

**EXTRAORDINARY RENDITION: A CHALLENGE TO  
CANADIAN AND UNITED STATES LEGAL OBLIGATIONS  
UNDER THE CONVENTION AGAINST TORTURE**

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*“Let us be clear: torture can never be an instrument to fight terror, for torture is an instrument of terror.”<sup>1</sup>*

– Kofi Annan

## I. INTRODUCTION

Since the terrorist attacks on the United States in September 2001, western nations have justified acts of torture, made possible by the use of extraordinary rendition, as necessary measures in the War on Terror.<sup>2</sup> Governments use torture to destroy the physical and emotional well-being of a person in order to secure intelligence information.<sup>3</sup> The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>4</sup> contains an absolute prohibition against torture.<sup>5</sup> Therefore, countries that are

1. Kofi Annan, U.N. Sec’y Gen., Message for Human Rights Day (Dec. 10, 2005).

2. Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1215-16 (2007).

3. See U.N. HIGH COMM’R FOR HUMAN RIGHTS, MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: ISTANBUL PROTOCOL, U.N. Doc. HR/P/PT/8, U.N. Sales No. E.01.XIV.1 (1999), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/DPAL5ZLDT7/\\$file/8istprot.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/DPAL5ZLDT7/$file/8istprot.pdf?openelement).

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 113 [hereinafter CAT].

5. CAT, *supra* note 4, art. 2. The CAT further states that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to

parties to the CAT need to identify and implement effective measures to protect individuals in their custody from torture.<sup>6</sup> These countries must also respect international obligations to refrain from torture or extraordinary rendition to a country where torture is likely to occur.<sup>7</sup>

Maher Arar, a Canadian citizen, was the subject of a highly publicized case of extraordinary rendition and a Commission of Inquiry.<sup>8</sup> The Arar Commission concluded that Canadian intelligence officials provided questionable information to their U.S. counterparts, which led to Arar's rendition to Syria following a routine stopover in the United States.<sup>9</sup> The Arar case highlights the concern that certain countries are failing to comply with their domestic and international obligations not to participate in extraordinary rendition. The Iacobucci report, which reviewed Canada's role in the extraordinary rendition of several Canadians, also highlighted these violations.<sup>10</sup> This report found that the sharing of flawed intelligence with the United States had contributed indirectly to the Canadians' plight.<sup>11</sup>

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torture." *Id.* art. 3.

6. *Id.* art 2.

7. *Id.* art. 3.

8. See COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND (2006) [hereinafter ARAR COMM'N, FACTUAL BACKGROUND]; COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS (2006) [hereinafter ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS].

9. ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 13-14.

10. FRANK IACOBUCCI, INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN (2008).

11. *Id.* at 375. In conducting this inquiry, Justice Iacobucci was required to determine two issues. *Id.* at 333. First, whether the detentions of Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin in Syria and Egypt "resulted, directly or indirectly, from actions of Canadian officials, particularly in relation to the sharing of information with foreign countries" and, if so, whether those actions were "deficient in the circumstances." *Id.* Then, Justice Iacobucci was required to determine "whether there were any deficiencies in the consular services provided to the three men while they were detained in Syria or Egypt." *Id.* Further, Justice Iacobucci explained that he used the following tests in making his findings:

In determining whether the detention or mistreatment of the three men resulted, directly or indirectly, from the actions of Canadian officials, I

This Article critically examines the use of extraordinary rendition by Canadian and U.S. officials, who have acted in clear violation of the CAT. Part II examines Canadian and U.S. obligations under this statute, as well as the origins of extraordinary rendition and reliance on diplomatic assurances. Part III examines the meaning of torture under the CAT and its *jus cogens* norms. Part IV uses the rendition of Maher Arar to evaluate Canadian and U.S. obligations under the CAT, as well as the customary international law of *non-refoulement*. Part V explores the legal framework of extraordinary rendition and suggests possible areas of reform that would safeguard against torture.

## II. EXTRAORDINARY RENDITION

### A. Extradition

Initially, the surrender of individuals for criminal prosecution to another jurisdiction was based on principles of comity and reciprocity, but it became the subject of many extradition treaties between states in the latter part of the eighteenth century.<sup>12</sup> Extradition consists of one country surrendering, or rendering, an individual within its jurisdiction to another country.<sup>13</sup> This is done through extradition treaties, which create a formal legal process outlined in the respective statutes of each country.<sup>14</sup>

Through this process suspected terrorists may be transferred to other states, where they may be arrested and detained for questioning

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have asked whether, on a consideration of all the evidence and the rational inferences to be drawn from it, the actions can be said to have likely contributed to the detention or mistreatment of the individual concerned. . . . The term “deficiency” . . . should be given its ordinary meaning of conduct falling short of a norm. In the context of this Inquiry, any of the following three types of actions can constitute a deficiency:

- (a) failing to meet a standard or norm that existed at the time;
- (b) failing to establish a standard or norm when there should have been one; and
- (c) maintaining a standard or norm that was itself deficient.

*Id.* at 343.

12. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE 1 n.1 (2007) [hereinafter GARCIA, RENDITIONS].

13. *Id.* at 1.

14. *See id.*

within an accepted judicial framework.<sup>15</sup> For example, the United States or Canada may transfer persons facing charges of terrorism or other criminal offenses to a country with which the United States or Canada has an extradition treaty, in order to stand trial and face judicial consequences.<sup>16</sup>

*B. The Practice of Extraordinary Rendition*<sup>17</sup>

“The terms ‘irregular rendition’ and ‘extraordinary rendition’ have been used to refer to the *extrajudicial* transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation.”<sup>18</sup> Since 9/11 and the subsequent U.S. War on Terror, the perfectly legal practice of extraditing prisoners to other countries has been replaced by the illegal practice of extraordinary rendition.<sup>19</sup> Extraordinary rendition consists of transferring suspects from one state to another in violation of treaty obligations and domestic judicial mechanisms.<sup>20</sup> In general, suspects being transferred have “no access to the judicial system of the sending State by which they may challenge their transfer.”<sup>21</sup>

Both Canada and the United States can judicially extradite individuals suspected of terrorist acts to the individuals’ countries of origin.<sup>22</sup> However, the transfer of any individual for the purpose of torture is a clear violation of international law and strictly prohibited under Article 3 of the CAT.<sup>23</sup>

The nature of extraordinary rendition has evolved in tandem with the procedural framework.<sup>24</sup> Prior to 9/11, the United States had firm

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15. *Id.* at 1.

16. *Id.* at 1-2.

17. For the purposes of this Article, the terms “rendition” and “extraordinary rendition” will be used interchangeably.

18. GARCIA, RENDITIONS, *supra* note 12, at 1.

19. Isaac A. Linnartz, Note, *The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1487 (2008).

20. GARCIA, RENDITIONS, *supra* note 12, at 1-2.

21. *Id.*

22. *Id.* at 6; Extradition Act, 1999 S.C., ch.18 (Can.).

23. CAT, *supra* note 4, art. 3.

24. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the*

guidelines that governed the rendition process.<sup>25</sup> “First, the receiving country had to have issued an arrest warrant for the person” who was being rendered.<sup>26</sup> Then, “the administration scrutinized each rendition before senior government officials granted approval.”<sup>27</sup> U.S. government officials from the Central Intelligence Agency (CIA), would notify “the local government, and obtain[] an assurance from the receiving government that it would not [harm] the individual.”<sup>28</sup> Following 9/11, the U.S. rendition program is reported to have expanded with approval from the executive branch.<sup>29</sup>

After 9/11, U.S. officials detained several terrorist suspects and subsequently transferred them to other countries where they were subjected to interrogation and torture.<sup>30</sup> For example, if the appropriate procedures had been followed in Maher Arar’s case, he would have been returned to Canada where he lived with his family. Instead, the United States rendered Maher Arar to Syria, his country of origin.<sup>31</sup>

According to the U.S. State Department, Syria is a country involved in terrorist activities.<sup>32</sup> The State Department has issued a high security travel warning for Syria and has discouraged travel there.<sup>33</sup> In a 2002 report on human rights practices in Syria, the State Department stated that, “there was credible evidence that [Syrian] security forces continued to use torture.”<sup>34</sup> The report further noted that torture in Syrian prisons was “most likely to occur while detainees were being held at one of the many detention centers run by

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*Torture Convention*, 46 VA. J. INT’L L. 585, 589 (2006).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 589-90.

30. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005.

31. ARAR COMM’N, FACTUAL BACKGROUND, *supra* note 8, at 175-76.

32. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, TRAVEL WARNING: SYRIA (2008).

33. *Id.*

34. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2002: SYRIA (2003).

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the various security services throughout the country, especially while the authorities were attempting to extract a confession or information.”<sup>35</sup>

Maher Arar has stated that Syrian officials tortured him in an attempt to extract information from him.<sup>36</sup> In Arar’s situation, Canadian and U.S. regulations that implement the CAT failed to protect him from the very kind torture the U.S. government knew Syria administered.<sup>37</sup>

Despite the State Department’s profile on Syria, the Department of Homeland Security did not hesitate to render Arar to Syrian authorities.<sup>38</sup> This however, does not comport with the United States’ obligations under the CAT.<sup>39</sup>

In 2006, the Secretary General of Amnesty International, Irene Khan, described extraordinary rendition as a “callous and calculated multiplicity of [human rights] abuses.”<sup>40</sup> In her view, the term extraordinary rendition, “sanitises [sic] the multiple layers of human rights violations involved . . . [and most] victims of rendition were arrested and detained illegally in the first place. Many were abducted, denied access to any legal process and have subsequently ‘disappeared.’”<sup>41</sup>

In 2005 and 2007, the U.K. House of Commons Intelligence and Security Committee issued reports on rendition.<sup>42</sup> The 2005 report

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35. *Id.*

36. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 254-55 (E.D.N.Y. 2006).

37. Linnartz, *supra* note 19, at 1510.

38. *See* ARAR COMM’N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 14.

