



# Renditions: Constraints Imposed by Laws on Torture

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## Summary

Persons suspected of criminal or terrorist activity may be transferred from one State (i.e., country) to another for arrest, detention, and/or interrogation. Commonly, this is done through extradition, by which one State surrenders a person within its jurisdiction to a requesting State via a formal legal process, typically established by treaty. Far less often, such transfers are effectuated through a process known as “extraordinary rendition” or “irregular rendition.” These terms have often been used to refer to the *extrajudicial* transfer of a person from one State to another. In this report, “rendition” refers to extraordinary or irregular renditions unless otherwise specified.

Although the particularities regarding the usage of extraordinary renditions and the legal authority behind such renditions are not publicly available, various U.S. officials have acknowledged the practice’s existence. During the Bush Administration, there was some controversy as to the usage of renditions by the United States, particularly with regard to the alleged transfer of suspected terrorists to countries known to employ harsh interrogation techniques that may rise to the level of torture, purportedly with the knowledge or acquiescence of the United States.

This report discusses relevant international and domestic law restricting the transfer of persons to foreign states for the purpose of torture. The U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), and its domestic implementing legislation (the Foreign Affairs Reform and Restructuring Act of 1998) impose the primary legal restrictions on the transfer of persons to countries where they would face torture. Both CAT and U.S. implementing legislation generally prohibit the rendition of persons to countries in most cases where they would more likely than not be tortured, though there are arguably limited exceptions to this prohibition. Historically, the State Department has taken the position that CAT’s provisions concerning the transfer of persons do not apply extraterritorially, though as a matter of policy the United States does not transfer persons in its custody to countries where they would face torture (U.S. regulations and statutes implementing CAT, however, arguably limit the extraterritorial transfer of individuals nonetheless). Under U.S. regulations implementing CAT, a person may be transferred to a country that provides credible assurances that the rendered person will not be tortured. Neither CAT nor its implementing legislation prohibit the rendition of persons to countries where they would be subject to harsh treatment not rising to the level of torture. Besides CAT, additional obligations may be imposed upon U.S. rendition practice via the Geneva Conventions, the War Crimes Act (as amended by the Military Commissions Act (P.L. 109-366)), the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration on Human Rights.

Legislation was introduced in the 110<sup>th</sup> Congress to limit or bar U.S. participation in renditions. It is possible that similar legislation will be proposed in the 111<sup>th</sup> Congress.

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## Introduction

Persons suspected of terrorist or criminal activity may be transferred from one State (i.e., country) to another to answer charges against them.<sup>1</sup> The surrender of a fugitive from one State to another is generally referred to as *rendition*.<sup>2</sup> A distinct form of rendition is *extradition*, by which one State surrenders a person within its territorial jurisdiction to a requesting State via a formal legal process, typically established by treaty between the countries.<sup>3</sup> However, renditions may be effectuated in the absence of extradition treaties, as well.<sup>4</sup> The terms “irregular rendition” and “extraordinary rendition” have been used to refer to the *extrajudicial* transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation by the receiving State (for purposes of this report, the term “rendition” will be used to describe irregular renditions, and not extraditions, unless otherwise specified). Unlike in extradition cases, persons subject to this type of rendition typically have no access to the judicial system of the sending State by which they may challenge their transfer.<sup>5</sup> Sometimes persons are rendered from the territory of the rendering State itself, while other times they are seized by the rendering State in another country and immediately rendered, without ever setting foot in the territory of the rendering State.<sup>6</sup> Sometimes renditions occur with the consent of the State where the fugitive is located;<sup>7</sup> other times, they do not.<sup>8</sup>

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<sup>1</sup> The surrender of persons to a requesting State to answer criminal charges was originally guided by principles of comity and reciprocity. Beginning in the late eighteenth century, the surrender of persons to a requesting State to answer charges increasingly became governed by formal extradition treaties between States (though the practice of extradition can be traced back to antiquity). For background, see CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, by Charles Doyle. In contrast to earlier practices, extradition treaties established formal procedures governing the surrender of persons from one treaty party to another, facilitating treaty parties’ shared interest in punishing certain crimes while providing persons with a legal means to challenge their proposed transfer to a requesting State. By the 20<sup>th</sup> century, extradition treaties became the predominant means of permitting the transfer of persons from one State to another to answer charges against them. For background, see *id.* at 1-3; M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (4<sup>th</sup> ed. 2002).

<sup>2</sup> BLACK’S LAW DICTIONARY 1298-99 (7<sup>th</sup> ed. 1999).

<sup>3</sup> U.S. extradition procedures for transferring a person to another State are governed by the relevant treaty with that State, as supplemented by 18 U.S.C. §§ 3181-3196. U.S. law generally prohibits the extradition of individuals from the United States in the absence of a treaty. 18 U.S.C. § 3181.

<sup>4</sup> For example, via statutory authorization, the U.S. may in the exercise of comity surrender a person to a foreign country to face criminal charges for committing a crime of violence against a U.S. national, if the offense is non-political in nature and the person is not a U.S. citizen, national, or permanent resident. 18 U.S.C. § 3181(b). Courts have also recognized that an extradition may be effectuated pursuant to a statute rather than a treaty. See *Ntakirutimana v. Reno*, 184 F.3d 419 (5<sup>th</sup> Cir. 1999) (upholding surrender of Rwandan citizen to international tribunal, when surrender was authorized via executive agreement and implementing statute rather than treaty).

<sup>5</sup> Before the United States may extradite a person to another State, an extradition hearing must be held before an authorized judge or magistrate, during which the judge or magistrate must determine whether the person’s extradition would comply with the terms of the extradition treaty between the United States and the requesting State. Even if the magistrate or authorized judge finds extradition to be appropriate, a fugitive can still institute habeas corpus proceedings to obtain release from custody and thereby prevent his extradition, or the Secretary of State may decide not to authorize the extradition. See CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, by Charles Doyle, *supra* footnote 1. These protections do not apply in situations where an alien is being removed from the United States for immigration purposes. Nevertheless, separate procedural and humanitarian relief protections do pertain.

<sup>6</sup> In 2005, Khaled El-Masri, a German citizen of Lebanese descent, filed suit against a former CIA director and other persons for their involvement in his alleged rendition from Macedonia to a detention center in Afghanistan, where he was subjected to harsh interrogation for several months on account of suspected terrorist activities. El-Masri claimed that after the CIA discovered that its suspicions of El-Masri were mistaken, it thereafter released him in Albania. Don Van Natta Jr. & Souad Mekhennet, “German’s Claim of Kidnapping Brings Investigation of U.S. Link,” *New York* (continued...)

Besides irregular rendition and extradition, aliens present or attempting to enter the United States may be removed to another State under U.S. immigration laws, if such aliens are either deportable or inadmissible and their removal complies with relevant statutory provisions.<sup>9</sup> Unlike in the case of rendition and extradition, the legal justification for removing an alien from the United States via deportation or denial of entry is not so that he can answer charges against him in the receiving State; rather, it is because the U.S. possesses the sovereign authority to determine which non-nationals may enter or remain within its borders, and the alien fails to fulfill the legal criteria allowing non-citizens to enter, remain in, or pass in transit through the United States. Although the deportation or exclusion of an alien under immigration laws may have the same practical effect as an irregular rendition (especially if the alien is subject to “expedited removal” under § 235 of the Immigration and Nationality Act, in which case judicial review of a removal order may

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(...continued)

*Times*, January 9, 2005, at 11. The federal district court dismissed El-Masri’s claim without evaluating its merits, finding that the claim could not be fairly litigated without disclosure of sensitive information protected by the state secrets privilege. *El-Masri v. Tenet*, 437 F.Supp.2d 530 (E.D.Va. 2006). The district court’s ruling was affirmed by the Fourth Circuit Court of Appeals in 2007, and the Supreme Court subsequently denied plaintiff’s petition for writ of certiorari. *El-Masri v. United States*, 479 F.3d 296 (4<sup>th</sup> Cir. 2007), cert. denied, 128 S.Ct. 373 (2008). In 2007, German public prosecutors issued arrest warrants for 13 CIA agents who were allegedly involved in El-Masri’s rendition, but the Justice Ministry declined to request the agents’ extradition from the United States. “Renditions Victim to Sue German Government,” *Spiegel Online*, June 9, 2008, at <http://www.spiegel.de/international/germany/0,1518,558496,00.html>.

<sup>7</sup> In some instances, questions as to whether a State has consented to the rendition of a person located in its territory have been subject to controversy and investigation. In Italy, the trial of several Italian intelligence officers and 26 American intelligence operatives (being tried in absentia) for the rendition of an Islamic cleric from Italy to Egypt was suspended after the Italian government said testimony could reveal state secrets threatening Italy’s national security. “CIA-Linked Kidnapping Trial on Hold,” *Chicago Tribune*, December 4, 2008, at 22. In late 2006, a committee established by the European Parliament (the parliamentary body of the European Union) to investigate European governments’ participation in renditions by the CIA found evidence indicating the involvement of European State agents or officials in a number of investigated renditions. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Eur. Parl., Working Doc. 7, November 16, 2006, available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/working\\_docs/pe380593\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/working_docs/pe380593_en.pdf) at 2. The final report by the committee was issued in January 2007. Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Eur. Parl., Final Report, January 30, 2007, available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf). For additional background, see CRS Report RL33643, *Undisclosed U.S. Detention Sites Overseas: Background and Legal Issues*, by Jennifer K. Elsea and Julie Kim.

