CURRENT LEGAL DEVELOPMENTS

The Arrest of Abdullah Öcalan

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Keywords: extradition; Öcalan; international abduction; transnational fugitive offender; political offense exemption.

Abstract: Abdullah Öcalan's arrival in Turkey in February 1999 followed a prolonged search in Europe for asylum following his expulsion from Syria in late 1998. His coming within Turkish jurisdiction raises questions about the international processes to bring alleged transnational fugitive offenders before the courts. This article looks at the extradition regime within Europe and the alternative methods of rendition that were eventually employed to remove him from Kenya. Extradition law developed during the nineteenth century and is based on ideas of revolution, the principle of nationality and liberal democracy which pervaded that period. The late twentieth century has a different ethos that offers fewer protection to the political revolutionary, but has incorporated international human rights standards. Extradition law straddles the enforcement of criminal law, non-interference in the domestic affairs of another State and international human rights law. The article concludes by examining the demands of international human rights law for the trial in Turkey.

1. INTRODUCTION

As news spread on 16 February 1999 that Abdullah Öcalan, leader of the PKK, was in Turkish custody, Kurdish protesters throughout Europe demonstrated against alleged Greek complicity in his capture. Furthermore, it ended a month of high farce on the international stage as Öcalan had sought refuge in various European States and ultimately Kenya, having been expelled from his base in Syria by the authorities in Damascus in October 1998. The details of his movements following his departure from Syria are not wholly clear, but his case highlights aspects of the law relating to the international protection of refugees, extradition law, *de facto* extradition and international abduction, international human rights law and self-determination.

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The full facts are not known, but since leaving Syria it seems that he first went to Russia for a time before being arrested in Italy because he had entered the country on a false passport, although the Italian government alleged his arrest was the result of an international arrest warrant issued by Germany in 1990. An extradition request was received from Turkey, but rejected. The Germans did not execute the 1990 warrant. At this point, the picture becomes even murkier, but Öcalan then left Italy and sought asylum in various European states. He possibly went to Russia before flying to Greece, at minimum refuelling on Corfu, before flying on to Kenya where he stayed at the Greek embassy in Nairobi until 15 February 1999. Whether with Greek complicity or not, he left the embassy compound and was then flown on a private jet back to Turkey in the company of Turkish commandos; the knowledge or involvement of the Kenyan authorities is equally unclear.[1] There is no need for the purposes of this article to resolve this confusion, for the focus of this article is the international law relating to transnational fugitive offenders. Moreover, there will be no attempt to discuss the rights and wrongs of the PKK's campaign for an independent Kurdish state, although Öcalan's attempt to enter The Netherlands to petition the Permanent Court of Arbitration[2] in the Hague will be touched upon.