39. *See* CAT, *supra* note 4, art. 20. The United States ratified the CAT on October 21, 1994, and Canada ratified it on June 24, 1987. U.N. High Comm’r for Human Rights, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Status of Ratifications* (2008), <http://www2.ohchr.org/English/bodies/ratification/9.htm> (last visited Jan. 6, 2009) [hereinafter *Status of Ratifications*].

40. Amnesty Int’l, *USA: Front Companies Used in Secret Flights to Torture and “Disappearance,”* AMR 51/054/2006, Apr. 5, 2006 (citing Irene Khan, Sec’y Gen. of Amnesty Int’l). Khan stated that those who were captured “have been subjected to a range of abuses of human rights by a number of governments acting in collusion, and all of this has been shrouded by secrecy and deceit.” *Id.*

41. *Id.*

42. ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION,

defined extraordinary rendition as the “transfer of an individual, with the involvement of the U.S. 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>43</sup> The 2007 report defined rendition as “numerous variations of extra-judicial transfer such as: to countries where the person is wanted for trial; to countries where the individual can be adequately interrogated; transfer for the purposes of prolonged detention; and military transfer of battlefield detainees.”<sup>44</sup> Despite repeated concerns expressed by various international human rights groups regarding the flagrant violation of international law and norms,<sup>45</sup> U.S. government officials claim extraordinary rendition saves lives because it produces intelligence information and is defensible under international law.<sup>46</sup> Many argue that the “actions are carried out with the assistance and consent of the States concerned” and therefore meet U.S. international obligations under the CAT.<sup>47</sup>

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BRIEFING: TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” (2005), *available at* [http://statewatch.org/news/2005/dec/CHRGJ\\_rendition.pdf](http://statewatch.org/news/2005/dec/CHRGJ_rendition.pdf) [hereinafter ALL PARTY, TORTURE BY PROXY]; *see also* INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, Cm. 7171, *available at* <http://fas.org/irp/world/uk/rendition.pdf>.

43. ALL PARTY, TORTURE BY PROXY, *supra* note 42, at 6.

44. INTELLIGENCE AND SECURITY COMMITTEE, *supra* note 42, at 6. The European Parliament has also defined extraordinary rendition similarly. EUR. PARL. DOC. (A6-0020/2007) (2007) [hereinafter EUR. PARL. DOC.]. For example, the report states that this extra-judicial practice “contravenes established international human rights standards [and occurs when] an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of U.S. officials and/or transported to another country for interrogation which, in the majority of cases, involves *incommunicado* detention and torture.” EUR. PARL. DOC., *supra*, ¶ 36.

45. Andrew Byrnes, *More Law or Less Law? The Resilience of Human Rights Law and Institutions in the “War on Terror,”* in FRESH PERSPECTIVES ON THE “WAR ON TERROR” 127, 151-52 (Miriam Gani & Penelope Mathew eds., 2008), *available at* [http://epress.anu.edu.au/war\\_terror/pdf/ch08.pdf](http://epress.anu.edu.au/war_terror/pdf/ch08.pdf).

46. MARY CRANE, COUNCIL ON FOREIGN REL., U.S. TREATMENT OF TERROR SUSPECTS AND U.S.–E.U. RELATIONS (2005), <http://www.cfr.org/publication/9350/>; *see generally* MIRKO BAGARIC & JULIE CLARKE, TORTURE: WHEN THE UNTHINKABLE IS MORALLY PERMISSIBLE (2007).

47. *See* Matteo M. Winkler, *When “Extraordinary” Means Illegal: International Law and the European Reactions to the United States Rendition Program*, in YALE LAW SCHOOL STUDENT SCHOLARSHIP SERIES, at Abstract (2007).

However, the humanitarian rationale that torture is acceptable because it could result in lifesaving information distorts “its inherent cruelty, tyrannical nature, and disregard for human dignity.”<sup>48</sup> Torture may also yield false confessions.<sup>49</sup> Nevertheless, since 9/11 this rationale has “become more prominent given the attention paid to terrorism as a national security threat.”<sup>50</sup> Further, academics such as Alan Dershowitz argue that torture can be justified because it “*sometimes* works, even if it does not always work.”<sup>51</sup> Such reasoning makes the implementation of international prohibitions on torture even more difficult.<sup>52</sup>

### *C. Rendition by the United States*

Many believe that the U.S. government has practiced rendition for more than twenty years.<sup>53</sup> “The rendition of terrorist suspects to other countries was reportedly first authorized by President Ronald Regan [sic] in 1986. Over time the practice became more organized, and by 1997, the CIA Counterterrorism Unit had established its own Renditions Branch.”<sup>54</sup>

Although the practice of rendition still remains “shrouded in the deepest secrecy,” both the Reagan and Clinton Administrations used rendition “to transfer drug lords and terrorists to the United States or other countries for military or criminal trials.”<sup>55</sup> Former CIA Director George Tenet testified that prior to 9/11 the CIA was allowed to render approximately seventy terrorists to other jurisdictions around the world.<sup>56</sup> After 9/11, former President George W. Bush apparently

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48. Linnartz, *supra* note 19, at 1508.

49. *Id.* at 1509.

50. *Id.* at 1508-09.

51. *Id.* at 1509 (quoting ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 137 (2002)).

52. *Id.* at 1509-10.

53. GARCIA, *RENDITIONS*, *supra* note 12, at 5.

54. LAURA BARNETT, *EXTRAORDINARY RENDITION: INTERNATIONAL LAW AND THE PROHIBITION OF TORTURE* (rev. July 17, 2008), <http://www.parl.gc.ca/information/library/PRBpubs/prb0748-e.htm>.

55. Dana Priest, *CIA's Assurances on Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005.

56. *Joint Investigation Into September 11th: Ninth Public Hearing, Written*

signed a classified directive allowing renditions.<sup>57</sup> Some reports estimate that since that directive, the United States has rendered approximately 100 individuals.<sup>58</sup>

Following 9/11, there has been much controversy over allegations of extraordinary rendition by the U.S. government to countries that are known to practice torture, including Egypt, Jordan, Morocco, and Syria.<sup>59</sup> The Bush Administration did not deny that the United States engaged in the practice of rendition, but claimed that it sought diplomatic assurances before individuals were rendered to a given country.<sup>60</sup>

Extradition procedures in the United States are governed by 18 U.S.C. § 3184<sup>61</sup> and 18 U.S.C. § 3181.<sup>62</sup> “Before the United States may extradite a person to another State, an extradition hearing must be held before an authorized judge or magistrate [to determine] whether the person’s extradition would comply with the terms of the extradition treaty between the United States and the requesting State.”<sup>63</sup> However, foreign nationals will not receive these protections if they are being removed for immigration purposes.<sup>64</sup>

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*Statement for the Record of the Director of Central Intelligence Before the J. Inquiry Comm.*, 107th Cong. (2002) (statement of George J. Tenet, Director of Central Intelligence), available at [http://www.fas.org/irp/congress/2002\\_hr/101702\\_tenet.html](http://www.fas.org/irp/congress/2002_hr/101702_tenet.html).

57. Amnesty Int’l, *United States of America: Below the Radar: Secret Flights to Torture and “Disappearance,”* AI Index AMR 51/051/2006, Apr. 5, 2006, at 6.

58. Priest, *supra* note 55. The expansion of CIA authority by presidential directives has rendered individuals “from one country to another without legal proceedings and without providing access to the International Committee of the Red Cross, a right afforded all prisoners held by the U.S. military.” *Id.*

59. MICHAEL WELCH, *SCAPEGOATS OF SEPTEMBER 11TH: HATE CRIMES & STATE CRIMES IN THE WAR ON TERROR* 167 (2006).

60. *See* SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE, art. 2, ¶ 33 (2005).

61. 18 U.S.C. § 3184 (2002).

62. 18 U.S.C. § 3181 (2002). This statute “prohibits the extradition of individuals . . . in the absence of a treaty.” GARCIA, *RENDITIONS*, *supra* note 12, at 1 n.3.

63. GARCIA, *RENDITIONS*, *supra* note 12, at 2 n.5.

64. *Id.* According to legislative attorney Michael John Garcia, aside from irregular rendition and extradition,

aliens present or attempting to enter the United States may be removed to another State under U.S. immigration laws, if such aliens are either

Individuals subject to extraordinary rendition “have no access to the judicial system of the sending State by which they may challenge their transfer.”<sup>65</sup> Hence, by rendering terrorist suspects to another country, the United States seeks to avoid domestic criminal investigations and prosecutions.<sup>66</sup>

Although former President George W. Bush denied that rendition serves the purpose of facilitating torture, he nevertheless “argued that captured terrorists are a vital source of intelligence about terrorist organizations and operations.”<sup>67</sup> Former U.S. Secretary of State Condoleezza Rice reiterated this position.<sup>68</sup> The importance placed on gathering intelligence information raises concerns that the United States would condone interrogational torture.

#### *D. Torture by Proxy*

States have attempted to evade their international obligations under the CAT by extraditing terrorist suspects to countries that condone torture, which can be characterized as “torture by proxy.”<sup>69</sup> The U.S. government has been accused of initiating many renditions in order to facilitate the extreme interrogation of suspects, which includes the use of torture.<sup>70</sup> However, the use of torture in an interrogation is strictly prohibited in the CAT.<sup>71</sup>

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deportable or inadmissible and their removal complies with relevant statutory provisions. Unlike in the case of rendition and extradition, the . . . deportation or denial of entry is not so that he can answer charges against him in the receiving State; rather, it is because the U.S. possesses the sovereign authority to determine which non-nationals may enter or remain within its borders, and the alien fails to fulfill the legal criteria allowing non-citizens to enter, [or] remain in . . . the United States.

*Id.* at 3.

65. *Id.* at 1-2.