<sup>8</sup> In 1980, the Department of Justice’s Office of Legal Counsel issued an opinion that irregular renditions absent the consent of the State where the fugitives are seized would violate customary international law because they would be an invasion of sovereignty for one country to carry out law enforcement activities in another without that country’s consent. *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B. OP. OFF. LEGAL COUNSEL 543 (1980). Additionally, Article 2(4) of the U.N. Charter prohibits Member States from violating the sovereignty of another State. In 1989, the Office of Legal Counsel constrained the 1980 opinion, though not on the grounds that such renditions are consistent with customary international law. *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Activities*, 13 OP. OFF. LEGAL COUNSEL 163 (1989) (finding that extraterritorial law enforcement activities authorized by domestic law are not barred even if they contravene unexecuted treaties or treaty provisions, such as Article 2(4) of the United Nations Charter, as well as customary international law). Further, while upholding court jurisdiction over a Mexican national brought to the United States via rendition, despite opposition from the Mexican government, the Supreme Court nevertheless noted that such renditions were potentially “a violation of general international law principles.” *United States v. Alvarez-Machain*, 505 U.S. 655, 669 (1992). In a related case twelve years later, however, the Court held that any such principle—at least as it related to the rights of the rendered individual—did not “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18<sup>th</sup> century paradigms.” *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761-62 (2004).

<sup>9</sup> See, e.g., 8 U.S.C. §§ 1182 (providing grounds for alien inadmissibility into the United States), 1227 (describing classes of deportable aliens), 1251 (providing guidelines for removal of deportable and inadmissible aliens).

be very limited), this practice is arguably distinct from the historical understanding of what constitutes a rendition.<sup>10</sup> Nonetheless, the term “extraordinary rendition” has occasionally been used by some commentators to describe the transfer of aliens suspected of terrorist activity to third countries for the purposes of detention and interrogation, even though the transfer was conducted pursuant to immigration procedures.<sup>11</sup>

Over the years, several persons have reportedly been rendered into the United States by U.S. authorities, often with the cooperation of the States where such persons were seized, to answer criminal charges, including charges related to terrorist activity.<sup>12</sup> Besides receiving persons through rendition, the United States has also rendered persons to other countries over the years, via the Central Intelligence Agency (CIA) and various law enforcement agencies.<sup>13</sup>

There have been no widely-reported cases of persons being rendered *from the interior* of the United States, perhaps due to the constitutional and statutory limitations upon the summary transfer of persons from U.S. territory.<sup>14</sup> There have been cases where non-U.S. citizens were allegedly “rendered” at U.S. ports of entry but had yet to legally enter/be admitted into the United States. However, these “renditions” appear to have been conducted pursuant to immigration removal procedures.<sup>15</sup> Noncitizens arriving at ports of entry have no recognized constitutional

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<sup>10</sup> See BASSIOUNI, *supra* footnote 1, at 183-248 (discussing deportation and exclusion as an alternative to extradition).

<sup>11</sup> Perhaps the most notable case of alleged rendition involved Maher Arar, a dual citizen of Canada and Syria. Mr. Arar filed suit in January 2004 against certain U.S. officials that he claims were responsible for rendering him to Syria, where he was allegedly tortured and interrogated for suspected terrorist activities with the acquiescence of the United States. Arar was allegedly first detained by U.S. officials while waiting in New York’s John F. Kennedy International Airport for a connecting flight to Canada after previously flying from Tunisia. According to U.S. officials, Mr. Arar’s removal to Syria was done pursuant to § 235(c) of the Immigration and Nationality Act, which authorizes the “expedited removal” of arriving aliens suspected of terrorist activity. U.S. Department of State, U.S. Views Concerning Syrian Release of Mr. Maher Arar, October 6, 2003, available at <http://www.state.gov/r/pa/prs/ps/2003/24965.htm>; see also 8 U.S.C. § 1225(c). On February 16, 2006, the U.S. District Court for the Eastern District of New York dismissed Arar’s civil case on a number of grounds, including that certain claims raised against U.S. officials implicated national security and foreign policy considerations, and assessing the propriety of those considerations was most appropriately reserved to Congress and the executive branch. *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D.N.Y. 2006). The district court’s dismissal was upheld by a three-judge panel of the Court of Appeals for the Second Circuit on June 30, 2008. *Arar v. Ashcroft*, 532 F.3d 157 (2nd Cir. 2008). A rehearing *en banc* was granted on August 12, 2008, but a ruling has yet to be issued. The Canadian government established a commission to investigate Canada’s involvement in Arar’s arrest and transfer to Syria. The final report of the Arar Commission, released in September 2006, concluded that Arar had not been a security threat to Canada, but Canadian officials provided U.S. authorities with inaccurate information regarding Arar that may have led to his transfer to Syria. Arar Commission, Factual Inquiry, at <http://www.ararcommission.ca/eng/26.htm>. See also, Department of Homeland Security, OIG-08-18, Office of Inspector General, The Removal of a Canadian Citizen to Syria (Unclassified Summary), March 2008.

<sup>12</sup> See generally State Department, Office of the Coordinator of Counterterrorism, *Patterns of Global Terrorism, Appendix D: Extraditions and Renditions of Terrorists to the United States, 1993-2001* (May 21, 2002), available at <http://www.state.gov/s/ct/rls/pgtrpt/2001/html/10256.htm>. See also State Department, Bureau for International Narcotics and Law Enforcement Affairs International Narcotics Control Strategy Report, 2005: Southeast Asia (March 2005), available at <http://www.state.gov/g/inl/rls/nrcrpt/2005/vol1/html/42367.htm> (mentioning Vietnam and Cambodia as countries that have permitted the rendition of persons to the United States to answer drug charges).

<sup>13</sup> For a historical discussion of U.S. policy and practice regarding rendition, see William G. Weaver & Robert M. Pallitto, “The Law: ‘Extraordinary Rendition’ and Presidential Fiat,” 36 *PRESIDENTIAL STUD. Q.* 102 (2006).

<sup>14</sup> See, e.g., 18 U.S.C. § 3181 (generally prohibiting extradition of U.S. citizens and legal permanent residents in the absence of a treaty); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) (holding that Executive may not extradite U.S. citizen unless granted legal authority to do so); *Yamata v. Fischer*, 189 U.S. 86, 100-101 (deportation proceedings must reflect procedural due process requirements).

<sup>15</sup> See *supra* footnote 11.

rights with regard to their admission into the United States,<sup>16</sup> and federal immigration law provides arriving aliens with fewer procedural protections against their removal than aliens residing in the United States.<sup>17</sup>

Instead, it appears that renditions by the U.S. to third countries have involved non-citizens seized outside U.S. territory. The Supreme Court has found that the Constitution protects U.S. citizens abroad from actions taken against them by the federal government,<sup>18</sup> and this would generally appear to limit the summary transfer of such persons to the custody of foreign governments.<sup>19</sup> In contrast, noncitizens who have not entered the United States have historically been recognized as receiving few, if any, constitutional protections<sup>20</sup> (though noncitizens in foreign territory under the *de facto* control of the United States, such as Guantanamo Bay, Cuba, may be owed greater protections than other noncitizens abroad).<sup>21</sup>

Reportedly, the rendition of terrorist suspects to other countries was authorized by President Ronald Reagan in 1986 and has been part of U.S. counterterrorism efforts at least since the late 1990s.<sup>22</sup> In testimony before the House Foreign Affairs Committee in April 2007, former CIA official Michael F. Scheuer claimed authorship of the CIA's rendition program and stated that it originally began in mid-1995. The initial goals of the rendition program, according to Scheuer,

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<sup>16</sup> See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, (1950) (“At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right.”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660 (1892) (“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

<sup>17</sup> Arriving aliens who are deemed inadmissible may be subject to “expedited removal,” a more streamlined removal process than that applicable to aliens who have been admitted into the United States. 8 U.S.C. § 1225.

<sup>18</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 6 (1957) (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”).

<sup>19</sup> See *Valentine*, 299 U.S. at 9 (1936) (stating that there is “no executive prerogative to dispose of the liberty of the individual ... There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law.”). In limited circumstances, the involuntary transfer of a U.S. citizen to a foreign government may occur in the absence of an authorizing statute or treaty, in cases “involving the transfer to a sovereign’s authority of an individual captured and already detained [by the U.S.] in that sovereign’s territory.” *Munaf v. Geren*, 553 U.S. \_\_\_, 128 S.Ct. 2207, 2227 (2008). In *Munaf*, the Supreme Court found that while the federal *habeas corpus* statute gives U.S. courts jurisdiction over petitions filed on behalf of U.S. citizens held by U.S. authorities in foreign territory, courts may not exercise *habeas* jurisdiction to enjoin the surrender of such persons to the foreign territory’s sovereign for criminal prosecution.

<sup>20</sup> See, e.g., *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990) (“aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country”).

<sup>21</sup> In the 2008 case of *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229, the Supreme Court held that the constitutional writ of *habeas corpus* extended to non-citizen detainees held at Guantanamo, in significant part because Guantanamo, while not technically part of the United States, was nonetheless subject to its complete control. The Court’s opinion did not address the extent to which other constitutional protections extended to Guantanamo detainees, and it suggested that noncitizens held by the United States in foreign territories where U.S. control was less absolute than Guantanamo would be afforded lesser protections. See *id.* at 2262 (noting that the Court had never before found that the noncitizens detained in another country’s territory have any rights under the U.S. Constitution, but concluding that the case before it “lack[ed] any precise historical parallel”). Notably, the Court did not overrule its decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where it held that the constitutional writ of *habeas* did not extend to enemy aliens held in postwar Germany. Instead, the Court distinguished the two cases, and noted that unlike the petitioners in *Eisentrager*, the Guantanamo detainees denied they were enemy combatants and the government’s control over post-WWII German territory was not nearly as complete as its control over Guantanamo. *Boumediene*, 128 S. Ct. at 2259-2260.