1. This information is drawn mainly from The Guardian newspaper, with additional facts from CNN, Associated Press and Reuters. *See* J. Hooper & C. Morris, *Battle Intensifies over Ocalan's Fate*, The Guardian, 18 November 1998, at 17; Reuters, *Italy to free Kurdish Rebel*, The Guardian, 21 November 1998 at 21; I. Traynor & M. Walker, *Bonn Urged to Seek Trial of Kurd Rebel*, The Guardian, 25 November 1998, at 17; J. Rugman, *World's Most Wanted*, The Guardian, 25 November 1998, at 4; I. Traynor, *Italy 'May Expel Kurd Leader'*, The Guardian, 28 November 1998, at 17; J. Meek & J. Hooper, *Trail Leads to Russia as Kurd Leader Vanishes*, The Guardian, 18 January 1999, at 14; S. Bates, *Kurdish Rebel Finds no Sanctuary*, The Guardian, 2 February 1999, at 12; C. Morris, *Kurdish Rebel on the Run*, The Guardian, 3 February1999, at 12; A.P. Ankara, *Ocalan Pleads for Asylum*, The Guardian, 15 February 1999, at 12; J. Hooper *et al.*, *Flame and Fury as Ocalan Seized*, J. Hooper, *Quiet Man Who Led Cruellest War*, and I. Black, *The Blood-Drenched Dream*, The Guardian, 17 February 1999, at 3 and 17, respectively; H. Kundnani, C. Morris & J. Hooper, *Welcome Back to Your Country – You Are Our Guest Now*, and D. Sharrock, *Turkish Links Win Israel New Foe*, The Guardian, 18 February 1999, at 1 and 12, respectively; H. Smith, *Athens in Crisis Over CIA Link to Ocalan Capture*, The Guardian, 19 February 1999 at 14; A. Gentleman & C. Morris, *Ocalan Protesters Pile on the Pressure*, and M. Woollacott, *A Tragedy of Two Authors*, The Guardian, 20 February 1999, at 15 and 20, respectively; C. Morris, *Turkey Warns EU: Keep Off Ocalan Trial*, The Guardian, 22 February 1999, at 10; C. Morris, *Ocalan 'Admits He Used Greek Funds'*, The Guardian, 26 February 1999, at 19; Reuters, *Ocalan Lawyers Face Intimidation*, The Guardian, 27 February 1999, at 18. It is alleged that the United States and Israel were also involved, but that is irrelevant to this analysis.
2. *See* the First International Convention for the Pacific Settlement of International Disputes, The Hague, 29 July 1899, UKTS 9 (1901), and the Second, 18 October 1907, UKTS 6 (1971). *See also* 6 LJIL (1993).

2. THE EXTRADITION REQUEST FOR ÖCALAN AND RELATED MATTERS

When Öcalan was arrested in Italy, the Turks filed a request for extradition. It was ultimately refused by Italy because Turkey, at least in theory, maintains the death penalty and the Italian constitutional prohibition on capital punishment extends to extradition cases.[3] The question for this paper is what Italy's responsibilities were in international law. Both Italy and Turkey are parties to the European Convention on Extradition 1957[4] and the European Convention on the Suppression of Terrorism 1977 (ECST).[5] Before extradition can take place, one must find that the alleged offences constitute extradition crimes, defined by the eliminative method, and that there is double criminality (Article 2). Although it is acknowledged that under Öcalan's orders from his Syrian base, the PKK waged one of the bloodiest of non-international armed conflicts, it would not be possible to extradite for 'war crimes' on the facts and crimes against humanity are difficult to define and prove, especially before domestic fora. Nevertheless, less grave crimes in the eyes of international law, such as murder and explosives offensives, would be extraditable and, since they threatened the Turkish state, the protective principle would give extraterritorial jurisdiction to allow for double criminality.[6] Thus, *prima facie* Öcalan was extraditable. However, transnational fugitive offenders can argue under the European Convention on Extradition 1957 that their crimes were of a political character or were connected with political offences.

> *Article 3.1* Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.

Although generally accepted in nearly all extradition agreements, the interpretation of the political offence exemption is not uniform before domestic courts.[7] Matters are further complicated by the fact that Öcalan sought asylum in Italy. Italy, as a party to the Convention Relating to the Status of Refugees, 1951 and its 1967 Protocol,[8] is obliged under Article 33 of the former not to *refoule* any

3. Italy is also a party to Protocol 6 to the ECHR (ETS 114) which abolishes the death penalty and, according to Aylor *v.* France, 100 Int'l L Rep.690 (1993), prevents extradition where the death penalty might be imposed.
4. ETS 24 (1957). *See also* the two additional protocols ETS 86 (1975) and ETS 98 (1978). Article 11 of the 1957 Convention allows the requested state to refuse extradition where it would not carry out the death penalty for the offences for which the fugitive is requested unless the requesting state gives assurances it will not carry it out in this particular case.
5. ETS 90 (1977), 15 ILM 1272 (1976).
6. *In re* Urios, [1919–22] Ann.Dig.107.
7. For a detailed discussion, *see* G. Gilbert, Transnational Fugitive Offenders in International Law 203 *et seq.* (1998).
8. 189 UNTS 150 and 606 UNTS 267, respectively. The Protocol removed the time-bar and geographical restrictions in the Convention.

