to prove critical to the protection against torture and ill-treatment under the European system and potentially beyond.

ii) *Responsibility of European states for complicity to the US renditions and secret detentions*

As continuing disclosures show, the practices of rendition and secret detention instigated by the US would not have happened but for the assistance, in various forms and to varying degrees, of many European states. The responsibility of these states for failing to prevent, or for aiding and assisting torture should, we believe, be emphasised and clarified through judicial practice. The European Court has accepted that states can be responsible for conduct of foreign officials on their own territory where there has been “acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction” (*Ilascu and others v. Moldova and Russia*, para 318). The practice of the UN Human Rights Committee in the recent *Al-Zery* decision in relation to treatment during transfers is also instructive in reflecting the fact that “at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party”. Moreover, general rules of international law on state responsibility are relevant to

assessing state responsibility for aiding and assisting or directing international wrongs (see Articles 16 and 17 of the International Law Commission Articles on State Responsibility) as well as in respect of the extent of the positive obligations of all states to act in the face of serious breaches of *jus cogens* norms (Article 41 of the above International Law Commission Articles as reflected, albeit briefly, by the UK House of Lords in the *A & Ors v Secretary of State for the Home Department* (torture evidence) case). It is hoped that international practice will increasingly reflect these forms of responsibility as part of the doctrine of *positive obligations* of states.

iii) *Questions of applicability of due process rights in transfer proceedings*

One of the quintessential characteristics of rendition is that it is committed with complete disregard for legal process. The extra-legal handling of the transfer in itself constitutes a violation of the prohibition of torture, inhuman or degrading treatment as it deprives the person of the benefit of a “rigorous and meaningful scrutiny” of the transfer (*Jabari v Turkey*). The degree of arbitrariness and lack of due process should also be understood as a violation in itself, both of the safeguards associated with the right to liberty (Article 5) and the right to fair trial (Article 6 of the European Convention). Yet a major weakness of the protection against rendition and secret detention, as interpreted within the European system, is that the fair trial guarantees under Article 6 of the European Convention are considered inapplicable to transfer proceedings (expulsion, deportation, extradition) despite the obvious impact on the ‘civil rights’ of individuals affected. In this area, there is a discrepancy between the European Court’s approach and other international practice which recognizes that transfer process should observe basic rules of procedural fairness enshrined in the relevant fair trial provisions of human rights conventions (see eg. UN Human Rights Committee case *V. M. R. B v. Canada*, 1988, similarly, Inter-American Commission in *Tajudeen v. Costa Rica*, 1992).

Understanding Article 6 as applicable in transfer proceedings is important to secure the right to access to counsel, equality of arms and other fair procedure guarantees. The unavailability of these guarantees significantly reduces the opportunities of the individual to prepare and present his or her arguments against the transfer and thus decreases the chances of a thorough determination of the risk of *refoulement*. This is unjustified in view of the greatest importance of the freedom from torture, and is particularly inexplicable in view of the availability of the full catalogue of due process rights in respect of less fundamental interests such as, for example, small pecuniary claims. We believe that in order to make the protection against extra-legal transfers effective, there is a need to clarify and/or strengthen the normative framework by ensuring the application of basic due process rights to expulsion, deportation and extradition.

iv) *Post-rendition duties of states who have assisted the rendition*

As the Panel may be aware, the first case involving rendition is currently pending before the European Court. *Boumediene and others v. Bosnia and Herzegovina* involves the unlawful transfer by Bosnia and Herzegovina of six individuals into US custody in early 2002. The ‘Bosnian six’, who are currently still held at Guantanamo, complain to the

European Court of the failure of Bosnia and Herzegovina to take effective measures (including via diplomatic routes) to protect their rights while in US custody and to secure their release. In this case, in which INTERIGHTS hopes to intervene, the Bosnian state was responsible for the unlawful transfer of individuals to US custody in contravention of a binding domestic decision of the Human Rights Chamber staying the removal, as well as the European Convention. The applicants in the case do not however challenge this unlawfulness directly due to inapplicability of the European Convention *ratione temporis* to events prior to its ratification of July 2002. However, the case does raise novel and important issues in terms of the on-going responsibility of states in such circumstances post-transfer. If successful, this case could significantly bolster the duties of European states in respect of victims of *refoulement*, rendition and secret detention.