<sup>22</sup> See Dana Priest, “CIA’s Assurances On Transferred Suspects Doubted,” *Washington Post*, March 17, 2005, p. A1.

were to ensure the detention of Al Qaeda members posing a threat to U.S. security and to seize any documents in their possession.<sup>23</sup> However,

[a]fter 9/11, and under President Bush, rendered al-Qaeda operatives have most often been kept in U.S. custody. The goals of the program remained the same, although ... Mr. Bush's national security team wanted to use U.S. officers to interrogate captured al-Qaeda fighters.<sup>24</sup>

In a 2002 written statement to the Joint Committee Inquiry into Terrorist Attacks Against the United States, then-CIA Director George Tenet reported that even prior to the 9/11 terrorist attacks, the "CIA (in many cases with the FBI) had rendered 70 terrorists to justice around the world."<sup>25</sup> The *New York Times* has reported that following the 9/11 attacks, President Bush issued a still-classified directive that broadened the CIA's authority to render terrorist suspects to other States.<sup>26</sup> Although there are some reported estimates that the United States has rendered more than 100 individuals following 9/11,<sup>27</sup> the actual number is not a matter of the public record.

Controversy has arisen over the United States allegedly rendering suspected terrorists to States known to practice torture for the purpose of arrest, detention, and/or harsh interrogation.<sup>28</sup> Critics charge that the United States has rendered persons to such States so that they will be subjected to harsh interrogation techniques prohibited in the United States, including torture. The Bush Administration did not dispute charges that U.S. authorities rendered persons to foreign States believed to practice torture, but denied rendering persons for the purpose of torture.<sup>29</sup> Answering a question regarding renditions in a March 16, 2005 press conference, President Bush stated that prior to transferring persons to other States, the United States received "promise[s] that they won't be tortured ... This country does not believe in torture."<sup>30</sup> In testimony before the Senate Armed Services Committee in 2005, acting CIA Director Porter Goss stated that in his belief, "we have more safeguards and more oversight in place [over renditions] than we did before" 9/11.<sup>31</sup> Secretary of State Condoleezza Rice stated that "the United States has not transported anyone,

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<sup>23</sup> Statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency, House For. Affairs Comm. (April 17, 2007), Hearing, *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations*, available at <http://foreignaffairs.house.gov/110/sch041707.htm>.

<sup>24</sup> *Id.*

<sup>25</sup> Statement of Director of Central Intelligence George Tenet, Joint Committee Inquiry into Terrorist Attacks Against the United States (October 17, 2002), available online at [https://www.cia.gov/news-information/speeches-testimony/2002/dci\\_testimony\\_10172002.html](https://www.cia.gov/news-information/speeches-testimony/2002/dci_testimony_10172002.html).

<sup>26</sup> Douglas Jehl and David Johnston, "Rule Change Lets CIA Freely Send Suspects Abroad to Jails," *N.Y. Times*, March 6, 2005.

<sup>27</sup> See Priest, *supra* footnote 22.

<sup>28</sup> See generally Jane Mayer, "Outsourcing Torture," *New Yorker*, February 14, 2005, p. 106.

<sup>29</sup> See, e.g., R. Jeffrey Smith, "Gonzales Defends Transfer of Detainees," *Washington Post*, March 8, 2005, p. A3 (quoting Attorney General Gonzales as stating that it is not U.S. policy to send persons "to countries where we believe or we know that they're going to be tortured").

<sup>30</sup> White House, Office of the Press Secretary, President's Press Conference, March 16, 2005, available at <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>. This position was reiterated by President Bush in another press conference the following month. White House, Office of the Press Secretary, President's Press Conference, April 28, 2005, available at <http://www.whitehouse.gov/news/releases/2005/04/20050428-9.html> (remarking that the United States "operate[s] within the law and we send people to countries where they say they're not going to torture the people").

<sup>31</sup> "McCain, Dems Press Goss On Torture Allegations," *Congressional Daily*, March 18, 2005.



and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.”<sup>32</sup>

Little publicly available information from government sources exists regarding the nature and frequency of U.S. renditions to countries believed to practice torture, or the nature of any assurances obtained from them before rendering persons to them. To what extent U.S. agencies have legal authority to engage in renditions remains unclear. The only provision within the United States Code appearing to expressly permit an agency’s participation in a rendition is 10 U.S.C. § 374(b)(1)(D), as amended in 1998, which permits the Department of Defense (DOD), upon request from the head of a federal law enforcement agency, to make DOD personnel available to operate equipment with respect to “a rendition of a suspected terrorist from a foreign country to the United States to stand trial.”<sup>33</sup> On the other hand, given that the United States has participated in renditions, there would appear to be legal limits on the practice, especially with regard to torture. This report describes the most relevant legal guidelines limiting the transfer of persons to foreign States where they may face torture, as well as recent legislation seeking to limit the rendition of persons to countries believed to practice torture.

## Limitations Imposed on Renditions by the Convention Against Torture and Implementing Legislation

The U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)<sup>34</sup> and U.S. domestic implementing legislation impose the primary legal restrictions on the transfer of persons to countries where they would face torture. CAT requires signatory parties to take measures to end torture within territories under their jurisdiction, and it prohibits the transfer of persons to countries where there is a substantial likelihood that they will be tortured.<sup>35</sup> Torture is a distinct form of persecution, and is defined for purposes of CAT as “severe pain or suffering ... intentionally inflicted on a person” under the color of law.<sup>36</sup> Accordingly, many forms of persecution—including certain harsh interrogation techniques that would be considered cruel and unusual under the U.S. Constitution—do not necessarily constitute torture, which is an extreme and particular form of mistreatment.<sup>37</sup>

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<sup>32</sup> Remarks of Secretary of State Condoleezza Rice Upon Her Departure for Europe, December 5, 2005, online at <http://usinfo.state.gov/is/Archive/2005/Dec/05-978451.html> [hereinafter “Rice Statement”].

<sup>33</sup> 10 U.S.C. § 374(b)(1)(D), added by Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P.L. 105-277, Div. B, Title II, § 201(2) (1998). Though U.S. law expressly permits the surrender of certain fugitives to face criminal charges in the requesting State in the absence of an extradition treaty, such persons (at least if found in the United States) are provided with certain procedural protections under statute and the Constitution. *See* 18 U.S.C. §§ 3181-3196; *In re Kaine*, 55 U.S. 103, 113 (1852) (“an extradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty, and ought never to be allowed in this country”).

<sup>34</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

<sup>35</sup> *Id.*, art. 2(1).

<sup>36</sup> *Id.*, art. 1 (emphasis added).

<sup>37</sup> For further background on the applicability of CAT to interrogation techniques, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

CAT also obligates parties to take measures to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture,” but this obligation only extends to acts occurring within a State Party’s territorial jurisdiction.<sup>38</sup> CAT also established the Committee against Torture, a monitoring body which has declaratory but non-binding authority concerning interpretation of the Convention.<sup>39</sup> State parties are required to submit periodic reports to the Committee concerning their compliance with CAT.<sup>40</sup>

The United States ratified CAT in 1994, subject to certain declarations, reservations, and understandings, including that the Convention was not self-executing and therefore required domestic implementing legislation to take effect.<sup>41</sup>

The express language of CAT Article 2 allows for no circumstances or emergencies where torture could be permitted by Convention parties.<sup>42</sup> On the other hand, a number of CAT provisions limiting the acts of Convention parties does not use language coextensive as that contained in CAT Article 2. The following paragraphs describe the relevant provisions of CAT and implementing statutes and regulations that restrict the rendition of persons to countries when there is a substantial likelihood that such persons will be tortured. As will be discussed below, while CAT imposes an absolute prohibition on the use of torture by Convention parties, the plain language of certain CAT provisions may nevertheless permit parties in limited circumstances to transfer persons to countries where they would likely face torture, though such an interpretation arguably conflicts with the intent of the treaty.

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<sup>38</sup> CAT art. 16(1).

<sup>39</sup> See *id.*, arts. 17-24.

<sup>40</sup> *Id.*, art. 19(1).

<sup>41</sup> It could be argued that despite its declaration that CAT was not self-executing and required implementing legislation to take effect, such legislation was actually unnecessary in the case of certain CAT provisions, including those related to the removal of persons to countries where they would likely face torture. However, U.S. courts hearing cases concerning the removal of aliens have regularly interpreted CAT provisions prohibiting alien removal to countries where an alien would likely face torture to be non-self executing and judicially unenforceable, except to the extent permitted under domestic implementing legislation. See, e.g., *Castellano-Chacon v. INS*, 341 F.3d 533 (6<sup>th</sup> Cir. 2003) (applicant for withholding of removal could not invoke CAT directly, but could rely upon implementing regulations); *Akhtar v. Reno*, 123 F.Supp.2d 191 (S.D.N.Y. 2000) (rejecting challenge made by criminal alien to removal pursuant to CAT, and stating that “[g]iven the apparent intent of the United States that the Convention not be self-executing, this Court joins the numerous other courts that have concluded that the Convention is not self-executing”).

<sup>42</sup> CAT Article 2(2) declares that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” According to the State Department’s analysis of CAT, which was included in President Reagan’s transmittal of the Convention to the Senate for its advice and consent, this explicit prohibition of all torture, regardless of the circumstances, was viewed by the drafters of CAT as “necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.” President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-20 at 5, reprinted in 13857 U.S. Cong. Serial Set. [hereinafter “State Dept. Summary”].

