# THE SIREN SONG OF INTERROGATIONAL TORTURE: EVALUATING THE U.S. IMPLEMENTATION OF THE U.N. CONVENTION AGAINST TORTURE

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## ABSTRACT

*Though the United States officially condemns all forms of torture, it has not adequately implemented the United Nations Convention Against Torture. This Note focuses on instances in which the United States has transferred suspected terrorists to countries that practice interrogational torture. It contends that these renditions demonstrate a lingering belief that interrogational torture is sometimes necessary to obtain vital intelligence information. Unfortunately, this belief has developed in a secretive manner that is antithetical to democratic principles of transparency and accountability. This Note argues that the United States should reject all forms of interrogational torture by fully implementing international norms that forbid engaging in or facilitating state-sponsored torture.*

## INTRODUCTION

Following the terrorist attacks of September 11, 2001, the United States embarked on an aggressive global antiterrorism campaign often described as the "War on Terror."[1] This "War on Terror" has

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1. George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140 (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html ("Our *war on*

raised questions about the United States' commitment to international norms that prohibit engaging in or facilitating state-sponsored torture.[2] In particular, there have been persistent allegations that the United States has "outsourced" torture by rendering suspected terrorists to countries that practice state-sponsored torture.[3] Such renditions are often described as "extraordinary renditions" to differentiate them from renditions carried out according to the regular processes that govern extradition and immigration matters.[4] Prior to the "War on Terror," extraordinary renditions often involved returning criminals to face trial, but the practice has expanded to serve other ends in the struggle against terrorism.[5]

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*terror* begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated." (emphasis added)).

2. *See infra* Part IV.

3. *See, e.g.*, ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 28–35 (2004) (collecting reports of renditions to torture carried out by the United States); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 123–24 (2006) (describing several reports of renditions to torture); Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106–07, *available at* http://www.newyorker.com/printables/fact/050214fa_fact6 (describing instances in which suspects were rendered to other countries and stating that "[t]he most common destinations for rendered suspects are Egypt, Morocco, Syria, and Jordan, all of which . . . are known to torture suspects").

4. Even renditions carried out according to these regular processes can raise the same normative issues that extraordinary rendition does, as is apparent from examining Maher Arar's removal to Syria. *See infra* notes 18–39 and accompanying text. This Note defines extraordinary rendition as the transfer of an individual from the control of the United States to the control of a foreign state outside the normal extradition and immigration processes. Furthermore, it uses the term "extraordinary rendition" instead of "snatch," "rendition," "irregular rendition," or other possible terms. The practice is unquestionably both extraordinary and irregular, but "extraordinary rendition" seems to be the most common label. *See* A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 7–8 (2006) (comparing the terms "snatch," "irregular rendition," and "extraordinary rendition").

5. Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 12 (2007) (statement of Michael F. Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency), *available at* http://foreignaffairs.house.gov/110/34712.pdf (discussing the beginning of the CIA's rendition program in 1995 and stating that "interrogation was never a goal under President Clinton"). Scheuer proceeded to explain that interrogation was not pursued

> [b]ecause it would be a foreign intelligence or security service without CIA being present or in control who would conduct the interrogation, because the take from the interrogation would be filtered by that service holding the individual and we never knew if it was complete or distorted, and because torture might be used and the information might be simply what an individual thought we wanted to hear.

A number of journalists and organizations have documented extraordinary renditions,[6] but many of these individual accounts are difficult to verify.[7] Despite the disputed validity of these stories, the potential for extraordinary renditions as part of the "War on Terror" should prompt an examination of how the United States has understood and implemented its self-chosen international legal obligations to prevent torture—specifically, the United Nations Convention Against Torture[8] and the Fourth Geneva Convention.[9] Examining these regimes reveals the weakest link in the United States' stance against terror—the possibility that it might transfer detainees to countries that practice interrogational torture and then partake of the fruits of those interrogations. International law forbids such transfers,[10] but this Note argues that the United States has not effectively implemented these legal principles.[11] Indeed, the struggle against terrorism has increased the demand for interrogational torture, thereby revealing the United States' failure to fully implement international norms against torture into its domestic law.[12]

Specifically, this Note contends that the United States has failed to fully implement the Convention Against Torture.[13] This failure is particularly troubling after September 11, 2001, when a focus on eliminating terrorism has put a premium on gathering intelligence on terrorist operations and spawned theories that might justify

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*Id.*; *see also* Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1408 (2007) ("The administration has transformed the practice of extraordinary rendition from a mechanism used to transfer accused criminals to a country where they would face trial to a preventive technique whereby suspects are sent to third countries not to try them for crimes they allegedly committed, but to torture and preventively detain them without charge in order to obtain information to prevent future crimes.").

6. For summaries of these accounts, see sources cited *supra* note 3.

7. These accounts are particularly difficult to verify because the United States generally does not comment on such intelligence matters, and courts have been hesitant to make findings of fact in the limited instances in which the legality of these practices has been litigated. *See, e.g.*, Arar v. Ashcroft, 414 F. Supp. 2d 250, 287–88 (E.D.N.Y. 2006) (dismissing all claims against government officials arising from a suspected terrorist's removal to Syria without evaluating the veracity of the allegations or adjudicating the claims on their merits).

8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

9. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter IV Geneva Convention].

10. *See infra* Part I.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part III.

interrogational torture to avert future terrorist attacks.[14] The United States' failure to implement the universal prohibition of torture, combined with its attempts to finesse similar provisions in the Geneva Conventions, has undermined international norms that forbid torture regardless of exigent circumstances.[15] At the highest political levels, torture apparently remains on the table as a legitimate intelligence-gathering tool.[16] Unfortunately, the secrecy that surrounds these intelligence matters has shrouded the high-level debate over whether torture is ever acceptable, effectively precluding robust public discussion over the legitimacy of interrogational torture.[17]

These problems are evident in the story of Maher Arar. On September 26, 2002, Arar flew into New York's John F. Kennedy International Airport (JFK).[18] He was returning to Canada from vacationing with his wife and children in Tunisia.[19] Arar held dual Canadian and Syrian citizenship—he was born in Syria, but had immigrated to Canada with his parents at age seventeen.[20] During a routine immigration inspection at JFK, Arar was detained, searched, and questioned.[21] FBI agents and immigration officers subsequently interrogated him for eight hours.[22] Unsatisfied with his answers, they placed Arar in solitary confinement.[23] After several days, they informed him that the Immigration and Naturalization Service (INS)

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14. *See infra* Part IV.A.

15. *See* Weissbrodt & Bergquist, *supra* note 3, at 160 ("Countries that have orchestrated extraordinary renditions have sacrificed the moral authority to be leaders in promoting the rule of law and respect for human rights. . . . In order to regain international legitimacy, the architects of extraordinary rendition may need to take dramatic steps to show the world that they intend to play by the rules. Only then will they have a genuine opportunity to compel other countries to comply with the important obligations embodied in contemporary human rights instruments." (footnotes omitted)).

16. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1460–61 (2005) ("The only reasonable inference to draw from these recent efforts by the government to defend its actions is that the torture culture is still firmly in place, notwithstanding official condemnation of torture."); *see also* ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 3, at 28–35 (collecting reports of renditions to torture carried out by the United States).

