

# CRS Report for Congress

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## **Renditions: Constraints Imposed by Laws on Torture**

**April 28, 2005**

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# Renditions: Constraints Imposed by Laws on Torture

## Summary

Persons suspected of terrorist activity may be transferred from one State (i.e., country) 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 (for purposes of 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 is not publically available, various U.S. officials have acknowledged the practice’s existence. Recently, there has been 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. 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. 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 implementing legislation prohibits the rendition of persons to countries where they would be subject to harsh interrogation techniques 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, the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights.

This report also discusses legislative proposals to limit the transfer of persons to countries where they may face torture, including H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, which was introduced by Representative Jerry Lewis and passed the House, as amended, on March 16, 2005; the Senate version of H.R. 1268, which passed the Senate, as amended, on April 21, 2005; H.R. 952, the Torture Outsourcing Prevention Act, introduced by Representative Edward Markey in the House on February 17, 2005; and S. 654, the Convention Against Torture Implementation Act of 2005, introduced in the Senate by Senator Patrick Leahy on March 17, 2005.

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# Renditions: Constraints Imposed by Laws on Torture

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

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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* (4th ed. 2002).

<sup>2</sup> BLACK’S LAW DICTIONARY 1298-99 (7th 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. §§ 3184-3195. U.S. law prohibits the extradition of an individual in the absence of a treaty. 18 U.S.C. § 1394.

<sup>4</sup> 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. *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). 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 or remain in the United States.

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. Sometimes renditions occur with the formal consent of the State where the fugitive is located; other times, they do not.<sup>6</sup>

Over the years, a number of 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>7</sup>

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<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 (federal statute prohibits the extradition of an individual in the absence of a treaty). 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, *supra* note 1, at 15-20. These protections do not apply in situations where an alien is being removed from the United States for immigration purposes. *See supra* note 4. Nevertheless, separate procedural and humanitarian relief protections do pertain.

<sup>6</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 18th century paradigms." *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761-62 (2004).

<sup>7</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 (Mar. 2005), available at (continued...)

Currently, there have been no widely-reported cases of persons being rendered *from the interior* of the United States, though 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.<sup>8</sup> Noncitizens arriving at ports of entry have no recognized constitutional rights with regard to their admission into or removal from the United States. More generally, noncitizens are only considered to receive constitutional protections after they have effected entry into the United States.<sup>9</sup> On the other hand, the Supreme Court has found that the Constitution protects U.S. citizens abroad from actions taken against them by the United States.<sup>10</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. Reportedly, renditions were authorized by President Ronald Reagan in 1986, and the rendition of terrorist suspects to other countries has been part of U.S. counterterrorism efforts at least since the late 1990s.<sup>11</sup> In a 2002 written statement to the Joint Committee Inquiry into Terrorist Attacks

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<sup>7</sup> (...continued)

[<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>8</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. Arar's complaint, filed with the U.S. District Court for the Eastern District of New York, can be viewed at [[http://www.ccr-ny.org/v2/legal/september\\_11th/docs/ArarComplaint.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf)] (last viewed Mar. 22, 2005). The Department of Justice moved to dismiss the case, asserting state secrets privilege and alleging that litigating Arar's case would require the disclosing of classified information that would threaten national security. The assertion of state secrets privilege can be viewed at [[http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Arar\\_StateSecrets.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_StateSecrets.pdf)] (last viewed Mar. 22, 2005).

<sup>9</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"). *But see Rasul v. Bush*, 124 S.Ct. 2686, n.15 (2004) (noting in dicta that petitioners' allegations that they had been held in Executive detention for more than two years "in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" (*citing* federal habeas statute 28 U.S.C. § 2241(c)(3), under which petitioners challenged their detention).

<sup>10</sup> *See, e.g., Reid v. Covert*, 354 U.S. 1, 6 (1957) ("[w]hen 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>11</sup> *See* Dana Priest, *CIA's Assurances On Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1.

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>12</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, though this allegation has not been publicly confirmed or denied by the White House.<sup>13</sup> Although there are some reported estimates that the United States has rendered more than 100 individuals following 9/11,<sup>14</sup> the actual number is not a matter of the public record.

