



**BEYOND GUANTÁNAMO:  
TRANSFERS TO TORTURE  
ONE YEAR AFTER *RASUL V. BUSH***

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June 28, 2005

The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law (<http://www.chrgj.org>) focuses on issues related to “global justice,” and aims to advance human rights and respect for the rule of law through cutting-edge advocacy and scholarship. The CHRGJ promotes human rights research, education and training, and encourages interdisciplinary research on emerging issues in international human rights and humanitarian law. Philip Alston is the Center’s Faculty Director; Smita Narula is Executive Director; Margaret Satterthwaite is Research Director; and Angelina Fisher is Assistant Research Scholar.

This report should be cited as: Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (New York: NYU School of Law, 2005).

#### Acknowledgements

This report was researched and written by Angelina Fisher and Margaret Satterthwaite.

The authors thank the following people for collaboration, assistance or comments on portions of the report: Vilas Dhar, Cyrus Dugger, Gitanjali S. Gutierrez, Aziz Huq, Joseph Margulies, Smita Narula, Alison Nathan, and Richard Vagas.

## INTRODUCTION

One year ago, on June 28, 2004, the U.S. Supreme Court ruled in *Rasul v. Bush* that U.S. courts have jurisdiction to consider claims by foreign nationals captured abroad in connection with the global “War on Terror” and incarcerated at Guantánamo Bay.<sup>1</sup> While the federal courts work to determine the rights of these detainees, the Guantánamo Bay prison has itself become the focus of intense criticism by a wide variety of leaders and organizations, with prominent figures such as Former President Jimmy Carter calling for the prison to be shut down. Despite the criticisms, however, the Bush Administration continues to employ strategies that appear to be aimed at keeping “War on Terror” detainees outside the ambit of the U.S. legal system, including through renditions, extraordinary renditions,<sup>2</sup> reverse renditions,<sup>3</sup> and transfers to secret detention facilities in foreign countries.<sup>4</sup>

The Center for Human Rights and Global Justice is concerned that such transfers may become a convenient tool for avoiding U.S. courts and circumventing the rights of detainees while at the same time allowing the Administration to maintain access to the individuals and to any information they may possess. Though the types of transfer seem to change over time, one thing remains constant: detainees are not being given the opportunity to challenge their transfer on the grounds that they fear torture. The U.S. is therefore violating its international and domestic law obligation to protect against transfers to torture.

As a general matter, each of the various transfers can fall into one or more legal categories, defined for the purposes of this paper as (i) legal transfer, (ii) extra-legal transfer, and (iii) illegal transfer. A legal transfer is a transfer that is clearly authorized under U.S. law and contains an established, regulated method for detainees to challenge their transfer on the grounds that they fear torture. An extra-legal transfer is a transfer that appears to be authorized under U.S. law but contains no method for the detainee to effectively challenge transfer on the grounds of fear of torture. Finally, an illegal transfer is a transfer that is clearly unauthorized under U.S. law.

As the courts address the scope of the rights due to those detained in Guantánamo Bay, and as pressure to close the Guantánamo Bay facility mounts, the use of extra-legal and illegal transfers is likely to increase even further. It is therefore imperative that criticisms of Guantánamo Bay and calls for the facility’s closure be accompanied by an equally strong condemnation of the use transfers designed to circumvent the rule of law and to undermine the principles of justice that form the cornerstone of the U.S. legal system.

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<sup>1</sup> *Rasul v. Bush et al*, 124 S. Ct. 2686 (2004).

<sup>2</sup> Association of the Bar of the City of New York, Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (October 2004), available at [www.abcny.org](http://www.abcny.org); [www.nyuhr.org](http://www.nyuhr.org) (“Torture by Proxy”).

<sup>3</sup> See Section B, *infra*.

<sup>4</sup> Human Rights First, *Behind the Wire: An Update to “Ending Secret Detentions,”* March 2005, available at [http://www.humanrightsfirst.org/us\\_law/PDF/behind-the-wire-033005.pdf](http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf) (last visited June 21, 2005).

## UNCOVERING POLICY AND PRACTICE

The existence of a policy favoring transfers of terror suspects without allowing them to benefit from the protection against torture is indicated by off-the-record statements by officials,<sup>5</sup> and evidence of an infrastructure created to facilitate such transfers.<sup>6</sup> Because the key legal and policy documents have not been made public, however, evidence of U.S. policy and practice concerning transfers of terrorism suspects remains circumstantial. All factual information in this briefing paper is drawn from public, cited sources.

Despite the evidence of a policy of unprotected transfers, it is not known what proportion of these transfers were authorized and which were unauthorized.<sup>7</sup> To date, much of the media and Congressional attention has been focused on the most blatantly illegal transfer – extraordinary renditions – the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.<sup>8</sup> In October 2004, the Center for Human Rights and Global Justice (CHRGJ), together with the Association of the Bar of the City of New York (ABCNY), issued a report entitled *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions.”* The report presented a summary of the known cases of extraordinary rendition and provided an in-depth analysis of international and domestic

<sup>5</sup> For a detailed review of various on- and off-the-record statements, see *Torture by Proxy* report, *supra* note 2. Recent reports based on information from unnamed officials suggest that secret documents authorize extraordinary renditions and other covert transfers by the CIA. Douglas Jehl and David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, NEW YORK TIMES, March 6, 2005.

<sup>6</sup> The most substantial evidence of an infrastructure allowing such transfers is information that has recently come to light about the frequent appearance of specific planes owned by the CIA and possibly used by other U.S. agencies in locations known to have received detainees transferred by the United States. Journalists have identified specific planes and followed their flight patterns, finding that two planes – a Gulfstream 5 and a Boeing 737 business jet – appear to have been actively used by U.S. agents in extra-legal transfers. For details concerning the planes and their flight patterns, see Gordon Corera, *Does UK Turn a Blind Eye to Torture?* BBC NEWS, Apr. 5, 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/4414491.stm](http://news.bbc.co.uk/2/hi/uk_news/4414491.stm) (last visited May 9, 2005); Jeffrey St. Clair, *The Road to Rendition: Torture Air, Incorporated*, COUNTERPUNCH, Apr. 9/10, 2005, available at <http://www.counterpunch.com/stclair04092005.html> (last visited May 9, 2005); Dana Priest, *Jet Is an Open Secret in Terror War*, WASHINGTON POST, Jan. 27, 2004, at A1; Farah Stockman, *Terror suspects' torture claims have Mass. Link*, BOSTON GLOBE, Nov. 29, 2004; Jane Mayer, *Outsourcing Torture: The Secret History of America's “Extraordinary Rendition” Program*, THE NEW YORKER (Feb. 14, 2005), available at [www.newyorker.com/printables/fact/050214fa\\_fact6](http://www.newyorker.com/printables/fact/050214fa_fact6) (last visited May 9, 2005); and Scott Shane, Stephen Grey, Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, THE NEW YORK TIMES, May 31, 2005.

<sup>7</sup> The reason this information is unknown is – most importantly – because, to the extent the transfers are authorized, they are taking place pursuant to a covert program, meaning that the government agencies involved are not required to publicly report on their activities, and to the extent they are unauthorized, such information would of course be kept secret or denied.

<sup>8</sup> *Torture by Proxy*, *supra* note 2. The report uses the “more likely than not” standard for assessing an individual’s risk upon transfer because it is the test that the United States employs when assessing that risk. By using this standard, the authors acknowledge that this approach excludes cases of extraordinary rendition that could be technically legal under federal law, but would violate international human rights law that is binding on the United States. The relevant human rights treaties contain significantly more protective standards concerning the level of risk of torture or cruel, inhuman or degrading (CID) treatment that an individual faces upon transfer. The standard under the Convention Against Torture (CAT) requires the presence of “substantial grounds for believing [the individual] would be in danger of being subjected to torture” upon transfer. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* December 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535, available at <http://www.ohchr.org/english/law/cat.htm> (last visited Oct. 24, 2004), art. 4(1). The United States has codified a standard that is more stringent, requiring that it be “more likely than not” that an individual will face torture upon transfer.

legal standards applicable to the practice. The report concluded that extraordinary rendition was unequivocally prohibited by international law and was contrary to U.S. law and policy.

The term “extraordinary rendition,” however, has often been used indiscriminately to describe transfers other than extraordinary renditions (such as renditions and transfers to secret detentions), thus creating confusion over the meaning of the term, the source of authorization for the transfer, and the applicable legal standards.

The confusion over the meaning of “extraordinary rendition” and its similarities to and differences from other transfers obscures factual information. For example, in speaking about the number of individuals transferred to various locations in connection with the “War on Terror,” some experts have estimated that 150 people have been *transferred* to foreign states since 2001.<sup>9</sup> The prime minister of Egypt has publicly acknowledged that more than “60 or 70” detainees have been sent to Egypt by the United States since September 11, 2001 – a statement that suggests that the estimate of 150 transfers to all countries is a significant underestimate.<sup>10</sup> Indeed, according to Jane Mayer, a journalist for THE NEW YORKER, “one source knowledgeable about the rendition program suggested that the number of *renditions* since September 11, 2001 may have reached as high as several thousand.” (emphasis added)<sup>11</sup> Because of the general confusion over the distinctions among various transfers it is not known whether these numbers refer to rendition, extraordinary rendition, other forms of transfer (all discussed below), or a combination of the three. Unfortunately, the Administration fuels the confusion by failing to explain its policies and, instead, by alluding to a variety of loopholes in existing law or answering questions at a level of abstraction that does not clarify matters.<sup>12</sup>

This paper, in conjunction with *Torture by Proxy*, aims to dispel the confusion concerning various transfers employed by the Administration by describing what is known about such transfers and pointing to what still remains unclear. The distinction among the various forms of transfer is important not only because it provides factual clarity, but also because different types of transfer trigger the application of different legal regimes, and thus impact differently the rights of the transferee. The differences among the most common forms of transfers apparently employed by the Administration are discussed below.

As a legal matter, no U.S. official or agency can avoid the obligation assumed by the United States to ensure that no one is sent to a country where he faces torture. Any system of transfers that does not safeguard this basic right flouts the international human rights obligations that this

<sup>9</sup> Jane Mayer, *supra* note 6 (citing Scott Horton, Chair the Committee on International Law of the Association of the Bar of the City of New York); *see also* CIA ‘Outsourcing Torture,’ Agence France Presse, Feb. 7, 2005 (“Scott Horton - an expert on international law who has examined CIA renditions - estimates that 150 people have been picked up in the CIA net since 2001.”)

<sup>10</sup> Shaun Waterman, *Terror Detainees Sent to Egypt; Official, U.S. deny torture is condoned*, WASHINGTON TIMES, May 16, 2005, p.4. During an interview with NBS news in Washington, Egypt’s prime minister denied that torture was a widespread practice in Egypt, stating:

We are a country that has been subject to terrorism. Our police force sometimes has to take necessary actions to make sure that we have peace and stability inside Egypt, as well. So I don’t blame them very much in many cases. But we do tell them not to abuse their forces as much as humanly possible.

*Egypt Confirms ‘Rendition’ of Terror Suspects*, ISN SECURITY WATCH, May 17, 2005, available at <http://www.isn.ethz.ch/news/sw/details.cfm?id-11297> (last visited May 31, 2005).

<sup>11</sup> Jane Mayer, speaking at the panel discussion, *Transferring Terrorist Suspects to Other Countries: Legal and Policy Implications of Extraordinary Rendition*, Constitution Project, Wash. D.C. (Apr. 20, 2005).

<sup>12</sup> *See* Office of the Press Secretary, Press Conference of the President, April 28, 2005, available at <http://www.whitehouse.gov/news/releases/2005/04/20050428-9.html> (last visited June 26, 2005) (when asked how he would justify rendition to torture, President Bush responded, “That’s a hypothetical. Mark. We operate within the law and we send people to countries where they say they’re not going to torture the people.”).

country took on voluntarily when it ratified the Convention Against Torture (CAT),<sup>13</sup> the International Covenant on Civil and Political Rights,<sup>14</sup> the Geneva Conventions of 1948,<sup>15</sup> and the Refugee Convention of 1951.<sup>16</sup> Each of these treaties prohibits torture and *refoulement* – the transfer of an individual to a state where he faces the risk of torture.