17. *See infra* Part IV.A.

18. Complaint para. 25, Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. CV-04-249-DGT-VVP), *available at* http://ccrjustice.org/files/Arar%20Complaint_FINAL.pdf.

19. *Id.*

20. *Id.* para. 11.

21. *Id.* paras. 26–29.

22. *Id.* paras. 29, 31.

23. *Id.* paras. 32–36.

had found him inadmissible because he belonged to the terrorist organization al Qaeda.[24] When immigration officers asked Arar to designate a country for removal, he chose Canada.[25] Nevertheless, INS officials informed Arar that they had decided to remove him to Syria.[26] Though Arar expressed fear that he would be tortured in Syria, immigration officials told him that "[his] removal to Syria would be consistent with Article 3 of CAT [the Convention Against Torture]."[27]

On October 8, Arar was flown in shackles and chains to Washington, D.C., and from there to Amman, Jordan.[28] Jordanian authorities interrogated and beat him, then turned him over to Syria on October 9.[29] Syrian security officers intensely interrogated Arar for eighteen hours a day for twelve days.[30] These interrogations included various forms of physical and psychological torture.[31] The officers beat Arar's palms, hips, and lower back with a thick electrical cable; they also struck his face, stomach, and neck.[32] On occasion they confined Arar in a "room where he could hear the screams of other detainees being tortured."[33] They also threatened him with other forms of torture—a spine-breaking chair, suspension in a tire to facilitate beating, and electric shocks.[34] When he was not facing interrogation, Arar was confined in a tiny underground cell that was about "six feet long, seven feet high, and three feet wide."[35] Arar noted that his interrogators' questions "bore a striking similarity to those asked . . . by FBI agents at JFK in September, 2002."[36] To alleviate his suffering, Arar falsely confessed to having "trained with terrorists in Afghanistan."[37]

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24. *Id.* paras. 37–38.
25. *Id.* para. 41.
26. *Id.* para. 47.
27. *Id.*
28. *Id.* para. 49.
29. *Id.* para. 50.
30. *Id.* para. 51.
31. *Id.*
32. *Id.*
33. *Id.* para. 52.
34. *Id.*
35. *Id.* para. 58.
36. *Id.* para. 54.
37. *Id.* para. 53.

Though Canadian consular officials visited Arar several times, his captors threatened him with additional torture if he disclosed the torture he had already experienced.[38] Syria eventually released Arar without filing any criminal charges and "now considers Mr. Arar completely innocent."[39] After his release, Arar filed several claims in U.S. district court against the officials who participated in his imprisonment, interrogation, and removal to Syria.[40] The district court dismissed all of his claims.[41] The court did not even reach the defendants' assertion of the "state-secrets privilege," though it dismissed Arar's due process claims because of "the national-security and foreign policy considerations at stake."[42] The Center for Constitutional Rights, a nonprofit legal advocacy organization acting on Arar's behalf, filed an appeal from the district court's decision in the Second Circuit on December 12, 2006.[43]

In Part I, this Note describes the international norm against engaging in or facilitating state-sponsored torture embodied in the United Nations Convention Against Torture. Part II explains that the United States officially condemns all forms of torture and remains party to the Convention Against Torture. Part III, however, illustrates several shortcomings in the United States' domestic legal implementation of the Convention Against Torture. It also details how the United States has rationalized circumventing the Fourth Geneva Convention's restrictions on detainee transfers. Part IV examines how increased efforts to prevent terrorist attacks and eradicate terrorist networks have made interrogational torture a more expedient option than it used to be. In turn, these preventive efforts have highlighted the inadequate implementation of international norms against torture in domestic law. Finally, Part V advocates

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38. Id. para. 61.

39. Id. paras. 64–65.

40. Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

41. The court dismissed Arar's various claims on a number of grounds: first, because he lacked standing to bring a claim for declaratory relief; second, because the Torture Victim Protection Act does not establish a right of action for noncitizens and only covers acts carried out under color of foreign law; and third, because his due process claim was foreclosed by an exception to the *Bivens* doctrine. Id. at 287–88. The *Bivens* doctrine recognizes a cause of action for plaintiffs whose constitutional rights are violated by federal agents. Id. at 267. The court also dismissed without prejudice the due process claims stemming from Arar's domestic detention. Id. at 287.

42. Id. at 287.

43. Brief of Plaintiff-Appellant, Arar v. Ashcroft, No. 06-4126-cv (2d Cir. Dec. 12, 2006), available at http://ccrjustice.org/files/Appellant's%20Brief,%2006-4216-cv.pdf.

comprehensive legislative change to increase the structural and procedural protections against torture.

## I. THE UNITED NATIONS CONVENTION AGAINST TORTURE AND THE FOURTH GENEVA CONVENTION

The Convention Against Torture and the Fourth Geneva Convention codify the international norm prohibiting renditions to torture. Together, these international agreements provide the strongest protections against rendition to torture.

### *A. The United Nations Convention Against Torture*

The United Nations Convention Against Torture codifies and strengthens international norms against torture by prohibiting torture regardless of what exigent circumstances may arise.[44] The Convention Against Torture was intended to strengthen existing prohibitions on torture in international law.[45] For the purposes of the Convention, torture is defined as follows:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[46]

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44. *See* Convention Against Torture, *supra* note 8, art. 2, para. 2 ("No 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.").

45. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988) ("The principal aim of the *Convention* is to *strengthen* the existing prohibition of [torture and other cruel, inhuman, or degrading treatment or punishment] by a number of supportive measures."). The Convention's preamble specifically mentions the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as preexisting international prohibitions of torture. Convention Against Torture, *supra* note 8, pmbl.

46. Convention Against Torture, *supra* note 8, art. 1, para. 1.

This language restricts application of the Convention to instances in which torture is politically motivated or sanctioned.[47] Thus, the Convention Against Torture focuses specifically on state-sponsored torture.[48] This focus is particularly evident in Article 3, which provides the protection most relevant to the practice of extraordinary rendition. Article 3 establishes the following requirements:

> 1. 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.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[49]

Article 3 represents an advance over simply prohibiting states from engaging in torture because it establishes that "a State is not only responsible for what happens in its own territory, but it must also refrain from exposing an individual to serious risks outside its territory by handing him or her over to another State from which treatment contrary to the *Convention* might be expected."[50] States that are party to the Convention are required to implement the terms of the Convention through their own legal systems.[51] Part III.A discusses how the United States has implemented the Convention.

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47. *See id.* (limiting the definition of torture to instances in which "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

48. *Id.*; Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Prescription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 103 (2001) (stating that the Convention employs a "more restrictive legal definition which includes official state sanction and/or participation").

49. Convention Against Torture, *supra* note 8, art. 3.

50. BURGERS & DANELIUS, *supra* note 45, at 125.

51. Convention Against Torture, *supra* note 8, art. 2, para. 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); *see also* Nagan & Atkins, *supra* note 48, at 98 (stating that Article 2 "formally established the specific legal obligation of the state to prevent torture").