## **CAT Limitation on the Transfer of Persons to Foreign States for the Purpose of Torture<sup>43</sup>**

CAT Article 3 provides that no State Party “shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The U.S. ratification of CAT was contingent on its understanding that this requirement refers to situations where it would be “more likely than not” that a person would be tortured if removed to a particular country, a standard commonly used by U.S. courts when determining whether to withhold an alien’s removal for fear of persecution.<sup>44</sup>

It is important to note that CAT does *not* prohibit a State from transferring a person to another State where he or she would likely be subjected to harsh treatment that, while it would be considered cruel and unusual under the standards of the U.S. Constitution, would nevertheless not be severe enough to constitute “torture.”<sup>45</sup>

### **Domestic Implementation of CAT Article 3**

The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) implemented U.S. obligations under CAT Article 3.<sup>46</sup> Section 2242 of the act announced the U.S. policy “not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”<sup>47</sup> The act further required all relevant federal agencies to adopt appropriate regulations to implement this policy.<sup>48</sup>

In doing so, however, Congress opened the door for administrative action limiting CAT protection by requiring that, “to the maximum extent consistent” with Convention obligations, regulations adopted to implement CAT Article 3 exclude from their protection those aliens described in §

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<sup>43</sup> For additional information, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

<sup>44</sup> Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990) at II.(2). See generally *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). This standard is in contrast to the lower standard for determining whether an alien is eligible for consideration for asylum based on a “well-founded fear of persecution” if transferred to a particular country. To demonstrate a “well-founded” fear, an alien only needs to prove that the fear is reasonable, not that it is based on a clear probability of persecution. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>45</sup> According to the State Department’s analysis of CAT, the Convention’s definition of torture was intended to be interpreted in a “relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned.” State Dept. Summary, *supra* footnote 42, p. 3. For example, the State Department suggested that rough treatment falling into the category of police brutality, “while deplorable, does not amount to ‘torture’” for purposes of the Convention, which is “usually reserved for extreme, deliberate, and unusually cruel practices ... [such as] sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.” *Id.*, p. 4 (presumably, police brutality of extreme severity could rise to the level of “torture”). This understanding of torture as a particularly severe form of cruel treatment is made explicit by CAT Article 16, which obligates Convention parties to “prevent in any territory under [their] jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to acts of torture,” thereby indicating that not all forms of inhumane treatment constitute torture.

<sup>46</sup> P.L. 105-277 at § 2242(a)-(b).

<sup>47</sup> *Id.*, at § 2242(a) (emphasis added).

<sup>48</sup> *Id.*, at § 2242(b).

241(b)(3)(B) of the Immigration and Nationality Act (INA).<sup>49</sup> INA § 241(b)(3)(B) acts as an exception to the general U.S. prohibition on the removal of aliens to countries where they would face *persecution* (which may or may not include actions constituting torture). An alien may be removed despite the prospect of likely persecution if the alien:

- assisted in Nazi persecution or engaged in genocide;
- ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
- having been convicted of a particularly serious crime, is a danger to the community of the United States;
- is strongly suspected to have committed a serious nonpolitical crime outside the United States prior to arrival,<sup>50</sup> or
- is believed, on the basis of reasonable grounds, to be a danger to the security of the United States.

Thus far, however, U.S. regulations concerning the *removal* of aliens and *extradition* of fugitives have prohibited the removal of *all* persons to States where they would more likely than not be tortured,<sup>51</sup> regardless of whether they are described in INA § 241(b)(3)(B). CIA regulations concerning renditions (i.e., renditions where a person is seized outside the United States and transferred to a third country) are not publicly available. Nevertheless, such regulations would presumably need to comply with the requirements of FARRA.

## **The Role of Diplomatic Assurances in Transfer Decisions**

U.S. regulations implementing CAT Article 3 permit the consideration of diplomatic assurances in removal/extradition decisions.<sup>52</sup> Pursuant to removal and extradition regulations, a person subject to removal or extradition may be transferred to a specified country that provides diplomatic assurances to the Secretary of State that the person will not be tortured if removed there. Such assurances must be deemed “sufficiently reliable” before a person can be transferred to a country where he or she would otherwise more likely than not be tortured.<sup>53</sup> Although the DoD has not promulgated regulations implementing CAT Article 3, diplomatic assurances are also used by military authorities when determining whether to transfer a person from U.S. military detention at Guantanamo Bay, Cuba.<sup>54</sup>

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<sup>49</sup> P.L. 105-277 at § 2242(c).

<sup>50</sup> The distinction between political and nonpolitical crimes is occasionally unclear. For more background, see CRS Report 98-958, *Extradition To and From the United States: Overview of the Law and Recent Treaties*, by Charles Doyle, *supra* footnote 1.

<sup>51</sup> See 8 C.F.R. §§ 208.16-18, 1208.16-18 (relating to the removal of aliens); 22 C.F.R. §95.2 (relating to extradition of persons).

<sup>52</sup> 8 C.F.R. § 208.18; 22 C.F.R. § 95.3(b) (describing authority of Secretary of State to surrender fugitive “subject to conditions”).

<sup>53</sup> 8 C.F.R. § 208.18(c).

<sup>54</sup> For additional discussion, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

Assurances are also reportedly used in rendition decisions made by the CIA. The *Washington Post* reports that the CIA Office of General Counsel requires the CIA station chief in a given country to obtain verbal assurances from that country's security service that a person will not be tortured if rendered there.<sup>55</sup> Such assurances must then reportedly be cabled to CIA headquarters before the rendition may occur.<sup>56</sup>

CAT Article 3 itself (as opposed to U.S. regulations implementing CAT) provides little guidance as to the application of diplomatic assurances to decisions to transfer a person to another country. Although CAT Article 3 obligates signatory parties to take into account the proposed receiving State's human rights record, it also provides that the proposed sending State should take into account "all relevant considerations" when assessing whether to remove an individual to a particular State.<sup>57</sup> A State's assurances that it will not torture an individual would appear to be a "relevant consideration" in determining whether or not it would be appropriate to render him there, at least so long as the assurances are accompanied by a mechanism for enforcement.<sup>58</sup> Article 3 does not provide guidelines for how these considerations should be weighed in determining whether substantial grounds exist to believe a person would be tortured in the proposed receiving State.<sup>59</sup> In its second periodic report to the Committee against Torture, the United States claimed that it:

obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred. If assurances [are] not considered sufficient when balanced against treatment concerns, the United States would not transfer the person to the control of that government unless the concerns are satisfactorily resolved.<sup>60</sup>

On the other hand, the Committee against Torture has expressed concern over the use of diplomatic assurances by the United States. In 2006, it made a non-binding recommendation that the United States:

should only rely on "diplomatic assurances" in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for

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<sup>55</sup> Priest, *supra* footnote 22.

<sup>56</sup> *Id.*

<sup>57</sup> CAT art. 3(2).

<sup>58</sup> See Committee against Torture, Communication No 233/2003: Sweden, 24/05/2005 (Agiza v. Sweden), CAT/C/34/D/233/2003 (2005) at para. 13.4., *reprinted in* 44 ILM 1103 (2005)(finding that diplomatic assurances which provided no mechanism for their enforcement did not suffice to protect against the risk of torture and thus did not absolve sending State of its responsibility under CAT art. 3).

<sup>59</sup> The U.N. Special Rapporteur, an expert assigned by the U.N. Commission on Human Rights to examine issues related to torture, has stated that while diplomatic assurances "should not be ruled out *a priori*," they should be coupled with a system to monitor the treatment of transferred persons to ensure that they are not inhumanely treated. Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. General Assembly, 59<sup>th</sup> Sess., A/59/324. While the Rapporteur's opinion may provide persuasive guidance in the interpretation of CAT obligations, the Rapporteur is not part of the CAT Committee and his opinions are not legally binding under the terms of CAT.

<sup>60</sup> Second Periodic Report of the United States of America to the Committee Against Torture, submitted May 6, 2005, available at <http://www.state.gov/drl/rls/45738.htm>.

obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.<sup>61</sup>

In addition, the United States has an obligation under customary international law to execute its Convention obligations in good faith,<sup>62</sup> and is therefore required under international law to exercise appropriate discretion in its use of diplomatic assurances. For instance, if a State consistently violated the terms of its diplomatic assurances, the United States would presumably need to look beyond the face of such promises before permitting the transfer of an individual to that country.<sup>63</sup>

## **Criminal Penalties for Persons Involved in Torture**

One of the central objectives of CAT is to criminalize *all* instances of torture, regardless of whether they occur inside or outside a State's territorial jurisdiction. CAT Article 4 requires signatory States to criminalize all instances of torture, as well as attempts to commit and complicity or participation in torture.<sup>64</sup> While CAT does not necessarily obligate a State to prevent acts of torture beyond its territorial jurisdiction, State Parties are nevertheless required to criminalize such acts and impose appropriate penalties.

CAT Article 5 establishes minimum jurisdictional measures that each State Party must adopt with respect to offenses described in CAT Article 4. A State Party to CAT must establish jurisdiction over CAT Article 4 offenses when:

- the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- the alleged offender is a national of that State;
- the victim was a national of that State if that State considers it appropriate; or
- the alleged offender is present in any territory under its jurisdiction and the state does not extradite him in accordance with CAT Article 8, which makes torture an extraditable offense.<sup>65</sup>

In order to fulfill its obligations under CAT Articles 4 and 5, the United States enacted §§ 2340-2340B of the United States Criminal Code, which criminalize torture occurring *outside* the United States.<sup>66</sup> Jurisdiction occurs when the alleged offender is either a national of the United States or

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<sup>61</sup> Conclusions and Recommendations of the Committee against Torture regarding the United States of America, July 25, 2006, available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf) [hereinafter "Committee Recommendations"], at para. 21.

<sup>62</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 (1987) (recognizing that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith").

<sup>63</sup> The CAT Committee has stated that unenforceable diplomatic assurances are insufficient to meet Article 3 obligations. See *Agiza v. Sweden*, supra footnote 58.