66. Weissbrodt & Bergquist, *supra* note 24, at 596 (noting that “rendition is not designed for criminal prosecution”).

67. Linnartz, *supra* note 19, at 1494.

68. *Id.*

69. ASS’N OF THE BAR OF THE CITY OF NEW YORK & CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 23 (2004) [hereinafter ASS’N OF THE BAR, TORTURE BY PROXY].

70. See *Double Jeopardy: CIA Renditions to Jordan*, HUMAN RIGHTS WATCH, Apr. 2008, available at <http://www.hrw.org/en/reports/2008/04/07double-jeopardy>.

As signatories of the CAT, Canada and the United States have agreed not to participate in any outsourcing of torture to countries that are known to practice cruel, degrading, or inhuman techniques of interrogation.<sup>72</sup> The CAT prohibits the expulsion, return, or extradition of “a person [within its jurisdiction] to another State where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture.”<sup>73</sup> The United States and Canada, therefore, are clearly violating their legal obligations under the CAT.

#### *E. U.S. Obligations Under the CAT*

The removal or extradition of all individuals from the United States must be consistent with U.S. obligations under the CAT.<sup>74</sup> In support of Article 3 of the CAT, the U.S. Congress enacted legislation that prohibits the transfer of individuals to foreign countries where they may be tortured.<sup>75</sup> Foremost among these legislative enactments, the Foreign Affairs Reform and Restructuring Act (FARRA) requires the heads of the appropriate agencies and departments to implement the United States’ obligations under Article 3 of the CAT.<sup>76</sup> The FARRA gave effect to the CAT by providing as follows:

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In a report on rendition, the U.S. television news program 60 Minutes noted that “well over 100 people have disappeared or been ‘rendered’ all around the world. Witnesses tell the same story: masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him and fly him away.” Rebecca Leung, *CIA Flying Suspects to Torture?*, CBS NEWS, Mar. 6, 2005, <http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml>.

71. CAT, *supra* note 4, arts. 1-2.

72. *Id.* art. 3.

73. *Id.* In order to determine whether there are “substantial grounds” to believe a person is in danger of being tortured, the CAT directs that “competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” *Id.*

74. CAT, *supra* note 4; *see also* GARCIA, RENDITIONS, *supra* note 12, at 7.

75. *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 (2000).

76. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, § 2242(b), 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 (2006)); *see also* CAT, *supra* note 4, art. 3.

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.<sup>77</sup>

An order may then be denied if “the immigration judge determines that the [person] is more likely than not to be tortured in the country of removal.”<sup>78</sup> However, given the number of reported cases of extraordinary rendition, it is highly doubtful that such an application of the CAT to domestic law would be effective in preventing extraordinary renditions undertaken to facilitate interrogational torture.<sup>79</sup>

Persons residing in the United States receive a greater degree of protection than non-residents whom the United States deems inadmissible on security or related grounds, such as terrorism.<sup>80</sup> Moreover, in deciding whether or not to remove an individual to a particular country, U.S. laws permit the consideration of diplomatic assurance that the person will not be tortured in that country.<sup>81</sup>

The United States has ratified many international conventions banning torture,<sup>82</sup> but it entered into the CAT subject to certain reservations and declarations.<sup>83</sup> Specifically, Article 3 of the CAT applies when there are “substantial grounds for believing that [a person] would be in danger of being subjected to torture,”<sup>84</sup> but the

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77. § 2242(a).

78. 8 C.F.R. § 208.16(c)(4) (2000).

79. See Linnartz, *supra* note 19, at 1496.

80. See GARCIA, RENDITIONS, *supra* note 12, at 4.

81. 8 C.F.R. § 208.18(c) (2000).

82. However, the United States has not ratified the Convention for the Protection of All Persons From Enforced Disappearance or the Rome Statute of the International Criminal Court. See International Convention for the Protection of All Persons From Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/Res/61/177 (Dec. 20, 2006); Rome Statute of the International Criminal Court, U.N. Doc A/CONF.183/9\* (July 17, 1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> [hereinafter ICC Statute].

83. MICHAEL JOHN GARCIA, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 4-6 (2004) [hereinafter GARCIA, OVERVIEW OF U.S. POLICY].

84. CAT, *supra* note 4, art. 3.

United States limited application to when it is “more likely than not” that an individual would be tortured if transferred to another country.<sup>85</sup>

Under the CAT, the United States is responsible for the conduct of its agencies and departments.<sup>86</sup> Many U.S. government agencies are believed to have participated in the extraordinary rendition process, including the Federal Bureau of Investigation (FBI), the Central Intelligence Agency, the Department of Homeland Security, and the Department of Defense.<sup>87</sup> Clearly, then, the issue of extraordinary rendition extends across various departments of the U.S. government.

#### *F. Canadian Legal Obligations to Prevent Torture*

Although most western states have expressed concerns about the threat that extraordinary rendition poses to the terms of the CAT, there is evidence to suggest that the intelligence agencies of some of these states have participated in conducting extraordinary renditions.<sup>88</sup> The rendition of Maher Arar is one example of such conduct.<sup>89</sup>

The circumstances surrounding Arar’s rendition to Syria were the subject of a Commission of Inquiry directed by the Canadian government.<sup>90</sup> The Arar Commission concluded that both the Canadian and U.S. officials failed to meet their domestic and international obligations under Article 3 of the CAT and violated the principle of *non-refoulement* by their conduct in relation to the extraordinary rendition of Arar.<sup>91</sup> In particular, these countries shared prejudicial or compromising information that would likely have been

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85. GARCIA, OVERVIEW OF U.S. POLICY, *supra* note 83, at 6.

86. CAT, *supra* note 4, art. 2.

87. ASS’N OF THE BAR, TORTURE BY PROXY, *supra* note 69, at 9-15, 18.

88. Eur. Parl. Ass., *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, 52nd Sess., Doc. No. 10957, at 59 (2006), available at <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>.

89. ARAR COMM’N, FACTUAL BACKGROUND, *supra* note 8.

90. *Id.*; ARAR COMM’N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8. The Arar Commission was led by the Honorable Dennis O’Connor, Associate Chief Justice for the Court of Appeal of Ontario. See ARAR COMM’N, FACTUAL BACKGROUND, *supra* note 8.

91. ARAR COMM’N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 13-16.

deemed inadmissible in any sort of proper judicial hearing and which contributed directly to Arar's extraordinary rendition.<sup>92</sup>

Since 9/11, Canada and the United States have discernibly increased the extent to which they engage in cross-border intelligence sharing in order to deal with terrorist threats.<sup>93</sup> The two countries have also enacted several "harmonization initiatives" undertaken together with agreements to increase security.<sup>94</sup> While these measures were intended to respect Canadian obligations under the CAT, they also have the potential to erode human rights.<sup>95</sup>

International law requires states to conform their domestic laws to international agreements.<sup>96</sup> International law also requires parties to sign and ratify treaties in good faith.<sup>97</sup> The Canadian government,

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92. *Id.*; see also ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 91.

93. See WESLEY K. WARK, CANADIAN HUMAN RIGHTS COMM'N, NATIONAL SECURITY AND HUMAN RIGHTS CONCERNS IN CANADA: A SURVEY OF EIGHT CRITICAL ISSUES IN THE POST-9/11 ENVIRONMENT 6 (2006), *available at* [http://www.chrc-ccdp.ca/pdf/ns\\_sn\\_en.pdf](http://www.chrc-ccdp.ca/pdf/ns_sn_en.pdf).

94. *Id.* at 6-7.

95. *Id.* at 6. "The most contentious matter to arise out of harmonization efforts on bilateral security has been the Safe Third Country Agreement. The Safe Third Country Agreement was built into the Smart Border Action Plan and changes the system for handling refugee claims at the Canada-U.S. land border." *Id.* at 7.

Deeper structural changes occurred in December 2003. The new Liberal leader, Paul Martin announced some sweeping changes to national security organizations in Canada, including the creation of a new federal government department, Public Safety and Emergency Preparedness (PSEPC), the establishment of the position of National Security Advisor to the Prime Minister in the Privy Council Office, and the inauguration of the Canada Border Services Agency (CBSA), which took on board legacy functions from Citizenship and Immigration Canada, the Canada Customs and Revenue Agency, and the Canadian Food Inspection Agency. At the same time the Office of Critical Infrastructure Protection and Emergency Preparedness (OCIPEP), originally created to tackle concerns about computer system failures at the turn of the millennium, was moved from the Department of National Defence to the new department, PSEPC. These changes collectively signaled a new and unprecedented priority for national security in the Canadian federal government.

*Id.* at 21.

96. Vienna Convention on the Law of Treaties arts. 26, 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

97. *Id.*

therefore, has an obligation to ensure that its domestic laws conform fully to the treaties it signs and ratifies, including the CAT.<sup>98</sup>

The definition of torture under the Canadian Criminal Code is essentially the same as the language in Article 1 of the CAT.<sup>99</sup> Moreover, section 269.1 of the Criminal Code provides that an official “who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”<sup>100</sup> Canada enacted this provision in response to Article 16 of the CAT. According to Article 16, countries must “undertake to prevent [and investigate any] acts of cruel, inhuman or degrading treatment or punishment . . . [by] public official[s] or . . . person[s] acting in an official capacity.”<sup>101</sup>

In 2000, the Canadian Parliament enacted the Crimes Against Humanity and War Crimes Act, which defines torture as both a war crime and a crime against humanity.<sup>102</sup> This statute uses the same language as Article 7 of the International Criminal Court’s Rome Statute (ICC Statute) regarding crimes against humanity.<sup>103</sup> Article 7 of the ICC Statute defines crimes against humanity to include acts such as torture and “enforced disappearance of persons” only “when committed as part of a widespread or systematic attack directed against any civilian population.”<sup>104</sup> Torture is defined as the “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the

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98. Canada is a signatory to the CAT. *See* Status of Ratifications, *supra* note 39.

99. *Compare* Canada Criminal Code, R.S.C., ch. C-46, § 269.1(2) (1985), available at <http://laws.justice.gc.ca/en/PDF/C-46.pdf> with CAT, *supra* note 4, art. 1.