## EXTRAORDINARY RENDITIONS AND OTHER TRANSFERS

Despite the recent flurry of attention to the practice of extraordinary rendition, the differences between this practice and other forms of legal and extra-legal transfer such as rendition to justice may seem difficult to grasp. The differences are important, however, since they often trigger the application of different legal regimes – both domestic and international. For example, transfers pursuant to extradition procedures are governed explicitly by statute and involve certain forms of judicial review. Other transfers, such as removals, are carried out according to the detailed rules of the Immigration and Naturalization Act (INA) and its accompanying regulations, and often include some opportunity for judicial review. Both types of transfer are legal transfers because they are clearly authorized and contain safeguards to ensure compliance with the requirement that the United States not return an individual to a country where he risks torture.

<sup>13</sup> CAT explicitly prohibits the *refoulement* of individuals to states where there is a “substantial likelihood” that they “may be in danger of” torture. CAT protections apply to all types of transfers (including expulsion and extradition) and the treaty applies in *all* circumstances, including in situation of armed conflict and regardless of whether other legal regimes, such as the humanitarian law regime, applies. CAT, *supra* note 8.

<sup>14</sup> The ICCPR similarly prohibits *refoulement* through its provision concerning torture and CID, and its prohibition is broader than that contained in CAT. As interpreted by the Human Rights Committee, the ICCPR prohibits the *refoulement* of individuals to states where they may be “at risk of” either torture or CID (or both). International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 Dec. 16, 1966, *entered into force* 23 March 1976, 999 U.N.T.S. 171 *available at* <http://www.ohchr.org/english/law/ccpr.htm> (last visited Oct. 24, 2004).

<sup>15</sup> The Geneva Conventions are applicable to situations of armed conflict. Specifically, the Third Geneva Convention and the Fourth Geneva Convention prohibit both torture and the inhuman treatment of prisoners of war and civilians classified as “protected persons” in the context of armed conflict. In addition, the transfer of a POW to a state where the POW is likely to be tortured or inhumanely treated is a violation of Third Geneva Convention. The unlawful transfer of a civilian classified as a “protected person” to such a state has harsher consequences—the transfer is a “grave breach” under the Fourth Geneva Convention, and is a criminal act. Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 31, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3> (last visited Oct. 24, 2004) (First Geneva Convention); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977> (last visited Oct. 24, 2004) (Second Geneva Convention); Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (last visited Oct. 24, 2004) (Third Geneva Convention); Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5> (last visited Oct. 24, 2004) (Fourth Geneva Convention) (together, Geneva Conventions).

<sup>16</sup> The Refugee Convention affords protection against torture and *refoulement* to individuals with a “well-founded fear of persecution” on specific enumerated grounds. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152, *entered into force* Apr. 22, 1954, *available at* <http://www.ohchr.org/english/law/refugees.htm> (last visited Oct. 24, 2004) (Refugee Convention). Although the United States did not ratify the Refugee Convention, it is a party to it through its accession to the 1967 Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *entered into force* Oct. 1967, *available at* <http://www.ohchr.org/english/law/protocolrefugees.htm> (last visited Oct. 24, 2004) (1967 Protocol), which adopted and extended the Refugee Convention’s protections.

On the other hand, rendition to justice is a form of extra-legal transfer because although it is apparently authorized by a series of secret presidential directives, it does not involve any procedures allowing detainees to challenge their transfer on the basis of a fear of torture. Even more disturbing, extraordinary renditions take place outside or directly in contravention to the processes set out in statutes and published regulations, and flout the requirement that the United States refrain from transferring individuals to countries where they are at risk of torture. This secrecy, informality, and lack of authorization is not surprising given that, as the *Torture by Proxy* report demonstrates, any authorization of extraordinary rendition would be contrary to U.S. and international law and policy. Additional forms of extra-legal transfer have also reportedly been used by the U.S. that share the crucial defining characteristic with these forms of rendition: they do not include a regularized, transparent method for detainees to challenge their transfer on the grounds that they fear torture.

In section A of this paper, we review two types of legal transfer, extradition and removal, which are available to U.S. officials seeking to move individuals across borders. As stated above, legal transfers are authorized and governed by statutes, published regulations, or a specific treaty (and often by all three), and they provide those being transferred with an established, regulated method for challenging the transfer on the grounds that they fear torture. On the other hand, extra-legal transfers may be authorized but do not include a regularized method for detainees to challenge their transfer on the grounds that they fear torture. This failure to protect against the risk of torture renders a given form of transfer extra-legal and, if clearly unauthorized, illegal.

Section B will discuss rendition to justice and reverse rendition; Section C examines transfers out of Guantánamo Bay; Section D considers transfers to a secret detention facility outside the United States; and Section E focuses on extraordinary rendition.

## A. EXTRADITION AND REMOVAL

### (i) *Extradition.*

The traditional legal mechanism for the transfer of an individual suspected of or convicted of a crime is EXTRADITION, a process by which “one sovereign surrenders to another sovereign a person sought as an accused criminal or a fugitive offender.”<sup>17</sup> Under U.S. law, extradition occurs pursuant to a valid treaty, and is initiated when a foreign state requests the transfer of a named individual. This request is followed by the certification of the transfer by a federal judicial officer, who must determine whether the crime is extraditable and whether there is probable cause to sustain the charge.<sup>18</sup> If these two requirements are met, the judicial officer certifies the individual as extraditable to the Secretary of State.<sup>19</sup> Once the individual has been certified as extraditable, the Secretary of State must decide whether to surrender the alleged fugitive to the requesting foreign state.<sup>20</sup> Chief among the Secretary’s duties in undertaking this decision is the obligation to ensure that the alleged fugitive is not at risk of torture if surrendered. This duty is set out in the regulations implementing CAT in the United States: the regulations pertaining to extradition quote the *non-refoulement* obligation set out in Article 3 of CAT,<sup>21</sup> and specify that “in order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the State Department considers the question of whether a person facing extradition from the United States ‘is more likely than not’ to be tortured in the State requesting extradition

<sup>17</sup> M. Cherif Bassiouni, *INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE* 29 (4th ed. 2002).

<sup>18</sup> *Quinn v. Robinson*, 783 F.2d 776, 782 (9<sup>th</sup> Cir. 1986) at 787.

<sup>19</sup> 18 U.S.C. § 3184.

<sup>20</sup> 18 U.S.C. §§ 3184, 3186. *See also* 22 C.F.R. §95.2(b).

<sup>21</sup> 22 C.F.R. § 95.2(a)(1).

when appropriate in making this determination.”<sup>22</sup> Using the language of CAT Article 3, the regulations stipulate that in making this determination, the authorities 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.”<sup>23</sup> Extradition under U.S. and international laws is discussed in greater detail in the *Torture By Proxy* report.

(ii) *Removal.*

In addition to EXTRADITION, an individual can be removed *from* the United States by virtue of immigration REMOVAL. Broadly speaking, an individual arriving in the United States may be *summarily removed* if the individual is found inadmissible pursuant to sections 212(a)(6)(C) or 7 of the INA (i.e., because the person lacks required documents or makes a misrepresentation)<sup>24</sup> or if the individual is viewed as a threat to national security.<sup>25</sup>

In 1998, Congress enacted the Foreign Affairs Reform and Restructuring Act (FARRA), which implemented the Convention Against Torture’s Article 3 *non-refoulement* obligation. The statute provides that the

United States [shall] not ... 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>26</sup> (emphasis added)

Relevant agencies were directed by FARRA to promulgate regulations setting out procedures to determine *non-refoulement* claims. Regulations have been adopted pursuant to FARRA in the extradition and removal contexts, and include safeguards against transfers of an individual to a country where he or she fears torture. In relation to removal, the regulations provide that the “Service shall not execute a removal order under this section under circumstances that violate section 241(b)(3) of the Act [i.e., restrictions on removal to a country where the individual’s life or freedom would be threatened] or Article 3 of the Convention Against Torture.”<sup>27</sup> The regulations state that the immigration agency will “assess the applicability of Article 3 [of CAT]

<sup>22</sup> 22 C.F.R. § 95.2(b).

<sup>23</sup> 22 C.F.R. § 95.2(a)(2).

<sup>24</sup> 8 C.F.R. §235.3. Section 212(a)(6)(C) of the INA provides:

Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:...

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible;
- (ii) (I) Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.  
(II) In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (I).

Section 212(a)(7) of the INA enumerates required documentation for entry to the United States.

<sup>25</sup> 8 C.F.R. §235.8.

<sup>26</sup> Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242 (FARRA).

<sup>27</sup> 8 C.F.R. § 235.8(b)(4).

through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3.”<sup>28</sup>

An alien not subject to summary removal (because he has proper documentation and has not been found to present a threat to security at the time of entry to the United States) may be removed to the country in which he boarded the airplane or other vessel used to arrive in the United States only once he has been deemed inadmissible or deportable, including on the grounds of security, through removal proceedings.<sup>29</sup> However, if the government of that country is unwilling to accept the alien, he or she may be removed to (i) the country of which the alien is a citizen, subject, or national, (ii) the country in which the alien was born, (iii) the country in which the alien has a residence, or (iv) a country with a government that will accept the alien into the country's territory if removal to each country described in (i)-(iii) is impracticable, inadvisable, or impossible.<sup>30</sup> When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien to a specific country because of the war, the Attorney General may remove the alien “(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or (ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.”<sup>31</sup>

The Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.<sup>32</sup> This rule, however, does not apply if the alien participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing or if the Attorney General decides that “(i) the alien 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; (ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.”<sup>33</sup> Nonetheless, a person subject to a removal may obtain a withholding or a deferral of the removal order if an immigration judge determines that it is “more likely than not” that the alien would be tortured if removed to the proposed state.<sup>34</sup>

Special removal proceedings are available in the case of those considered alien terrorists pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>35</sup> AEDPA also created a special removal court consisting of five federal district court judges. Where the Attorney General has classified information that an alien is an “alien terrorist,”<sup>36</sup> the Attorney General may seek

<sup>28</sup> 8 C.F.R. §§ 208.18(d), 235.8(b)(4).

<sup>29</sup> 8 U.S.C. §1227; 8 U.S.C. §1231(b).

<sup>30</sup> 8 U.S.C. §1231(b)(1)(C).

<sup>31</sup> 8 U.S.C. §1231(b)(2)(F).

<sup>32</sup> 8 U.S.C. §1231(b)(3)(A).

<sup>33</sup> 8 U.S.C. §1231(b)(3)(B).

<sup>34</sup> 8 C.F.R. § 208.16(c)(2); 8 C.F.R. §208.16(c)(4).

<sup>35</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258 (enacting a new Title V within the INA), *as amended* by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 354, 110 Stat. 3009, 3009-641).

<sup>36</sup> An alien terrorist generally is a person who “ is engaged in or is likely to engage after entry in any terrorist activity...; has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist

removal of the alien by filing an application with the removal court.<sup>37</sup> Generally, the removal of an alien “shall be to any country which the alien shall designate if such designation does not, in the judgment of the Attorney General, in consultation with the Secretary of State, impair the obligation of the United States under any treaty (including a treaty pertaining to extradition) or otherwise adversely affect the foreign policy of the United States.”<sup>38</sup> However, “if the alien refuses to designate a country to which the alien wishes to be removed or if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so designated would impair a treaty obligation or adversely affect United States foreign policy, the Attorney General shall cause the alien to be removed to any country willing to receive such alien.”<sup>39</sup> The immigration statute does not explicitly state whether “alien terrorists” in these special proceedings may apply for relief under CAT. However, it would be contrary to the FARRA, the federal statute passed to implement CAT Article 3 if such transfers could take place without regard to CAT. Generally speaking, outside of AEDPA, aliens who, based on reasonable grounds, are believed by the Attorney General to be a danger to the security of the United States are unable to obtain a withholding of removal order on CAT grounds. Nonetheless, such individuals are able to apply for a *deferral of removal*, which provides protection from transfer.<sup>40</sup> It would seem then, that, at the very least, a similar opportunity for deferral of removal should be available to alien terrorists subject to removal under AEDPA.

A legal transfer during which the established procedures for safeguarding against transfers to torture are violated becomes an illegal transfer. An example of this is the now well-known case of Maher Arar. Arar was found inadmissible under INA section 235(c) because U.S. officials believed him to be a member of Al Qaeda.<sup>41</sup> Section 235(c) of the INA provides that “[i]f an

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activity; is a representative of (aa) a terrorist organization ...; or (bb) a political, social, or other group that endorses or espouses terrorist activity; is a member of a terrorist organization ...; endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization; or has received military-type training ... from or on behalf of any organization that, at the time the training was received, was a terrorist organization.” 8 U.S.C. §§1227(a)(4)(B); 1182(a)(3)(B).