v) *Restricted access to evidence by victims*

Despite the continuous revelations about European involvement, there are almost no rendition cases pending in the European courts (with the notable exception of the Bosnian 'six' case at the European Court, and the national criminal investigations in Italy, Germany and some other countries). This anomaly can be explained primarily due to longstanding secrecy surrounding rendition. Securing sufficient evidence is a vast practical obstacle for victims and their representatives. There is a need to acknowledge this difficulty through upholding and expanding further the access to evidence of victims and their representatives. Example of this can be seen in the *Ramzy* case, where the respondent Dutch Government refused to reveal to the applicant - both in the national proceedings and before the European Court - the factual and evidential basis on which he was considered to be a national security threat. He has thus been put in the impossible position of being required to rebut a claim which is unspecified and unsubstantiated.

A recent proposal of the Dutch Government in *Ramzy* provides a further illustration of the attempts to circumvent basic legal principles through procedural innovations. The Dutch Government has proposed that the Dutch member of the European Court inspect some of the 'secret' evidence in the case, under conditions of confidentiality, including from the applicant, his representatives and it seems the other members of the European Court. This proposal of the Dutch Government is unprecedented in Strasbourg proceedings, where in principle, public access to the case-file may be restricted (on, *inter alia*, national security grounds), but access of the applicant to the case-file can never be denied or restricted in any way. This proposal, on which decision is currently awaited, is at odds with fundamental principles of fairness and the working principles of the European Court.

vi) *Threshold and burden of proof in refoulement and torture evidence cases*

The governmental pleas in the *Ramzy* case are also illustrative of what appears to be a troubling trend to promote a raised threshold of risk required for the operation of the *non-refoulement* rule, and rules regarding onus of proof that render the prohibition unpractical and ineffective. In so doing, both the Dutch Government and the group led by the UK specifically referred to the national security concerns (see eg. para 6 of the Dutch

observations; see also para 30 of the UK and others intervention: “[N]ational security considerations can have an impact on the threshold to be overcome by a person who is to be removed. In a case in which there is material indicating a national security threat, it would be appropriate for it to be shown more clearly, or to a higher standard, that a person might be ill-treated.”).

“Personal” risk of torture or ill-treatment

The observations of the Dutch Government in the *Ramzy* case insisted that the applicants should prove a ‘personal’ risk, and seem to interpret this to require information specifically about the individual concerned, as opposed to information about the fate of persons in similar situations. In response, INTERIGHTS and the other NGOs noted in our intervention that the existence of “personal” risk may be deduced from various factors, for example from previous ill-treatment or evidence of current persecution, but that neither is necessary to substantiate that the individual is ‘personally’ at risk (See eg. *Shamayev and 12 others v. Russia*, 2005, § 352; *Said v. the Netherlands*, 2005, § 48-49). A person may be found at risk by virtue of a characteristic that makes him or her particularly vulnerable to torture or other ill-treatment. Indeed, we argued that great weight should attach to the person’s affiliation with a vulnerable group in determining risk.

Burden of proof in non-refoulement cases

INTERIGHTS and the group of seven NGOs argued in their intervention in the *Ramzy* case that the evidentiary requirements in respect of risk of *refoulement* should be tailored to the reality of the circumstances of the case. These include the capacity of the individual to access relevant facts and prove the risk of torture and ill-treatment, the practical reality in which the *non-refoulement* principle operates - notably difficulties of accessing evidence and difficulties in view of the clandestine nature of ill-treatment - the gravity of the potential violation at stake and the positive obligations of states to prevent it. Once a *prima facie* or arguable case of risk of torture or other ill-treatment is established, it is for the State to satisfy the Court that there is in fact no real risk that the individual will be subject to torture or other ill-treatment. We also noted that an existing risk of torture or ill-treatment cannot be displaced by diplomatic assurances.

Burden of proof in cases of evidence obtained through torture

As the Panel will be aware, the issue of the admissibility of evidence that may have been obtained through torture has arisen in several states in the context of the ‘war on terror’, and was litigated before the UK House of Lords in a case in which INTERIGHTS intervened with other NGOs - *A & Ors v Secretary of State for the Home Department*.¹ The unanimous judgment was important in signalling that the use of torture is universally forbidden under all circumstances, and that states have positive duties to give effect to that prohibition, including by treating as inadmissible in any proceedings of

¹ The judgment of the UK House of Lords in this case is available at <http://hei.unige.ch/~clapham/hrdoc/docs/Aandothers2005HoL.htm>

evidence obtained through torture. However, the majority judgment on issues related to the burden and standard of proof gives cause for concern, by holding that where there remained doubt as to whether evidence is obtained through torture, such evidence may be admitted, with account being taken of this doubt. As Lord Bingham states in his minority opinion: “This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade.”