Recent 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>15</sup> Critics charge that the United States is rendering persons to such States so that they will be subjected to harsh interrogation techniques prohibited in the United States, including torture. While the Bush Administration has not disputed charges that persons have been rendered to foreign States believed to practice torture, officials have denied rendering persons to States for the purpose of torture.<sup>16</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 receives “promise that they won’t be tortured...This country does not believe in torture.”<sup>17</sup> In testimony before the Senate Armed Services Committee, 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>18</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

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<sup>12</sup> Statement of Director of Central Intelligence George Tenet, Joint Committee Inquiry into Terrorist Attacks Against the United States (Oct. 17, 2002), *available at* [[http://www.cia.gov/cia/public\\_affairs/speeches/2002/dci\\_testimony\\_10172002.html](http://www.cia.gov/cia/public_affairs/speeches/2002/dci_testimony_10172002.html)].

<sup>13</sup> Douglas Jehl and David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005.

<sup>14</sup> *See* Priest, *supra* note 11.

<sup>15</sup> *See generally* Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106.

<sup>16</sup> *See, e.g.*, R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at 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>17</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>].

<sup>18</sup> *McCain, Dems Press Goss On Torture Allegations*, CONG. DAILY, Mar. 18, 2005.

from a foreign country to the United States to stand trial.”<sup>19</sup> On the other hand, given that the United States apparently participates 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 Domestic Implementing Legislation**

The U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)<sup>20</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>21</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>22</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>23</sup>

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>24</sup> CAT also established the Committee against Torture, a monitoring body which has declaratory but non-binding authority concerning interpretation of the Convention.<sup>25</sup>

The United States ratified CAT in 1994, subject to certain declarations, reservations, and understandings, including that the Convention was not

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<sup>19</sup> 10 U.S.C. § 374(b)(1)(D), *added* by Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, Div. B, Title II, § 201(2) (1998).

<sup>20</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [*hereinafter* “CAT”].

<sup>21</sup> *Id.* art. 2(1).

<sup>22</sup> *Id.* art. 1 (emphasis added).

<sup>23</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.

<sup>24</sup> CAT art. 16(1).

<sup>25</sup> *See id.* arts. 17-24.



self-executing and therefore required domestic implementing legislation to take effect.<sup>26</sup>

The express language of CAT Article 2 allows for no circumstances or emergencies where torture could be permitted by Convention parties.<sup>27</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 of CAT arguably conflicts with the intent of the treaty.

**CAT Limitation on the Transfer of Persons to Foreign States for the Purpose of Torture.**<sup>28</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

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<sup>26</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 (6th 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>27</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”].

<sup>28</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.

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>29</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>30</sup>

***Domestic Implementation of CAT Article 3.*** The Foreign Affairs Reform and Restructuring Act of 1998 implemented U.S. obligations under CAT Article 3.<sup>31</sup> Section 2242 of the act announced 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>32</sup> The act further required all relevant federal agencies to adopt appropriate regulations to implement this policy.<sup>33</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 section 241(b)(3)(B) of the

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<sup>29</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>30</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* note 27, at 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.* at 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>31</sup> Pub. L. No. 105-277 at § 2242(a)-(b).

<sup>32</sup> *Id.* at § 2242(a) (emphasis added).

<sup>33</sup> *Id.* at § 2242(b).

Immigration and Nationality Act (INA).<sup>34</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>35</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>36</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 the Foreign Affairs Reform and Restructuring Act of 1998.

***The Role of Diplomatic Assurances in Removal Decisions.*** U.S. regulations implementing CAT Article 3 permit the consideration of diplomatic assurances in removal/extradition decisions,<sup>37</sup> and reportedly in rendition decisions made by the CIA concerning persons seized outside the United States and transferred to a third country. 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>38</sup> Again, because CIA regulations regarding the transfer of persons are not publicly available, the role that assurances play in assessing whether to render someone to another country remains unclear. The *Washington Post* reports that the CIA Office of General Counsel requires the CIA station chief in a given

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<sup>34</sup> Pub. L. 105-277 at § 2242(c).

<sup>35</sup> The distinction between political and nonpolitical crimes is occasionally unclear. For more background, see CRS Report 98-958, *supra* note 1, at 6-7.

<sup>36</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>37</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>38</sup> 8 C.F.R. § 208.18(c).

country to obtain verbal assurances from that country's security service that a person will not be tortured if rendered there.<sup>39</sup> Such assurances must then reportedly be cabled to CIA headquarters before the rendition may occur.<sup>40</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>41</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. 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>42</sup>

The United States has an obligation under customary international law to execute its Convention obligations in good faith,<sup>43</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.