100. § 269.1(1).

101. CAT, *supra* note 4, art. 16.

102. Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24, § 4(3) (Can.), available at <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-45.9//en>.

103. *Compare id.* with ICC Statute, *supra* note 82, at Part II, art. 7. The Rome Statute creating the ICC was adopted by a Meeting of Plenipotentiaries on July 17, 1998. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc A/CONF.183/10 (July 17, 1998). The ICC came into being on July 1, 2002, upon the sixtieth ratification by a signatory state. United Nations, Rome Statute of the International Criminal Court, <http://untreaty.un.org/cod/icc/index.html>.

104. ICC Statute, *supra* note 82, at Part II, art. 7(1).

accused; except that torture [does] not include pain or suffering arising only from . . . lawful sanctions.”<sup>105</sup> The “enforced disappearance of persons” is defined in Article 7 as

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>106</sup>

Through these provisions in the Criminal Code and the Crimes Against Humanity and War Crimes Act, Canadian domestic law clearly recognizes the need to conform to international law and the bans on all forms of torture. Moreover, Canada’s Immigration and Refugee Protection Act<sup>107</sup> provides that persons whose refugee claims have been denied are not to be deported to countries where they may be tortured.<sup>108</sup> This is consistent with the international law principle of *non-refoulement*, whereby a country should not remove a person where there is a risk of being tortured.<sup>109</sup>

In the aftermath of 9/11, Canada introduced new legislation in response to terrorist threats, including an Anti-Terrorism Act.<sup>110</sup>

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105. *Id.* at Part II, art. 7(2)(e).

106. *Id.* at Part II, art. 7(2)(i).

107. The Immigration and Refugee Protection Act, 2001 S.C., ch. 27 (Can.), available at <http://laws.justice.gc.ca/en/I-2.5/>. The Immigration and Refugee Protection Act (IRPA) received Royal Assent on November 1, 2001, and entered into force in 2002. *Id.*

108. *Id.* ¶ 97. The IRPA takes four factors into account when determining whether a person is in need of protection:

(a) whether the country is a party to the Refugee Convention and to the Convention Against Torture; (b) its policies and practices with respect to claims under [each of those Conventions]; (c) its human rights record; and (d) whether it is party to an agreement with . . . Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

*Id.* ¶ 102(2).

109. See CAT, *supra* note 4, art. 3.

110. Anti-Terrorism Act, R.S., ch. C-36 (Can.), available at <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=n&StartList=a&EndList=z&Session=9&Type=0&Scope=i&query=2981&List=toc-1>; see also

Canada designed this complex statute to combat terrorist activity both domestically and internationally.<sup>111</sup> Canada also enacted the United Nations Act, which empowers the executive branch to make regulations that give effect to decisions of the U.N. Security Council.<sup>112</sup> This ensures that Canada will recognize any individual or group that the United Nations identifies as a terrorist.<sup>113</sup>

Notwithstanding all the affirmative actions Canada has taken, the Arar situation demonstrates that merely enacting legislation to prohibit torture is insufficient. Rather, there must also be careful monitoring for compliance with this legislation to ensure that extraordinary rendition does not take place.

### *G. Deportation From Canada and the Risk of Torture*

The Canadian government determined that “it may deport people [within its jurisdiction to countries where they may be in] danger of torture, despite the absolute prohibition contained in Article 3 of the Convention [A]gainst Torture.”<sup>114</sup> The government based this position on a 2002 decision from the Supreme Court of Canada, *Suresh v. Canada*, in which the court suggested “that in exceptional circumstances, deportation to face torture might be justified.”<sup>115</sup>

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Parliamentary Review of the Anti-Terrorism Act, <http://Canada.Justice.gc.ca/eng/antiter/> (last visited Apr. 1, 2009) [hereinafter Parliamentary Review]. “The Anti-Terrorism Act (ATA) is one of several pieces of legislation that form the [g]overnment of Canada’s overall anti-terrorism strategy.” Parliamentary Review, *supra*. The Act received Royal Assent on December 18, 2001. *Id.*

111. Parliamentary Review, *supra* note 110.

112. United Nations Act, 1985 R.S., ch. U-2, art. 2 (Can.), available at <http://laws.justice.gc.ca/en/U-2/text.html>.

113. Reem Bahdi, *No Exit: Racial Profiling and Canada’s War Against Terrorism*, 41 OSGOODE HALL L.J. 293, 300 (2003); see also Kent Roach, *What Has Been the Impact of the Anti-Terrorism Act on Canada?*, in DEP’T OF JUSTICE, THE VIEWS OF CANADIAN SCHOLARS ON THE IMPACT OF THE ANTI-TERRORISM ACT, app. A, § 5.1 (2004).

114. Canadian Council for Refugees, *Comments on Canada’s Compliance With Article 3 of the Convention Against Torture*, § 7, <http://ccrweb.ca/catcompliance.html> (last visited Apr. 1, 2009). Canadian Council for Refugees (CCR) and other leading Canadian NGO’s have criticized this policy of extraordinary rendition. See *id.*

115. *Suresh v. Canada*, [2002] 1 S.C.R. 3, 2002 SCC 1, ¶ 78 (Can.), available at <http://csc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html>; see also

Because of this decision, “Department of Justice lawyers have in a number of cases sought to invoke the generalized ‘war on terrorism’ as exceptional circumstances sufficient to justify refoulement.”<sup>116</sup> In addition, “[Canadian] government lawyers consistently seek to undermine the status of the Convention Against Torture and other human rights treaties to which Canada is a party by arguing that they are not bound to comply with them.”<sup>117</sup>

#### *H. Reliance Upon Diplomatic Assurances*

States participating in extraordinary renditions may obtain assurances from the countries to which they are rendering individuals that these individuals will not be tortured.<sup>118</sup> The states will then rely upon such assurances to justify their decisions to send detainees to these countries.<sup>119</sup> However, any state that deports a person to a state known to torture detainees violates international law, regardless of whether diplomatic assurances are obtained from the country to which the person is being deported.<sup>120</sup> Further, the reality is that such assurances do not prevent those who are rendered from being tortured, and there exists no mechanism to ensure compliance.<sup>121</sup>

Assurances from states known to torture are neither effective nor reliable.<sup>122</sup> For example, some believe that a totalitarian regime’s diplomatic assurance to refrain from torturing detainees is of little or no value and states cannot rely on it for the purpose of Article 3 of the

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Canadian Council for Refugees, *supra* note 114, § 7 (suggesting that this position is based on the Supreme Court case, *Suresh v. Canada*).

116. Canadian Council for Refugees, *supra* note 114, § 7.

117. *Id.*

118. GARCIA, RENDITIONS, *supra* note 12, at 11.

119. *Id.*

120. *See* CAT, *supra* note 4, art. 3.

121. For example, a recent report by Human Rights Watch examined a number of cases involving diplomatic assurances against torture and seemed to suggest that reliance upon these diplomatic assurances is not a satisfactory method of protecting the detainee. *See Cases Involving Diplomatic Assurances Against Torture: Developments Since May 2005*, HUMAN RIGHTS WATCH, Jan. 2007, <http://www.hrw.org/en/node/77209/section/1>.

122. Human Rights Watch, “Diplomatic Assurances” Against Torture: Questions and Answers, <http://www.hrw.org/legacy/background/eca/ecaqna1106/index.htm> (last visited Apr. 1, 2009).

CAT.<sup>123</sup> In Maher Arar's case, Syria made assurances, however Arar was still tortured.<sup>124</sup> In addition, there are numerous examples in which individuals deported from Canada or the United States were subjected to unlawful physical harm, despite receiving state assurances to the contrary.<sup>125</sup>

Some may construe a mere reliance on these assurances, in and of itself, as an attempt to operate outside domestic and international law. If the receiving state has a history of using torture, then there is a high probability that the country will torture, regardless of the diplomatic assurances that are received.<sup>126</sup> In the case of Maher Arar, it would appear that the United States sought diplomatic assurances, at least in a superficial manner, prior to his removal; but he was being sent to Syria, where there was a high probability that he would be exposed to torture.<sup>127</sup>

### III. THE CONVENTION AGAINST TORTURE

#### A. Historical Framework

The U.N. General Assembly adopted the CAT on December 10, 1984,<sup>128</sup> and it was ratified by twenty countries on June 26, 1987.<sup>129</sup> By December 2008, 146 nations had ratified the CAT.<sup>130</sup> The CAT codifies and strengthens international norms against torture, requires states to take effective measures to prevent and end torture, and prohibits the return of persons to their countries of origin if there is reason to believe that they will be tortured.<sup>131</sup>

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123. *Id.*

124. ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 176.

125. *See Still at Risk: Diplomatic Assurances No Safeguard Against Torture, Developments Regarding Diplomatic Assurances Since April 2004*, HUMAN RIGHTS WATCH, Apr. 14, 2008, <http://www.hrw.org/en/reports/2005/04/14/still-risk?print>.

126. *See ASS'N OF THE BAR, TORTURE BY PROXY, supra* note 69, at 32.

127. ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 261.

128. CAT, *supra* note 4.

129. Status of Ratifications, *supra* note 39.

130. *Id.*

131. *See* CAT, *supra* note 4.

Under international customary law, this right is understood to be non-derogable and binding upon all states.<sup>132</sup> Even national security concerns such as terrorism would not justify acts of torture by a member state or an individual acting on behalf of the state.<sup>133</sup>

*B. Definition of Torture and the Principle of Non-Refoulement*

The CAT defines the term torture to mean any act by which

severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>134</sup>

This language restricts the application of the CAT to circumstances in which public officials either motivate or sanction torture.<sup>135</sup> Article 2 makes the absolute nature of the prohibition against torture very clear: under no circumstances is torture ever justified, whether it is “a state of war or a threat of war, internal political in stability or any other public emergency.”<sup>136</sup>

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132. U.N. Comm. Against Torture, *Statement of the Committee Against Torture*, U.N. Doc. CAT/C/XXVII/Misc.7 (Nov. 22, 2001).

