

January 2009

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Recommended Citation

Krishma C. Parsad, *Illegal Renditions and Improper Treatment An Obligation to Provide Refugee Remedies Pursuant to the Convention against Torture*, 37 *Denv. J. Int'l L. & Pol'y* 681 (2009).

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Illegal Renditions and Improper Treatment An Obligation to Provide Refugee Remedies Pursuant to the Convention against Torture

Keywords

Remedies, Torture, Expulsion, International Law: History, States

ILLEGAL RENDITIONS AND IMPROPER TREATMENT: AN OBLIGATION TO PROVIDE REFUGEE REMEDIES PURSUANT TO THE CONVENTION AGAINST TORTURE

KRISHMA C. PARSAD*

I. INTRODUCTION

The state of International Law has been significantly influenced in recent years by the terrorist attacks which took place on United States soil on September 11, 2001. Since that time, in an effort to combat terrorism, the United States has engaged in a number of questionable practices in relation to the treatment of suspected terrorists. Specifically, suspected terrorists are rendered to third countries where they are subject to torture and cruel, inhuman and degrading treatment (CIDT).

Not only are these acts *prima facie* violations of international law to which the United States has obligated itself, but they disrupt the lives of innocent civilians who are unlawfully detained and improperly interrogated. Often times those accused of acts of terrorism are denied re-entry into their home countries because they are stigmatized as terrorists or are denied refugee status in the United States due to stringent application of these international conventions which seek to protect individuals from torture and CIDT. The conventions to which the United States has bound itself which are applicable in this context include the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (CAT)¹, the International Covenant on Civil and Political Rights (ICCPR)², and the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention)³. Instead of adhering to its obligations pursuant to these conventions, the United States application of these obligations has the effect of

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1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

2. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

3. Convention Relating to the Status of Refugees, July 28 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. Note that the United States is only a signatory to the related but independent Protocol Relating to the Status of Refugees, which is a treaty that incorporates articles 2 through 34 of the Refugee Convention. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Refugee Convention covers only those persons who have become refugees as a result of events occurring before January 1, 1951, whereas the Protocol covers those who have become refugees after January 1, 1951. *See id*; *see also* Refugee Convention.

subjecting individuals to indefinite and improper detention within the United States or leading to the removal of individuals to countries where they are subject to torture and CIDT.

Thus, this paper seeks to explore the manner in which the United States has interpreted and applied international law when it renders persons to countries where they will be tortured and subject to CIDT and evaluates the legal obligations that the United States has under international law – whether or not those persons are considered terrorists. As all other countries which are signatories to international human rights conventions and which are bound to comply with customary international law, the United States must too adhere to extraterritorial application of international obligations and provide proper remedy to those likely to be subject to improper treatment under all circumstances.

II. “EXTRAORDINARY” RENDITION, NON-REFOULEMENT, TORTURE, AND TERRORISM DEFINED

A. *Rendition, Extradition, and “Extraordinary” Rendition*

Notions of rendition and extradition are not new to international discourse and international law jurisprudence. Renditions occur when persons are abducted from their home countries without administrative process.⁴ Such renditions may be found to be in and of themselves violations of international law norms because they constitute violations of state sovereignty.⁵ Extraditions generally take place between two countries that have an extradition treaty and occur when one country requests that its citizen who is residing in another country be returned for criminal prosecution.⁶

In recent years, international law scholars have also been confronted with the notion of “extraordinary rendition” which does not have a definition under international law.⁷ The term extraordinary rendition is generally used to refer to the situation where a person is taken to a third country in a manner such that he or she does not know where he or she is and is subject to torture or CIDT.⁸ These individuals are transferred before they enter United States borders to negate any constitutional protections they might have received had they been transferred directly from U.S. soil.⁹ These acts have caused controversy over whether or not

4. See *Prosecutor v. Nikolic*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, paras. 22, 29 (June 5, 2003).

5. *Id.* at paras. 22-26.

6. See *Abel v. Minister of Justice & Others*, 2000 (4) All SA 63 (C) (S. Afr); see also *United States v. Shulman*, [2001] 1 S.C.R. 616 (Can.).

7. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1334-36 (2007) (explaining that the United States has presented no legal justification for the practice of “extraordinary” rendition).

8. ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION, THE CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE N. Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” 6 (2005), available at <http://www.chrgj.org/docs/APPG-NYU%20Briefing%20Paper.pdf> [hereinafter TORTURE BY PROXY].

9. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our

the United States, as a party to the CAT, violates principles of *non-refoulement*, or improper return, by engaging in these practices.¹⁰

B. The Customary International Law Principle of Non-Refoulement

Non-refoulement is a principle of customary international law by which a person may not be returned to a country where he or she may face persecution or be subject to torture or CIDT.¹¹ The concept of *non-refoulement* has taken many forms in treaties of international human rights law. Those which are pertinent here include the *non-refoulement* provision within the Refugee Convention and the *non-refoulement* provision embodied in both the CAT and the ICCPR.