**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>44</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.

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<sup>39</sup> Priest, *supra* note 11.

<sup>40</sup> *Id.*

<sup>41</sup> CAT art. 3(2).

<sup>42</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>43</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>44</sup> CAT art. 4(1).

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>45</sup>

***Domestic Implementation of CAT Articles 4 and 5.*** In order to fulfill its obligations under CAT Articles 4 and 5, the United States enacted sections 2340 and 2340A of the United States Criminal Code, which criminalize torture occurring *outside* the United States.<sup>46</sup> Jurisdiction occurs when the alleged offender is either a national of the United States or is present in the United States, irrespective of the nationality of the victim or alleged offender.<sup>47</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>48</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>49</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>50</sup> Specific intent is “the intent to accomplish the precise criminal act that one is later charged with.”<sup>51</sup> This degree of intent differs from general intent, which usually “takes the form of

<sup>45</sup> *Id.* art. 5.

<sup>46</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).

<sup>47</sup> 18 U.S.C. § 2340A(b).

<sup>48</sup> Sen. Rep. 103-107, at 59 (1993) (discussing legislation implementing CAT arts. 4 and 5).

<sup>49</sup> 18 U.S.C. § 2340A(a).

<sup>50</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>51</sup> BLACK’S LAW DICTIONARY 814 (7th ed. 1999).

recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).”<sup>52</sup>

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

While the express intent of CAT was to help ensure that no one would be subjected to torture,<sup>53</sup> it is arguably unclear as to whether CAT would in *all* circumstances bar renditions to countries that practice torture, including possibly 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 and transferred to another country, or whether criminal sanctions would apply to a U.S. official who authorized a rendition without the intent 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 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>54</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.

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<sup>52</sup> *Id.* at 813.

<sup>53</sup> CAT at Preamble.

<sup>54</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”).

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>55</sup>

Some commentators have alleged that the position of recent U.S. Administrations appears to be that protections afforded under CAT and other human rights treaties do not apply extraterritorially.<sup>56</sup> Indeed, it could be argued that, based on the explicit language of CAT, its provisions do not apply to certain actions taken by signatory parties *outside* of territories under their jurisdiction.<sup>57</sup> For example, while CAT Article 2 requires each signatory party to take effective measures to

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<sup>55</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 and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

<sup>56</sup> See Joan Fitzpatrick, *Rendition and Transfer in the War against Terrorism: Guantanamo and Beyond*, 25 LOYOLA INT’L & COMP. L. REV. 457, 480-81 (Summer 2003); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L LAW 78 (1995) (discussing human rights treaty application with respect to U.S. action towards Haiti in 1994).

<sup>57</sup> Some ambiguity arises as to whether to interpret CAT language concerning party requirements with regard to “territory under its jurisdiction” to include both a State’s territorial jurisdiction and other areas where a State claims jurisdiction. For example, the U.S. special maritime and territorial jurisdiction (SMTJ) statute asserts U.S. jurisdiction over acts occurring at U.S. military bases abroad and registered U.S. aircraft and vessels operating over the high seas. 18 U.S.C. § 7. However, CAT appears to view a State’s obligations in “territory under [a signatory State’s] jurisdiction” as something separate from those things outside a State’s territorial jurisdiction that are nonetheless covered by its SMTJ. For example, CAT Article 5 obligates each party to establish criminal jurisdiction over acts of torture “in any territory under its jurisdiction *or* on board a ship or aircraft registered in that State” (emphasis added). Other CAT provisions, such as those restricting the transfer of aliens to countries where they would likely face torture or requiring States to undertake to prevent non-torturous acts of cruel, inhuman or degrading treatment or punishment, impose obligations only with reference to “any territory under [a signatory State’s] jurisdiction,” and *not* explicitly with respect to registered ships or aircraft registered to the State operating outside such territory.

prevent torture, this obligation is only with respect to “acts of torture *in any territory under its jurisdiction*.”<sup>58</sup>

It could be argued that the 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 formally 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 an extradition agreement, it could be argued they did not constitute extraditions for the purposes of Article 3. Accordingly, it could be argued that the United States would not violate the *explicit* 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.

Critics of this interpretation would argue that such a narrow interpretation of CAT Article 3 would contradict the over-arching goal of the Convention 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>59</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. 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>60</sup>

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<sup>58</sup> CAT art. 2(1) (emphasis added).

<sup>59</sup> *See supra* note 6.