<sup>37</sup> 8 U.S.C. § 1533.

<sup>38</sup> 8 U.S.C. § 1537(b)(2)(A).

<sup>39</sup> 8 U.S.C. § 1537(b)(2)(B).

<sup>40</sup> See INA §§237(a)(4)(B) (2004), 241(b)(3)(B) (2004), 8 U.S.C. §§1227(a)(4)(B) (2000), 1231(b)(3)(B) (2000). Aliens to be designated as engaging in “terrorist activity” include those who, acting as an individual or part of an organization, (1) commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepare or plan a terrorist activity; (3) gather information on potential targets for a terrorist activity; (4) solicit funds for a terrorist activity or organization, unless it can be demonstrated that the alien did not know and should not reasonably have known that solicitation would further terrorist activity; (5) solicit any individual for terrorist activity or membership, unless it can be demonstrated that the alien did not know and should not reasonably have known that solicitation would further terrorist activity; or (6) commit an act that the actor knows, or reasonably should know, affords material support to the terrorist organization, including providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives, or training. CRS Report for Congress, “The UN Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens,” available at <http://fpc.state.gov/documents/organization/31351.pdf> (last visited Oct. 25, 2004) (CRS Report); see also INA §212(a)(3)(B) (2004), 8 U.S.C. §1182(a)(3)(B) (2000). Removal proceedings are discussed in greater detail in the *Torture by Proxy* report, *supra* note 2.

<sup>41</sup> U.S. Department of Justice, Immigration and Naturalization Services, *In the matter of Arar, Maher Abdul Hammid*, Oct. 7, 2002 (on file with the Center for Human Rights and Global Justice); see also Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003, at 3, at <http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf> (last visited May 10, 2005). See also U.S. Dep’t of State, *U.S. Views Concerning Syrian Release of Mr. Maher Arar* (Oct. 6, 2003), available at <http://www.state.gov/r/pa/prs/ps/2003/24965.htm> (last visited May 11, 2005) (“Mr. Maher Arar was detained in New York on September 26, 2002 by United States immigration and law enforcement authorities after his name appeared on an immigration watch list. He was subsequently refused entry into the United States under Section 235C [sic] of the United States Immigration and Nationality Act based on information in the possession of United States law enforcement officials.”).

immigration officer or an immigration judge suspects that an arriving alien may be inadmissible ... [for a security-related ground], the officer or judge shall ... order the alien removed.”<sup>42</sup> One security-related ground is when “the Attorney General knows, or has reasonable ground to believe, [that the alien] is engaged in or is likely to engage after entry in any terrorist activity.”<sup>43</sup> Thus, the removal of Arar from the United States appears to have been authorized by the INA. That is not the end of the matter, however. The regulations accompanying the INA explain that the immigration agency “shall not execute a removal order under [INA § 235(c)] ... under circumstances that violate ... Article 3 of the Convention Against Torture.”<sup>44</sup> At the outset, Arar’s transfer pursuant to section 235(c) appeared to be a legal transfer. However, Arar has asserted that he was denied the opportunity to challenge his removal on the grounds of fear of torture.<sup>45</sup> By transferring Arar to Syria where it was more likely than not that Arar would be subjected to torture, without giving Arar full opportunity to assert his rights under CAT, the United States violated Article 3 of CAT.<sup>46</sup> At this point, Arar’s transfer became an illegal transfer.

## B. RENDITION TO JUSTICE AND REVERSE RENDITION

### (i) *Rendition to Justice*

Rendition is a covert procedure, also known as “rendition to justice,” which is authorized by a number of known presidential directives,<sup>47</sup> despite itself being a deviation from legally codified procedures for the transfer of individuals by U.S. agents to other states. Rendition was developed in the late 1980s when the technique was apparently created to allow U.S. law enforcement personnel to apprehend wanted individuals in “lawless” states like Lebanon during its civil war, where extradition would have been a practical impossibility.<sup>48</sup> In the early 1990s, renditions to justice were apparently exclusively law enforcement operations in which suspects were apprehended by covert CIA or FBI teams and brought to the United States or sent to other states (usually the states having an interest in bringing the person to justice) for trial or questioning concerning specific crimes.<sup>49</sup> According to then-FBI Director Louis J. Freeh, during

<sup>42</sup> INA § 235(c)(1), 8 U.S.C. § 1225(c)(1).

<sup>43</sup> INA § 212(a)(3)(B)(i)(II), 8 U.S.C. § 1182(a)(3)(B)(i)(II).

<sup>44</sup> 8 C.F.R. § 235.8(b)(4).

<sup>45</sup> *Arar v. Ashcroft et al.*, complaint and demand for jury trial, Jan 22, 2004, available at [http://www.maherarar.ca/cms/images/uploads/Arar\\_Complaint\\_FINAL.pdf](http://www.maherarar.ca/cms/images/uploads/Arar_Complaint_FINAL.pdf), para. 47.

<sup>46</sup> The United States has argued that the transfer of detainees like Maher Arar are not illegal because it obtains “diplomatic assurances” from the receiving state in which officials promise that the state will not torture the transferee. As Human Rights Watch has demonstrated, such assurances are not trustworthy and cannot be relied upon by the U.S. to discharge the duty of *non-refoulement*. Human Rights Watch, “*Empty Promises: Diplomatic Assurances No Safeguard against Torture* (April 2004), available at <http://hrw.org/reports/2004/un0404/index.htm> (last visited June 23, 2005) (HRW Diplomatic Assurances Report), and *Still at Risk: Diplomatic Assurances no Safeguard Against Torture* (April 2005), available at <http://www.hrw.org/reports/2005/eca0405/> (last visited June 23, 2005) (HRW Diplomatic Assurances Report: Update). For a detailed discussion of diplomatic assurances in the context of extraordinary renditions, see *Torture by Proxy* report, *supra* note 2.

<sup>47</sup> The President’s authorization of covert actions are subject to the reporting requirements set out by Congress in 50 U.S.C. § 413(b). The statute specifies that the President may not “authorize any action that would violate the Constitution or any statute of the United States.”

<sup>48</sup> Kareem Fahim, *The Invisible Men*, VILLAGE VOICE, Apr. 6, 2004, at 37.

<sup>49</sup> DeNeen, L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian’s Case Called Typical of CIA*, WASHINGTON POST, Nov. 5, 2003, at A1. One U.S. official, speaking on condition of anonymity, characterized such renditions as follows: “These are not abductions, these are renditions. If [the detainees] are wanted by foreign governments and there is concern that they are involved in terrorist activities, the idea is to render them to justice.” Anthony Shadid, *America Prepares the War on Terror; U.S., Egypt Raids Caught Militants*, BOSTON GLOBE, Oct. 7, 2001, at A1.

the 1990s, the United States “successfully returned” thirteen suspected international terrorists to stand trial in the United States for completed or planned acts of terrorism against U.S. citizens.<sup>50</sup> There are no known procedures in place to allow detainees being rendered to challenge their transfer on the grounds that they fear torture; for this reason, they are extra-legal.

Renditions are apparently authorized by Presidential Directive (PDD) 39, which states as follows:

*Return of Indicted Terrorists to the U.S. for Prosecution:* We shall vigorously apply extraterritorial statutes to counter acts of terrorism and apprehend terrorists outside of the United States. When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, where possible and appropriate, through negotiation and conclusion of new extradition treaties.

If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect.<sup>51</sup>

NSD-77 remains classified. The interim staff report on diplomacy of the National Commission on Terrorist Attacks Upon the United States (9-11 Commission) summed up the rendition process in place before September 11, 2001, as follows:

If extradition procedures were unavailable or put aside, the United States could seek the local country’s assistance in a rendition, secretly putting the fugitive in a plane back to America or some third country for trial.<sup>52</sup>

The 9-11 Commission also explained the practice of rendition as a counter-terrorism measure and described the role of the CIA in the practice:

Under the presidential directives in the Clinton administration, [Presidential Decision Directive]-39 and PDD-62, the CIA had two main operational responsibilities for combating terrorism, rendition and disruption. ... [I]f a terrorist suspect is outside of the United States, the CIA helps to catch and send him to the United States or a third country.... Overseas officials of the CIA, FBI and State Department may locate the terrorist suspect, perhaps using their own sources. If possible, they seek help from a foreign government. Though the FBI is often part of the process, the CIA is usually the main player, building and

<sup>50</sup> *U.S. Counterterrorism Policy: Hearing Before the Senate Judiciary Committee*, 106<sup>th</sup> Cong. (Sept. 1998) (statement by Louis J. Freeh, Director of Federal Bureau of Investigation), available at [http://www.fas.org/irp/congress/1998\\_hr/98090302\\_npo.html](http://www.fas.org/irp/congress/1998_hr/98090302_npo.html) (last visited Oct. 25, 2004). This figure includes the renditions of two suspects in the August 7, 1998, bombing of the U.S. embassy in Nairobi, Mohamed Rashed Daoud Al-Owhali and Mohamed Sadeek Odeh. All of the examples given by Freeh involved renditions of suspects to the United States in order to stand trial.

<sup>51</sup> Presidential Directive 39, *U.S. Policy on Counterterrorism*, June 21, 1995, available at <http://www.fas.org/irp/offdocs/pdd39.htm> (last visited June 1, 2005).

<sup>52</sup> *Formulation and Conduct of U.S. Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States (Interim Report)* (Mar. 23, 2004), available at [http://www.9-11commission.gov/archive/hearing8/9-11Commission\\_Hearing\\_2004-03-23.pdf](http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-23.pdf) (last visited Oct. 25, 2004).

defining the relationships with the foreign government intelligence agencies and internal security services.<sup>53</sup>

PDD-62 remains classified. Former CIA chief George Tenet, in a written statement to the 9-11 Commission confirmed that:

CIA's policy and objectives statement for the FY 1998 budget submission prepared in early 1997 evidenced a strong determination to go on the offensive against terrorists. The submission outlined our Counterterrorist Center's offensive operations and noted the goal to "render the masterminds, disrupt terrorist infrastructure, infiltrate terrorist groups, and work with foreign partners."<sup>54</sup>

Noteworthy, while renditions can be to foreign countries (as well as to the United States from another country), their main purpose appears to have been to obtain a suspect's presence so that he may stand trial, rather than to deliver an individual for interrogation. To the extent that renditions are carried out in circumstances that make it more likely than not that the person would be tortured, such renditions are better understood as extraordinary rendition (discussed below) and are not authorized by U.S. law or policy.

"Renditions to justice" in the United States – when free of torture or maltreatment – have been accepted by U.S. courts in specific instances. When required to rule on the matter, federal courts have held that extra-judicial transfers to the United States (usually taking the form of abductions) do not preclude U.S. courts from exercising criminal jurisdiction over the transferred individuals (the *Ker-Frisbie* doctrine).<sup>55</sup> U.S. courts, however, have been more reluctant to accept jurisdiction where extrajudicial transfers were accompanied by torture by or with the acquiescence of the United States. Thus, in *United States v. Toscanino*<sup>56</sup>, the Court of Appeals for the Second Circuit refused to exercise jurisdiction over an individual charged with conspiracy to import narcotics who was kidnapped by the U.S. government from Montevideo, bound, blindfolded, held incommunicado for eleven hours, deprived of food and water, and subsequently transferred to Brasilia where he was tortured for 17 days in the presence and with the participation of a member of the U.S. Bureau of Narcotics. Judge Mansfield, writing for the Second Circuit, stated:

<sup>53</sup> *National Commission on Terrorist Attacks Upon the United States: Staff Statement 7*, available at <http://news.findlaw.com/hdocs/docs/terrorism/911comm-ss7.pdf> (last visited Oct. 25, 2004); see also *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004) (statement by Christopher Kojm, Testimony of the Deputy Executive Director, National Commission on Terrorist Attacks Upon the United States, and former Deputy Assistant Secretary of State), available at [http://www.9-11commission.gov/archive/hearing8/9-11Commission\\_Hearing\\_2004-03-24.pdf](http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf) (last visited Oct. 25, 2004).

<sup>54</sup> *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004) (statement by George Tenet, former Director of Central Intelligence), available at [http://www.9-11commission.gov/archive/hearing8/9-11Commission\\_Hearing\\_2004-03-24.htm](http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm) (last visited Oct. 25, 2004) (Tenet Statement to 9-11 Commission).