### *B. The Fourth Geneva Convention*

The Fourth Geneva Convention prohibits the deportation or forcible transfer of "protected persons" out of an occupied territory.[52] For the purposes of the Convention, "protected persons" are those who "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[53] In dealing with "protected persons," Article 49 states that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[54] According to the leading commentary on the Geneva Conventions, "The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2."[55] These limited exceptions permit transfers or evacuations only in cases in which the "security of the population" or "imperative military reasons" demand them.[56] Part III.B discusses how the United States has rationalized circumventing the protections in the Fourth Geneva Convention.

## II. THE OFFICIAL POSITION OF THE UNITED STATES REGARDING TORTURE

The United States maintains a strong official stance against torture; indeed, President George W. Bush has said, "I want to be absolutely clear . . . . The United States does not torture. It's against our laws, and it's against our values. I have not authorized it—and I will not authorize it."[57] Secretary of State Condoleeza Rice has echoed this statement, saying that "[t]he United States does not permit, tolerate, or condone torture under any circumstances."[58] This position was reiterated in the United States' 2006 presentation to the

52. IV Geneva Convention, *supra* note 9, art. 49.

53. *Id.* art. 4.

54. *Id.* art. 49, para. 1.

55. INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 279 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

56. IV Geneva Convention, *supra* note 9, art. 49, para. 2.

57. George W. Bush, Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1573 (Sept. 6, 2006).

58. Condoleeza Rice, U.S. Sec'y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005), *available at* http://www.state.gov/secretary/rm/2005/57602.htm.

Committee Against Torture, which monitors the compliance of countries that are party to the Convention.[59] In that presentation, Assistant Secretary for the Bureau of Democracy, Human Rights, and Labor Barry Lowenkron stated that the United States was "committed to upholding [its] national and international obligations to eradicate torture and to prevent cruel, inhuman or degrading treatment or punishment."[60] In addition, Lowenkron stressed that the United States was committed to "transparency about our policies and actions."[61] Like many countries, the United States is party to the United Nations Convention Against Torture, although it only ratified the Convention subject to certain reservations and understandings.[62]

Nevertheless, President Bush has also argued that captured terrorists are a vital source of intelligence about terrorist organizations and operations. According to the president, such detainees are "the most important source of information on where the terrorists are hiding and what they are planning."[63] Secretary of State Condoleeza Rice has repeated these sentiments, arguing that some terrorist suspects "have information that may save lives, perhaps even thousands of lives," and that they must be interrogated to "gather potentially significant, life-saving, intelligence."[64] The emphasis placed on gathering this information raises the question of whether the United States would ever engage in or condone interrogational torture to pry information out of recalcitrant detainees. The answer to this question is more complex than the United States' strong rhetoric against torture indicates.

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59. Nagan & Atkins, *supra* note 48, at 103 ("The major function of the Committee Against Torture is to monitor the implementation of the Convention."). The Committee Against Torture was established under Article 17 of the Convention and acts according to the procedures established in Articles 19–21. *Id.*

60. Barry F. Lowenkron, Assistant Sec'y for the U.S. Bureau of Democracy, Human Rights & Labor, Opening Statement for U.S.: Hearing at Committee Against Torture (May 5, 2006), *available at* http://www.state.gov/g/drl/rls/68558.htm.

61. *Id.*

62. *See infra* Part III.A.

63. George W. Bush, Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1570 (Sept. 6, 2006).

64. Rice, *supra* note 58.

## III. THE UNITED STATES' IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE

### *A. Implementing the United Nations Convention Against Torture*

The United States Senate ratified the Convention Against Torture in November 1994, subject to a number of reservations and understandings.[65] Under U.S. law, reservations, understandings, and declarations are conditions placed on treaties that "are designed to harmonize . . . treaties with existing requirements of U.S. law and to leave domestic implementation of the treaties to Congress."[66] The Senate's reservations and understandings for the Convention Against Torture included a provision stating that "the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing,"[67] meaning that the obligations imposed by those articles had to be legislatively implemented to have the force of law.[68] In addition, the Senate modified the "substantial grounds" standard found in Article 3,[69] stating that "the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'"[70]

After ratification of the treaty, Congress took legislative steps to implement the Convention's requirements. Primary among these was the passage of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA),[71] which gave effect to the Convention Against Torture using the following language:

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65. 136 CONG. REC. 25, 36198–99 (1990) (including a number of reservations and declarations in the Senate's resolution of ratification).

66. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Humans Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416 (2000).

67. 136 CONG. REC. 25, 36198 (1990).

68. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.").

69. *See* Convention Against Torture, *supra* note 8, art. 3, para. 1 ("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.").

70. 136 CONG. REC. 25, 36198 (1990).

71. Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note (2006) (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture)). In addition, the Torture

> It shall be the policy of the United States 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.[72]

FARRA required that "the heads of the appropriate agencies . . . prescribe regulations to implement the obligations of the United States under Article 3" of the Convention Against Torture.[73] Such regulations have been promulgated by the Department of Homeland Security (DHS)[74] (the successor to the INS[75]), the Department of Justice (DOJ),[76] and the State Department.[77] The Central Intelligence Agency (CIA) has presumably instituted similar regulations, though these regulations, if they exist, are not public information.[78]

Under the regulations that apply to the DHS and the DOJ, enforcement of a removal order may be withheld or deferred for aliens who meet their burden of proof if "the immigration judge determines that the alien is more likely than not to be tortured in the country of removal."[79] The State Department's regulations implement the same standard with respect to extraditions, where the question considered is "whether a person facing extradition from the United States 'is more likely than not' to be tortured in the State requesting extradition."[80] This implementation of the Convention Against Torture raises concerns about its efficacy and ability to prevent extraordinary renditions undertaken to facilitate interrogational torture.

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Statute, 18 U.S.C. §§ 2340 to 2340B (2006), also represents a partial implementation of the Convention's requirements.

72. 8 U.S.C. § 1231 note (2006) (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture).

73. *Id.*

74. 8 C.F.R. §§ 208.16–.18 (2007).

75. *See* 6 U.S.C. § 291(a) (2006) (abolishing the Immigration and Naturalization Service); § 291(b) (establishing the Bureau of Citizenship and Immigration Services within the Department of Homeland Security).

76. 8 C.F.R. §§ 1208.16–.18.

77. 22 C.F.R. § 95.2 (2007).

78. MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERV., NO. RL32890, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE, at 11 (2007); Radsan, *supra* note 4, at 21 ("Whether or not the CIA has adopted regulations to implement Article Three principles is classified.").

79. 8 C.F.R. §§ 208.16(c)(4), 1208.16(c)(4) (2007).

80. 22 C.F.R. § 95.2(b) (2007).

1. *Alteration of the Governing Standard.* One of the most striking features of the understandings and reservations that the Senate attached to the Convention Against Torture is their substitution of a "more likely than not" and "would be tortured" test for the Convention's language that specifies "substantial grounds" and "would be in danger of being subjected to torture" as the proper test.[81] Professor Robert Chesney notes that the "substantial grounds" standard is critically important because it "functions as a standard of proof, setting the evidentiary bar for triggering a state's Article 3 obligations."[82] Changing that standard compromises the heart of Article 3's protection against rendition to torture. The United States has responded that its replacement of the "substantial grounds" standard with a "more likely than not" test was "merely a clarification of the definitional scope of Article 3, rather than a statement that would exclude or modify the legal effect of Article 3 as it applied to the United States."[83] This explanation, however, ignores the clear difference between the "substantial grounds" standard and the "more likely than not" test.