<sup>60</sup> Committee against Torture, Communication No 13/1993 : Switzerland. 27/04/94 (continued...)



Beyond the express language of 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>61</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. 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., capturing persons in non-U.S. territory and rendering them to other States). At the very least, it could be argued that U.S. legislation implementing CAT Article 3 evidences an understanding that CAT universally prohibits renditions of persons to countries where they would face torture, rather than only in cases where persons are rendered from the CAT Member State’s territory.

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, as mentioned previously, although the Foreign Affairs Reform and Restructuring Act of 1998 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>62</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, the Foreign Affairs Reform and Restructuring Act of 1998 would require such persons to be excluded from the protection of any CAT-implementing regulations that would otherwise prohibit their rendition.

A second counter-argument that could be made 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 expelling 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

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<sup>60</sup> (...continued)

(Mutombo v. Switzerland), CAT/C/12/D/13/1993 (1994) at para. 10.

<sup>61</sup> Pub. L. No. 105-277 at § 2242(a) (emphasis added).

<sup>62</sup> *Id.* at § 2242(c).

return of persons from the territory of the receiving State, but also bars a State from “turning back” persons at its borders and compelling their involuntary return to their country of origin.<sup>63</sup> Unlike CAT 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 or not 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 torture statute.<sup>64</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>65</sup> Presuming that the United States received assurances before

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<sup>63</sup> For additional background on the concept of *non-refoulement* and its development in international human rights law, see Elihu Lauterpacht and 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).

<sup>64</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>65</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 (continued...)

rendering a person to another country, it would be difficult to argue that the official “agreed” to facilitate the rendered person’s subsequent torture.

## 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, some 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. Each of the four Conventions accords protections to specified categories of persons in armed conflict or in post-conflict, occupied territory.<sup>66</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>67</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>68</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>69</sup> A violation of this obligation represents a “grave breach” of the

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<sup>65</sup> (...continued)

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).

<sup>66</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 Oct. 21, 1950). The United States, Iraq, and Afghanistan are all parties to the Conventions.

<sup>67</sup> *See, e.g.*, Third Geneva Convention arts. 3, 17, 87, 130; Fourth Geneva Convention arts. 3, 32, 147.

<sup>68</sup> Fourth Geneva Convention, art. 31

<sup>69</sup> Fourth Geneva Convention, art. 49.

relevant Geneva Convention and therefore constitutes a war crime.<sup>70</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>71</sup>

Neither civilians nor protected POWs may be transferred to penitentiaries for disciplinary punishment.<sup>72</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>73</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>74</sup> Accordingly, in order to comply with its Convention obligations, the United States could 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 a 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 minimus* 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 expressly protect designated categories of persons (though such persons may nevertheless be owed certain protections under customary laws of war). Though its determinations have been subject to criticism,<sup>75</sup> the Bush Administration has posited that while the Conventions apply in Iraq and

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<sup>70</sup> Fourth Geneva Convention art. 147.

<sup>71</sup> *Id.* art. 45.

<sup>72</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>73</sup> Third Geneva Convention art. 12; Fourth Geneva Convention art. 45.

<sup>74</sup> Third Geneva Convention art. 12; Fourth Geneva Convention art. 45.

<sup>75</sup> Some critics argue that all persons are covered by the Geneva Conventions, even if only under Common Article 3. For additional background regarding the protections accorded to wartime detainees and conflicting views as to the legal rights accorded to them under the Geneva Conventions, see CRS Report RL32395, *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, and CRS Report RL31367, *Treatment of “Battlefield Detainees” in the War on Terrorism*, by Jennifer K. Elsea.

Afghanistan, Al Qaeda members (outside of Iraq, at least) are not covered under the Conventions, as they are neither a State nor a party to the treaties.<sup>76</sup> Reportedly, the Administration has also concluded that the Geneva Convention prohibition on the “forcible transfer” of civilians does not apply to “illegal aliens” who have entered Iraq following the U.S.-led invasion, or bar the temporary removal of persons from Iraq for the purposes of interrogation.<sup>77</sup>

**War Crimes Act.** The War Crimes Act imposes criminal penalties upon U.S. nationals or Armed Forces members who commit severe war crimes.<sup>78</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 violations of Common Article 3 of the Geneva Conventions, as well as “grave breaches” of the Conventions,<sup>79</sup> such as torture of protected POWs or civilians and the “unlawful deportation or transfer or unlawful confinement” of protected civilians.<sup>80</sup>

As discussed previously, the Bush Administration has taken the position that Geneva Convention protections do not necessarily extend to persons who would perhaps most likely be subject to renditions (i.e., Al Qaeda members, “illegal aliens” in Iraq).