<sup>55</sup> See, e.g., *Ker v. Illinois*, 119 U.S. 436 (1886) (extrajudicial kidnapping from Peru of an individual for purposes of bringing him to trial in the United States on charges of larceny and embezzlement did not deprive the U.S. court of jurisdiction to try the defendant in the United States); *Frisbie v. Collins*, 342 U.S. 519, 522-23 (1952) (reaffirming the *Ker* doctrine, the court stated that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (Supreme Court sustained the jurisdiction of a U.S. court to try a Mexican national who was brought to the United States through abduction rather than pursuant to the extradition treaty between the United States and Mexico).

<sup>56</sup> 500 F.2d 267 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974). On remand, the court found "[no] credible evidence which would indicate any participation on the part of the United States officials prior to the time the defendant arrived in this country. Nor is there any evidence which shows that the abduction was carried out at the direction of United State officials." *United States v. Toscanino*, 398 F. Supp. 916, 917.

Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.... In light of these developments [in the protection of the rights of the accused] we are satisfied that the “Ker-Frisbie” rule cannot be reconciled with the Supreme Court’s expansion of the concept of due process, which protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. Although the issue in most of the cases forming part of this evolutionary process was whether evidence should have been excluded..., [w]here suppression of evidence will not suffice, ...we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, ...and when an accused is kidnapped and forcibly brought within the jurisdiction, the court’s acquisition of power over his person represents the fruits of the government’s exploitation of its own misconduct. ...Faced with a conflict between the two concepts of due process, the one being the restricted version found in Ker-Frisbie and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the Ker-Frisbie version must yield.<sup>57</sup>

However, the Second Circuit substantially narrowed the *Toscanino* decision in *United States ex rel. Lujan v. Gengler*.<sup>58</sup> In *Lujan*, the defendant was abducted in a foreign country and brought to the United States to face prosecution for a narcotics violation. Lujan attacked the court’s jurisdiction over his person based upon the manner in which he was apprehended.<sup>59</sup> The district court dismissed Lujan’s petition without a hearing. On appeal, the Second Circuit acknowledged that the Supreme Court had never disavowed the *Ker-Frisbie* doctrine and stressed that it in no way intended to eviscerate that doctrine in *Toscanino*.<sup>60</sup> The court noted that an irregularity in the manner of transfer did not, by itself, require a court to divest itself of jurisdiction.<sup>61</sup> The court further stated that absent a set of facts analogous to those alleged in *Toscanino*, the “expanded scope of due process” does not require nullification of an indictment where the defendant was brought before the court by illegal means.<sup>62</sup> Because the manner in which Lujan was apprehended did not “shock the conscience,” the Court concluded that rule set out in *Toscanino* did not apply and upheld its jurisdiction over Lujan.<sup>63</sup> Similarly, in *United States v. Lira* the court noted that unless a defendant’s presence is secured through the use of “cruel and inhuman conduct,” a court need not automatically divest itself of jurisdiction when the defendant has been abducted by United States representatives.<sup>64</sup> None of these cases, however, address the issue of a detainee’s opportunity to challenge transfer on the basis that he fears torture.

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<sup>57</sup> 500 F.2d at 274-75.

<sup>58</sup> 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975).

<sup>59</sup> Lujan was lured from Argentina to Bolivia, where was promptly taken into custody by Bolivian police who were acting as paid agents of the United States. Lujan was not permitted to communicate with the Argentine embassy, an attorney, or any member of his family. Subsequently, Bolivian police, acting together with American agents, brought Lujan to the airport and placed him on a plane bound for New York. Upon his arrival at Kennedy Airport Lujan was formally arrested by federal agents. At no time had he been formally charged by the Bolivian police, nor had a request for extradition been made by the United States. *Lujan*, supra note 58 at 63.

<sup>60</sup> *Id.* at 65.

<sup>61</sup> *Id.* at 65.

<sup>62</sup> *Id.* at 66.

<sup>63</sup> *Id.* at 66.

<sup>64</sup> 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1975) at 70. In *Lira*, the prisoner was charged with narcotics offenses and alleged that he had been arrested, taken to a local police station (and then to Chilean Naval Prison), tortured, forced to sign a decree expelling him from Chile, and subsequently sent to New York accompanied by of U.S. DEA agents and the Chilean police. Accepting jurisdiction, the Court distinguished *Lira* from *Toscanino* on the grounds that “the evidentiary hearing produced no proof that representatives of the United

Even if such transfers are authorized, renditions lack a regulated method for challenging the transfer on the grounds of fear of torture. In this sense, rendition to justice is an extra-legal transfer that provides significantly less protection of the transferee's rights than a legal transfer.<sup>65</sup>

(ii) *Reverse Rendition*

“Reverse rendition” is a term that was coined by Human Rights Watch to describe the practice of “foreign authorities picking up suspects in non-combat and non-battlefield situations and handing them over to the United States without basic protections afforded to criminal suspects.”<sup>66</sup> It is not clear what, if anything, authorizes U.S. participation in reverse renditions. However, examination of such cases demonstrates that those transferred through reverse rendition are not given the opportunity to challenge their transfer on the basis of a risk of torture. Thus, at best, reverse renditions are extra-legal transfers and at worst are illegal transfers. The following are reported examples of reverse rendition.

- On January 17, 2002, just a few hours after Bosnia's Supreme Court ordered the release from detention of Bensayah Belkacem, Hadj Boudellaa, Saber Lahmar, Mustafa Ait Idir, Boumediene Lakhdar and Mohamed Nechle<sup>67</sup> for lack of evidence justifying their detention, Bosnian police handed them over to U.S. authorities, who reportedly flew them to Guantánamo Bay.<sup>68</sup> The Human Rights Chamber of Bosnia-Herzegovina subsequently noted that there was no evidence to suggest that

the hand-over of the [individuals] can be interpreted to be an extradition. In particular, the diplomatic note of 17 January 2002 from the U.S. embassy cannot be understood to be a valid extradition request of the United States of America. In this note, the U.S. embassy in Sarajevo advised the government of Bosnia and Herzegovina that it was prepared to assume custody of the six specified Algerian citizens and it offered to arrange to take physical custody of the individuals at a time and location mutually convenient.<sup>69</sup>

The Chamber held that the transfer of the individuals to the custody of U.S. forces “without seeking and receiving any information as to the basis of the detention constitutes a breach of [Bosnia and Herzegovina's and the Federation of Bosnia and Herzegovina's] obligations to protect the [individuals] against arbitrary detention by foreign forces.”<sup>70</sup>

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States participated or acquiesced in the alleged misconduct of the Chilean officials.” *Id.* While these decisions on the whole appear to accept the practice of “RENDITIONS TO JUSTICE,” in no case was the issue of their authorization squarely presented to the court. Instead, the court in each case was considering its jurisdiction to entertain criminal charges against the defendant[0].

<sup>65</sup> Renditions to third countries, however, should be distinguished from renditions to the United States in that the latter would provide the transferee with protections of the U.S. constitution. However, even in the case of renditions to the United States, the transferee is not given the opportunity to challenge the transfer – an element that distinguishes renditions from legal transfers such as extradition or removal.

<sup>66</sup> Human Rights Watch, *Guantanamo: New “Reverse Rendition” Case: A Detainee Captured in Egypt Disappeared in U.S. Custody*, Mar. 30, 2005, available at <http://www.hrw.org/english/docs/2005/03/29/usint10382.htm> (last visited May 9, 2005).

<sup>67</sup> Amnesty International, *Bosnia-Herzegovina Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay*, available at [http://web.amnesty.org/library/pdf/EUR630132003ENGLISH/\\$File/EUR6301303.pdf](http://web.amnesty.org/library/pdf/EUR630132003ENGLISH/$File/EUR6301303.pdf) (last visited June 23, 2005).

<sup>68</sup> *Coming to Light*, WASHINGTON POST, May 11, 2004, at A1.

<sup>69</sup> *Boudellaa et al. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Cases Nos. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691, Human Rights Chamber for Bosnia and Herzegovina, Oct. 2002, para. 227.

<sup>70</sup> *Id.* para. 233. The Human Rights Chamber noted that “[c]onsidering the broad interpretation of the term jurisdiction, this obligation arises even if under the Dayton Peace Agreement [Bosnia and Herzegovina and the

- On September 19, 2002, Yemeni businessman and intelligence official Abd al-Salam Ali al-Hila arrived in Cairo for a series of business meetings. Within weeks, he had disappeared.<sup>71</sup> It is believed that al-Hila was taken first to Baku, Azerbaijan, then transferred to U.S. custody in Afghanistan, and after being held in Afghanistan for approximately sixteen months, was sent to Guantánamo Bay, where he is still being held.<sup>72</sup> The extra-legal transfer of al-Hila, allegedly with the involvement of U.S. agents, from a third country to Guantánamo Bay as an “enemy combatant” has been termed a “reverse rendition” by Human Rights Watch, which reported the incident.
- Algerian national Adil Al-Jazeera<sup>73</sup> was reportedly arrested by Pakistani authorities on June 17, 2003 in Pakistan’s province of Peshawar.<sup>74</sup> According to Pakistani intelligence officials speaking on condition of anonymity, on July 13, 2003, “Adil al-Jazeera was blindfolded with his hands tied behind his back while he was taken to an American plane in Peshawar.”<sup>75</sup> Al-Jazeera’s arrest and U.S. custody were confirmed by the United States in a December 2003 State Department report;<sup>76</sup> however, his location remains unknown. According to various reports, it is believed that al-Jazeera had been transferred to Afghanistan, and was likely held at Bagram Air Force Base.<sup>77</sup> Al-Jazeera’s family has reportedly received letters from him originating from Bagram Air Force Base.<sup>78</sup> Since his arrest his family has received no formal notification of his detention from Pakistani authorities.<sup>79</sup>
- Abdallah Tabarak, a Moroccan national, was reportedly arrested in Pakistan in December 2001 by Pakistani officials.<sup>80</sup> According to media reports and Tabarak’s own account, he was subsequently transferred to U.S. custody in Kandhar, Afghanistan<sup>81</sup> and then to

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Federation of Bosnia and Herzegovina] had no direct jurisdiction over U.S. forces stationed in Bosnia and Herzegovina.” *Id.*

<sup>71</sup> *Guantánamo: New “Reverse Rendition” Case: A Detainee Captured in Egypt Disappeared in U.S. Custody*, *supra* note 66.

<sup>72</sup> *Id.*

<sup>73</sup> *Pakistan hands over al-Qaeda Suspect*, BBC NEWS, Jul. 15, 2003, available at [http://news.bbc.co.uk/1/hi/world/south\\_asia/3067135.stm](http://news.bbc.co.uk/1/hi/world/south_asia/3067135.stm) (last visited June 23, 2005); Human Rights Watch, *The Road to Abu Ghraib*, 12, n.27, available at <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf> (last visited June 23, 2005); Amnesty International, *America: Incommunicado detention / Fear of ill-treatment, Adil al-Jazeera*, July 16, 2003, available at <http://web.amnesty.org/library/Index/ENGAMR511032003?open&of=ENG-DZA> (last visited June 23, 2005).

<sup>74</sup> Amnesty International, *supra* note 73; *Pakistan captures terrorists*, BILLINGS GAZETTE, Jun. 19, 2003, available at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2003/06/19/build/world/w-60-paki.inc> (last visited June 23, 2005).

<sup>75</sup> *Alleged Qaeda Big Goes To Bagram*, CBS NEWS, July 14, 2003, available at <http://www.cbsnews.com/stories/2003/07/14/attack/main563079.shtml> (last visited June 23, 2005); Amnesty International, *supra* note 73.

<sup>76</sup> U.S. Department of State, *FY 2003 Performance and Accountability Report, Strategic Goal 2: Counterterrorism - Performance Summary, Resources Invested, and Illustrative Example of Significant Achievement*, Dec. 2003, available at <http://www.state.gov/m/rm/rls/perfrpt/2003/html/28996.htm> (last visited June 23, 2005).

<sup>77</sup> *Alleged Qaeda Big Goes to Bagram*, *supra* note 75; *Pakistan hands over al-Qaeda Suspect*, *supra* note 73; Amnesty International, *supra* note 73.

<sup>78</sup> *Adil al-Jazeera, Cageprisoner Profile*, Cageprisoners.com, May, 7, 2005, at <http://www.cageprisoners.com/prisoners.php?id=1366> (last visited June 23, 2005).

<sup>79</sup> *Id.*

<sup>80</sup> Jason Burke, *Terror Backlash: Global web of secret US prisons: Jason Burke charts the worldwide hidden network of jails where more than 3,000 al-Qaeda suspects have been held without trial - and many subjected to torture - since 9/11*, THE OBSERVER, June 13, 2004.