refugee. However, excluded from refugee status are those who have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political offence, or who have been guilty of acts contrary to the purposes and principles of the United Nations (Article 1F). Article 33 is somewhat more restricted

> *Article 33.2*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Although ultimately separate questions, the political character of an offence for the purposes of extradition law and qualifying for refugee status and *non-refoulement*, have, on several occasions, been dealt with together.[9] There is an overlap. Nevertheless, a clear distinction should be maintained because the political offence exemption looks at previous conduct, whereas *non-refoulement* should look at future treatment. The political character of Öcalan's crimes depends on what particular test is applied. Öcalan would argue for the application of the broad U.S. approach which looks for a political uprising and accepts any offence that was part thereof[10] – United States courts have held that it is not part of their remit to tell foreign groups how to wage their campaign. The fact that all accept that both sides have committed atrocities in the conflict in South East Turkey would be secondary to the existence of that conflict and the PKK's ultimate goal, an independent Kurdish state. The more restrictive European approach to the political offence exemption is found in case law from the United Kingdom, Switzerland and Ireland. It comprises two elements, proximity and proportionality. In *Cheng*,[11] the English House of Lords held that for an offence to be of a political character, it must be proximate to the ultimate goal of the fugitive's organisation – how far some of the activities of the PKK under Öcalan's orders were to the desire for an independent Kurdish state is open to debate, but one can argue that a test devised to deal with a sporadic attack is not appropriate to judge the events of a non-international armed conflict. As well as proximity, however, the prevailing European analysis incorporates an element of proportionality:

> Although [...] [the fugitive] acted for political, not personal reasons, it does not, however, follow that the act had a predominantly political character. For this to be the case

9. *E.g.* Folkerts *v.* State Secretary of Justice, 74 ILR 472 (1978); T. *v.* Secretary of State for the Home Department, [1996] 2 All ER 865.
10. *In re* Ezeta, 62 F.972 (1894) N.D. Cal.; Artukovic, 140 F.Supp 245 (1956), 247 F.2d 198 (1957), 355 US 393 (1958), 170 F.Supp 383 (1959): *In the Matter of the Extradition of McMullen*, 74 AJIL 433 (1980); *In the Matter of the Extradition of Mackin*, 668 F.2d 122 (1981); *In re* Doherty, 599 F.Supp 270 (1984).
11. Cheng *v.* Pentonville Prison Governor, [1973] AC 931.

> it is necessary that the murder be the *sole means* of safeguarding the more important interests of the FLN and of attaining the political aim of that organization.[12]

> "Modern terrorist violence ... is often the antithesis of what could be regarded as political."[13]

Even U.S. courts when considering the Arab-Israeli conflict have rejected the political offence exemption where the victims of the attack were civilians rather than the security forces.[14] Indeed, in *Extradition of Atta*, the District Court applied the Geneva Conventions and Protocols to the claim that the attack on a civilian bus on the West Bank were of a political character.[15] It proceeded on the basis that the fugitive offender had to show his crimes did not violate the Conventions or Protocols before they could *prima facie* qualify as political. The court was prepared to consider that the fugitive, as a member of the Abu Nidal Organization, was fighting a war of self-determination and that, as such, Protocol I might be applicable. Given that Article 48 calls on parties to distinguish at all times between combatants and civilians and that civilians and civilian objects shall not be the object of attack,[16] the fugitive did not meet the test. The distinction as to whether a conflict should be treated as international or non-international for the purposes of characterizing the standard for whether the offence is of a political character is open to question – most civil wars will not fall within Article 1.4 of Protocol I,[17] which means that the law relating to civilian targets will be that found in Protocol II, which is much weaker. On the other hand, parts of the 1949 Geneva Conventions and Protocol I are now customary international law applicable in non-international armed conflicts,[18] so the distinction is otiose. Subject to that caveat, the *Atta* test is helpful: "Offences that transcend the Law of Armed Conflict are beyond the limited scope of the political offences the Treaty excludes as bases for extradition."[19] To complicate matters still further, both Italy and Turkey are parties to the ECST.[20] The Convention seeks to exclude the political offence exemption as between parties for serious, violent offences. However, Italy entered a reservation declaring that it