**International Covenant on Civil and Political Rights.** Article 7 of the International Covenant on Civil and Political Rights (ICCPR),<sup>81</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>82</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>83</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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<sup>76</sup> See Fact Sheet, White House Press Office, Feb. 7, 2002, available at [<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>]. It is not clear whether Al Qaeda members in Iraq are deemed excluded from Geneva Convention coverage.

<sup>77</sup> See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

<sup>78</sup> 18 U.S.C. § 2441.

<sup>79</sup> 18 U.S.C. §§ 2441(c)(1),(3).

<sup>80</sup> Fourth Geneva Convention, art. 147.

<sup>81</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg. at 49, U.N. Doc. A/RES/ 2200A (XXI) (1966).

<sup>82</sup> *Id.* art. 7.

<sup>83</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>84</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>85</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>86</sup> and Member States have an obligation to work jointly and separately to promote such rights and freedoms.<sup>87</sup> In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights,<sup>88</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>89</sup> as well as torture and cruel, inhuman, or degrading treatment.<sup>90</sup>

The Universal Declaration is not a treaty and accordingly is not technically binding on the United States,<sup>91</sup> though a number of its provisions are understood to

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<sup>84</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 Feb. 5, 2002).

<sup>85</sup> *Id.*

<sup>86</sup> U.N. CHARTER art. 55.

<sup>87</sup> *Id.* art. 56.

<sup>88</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

<sup>89</sup> *Id.* art 9.

<sup>90</sup> *Id.* art. 5.

<sup>91</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").

reflect customary international law.<sup>92</sup> The Universal Declaration does not include an enforcement provision.

## Legislative Developments Concerning Renditions

A number of proposals have been introduced in the 109<sup>th</sup> Congress to provide additional oversight over the rendering of persons to other countries. A provision of H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, which was introduced by Representative Jerry Lewis on March 11, 2005, and passed the House, as amended, on March 16, 2005 on a vote of 388-43, prohibits appropriations under the act from being used in any manner that violates CAT or CAT-implementing legislation and regulations.<sup>93</sup> H.R. 1268 passed the Senate on April 21, 2005, as amended, on a vote of 99-0, but does not include this provision, and instead provides that no funds appropriated under the act shall be obligated or expended to “subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.”<sup>94</sup> The House and Senate will now attempt to resolve differences between the two versions of H.R. 1268 via conference.

Two proposals — H.R. 952, the Torture Outsourcing Prevention Act, introduced by Representative Edward Markey in the House on February 17, 2005, and S. 654, the Convention Against Torture Implementation Act of 2005, introduced in the Senate by Senator Patrick Leahy on March 17, 2005 — would direct the Secretary of State to submit to appropriate congressional committees an annual list of countries where there are substantial grounds for believing that torture or cruel or degrading treatment of detained/interrogated individuals occurs. Transfer of persons to listed countries would be generally prohibited, subject to waiver by the Secretary of State in limited circumstances, including if verifiable mechanisms assure the United States that a person will not be tortured if transferred to a particular country. Written or verbal assurances would be insufficient grounds to permit a person’s transfer to such countries. Both bills would also require relevant agencies to modify their CAT-implementing regulations, with H.R. 952 requiring such agencies to establish a process by which a person could raise and adjudicate claims in an independent judicial forum that his or her transfer would be violate CAT Article 3. While H.R. 952 would amend the CAT-related provisions of the Foreign Affairs Reform and Restructuring Act of 1998, S. 654 would repeal such provisions and require the promulgation of new CAT-implementing regulations which would generally prohibit persons from being expelled, returned, or extradited to another country where they would likely face torture. Notably, S. 654 would define “expelled persons” protected

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<sup>92</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).

<sup>93</sup> H.R. 1268, § 7003 (House-passed version). This provision was added via an amendment introduced by Representative Edward Markey.

<sup>94</sup> H.R. 1268, § 6057(a) (Senate-passed version). This provision was added via an amendment proposed by Senator Harry Reid on behalf of Senator Richard Durbin.

under CAT-implementing regulations to include persons involuntarily transferred from the territory of any country.