<sup>81</sup> Jason Burke, *Secret world of US jails*, GUARDIAN, Jun. 13, 2004, available at <http://observer.guardian.co.uk/international/story/0,6903,1237589,00.html> (last visited June 23, 2005); Khadija Ali Moussa, *Released Moroccan Guantanamo Detainee Tells Islamist Paper of his “ordeal,”* published by

Guantánamo Bay detention center.<sup>82</sup> During his detention at Guantánamo, Tabarak was identified by prisoner number 760.<sup>83</sup> The International Committee of the Red Cross (ICRC) was reportedly unable to visit Tabarak until at least late February 2004, though it appears he had been in detention there for some time.<sup>84</sup> Tabarak was, however, visited by Moroccan officials who interviewed him and other Moroccan citizens.<sup>85</sup> On August 1, 2004, Tabarak was repatriated to Morocco<sup>86</sup> where he was detained pending trial on charges of “belonging to a criminal group, non-denunciation of a crime harming State security, assistance to a criminal group by transferring money to Moroccans with the aim of creating a gang that threatens Morocco's interests and participation in the forging of a passport.”<sup>87</sup> Moroccan court proceedings against Tabarak and five others began on December 6, 2004, after which Tabarak and two other Moroccan co-defendants were released on bail on December 20, 2004.<sup>88</sup> The trial had been originally postponed until March 7, 2005 and was adjourned again to July 4, 2005.<sup>89</sup>

As demonstrated from these reported incidents, in reverse rendition, an individual is removed from a civilian setting and placed into a closed system created for “enemy combatants” and designed to facilitate interrogation rather than trial before a regularly constituted court or tribunal. Reverse rendition can in fact be viewed as an attempt to circumvent authorized rendition procedures. That is, as stated above, renditions were historically used most frequently to transfer an individual into the United States. In those cases the transferee could avail himself of U.S. Constitutional protections once before a U.S. judge. In contrast, reverse rendition appears to be designed precisely to remove transferee’s access to such protection. Although those subject to reverse rendition who are being held in Guantánamo Bay may have the right to challenge their detention in U.S. courts using the writ of *habeas corpus*, the scope of that review is not yet settled. Until the scope of review is settled, reverse rendition may well continue.

From the perspective of United States’ obligations under international law, reverse rendition triggers the application of a significantly different set of standards from those applicable to other transfers. This is because in the case of reverse rendition, the United States is not always the transferring party. Thus, unless U.S. agents organize or otherwise participate in the transfer, the focus of international law as it applies to the United States is not on the obligation of *non-refoulement* but rather on the standards applicable to detention of individuals. The ICCPR, CAT, and, where applicable, the Geneva Conventions, provide a framework for determining whether detention by the United States of individuals subject to the reverse rendition complies with international legal protections:

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Moroccan Islamic movement Tawhid wal Islah daily newspaper Attajdid, 28 December, reported in BBC MONITORING INTERNATIONAL REPORTS, December 30, 2004.

<sup>82</sup> *Terror Backlash*, *supra* note 80.

<sup>83</sup> See Scott Higham, *In Guantánamo, detainee fears recorded*, Jun. 13, 2004, available at [http://www.veteransforpeace.org/In\\_Guantanamo\\_detainee\\_061304.htm](http://www.veteransforpeace.org/In_Guantanamo_detainee_061304.htm) (last visited June 23, 2005).

<sup>84</sup> *Id.*

<sup>85</sup> Peter Finn, *Captive helped trick US while bin Laden escaped*, WASHINGTON POST, Jan. 22 2003, available at <http://www.smh.com.au/articles/2003/01/21/1042911381796.html> (last visited June 23, 2005).

<sup>86</sup> *Guantánamo: Abdullah Tabarak (Repatriated)*, CAGEPRISONERS.COM, June 23, 2005, available at <http://www.cageprisoners.com/prisoners.php?id=69> (last visited June 23, 2005).

<sup>87</sup> Karima Rhanem *A trial without a case Moroccan Ex-Guantánamo detainees' hearing postponed to March 7*, MOROCCO TIMES, Feb. 24 2005, available at <http://www.moroccotimes.com/paper/article.asp?idr=2&id=4117> (last visited June 23, 2005).

<sup>88</sup> *Id.*

<sup>89</sup> See *Suspected former bodyguard of Osama bin Laden appears in Moroccan court*, ASSOCIATED PRESS WORLDSTREAM, Dec. 27, 2004; *Morocco frees former Guantánamo detainees pending trials*, AGENCE FRANCE PRESSE, Mar. 28, 2005, available at <http://www.middle-east-online.com/english/morocco/?id=13076> (last visited June 23, 2005).

- *ICCPR*: The ICCPR prohibits arbitrary arrest or detention and requires that individuals be informed of the reasons for their arrest. It also mandates that anyone deprived of his liberty by arrest *or* detention for a criminal matter has the right to appear without delay before a court, which should determine the “lawfulness of his detention and order his release if the detention is not lawful.”<sup>90</sup> The Human Rights Committee, a body charged with interpreting the ICCPR, has held that denying individuals contact with family and friends, violates the states’ obligation under the ICCPR to treat prisoners with humanity.<sup>91</sup>
- *CAT*: CAT unequivocally prohibits torture and cruel, inhuman or degrading treatment. The prohibition against torture is absolute and non-derogable.<sup>92</sup> In addition, CAT requires each state party to “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment ... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>93</sup>
- *Geneva Conventions*: In situations of armed conflict, the Geneva Conventions contain detailed provisions governing the circumstances and conditions of detention. Under the Geneva Conventions there are two broad categories of persons who can be detained lawfully by an occupying power: (1) prisoners of war, and (2) specified civilians. The Third Geneva Convention sets out the terms of detention of prisoners of war, the protections to be accorded during their detention, and the circumstances under which they are to be released. The Fourth Geneva Convention sets out a similar framework for the detention of civilians. Generally speaking, the status of individuals (e.g., POW, unlawful combatants) determines what rights they are due under the Geneva Conventions. However, all detainees, regardless of their status, must be treated humanely.<sup>94</sup> An important measure of the detaining power’s humaneness is whether it allows visits by the ICRC and follows ICRC’s recommendations.<sup>95</sup> The Geneva Conventions’ protections have been interpreted to extend to individuals detained during the war in Afghanistan (though not without controversy), and also the United States’ war in, and occupation of, Iraq.<sup>96</sup> The Geneva Conventions’ applicability to individuals captured by the United States in situations other than these two conflicts is open to debate.

### C. TRANSFERS OUT OF GUANTÁNAMO BAY

There is increasing evidence that the Bush Administration is considering options for transferring detainees out of the Guantánamo Bay detention facility. The WASHINGTON POST reported in March 2005 that Defense Secretary Donald H. Rumsfeld wanted the State Department to convince countries whose nationals were detained at Guantánamo to take custody of those

<sup>90</sup> ICCPR, *supra* note 1414 Art. 9.

<sup>91</sup> *Angel Estrella v. Uruguay* Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990); *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994),

<sup>92</sup> CAT, *supra* note 8, Art. 2.

<sup>93</sup> CAT, *supra* note 8, Art. 16.

<sup>94</sup> Third Geneva Convention, *supra* note 15, Art. 13; Fourth Geneva Convention, *supra* note 15, Art. 3, 27.

<sup>95</sup> See Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by US Forces*, Jan. 29, 2002, available at <http://www.globalpolicy.org/intljustice/general/2002/0129hrw.htm> (last visited June 22, 2005).

<sup>96</sup> For a discussion of the standards used to determine a state’s “occupation” by another state, see Association of the Bar of the City of New York, *Supplement to the Report on Human Rights Standards Applicable to the United States’ Interrogation of Detainees* (2004), available at <http://www.abcny.org/pdf/ABCNY-InterrogationReportSupp.pdf> (last visited Oct. 24, 2004), at 5.

individuals.<sup>97</sup> Sixty five detainees have reportedly been transferred from Guantánamo for further detention or prosecution by foreign governments. Of these, 29 have been sent to Pakistan, nine to Britain, seven to Russia, six to France, five to Morocco, four to Saudi Arabia and one each to five other countries.<sup>98</sup> The State Department has said that the Department has a policy to "not transfer a person to a country if we determine that it is more likely than not" that the prisoner will be tortured.<sup>99</sup> However, based on declarations by U.S. officials, there are no regularized procedures in place that would allow a detainee to challenge his transfer out of Department of Defense custody on the basis that he fears torture.<sup>100</sup> Instead, the Department of Defense considers such risk and works with the Department of State to obtain "diplomatic assurances" from the receiving government as it sees fit. This discretionary process, which is based on what the Department of Defense calls the U.S. "policy" not to send individuals to countries where they risk being tortured, is a far cry from a regularly constituted process that allows for detainees to make out a claim against *refoulement* and which is available in the context of legal transfers. Further, by making the process discretionary, the Department of Defense has transformed an obligatory duty – not to transfer an individual to a place where he risks torture – into a "consideration" left to the government agencies to uphold or ignore.

Transfers out of Guantánamo Bay implicate both the humanitarian law and the human rights law regimes. Where the Geneva Conventions apply, transfers out of detention are authorized – even required – at the "cessation of active hostilities."<sup>101</sup> Although the issue is not without dispute, it seems clear that states remain bound by the obligation of *non-refoulement* even in situations where the Geneva Conventions apply. This position is supported by the ICRC. In its commentary on the 1949 Geneva Conventions, the ICRC proposed the following interpretation of the transfer article:

1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. In parallel (...) it is the duty of the Detaining Power to carry out repatriation and to provide the necessary means for it to take place....
2. No exception may be made to this rule *unless* there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human beings. Each case must be examined individually.<sup>102</sup>

<sup>97</sup> *Rumsfeld Seeks to Move More Detainees: State Department Urged to Press Countries to Take Custody of Their Nationals*, WASHINGTON POST, March 12, 2005, A14.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Declaration of Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs, Attached to Appendix 1 of United States of America, *Second Periodic Report of the United States of America to the Committee Against Torture*, May 2005, available at <http://www.ohchr.org/english/bodies/cat/cats36.htm> (last visited June 27, 2005).

<sup>101</sup> Article 118 of Third Geneva Convention states that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Third Geneva Convention, *supra* note 15, Art. 118. Article 134 of the Fourth Geneva Convention requires parties to "endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation. Fourth Geneva Convention, *supra* note 15, Art. 134. Thus, repatriation of detainees upon cessation of hostilities is authorized (and even mandated) by the Geneva Conventions.

<sup>102</sup> Jean S. Pictet (ed.), *GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY*, ICRC, Geneva, 1960, 543 (emphasis added). It should be noted that this passage was written before the major human rights conventions were drafted; therefore, the absence of a discussion of the obligation of *non-refoulement* specifically should not be seen as significant.

The former advisor to the ICRC encapsulated the position as follows: “As long as prisoners of war are held in captivity and there is no obligation to release them, they are protected by the Geneva Convention. They have POW status and are under the responsibility of the Detaining Power. But as soon as there is an obligation to release them, those who would be at risk of persecution in their country of origin are entitled to have their claim examined and their refugee status determined by the Detaining Power. This State is no longer merely the Detaining Power but must assume a different responsibility/obligation deriving from refugee law and principles that include, but are not limited to, the principle of *non-refoulement*.”<sup>103</sup>

Thus, individuals facing transfer from Guantánamo have the right to assert a claim against *refoulement*. Where it is more likely than not that an individual will be subjected to torture in the hands of the transferee state, the transfer of such individual in the face of that risk would amount to an extraordinary rendition and would be an illegal transfer.

#### D. TRANSFER TO A SECRET DETENTION FACILITY<sup>104</sup> OUTSIDE THE UNITED STATES

In October 2004, Human Rights Watch reported that at least eleven terror suspects had been “disappeared” by or with the involvement of U.S. agents. Each of these individuals has allegedly been transferred to and detained in one of a number of secret detention centers allegedly operated by the United States in various parts of the world.<sup>105</sup> At the time of this writing, most of these individuals remain unaccounted for.<sup>106</sup>

It is not known whether transfers by or with the involvement of U.S. agents<sup>107</sup> into secret detention facilities located outside of the United States are authorized under U.S. law. What is clear, however, is that such transfers appear to be aimed at removing the individual from the protection of U.S. courts, and do not include a procedure giving the detainee an opportunity to challenge his transfer on the grounds that he risks being tortured. Transfers to secret detention facilities stand in opposition to renditions to justice, which generally entail bringing individuals to face justice *in* U.S. courts. Moreover, whereas rendition to justice would provide the transferee with the full range of legal rights under U.S. law once the individual comes within the ambit of the criminal justice system, transfers into secret detention centers by definition deny the transferee access to any legal protections whatsoever. To the extent that transfers into a secret detention entail a likelihood of torture therein, any authorization for such transfers would be contrary to U.S. law implementing CAT, thus rendering such transfers illegal.