The Refugee Convention provides that a person who will likely be subject to persecution on the basis of race, nationality, political opinion, religion or membership in a particular social group may not be returned, or *refouled*, to the country where he or she faces such persecution.¹² The standard under the CAT and the ICCPR has a broader range of applicability. The provision for *non-refoulement* in the CAT is distinguished from the *non-refoulement* provision of the 1951 Convention relating to the Status of Refugees on the basis that there are no exceptions to the provision under the CAT as there are under the Convention.¹³ In this regard, the *non-refoulement* provision is non-derogable and “[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”¹⁴

The principle of *non-refoulement* has been widely held a norm of customary international law such that all states are bound by this principle whether or not they are parties to any of the aforementioned conventions.¹⁵ Thus, there are two bases

geographic borders.”); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892) (“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

10. CAT, *supra* note 1, art. 3(1).

11. Refugee Convention, *supra* note 3, art. 33(1); CAT, *supra* note 1, art. 3(1).

12. Refugee Convention, *supra* note 3, art. 33. It is important to note the distinction between the definition of persecution as referenced in the Refugee Convention as compared to torture in the CAT and the ICCPR. It has been noted that there is no internationally accepted definition of persecution under international law. UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 51 (1992). The definition of torture, on the other hand, has been widely acknowledged and accepted in the international community. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgment, ¶ 146 (Dec. 10, 1998). For purposes of this paper, the focus is on the definition of torture as it relates to rendition and the principle of *non-refoulement*.

13. GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 301 (3rd ed. 2007).

14. U.N. Comm. Against Torture [UNCAT], *Gorki Ernesto Tapia Paez v. Sweden*, ¶ 14.5, U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997).

15. SIR ELIHU LAUTERPACHT & DANIEL BETHLEHEM, *REFUGEE PROTECTION IN INTERNATIONAL LAW* 163-64 (Erika Feller, Volker Türk & Frances Nicholson eds., Cambridge University Press 2003) (2001) (articulating that the customary norm of *non-refoulement* prohibits return of a person to a country where there are “substantial grounds” for asserting that the person will be subject to torture). It

of international law by which a state may be bound by the obligation of *non-refoulement*: 1) by treaty, or 2) by customary international law. Each form constitutes a separate binding obligation for states, such as the United States, which are parties to these conventions.¹⁶

C. Torture as a *Jus Cogens* Norm of International Law

Torture is defined at Article 1 of the CAT which provides that:

[T]he term "torture" means 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.¹⁷

The prohibition of torture has been widely held as a *jus cogens* norm¹⁸, or a preemptory norm of international law from which no derogation is permitted.¹⁹ Thus, no state is permitted to engage in acts of torture at any time. Likewise, no state is permitted to subject persons to torture via *refoulement*.²⁰

is once again important to note the distinction between the *non-refoulement* provision articulated in the Refugee Convention and that referenced in the CAT. The Refugee Convention provision limits the scope of *non-refoulement* protections on the basis of persecution for race, religion, nationality, political opinion and membership in a particular social group. *Non-refoulement* for torture as provided in the CAT is widely recognized as custom, and some authors have even asserted that it constitutes a norm of *jus cogens*. See, e.g., Jean Allain, *The Jus cogens Nature of Non-refoulement*, 13 Int'l Journal Refugee Law 533, 538 (2001).

16. See *North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.)*, 1969 I.C.J. 3, at paras. 37, 63 (Feb. 20) (distinguishing between being bound by "specific assent" by ratifying a treaty and being bound by customary international law which is automatic and does not require assent and to which no reservations may be made); see also, *id.* at para. 69 (noting that a treaty provision might embody or crystallize a norm of customary international law, or contribute to its later development into customary international law).

17. CAT, *supra* note 1, art. 1.

18. U.N. Office of the High Comm'n for Human Rights [UNHCHR], Comm'n on Human Rights, Human Rights Comm., *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1997); see also *Armed Activities on the Territory of the Congo, Request for the Indication of Provisional Measures (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, 2002 I.C.J. 219, 289 (July 10).

19. Vienna Convention on the Law of Treaties art. 53, done May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT].

20. See LAUTERPACHT, *supra* note 15, at 163-64.

The scope of acts which constitute torture is not limited.²¹ To establish torture, there must be intent to carry out a “prohibited” purpose.²² Such prohibited purposes include inhuman treatment for obtaining information, imposing punishment or discrimination for any reason.²³ Regardless of who imposes the torture, states have the obligation to impose legislation that prohibits torture by either public officials or private individuals.²⁴ A state may be responsible for acts of torture where it engages in torture or does not prevent torture from occurring.²⁵

Torture is distinguished from CIDT on the basis of the severity of the treatment.²⁶ A number of factors such as “physical or mental condition of the victim, the effect of the treatment and, . . . age, sex, state of health and position of inferiority” may be considered in determining whether the conduct arises to the required level of severity.²⁷ Examples of conduct which have been found to constitute torture include: beating, falanga, extraction of nails, burns, electric shock, sexual violence, deprivation of senses, and threats.²⁸

D. The Definition of Terrorism under International Law

The international community has not adopted a uniform definition of terrorism. Instead, a number of treaties concerning terrorism have been adopted over the years which embody several varying definitions of terrorism.²⁹ While the Security Council of the United Nations has recognized terrorism as an important issue in international law, it too declined to affirmatively define terrorism in its most prominent resolution concerning the issue.³⁰ In addition to condemning acts of terrorism, the Security Council used its United Nations Charter Chapter VII powers to prohibit Member States from providing “safe haven” to those who commit or who aid in the commission of terrorist acts.³¹

21. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 470 (Nov. 16, 1998).

22. *Id.* para. 471.

23. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, paras. 478, 485 (Feb. 22, 2001).

24. U.N. Int'l Human Rights Instruments [HRI], *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 150-51, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

25. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, para. 142 (Dec. 10, 1998).