133. Following the terrorist attacks on 9/11, the U.N. Committee Against Torture made a statement in which it reminded member states that they had a positive obligation to conform to the Convention. *Id.*

134. CAT, *supra* note 4, art. 1.

135. *Id.*

136. *Id.* art. 2. Additionally, Article 2 of the CAT provides as follows:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be

Article 3 provides that a state is not to return a person to another state “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture.”<sup>137</sup> In determining whether “substantial grounds” exist, the CAT directs state authorities to “take into account all relevant considerations, including . . . a consistent pattern of gross, flagrant or mass violations of human rights” in the receiving state.<sup>138</sup> Article 4 requires member states to ensure that all acts of torture, attempts to commit torture, and acts of complicity to engage in torture are offenses under domestic criminal law.<sup>139</sup> Member states are further required to enact “appropriate penalties” for these offenses.<sup>140</sup>

The absolute prohibition against torture has become accepted as a principle of customary international law since the CAT came into force. Moreover, given that it is often hard to differentiate between cruel, inhuman, or degrading treatment and torture, the Committee Against Torture regards the prohibition contained in Article 16 of the CAT as being similarly absolute and non-derogable.<sup>141</sup> Member states are also required to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official.”<sup>142</sup> According to the U.S. Senate, this distinction reflects the principle underlying the CAT—that torture

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invoked as a justification of torture.

*Id.*

137. *Id.* art. 3.

138. *Id.*

139. *Id.* art. 4.

140. *Id.* Article 4 of the CAT provides as follows:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

*Id.*

141. U.N. Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 3, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007).

142. CAT, *supra* note 4, art. 16.

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must be “severe” and requires a specific intent to cause severe pain and suffering.<sup>143</sup>

### *C. The Istanbul Protocol*

The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as the Istanbul Protocol, was submitted to the U.N. High Commissioner for Human Rights in 2000.<sup>144</sup> Both the U.N. General Assembly and the U.N. Commission on Human Rights have encouraged states to use the Protocol as a tool to combat torture.<sup>145</sup> According to the U.N. Commission on Human Rights, states should use the Protocol to severely punish those who commit or facilitate any acts of torture.<sup>146</sup> Although the Protocol is a non-binding document,<sup>147</sup> governments do have certain obligations under international law. These obligations include investigating all allegations of torture or other cruel, inhuman, or degrading treatment or punishment; documenting incidents of torture and other forms of ill-treatment; and punishing those responsible in a comprehensive, effective, prompt, and impartial manner.<sup>148</sup>

Extraordinary rendition is a clear violation of multiple treaties to which both Canada and the United States are signatories. These treaties explicitly preclude rendering detainees to torture, such that any act of extraordinary rendition constitutes a very serious breach of these treaty obligations.

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143. See GARCIA, OVERVIEW OF U.S. POLICY, *supra* note 83, at 5.

144. G.A. Res. 55/89, U.N. Doc. A/RES/55/89 (Feb. 22, 2001).

145. See U.N. Comm’n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Res. 2003/32 (Apr. 23, 2003).

146. *Id.* ¶ 8. The Commission stresses that the Istanbul Protocol clearly explain that individuals who “encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place.” *Id.*

147. *The Istanbul Protocol: A Guide to Documenting Torture*, International Rehabilitation Council for Torture Victims, *available at* [http://www.irct.org/Files/Filer/26June/2008/Istanbul\\_Protocol.pdf](http://www.irct.org/Files/Filer/26June/2008/Istanbul_Protocol.pdf).

148. International Rehabilitation Council for Torture Victims, *The Istanbul Protocol: Background and Purpose*, <http://www.irct.org/Background---purpose-2687.aspx> (last visited Apr. 1, 2009).

## IV. CASE STUDY: MAHER ARAR

A. *Factual Overview*

On September 26, 2002, U.S. authorities arrested Maher Arar on a routine stopover in New York while he was waiting for a connecting flight home to Canada.<sup>149</sup> Arar was born in Syria, but he lived in Canada for more than twenty years and was a Canadian citizen.<sup>150</sup> During the stopover in New York, he was detained by U.S. immigration officers and questioned by members of the New York City Police Department and the FBI for several days.<sup>151</sup>

Specifically, officials questioned Maher Arar about a rental application that he had signed, listing Abdullah Almalki, another Canadian citizen who was a suspected terrorist, as an emergency contact.<sup>152</sup> Canadian officials passed this information on to the United States.<sup>153</sup> Although Arar denied having any links to terrorist organizations in his interviews,<sup>154</sup> he was repeatedly denied requests to see a lawyer or to make a phone call.<sup>155</sup>

On the third day of Arar's detention, he was given a document stating that he was inadmissible to the United States under section 235(c) of the U.S. Immigration and Nationality Act.<sup>156</sup> Arar then signed a document requesting that he be returned to Canada, after Canadian consul, Maureen Girvan, told him that he would not be deported to Syria.<sup>157</sup>

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149. ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 149.

150. *Id.* at 53.

151. *Id.* at 192.

152. *Id.* at 55.

153. *Id.*

154. *Id.* at 205.

155. *Id.* at 271.

156. *Id.* at 204. The deportation order was signed by Larry Thompson, who at the time was the Deputy Attorney General of the United States and the second-highest official in the Justice Department. Katherine Hawkins, *Torturous Passage: The House Decided Not to Condone Torture—But That Hasn't Stopped It in the Past*, AM. PROSPECT (Oct. 20, 2004), available at <http://www.prospect.org/cs/articles?articleId=8794>.

157. ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 195.

The CAT provides that any person within a member state's custody "shall be assisted in communicating immediately with the nearest appropriate representative" from his or her government.<sup>158</sup> Therefore, because Arar was a Canadian citizen, the United States was required to inform Canada that Arar had been taken into custody and the circumstances that warranted his detention.<sup>159</sup> Arar was traveling under a Canadian passport, and if he was to be deported, the deportation should have been to Canada.<sup>160</sup> Instead, Arar was rendered to Jordan, where Jordanian authorities beat and interrogated him before turning him over to Syria.<sup>161</sup>

In all likelihood, the reason he was sent to Jordan and Syria, rather than Canada, was that Canadian officials did not have enough concrete substantive information to detain Arar. Hence, it was believed that the only way to obtain information about his suspected links to terrorist organizations was to send him to Syria.<sup>162</sup> Both U.S. and Canadian officials were complicit in the extraordinary rendition of Arar to Syria where torture was likely to occur, which put them in clear violation of Article 3 of the CAT.

Syrian officials interrogated and tortured Arar for ten months while he was held in a Syrian prison.<sup>163</sup> Arar eventually confessed to having links to terrorism and attending a training camp in Afghanistan, because he believed that such confessions might spare him from being subjected to further torture.<sup>164</sup>

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158. CAT, *supra* note 4, art. 6.

159. *Id.* art. 6. Article 6 states:

When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the [member] States . . . of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry . . . shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

*Id.* art. 6.

160. ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 200.

161. *Id.* at 174; ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 54.

162. *See* ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 176.

163. ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 54-57.

164. *See id.* at 56.

On August 14, 2003, during the Canadian consul's seventh visit to Arar in Syria, Arar finally informed the consul that he had been tortured.<sup>165</sup> Arar was released to the Canadian embassy on October 5, 2003.<sup>166</sup> Canadian intelligence officials provided the United States with what is now regarded as flawed information that Arar might be linked to terrorist cells.<sup>167</sup> "Upon his return to Canada, Mr. Arar was never charged with any crime; nor [was he] charged with any crime by the United States."<sup>168</sup>

The United States claimed Syria assured officials that Arar would not be subjected to torture, even though at that time, the U.S. State Department listed Syria as a haven for terrorists.<sup>169</sup> This case clearly demonstrates that receiving diplomatic assurance from a state that it will refrain from torturing a detainee is insufficient to meet member states' obligations under the CAT.

#### *B. The Arar Commission*

On February 4, 2008, the Canadian government established a Commission of Inquiry to investigate and report on the actions of Canadian officials in relation to Maher Arar.<sup>170</sup> The Commission's duties also included reviewing the procedures followed by the Royal Canadian Mounted Police (RCMP) regarding national security.<sup>171</sup>

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165. ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8, at 389 & n.1434.

166. *Id.* at 396.

167. Center for Constitutional Rights, *Arar v. Ashcroft et al.*, <http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft> (last visited Apr. 1, 2009) ("After nearly a year of confinement, Syrian authorities released Mr. Arar, publicly stating that they had found no connection to any criminal or terrorist organization or activity.").

168. *Id.*

169. *Rendition to Torture: The Case of Maher Arar: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary H.R.*, 110th Cong. 3 (2007); see also Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, *NEW YORKER*, Feb. 14, 2005, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6).

170. See generally ARAR COMM'N, FACTUAL BACKGROUND, *supra* note 8; ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8.

171. Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, Rules of Procedure and Practice, <http://www.maherarar.ca/>

The Commission enumerated a range of actions taken by Canadian officials that likely led to Arar's extraordinary rendition to Syria, including the unfounded intelligence that the RCMP had passed on to U.S. officials.<sup>172</sup> Because Canadian officials did not have appropriate safeguards in place for the information shared with their U.S. counterparts, these officials were complicit in Arar's detention and torture.<sup>173</sup> According to one expert:

as long as the person rendering the information knew, or should have known, or was willfully blind to the fact that the information would be utilized for that purpose . . . [he or she] would be [in] breach of Canada's obligations under the Convention Against Torture.<sup>174</sup>

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cms/images/uploads/Rule\_of\_Procedure.pdf (last visited Apr. 1, 2009).

172. ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 27-30. While Commissioner O'Connor concluded that Canadian officials did not participate in or acquiesce in the U.S. decision to remove Arar to Syria, he went on to find that:

It is very likely that, in making the decisions to detain and remove Mr. Arar to Syria, the U.S. authorities relied on information about Mr. Arar provided by the RCMP. Although I cannot be certain without the evidence of the American authorities, the evidence strongly supports this conclusion. Over time, a good deal of information about Mr. Arar that would undoubtedly have raised suspicions about him was supplied without caveats to the American agencies by the RCMP. Indeed, although the appendix containing the confidential information in the removal order has not been disclosed, the publicly available portion of the order refers to information that originated in Canada. Moreover, on many occasions after the event, several American officials, including then Secretary of State Colin Powell, said that the American authorities had relied on information provided by Canada in making the decision to send Mr. Arar to Syria. Tellingly, the Americans have never provided the Canadian authorities with any information of their own about Mr. Arar that would have supported the removal order. Given the close co-operation between the RCMP and the American agencies, it seems likely that, if they had such information, they would have supplied it to the Canadians.

*Id.* at 30.

173. KERRY PITHER, DARK DAYS: THE STORY OF FOUR CANADIANS TORTURED IN THE NAME OF FIGHTING TERROR 393 (2008).

174. *Id.* at 394 (quoting Peter Burns, former Dean Emeritus, Univ. of British Columbia Law School).

The Canadian government concluded that its domestic and international obligations under both the Istanbul Protocol and the CAT were breached.<sup>175</sup> It publicly exonerated Arar of any wrongdoing, apologized to him, and provided him with a \$10.5 million settlement.<sup>176</sup> Nevertheless, anonymous Canadian officials have been quoted as stating that Arar was never tortured.<sup>177</sup>

### *C. Lawsuit Against the U.S. Government*

In 2004, Arar commenced an action in U.S. federal district court against Attorney General John Ashcroft and numerous U.S. immigration officials.<sup>178</sup> The action was founded upon a statute, the Torture Victims Protection Act of 1991,<sup>179</sup> and alleged that U.S. officials were complicit in bringing about Arar's torture.<sup>180</sup> The U.S. government moved quickly to dismiss the case, alleging that such litigation would disclose "state secrets" and harm national security.<sup>181</sup> The government also alleged that Arar had been rendered to Syria because he was believed to be a member of Al Qaeda.<sup>182</sup> On February 16, 2006, U.S. District Court Judge David Trager dismissed the action, holding that Arar did not have a cause of action because of "national security and foreign policy considerations."<sup>183</sup>

The court also held that because Arar was never technically inside the United States, he had no standing for his claims, and therefore the

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175. ARAR COMM'N, ANALYSIS AND RECOMMENDATIONS, *supra* note 8, at 13-16.

176. Les Whittington, *Arar Accepts \$10.5M Offer*, TORONTO STAR, Jan. 26, 2007.

177. Reg Whitaker, *Arar: The Affair, the Inquiry, the Aftermath*, 9 INST. FOR RES. ON PUB. POL'Y 22 (2008).

178. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006); *see also* Michael V. Sage, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. W. INT'L L.J. 121 (2006).

179. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. The U.S. Congress adopted this Act in 1992. *Id.* This Act allows a victim who has been tortured by an individual of a foreign government to bring suit against that actor in a U.S. court. *Id.*

180. *Arar*, 414 F. Supp. 2d at 252, 257.

181. *Id.* at 252.

182. *Id.* at 253-54.

183. *Id.* at 287.

U.S. government did not violate the Torture Victim Protection Act by sending him abroad.<sup>184</sup> The court's ruling in this case may be a reflection of the general deference given to the executive branch on national security issues.<sup>185</sup> It is important to note that *Arar* was the "first direct legal challenge to the United States' practice of sending terrorism suspects to be detained and interrogated in countries that routinely torture prisoners."<sup>186</sup>

In 2006, Arar appealed the decision of the federal district court to the Second Circuit Court of Appeals.<sup>187</sup> The court dismissed his appeal in a 2-1 ruling that was released on June 30, 2008.<sup>188</sup> The majority held that adjudicating Arar's claims would have interfered with issues of national security and foreign policy.<sup>189</sup> The dissenting judge feared that this decision would give federal officials a license to "violate constitutional rights with virtual impunity."<sup>190</sup> The majority rejected the argument that U.S. officials were responsible for conspiring with Syria to subject Arar to torture, asserting that they were federal officials exercising federal authority.<sup>191</sup>

While Arar has been unable to obtain any form of relief from either the executive or judicial branch of the U.S. government, he did testify at a hearing before a congressional joint committee that convened specifically to discuss his rendition to Syria.<sup>192</sup> "During that hearing . . . individual members of Congress publicly apologized to

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184. *Arar*, 414 F. Supp. 2d at 287.

185. *Id.* at 283.

186. Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213, 215 (2006).

187. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008).

188. *Id.* at 162. On December 9, 2008, the Second Circuit Court of Appeals again heard arguments in Mr. Arar's case, after agreeing to reconsider its 2008 decision. Isabel Teotonio, *U.S. Appeals Court Reconsiders Arar Suit Against Bush Officials*, TORONTO STAR, Dec. 10, 2008. The decision will be released in 2009. *Id.*

189. *Arar*, 532 F.3d at 181.

190. *Id.* at 213 (Sack, J., dissenting).

191. *Id.* at 164.

192. Press Release, Center for Constitutional Rights, No Justice for Canadian Rendition Victim Maher Arar: Court Majority Refuses to Hold U.S. Officials Accountable for Complicity in Torture Abroad (June 30, 2008).

[Arar], though the government still has not issued a formal apology.”<sup>193</sup>

In October 2007, former U.S. Secretary of State Condoleezza Rice testified before the U.S. House of Representatives Foreign Affairs Committee.<sup>194</sup> She acknowledged that the deportation of Arar to Syria was not managed properly, and stated, “[o]ur communication with the Canadian government on this [case] was by no means perfect; it was in fact quite imperfect.”<sup>195</sup> Nevertheless, Arar’s name still appears on the U.S. “no fly” list.<sup>196</sup>

#### *D. Findings of U.N. Committees*

The U.N. Committee Against Torture<sup>197</sup> and the U.N. Human Rights Committee have both criticized Canada’s role in the Arar deportation.<sup>198</sup>

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193. *Id.*

194. *U.S. Handling of Arar Case “By No Means Perfect”*: Rice, CBC NEWS, Oct. 24, 2007, available at <http://www.cbc.ca/world/story/2007/10/24/rice-arar.html>.

195. *Id.*

196. *Id.*

197. The Committee Against Torture expressed concerns about Canada’s role “in the expulsion of Canadian national Mr. Maher Arar, expelled from the United States to the Syrian Arab Republic where torture was reported to be practised.” Office of the High Comm’r for Human Rights, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: Canada*, ¶ 4(b), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005) [hereinafter OHC, *Canada*]. The Committee Against Torture was established under Article 17 of the Convention and acts according to the procedures established in Articles 19-21. *See* CAT, *supra* note 4, arts. 17-21. The major function of the Committee Against Torture is to monitor the implementation of the Convention. CAT, *supra* note 4, art. 17.

198. OHC, *Canada*, *supra* note 197; U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations, Canada*, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006) [hereinafter U.N. Human Rights Comm., *Canada*]. The Human Rights Committee also concluded that U.S. authorities in *Arar* conducted themselves in a manner contrary to domestic and international legal obligations that prohibit extraordinary rendition. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations, United States of America*, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) [hereinafter U.N. Human Rights Comm., *United States of America*].

In particular, the Human Rights Committee expressed concern about “allegations that Canada may have cooperated with agencies known to resort to torture with the aim of extracting information from individuals detained in foreign countries.”<sup>199</sup>

The Human Rights Committee requested that Canada conduct a “public and independent inquiry review” of all cases of individuals who are in its jurisdiction and “who are suspected terrorists or suspected to be in possession of information in relation to terrorism, and who have been detained in countries where it is feared that they have undergone or may undergo torture and ill-treatment.”<sup>200</sup> The Committee also requested that Canada determine whether any “officials have directly or indirectly facilitated or tolerated their arrest and imprisonment.”<sup>201</sup>

## V. LEGAL FRAMEWORK

### A. *Extraordinary Rendition as a Violation of International Law*

Several U.N. agencies have expressed concerns about the United States’ failure to observe various international law prohibitions against torture.<sup>202</sup> The Committee Against Torture has pointed in particular to the lack of clear provisions in U.S. law to ensure that the ban against torture is non-derogable.<sup>203</sup> The Human Rights Committee is concerned about the U.S. government’s position that the *non-refoulement* obligation in Article 3 of the CAT does not apply to persons detained outside of the United States.<sup>204</sup>

The Committee Against Torture has also expressed concerns over the U.S. government’s use of diplomatic assurances.<sup>205</sup> U.N. Special Rapporteur on Torture, Theo van Boven, in his 2002 report to the U.N. Commission on Human Rights, concluded that “the legal and moral basis for the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is absolute and imperative and

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199. U.N. Human Rights Comm., *Canada*, *supra* note 198, ¶ 16.

200. *Id.*

201. *Id.*

202. U.N. Human Rights Comm., *United States of America*, *supra* note 198.

203. BARNETT, *supra* note 54.

204. *Id.* ¶ 16.

205. *Id.*

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must under no circumstances yield or be subordinated to other interests, policies and practices.”<sup>206</sup>

In his interim report to the U.N. General Assembly later that year, van Boven added that countries should categorically refrain from extraditing persons to other countries

unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.<sup>207</sup>

“Ultimately, international law stipulates that states have an obligation to bring their domestic laws into line with the international prohibition against torture and to interpret all treaties they have ratified . . . in good faith—outsourcing torture beyond a nation’s borders is not consistent with these obligations.”<sup>208</sup> Christopher Pyle argues that legal reforms are needed to give an accused legal standing to raise concerns about human rights violations, including provisions to facilitate monitoring of compliance.<sup>209</sup> Similarly, Professor Radsan writes that one advantage to having U.S. authorities send suspected terrorists overseas is that “officials in other countries might use interrogation techniques that the United States does not, may not, and should not use.”<sup>210</sup>

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206. U.N. Comm’n on Human Rights, *Civil and Political Rights Including the Questions of Torture and Detention, Report of the Newly Appointed Special Rapporteur on Torture, Mr. Theo van Boven*, ¶ 15, U.N. Doc. E/CN.4/2002/137 (Feb. 26, 2002).