From the perspective of international law, a detainee in a secret detention facility has rights under international human rights treaties and – where applicable, humanitarian law – and the state

<sup>103</sup> Stephane Jaquetmet, *The cross-fertilization of international humanitarian law and international refugee law*, IRRRC Sept. 2001 VOI. 83, No.843, p.651, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JRE8/\\$File/651-674%20jaquetmet.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JRE8/$File/651-674%20jaquetmet.pdf) (last visited June 22, 2005).

<sup>104</sup> Where the secret detention facility is operated by a foreign government at the direction of the United States or where it is operated by a foreign government and the individual is detained there at the direction of the United States, the question of whether the United States had constructive custody over the detainee and/or whether the actions of foreign officials may be attributed to U.S. agents will affect the issue of legal liability of U.S. agents.

<sup>105</sup> Human Rights Watch, *The United States “Disappeared” The CIA’s Long-Term “Ghost Detainees”* Annex, available at [http://www.hrw.org/backgrounder/usa/us1004/7.htm#\\_Toc84652978](http://www.hrw.org/backgrounder/usa/us1004/7.htm#_Toc84652978); Human Rights First, *Behind the Wire*, *supra* note 4; Human Rights First, *Ending Secret Detentions*, June 2004, available at [http://www.humanrightsfirst.org/us\\_law/pdf/EndingSecretDetentions\\_web.pdf](http://www.humanrightsfirst.org/us_law/pdf/EndingSecretDetentions_web.pdf) (last visited June 3, 2005).

<sup>106</sup> See Center for Human Rights and Global Justice, *Secret Detentions and Proxy Prisons: Legal Standards Applicable to Disappearances*, forthcoming July 2005.

<sup>107</sup> The degree of legal liability of U.S. agents will generally depend on the degree of their involvement in the transfer.

responsible for the individual's detention has corresponding obligations under these regimes. Thus, for example, the detaining power has an obligation to protect the detainee from torture and CID treatment under CAT, the ICCPR and, where applicable, the Geneva Conventions. Regardless of the presence of torture or CID, the detaining state is – by definition – flouting the standards for detention under the ICCPR and, where applicable, the Geneva Conventions by detaining individuals secretly and without process. In addition, transfers into secret detentions contravene laws against disappearances. Disappearances, or “enforced disappearances,” as they are sometimes called, have been addressed in a number of international legal instruments, all of which condemn the act of disappearance as a violation of human rights and – when systematic – as a crime against humanity.<sup>108</sup>

Disappearances and/or transfers into secret detention facilities are particularly abhorrent practices because although the transferee still has rights under international human rights treaties and, depending on the circumstances, the humanitarian law regime, as a practical matter a detainee in a secret detention facility has no means of asserting and enforcing such rights.

### E. EXTRAORDINARY RENDITION

#### (i) *Extraordinary Rendition vs. Rendition*

Extraordinary rendition appears – in the main – to be a relatively new version of rendition. What is particularly “extraordinary” about extraordinary rendition is the role of torture and cruel, inhuman or degrading treatment involved in such transfers: U.S. officials allegedly 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. It is important to underline that an extraordinary rendition is an illegal form of transfer; its defining characteristic is that the transfer occurs in direct violation of the *non-refoulement* obligation set out in CAT, the ICCPR and related U.S. laws and could not be authorized under U.S. law.<sup>109</sup>

#### (ii) *Updated Reports of Extraordinary Rendition*

To date, the following instances of extraordinary rendition have been publicly reported:

- In 1995 or 1998,<sup>110</sup> U.S. intelligence agents reportedly picked up from Croatia one of Egypt's most wanted Islamic militants, Talaat Fouad Qassem, placed him on a ship in the Adriatic Sea for interrogation, and subsequently turned him over to Egyptian authorities who had in 1992 sentenced him to death *in absentia*. His family believes he was executed in Egypt.<sup>111</sup>
- In 1998, CIA officers working with the Albanian police reportedly seized five members of Egyptian Islamic Jihad, Ahmed Osman Saleh, Ahmed Ibrahim al-Naggar, Shawki Salama Attiya, Essam Abdel Tawwab, and Mohamed Hassan Tita,<sup>112</sup> who were allegedly planning to bomb the U.S. embassy in Tirana. After three days of

<sup>108</sup> For a discussion of legal standards applicable to disappearances, see *Secret Detentions and Proxy Prisons: Legal Standards Applicable to Disappearances*, *supra* note 106.

<sup>109</sup> For an in-depth discussion of the illegality of Extraordinary Renditions, see *Torture by Proxy*, *supra* note 2.

<sup>110</sup> There are conflicting reports as to the date of his arrest. Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASHINGTON POST FOREIGN SERVICE, March 11, 2002; Anthony Shadid, *supra* note 49.

<sup>111</sup> Anthony Shadid, *supra* note 49; *U.S., Egypt Raids Caught Militants*, *supra* note 49.

<sup>112</sup> Andrew Higgins and Christopher Cooper, *CIA-Backed Team Used Brutal Means To Break Up Terrorist Cell in Albania*, WALL STREET JOURNAL, Nov. 20, 2001.

interrogation, the men were flown to Egypt, allegedly aboard a CIA-chartered plane.<sup>113</sup>

- In October 2001, Aseed Mohammed, a Yemeni microbiology student, was allegedly flown from Pakistan to Jordan on a U.S.-registered Gulfstream jet after Pakistan's intelligence agency reportedly surrendered him to U.S. authorities at the Karachi airport. U.S. officials alleged that Aseed Mohammed was an Al Qaeda operative who played a role in the bombing of the USS *Cole*. The handover of the shackled and blindfolded Aseed Mohammed reportedly took place in the middle of the night in a remote corner of the airport, without recourse to extradition or deportation procedures.<sup>114</sup>
- On December 18, 2001, Ahmed Agiza and Mohammed al-Zari were expelled from Sweden and transferred to Egypt. According to the reputable Swedish TV program *Kalla Fakta*, both men were flown on a Gulfstream V, a private jet alleged to be owned by a U.S. company and which reportedly is used mainly by the U.S. government.<sup>115</sup> Both were asylum seekers and the Swedish government had acknowledged that each had a well-founded fear of being persecuted if returned to Egypt. However, the men were excluded from refugee status based on secret evidence that they were associated with Islamist groups responsible for acts of terrorism.<sup>116</sup> To justify the expulsions, the Swedish government relied upon "diplomatic assurances" or formal guarantees from the Egyptian government that the two men would not be tortured and would have fair trials upon return. However, according to Human Rights Watch and a coalition of Swedish human rights groups, both men were tortured and ill-treated in Egyptian prisons upon transfer. Moreover, a trial monitor from Human Rights Watch provided a firsthand account of Agiza's re-trial by a military tribunal in April 2004 during which Agiza made serious allegations of torture and ill-treatment.<sup>117</sup> The re-trial was marred by numerous fair trial violations, proving a lack of compliance by the Egyptian authorities with their diplomatic assurances that Agiza would be granted a fair trial. *Kalla Fakta's* report that the U.S. government was involved in the transfers of Agiza and al-Zari from Sweden to Egypt has been subsequently confirmed by the Swedish Ministry of Justice.<sup>118</sup> On May 20, 2005, the CAT Committee (the U.N. Committee charged with monitoring compliance with the Convention Against Torture) found that Sweden had violated Article 3 of CAT because "it was known, or should have been known, to [Sweden's] authorities at the time of the [] removal [of Agiza] that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security

<sup>113</sup> *U.S. Bypasses Law in Fight against Terrorism*, INTERNATIONAL HERALD TRIBUNE, Mar. 12, 2002; Chandrasekaran & Peter Finn, *supra* note 110.

<sup>114</sup> *U.S. Bypasses Law in Fight against Terrorism*, *supra* note 113; Chandrasekaran & Finn, *supra* note 110.

<sup>115</sup> *The Broken Promise*, (TV4 Kalla Fakta Broadcast, May 17, 2004) (English transcript available at <http://hrw.org/english/docs/2004/05/17/sweden8620.htm> (last visited Oct. 25, 2004)) (TV4 Kalla Fakta Broadcast); see also SEYMOUR HERSH, CHAIN OF COMMAND 54 (HarperCollins, 2004).

<sup>116</sup> In 1999, Agiza had been tried and convicted in absentia by an Egyptian military tribunal for terrorism-related acts. It remains unclear on what grounds al-Zari was expelled from Sweden and then imprisoned in Egypt. He was released from a Cairo prison in October 2003 without charge or trial, but remains under constant surveillance and is routinely summoned for interrogations. *HRW Diplomatic Assurances Report*, *supra* note 46.

<sup>117</sup> Human Rights Watch, *Sweden: Torture Inquiry Must be Under U.N. Auspices; Independent Panel Must Probe Abuses by Sweden, Egypt and U.S. Operatives* (May 2004), available at [http://www.hrw.org/english/docs/2004/05/27/sweden8621\\_txt.htm](http://www.hrw.org/english/docs/2004/05/27/sweden8621_txt.htm) (last visited Oct. 25, 2004).

<sup>118</sup> Craig Whitlock, *A Secret Deportation of Terror Suspects; 2 Men Reportedly Tortured in Egypt*, WASHINGTON POST, July 25, 2004, at A1.

reasons.”<sup>119</sup> The CAT Committee held that facts known to Sweden at the time of removal lead to a “natural conclusion... that the complainant was at a real risk of torture in Egypt in the event of expulsion” and this “was confirmed when, immediately preceding expulsion, the complainant was subjected on [Sweden’s] territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party’s police. It follows that the State party’s expulsion of the complainant was in breach of Article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”<sup>120</sup> The “foreign agents” referred to here were most likely U.S. agents.

- In January 2002, apparently based on information provided by the CIA, Indonesian authorities reportedly detained Muhammad Saad Iqbal Madni, who was suspected by the CIA of having worked with Richard Reid (the “shoe-bomber”).<sup>121</sup> According to a senior Indonesian official, a few days later, the Egyptian government formally asked Indonesia to extradite Iqbal, who carried an Egyptian as well as a Pakistani passport.<sup>122</sup> The Egyptian request apparently did not specify the crime, instead noting broadly that Egypt sought Iqbal in connection with terrorism.<sup>123</sup> On January 11, 2002, allegedly without a court hearing or a lawyer, Iqbal was put aboard an unmarked U.S.-registered Gulfstream V jet and flown to Egypt.<sup>124</sup> A senior Indonesian official said that an extradition request from Egypt provided political cover to comply with the CIA’s request. “This was a U.S. deal all along,” the senior official said, “Egypt just provided the formalities.”<sup>125</sup>
- While in transit at John F. Kennedy International Airport in New York in September 2002, Syrian-born Canadian citizen, Maher Arar<sup>126</sup> was taken into custody by officials from the FBI and Immigration and Naturalization Service (since reorganized into the Department of Homeland Security) and shackled.<sup>127</sup> Arar’s requests for a lawyer were dismissed on the basis that he was not a U.S. citizen and therefore he did not have the right to counsel.<sup>128</sup> Officials, acting on the basis of suspicions by U.S. authorities that Arar had links to Al Qaeda,<sup>129</sup> repeatedly questioned Arar about his connection to certain members of Al Qaeda.<sup>130</sup> Arar repeatedly denied that he had

<sup>119</sup> *Agiza v. Sweden*, Committee Against Torture, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003.  
<sup>120</sup> *Id.*

<sup>121</sup> *U.S. Bypasses Law in Fight Against Terrorism*, *supra* note 113; Chandrasekaran & Finn, *supra* note 110.

<sup>122</sup> *U.S. Bypasses Law in Fight Against Terrorism*, *supra* note 113; Chandrasekaran & Finn, *supra* note 110.

<sup>123</sup> *U.S. Bypasses Law in Fight Against Terrorism*, *supra* note 113; Chandrasekaran & Finn, *supra* note 110.

<sup>124</sup> *U.S. Bypasses Law in Fight Against Terrorism*, *supra* note 113; Chandrasekaran & Finn, *supra* note 110; Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASHINGTON POST, May 11, 2004, at A1.