<sup>64</sup> CAT art. 4(1).

<sup>65</sup> *Id.*, art. 5.

<sup>66</sup> Pursuant to an amendment made by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, "United States" is defined as "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." Previously, the statute had defined "United States" as including all areas under U.S. jurisdiction, including U.S. special maritime and territorial jurisdiction. 18 U.S.C. § 2340(3).

is present in the United States, irrespective of the nationality of the victim or alleged offender.<sup>67</sup> Congress did not enact legislation expressly prohibiting torture occurring *within* the United States, as it was presumed that such acts would “be covered by existing applicable federal and [U.S.] state statutes,”<sup>68</sup> such as those statutes criminalizing assault, manslaughter, and murder. The Federal Torture Statute criminalizes torture, as well as attempts and conspiracies to commit torture.<sup>69</sup>

The Federal Torture Statute provides that the specific intent of the actor to commit torture is a requisite component of the criminal offense.<sup>70</sup> Specific intent is “the intent to accomplish the precise criminal act that one is later charged with.”<sup>71</sup> This degree of intent differs from general intent, which usually “takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).”<sup>72</sup>

## **Application of CAT and Implementing Legislation to the Practice of Extraordinary Renditions**

Although the express intent of CAT was to help ensure that no one would be subjected to torture,<sup>73</sup> it is arguably unclear as to whether CAT would in *all* circumstances bar renditions to countries that practice torture, including possibly in certain cases where the rendering State was aware that a rendered person would likely be tortured. Clearly, it would violate U.S. criminal law and CAT obligations for a U.S. official to conspire to commit torture via rendition, regardless of where such renditions would occur. However, it is not altogether clear that CAT prohibits the rendering of persons seized *outside* the United States, or whether criminal sanctions would apply to a U.S. official who authorized a rendition without intending to facilitate the torture of the rendered person (as opposed to, for instance, the harsh mistreatment of the rendered person to a degree not rising to the level of torture).

### **Renditions from the United States**

CAT Article 3 clearly prohibits the rendition of persons from the territory of a signatory State to another State when there are substantial grounds for believing the person would be tortured. Even if it could be technically argued that renditions do not constitute “extraditions” within the meaning of CAT Article 3, and the rendition was to a country other than one where the person previously resided (meaning that the person was not being “returned” to a country where he

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<sup>67</sup> 18 U.S.C. § 2340A. The USA PATRIOT Act amended the Federal Torture Statute to criminalize conspiracies to commit torture outside the United States. P.L. 107-56, Title VIII, § 811(g) (2001).

<sup>68</sup> S.Rept. 103-107, at 59 (1993) (discussing legislation implementing CAT arts. 4 and 5).

<sup>69</sup> 18 U.S.C. § 2340A(a).

<sup>70</sup> For purposes of the federal criminal statute, “torture” is defined as “an act committed by a person acting under the color of law *specifically intended* to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1) (emphasis added).

<sup>71</sup> BLACK’S LAW DICTIONARY 814 (7<sup>th</sup> ed. 1999).

<sup>72</sup> *Id.*, at 813.

<sup>73</sup> CAT at Preamble.

would risk torture), such transfers would still violate the Convention's requirement that no State Party "expel" a person from its territory to another State where he is more likely than not to be tortured.

If the United States were to receive diplomatic assurances from a State that it would not torture a person rendered there, and such assurances were deemed sufficiently credible, the rendition would not facially appear to violate either CAT Article 3 or domestic implementing legislation. U.S. regulations permit the use of assurances in removal and extradition decisions, and CAT does not discuss their usage. As mentioned previously, however, the United States is obligated to execute its CAT obligations in good faith,<sup>74</sup> and therefore must exercise appropriate discretion in its use of diplomatic assurances. If a State consistently violated the terms of its diplomatic assurances, or the United States learned that a particular assurance would not be met, the United States would presumably need to look beyond the face of such promises before permitting the transfer of an individual to that country.

Again, neither CAT nor U.S. implementing regulations prohibit the United States from transferring persons to States where they would face harsh treatment—including treatment that would be prohibited if carried out by U.S. authorities—that does not rise to the level of torture. Indeed, the United States could conceivably render a person to a State after receiving sufficient diplomatic representations that the rendered person could be accorded cruel and inhumane treatment not rising to the level of torture without violating CAT or CAT-implementing regulations.

## **Renditions from Outside the United States**

As mentioned earlier, while CAT Article 2(2) provides that there are "no ... circumstances whatsoever" allowing torture, certain other CAT provisions do not use language coextensive in scope when discussing related obligations owed by Convention parties. While CAT Article 3 clearly limits renditions from the United States, it is not altogether certain as to what extent CAT applies to situations where a country seizes suspects outside of its territorial jurisdiction and directly renders them to another country.<sup>75</sup>

### **Extraterritorial Application of CAT Article 3**

The territorial scope of CAT Article 3 is a matter of debate. As a general matter, the United States has taken the position that human rights treaties "apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community."<sup>76</sup> In 2006, representatives of the U.S. State Department informed the CAT Committee Against Torture that the United States does not believe CAT Article 3 applies to

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<sup>74</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 (1987) (recognizing that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith").

<sup>75</sup> The *Washington Post* has alleged that U.S. intelligence and law-enforcement officials have, on occasion, seized a terrorist suspect abroad and rendered him to a foreign intelligence service known to employ torture with a list of questions that these U.S. officials want answered. Dana Priest & Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002, p. A1.

<sup>76</sup> JAG's Legal Ctr. & Sch., Operational Law Handbook 50 (Maj. Derek I. Grimes ed., 2006), available at <http://www.fas.org/irp/doddir/army/law2006.pdf>.



persons outside U.S. territory.<sup>77</sup> However, these representatives also claimed that as a matter of policy, the United States accords CAT Article 3 protections to all persons in U.S. custody, regardless of whether such persons were found in U.S. territory.<sup>78</sup> In congressional testimony in June 2008, State Department Legal Advisor John Bellinger testified that the view that CAT Article 3 did not apply to extraterritorially has “been the long-standing legal position[] of the United States since the Convention against Torture was ratified in 1994.”<sup>79</sup>

Although the scope of human rights treaties may generally be limited to conduct occurring within the territorial jurisdiction of parties, it seems clear that at least some CAT provisions are extraterritorial in scope. Most notably, CAT Articles 4-5 require parties to criminalize all acts of torture, regardless of where they occur.<sup>80</sup> Indeed, the Federal Torture Statute implementing this obligation expressly covers torture occurring “outside the United States.”<sup>81</sup> Although several CAT provisions limit their scope to acts occurring “in any territory under [the State Party’s] jurisdiction,”<sup>82</sup> CAT Article 3 does not contain a similar limiting provision. Accordingly it could be argued that, like CAT Articles 4-5, CAT Article 3 is intended to be extraterritorial in scope.

Nevertheless, it could still be argued that the express provisions of CAT Article 3 do not apply to extraordinary renditions occurring *outside* the United States, at least so long as the person is not rendered to a country where he has formerly resided. Article 3 states that no party shall “expel, return (‘refouler’) or extradite a person” to a country where there are substantial grounds to believe that he or she will be tortured. It could be argued, however, that certain extraterritorial renditions are not covered by this provision. Seizing a person in one country and transferring him to another would arguably not constitute “expelling” the person, if a State is understood only to be able to “expel” persons from territory over which it exercises sovereign authority. So long as these persons were rendered to countries where they had not previously resided, it also could not be said that the United States “returned” these persons to countries where they faced torture (though persons rendered to countries where they had previously resided would presumably be protected under CAT Article 3). In addition, if such renditions were not executed via a formal process, it could be argued they did not constitute extraditions for the purposes of Article 3.<sup>83</sup>

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<sup>77</sup> United States Written Response to Questions Asked by the Committee Against Torture, April 28, 2006, available at <http://www.state.gov/g/drl/rls/68554.htm> [hereinafter “Written Responses”].

<sup>78</sup> *Id.*; Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, available at <http://www.state.gov/g/drl/rls/45738.htm> [hereinafter “Report to CAT Committee”], para. 30 (describing U.S. compliance with CAT Article 3, and broadly stating that “The United States does not transfer persons to countries where the United States believes it is ‘more likely than not’ that they will be tortured. This policy applies to all components of the United States government.”). See also Rice Statement, *supra* footnote 32 (describing U.S. rendition policy as complying with U.S. laws and treaties, including CAT, and denying the transport of anyone to a country where he would face torture).

<sup>79</sup> Subcommittee on International Organizations, Human Rights, and Oversight, *Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department’s Legal Advisor*, committee print, 110th Cong., 2nd sess., June 10, 2008, p. 11 (statement by John B. Bellinger, III, Legal Advisor, State Department).

<sup>80</sup> CAT Article 5 requires each State to establish jurisdiction over some (but not all) extraterritorial torture offenses, including when the offender is either a national of the State or is found in the State’s territory and the State does not extradite him.

<sup>81</sup> 18 U.S.C. §2340A. See also Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, available at <http://www.state.gov/g/drl/rls/45738.htm>, paras 44-46 (discussing U.S. implementation of obligations under CAT Articles 4-5, including through the Federal Torture Statute and the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261 et seq., which extends U.S. criminal jurisdiction over certain categories of individuals for conduct occurring outside the United States).

<sup>82</sup> See CAT arts. 2, 6-7, 11-13, 16.

<sup>83</sup> See BASSIOUNI, *supra* footnote 1, at 29 (“Extradition in contemporary practice means a formal process by which a (continued...)”).