First, "more likely than not" establishes a higher burden of proof for a person seeking protection under Article 3 than "substantial grounds" does.[84] "More likely than not" seems to require something greater than a 50 percent chance of torture, whereas a significantly smaller chance of torture might constitute "substantial grounds" for believing that a person would be tortured. In *INS v. Cardoza-Fonseca*,[85] the Supreme Court held that a person seeking asylum need not show that persecution was "more likely than not" to satisfy the

81. This standard comes from one of the United States' reservations made in ratifying the Convention Against Torture, which says, "the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'" 136 CONG. REC. 25, 36198 (1990) (quoting Convention Against Torture, *supra* note 8, art. 3, para. 1).

82. Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 671 (2006).

83. United States Written Response to Questions Asked by the Committee Against Torture, http://www.state.gov/g/drl/rls/68554.htm (last visited Mar. 8, 2008).

84. *See* Radsan, *supra* note 4, at 19 (arguing that this change "may have actually watered down the CAT's requirement, making it easier to be in compliance on renditions"); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1228 (2004) (stating that this change "substantively limits the [United States'] obligations under Article 3").

85. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

"well-founded fear of persecution" standard.[86] As the Court put it, "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."[87] The Court went on to endorse one commentator's suggestion that a one in ten chance of severe persecution (death or exile and imprisonment in a labor camp) would suffice to create a well-founded fear.[88] Similarly, something less that 50 percent could presumably constitute "substantial grounds for believing that [a person] would be in danger of being subjected to torture."[89] Thus the "more likely than not" standard is more permissive than the test established by the Convention Against Torture.

Second, a less obvious alteration shifts the question from whether a person would be "*in danger* of being subjected to torture"[90] to whether a person actually "*would* be tortured."[91] This change, though subtle, shifts the inquiry toward individual risk and away from the destination country's reputation. For example, under the substantial grounds standard, removing a person into the custody of a country with an extremely poor human rights record might, in and of itself, create sufficient *danger* to meet the Convention's standard.[92] By altering the standard to consider whether torture *would* occur, however, the United States directs attention away from the destination country's reputation and emphasizes the individual case. This may contribute to excessive reliance on diplomatic promises to refrain from torture, given that diplomatic assurances are more attuned to addressing individual cases than overall reputation. Thus, the United States' implementation of the Convention Against Torture distorts the original standard, replacing a standard that seeks

86. *Id.* at 431.

87. *Id.*

88. *Id.*

89. Convention Against Torture, *supra* note 8, art. 3, para. 1.

90. Convention Against Torture, *supra* note 8, art. 3, para. 2 ("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.").

91. 136 CONG. REC. 25, 36198 (1990) ("[T]he United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'").

92. Radsan, *supra* note 4, at 62 (describing Uzbekistan, Egypt, and Syria as three countries with such poor human rights records that any renditions to these countries would strain credulity with regard to compliance with the Convention Against Torture).

to avert all substantial dangers of torture with one that seeks only to prevent torture that will more likely than not actually occur.

2. *Reliance on Diplomatic Assurances*. When determining whether to remove or transfer an individual, the United States sometimes considers diplomatic assurances that the receiving country will not torture that individual.[93] According to the State Department's 2005 report to the Committee Against Torture, "The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred."[94] Addressing allegations about extraordinary renditions, Secretary of State Condoleeza Rice stated that "[w]here appropriate, the United States seeks assurances that transferred persons will not be tortured."[95] Nothing in the Convention Against Torture makes relying on such assurances illegal.[96] According to the Convention, "competent authorities shall take into account all relevant considerations" when determining whether there are substantial grounds for believing that a person would be in danger of being tortured.[97] The United States treats diplomatic assurances as this type of relevant information when making an individualized assessment about whether an individual is "more likely than not" to be tortured.[98] According to the United States' Second Periodic Report to the Committee Against Torture, such assurances have, in a "very small number of cases," formed the basis for allowing individuals to be removed.[99]

The consideration of such assurances is part of the legal framework that implements the Convention Against Torture in

93. *Id.* at 44 ("On several occasions, the Bush Administration has noted that assurances affect its decisions on transfers of prisoners.").

94. U.S. Dep't of State et al., *Second Periodic Report to the Committee Against Torture*, ¶ 30, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), *available at* http://www.state.gov/documents/organization/62175.pdf.

95. Rice, *supra* note 58.

96. *See* Radsan, *supra* note 4, at 43–54 (discussing the use of diplomatic assurances under Article 3).

97. Convention Against Torture, *supra* note 8, art. 3, para. 2.

98. *See* Radsan, *supra* note 4, at 23 ("[I]n the immigration context, assurances are laid out as one explicit factor in determining the legality of a rendition."); *see also* 8 C.F.R. § 208.18(c) (2007) (describing how assurances may be considered in deciding whether removal is consistent with Article 3).

99. U.S. Dep't of State et al., *supra* note 94, para. 33.

immigration removal and extradition contexts. In immigration removal cases, the relevant regulations provide that

> (1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.
>
> (2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.[100]

The regulations governing extradition[101] and inadmissibility for security reasons[102] do not explicitly mention assurances, but assurances could presumably serve similar purposes in those contexts. Extraordinary renditions carried out by the CIA probably operate under similar guidelines, though such matters are classified information.[103]

This reliance on assurances is problematic for a number of reasons. First, a need to procure such assurances to comply with Article 3 indicates that the receiving country may already have a questionable human rights record, which itself suggested an increased likelihood that an individual would be tortured.[104] Second, monitoring compliance with such assurances is difficult, if not impossible, because

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100. 8 C.F.R. § 208.18(c) (2007). Identical regulations govern the Executive Office of Immigration Review. 8 C.F.R. § 1208.18(c) (2007).

101. 22 C.F.R. § 95 (2007).

102. 8 C.F.R. § 235.8 (2007).

103. *See* sources cited *supra* note 78.

104. *See* Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 303 (2003) ("[P]ast torture is evidence of the likelihood of future torture, and absent a showing of change in the human rights conditions of a country where past torture was experienced, such evidence is likely to be extremely persuasive."); *see also* Lobel, *supra* note 5, at 1414 ("[G]overnment actions that are based on predictions or suspicions about future conduct are inherently less subject to clear rules than those based on evidence of what has already occurred.").

"torture is conducted in secret and regimes that use torture have become adept at hiding it."[105] Without effective monitoring, a receiving country has little incentive to refrain from engaging in torture, given that its noncompliance will likely remain unknown.[106] Third, procuring assurances could (and perhaps has) become a rubber stamp for complying with the Convention Against Torture. Given that monitoring is difficult and that the incentives to prevent torture post hoc are relatively low, obtaining assurances may be a pro forma way to feign compliance with the Convention Against Torture.[107] Because of these problems, assurances should be used sparingly, if at all. Liberal use of such assurances effectively eviscerates the determination of whether an individual is "more likely than not" to be tortured—a determination that lies at the very heart of the Convention Against Torture.