207. Theo van Boven, Special Rapporteur, Comm’n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 35, U.N. Doc. A/57/173 (July 2, 2002).

208. BARNETT, *supra* note 54.

209. CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 321-22 (2001). According to Pyle, “[e]xtradition was developed to replace the politics of abduction and deportation with the rule of law. Now the United States will do extradition business with some of the least democratic and least just foreign regimes.” *Id.* at 322.

210. A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 3 (2006).

Perhaps the strongest proponent of U.S. presidential executive power trumping international law is Professor John Yoo,<sup>211</sup> who served as an advisor in the Bush Administration.<sup>212</sup> Professor Yoo argues that there is no law that prevents the President from rendering suspected terrorists to another country, not even the CAT.<sup>213</sup> Further, even if there was such a law, he argues that law would be overridden by executive orders to render terrorists.<sup>214</sup>

“The well-grounded fears of international terrorism that were aroused by the attacks on the United States of September 11, 2001, have led to a reconsideration of extreme measures for the protection of the nation,” such as the rendition of suspected terrorists to destinations where torture is likely to take place.<sup>215</sup> The United States, however, consistently disregards its own laws, as well as its international treaty obligations, by invoking anti-terror measures that take precedence over legal considerations.<sup>216</sup>

#### *B. Critique of U.S. Rendition Practices by U.N. Agencies*

The Committee Against Torture, created by the parties to the CAT, is designed to monitor the extent to which member states adhere to their obligations under the CAT.<sup>217</sup> The Committee construes Article 3 of the CAT as placing the burden on the person removed to demonstrate that there is evidence that he or she would be subjected to torture as a result of removal.<sup>218</sup> Pursuant to this interpretation, a state cannot remove a person to a country if the state knows that the person

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211. John Yoo is now a professor of law at the University of California Berkeley. Berkeley Law, Boalt Hall, Our Faculty, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235> (last visited Apr. 2, 2009).

212. *Id.*

213. John Yoo, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?: Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1229-30 (2004).

214. *Id.* at 1230.

215. Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 291 (Sanford Levinson ed., 2004).

216. J. Trevor Ulbrick, *Tortured Logic: The (Il)legality of United States Interrogation Practices in the War on Terror*, 4 NW. U. J. INT’L HUM. RTS. 210, 221-24 (2005).

217. CAT, *supra* note 4, art. 17.

218. *See* CAT, *supra* note 4.

would then be transferred to another country where he or she would likely face torture.<sup>219</sup>

Under the U.S. Detainee Treatment Act,<sup>220</sup> no person within the jurisdiction or “under the physical control of the United States [g]overnment, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”<sup>221</sup> The U.S. Constitution also prohibits acts of cruel and unusual punishment.<sup>222</sup> It would appear that the United States is respecting its statutory and constitutional obligations to prohibit all acts of torture within U.S. borders. However, the Committee has refuted the U.S. government’s assertion that the CAT does not apply to persons detained outside of a member state’s own territory.<sup>223</sup> Rather, the Committee has asserted that any party to the CAT is required to investigate, disclose, and condemn any secret detention facility that is within its de facto control.<sup>224</sup>

The United States has limited its international treaty obligations to obligations imposed by the U.S. Constitution.<sup>225</sup> To that end, Diane Amann suggests that the United States has “leaned toward an originalist interpretation of treaties that gives priority to sovereignty concerns.”<sup>226</sup>

In 2007, the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms concluded that the CIA has been involved in the extraordinary rendition of

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219. GARCIA, RENDITIONS, *supra* note 12, at 14-15.

220. Detainee Treatment Act of 2005, Pub. Law No. 109-148, 119 Stat. 2680 (2006).

221. *Id.* § 1003(a).

222. U.S. CONST. amend. VIII. The Eighth Amendment of the U.S. Constitution declares “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

223. U.S. DEP’T OF STATE, UNITED STATES WRITTEN RESPONSES TO QUESTIONS ASKED BY THE COMMITTEE AGAINST TORTURE 25 (2006), available at <http://www.state.gov/documents/organization/68662.pdf> [hereinafter U.S. RESPONSES].

224. *Id.* at 8-12.

225. Diane Marie Amann, *The Committee Against Torture Urges an End to Guantánamo Detention*, 10 AM. SOC’Y OF INT’L L. INSIGHTS (2006).

226. *Id.*

individual terrorist suspects.<sup>227</sup> This conclusion is consistent with recent findings of the Committee Against Torture in three cases where the Swedish and Canadian governments violated their treaty obligations by handing over three individuals to CIA agents in the course of their rendition to Syria and Egypt.<sup>228</sup> The Special Rapporteur emphasized that

there is a difference between “rendition to justice” (whereby a person is outside formal extradition arrangements handed to another State for the purpose of standing trial in that State, and so long as there is no risk of the person being subjected to torture, or being faced with an unfair trial where the death penalty might be imposed), versus “extraordinary rendition” to another State for the purpose of interrogation or detention without charge. Rendition in the latter circumstances runs the risk of the detained person being made subject to torture, or cruel, inhuman or degrading treatment.<sup>229</sup>

The United States has steadfastly denied that torture is the object of extraordinary renditions or that the United States transfers detainees to countries that employ torture.<sup>230</sup> Nonetheless, a number of current and former U.S. officials have admitted that the use of torture motivates many renditions.<sup>231</sup>

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227. U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Mission to the United States of America*, ¶¶ 36-38, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007).

228. Press Release, United Nations, Preliminary Findings on Visit to United States by Special Rapporteur on Promotion and Protection of Human Rights While Countering Terrorism (May 29, 2007), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/338107B9FD5A33CDC12572EA005286F8?opendocument>.

229. *Id.*

230. Condoleezza Rice, Sec’y of State, U.S. Dep’t of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005), available at <http://www.state.gov/secretary/rm/2005/57602.htm>.

231. See American Civil Liberties Union, Fact Sheet: Extraordinary Rendition (Dec. 6, 2005), <http://www.aclu.org/safefree/extraordinaryrendition/22203res20051206.html>. One such official is former CIA agent Robert Baer, who stated, “[i]f you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt.” *Id.* (quoting Robert Baer, former CIA agent). See also Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends*

*C. U.S. Reliance on Diplomatic Assurances*

The U.S. government's reliance upon diplomatic assurances when determining whether to remove or transfer an individual in its custody runs contrary to its obligations under Article 3 of the CAT.<sup>232</sup> However, the U.S. government maintains that there is nothing illegal about its reliance on diplomatic assurances, and that reliance satisfies its obligations under the CAT.<sup>233</sup> Such reliance on diplomatic assurances is problematic in a number of different scenarios, for example, where the receiving country has a "questionable human rights record, [there is] an increased likelihood that an individual would be tortured."<sup>234</sup> Moreover, "monitoring compliance with such assurances is difficult, if not impossible . . . [and] procuring assurances could (and perhaps has) become a rubber stamp for complying with the Convention Against Torture."<sup>235</sup> As a result, "assurances should be used sparingly, if at all."<sup>236</sup>

In an address regarding allegations of the practice of extraordinary renditions, former Secretary of State Condoleezza Rice stated that "[w]here appropriate, the United States seeks assurances that transferred persons will not be tortured."<sup>237</sup> However, reliance upon assurances from states that are known to violate human rights and engage in torture facilitates nominal compliance with the CAT, and quickly renders terrorist suspects to countries where torture is likely to occur. Transferring or rendering suspected terrorists has been found to be both "ineffective and virtually impossible to monitor, according to

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*Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (quoting an unnamed official who stated: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them").

232. U.S. Dep't of State, Second Periodic Report of the United States of America to the Committee Against Torture, ¶ 30 (May 6, 2005), *available at* <http://www.state.gov/g/drl/rls/45738.htm>. According to the State Department's 2005 report to the Committee Against Torture, "[t]he United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred." *Id.*

233. Linnartz, *supra* note 19, at 1499.

234. *Id.* at 1500.

235. *Id.* at 1500-01.

236. *Id.* at 1501.

237. Rice, *supra* note 230.

current and former intelligence officers and lawyers, as well as counterterrorism officials who have participated in or reviewed the practice.”<sup>238</sup>

Former President George W. Bush has defended the practice of rendition as vital to U.S. national defense as a tool in the fight against terrorism.<sup>239</sup> In a White House press conference, he commented on the issue of extraordinary rendition, stating that “one way to do so 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.”<sup>240</sup>

Little information exists as to what assurances, if any, U.S. government officials are requesting. Former U.S. Attorney General Alberto R. Gonzales publicly stated that once a person is rendered to another state “we can’t fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us. If you’re asking me ‘Does a country always comply?’ I don’t have an answer to that.”<sup>241</sup>

Both the U.N. Special Rapporteur and the Committee Against Torture have stated that governments should only rely upon diplomatic assurances from states that do not systematically violate the CAT’s provisions, after a thorough examination of the merits of each case.<sup>242</sup> The Committee argues that the U.S. government should establish a clear standard for obtaining such assurances, an adequate

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238. Priest, *supra* note 55.

239. Bush: “A Personal Account is an Attractive Option,” CNN.COM, Mar. 16, 2005, <http://edition.cnn.com/2005/ALLPOLITICS/03/16/transcript.bush/index.html> (“In the 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.”).

240. *Id.* However, “[o]ne CIA officer involved with renditions . . . called the assurances from other countries ‘a farce.’” Priest, *supra* note 55. Also, on December 5, 2005, former Secretary of State Condoleezza Rice stated, “[t]he United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured.” Rice, *supra* note 230.