26. Compare CAT, *supra* note 1, art. 1(1), with CAT, *supra* note 1, art. 16(1) (distinguishing between torture and other cruel, inhuman and degrading treatment or punishment).

27. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, para. 484 (Sept. 1, 2004).

28. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 119, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986) (*prepared by P. Kooijmans*).

29. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; see also International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/52/49 (Dec. 15, 1997); see also International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/54/49 (Dec. 9, 1999); see also International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290/Annex, U.N. Doc. A/59/2005 (Apr. 13, 2005).

30. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

31. *Id.* para. 2(c).

Even so, the Security Council has passed resolutions to remind the international community of its obligations pursuant to *non-refoulement* in assessing treatment of alleged terrorists. For example, Security Council Resolution 1624 calls upon states to comply with *non-refoulement* as articulated in the Refugee Convention and comply with international standards of human rights and refugee law.³² The United Nations Human Rights Committee which evaluates Member State implementation of the ICCPR has also emphasized the need to comply with treaty provisions in implementing Security Council Resolution 1373 by stressing, in particular, the prohibition on torture and CIDT.³³

III. TORTURE AND ITS RELATIONSHIP TO EXTRAORDINARY RENDITION

The primary legal reasons for condemning renditions which result in improper treatment include 1) the manner in which persons are abducted from their home countries without administrative process; 2) the treatment that these persons are subject to once they are detained in third countries; and 3) the validity of the jurisdiction a court has in trying these individuals by virtue of unlawful treatment.³⁴ The practice of rendering such individuals to countries where torture and CIDT occur is frequent in a number of countries around the world.

For example, Sweden has been found to be in breach of both the ICCPR and the CAT for violating their *non-refoulement* provisions by returning Egyptian citizens to Egypt where it was substantially more likely than not that they would be subject to torture.³⁵ According to Human Rights Watch, similar cases are pending in Austria, Canada, Germany, the Netherlands, the Russian Federation, the United Kingdom and the United States.³⁶ Each of these cases involves the question of whether or not a person should have been extraterritorially transferred to a third country where torture is practiced based on diplomatic assurances from that country that the individual in question would not be tortured.

In some of these cases, the relevant immigration court or United Nations High Commissioner for Refugees (UNHCR) determined that the individual was eligible for refugee status due to a substantial likelihood that he or she would be subject to torture if returned to the home country.³⁷ In light of cases such as those that took

32. S.C. Res. 1624, para. 4, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

33. See, e.g., U.N. Human Rights Comm. [HRC], Concluding Observations of the Human Rights Committee: Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Est., para. 8, U.N. Doc. CCPR/CO/77/EST (Apr. 15, 2003); Yemen, para. 18, U.N. Doc. CCPR/CO/75/YEM (July 26, 2002); U. K., para. 6, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001).

34. See *supra*, note 1.

35. Agiza v. Sweden, Decision of the Comm. Against Torture, Communication No. 233/2003, para. 13.4, U.N. Doc. CAT/C/34/D/233/2003 (2005); Alzery v. Sweden, Views of the Human Rights Comm., Communication No. 1416/2005, paras. 11.2, 11.5, U.N. Doc. CCPR/C/88/D/1416/2005 (2006).

36. HUMAN RIGHTS WATCH, CASES INVOLVING DIPLOMATIC ASSURANCES AGAINST TORTURE: DEVELOPMENTS SINCE MAY 2005, 1 (Jan. 2007), available at <http://www.hrw.org/en/node/77209/section/1>.

37. See, e.g., *Russian Supreme Court Rejected Challenge to Extraditions of Uzbek Asylum Seekers*, THE TIMES OF CENTRAL ASIA, Dec. 1, 2006 (holding that notwithstanding a UNHCR determination of refugee status, extradition to Uzbek was proper; extraditions are on hold pending

place in Sweden where the detainees were returned to the home country without review of the order of extradition by an immigration court with authority to grant asylum, the European Court of Human Rights has begun to enforce “interim measures” to prevent extraditions from taking place before they are reviewed by the court.³⁸

When properly applied in this context, the CAT addresses the acts that are prohibited under international law and positive duties that state parties must enforce to ensure that torture and CIDT are quelled at the domestic level and condemned on an international level.³⁹ Thus, the CAT provides a means by which people who are subject to unlawful treatment may seek refuge in another country when traditional asylum relief is not available.⁴⁰ When countries such as the United States unlawfully render persons to another country and subject them to unlawful treatment, the United States and other countries who are parties to the CAT have an international obligation to provide asylum relief to these individuals notwithstanding any criminal acts in which these detained individuals may have engaged, even when the renditions occur extraterritorially.

IV. SEEKING RELIEF PURSUANT TO THE CONVENTION AGAINST TORTURE

A. Basic Procedures for Seeking Relief Under the CAT

A party seeking relief under the CAT may file an individual petition with the Committee Against Torture which is appointed by the United Nations and provides commentaries on the interpretation of treaty provisions and serves as an international tribunal before which cases may be brought.⁴¹ To assert standing before the Committee Against Torture, a state must make an optional declaration pursuant to Article 22 of the convention.⁴² Additionally, the individual asserting standing must have exhausted all domestic remedies and the issue must not have been decided by another court of international law.⁴³ This requirement is a general principle of international law which must be satisfied before claims before international courts of law are considered ripe for review.⁴⁴

When the Committee Against Torture considers these cases with specific regard to violation of Article 3 of the CAT and violations of *non-refoulement*, it considers whether or not the state that is enforcing the extradition had actual or constructive knowledge at the time of removal that there were “substantial grounds for believing that [the detainee] would be in danger of being subjected by . . .

review by the European Court of Human Rights).