Accordingly, it could be argued that the United States would not violate the *express language* of Article 3 if it rendered persons to countries where they faced torture, so long as no part of these renditions occurred within the territorial jurisdiction of the United States.<sup>84</sup>

Critics of this view might argue that such a narrow interpretation of CAT Article 3 would contradict the Convention's over-arching goal to prevent torture. The fact that CAT requires parties to take legal steps to eliminate torture within their respective territories and to impose criminal penalties on torture offenders, coupled with the Convention's statement that "no exceptional circumstances whatsoever" can be used to justify torture, arguably imply that a State Party may never exercise or be complicit in the use of torture, even when it occurs extraterritorially. It could be further argued that the drafters of CAT did not explicitly discuss extraterritorial renditions because they were either not contemplated or, in cases where such renditions might occur absent the consent of the hosting country, because these actions were arguably already understood to be impermissible under international law.<sup>85</sup> Indeed, some of the drafters of CAT have taken the position that Article 3 was "intended to cover all measures by which a person is physically transferred to another State."<sup>86</sup>

Opponents of a narrow interpretation of CAT would likely argue that it is contrary to the purpose of CAT to interpret the Convention as prohibiting formal transfers of persons to States where they face torture while still allowing such transfers through irregular forms of transfer. In 1994, the CAT Committee against Torture declared in a non-binding opinion that Article 3 prevents not only the return of a person to a country where he or she is in danger of being tortured, but also prohibits the person's transfer to "any other country where he runs a real risk of being expelled or returned to [his or her country of origin] or of being subjected to torture."<sup>87</sup> More recently in 2006, the Committee urged the United States to "apply the *non-refoulement guarantee* [of CAT Article 3] to all detainees in its custody, cease the rendition of suspects, in particular by its

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(...continued)

person is surrendered by one state to another based on a treaty, reciprocity, or comity.").

<sup>84</sup> In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court held that the interdiction of Haitian refugees by the United States did not violate U.S. obligations under the U.N. Convention Relating to the Status of Refugees. The Court concluded that the Convention's provisions providing that no Contracting Party "shall expel or return ('refouler') a refugee" facing persecution applies only to refugees within a Party's territory, and not to those interdicted on the high seas. *Id.* at 179-183. Some have suggested that CAT Article 3's limitation on the transfer of persons should also be interpreted in a non-extraterritorial fashion. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229 (2004) ("Given the Supreme Court's interpretation [in *Sale*] of identical language in the Refugee Convention, it makes no sense to view the Torture Convention as affecting the transfer of prisoners held outside the United States to another country."). On the other hand, the *Sale* Court's interpretation of the Refugee Convention's prohibition on the expulsion or return of refugees was largely based on this prohibition's interplay with other Convention provisions. Reading this prohibition to apply extraterritorially would create "an absurd anomaly" with a related Convention provision that only applied to refugees within a Convention Party's territory. *Sale*, 509 U.S. at 179-180. In contrast, reading CAT Article 3 as being extraterritorial in scope would not have an incongruous effect on the interpretation of other CAT provisions.

<sup>85</sup> See *supra* footnote 8.

<sup>86</sup> J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT* 126 (1988). On the other hand, the State Department has claimed that "Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the CAT applies to persons outside the territory of [a Party]." *Written Responses*, *supra* footnote 77.

<sup>87</sup> Committee against Torture, Communication No 13/1993: Switzerland. 27/04/94 (*Mutombo v. Switzerland*), CAT/C/12/D/13/1993 (1994) at para. 10.

intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention.”<sup>88</sup>

### **Extraterritorial Application of Legislation Implementing CAT Article 3**

Beyond CAT, it is important to note that, given the express language of CAT-implementing legislation, the United States cannot “expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”<sup>89</sup> It may be argued that this express statutory language prohibits renditions from outside the United States, even if such renditions would not otherwise be in violation of CAT obligations.<sup>90</sup>

Two possible counter-arguments could be made to this position, at least in certain circumstances. The first and perhaps most compelling counter-argument is that although FARRA generally prohibits persons from being expelled, extradited, or involuntarily returned regardless of whether the person is physically present in the United States, section 2243(c) of the act makes an exception requiring federal agencies to exclude from the protection of CAT-implementing regulations any aliens who, *inter alia*, are reasonably believed to pose a danger to the United States, “to the maximum extent [such exclusions are] consistent” with CAT obligations.<sup>91</sup> Accordingly, presuming for the sake of argument that CAT does *not* protect persons believed to be security dangers from being rendered from *outside* the United States, FARRA would require such persons to be excluded from the protection of any CAT-implementing regulations as well.

A second counter-argument is that the clause “regardless of whether the person is physically present in the United States” should be read only in reference to the prohibition contained in the CAT-implementing legislation upon the “involuntary return” of persons to countries where they would more likely than not be tortured, and not be read in reference to the prohibition on the extradition or expulsion of persons. CAT Article 3 obligates States not to “expel, return (‘refouler’) or extradite a person” to a State where he would be at substantial risk of torture. The principle of *non-refoulement* is commonly understood to prohibit not simply the exclusion of persons from the territory of the receiving State, but also a State from “turning back” persons at its borders and compelling their involuntary return to their country of origin.<sup>92</sup> Unlike CAT

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<sup>88</sup> Committee Recommendations, *supra* footnote 61, at para. 20.

<sup>89</sup> P.L. 105-277 at § 2242(a) (emphasis added).

<sup>90</sup> Though it generally could be argued that a State can only “expel” someone from a territory over which the State exercises sovereign authority, the language of the U.S. legislation implementing CAT may suggest an intent by Congress to broadly define the prohibition on “expel[ling]” persons to countries where they would likely face torture, so that this prohibition covers not only expulsions from areas over which the United States exercises sovereign authority, but also “expulsions” from all other areas (e.g., rendering persons captured in non-U.S. territory to other States).

<sup>91</sup> *Id.* at § 2242(c).

<sup>92</sup> For additional background on the concept of *non-refoulement* and its development in international human rights law, see Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 78-177 (Erika Feller, Volker Türk and Frances Nicholson eds., 2003). It should be noted that the CAT-implementing legislation prohibiting the return of any person to a country where he would face torture, regardless of whether he was physically present in the United States, was enacted five years after the Supreme Court’s decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). In *Sale*, the Court found that the Refugee Convention’s prohibition on the refoulement of refugees was not intended to apply extraterritorially. *Sale*, 509 U.S. at 179-187. See also *supra* footnote (continued...)

Article 3, CAT-implementing legislation enacted by the United States does not use the term “refouler.” However, its use of the phrase “involuntary return ... regardless of whether the person is physically present in the United States” appears to reflect the principle of *non-refoulement* expressed in CAT. It could be argued that the use of the phrase “regardless of whether the person is physically present in the United States” in CAT-implementing legislation was only intended to be read in reference to the “involuntary return” phrase that precedes it (a reading that reflects the *non-refoulement* obligation imposed by CAT), and not meant also to be read in reference to the prohibition imposed upon the expulsion and extradition of persons to countries where they would likely face torture, as this alternative reading would arguably go beyond the *non-refoulement* obligations imposed upon the United States by the express language of CAT.

Regardless of whether renditions that occur outside of the United States are covered under CAT Article 3 and CAT-implementing legislation and regulations, CAT Article 4 and corresponding domestic law criminalizing all acts of torture and complicity therein would be controlling. Accordingly, U.S. officials could not conspire with officials in other States to render a person so that he would be tortured. As discussed below, however, criminal penalties may not necessarily attach to a person who renders another with the knowledge that he will likely be tortured.

## **Criminal Sanctions for Participation in Torture**

CAT Article 4 and the Federal Torture Statute do not expressly prohibit the transfer of a person to a State where he is more likely than not to face torture. Indeed, the Federal Torture Statute only imposes criminal penalties for acts or attempts to commit torture and, most relevantly to the subject of renditions, conspiracies to commit torture. Clearly, if a U.S. official rendered a person to another country with instructions for the country to torture the rendered individual, that official could be criminally liable under the Federal Torture Statute.<sup>93</sup>

However, it appears unlikely that a U.S. official would be found criminally liable for conspiracy to commit torture if he authorized a rendition after receiving assurances that the rendered person would not be tortured. It is generally understood that a conspiracy to commit a crime requires an agreement between parties for a common purpose.<sup>94</sup> Presuming that the United States received assurances before rendering a person to another country, it would be difficult to argue that the official “agreed” to facilitate the rendered person’s subsequent torture.

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<sup>93</sup> Such an official might also be charged under the federal statute governing accomplice liability, which makes it a criminal offense to willfully cause an act to be done which, if directly performed by him or another, would be a criminal offense. 18 U.S.C. § 2.

<sup>94</sup> See, e.g., *Iannelli v. United States*, 420 U.S. 770, 777 (1975) (“[c]onspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act”); *United States v. Evans*, 970 F.2d 663, 668 (10<sup>th</sup> Cir. 1992) (“[to] prove conspiracy, the government must show ‘[1] that two or more persons agreed to violate the law, [2] that the defendant knew at least the essential objectives of the conspiracy, ... [3] that the defendant knowingly and voluntarily became a part of it,’ and [4] that the alleged coconspirators were interdependent”) (quoting *United States v. Fox*, 902 F.2d 1508, 1514 (10<sup>th</sup> Cir. 1990)); *United States v. Pearce*, 912 F.2d 159, 161 (6<sup>th</sup> Cir. 1990) (“the essential element of conspiracy is that ‘the members of the conspiracy in some way or manner, or through some contrivance, came to a mutual understanding to try to accomplish a common and unlawful plan’”) (internal citation omitted).

## Other Statutes and Treaties Relevant to the Issue of Renditions

Although CAT and its implementing legislation provide the primary legal constraints upon the rendition of persons to countries believed to engage in torture, other treaties and statutes are also potentially relevant. The following paragraphs briefly discuss a few of them.