12. Ktir *v.* Ministère Public Fédéral, 34 ILR 143, at 144 (1961). (Emphasis added).
13. McGlinchey *v.* Wren, [1982] IR 154, at 159.
14. Extradition of Atta, Ahmad *v.* Wigen, 910 F.2d 1063, at 1066 (1990); *see also* 706 F.Supp 1032 (1989) and 726 F.Supp 389 (1989).
15. *Supra* note 14, at 726 F.Supp, at 405-408. The Court of Appeals did not discuss the question, but nor did it criticize the approach.
16. *See* Articles 51 and 52. NB Article 13 of Protocol II makes a similar demand.
17. International armed conflicts include wars of self-determination against colonial domination, alien occupation or racist regimes.
18. *See* Prosecutor *v.* Duško Tadić, a.k.a. 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY, Case No. IT-94-1-AR72, 2 October 1995, *per* Cassese J.
19. *Supra* note 14, at 408.
20. *Supra* note 5.

would not extradite fugitive offenders for a "political offence, an offence connected with a political offence or an offence inspired by political motives,"[21] which seems to defeat the purpose of the Convention. Thus, given that the scope of the political offence exemption is open to differing interpretations and that the ECST provides no certainty in this case, it was not clear that Ocalan would have been extradited.[22]

In addition, Öcalan sought asylum in Italy. Italy's obligation in international law is not to *refoule* any refugees who would suffer persecution in the State to which they were to be returned. However, excluded from refugee status are those who have committed serious non-political offences.[23] Thus, there is overlap with the political offence exemption in extradition law; similarly, Article 3.2 of the European Convention on Extradition 1957 prohibits surrender where the fugitive would suffer persecution upon her/his return. To conflate the two questions may seem appropriate since both decisions will be based on the same set of facts. Nevertheless, one might come across a case where the applicant for refugee status had definitely committed serious non-political crimes contrary to Article 1F(b), but to return her/him to face trial would result in her/his life or freedom being threatened contrary to Article 33 Convention Relating to the Status of Refugees, 1951.[24] While one cannot extradite refugees, if this person is excluded under Article 1F, then one might have to offer temporary leave to remain, unless there is a threat posed to the security or community of the requested state.

Finally, whilst considering the likelihood of his return to Turkey from Italy, the latter is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and, while Turkey is too, its record as to the treatment of prisoners[25] would suggest that an application against Italy to Strasbourg by Öcalan might also have led to him not being surrendered to Turkey under the *Soering* principle.[26] It is not that he might face the death penalty, although that is not as straightforward an option as might be thought under the Turkish criminal justice system, it is that his time in a Turkish prison may leave him vulnerable to torture, inhuman or degrading treatment.

21. Green, *International Crimes and the Legal Process*, 29 ICLQ 567, at 582 (1980). *See also*, Trb. 1985, no. 66, at 3-5.
22. The obligation to prosecute if no extradition takes place can be derived from the ECST, even if universal jurisdiction does not exist for even serious crimes committed in non-international armed conflicts.
23. T. *v.* Secretary of State for the Home Department, *supra* note 9.
24. *See* note 8.
25. *E.g.* Aydin *v.* Turkey, Case No.57/1996/676/866, European Court of Human Rights, 25 September 1997, paras.83-86.
26. Soering *v.* United Kingdom, 1989 ECHR (Ser. A), at paras. 90-91. *See also* the refugee case of Chahal *v.* United Kingdom, 70/1995/576/662, November 15 1996, paras. 79-82.