38. See EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL ACTIVITY REPORT 18 (2005) (enforcing interim measures to prevent Austria from extraditing detainees to Egypt).

39. CAT, *supra* note 1, arts. 2, 3.

40. See, e.g., *Kamalthas v. Immigration and Naturalization Serv.*, 251 F.3d 1279, 1282 (9th Cir. 2001).

41. GOODWIN-GILL & MCADAM, *supra* note 13, at 298-99.

42. *Id.*

43. CAT, *supra* note 1, art. 22.

44. *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 26 (Mar. 21).

authorities to torture.”⁴⁵ The applicant, or “author” has the burden to demonstrate not only that there are general violations of torture, but also that “additional grounds . . . exist to show that the individual concerned was personally at risk.”⁴⁶

The author has the overall “responsibility . . . to establish a prima facie case for the purpose of admissibility of his or her communication under article 22 of the Convention” for Article 3 cases.⁴⁷ Article 14 of the CAT provides that state parties who violate its provisions must provide redress to victims including compensation and rehabilitation.⁴⁸ It is the duty of the state to take upon itself provision of a remedy where the Committee Against Torture has found a breach of the convention and that remedy must be reported back to the Committee Against Torture for further assessment of the state’s compliance with the CAT.⁴⁹

To apply the Article 3 *non-refoulement* provision, the Article 1 definition of torture must be satisfied. Thus, the provision does not apply in instances of CIDT. Three requirements must be met for a state to be obligated to carry out this principle. First, there must be “substantial grounds” indicating that torture will occur upon the person’s return to his or her country.⁵⁰ Second, the acts of torture must be state sanctioned.⁵¹ Finally, any pain or suffering that is inflicted on a person as a result of a lawful sanction is exempt from the definition of torture.⁵² Courts are unclear as to whether this last requirement refers to international or domestic law. It is possible that the provision refers to domestic law based on the Article 4.1 requirement for domestic legislation to implement the provisions of the CAT.⁵³

The Committee Against Torture has held that rendering a person to a country that is not a party to the CAT puts that person at risk of torture.⁵⁴ Additionally, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has declared that extraordinary renditions constitute violations of Article 3 of the CAT.⁵⁵ Such acts may also be considered

45. *Agiza v. Sweden*, Decision of the Comm. Against Torture, Communication No. 233/2003, para. 13.4, U.N. Doc. CAT/C/34/D/233/2003 (2005).

46. *Id.* para. 13.3.

47. U.N. Comm. Against Torture [UNCAT], *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 52, U.N. Doc. A/53/44, annex IX (1998), reprinted in U.N. Int’l Human Rights Instruments [HRI], *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, para. 4, 279 U.N. Doc. HRI/GEN/1/Rev.6 (2003).

48. See CAT, *supra* note 1, art. 14.

49. See *Agiza v. Sweden*, Decision of the Comm. Against Torture, Communication No. 233/2003, para. 15, U.N. Doc. CAT/C/34/D/233/2003 (2005).

50. CAT, *supra* note 1, art. 3.

51. *Id.*

52. *Id.* art. 1.

53. See GOODWIN-GILL & MCADAM, *supra* note 13, at 303.

54. U.N. Comm. Against Torture [UNCAT], *Khan v. Canada*, para. 12.5, U.N. Doc. A/50/44, 46 (Nov. 15, 1994).

55. See Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 29, delivered

conspiracies to commit torture.⁵⁶ Thus, countries that engage in acts of rendition not only violate the basic torture provisions of the CAT, but also the *non-refoulement* provision. These decisions and commentaries indicate that violations of Article 3 rely not on the geographical location of the individual in question, but rather the act of the state facilitating the rendition to a country where it is known that a significant risk of torture exists. Without such extraterritorial application of the *non-refoulement* provision, the purpose behind the CAT, to prevent torture, cannot be satisfied because it allows states to renege on their international obligations.⁵⁷ Additionally, since prevention of torture constitutes a *jus cogens* norm, even if no part of the CAT calls for extraterritorial application of its provisions, states have an obligation to prevent torture in any situation.

B. United States Domestic Legislation Addressing CAT Relief

United States refugee law provides varying degrees of remedies for persons who may face torture upon return to their home countries but who are not eligible for asylum because they have committed an “aggravated felony.”⁵⁸ Aggravated felonies are “particularly serious crimes” such as murder, rape, fraud, theft or drug and firearm trafficking.⁵⁹ Such persons may be provided withholding of removal pursuant to United States obligations not to *refoule* persons who will be subject to torture.⁶⁰ However, this relief may be denied where a person has committed an aggravated felony with a five-year aggregate sentence.⁶¹ Thus, United States law provides that a person may then be eligible for deferral of removal if a more than substantial likelihood of torture is established.

In this regard, relief provided under the CAT is a separate form of relief from asylum and requires a separate determination under a unique standard. While the United States statutes do not require that an “on account of” ground be demonstrated as the basis for torture, as required in the Refugee Convention⁶², the applicant must demonstrate that if he or she is returned to his or her home country, that it is “more likely than not” that he or she will be subject to torture.⁶³ This standard is arguably higher than the “substantial grounds” standard required in the text of the CAT.⁶⁴

As required under Article 3, past criminal conduct does not bar relief under

to the General Assembly, U.N. Doc. A/59/324 (Sept. 1, 2004).

56. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 144 (2006).

57. See *infra* Section VI (addressing extraterritorial application of CAT provisions).

58. Immigration and Nationality Act § 208(b)(2)(B)(i) [hereinafter INA].

59. *Id.* § 101(a)(43).

60. *Id.* § 241(b)(3)(A).

61. *Id.* § 241(b)(3)(C).

62. Refugee Convention, *supra* note 3, art. 33(1).

63. *Kamalthas v. Immigration and Naturalization Serv.*, 251 F.3d 1279, 1284 (9th Cir. 2001).

64. See *id.* at 1282 (indicating that in addition to the substantial grounds test articulated in the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the standard is supplemented by the requirement of country conditions and incidents of past torture and other relevant evidence).

the CAT and when denied withholding, an applicant may apply for a deferral of removal in the alternative.⁶⁵ United States statutes also limit the review of an application for deferral of removal to the final removal proceedings such that an applicant may not apply for the relief until all other forms of relief have been denied.⁶⁶ Since ratifying the CAT, the United States Department of State has maintained that it interprets the definition of torture in a narrow fashion and that it conforms only to "the common understanding of torture as an extreme practice which is universally condemned."⁶⁷

Applications for withholding of removal or deferral of removal relief have had little success. Approximately 3% of applications were granted in 2002 and 1,700 were granted in 2003.⁶⁸ When determining whether it is more likely than not that torture will occur in the future, United States Courts consider incidents of past torture, patterns and practice of torture in the removal country and any other relevant information including country conditions.⁶⁹ United States courts have found that instances of rape, domestic violence condoned by law enforcement, and cigarette burns and beatings may constitute torture.⁷⁰

Deferral of removal is a minimal protection offered to those who are found to be removable because they engaged in persecution themselves or are considered a security threat to the United States.⁷¹ Such deferrals are granted such that the least amount of protections are provided while the person does not have to be removed to a country where he or she is more likely than not to face torture.⁷² U.S. regulations also require consideration of a likelihood of torture for instances of extradition.⁷³ The United States Supreme Court found in the case of *Zadvydas v. Davis* that in cases where a person is subject to deportation under immigration law but extradition is prohibited under the CAT, under certain circumstances, indefinite

65. In re Y-L- In re A-G- In re R-S-R, 23 I&N Dec. 270, 279 (A.G. 2002).

66. Foreign Affairs Reform and Restructuring Act of 1998 § 2242(d) [hereinafter FARRA]; see also INA § 242(a)(4).

67. MICHAEL JOHN GARCIA, CRS REPORT FOR CONGRESS, U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 2 (2006) (quoting *President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, May 23, 1988, S. Treaty Doc. No. 100-20, reprinted in 1387 U.S. Cong. Serial Set at 3 (1990)).

68. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY 2002 STATISTICAL YEAR BOOK, at A-1 (2003); *Immigration Relief under the Convention Against Torture for Serious Criminals and Human Rights Violators: Hearing Before the H. Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. 26 (2003) (prepared statement of C. Stewart Verdery, Assistant Secretary for Policy and Planning, Border and Transportation Security Directorate).

69. 8 C.F.R. § 1208.16(c)(3) (2000).

70. *Zubeda v. Ashcroft*, 333 F.3d 463 (3rd Cir. 2003); *Aliv v. Reno*, 237 F.3d 591 (6th Cir. 2001); *Al-Shaer v. INS*, 268 F.3d 1143 (9th Cir. 2001).

71. INA § 241(b)(3)(B).

72. FARRA § 2242(d).

73. 22 C.F.R. § 95.2(b) (2008).

detentions are permissible.⁷⁴ Indefinite detentions are permitted when there are potential foreign policy consequences if the person is released, if the person has committed a violent crime, has a mental illness, or if the person is prone to violence.⁷⁵ United States acts in extraditing persons to third countries extraterritorially indicate that the United States does not believe such “extraordinary” renditions constitute violations of the CAT.⁷⁶

C. Review of Cases by the Committee Against Torture and Other International Tribunals

International tribunals have made a number of specific findings regarding the nature of treatment of individuals who have been illegally rendered from one country to another. Some courts have determined that the nature of the abduction does not preclude a court from maintaining jurisdiction over an individual for potentially criminal acts.⁷⁷ These assertions of jurisdiction were based on the premise that the country from which the defendant was abducted made no claim that its sovereignty had been violated. Other international courts have held that the nature of illegal renditions alone strips the court of jurisdiction.⁷⁸

Perhaps the most controversial international case on this precise issue is that of *People of Israel v. Eichmann* from 1962 in the Supreme Court of Israel. In that case, a German citizen was residing in Argentina where he was apprehended by the Israeli government and brought to trial before its courts.⁷⁹ The Israeli court asserted jurisdiction over Mr. Eichmann despite widespread international protest based solely on the nature of the rendition which shocked the conscience of the international community.⁸⁰ Prior to Israel’s assertion of jurisdiction, the United Nations Security Council issued a resolution specifically condemning the acts and declaring them a violation of Argentina’s territorial sovereignty.⁸¹

The Eichmann case illustrates that the issue of rendition is not a new one in international law and that courts have struggled to deal with the question of whether or not renditions, in and of themselves, are severe enough to strip a court of its jurisdiction. When coupled with unlawful treatment by the court in question, treatment that specifically violates the CAT, the response of international courts is

74. See *Zadvydas*, 533 U.S. at 679.

75. 8 C.F.R. § 241.14 (2009).