### 1949 Geneva Conventions

In certain situations, the 1949 Geneva Conventions may impose limitations on the use of renditions separate from those imposed by CAT. Each of the four Conventions accords protections to specified categories of persons in armed conflict or in post-conflict, occupied territory.<sup>95</sup> The torture, inhumane, or degrading treatment of persons belonging to specified categories—including civilians and protected prisoners of war (POWs)—is expressly prohibited by the Conventions.<sup>96</sup> In addition, “[n]o physical or moral coercion shall be exercised against protected [civilians], in particular to obtain information from them or from third parties.”<sup>97</sup>

The Geneva Conventions impose limitations on the transfer of protected persons. Civilians may not be *forcibly* (as opposed to voluntarily) transferred to another State.<sup>98</sup> A violation of this obligation represents a “grave breach” of the relevant Geneva Convention and therefore constitutes a war crime.<sup>99</sup> However, it is not a violation of the Geneva Conventions to extradite such persons, in compliance with extradition treaties concluded before the outbreak of hostilities, who are charged with ordinary criminal law offenses.<sup>100</sup>

Neither civilians nor protected POWs may be transferred to penitentiaries for disciplinary punishment.<sup>101</sup> In addition, persons protected by the Conventions may only be transferred to other Convention parties, and then only after the transferring Power “has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”<sup>102</sup> If the transferee Power fails to abide by the Convention in any important respect (e.g., torturing a transferred person), upon notification the transferring Power is required to either request their return or “take effective measures to correct the situation.”<sup>103</sup> Accordingly, in order to comply with its

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<sup>95</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [hereinafter “Third Geneva Convention”]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 [hereinafter “Fourth Geneva Convention”] (entered into force October 21, 1950). The United States, Iraq, and Afghanistan are all parties to the Conventions.

<sup>96</sup> See, e.g., Third Geneva Convention, arts. 3, 17, 87, 130; Fourth Geneva Convention, arts. 3, 32, 147.

<sup>97</sup> Fourth Geneva Convention, art. 31.

<sup>98</sup> *Id.*, art. 49.

<sup>99</sup> *Id.*, art. 147.

<sup>100</sup> *Id.*, art. 45.

<sup>101</sup> Third Geneva Convention, art. 97; Fourth Geneva Convention art. 124. The Conventions do not expressly prohibit the transfer of such persons for non-disciplinary reasons.

<sup>102</sup> Third Geneva Convention, art. 12; Fourth Geneva Convention, art. 45.

<sup>103</sup> Third Geneva Convention, art. 12; Fourth Geneva Convention, art. 45.

Convention obligations, the United States may only render a protected person if (1) the State to which the person was being rendered was a member of the Convention; (2) the United States had received assurances that the person would not be tortured if rendered there; and (3) the United States requested the return of the rendered person or took other effective measures if the rendered individual was subsequently tortured.

In the case of armed conflicts that are not of an international character and occur in the territory of a High Contracting Party, each party is obligated under Article 3 of each of the 1949 Geneva Conventions (Common Article 3) to accord *de minimis* protections to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.” Parties are required to treat such persons “humanely,” and are prohibited from subjecting such persons to “violence to life and person ... mutilation, cruel treatment and torture ... [and] [o]utrages upon personal dignity, in particular humiliating and degrading treatment.”

As mentioned previously, the Geneva Conventions apply in limited circumstances. Besides only applying in armed conflict or in post-conflict occupied territory, the Conventions also only protect designated categories of persons (though other persons may nevertheless be owed certain protections under customary laws of war). At least since early 2002, the Bush Administration took the position that the Geneva Conventions did not apply to members of Al Qaeda.<sup>104</sup> Reportedly, the Administration has also concluded that the Geneva Convention prohibition on the “forcible transfer” of civilians did not apply to “illegal aliens” who entered Iraq following the U.S.-led invasion, or bar the temporary removal of persons from Iraq for the purposes of interrogation.<sup>105</sup>

In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court held that Common Article 3 of the Geneva Conventions applied to the armed conflict with Al Qaeda and accorded Al Qaeda members certain minimal protections, even if such persons were not otherwise covered by other Convention provisions (i.e., those covering “lawful combatants” and civilians). Common Article 3 does not expressly prohibit the transfer of persons to other countries, even if such persons might face cruel treatment or torture there. Some have argued that Common Article 3 nevertheless prohibits renditions committed to facilitate the rendered person’s torture or cruel treatment.<sup>106</sup> However, it is unclear whether this interpretation is proper<sup>107</sup> or that it would cover all renditions to countries where the detainee would face torture or cruel treatment (e.g., when the rendering country does not request the torture or cruel treatment of the detainee by the party to which he is rendered).

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<sup>104</sup> See White House Memorandum, *Humane Treatment of Taliban and Al Qaeda Detainees* (February 7, 2002), available at [http://www.justicescholars.org/pegc/archive/White\\_House/bush\\_memo\\_20020207ed.pdf](http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207ed.pdf).

<sup>105</sup> See Dana Priest, “Memo Lets CIA Take Detainees Out of Iraq,” *Washington Post*, October 24, 2004, p. A1 (discussing draft DOJ Office of Legal Counsel opinion dated March 19, 2004). See also Jack L. Goldsmith III, Asst. Attorney General, “*Protected Person*” *Status in Occupied Iraq under the Fourth Geneva Convention*, Dept. of Justice, Office of Legal Counsel, March 18, 2004, <http://www.usdoj.gov/olc/2004/gc4mar18.pdf>.

<sup>106</sup> See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: a Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 151-153 (2006).

<sup>107</sup> As discussed, several Convention provisions specifically discuss and limit the transfer of protected persons to third parties when such persons would face treatment prohibited by the Conventions. See *infra* at 19-20. It could be argued that these provisions would be made redundant if Convention provisions covering mistreatment were also read to cover the rendition of detainees to third-parties who might subject them to mistreatment.

For purposes of U.S. law, however, it does not appear that Common Article 3 has been understood to cover renditions of persons to countries where they might face torture.<sup>108</sup> The Military Commissions Act of 2006 (MCA, P.L. 109-366), which was signed into law on October 17, 2006, provides that for purposes of U.S. law it is generally a violation of Common Article 3 to engage in conduct (1) inconsistent with the Detainee Treatment Act of 2005, which prohibits “cruel, inhuman, or degrading treatment” of persons in U.S. custody or control;<sup>109</sup> or (2) subject to criminal penalty under provisions of the War Crimes Act, as amended, concerning “grave breaches” of Common Article 3 (the President is authorized to subsequently interpret the Conventions more restrictively, subject to certain limitations).<sup>110</sup> Under this standard, torture and cruel treatment would only be considered a violation of Common Article 3 in cases where the victim was *in the custody or control of the United States*, not in circumstances where the victim was transferred to the custody and control of a third-party and was subsequently treated harshly. As discussed in the following paragraph, however, this standard might still prohibit U.S. personnel from rendering a person covered by Common Article 3 if they have conspired with the receiving party to intentionally cause the transferee serious bodily injury.

## War Crimes Act

The War Crimes Act imposes criminal penalties upon U.S. nationals or Armed Forces members who commit listed offenses of the laws of war.<sup>111</sup> Persons who commit applicable war crimes are potentially subject to life imprisonment or, if death results from such acts, the death penalty. War crimes include “grave breaches” of the Geneva Conventions,<sup>112</sup> such as torture of protected POWs or civilians and the “unlawful deportation or transfer or unlawful confinement” of protected civilians,<sup>113</sup> as well as certain violations of Common Article 3.<sup>114</sup>

As discussed previously, following the Supreme Court’s ruling in *Hamdan*, it is understood as a matter of U.S. law that Common Article 3 covers the conflict with Al Qaeda and accords Al Qaeda members captured in that armed conflict with certain protections.<sup>115</sup> Accordingly, certain

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<sup>108</sup> U.S. authorities have apparently not considered Common Article 3 to be relevant in military transfer decisions, and have instead only considered whether the transfer would be consistent with CAT Article 3. Declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs, DoD, executed on June 8, 2007, at para. 3, In re Guantanamo Bay Detainee Litigation, Case No. 1:05-cv-01220 (D.D.C. 2007).

<sup>109</sup> For background on the Detainee Treatment Act’s prohibition on “cruel, inhuman, or degrading treatment,” see CRS Report RL33655, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia.

<sup>110</sup> For background, see CRS Report RL33662, *The War Crimes Act: Current Issues*, by Michael John Garcia.

<sup>111</sup> 18 U.S.C. § 2441.

<sup>112</sup> 18 U.S.C. §§ 2441(c)(1).

<sup>113</sup> E.g., Fourth Geneva Convention, art. 147.

<sup>114</sup> 18 U.S.C. § 2441(c)(3). Until October 17, 2006, the War Crimes Act prohibited *any* violation of Common Article 3. The Military Commissions Act (P.L. 109-366) amended this provision so that only certain, “grave” violations of Common Article 3 are subject to criminal penalty. This amendment was retroactive in effect.

<sup>115</sup> It is not clear that Common Article 3 is applicable to captured Al Qaeda agents in all circumstances. The Geneva Conventions concern treatment owed to protected persons in an armed conflict, and would arguably be inapplicable to law enforcement activities relating to Al Qaeda agents. International terrorism is recognized as a criminal offense under both domestic law and various international agreements. E.g., 18 U.S.C. § 2332b (concerning certain terrorist activities transcending international boundaries); International Convention for the Suppression of the Financing of Terrorism, S. Treaty Doc. No. 106.49, entered into force for the United States on July 26, 2002; International Convention for the Suppression of Terrorist Bombings, S. Treaty Doc. No. 106-6, entered into force for the United States on July 26, 2002. Whether the Geneva Conventions are applicable to the arrest and detention of Al Qaeda agents may depend upon whether such agents were (1) captured on or away from the battlefield; (2) captured by military or law enforcement (continued...)

forms of treatment with respect to Al Qaeda members is subject to criminal penalty, including torture, certain lesser forms of cruel treatment, and the intentional infliction of serious bodily injury.