<sup>125</sup> Chandrasekaran & Finn, *supra* note 110; *U.S. Bypasses Law in Fight Against Terrorism*, *supra* note 113.

<sup>126</sup> For more information about Maher Arar and his transfer to Syria, see [www.ararcommission.ca](http://www.ararcommission.ca)

<sup>127</sup> According to a lawsuit filed by Arar against Attorney General John Ashcroft and other U.S. officials, Larry D. Thompson (then Acting Attorney General), J. Scott Blackman (then Regional Director of the Immigration and Naturalization Services for the Eastern District), Edward J. McElroy (formerly District Director for the Immigration and Naturalization Services for the New York City District and presently District Director of U.S. Immigration and Customs Enforcement), Robert Mueller (Director of the Federal Bureau of Investigation), and others, unlawfully detained and interrogated Arar for thirteen days. Complaint and Demand for Jury Trial, filed with the U.S. District Court, Eastern District of New York in *Arar v. Ashcroft, et al.*, available 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 visited Oct. 25, 2004) (*Arar v. Ashcroft*). For additional information on the case of Maher Arar, see <http://www.maherarar.ca/>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* paras. 31, 33.

any connections whatsoever to the named individuals.<sup>131</sup> Despite his denials, U.S. immigration authorities, reportedly with the approval of then-Acting Attorney General Larry Thompson, authorized Arar's "expedited removal" to Syria under section 235(c) of the INA. Arar was eventually put on a small jet that first landed in Washington, D.C., and then in Amman, Jordan.<sup>132</sup> Arar was then transferred to Syria.<sup>133</sup> Arar remained in Syria for ten months during which he was repeatedly beaten, tortured, and kept in a shallow grave.<sup>134</sup> Arar has since been released and returned to Canada without any charges. The Canadian government has initiated an inquiry into Arar's transfer.

- In October 2001, Australian Citizen Mamdouh Habib was arrested in Pakistan and, reportedly at the request of the U.S. authorities, flown to Egypt where, allegedly, he was severely tortured.<sup>135</sup> Habib remained in Egypt for six months, after which he was transferred to Guantánamo.<sup>136</sup> On January 11 2005, Mamdouh Habib was released from Guantánamo without charge and subsequently transferred to Australia.
- In the fall of 2001, Libyan national Ibn al-Sheikh al-Libi was arrested in Pakistan. Shortly thereafter, in January of 2002, he was reportedly handed over to the CIA agents stationed in Afghanistan.<sup>137</sup> He was suspected of running Osama bin Laden's terrorist training camp in Khalden, Afghanistan, and was wanted as a witness in the cases against Zacarias Moussaoui and Richard Reid.<sup>138</sup> The CIA allegedly became frustrated with the ability of its operatives in Afghanistan to obtain information from al-Libi and transferred him first to the U.S.S. Bataan, an assault ship stationed in the Arabian Sea, where he was interrogated by FBI and CIA agents,<sup>139</sup> and then to Egypt for harsher questioning.<sup>140</sup> According to *Newsweek*, officials eventually retrieved al-Libi from Egyptian custody and transferred him to Guantánamo Bay.<sup>141</sup>
- In February 2003, Egyptian-born Hassan Osama Nasr, also known as Abu Omar, disappeared from his home city of Milan. He briefly surfaced 15 months later, when he called his family in Italy claiming to have been kidnapped by U.S. and Italian forces, taken to Egypt and tortured.<sup>142</sup> According to the latest available information,

<sup>131</sup> *Id.* para.38.

<sup>132</sup> *Id.* para. 49.

<sup>133</sup> Despite the fact that he is a Canadian citizen and has resided in Canada for seventeen years, Arar's pleas to return to Canada were ignored *Id.* paras. 53, 62. Upon reaching Syria, Arar was transferred to a prison where he was allegedly beaten for several hours and forced to falsely confess that he had attended a training camp in Afghanistan in order to fight against the United States. *Id.*

<sup>134</sup> *Id.* para 61.

<sup>135</sup> *The Trials of Mamdouh Habib* (SBS, Dateline, July 7, 2004) (transcript available at <http://www6.sbs.com.au/dateline/index.php?page=archive&daysum=2004-07-07#> (last visited Oct. 25, 2004).

<sup>136</sup> Joint Press Release, Attorney-General The Hon. Daryl Williams AM QC MP and Minister for Foreign Affairs and Trade The Hon. Alexander Downer MP, Mamdouh Habib in United States Custody (Apr. 18, 2002), available at <http://www.ag.gov.au/www/attorneygeneralhome.nsf/0/49DF56AF955E312CCA256B9F007F44FA?OpenDocument> (last visited Oct. 25, 2004); *The Trials of Mamdouh Habib*, *supra* note 135.

<sup>137</sup> Dana Priest, *Al Qaeda-Iraq Link Recanted, Captured Libyan Reverses Previous Statement to CIA, Officials Say*, WASHINGTON POST Aug. 1, 2004, at A20.

<sup>138</sup> Jane Mayer, *supra* note 6.

<sup>139</sup> *The United States "Disappeared" The CIA's Long-Term "Ghost Detainees," supra* note 105; *Intelligence might have thwarted attacks, Senior Taliban fighters taken into custody*, CNN.COM, Jan. 9, 2002, available at <http://archives.cnn.com/2002/WORLD/asiapcf/central/01/08/ret.afghan.attacks/>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Tracy Wilkinson & Bob Drogin, *Missing Imam's Trail Said to Lead from Italy to CIA; Prosecutors in Milan are investigating whether an Egyptian-born suspected militant was spirited away by the U.S. using a disputed tactic*, LOS ANGELES TIMES, Mar. 3, 2005, at A1.

Abu Omar is being held in the Tora prison on the edge of the Egyptian capital Cairo.<sup>143</sup> Nasr was a controversial Imam who was suspected of being involved in the planning of terrorist activities. Italian prosecutors are currently conducting an inquiry into Nasr's purported kidnapping.<sup>144</sup> On June 23, 2005, an Italian judge issued arrest warrants for 13 alleged C.I.A. agents in connection with Abu Omar's kidnapping and disappearance. On the same day, an Italian judge indicted Abu Omar on numerous terrorism-related charges.<sup>145</sup>

- On December 31, 2003, Khaled el-Masri, a German citizen born in Lebanon, was arrested by police at the Macedonian border. He was then held in a Macedonian hotel room for 23 days. During this time he was constantly interrogated by Macedonian agents about connections to Islamic organizations and accused of having been in a terrorist training camp in Jalalabad.<sup>146</sup> At the end of this time he was allegedly beaten, stripped, shackled, blindfolded, and placed aboard a plane. El-Masri was delivered to a prison in Afghanistan that was nominally run by Afghan officials but was under actual U.S. control.<sup>147</sup> While in the prison he was repeatedly interrogated, and photographed naked by individuals el-Masri identified as U.S. agents. U.S. authorities have neither confirmed nor denied these allegations.<sup>148</sup> In May of 2004, el-Masri was returned to Europe, having never been charged with a crime. A reporter, Stephen Grey and the ZDF television show *Frontal 21*, have independently determined that the details of al Masri's statement coincide with the flight schedule of the U.S.-charted Boeing 737 used by the CIA.<sup>149</sup> El-Masri's release was reportedly personally ordered by Secretary of State Condoleezza Rice after she learned the man had been mistakenly identified as a terrorist suspect.<sup>150</sup> German authorities are currently investigating the case.

As described in greater detail in the *Torture by Proxy* report, the practice of extraordinary rendition unequivocally violates international law and is contrary to U.S. law and policy.

(iii) *Extraordinary Renditions and Congress: An Update*

Increasingly, Members of Congress are scrutinizing the practice of extraordinary rendition. A number of lawmakers have asked for more information about the practice. During the Hearing on Allegations of Mistreatment of Iraqi Prisoners before the Senate Armed Services Committee in May 2004, Senator Kennedy questioned Dr. Stephen Cambone, Under Secretary of Defense for Intelligence about the practice of "rendering." At that time, Dr. Cambone stated he was not aware of any persons in the custody of the Department of Defense who were rendered to Saudi Arabia, Jordan, Morocco or Syria for purposes of information gathering. He explained that DOD

<sup>143</sup> *Italy: rendition victim alive and in prison*, ADNKRONISINTERNATIONAL, available at [http://www.adnki.com/index\\_2Level.php?cat=Terrorism&loid=8.0.180983052&par=0](http://www.adnki.com/index_2Level.php?cat=Terrorism&loid=8.0.180983052&par=0) (last visited June 27, 2005).

<sup>144</sup> *Missing Imam's Trail Said to Lead from Italy to CIA; Prosecutors in Milan are investigating whether an Egyptian-born suspected militant was spirited away by the U.S. using a disputed tactic*, supra note 142.

<sup>145</sup> Tracy Wilkinson, *CIA Said to Leave Trail in Abduction: Agents sought by Italy in alleged 'rendition' of a terrorism suspect apparently checked into flashy hotels and gave out account numbers*, LOS ANGELES TIMES, June 26, 2005.

<sup>146</sup> James Meek, *They beat me from all sides*, GUARDIAN (London), Jan. 14, 2005, at 2.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See also Scott Shane, Stephen Grey, Margot Williams, supra note 6.

<sup>150</sup> *Innocent German beaten by US jailers*, SYDNEY MORNING HERALD, Apr. 25, 2005, available at <http://www.smh.com.au/news/Global-Terrorism/Innocent-German-beaten-by-US-jailers/2005/04/24/1114281451199.html?oneclick=true> (last visited May 9, 2005); David Johnston, Don Van Natta, *Rice Ordered Release of German Sent to Afghan Prison in Error*, NEW YORK TIMES, Apr. 23, 2005, at A3.

has “returned” individuals to their home states, including the return of prisoners to the United Kingdom from Guantánamo Bay.<sup>151</sup> Senator Kennedy also questioned Attorney General Alberto Gonzalez about extraordinary renditions during Gonzalez’s nomination hearing. Specifically, Senator Kennedy submitted the following written question to Gonzalez:

The United States is a party to the Convention Against Torture, which provides that “No Party shall expel, return or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subject to torture.” This prohibited process is also referred to as “extraordinary rendition.” Do you agree that extraordinary renditions are illegal for any agency of the United States under applicable American and international law?<sup>152</sup>

Attorney General Gonzalez replied only that “The United States is bound to honor and comply with its obligations under Article 3 of the Convention Against Torture, subject to the Senate’s reservations and understandings applicable to Article 3.” Gonzalez also denied that any member of the Executive Branch provided authorization to conduct extraordinary renditions.<sup>153</sup>

However, on March 6, 2005, the NEW YORK TIMES reported that extraordinary renditions have been carried out pursuant to a classified directive signed by President Bush a few days after September 11, 2001 that purports to grant the C.I.A. “an unusually expansive authority” to act independently, without a case-by-case approval from the White House or the State or Justice Departments.<sup>154</sup> Despite a call by Congressman Edward Markey to declassify this directive,<sup>155</sup> to date the directive (if it exists) remains classified. Under established U.S. law, a presidential directive that purports to authorize a practice like extraordinary rendition, which is prohibited by

<sup>151</sup> Questioning of Dr. Stephen A. Cambone, Under Secretary of Defense for Intelligence, by Senator Kennedy during the Senate Armed Services Committee hearing regarding the mistreatment of Iraqi prisoners. *Hearing on Allegations of Mistreatment of Iraqi Prisoners before the Senate Armed Services Committee*, 108th Cong. (May 2004) (statement by Dr. S.A. Cambone, Under Secretary of Defense for Intelligence), *transcript available at* [http://www.washingtonpost.com/wp-dyn/articles/A17812-2004May11\\_2.html](http://www.washingtonpost.com/wp-dyn/articles/A17812-2004May11_2.html) (last visited May 31, 2005). The following exchange took place between Senator Kennedy and Dr. Cambone:

KENNEDY: Let me ask you, Dr. Cambone, about rendering. A number of reports about detainees in U.S. custody -- U.S. military intelligence officials being transferred for interrogations to governments that routinely torture prisoners. December, 2002, Washington Post state, "detainees who refuse to cooperate." The Americans have been rendered to foreign intelligence services: Saudi Arabia, Jordan, Morocco, Syria and other countries. Can you assure the committee that the administration is fully complying with all of the legal requirements and that all reports of U.S. officials engaging in the practice of rendering are false?

CAMBONE: Sir, to the best of my knowledge, that is a true statement.