The possibility that such assurances have become a rubber stamp is particularly pertinent to Maher Arar's case; he was reportedly only removed to Syria after the United States "received assurances from Syria that Arar would not be tortured."[108] Given Syria's exceedingly poor human rights record,[109] it is difficult to understand how removing anyone into Syrian custody could have comported with the

105. ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 3, at 89.

106. *See* Chesney, *supra* note 82, at 696 ("[T]here is also substantial reason to doubt that compliance-monitoring mechanisms . . . will succeed in detecting abuse. . . . [E]ven in the event that non-compliance is detected, there are no mechanisms in place to impose accountability." (footnotes omitted)).

107. *See* HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 3 (2005), *available at* http://hrw.org/reports/2005/eca0405/eca0405.pdf ("[C]ountries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture.").

108. DeNeen L. Brown, *Canadian Sent to Mideast Files Suit*, WASH. POST, Nov. 25, 2003, at A25. For an account of Arar's experiences, see *supra* notes 18–39 and accompanying text.

109. Amnesty Int'l, *Syrian Arab Republic: Briefing to the Human Rights Committee, 71st Session – March 2001*, art. 7, MDE 24/001/2001 (Aug. 13, 2001), *available at* http://web.amnesty.org/library/pdf/MDE240012001ENGLISH/$File/MDE2400101.pdf (describing how Amnesty International has human rights concerns regarding Syrian torture practices). The State Department's 2002 report on Syria's human rights practices stated that its "human rights record remained poor, and it continued to commit serious abuses. . . . Continuing serious abuses included the use of torture in detention . . . . [T]here was credible evidence that security forces continued to use torture . . . ." BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 108TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2002, at 2108–09 (Joint Comm. Print 2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm.

Convention Against Torture,[110] yet Syria's assurances apparently sufficed in Arar's case. If diplomatic assurances are given such significant weight without reciprocal accountability through effective monitoring,[111] the protections of Article 3 are slight indeed.

3. *Designation of an Interested Decisionmaker*. The United States' implementation of the Convention Against Torture also fails to provide full Article 3 protection, because the process for determining whether a person is protected from removal under Article 3 invites an improper balancing of the state's interests against the individual's interests. Under the existing regulations, determinations of whether a detainee is "more likely than not" to suffer torture may be made at the highest levels, usually by the secretary of state or the attorney general.[112] As high-level executive branch officials, these decisionmakers are also likely to know about the potential intelligence value of detainees, and this knowledge may influence their decisions. For example, a decisionmaker might believe that a particular detainee knew important information about impending terrorist plots, but would not disclose that information under interrogations carried out within the bounds of domestic law. Rendering that person to a country that practiced more forceful interrogation techniques might yield valuable information and save American lives. Knowing the potential benefits of more intensive questioning could influence that decisionmaker's determination about whether removing or rendering a particular suspect would comport with Article 3. This type of balancing, however, is entirely contrary to the purpose of the Convention Against Torture, which expressly prohibits torture regardless of what exigent circumstances arise.[113]

4. *Evasion of Judicial Review and Public Scrutiny*. In its written response to questions from the Committee Against Torture, the

110. Radsan, *supra* note 4, at 62 (noting that any renditions to Syria might run afoul of the Convention Against Torture because of Syria's poor human rights record).

111. Arar's case demonstrates a lack of effective monitoring, despite the United States' reliance on diplomatic assurances. Indeed, even the visits of Canadian consular officials were ineffective at stopping the torture. *See supra* note 38 and accompanying text.

112. 22 C.F.R. §§ 95.1–.3 (2007) (authorizing the Secretary of State and the Deputy Secretary of State to make Article 3 determinations in extradition cases).

113. Convention Against Torture, *supra* note 8, art. 2, para. 2 ("No 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.").

United States reiterated that it "does not comment on information or reports relating to alleged intelligence operations."[114] The United States has largely refrained from commenting on the case of Maher Arar, despite the widespread publicity his story has received.[115] This silence extends to the process of extraordinary rendition, which the United States generally does not publicly acknowledge.[116] This opacity is only augmented by the fact that the legislation implementing the Convention expressly states that no court has jurisdiction to review regulations promulgated under it.[117] The various implementing regulations reiterate this restriction on the availability of judicial review.[118] Furthermore, Arar's case demonstrates how difficult it is to bring a claim based on a determination under the Convention Against Torture, and he was removed after being deemed inadmissible for security reasons, not through the more covert process of extraordinary rendition.[119] Even if one or more of Arar's claims had withstood initial review in federal district court, he still would have needed to overcome the assertion of the "state-secrets privilege," with its attendant deference to the government action in question.[120] Given this lack of information and the restrictions placed on judicial review, the practical application of the "more likely than not" standard takes place with little transparency or accountability.[121]

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114. United States Written Response to Questions Asked by the Committee Against Torture, *supra* note 83.

115. COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 9 (2006), *available at* http://ararcommission.ca/eng/AR_English.pdf ("There was a great deal of media coverage of Mr. Arar's case in the later stages of his imprisonment in Syria and even more after his return to Canada.").

116. *See* Radsan, *supra* note 4, at 50 ("Except for isolated comments by a few officials, the Bush Administration has not said much about irregular rendition.").

117. 8 U.S.C. § 1231 note (2006) (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture) ("[N]o court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section . . . .").

118. *See, e.g.*, 22 C.F.R. § 95.4 (2007) ("Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.").

119. *See supra* note 24 and accompanying text.

120. Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

121. The combination of government silence, the lack of judicial review, and the fact that a detainee rendered to another country is likely unable to protest all combine to shroud these determinations in secrecy. Cases that come to light (like Maher Arar's) are likely the exception, not the rule.

### *B. Avoidance and the Fourth Geneva Convention*

Outside the domestic legal context, the United States has reportedly used extraordinary renditions in the war in Iraq.[122] Those extraordinary renditions must be evaluated according to the legal obligations imposed by the Geneva Conventions.[123] The United States' legal analysis of the permissibility of extraordinary rendition in Iraq proceeded from the assumption that detainees whom it wanted to render were protected persons.[124] In dealing with such "protected persons," Article 49 states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[125]

Despite the language of Article 49, the United States has explored ways to circumvent the prohibition on removing "protected persons" from the occupied territory of Iraq. In a draft memorandum,[126] then-Assistant Attorney General Jack Goldsmith, the head of the Office of Legal Counsel,[127] examined the applicability of Article 49 and concluded:

> [T]he United States may, consistent with article 49, (1) remove "protected persons" who are illegal aliens from Iraq pursuant to local immigration law; and (2) relocate "protected persons" (whether illegal aliens or not) from Iraq to another country to

122. ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 3, at 64 n.351.

123. For background on the Fourth Geneva Convention, see *supra* Part I.B.

124. *See* ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 3, at 65 n.351 (stating that the memorandum concerns "protected persons").

125. IV Geneva Convention, *supra* note 9, art. 49, para. 1.

126. Draft Memorandum from Jack Goldsmith, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dept. of Justice, to Alberto R. Gonzales, Counsel to the President (Mar. 19, 2004), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 366–80 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Goldsmith Memorandum].

127. The Office of Legal Counsel is housed within the Justice Department, and "[t]he Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies." United States Department of Justice, Office of Legal Counsel, http://www.usdoj.gov/olc (last visited Mar. 8, 2008).