76. See Joan Fitzpatrick, *Rendition and Transfer in the War against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457, 480-81 (2003); see also Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995).

77. See *In Re Argoud*, Cass. crim. [highest court of ordinary jurisdiction], June 4, 1964, 45 I.L.R. 90, 91, 97 (Fr.); see also *Stocke v. Fed. Republic of Germany*, App. No. 11755/85, 53 Eur. Comm’n H.R. Dec. & Rep. 166, 170-71 (1987).

78. See *State v. Ebrahim* 1991 (2) SA 553 (AD), 95 I.L.R. 417, 442, 445 (S. Afr.); see also *Regina v. Horseferry Rd. Magis. Ct. (ex parte Bennett)* (1993) 3 All E.R. 138, 138, 139, 95 I.L.R. 380, 380, 381(H.L.).

79. S.C. Res. 138, U.N. Doc. S/RES/138 (June 22, 1960).

80. See *id.*

81. *Id.*

more forceful.⁸²

82. *See* Prosecutor v. Nikolic, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 24 (June 5, 2003).

V. UNITED STATES APPLICATION IN COMPARISON TO INTERNATIONAL OBLIGATIONS

A. *The Current State of International Law in Relation to Renditions*

As noted earlier, renditions generally constitute a violation of a state's sovereignty.⁸³ The case that most clearly articulates the current state of international law in this area is the case of *Prosecutor v. Nikolic* out of the International Criminal Tribunal for the former Yugoslavia. There, the court outlined a three-part test that may be used in assessing whether or not renditions are illegal under international law.⁸⁴ The court stated first, that all renditions constitute violations of sovereignty, particularly when the state whose sovereignty was violated claims a violation.⁸⁵ Next, the court stated that jurisdiction may be stripped based on the nature of the rendition alone and the fact that such renditions may compromise the credibility of the court at issue.⁸⁶ Such jurisdiction stripping measures are negated where the person who is being detained has committed a crime of an egregious nature, such as genocide or a war crime. Finally, jurisdiction of the court may be stripped if the detainee is subject to torture while held in detention.⁸⁷

The Human Rights Committee has asserted that if "a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."⁸⁸ If torture is foreseeable, the state that renders the person is in violation of the ICCPR.⁸⁹ In these cases, the Human Rights Committee placed the responsibility in the hands of the transferring state regardless of the location of the person in question. Here, there may be a conflict of interest between United States policy and international law in that the U.S. is likely to claim that persons outside the geographical territory of the United States are not technically within the jurisdiction of the United States even if it is facilitating the transfer of a person to a state where torture is foreseeable. These cases indicate that such a position by the U.S. would be erroneous in nature.

The Geneva Conventions also provide a variety of protections for persons considered Prisoners of War (POWs) and Civilians. These protections are

83. *Id.* paras. 24-27.

84. *Prosecutor v. Nikolic*, Case No. IT-94-2-PT, Decision On Defense Motion Challenging The Exercise of Jurisdiction By The Tribunal, para. 97 (June 5, 2003) *available at* http://www.icty.org/case/dragan_nikolic/4.

85. *See id.* paras. 97, 99.

86. *Id.* para. 108.

87. *Id.* para. 114.

88. *Kindler v. Canada*, Views, Communication No. 470/1991, Human Rights Committee, para. 13.2, U.N. Doc. CCPR/C/48/D/470/1991 (Nov. 11, 1993).

89. *Ng v. Canada*, Views, Communication No. 469/1991, Human Rights Committee, para. 6.2, U.N. Doc. CCPR/C/49/D/469/1991 (Jan. 7, 1994) (holding that the "foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.").

applicable in times of international armed conflict.⁹⁰ Article 13 of the Third Geneva Convention requires that “prisoners of war must at all times be humanely treated . . . prisoners of war must at all times be protected, particularly against acts of violence or intimidation . . .”⁹¹ POWs cannot be transferred to states that are not party to the Geneva Conventions.⁹² Civilians or “protected persons” under the Fourth Geneva Convention cannot be subject to “physical or moral coercion. . . in particular to obtain information from them or third parties.”⁹³ Like POWs, Civilians may not be transferred to countries that are not parties to the conventions.⁹⁴ Such a transfer may constitute a grave breach of the convention.⁹⁵

Also, as noted earlier, the provisions under the Refugee Convention are less restricting than those under the CAT. Article 33(2) provides that states may engage in *refoulement* when the person in question:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity . . . ;
- (b) He has committed a serious non-political crime outside the country of refuge to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes of the United Nations.⁹⁶

Even if the United States were to justify an extradition on the basis of the Refugee Convention, it may still be in violation of the CAT. Overall, the status of treaty law indicates that any extraditions of persons to states that practice torture are prohibited under international law and redress must be afforded.

B. Applying CAT Relief to Rendition and Treatment

As articulated above, the primary remedy available to persons who may not be returned to their countries for fear of torture under United States law is deferral of removal where those persons have been convicted of serious crimes or aggravated felonies.⁹⁷ While this is not the equivalent of being granted refugee status or even withholding of removal, it still is a form of relief that prevents a person from being returned to unlawful treatment.