KENNEDY: We are not, we have not -- your sworn statement now to your knowledge, the United States has not been involved in any rendering, any turning over of any personnel to any other country?

CAMBONE: No, you said that they were turned over for torture and misbehavior -- mistreatment. We have returned, for example, individuals to the U.K. There may be three or four of them that have been returned from Gitmo.

KENNEDY: Have you turned over, to your knowledge, any suspects to Saudi Arabia, Jordan, Morocco or Syria to gather information?

CAMBONE: From those people in DOD custody, not that I'm aware of, sir.

KENNEDY: So you would know...

CAMBONE: I am not aware of any that have been transferred for that purpose, and if there are...

KENNEDY: For any other purpose?

CAMBONE: If there are, I will come back to you and tell you. As best I know, there are not any persons under our custody that have been transferred.

To our knowledge, no additional information has been provided to Senator Kennedy by Dr. Cambone.

<sup>152</sup> Written Response of Alberto R. Gonzales, Nominee to be Attorney General of the United States to the Hearing Question of Senator Edward M. Kennedy; on file with the Center for Human Rights and Global Justice.

<sup>153</sup> *Id.*

<sup>154</sup> Jehl & Johnston, *supra* note 5.

<sup>155</sup> See Markey Calls for Declassification of Secret Torture Outsourcing Order, March 6, 2005, [http://www.house.gov/markey/Issues/iss\\_human\\_rights\\_pr050307.pdf](http://www.house.gov/markey/Issues/iss_human_rights_pr050307.pdf) (last visited May 31, 2005).

U.S. law and practice, would almost definitely be invalid.<sup>156</sup> Senator Jay Rockefeller has demanded investigation into the practice of extraordinary rendition,<sup>157</sup> but none has been initiated.

In addition to seeking information, some legislators have sought to amplify the prohibition on extraordinary rendition by introducing legislation explicitly outlawing the practice. On February 17, 2005, Congressman Edward Markey introduced legislation to stop the practice of sending terrorism suspects to foreign governments known to engage in torture.<sup>158</sup> A similar bill was introduced in the Senate by Senator Patrick Leahy.<sup>159</sup> The outlook for either of these bills, however, is not good. For example, when asked if the House Speaker Dennis Hastert would support the legislation, Pete Jeffries, Hastert's communications director said: "The speaker does not support the Markey proposal. He believes that suspected terrorists should be sent back to their home countries."<sup>160</sup> When asked why suspected terrorists should be sent anywhere instead of being held by the United States and prosecuted, Jeffries responded that "U.S. taxpayers should not necessarily be on the hook for their judicial and incarceration costs." Although the future may be bleak for Rep. Markey's and Sen. Leahy's bills, several amendments to various appropriation bills prohibiting the use any funds in contravention of legal obligations under CAT have been passed by the House and Senate: on March 16, 2005, the House approved an amendment offered by Rep. Markey to the Emergency Supplemental Appropriations bill (H.R. 1268) by a vote of 420-2-3; a modified version of this amendment was signed into law by President Bush on May 11, 2005 (P.L. 109-13);<sup>161</sup> on June 16, 2005, the House approved an amendment offered by Rep. Markey to the Science, State, Justice Appropriations bill (H.R. 2862); on June 20, 2005 the House approved an identical Markey amendment to the Department of Defense Appropriations bill by a unanimous voice vote.

(iv) *Extraordinary Rendition and the Bush Administration: An Update*

Despite the criticisms of the practice, the Bush Administration has distanced extraordinary rendition from rendition, defending the latter while refusing to acknowledge the former. Significantly, when speaking to reporters on March 7, 2005, Attorney General Alberto Gonzalez said that the U.S. policy is not to send detainees "to countries where we believe or we know that they're going to be tortured,"<sup>162</sup> but he did not assert that the United States opposes extra-legal transfers more broadly. Gonzalez added that if a country has a history of torture, the Administration would seek assurances that the transferee would not be tortured before effecting the transfer. However, Gonzalez acknowledged that the Administration "can't fully control" what countries do once they receive the transferee and said that he did not know whether the countries in fact always complied with their assurances.<sup>163</sup> During a press conference, President Bush, in response to questions about extraordinary rendition stated that

[In] [t]he post-9/11 world, the United States must make sure we protect our people and our friends from attack. That was the charge we have been given. And one way to do so

<sup>156</sup> For a discussion of the applicable standards, see *Torture by Proxy* report, *supra* note 2.

<sup>157</sup> Rockefeller to Pursue Full Senate Debate on the Detention, Interrogation, and Rendition of Prisoners, April 19, 2005, available at <http://rockefeller.senate.gov/news/2005/pr041905.html> (last visited June 22, 2005).

<sup>158</sup> For the full text of the Markey bill, see [http://www.house.gov/markey/human\\_rights.htm](http://www.house.gov/markey/human_rights.htm) (last visited May 31, 2005).

<sup>159</sup> S.654, available at <http://leahy.senate.gov/bills01/index.html> (last visited May 1, 2005).

<sup>160</sup> Bob Herbert, *It's Called Torture*, NEW YORK TIMES, pg. 19.

<sup>161</sup> H.R. 1268, the Emergency Supplemental Appropriations bill; See Congress Passes Supplemental Bill Which Prevents Use of Funds for Torture, May 5, 2005, [http://www.house.gov/markey/Issues/iss\\_human\\_rights\\_pr050505.pdf](http://www.house.gov/markey/Issues/iss_human_rights_pr050505.pdf) (last visited May 31, 2005); Congress Says "No" to Torture, But Still Needs to End the Use of Diplomatic Assurances, June 21, 2005, [http://www.house.gov/markey/Issues/iss\\_human\\_rights\\_pr050621.pdf](http://www.house.gov/markey/Issues/iss_human_rights_pr050621.pdf) (last visited June 22, 2005).

<sup>162</sup> R. Jeffrey Smith, *Gonzalez Defends Transfer of Detainees*, WASHINGTON POST, March 8, 2005, A 03.

<sup>163</sup> *Id.*

is to arrest people and send them back to their country of origin with the promise that they won't be tortured. That's the promise we receive. This country does not believe in torture. We do believe in protecting ourselves. We don't believe in torture.<sup>164</sup>

President Bush continued to defend the practice by stating that the policy is in "our country's interest to find people who would do harm to us and get them out of harm's way"<sup>165</sup> – apparently through extra-legal transfers if desired. Further, by framing the issue as one of sending individuals "home," President Bush was deflecting attention from cases that were receiving significant media attention (such as the cases of Khaled el-Masri and Mamdouh Habib) in which individuals were not taken "home" to their countries of citizenship but were instead transferred to third states for interrogation.

Further, President Bush refers to "promises" by receiving states that agree not to torture specific transferees. A comprehensive report released by Human Rights Watch on April 15, 2005 demonstrates unequivocally that diplomatic assurances such as these are unreliable and presents credible evidence that shows that governments frequently break such promises.<sup>166</sup> Given their unreliability, diplomatic assurances cannot be relied upon to legalize that which would otherwise be illegal: the transfer of an individual to a country where he is at risk of torture.

To date, the Bush Administration has refused to identify or disclose documents relevant to renditions and has refused to acknowledge the existence of extraordinary renditions. Despite the repeated assertions by Bush Administration officials that extra-legal transfers are necessary and that no transfer takes place where there is evidence that the transferee would be tortured, a plethora of off the record accounts as well as reports about transferred individuals suggest that extraordinary rendition – that is, illegal transfers – continue to take place, apparently with the purpose of interrogation in locations where abuse is rife.<sup>167</sup>

## CONCLUSION

Given the many legal regimes at work and their differential application to various kinds of transfer, it is crucial to clarify that there is no way to transfer individuals outside the protective reach of the norm of *non-refoulement* without violating the laws binding on the United States. This paper sets out the various types of legal and extra-legal transfers with the aim of clarifying the rules applicable to these processes. Since the Administration has reportedly been using all of these methods in the "War on Terror," the bottom line must remain clear: in all transfers, the United States is bound to refrain from sending an individual to a country where he is at risk of torture.

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<sup>164</sup> Dan Robinson, *Lawmakers Oppose Practice of Extraordinary Rendition*, VOICE OF AMERICA NEWS (online), March 17, 2005.

<sup>165</sup> Helen Thomas, *'Ghost detainees' should haunt CIA*, SEATTLE POST-INTELLIGENCER, May 5, 2005.

<sup>166</sup> *HRW Diplomatic Assurances Report: Update*, *supra* note 46. The Bush Administration has not responded to the report by Human Rights Watch.

<sup>167</sup> See Jane Mayer, *supra* note 6.

## RECOMMENDATIONS

### **Congress should create an independent commission to investigate U.S. abuses in the “War on Terror.”**

- An independent commission, modeled on the National Commission on Terrorist Attacks Upon the United States (9-11 Commission) should be formed and charged with investigating U.S. abuses in the “War on Terror,” including extra-legal and illegal transfers such as extraordinary renditions. Such investigations should include an examination of the alleged authority for various forms of extra-legal transfers, and an accounting of how such practices came to be approved, if they were.

### **Relevant U.S. agencies should investigate all allegations of illegal and extra-legal transfers, and should cooperate with foreign governments in their efforts to investigate extraordinary rendition.**

- The inspectors general of all relevant agencies, including the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Defense, and the Department of Homeland Security should investigate the involvement of their personnel and institutions in extraordinary rendition, and should make recommendations for civil and criminal actions, as well as any regulatory measures necessary to prevent further violations.
- The reports resulting from these investigations should not be classified. If classified, the reports should be reviewed by the appropriate Congressional committees for a determination as to whether the classifications were appropriate.
- All relevant agencies should cooperate fully in investigations being carried out by foreign governments into alleged instances of extraordinary rendition. This includes the Canadian investigation of the case of Maher Arar, the German investigation of the case of Khaled el-Masri, and the Italian investigation of the case of Hassan Osama Nasr (Abu Omar).

### **All relevant agencies should declassify and disclose documents relevant to extra-legal transfers.**

- Agencies with custody of documents purportedly authorizing extra-legal and illegal transfers, including the Central Intelligence Agency, should declassify and make public such documents.
- Agencies should comply with requests for documents concerning extra-legal and illegal transfers pursuant to the Freedom of Information Act.
- The president should declassify Presidential Decision Directives and any other order or finding that purports to authorize extra-legal or illegal transfers, including extraordinary renditions.

### **Members of Congress should pass legislation like that proposed by Congressman Markey and Senator Leahy to ensure full compliance with the Convention Against Torture.**

- Congress should pass legislation clarifying the illegality of extraordinary rendition.
- Congress should instruct the Department of Defense, the CIA, and other relevant agencies that have not fully implemented the *non-refoulement* obligation codified by the Foreign Affairs Reform and Restructuring Act of 1998 to formulate such regulations immediately, and to provide opportunity for public comment through the standard regulatory process.

- Congress should ensure that liability for complicity or conspiracy in torture is extended to civilian contractors working with U.S. armed forces, security personnel, or intelligence services.

**The United States government should not transfer individuals on the basis of diplomatic assurances from countries with documented histories of widespread or systematic torture, or where an individual can show a particularized risk of torture upon transfer.**

- The President, the Secretary of State, the Secretary of Defense, the Director of National Intelligence and the Attorney General should announce a policy rejecting the reliance on diplomatic assurances by countries where torture is widespread or systematic, or where an individual can show a particularized risk that would entitle him to withholding of deportation were he in the United States. Regulations should be promulgated to this effect, and fair procedures must be put in place allowing individuals facing transfer to make out a claim concerning their risk upon transfer.
- The President, the Secretary of State, the Secretary of Defense, the Director of National Intelligence, and the Attorney General should interpose a moratorium on the use of diplomatic assurances in all cases until such safeguards protecting the rights of detainees are in place.

**The Attorney General, federal officials and military authorities should investigate and prosecute those involved in a conspiracy or complicity to commit torture.**

- Federal officials and military authorities should investigate individuals who may have been involved in acts that could amount to aiding and abetting or conspiracy to torture. Such investigations should include examination of officials involved in activities that could amount to aiding and abetting or conspiracy to torture, and should not be focused on only those lower level officials carrying out extraordinary renditions or other extra-legal transfers.
- Following such investigations, federal prosecutors and military officials should prosecute individuals concerning whom sufficient evidence exists to indict for aiding and abetting or conspiracy to torture.
- The United States should ensure that civil or military personnel involved in the custody, interrogation and treatment of any detainees be adequately trained and supervised in implementing the prohibition against torture and *refoulement*.