> facilitate interrogation, for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them.[128]

Goldsmith's analysis separated "protected persons" into three groups: illegal aliens, those who have been accused of an offense, and those who have not been accused of an offense.[129]

For illegal aliens, Goldsmith argued that Article 49 does not apply because the terms "deportations" and "forcible transfers" refer to permanent transfers of inhabitants from areas in which they had a lawful right to be.[130] He argued that in international law the term "deportation" meant "removal of a person from a country where he has a legal right to be," rather than simply meaning removing a person from one country to another.[131] Goldsmith then addressed the term "transfer," concluding that it is used somewhat interchangeably with "deportation," and thus only applies to legal inhabitants of the occupied territory.[132] To make this case, Goldsmith cited instances in which the words have been used interchangeably or the word "deportation" has been used as shorthand for describing the Article 49 prohibition.[133] This evidence shows that these terms do overlap to some extent, but does not shed light on what distinguishes the two terms. Given that these terms do not apply to illegal aliens, Goldsmith concluded that illegal aliens were not protected by Article 49.[134]

Goldsmith argued that this implicit exception to the Article 49 prohibition on deporting or forcibly transferring "protected persons" "comports with common sense" because failing to remove illegal aliens would make the Convention "a welcome mat to occupied territory."[135] Yet Goldsmith himself noted that those who violate Iraqi immigration law are subject to imprisonment, and that under customary international law, the United States is likely required to enforce the existing Iraqi immigration laws.[136] This belies his

128. Goldsmith Memorandum, *supra* note 126, at 367–68.
129. *Id.* at 368, 374–75.
130. *Id.* at 374.
131. *Id.* at 371.
132. *Id.* at 371–72.
133. *Id.*
134. *Id.* at 372.
135. *Id.*
136. *Id.* at 374.

suggestion that comprehensive Article 49 protection would constitute a "welcome mat" for illegal aliens.

Given that the plain language of Article 49 establishes a blanket prohibition of forcible transfers of "protected persons,"[137] an exception to that prohibition should only be allowed when it can be demonstrated with equal clarity. Goldsmith's memorandum does not convincingly show that the term "transfer" only applies to legal inhabitants. Thus, Article 49 seems to protect even illegal aliens from forcible transfer, though they could still be imprisoned under local law. This conclusion also comports with Article 76,[138] which requires that "[p]rotected persons accused of offences [presumably even immigration-related offenses] shall be detained in the occupied country, and if convicted they shall serve their sentences therein."[139]

Goldsmith's second argument proceeded on the foundation created by his analysis of "deportations" and "transfers." First, he acknowledged that Article 76 clearly prohibits removing a "protected person" against whom "adjudicative proceedings have been initiated."[140] Nevertheless, Goldsmith argued that the terms "deportation" and "transfer" reference only an extended, indefinite, or permanent removal from the occupied country.[141] Goldsmith said that these terms have the connotation of "*uprooting* from one's home" and suggest that "resettlement" will be required.[142] They do not include a "mere temporary absence, for a brief and definite period, from one's still-established home."[143] Thus Goldsmith concluded that it would be permissible to relocate people in this class of protected persons to another country for a "brief but not indefinite period" to facilitate interrogation.[144]

This analysis goes to some lengths to recast the straightforward prohibition found in Article 49. It establishes two distinct justifications for why extraordinary rendition of a "protected person" from Iraq to another country would not violate Article 49. First, an

137. IV Geneva Convention, *supra* note 9, art. 49, para. 1.

138. *See* INT'L COMM. OF THE RED CROSS, *supra* note 55, at 363 (describing Article 76 as "based on the fundamental principle forbidding deportations laid down in Article 49").

139. IV Geneva Convention, *supra* note 9, art. 76, para. 1.

140. Goldsmith Memorandum, *supra* note 126, at 375.

141. *Id.* at 375–76.

142. *Id.* at 376.

143. *Id.*

144. *Id.* at 379.

individual who is an illegal alien does not receive Article 49 protection.[145] This raises the question whether an illegal alien could be removed to any nation willing to receive that individual. Presumably, an illegal alien would need to be charged under Iraqi immigration law, which would seem to implicate the protection against removal found in Article 76, which applies to "[p]rotected persons accused of offences."[146] Second, a "protected person" could be removed through extraordinary rendition so long as that removal was a "temporary relocation . . . for a brief but not indefinite period."[147]

Why would the United States go to such lengths to justify removing a "protected person" from Iraq? The memorandum concludes that the United States may "relocate 'protected persons' (whether illegal aliens or not) from Iraq to another country to facilitate interrogation."[148] This reason is repeated throughout the memorandum, and no other explanations are offered, though explanations such as prison overcrowding and detainee safety might be plausible alternatives. This focus on "facilitating interrogation," though, raises a number of questions: Where would these detainees be sent? How would carrying out an interrogation in another country facilitate that interrogation? What safeguards would prevent the receiving countries from torturing detainees to facilitate their interrogation? The commonly proffered argument is that "an allied nation may have cultural or linguistic connections with a captured individual that the United States lacks, placing that nation in a position to more effectively establish a rapport with the individual and allowing for more effective interrogations."[149] The more cynical explanation is that some countries interrogate more effectively because they utilize torture.[150] Given the United States' insistence that this type of extraordinary rendition does not violate Article 49, it is

145. *See supra* notes 130–34 and accompanying text.

146. IV Geneva Convention, *supra* note 9, art. 76, para. 1.

147. Goldsmith Memorandum, *supra* note 126, at 380.

148. *Id.* at 368.

149. Yoo, *supra* note 84, at 1187.

150. *See* ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 3, at 4–5 ("U.S. officials reportedly are seeking opportunities to transfer terrorist suspects to locations where it is known that they may be tortured, hoping to gain useful information with the use of abusive interrogation tactics."); Radsan, *supra* note 4, at 3 ("[A]ccording to the surprisingly candid statements of one CIA official, officials in other countries might use interrogation techniques that the United States does not, may not, and should not use.").

reasonable to question its underlying motives. Responding to criticism of this memorandum, Goldsmith notes that he "never finalized the draft, it never became operational, and it was never relied on to take anyone outside of Iraq."[151] Nevertheless, the memorandum's focus on circumventing legal protections to enable extraterritorial interrogations exemplifies a common tendency in the struggle against terrorism.

## IV. THE PRECARIOUS STATE OF THE ABSOLUTE NORM AGAINST TORTURE

### *A. The Expedience of Interrogational Torture*

The United States remains opposed to torture based on most of the traditional motivations for torture that Professor David Luban identifies, including "victor's pleasure, terror, punishment, and extracting confessions."[152] Nevertheless, Luban also suggests that modern liberalism (in the sense of "liberal democracy") might not be wholly opposed to "torture as a technique of intelligence gathering from captives who will not talk."[153] Torturing terrorists may seem like a small price to pay when that torture could yield lifesaving information.[154] Indeed, by offering a humanitarian motivation for torture, this understanding dissociates torture from its most illiberal aspects—its inherent cruelty, tyrannical nature, and disregard for human dignity.[155] In this context, preventive interrogational torture is portrayed as almost pragmatic and humanitarian, rather than simply barbaric and authoritarian.[156]

This utilitarian motivation for torture seems to have become more prominent given the attention paid to terrorism as a national

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151. JACK GOLDSMITH, THE TERROR PRESIDENCY 172 (2007). Goldsmith also says that the memorandum noted that "persons temporarily relocated outside of Iraq" would retain their Geneva Convention protections against torture. *Id.* at 242–43 n.45.