Both the Human Rights Committee and the Committee Against Torture have addressed these important issues of rendition and “extraordinary” rendition in the

90. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

91. GCIII, *supra* note 90, art. 13.

92. *Id.* art. 12.

93. GCIV, *supra* note 90, art. 31.

94. *Id.* art. 45.

95. *Id.* arts. 147-48.

96. Convention Relating to the Status of Refugees arts. 1(F), 33(2), July 28, 1951, 189 U.N.T.S. 150.

97. *See supra* Part IV(b).

context of their respective treaties and have articulated appropriate relief for those who were improperly rendered to their home country and more likely than not subject to torture.

The first case, which was mentioned earlier, is that of *Agiza v. Sweden* where Agiza was a national of Egypt where he was tortured as a suspect in the assassination of former President Anwar Sadat.⁹⁸ He was denied asylum in Sweden for unknown reasons and subject to removal proceedings on the basis that he was involved in supporting terrorism.⁹⁹ Sweden also received diplomatic assurances from Egypt that it would not subject Agiza to improper treatment and used such assurances to justify its extradition of Agiza back to his home country.¹⁰⁰

In making its findings on the case, the Committee Against Torture asserted holdings which pertain directly to the United States and its use of “extraordinary” rendition tactics. Most prevalent in this regard is the Committee’s finding that while Security Council Resolutions are binding in nature under international law, they do not preclude a state from compliance with Article 3 of the CAT.¹⁰¹ This recognition is particularly important because it recognizes the importance of preventing and punishing terrorism but does not allow terrorist acts to serve as a justification for subjection to torture. This finding also highlights the Security Council’s recognition that responses to terrorist acts must comply with refugee law.¹⁰² Here, the Committee found an explicit violation of Article 3 by Sweden for extraditing Agiza notwithstanding the existing diplomatic assurances.¹⁰³ The Committee thus makes the point that such assurances are not sufficient enough to outweigh findings of a “real risk” of torture.¹⁰⁴ The Committee also found an Article 3 violation on the basis that there was no judicial review of the Swedish government’s decision to extradite Agiza and thus found a violation of the “procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.”¹⁰⁵

Finally, the Committee, for the first time, held that there was an express violation of Article 22 which is the jurisdiction provision of the CAT.¹⁰⁶ While the United States has not signed the optional declaration implementing this provision of the CAT, the Committee sends a signal to other state parties engaged in

98. *Agiza v. Sweden*, Decision of the Comm. Against Torture, Communication No. 233/2003, para. 2.1, U.N. Doc. CAT/C/34/D/233/2003 (2005);

99. *Id.* paras. 2.4-2.5.

100. *Id.* para. 4.29.

101. *Id.* para. 13.1.

102. S.C. Res. 1456, para. 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (providing that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, *refugee*, and humanitarian law.”) (emphasis added).

103. *Agiza v. Sweden*, Decision of the Comm. Against Torture, Communication No. 233/2003, para. 13.4, U.N. Doc. CAT/C/34/D/233/2003 (2005).

104. *Id.*

105. *Id.* para. 13.8.

106. *Id.* para. 13.10.

renditions that all domestic processes must be exhausted before such transfers are facilitated. The Committee chose to highlight this violation because Agiza was transferred before there was any review of the final order by either a higher Swedish court or the Committee Against Torture. Thus, Agiza did not have any time to file a complaint before the Committee before he was extradited to Egypt.¹⁰⁷ As a result of these breaches, Sweden had the obligation to formulate a remedy and present its remedy to the Committee within 90 days.¹⁰⁸

This case serves as an illustration of the manner in which the CAT can provide protections for individuals who are unlawfully subject to *refoulement*. While these procedures do not apply to the United States, it still has an international obligation to abide by the provisions of the CAT and prevent torture from occurring to persons within United States control. In instances where a person is in U.S. custody, even if extraterritorially, it is difficult to argue that any other state other than the United States has the ability to prevent that person from being subjected to unlawful treatment. The Committee's decision also emphasizes the need for judicial review of a denial of asylum in these cases before extradition takes place.

These same concerns were highlighted by the Human Rights Committee in the case of *Alzery v. Sweden*.¹⁰⁹ The facts of that case were similar to those of the *Agiza* case where Alzery was improperly extradited to Egypt under the auspices of diplomatic assurances despite a high probability that he would be subject to torture.¹¹⁰ The Human Rights Committee found that there was a violation of Article 7 of the ICCPR along with a violation of Article 2 which requires an "effective remedy" for Article 7 violations.¹¹¹ In making its determination, the Committee adopted the findings of the Committee Against Torture in the *Agiza* case where the diplomatic assurances were not sufficient to negate evidence of likely torture.¹¹² The remedy suggested by the Committee in this case was monetary compensation for unlawful treatment.¹¹³

C. Ineffectiveness of Diplomatic Assurances

Importantly, both of these cases asserted that diplomatic assurances are not sufficient in guaranteeing that a person will not be subject to torture or CIDT. Such assurances cannot be relied upon in international law to protect a person from torture unless certain circumstances are met. The United Nations Special Rapporteur on Torture has stated that such assurances must be "unequivocal" and that there must be a "system to monitor" the person and ensure that he or she is

107. *Id.* para. 13.9.

108. *Id.* para. 15.

109. *Alzery v. Sweden*, Views of the Human Rights Comm., Communication No. 1416/2005, paras. 4.3, 11.3, 11.5, U.N. Doc. CCPR/C/88/D/1416/2005 (2006).