3. ÖCALAN'S REMOVAL FROM KENYA

Nevertheless, none of these issues were to be resolved, because Öcalan fled Italy and, after a somewhat circuitous route, ended up in the Greek embassy in Nairobi.[27] How Öcalan left the Greek embassy is unknown, although one would have expected a formal protest from Greece if either Kenyan or Turkish troops had seized him on diplomatic premises. Article 22 of the Vienna Convention on Diplomatic Relations, 1961[28] provides that the premises of the mission shall be inviolable and that the receiving state, Kenya, was under a special duty to protect them, although Article 41.3 provides that they must not be used in any manner incompatible with the functions of the mission. Is using the embassy as a place of refuge incompatible with the functions of the mission? The question was left open by the 1961 Convention, but even if it were a breach of Article 41, it hardly seems to justify a violation of the Article 22 inviolability.[29] Greek complicity in his being obtained by the Turkish authorities, however, would leave it open to a complaint before the European Court of Human Rights that it had breached his rights under Article 3.[30]

Therefore, assuming Öcalan was detained off the embassy premises, the question arises as to whether he was kidnapped from Kenya or whether the Kenyan authorities colluded in his removal to Turkey. If he was kidnapped by Turkish forces, then Kenya's sovereignty was violated and the debates surrounding Eichmann's return to Israel are pertinent.[31] While Kenya could protest and seek the return of Öcalan, traditionally Öcalan has no personal right to plead his abduction as a ground for vitiating the Turkish court's jurisdiction.[32] Nevertheless, more recent case law[33], from common law and civil law systems, would suggest that courts do possess a discretion to renounce jurisdiction to prosecute where the fugitive's appearance before them has been obtained contrary to international law, as were abduction has been used or the various police forces and governmental authorities in both states have colluded to avoid the extradition

27. It would seem that he was not offered asylum in Greece because it was afraid this might jeopardise its plans to join the single European currency in 2001, a factor *clearly* relevant to a decision on *non-refoulement*!
28. 500 UNTS 95.
29. D.J. Harris, Cases and Materials on International Law 350-354 (1998).
30. Chahal, *supra* note 26.
31. For a discussion of the kidnap, *see* Lasok, *The Eichmann Case*, 23 Modern Law Review 507 (1960); Cardozo, *When Extradition Fails is Abduction the Solution*, 55 AJIL 127 (1960). *See also* Resolution of 24th June 1960, 15 UNSCOR Special Supp. (Jan-Dec 1960) Doc.S/4349. Attorney-General of the Government of Israel *v.* Adolf Eichmann, 36 ILR 5 (1961).
32. See United States of America *v.* Humberto Alvarez-Machain, 946 F.2d 1466 (1991); 745 F.Supp 599 (1990). *See also* Gilbert, *supra* note 7, at 337-362.
33. *See, for example*, The State *v.* Ebrahim, *infra* note 34, decided partially under South African Roman-Dutch law, and the English Court of Appeal in R. *v.* Mullen, unreported, 4 February 1999. *See also* the case cited at note 34.

system. It is on these authorities that Öcalan will seek to rely to deny Turkish courts the authority to proceed against him.

> In my opinion it is essential that in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. For abduction is illegal under international law [...] A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual.[34]

Furthermore, as a party to the ECHR, Turkey could find that it is in violation of Article 5 in line with the decision of the European Court of Human Rights in *Bozano* v. *France*.[35] There is no argument that persons accused of serious non-political crimes should enjoy lesser rights. Although the 'arrest' took place in Kenya, given that it was carried out by Turkish security forces, whether with or without the collusion of the Kenyan authorities, those forces carry with them the obligations of Turkey under the ECHR and must act in accordance therewith.[36]

4. THE PERMANENT COURT OF ARBITRATION

As part of his grand asylum-seeking tour of Europe, Öcalan went to The Netherlands so as to plead the case for a Kurdish state before the Permanent Court of Arbitration. The PCA is presently constituted under the 1907 Convention for the Pacific Settlement of International Disputes.[37] It was established to deal with "international differences" between contracting parties. Thus, Öcalan would have had no standing even if he could have produced legitimation for his claim to represent the Kurdish people. Moreover, Turkey has not ratified the 1907 Convention and it entered a declaration upon signature in 1907 that the Convention systems could "never be applied to questions of internal order."[38] As such,