152. Luban, *supra* note 16, at 1436.

153. *Id.*

154. Professor Alan Dershowitz describes the calculus under which nonlethal torture might be warranted: "The simple cost-benefit analysis for employing such nonlethal torture seems overwhelming: it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die." ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 144 (2002).

155. *See* Luban, *supra* note 16, at 1430 ("Torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes.").

156. *See id.* at 1436 ("Torture to gather intelligence and save lives seems almost heroic.").

security threat.[157] The difficulties of dealing with decentralized terrorist organizations have created new challenges and rendered many of the intelligence-gathering methods calibrated to deal with nation-state actors relatively ineffective.[158] Professor Jules Lobel describes the United States' response to the attacks of September 11, 2001, in terms of a "preventative paradigm": "The Bush administration's response to the September 11 attacks has been characterized by a paradigm shift in fighting terrorism: from a defensive to offensive strategy, from reliance on deterrence to a new emphasis on preemption, from backward to forward-looking measures, and from prosecution to prevention."[159] Given the decentralized way in which terrorist organizations operate, good intelligence is crucial to disrupting their operations and preventing attacks.[160] Although captured terrorists may have good intelligence to offer, they may be loath to reveal information that would endanger fellow terrorists, undermine the organizations they represent, and frustrate their attempts to launch additional attacks. This need for information explains why the incentive to engage in or condone interrogational torture has increased with the growing struggle against terrorism. Though torture may yield some false confessions, it also sometimes yields good information, particularly when the information sought is easily verified.[161] As Professor Alan Dershowitz argues, "It is impossible to avoid the difficult moral dilemma of choosing among evils by denying the empirical reality that torture *sometimes* works, even if it does not always work."[162] Thus, the preventive paradigm has placed a premium on intelligence, thereby

157. *See* Lobel, *supra* note 5, at 1408 ("The administration has justified its use of coercive interrogation tactics against detainees . . . by asserting the necessity of preventing future terrorist attacks."). Professor Lobel contends that the Bush administration has focused on "coercive prevention," which entails using force "to detain suspected terrorists . . . and send individuals to nations that will detain and likely torture them." *Id.* at 1409.

158. *See* GOLDSMITH, *supra* note 151, at 72–74 (describing how the struggle against terrorism involves far more uncertainty and "chronic obscurity" than prior military struggles against other nations that took place in specific geographic locations).

159. Lobel, *supra* note 5, at 1407.

160. *See id.* at 1409 ("The turn toward prevention is not surprising. When faced with potential terrorist threats, it makes sense to focus efforts on preventing future attacks, as opposed to merely punishing those who have attacked the United States.").

161. *See* DERSHOWITZ, *supra* note 154, at 136–37 ("There are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.").

162. *Id.* at 137.

making interrogational torture expedient and revealing weaknesses in the United States' implementation of international prohibitions on torture.

### *B. The Arar Case as Evidence of a Declining Norm*

Maher Arar's story[163] presents a specific example of how the United States might profit from interrogational torture while apparently complying with its implementation of the Convention Against Torture. It thus presents a useful test case for evaluating the United States' implementation of the Convention, given that Arar was removed to Syria through normal removal processes.[164] Despite these processes, however, Arar allegedly experienced the very sort of torture that the Convention seeks to prevent. Notably, the torture alleged in Arar's complaint fits the pattern of torture that the State Department detailed in its 2002 report on human rights practices in Syria. According to that report, "there was credible evidence that [Syrian] security forces continued to use torture."[165] Accounts of state-sponsored torture in Syria include reports of torture by a variety of methods, including

> administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine.[166]

In addition, the report noted that although torture did occur in Syrian prisons, it was "most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, especially while the authorities were attempting to extract a confession or information."[167] This fits with Arar's story, given that he was tortured using some of these methods and threatened with others, all with the goal of extracting information from him.[168] In Arar's case, the regulations that implement the

163. *See supra* notes 18–39 and accompanying text.
164. *See supra* notes 24–27 and accompanying text.
165. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *supra* note 109, at 2109.
166. *Id.*
167. *Id.*
168. *See supra* notes 30–36 and accompanying text.

Convention Against Torture apparently failed to protect him from torture. Indeed, they not only failed to protect him from torture generally, but also failed to protect him from the very kinds of torture that the United States government knew Syria practiced.

## V. ADDRESSING THE EROSION OF THE NORM AGAINST TORTURE

Increased political pressure to forestall terrorist attacks and eradicate terrorist networks has revealed significant flaws in the United States' implementation of the Convention Against Torture.[169] This inadequate implementation likely originated in concern over subjecting U.S. sovereignty to broadly written international agreements.[170] Though these shortcomings have existed since the Convention was first implemented, the struggle against terrorism has greatly magnified their pernicious effects.[171] Its origins aside, the lessons of detainee abuse at Abu Ghraib prison[172] and cases like Maher Arar's demand decisive action to strengthen U.S. adherence to international norms against torture. Such action could conceivably originate in the executive or legislative branch, but legislative change would be preferable. Legislative change would be more effective because the pressure to combat terrorism falls most directly on the

169. *See supra* Parts III–IV.

170. *See* Nagan & Atkins, *supra* note 48, at 109 ("The United States' long refusal to ratify the Convention Against Torture is indicative of its general unwillingness to subscribe to the treaty-based regime concerned with international human rights."); John B. Bellinger III, Legal Adviser, U.S. Dep't of State, Transatlantic Approaches to International Law and Institutions, Speech at Duke University School of Law: Center for International and Comparative Law (Nov. 15, 2006), *in* 17 DUKE J. COMP. & INT'L L. 513, 517–19 (2007) (describing how differences in historical experience, legal tradition, and national culture make the United State more hesitant than its European allies to endorse legal frameworks that codify broad principles and create comprehensive systems of rules). Bellinger states that the United States'

> problem-oriented approach also predisposes us to distinguish between issues that we believe lend themselves to international legal resolution and those that do not. This can be at odds with a European tendency—heightened by experience with the European Union—to see the ideal international legal framework as one that is comprehensive and cohesive, that covers the field.

*Id.* at 519.

171. *See* sources cited *supra* note 3.

172. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, International Criminal Law*, 98 AM. J. INT'L L. 579, 593–96 (2004) (summarizing accounts of American military personnel abusing detainees at Abu Ghraib prison).

executive branch.[173] The president is "Commander in Chief"[174] and has extensive responsibility for the nation's foreign affairs.[175] Therefore, pressure to gather useful intelligence and forestall terrorist attacks falls primarily on the president and executive agencies under the president's control, especially intelligence agencies like the CIA and the National Security Agency.