241. Priest, *supra* note 55 (quoting Alberto R. Gonzales, former U.S. Attorney General).

242. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006).

mechanism for judicial review, and effective post-monitoring provisions.<sup>243</sup>

Diplomatic assurances are an instrument of stealth designed to insulate the deporting state, and states that operate along with it, from criticism. In other words, the use of such assurances may constitute nothing more than an attempt by the deporting state to cloak its actions in a veil of legitimacy. However, the states that rely on these assurances have clearly not been very successful in achieving this goal.<sup>244</sup>

In a 2004 report, Human Rights Watch emphasized the dangers of relying on diplomatic assurances as a safeguard against torture and ill-treatment.<sup>245</sup> The report noted that in many countries, “[p]rison guards . . . are trained in torture techniques that ensure secrecy . . . and other medical personnel are often complicit in covering up any signs of torture.”<sup>246</sup> Prisoners are also intimidated into remaining silent about the abuse.<sup>247</sup> Countries that engage in such practices routinely deny doing so, while also refusing access to independent monitors and experts in detecting signs of torture.<sup>248</sup>

Prior to 9/11, extraordinary renditions did take place, and they occurred without any particular degree of public scrutiny. One possible reason for this lack of scrutiny might be that these renditions took place without the apparent public sanction of the U.S. government. This is not to suggest that U.S. authorities did not approve of such practices, but overt recognition of this conduct remained unpronounced.

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243. *Id.*

244. “U.S. officials said they sent Arar to Syria only after getting assurances” that he would not be tortured. Shannon McCaffrey, *Man Blames U.S. for Syrian Torture*, SEATTLE TIMES, Aug. 1, 2004. However according to a former CIA counterterrorism official, “[y]ou would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary.” *Id.* (quoting Vincent Cannistraro, former CIA counterterrorism official).

245. “*Empty Promises*”: *Diplomatic Assurances No Safeguard Against Torture*, Human Rights Watch (Apr. 14, 2004), available at <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf>.

246. *Id.*

247. *Id.*

248. *Id.*

*D. Civil Remedies Against States*

It remains to be seen what recourse might be available to individuals who are victims of extraordinary rendition and who suffer physical abuse following their removal. It is unlikely that those persons believed to be terrorists will ever have any legal recourse to protest their extraordinary rendition, judicially or otherwise. However, there has been considerable scrutiny directed towards those whose identification as suspected terrorists is reasonably in question or absolutely confirmed incorrect.<sup>249</sup>

After 9/11, both the Canadian and U.S. governments introduced new legislation to combat terrorism. As a result, it is even more essential that existing laws that protect individuals from being tortured are respected and that governments fulfill their domestic and international legal obligations to refrain from torture.

It is equally important that the United States utilize existing legislative tools such as the Torture Victim Protection Act.<sup>250</sup> The Torture Victim Protection Act allows civil suits to be filed against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killing.<sup>251</sup> The statute does not require an individual to be a U.S. citizen, but it does require a plaintiff to have exhausted all local remedies before filing a claim.<sup>252</sup> U.S. Senator Arlen Specter has argued that the U.S. government will lack credibility in its war against terrorism unless it enforces laws that protect innocent victims.<sup>253</sup>

*E. Safeguarding Against Extraordinary Rendition*

It is clear that the use of or participation in extraordinary rendition by countries like Canada or the United States violates both domestic law and international treaty obligations, and any action to safeguard against this practice must be tangible, transparent, and have a means

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249. Doug Struck, *Tortured Man Gets Apology From Canada*, WASH. POST, Jan. 27, 2007, at A14.

250. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

251. *Id.* § 2(a).

252. *Id.* § 2(b).

253. Arlen Specter, *The Court of Last Resort*, N.Y. TIMES, Aug. 7, 2003.

to measure the results. Whether decisions are made at the highest levels of government or carried out by other government officials, there are no circumstances under which domestic or international obligations should be sidestepped. Further, Canada and the United States should not use diplomatic assurances to safeguard individuals from being rendered to torture, as such assurances have been shown to be unreliable.<sup>254</sup>

Similarly, Canada and the United States have an obligation to ensure that any and all information that they elect to share with each other or with any other state is accurate. It is imperative that such information not lead to the endangerment of any individuals to whom it relates.

In terms of measuring outcomes, it is essential that the United States adopt a model like that of the Canadian Commissions of Inquiry.<sup>255</sup> This would include an impartial and accountable commission conducts investigations, identifies shortcomings, and makes recommendations and reparations.<sup>256</sup>

In short, governments must adhere to their domestic and international legal obligations, review violations or inconsistent practices, and act in a manner that is measurable and accountable in order to safeguard against the use of extraordinary rendition.

## VI. CONCLUSION

In Canada and the United States, torture is prohibited by both domestic laws and international treaty obligations. In the case of Maher Arar, the conduct of Canadian officials through interaction and cooperation with U.S. intelligence and law enforcement agencies amounted to a breach of international agreements including the CAT, as well as domestic legal prohibitions against torture.

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254. See *supra* Parts II.H, V.C.

255. See *supra* Part IV.B.

256. See Amnesty Int'l, *National Human Rights Institutions: Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights*, AI Index IOR 40/007/2001, at 16-18, Oct. 1, 2001. Note, however that in Canada, it is not worth creating such commissions if the resulting recommendations are not implemented and reviewed for compliance. Many of the recommendations made by the Arar Commission have not yet been acted upon.

Canada and the United States both have a positive obligation to prevent their citizens from being tortured or rendered to a state where torture is likely to occur.<sup>257</sup> Diplomatic assurances are not sufficient to prevent extra-judicial deportation, and countries are in violation of Article 3 of the CAT when they rely upon such assurances.<sup>258</sup> The reality is that extraordinary renditions are most likely still occurring. In order to prevent others from suffering the same fate that befell Maher Arar, states must fulfill their obligations under the CAT and prevent the rendering of individuals to countries where they can be tortured.

States are responsible for any sort of involvement with extraordinary rendition to torture, ranging from the specific conduct of the state and its officials, the conduct of ancillary states that do not participate directly but are parties to the action, and the conduct of third parties that, although removed from the process, are nonetheless responsible.

The United States has many agencies that have reportedly participated in extraordinary renditions, including the CIA, the FBI, various sectors of the armed forces, and the Department of Homeland Security. Under international law, the conduct of individual agencies of the state cannot be separated from the responsibility of the state as a whole.

By using measures such as extraordinary rendition to combat terrorism after 9/11, the United States and several of its close allies have been proceeding in a manner inconsistent with their domestic and international legal obligations. While such conduct may be understood within the context of the emotional response to the threat of terrorism,<sup>259</sup> the prolonged application and institutionalization of this conduct severely undermines the pillars of international law that are fundamental to the conduct of inter-state affairs, without which the stability of the global system becomes tenuous.

The pressure for intelligence gathering from individuals suspected of terrorism “has revealed weaknesses in how the United States and Canada have implemented the Convention Against Torture.”<sup>260</sup> The

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257. CAT, *supra* note 4, art. 3.

258. *See supra* Part II.H.

259. Linnartz, *supra* note 19, at 1514-15.

260. *Id.* at 1515.

CAT stipulates that there be an absolute prohibition on torture in all circumstances outlined in Article 1 of the CAT.<sup>261</sup> It requires states to refrain from using torture and to avoid extraditing or returning individuals to other countries when there is reason to believe that torture may occur.<sup>262</sup> If states blindly rely upon diplomatic assurances and fail to consider the human rights record of the destination country, an individual's claim to protection from torture under Article 3 of the CAT is further undermined.<sup>263</sup>

The purpose of extraordinary rendition is to facilitate methods of interrogation that would not be permissible within the borders of the rendering state. Actions like those taken against Maher Arar in Syria would have been quickly exposed through judicial review had they occurred in the United States.

There is little question, if any, that agencies like the CIA or FBI were acting on the instructions of superiors. It has been widely documented that the Bush Administration formulated a policy that manufactured a thin veil of legitimacy for the conduct of extraordinary rendition. Any attempt to question the legitimacy or morality of extraordinary rendition to torture was effectively rebuked.

Maher Arar's rendering to Syria was done for the specific purpose of undertaking interrogations that would have been unthinkable within the borders of the United States or Canada. Although the United States rendered Arar to Syria, Canada also bears responsibility for this outcome, given the complicity of Canadian police and intelligence agencies in the actions of the United States.

When countries like the United States refuse to comply with domestic and international law regarding issues like extraordinary rendition, there is little that can be done other than imposing sanctions or punitive measures, which are not politically viable. Certainly, victims can commence civil litigation, such as the action brought by Arar against the United States. However, in the broader context of state responsibility, there are no effective means of legal recourse.

Instruments of domestic and international law require not only recognition but compliance. Incorporating mechanisms to evade limits on behavior will inevitably lead to an erosion of the prohibitions and

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261. CAT, *supra* note 4, arts. 1, 4.

262. CAT, *supra* note 4, art. 3.

263. Linnartz, *supra* note 19, at 1515.

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restrictions on state conduct generally. It is a slippery slope that leads to a loss of control on the conduct of individual states within the world community.

To adequately address the issue of torture in the context of extraordinary renditions, countries such as Canada and the United States need to reinforce their implementation of international norms against state-sponsored torture through domestic legislation that absolutely prohibits any form of interrogational torture.<sup>264</sup> If the Canadian or U.S. government is perceived to condone torture in any context, it has the potential to weaken the international norms against torture.<sup>265</sup>

The practice of extraordinary rendition clearly violates both domestic laws and international treaty obligations for both Canada and the United States. The vital lessons to be learned from *Arar*, particularly regarding the commitment and obligations for member states under the CAT must not be forgotten or ignored.

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264. Linnartz, *supra* note 19, at 1511.

265. *Id.*