The above positions of governments not challenging directly the absolute nature of the prohibition, but instead its operation in practice, represent another form of undermining the effective application against *refoulement*. The concern is that while states show themselves willing to accept and even develop further substantive principles of law, they simultaneously prevent their effective operation by putting unreasonably high evidentiary thresholds.

vii) *Restrictive approach to extra-territorial applicability of human rights law*

Beyond *refoulement* and rendition, one of the cross-cutting obstacles in the protection of human rights in the context of counter-terrorism is the restrictive approach of governments towards applicability of human rights norms relevant to counter-terrorism. Examples of such approach is the UK position restricting the extraterritorial applicability of human rights obligations as recently examined in the UK House of Lords in the case of *Al-Skeini and others*, concerning the deaths of six Iraqi civilians in Basra in 2003.² As the Panel will likely be aware, although the House of Lords accepted that the European Convention applies to the death of persons who are in British custody, it rejected the proposition that the European Convention similarly applies to the killings by British troops of Iraqi civilians which occurred outside British custody. In so finding, the Law Lords followed the restrictive and controversial European Court of Human Rights’ decision in the *Bankovic* case, although they acknowledged that the European Court’s jurisprudence on this issue “does not speak with one voice,” thus perhaps foreshadowing a likely complaint to the European Court and further clarification of the law.

The House of Lords’ interpretation creates an anomalous distinction between persons killed by UK personnel while in custody, who would be covered by the European Convention, and persons killed in other circumstances who would be left without redress under the European Convention, and is out of step with the standards of some international tribunals such as the UN Human Rights Committee and others. Judgments such as in *Bankovic* and *Al-Skeini* undermine the human rights duties of states and make it difficult to challenge counter-terrorism actions abroad.

² The judgment in of the UK House of Lords in this case is available at <http://www.bailii.org/uk/cases/UKHL/2007/26.html>

III. Conclusion

INTERIGHTS shares the concern of many that this is a particularly challenging time for the protection of fundamental rights. Global challenges associated with the ‘war on terror’ seek to undermine long accepted standards, to put pressure on *refoulement* standards in Europe, and to limit the reach of human rights obligations extra-territorially. While for most part the legal framework is clear, with the problem lying in implementation, some aspects of that framework have not been thoroughly or consistently addressed in practice and would benefit from emphasis or clarification, including potentially by this Panel. These include the following:

- Rendition gives rise to human rights obligations whether the states acts extra-territorially or within its own territory, so far as it exercises the requisite effective control over individuals affected;
- The accountability of European states for rendition should be understood in light of the full range of possible forms of state responsibility. Thus, the state may be responsible under human rights treaties for acts by other states on its territory where it failed to exercises due diligence, or under general international law where it aids, assists or directs the commission of an international wrong. While reflected in international legal standards, this is as yet not well explored in human rights jurisprudence;
- Particularly in cases where states have assisted renditions and secret detentions, they have ‘post-rendition’ duties to take all appropriate measures, including via diplomatic routes, to secure rights and appropriate remedies for violations;
- The *refoulement* principle applies to flagrant breaches of the right to liberty or fair trial (as well as to rendition to torture or ill-treatment and risks to the right to life). While the jurisprudence of the European Court supports the understanding of *non-refoulement* as applying to flagrant denials of fair trial rights, European standards or guidelines adopted in the terrorism field in recent years have been uneven. Post-rendition circumstances regarding for example investigation and interrogation, limited access to counsel, trials before military commissions, raise serious issues regarding *refoulement* to flagrant denial of fair trial in breach of Article 6, while the indefinite detention and the lack of habeas corpus raise issues of *refoulement* to arbitrary detention in breach of Article 5 of the European Convention;
- Transfer procedures must conform to basic due process standards in accordance with fair trial provisions of human rights treaties; while accepted internationally, weakness in European jurisprudence as developed to date;
- The evidentiary and other procedural rules of the national and international tribunals should take into account the practical difficulties of victims in proving the existence of risk of *refoulement*. Once a *prima facie* or arguable case of risk of torture or other ill-treatment is established, it is for the state to show that there is in fact no real risk. An existing risk of torture or ill-treatment cannot be displaced by diplomatic assurances.