In an ideal scenario, the executive branch would strengthen the international norm against torture by giving more credence to a country's human rights record and less to its diplomatic assurances. Given that the executive branch stands at the forefront of U.S. foreign policy, its conduct inevitably affects domestic and international perceptions about the United States' stance on torture. Memoranda that attempt to circumvent international legal obligations or redefine what constitutes torture convey a discontinuity between the United States' rhetoric and practice on the issue of torture. Regardless of what occurs in practice, the impression that the United States condones torture is enough to weaken the international norm against torture.[176] Unfortunately, the political pressures on the executive branch have apparently encouraged a belief in the merits of interrogational torture.[177] This understanding has been formed outside the typical channels of political dialogue and implemented in a secretive manner that is antithetical to the democratic principles of transparency and accountability.[178]

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173. *See* GOLDSMITH, *supra* note 151, at 75 (describing "an executive branch entirely responsible for protecting the safety of Americans but largely in the dark about where or how the next terrorist attack will occur").

174. U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

175. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (quoting Representative John Marshall, 6 ANNALS OF CONG. 613 (1800)).

176. *See* Weissbrodt & Bergquist, *supra* note 3, at 127 & n.33 (describing extraordinary rendition as a practice that "involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation" (footnotes omitted)).

177. *See* Luban, *supra* note 16, at 1452–61 (describing the "torture culture" created by a "group of lawyers in President George W. Bush's administration who wrote the highly-permissive secret memoranda that came close to legitimizing torture for interrogational purposes").

178. *See* Nagan & Atkins, *supra* note 48, at 89 ("[T]he practice of torture is often among the least transparent aspects of governmental policy and practice."); Radsan, *supra* note 4, at 4 ("[R]endition is the hidden domain of intelligence services, not the open realm of courts, prosecutors, and defense lawyers."); *id.* at 51 (arguing that the "administration should move from secrecy toward transparency" regarding the practice of extraordinary rendition).

Given its self-chosen international legal obligation to prevent torture, the United States should publicly announce any fundamental change in its policy regarding torture. Similarly, as a constitutional democracy, a fundamental change of this magnitude should issue from transparent democratic process, not from secret, high-level policy decisions. To address the issue of torture in the context of extraordinary renditions, the United States government needs to reinforce its implementation of the international norms against state-sponsored torture through legislation that openly ventilates the issue of interrogational torture.

Congress should adopt legislation strengthening its implementation of Article 3 of the Convention Against Torture. In essence, this legislation would supplement the initial implementation of the Convention. Such legislation would be designed to reduce the burden of proof on applicants who seek to defer removal, replacing the "more likely than not" standard with something closer to the "substantial grounds" standard found in the Convention Against Torture or the "well-founded fear of persecution" standard that operates in the asylum context.[179] In addition, this legislation should make the provisions of the Convention Against Torture applicable to extraordinary renditions that take place outside the United States. Finally, Congress should revise the existing system to incorporate an impartial decisionmaker who could better ensure compliance with Article 3. This revised decisionmaking process could take a variety of forms, as long as it separated the determination of whether removal was consistent with Article 3 from the knowledge of an individual's potential intelligence value.

If Congress and the president are unwilling to strengthen the United States' implementation and application of the Convention Against Terror, their reasons for opposing a more robust policy prohibiting torture should be addressed through public debate. Professor Dershowitz has rightly noted that "[i]f we tolerate torture, but keep it off the books and below the radar screen, we compromise principles of democratic accountability."[180] As noted in Part II, the United States has maintained strong rhetorical opposition to torture,

179. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (quoting 8 U.S.C. § 1101(a)(42) (2006)) (describing how the "well-founded fear of persecution" standard operates in certain asylum cases).

180. DERSHOWITZ, *supra* note 154, at 153.

regardless of the circumstances.[181] If that position no longer reflects either the normative view of policymakers or the objective reality on the ground, that change should be publicly acknowledged. That discussion could take place on an abstract level and in general policy terms without revealing sensitive national security information. The possibility of institutionalizing torture by requiring a legal "torture warrant," a proposal made by Professor Dershowitz, could provide a starting point for this debate.[182] Under his proposal,

> An application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it.
>
> The suspect would be given immunity from prosecution based on information elicited by the torture. The warrant would limit the torture to nonlethal means, such as sterile needles, being inserted beneath the nails to cause excruciating pain without endangering life.[183]

This proposal is not intended to rationalize or endorse state-sponsored torture. If the United States is not willing to strengthen its laws and policies to match its strong rhetorical stance against torture, that alone indicates that this debate is likely already occurring, and ground has been given to torture advocates at the highest political levels. This debate must be public because it concerns a fundamental moral and ethical decision with vast implications. Such decisions are best made through an open and transparent democratic process, not by elite policymakers.

## CONCLUSION

The events of September 11, 2001, awakened the United States to the threat of international terrorism. In response to that threat, the United States has undertaken a comprehensive struggle against

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181. *See supra* Part II.

182. Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. Professor Dershowitz is not alone in having proposed legalizing torture as an alternative to its extralegal use. *See, e.g.*, Andrew H. Moyer, Note, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. JEFFERSON L. REV. 469, 489 (2004) ("Compared to the current policy of practicing torture 'under the radar screen,' however, [judicially sanctioned torture] may indeed be the lesser of two evils.").

183. Dershowitz, *supra* note 182.

terrorism. In that struggle to prevent terrorist attacks, intelligence information about terrorist organizations and their operations is at a premium, yet developing such intelligence has proven difficult. This intelligence-gathering problem has put pressure on the United States' legal obligation to refrain from engaging in or condoning torture. That pressure has revealed weaknesses in how that the United States has implemented the Convention Against Torture. In addition, it has shown that the efficacy of a strong norm against torture remains open to debate within the United States.

The Convention Against Torture embodies a comprehensive prohibition of torture in all circumstances. It goes beyond simply requiring that its members refrain from state-sponsored torture and mandates that they also avoid extraditing or returning individuals to other countries when there are "substantial grounds for believing" that those individuals would be in danger of being tortured.[184] The United States has partially implemented this norm into its legal system, but that implementation leaves something to be desired. By changing the standard from "substantial grounds for believing" that an individual would be in danger of torture to "more likely than not" that an individual would be tortured, the United States has made it more difficult for an individual to successfully claim Article 3 protection. This protection has been reduced even further by the United States' reliance on diplomatic assurances that the destination country will not torture the individual in question. Relying on such assurances improperly discounts the human rights record of the destination country and risks making assurances a talisman for compliance, thus further weakening Article 3 protection against torture. Finally, the decisionmaking process for Article 3 compliance may be compromised when the decisionmaker also weighs information about the potential intelligence value of the individual in question. Such balancing is contrary to the absolute prohibition that the Convention Against Torture establishes.

Thus far the debate about torture has stayed below the surface, shielded from view by the secrecy surrounding intelligence affairs and the lack of judicial review. The decision to facilitate interrogational torture, however, should not be made without public debate and democratic process. In light of the importance of this question, Congress should strengthen the implementation of the existing

184. Convention Against Torture, *supra* note 8, art. 3, para. 1.

international norms against state-sponsored torture, thereby opening the issue up for public debate. Without substantive legislative reform or open debate about the legitimacy of torturing suspected terrorists for intelligence purposes, the United States' use of extraordinary renditions to facilitate interrogation will continue to subvert transparent democratic process and undermine existing international norms against state-sponsored torture.