34. Beahan *v.* The State, 103 ILR 203 at 214 *per* Gubbay CJ (Zimbabwe S.Ct, 1991). *See also* Bennett *v.* Horseferry Road Magistrates' Court [1994] 1 AC 42, and The State *v.* Ebrahim, 31 ILM 888 (S.Af S.Ct, 1992).
35. 1986 ECHR (Ser. A), Vol. 111, paras. 53-58.
36. Loizidou *v.* Turkey (Preliminary Objections), 1995 ECHR (Ser. A), paras. 62-64; the decision on the Merits, 40/1993/435/514, 18 December 1996, reached the same conclusion, *see* paras. 58-64. Nevertheless, such concerns seem to matter little to the Turkish authorities who have apprehended another member of the PKK, Cevat Soyal, in Moldova, *see* D. Hearst & N. Doughty, *PKK Man Captured in Moldova*, The Guardian, 22 July 1999, at 12.
37. *Supra* note 2.
38. *Supra* note 2, 6 UKTS (1971), at 33.

the venture to The Hague was misconceived. On the other hand, another, more modern institution based in The Hague should have been of more practical use, the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe.[39] Unfortunately, the High Commissioner's mandate is as a tool of conflict prevention between OSCE participating states, not minority issues in general, and expressly excludes situations of terrorism, a restriction imposed at the behest of Turkey. Therefore, international involvement in settling the cause of the dispute between Turkey and its Kurdish population is still as remote as ever.

5. CONCLUSION

Öcalan would probably have fared best by not leaving Italy. Although, *prima facie*, the ECST would have denied him the guarantees of the political offence exemption, Italy's reservation thereto and its constitutional guarantees with respect to the death penalty would, in all likelihood, have led to a refusal of surrender to Turkey. His treatment by the Greeks will probably never be fully known, but he was within their jurisdiction and so entitled to all the rights set out in the ECHR. Allowing him to be removed from that jurisdiction, such that there is a substantial risk that his rights under Article 3 of the ECHR might be violated, is a breach of the Convention – the Turkish record before the European Court of Human Rights does not bode well. Greece's behaviour also calls into question the proper use of embassies, particularly as regards those seeking asylum. Finally, his abduction by Turkey may render any trial before a Turkish tribunal a nullity under the ECHR having regard to the judgment of the Court in *Bozano*. In sum, the process so far has not dignified rendition within Europe and has highlighted how far *realpolitik* can interfere with the proper law of extradition.

The conflict between Turkish security forces and the PKK has been one of the bitterest and most violent, and it is right that persons organising such acts should face justice. However, Öcalan should face *justice* – and that means detention and trial in accordance with, at minimum, the standards set out in Articles 5 and 6 of the ECHR.[40] Whether that is ever possible in this sort of context is open to question.

39. The Helsinki Document 1992, *The Challenges of Change*, 13 Human Rights Law Journal 284 (1992).
40. *See* the European Court of Human Rights's call for preliminary observations from Turkey – Council of Europe Press Release 106 23.2.1999. "In view of the gravity of the allegations, however, it decided, under Rule 54§3(a), to seek clarification from the Turkish authorities on a number of points concerning the circumstances of Mr Öcalan's arrest and detention. The Chamber would in particular ask the Turkish Government for a speedy response to a request for information on the question of Mr Öcalan's access to lawyers."

> Neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions [...] [The judges'] principal function is to support the institutions of government as established by law [...] The confusion arises when it is pretended that judges are somehow neutral between those who challenge existing institutions and those who control those institution.[41]

Moreover, given that Öcalan faced trial for his actions, it is right and proper that Turkey should investigate and, where appropriate, prosecute its own security forces for similar violations of the laws and customs of war in line with its international obligations.

41. Griffith, The Politics of the Judiciary, at 292 and 343 (1997).

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