Although the War Crimes Act imposes criminal penalties for conspiring to subject protected persons to torture or cruel treatment, such persons must be in the offender's custody or control. Accordingly, the provisions of the War Crimes Act covering torture and cruel treatment do not appear to cover the rendition of persons to countries for the purpose of cruel treatment or torture (though any U.S. personnel who conspired with officials in other States to render a person so that he would be tortured could still be prosecuted under the Federal Torture Statute).

However, the War Crimes Act may be interpreted as prohibiting some renditions. As amended by the MCA, the War Crimes Act expressly prohibits persons from conspiring to commit such acts as rape, mutilation or maiming, or causing "serious bodily injury" against persons protected by Common Article 3. A person may be subject to criminal penalty for these offenses regardless of whether the victim was in his custody or control. Accordingly, any U.S. personnel who conspire with officials in other States to render a person so that he would be subjected to serious bodily injury, rape, or sexual assault would appear to be subject to criminal liability under the War Crimes Act. As a practical matter, it is unclear whether the War Crimes Act would prohibit renditions in any circumstance not already prohibited under the Federal Torture Statute.<sup>116</sup>

## **International Covenant on Civil and Political Rights**

Article 7 of the International Covenant on Civil and Political Rights (ICCPR),<sup>117</sup> ratified by the United States in 1992, prohibits the State Parties from subjecting persons "to torture or to cruel, inhuman, or degrading treatment or punishment."<sup>118</sup> The Human Rights Committee, the monitoring body of the ICCPR, has interpreted this prohibition to prevent State Parties from exposing "individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."<sup>119</sup> Although the Committee is charged with monitoring the compliance of parties with the ICCPR and providing recommendations for improving treaty abidance, its opinions are not binding law.

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agents; and (3) charged with a criminal offense, and if so, whether the offense relates to a violation of the laws of war or some other activity.

<sup>116</sup> Mutilation and maiming, the intentional causing of serious bodily injury (defined by reference to 18 U.S.C. § 113b as bodily injury involving a substantial risk of death, extreme physical pain, disfigurement, or loss or impairment of the function of a bodily member, organ, or mental faculty), and rape have all been found by U.S. courts to constitute torture, at least in some circumstances. See *Zubeda v. Ashcroft*, 333 F.3d 463 (3<sup>rd</sup> Cir. 2003) ("[r]ape can constitute torture"); CRS Report RL33662, *The War Crimes Act: Current Issues*, by Michael John Garcia, supra footnote 110, at 7-8. Whether sexual assault rises to the level of torture depends on the particular nature of the assault. Cf. *Zubeda*, 333 F.3d at 472-473 (discussing instances where courts have found rape or sexual abuse to constitute torture).

<sup>117</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3<sup>rd</sup> Comm., 21<sup>st</sup> Sess., 1496<sup>th</sup> plen. mtg. at 49, U.N. Doc. A/RES/ 2200A (XXI) (1966).

<sup>118</sup> *Id.*, art. 7.

<sup>119</sup> Human Rights Committee, General Comment 20, Article 7, UN Doc. A/47/40 (1992) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).



U.S. ratification of the ICCPR was contingent upon the inclusion of a reservation that the treaty's substantive obligations were not self-executing (i.e., to take effect domestically, they require implementing legislation in order for courts to enforce them, though U.S. obligations under the treaty remain binding under international law).<sup>120</sup> The United States also declared that it considered Article 7 binding "to the extent that 'cruel, inhuman or degrading treatment or punishment' [prohibited by ICCPR Article 7] means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."<sup>121</sup>

The United States has not enacted laws or regulations to comply with the Human Rights Committee's position that ICCPR Article 7 prohibits the transfer of persons to countries where they would likely face torture or cruel, inhuman, or degrading treatment. CAT-implementing regulations prohibit the transfer of persons to countries where they would more likely than not face *torture*, but not cruel, inhuman, or degrading treatment that does not rise to the level of torture.

## Universal Declaration of Human Rights

The U.N. Charter provides that it is the duty of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms,"<sup>122</sup> and Member States have an obligation to work jointly and separately to promote such rights and freedoms.<sup>123</sup> In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights,<sup>124</sup> to explicate the "human rights and fundamental freedoms" that Member States were obliged to protect. The Universal Declaration prohibits, *inter alia*, the arbitrary arrest, detention, or exile of persons,<sup>125</sup> as well as torture and cruel, inhuman, or degrading treatment.<sup>126</sup>

The Universal Declaration is not a treaty and accordingly is not technically binding on the United States,<sup>127</sup> though a number of its provisions are understood to reflect customary international law.<sup>128</sup> The Universal Declaration does not include an enforcement provision.

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<sup>120</sup> See United Nations Treaty Collection, Declarations and Reservations to the International Covenant on Civil and Political Rights, at [http://www.unhchr.ch/html/menu3/b/treaty5\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm) (last updated February 5, 2002).

<sup>121</sup> *Id.*

<sup>122</sup> U.N. CHARTER art. 55.

<sup>123</sup> *Id.*, art. 56.

<sup>124</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

<sup>125</sup> *Id.*, art 9.

<sup>126</sup> *Id.*, art. 5.

<sup>127</sup> See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2767 (2004) (declining to apply protections espoused by the Universal Declaration of Human Rights because it "does not of its own force impose obligations as a matter of international law").

<sup>128</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980). But see *Sosa*, 124 S.Ct. at 2761-62 (finding that certain provisions of the Universal Declaration did not in themselves constitute an international norm that would fulfill the criteria that existed in the 18<sup>th</sup> century for a norm to be customary international law).

## Recent Developments

On January 22, 2009, President Barack Obama issued a series of Executive Orders concerning the treatment of persons apprehended by the United States in connection with armed conflicts or counterterrorism operations. The Orders do not expressly modify U.S. rendition policy, though one Order does mandate the closure of all CIA detention facilities, some of which were used to hold persons seized by the United States in other locations.<sup>129</sup> However, two of the Orders create separate task forces charged with reviewing aspects of U.S. detention policy, including the transfer of detainees to foreign States. The Executive Order entitled “Ensuring Lawful Interrogations” establishes a Special Interagency Task Force on Interrogation and Transfer Policies, which is charged with reviewing

the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.<sup>130</sup>

Another Executive Order, entitled “Review of Detention Policy Options,” creates a Special Task Force on Detainee Disposition, which is required

to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.<sup>131</sup>

Each Task Force is required to issue a report to the President of its recommendations within 180 days, unless the Task Force chair determines that an extension is necessary.

In the 110<sup>th</sup> Congress, legislative proposals were introduced to limit the ability of U.S. agencies to render persons to foreign States, and it is possible that similar proposals will be introduced in the 111<sup>th</sup> Congress. S. 1876, the National Security with Justice Act of 2007, introduced by Senator Biden on July 25, 2007, would have barred the United States from rendering or participating in the rendition of any individual to a foreign State absent authorization from the Foreign Intelligence Surveillance Court, except under limited circumstances in the case of enemy

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<sup>129</sup> Executive Order, “Ensuring Lawful Interrogations,” January 22, 2009, at § 4. For additional background, see CRS Report RL33643, *Undisclosed U.S. Detention Sites Overseas: Background and Legal Issues*, by Jennifer K. Elsea and Julie Kim.

<sup>130</sup> *Id.*, § 5. The Task Force is chaired by the Attorney General, and includes the Director of National Intelligence and the Secretary of Defense (who serve as co-vice-chairs); the Secretary of State; the Secretary of Homeland Security; the Director of the CIA; the Chairman of the Joint Chiefs of Staff; and other officers or full-time or permanent part-time employees of the United States, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

<sup>131</sup> Executive Order, “Review of Detention Policy Options,” January 22, 2009, at § 1. The Task Force includes the Attorney General and Secretary of Defense, who serve as co-chairs; the Secretary of State; the Secretary of Homeland Security; the Director of National Intelligence; the Director of the Central Intelligence Agency; the Chairman of the Joint Chiefs of Staff; and other officers or full-time or permanent part-time employees of the United States, as determined by either of the co-chairs, with the concurrence of the head of the department or agency concerned.

combatants held by the United States (though renditions in such circumstances would still have to comply with other legal requirements). For an order to be issued by the Foreign Intelligence Surveillance Court authorizing a rendition, the requesting U.S. official would have needed to provide evidence that the rendered person was (1) an international terrorist; and (2) would not be subjected to torture or lesser forms of cruel, inhuman, or degrading treatment—a more stringent limitation on the transfer of persons than that expressly imposed by CAT Article 3, which only bars the transfer of persons to countries where they would face torture.

H.R. 1352, the Torture Outsourcing Prevention Act, introduced by Representative Markey on March 6, 2007, would have required the State Department to provide annual reports to appropriate congressional committees regarding countries where there are substantial grounds for believing that torture or cruel, inhuman, or degrading treatment is commonly used in the detention or interrogation of individuals. Generally, persons could not be transferred to such countries, whether through rendition or some other process. This prohibition could be waived by the Secretary of State in limited circumstances, including, at a minimum, when continuing access to each such person was granted to an independent humanitarian organization. Written or oral assurances made to the U.S. government would have been deemed insufficient to demonstrate that a person would not face torture or cruel, inhuman, or degrading treatment if rendered to a particular State.

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