110. *Id.* paras. 3.6-3.9.

111. *Id.* para. 11.7.

112. *Id.* para. 3.24.

113. *Id.* para. 13.

protected.¹¹⁴ Most recently, the General Assembly noted that diplomatic assurances do not release states from an obligation not to *refoule* a person who is substantially likely to be subject to torture and CIDT.¹¹⁵

United States law allows for diplomatic assurances in application of the CAT. Pursuant to 8 C.F.R. § 208.18(c), the Secretary of State may seek assurances for extradition and if those assurances are found to be “sufficiently reliable” the person may be returned without further consideration of CAT protections. The factors considered include “the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the requesting State that would provide context for the assurances provided.”¹¹⁶

The failure of such assurances is evident in cases such as that of Maher Arar who was detained by the U.S. government and transferred to Syria despite his insistence that he would be subject to torture there.¹¹⁷ The U.S. transferred him based on assurances by Syria that he would not be harmed. Instead, he was subject to ten months of detention and torture.¹¹⁸ He has now filed suit in U.S. Federal Court for violations of the Torture Victim Protection Act.¹¹⁹

The European Court of Human Rights has also been active in determining that diplomatic assurances are not sufficient means of ensuring that a person will not be subject to torture upon return to his or her home country.¹²⁰ As referred to earlier, it has also made an effort to intervene on cases before people are extradited unlawfully and their asylum claims are effectively denied.¹²¹

These efforts by the European Court of Human Rights illuminate the importance of judicial review for asylum seekers and scrutiny over provisions of diplomatic assurances. This example can be used by the United States to determine which assurances are more reliable than others and to establish a higher standard of review for such assurances. The difficulty here in comparison to the European Court of Human Rights is that the European Court has access to conduct fact-finding missions in the countries in question while the United States courts must rely on expert testimony and reports of country conditions which may not be as accurate. Overall, however, it is important not to lose sight of the fact that

114. The Special Rapporteur, *Report of the Special Rapporteur on Torture, Mission to Uzbekistan*, ¶ 49, U.N. Doc. E/CN.4/2003/68/Add.2 (Feb. 3, 2003).

115. G.A. Res. 63/166, para. 15, U.N. Doc. A/RES/63/166 (Feb. 19, 2009).

116. Declaration of Samuel M. Witten at para. 9, *Cornejo-Barreto v. Seifert*, No. 01-cv-662-AHS (October 2001).

117. HUMAN RIGHTS WATCH, “EMPTY PROMISES:” DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 16 (April 2004).

118. *Id.*

119. *Id.* at 17.

120. *Chahal v. United Kingdom*, Eur. Ct. H.R., No. 70/1995/576/662 at para. 105 (1996) (holding that despite its acknowledgment that India gave assurances in good faith, they were not sufficient to indicate that Chahal would not be tortured); *Shamayev and Others v. Georgia and Russia*, Eur. Ct. H.R., No. 36378/02 at paras. 29-31 (2005) (where Russia did not comply with diplomatic assurances and refused to give a fact-finding team access to detainees).

121. See CAT, *supra* note 11; see also Refugee Convention, *supra* note 11.

diplomatic assurances are not guarantees and may still cause a country to be in violation of the CAT where overwhelming evidence of torture and CIDT exist.

VI. EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS OBLIGATIONS

An additional means by which the United States may be held accountable for unlawful renditions under international law implicates the acknowledged extraterritorial application of obligations embodied in human rights treaties. International law jurisprudence has recently recognized the importance of holding states accountable for human rights obligations when acting within the territory of other states.¹²² The difficulty in holding states accountable as such is that an obligation under international law must be established by which the state has an obligation to uphold human rights when acting in the territory of another country. This is particularly difficult to establish in cases of extraordinary rendition where alleged terrorists are not rendered from U.S. soil, but instead are transported from country to country in U.S. aircrafts.

A. *Effective Control of Territory as a Means to Extraterritorial Application*

The most widely recognized manner by which states are held to their international human rights obligations when acting in the territory of another country is by establishing that the state has effective control of the territory where it is acting. The International Court of Justice as well as the European Court of Human Rights have addressed this issue with regard to implementation of the ICCPR extraterritorially, as well as the application of human rights treaties in general.

In the *Legal Consequences Concerning the Construction of a Wall in Occupied Palestinian Territory* Advisory Opinion, the International Court of Justice established that ICCPR provisions apply extraterritorially where a state acting outside its territory has effective control of another state's territory.¹²³ There, the Court looked to Article 2 of the ICCPR which confers responsibility for the obligations embodied in the covenant with respect to persons within a state's jurisdiction.¹²⁴ This was supported by decisions of the Human Rights Committee which held that Uruguay was responsible for ensuring protection of persons who were arrested in Argentina and Brazil.¹²⁵ The Court thus came to the conclusion that where a State exercises jurisdiction outside of its own territory, it is still obligated to uphold the provisions in the ICCPR.¹²⁶ The Court affirmed this decision in *Congo v. Uganda* where it held that Uganda was bound by human rights obligations because its authority within the territory superseded Congolese governmental authority due to occupation.¹²⁷

122. See, e.g., U.N. Comm. Against Torture [UNCAT]; *Burgos v. Uruguay*, para. 12.3, U.N. Doc. A/36/40 (July 29, 1981).

123. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para.109 (July 9) [hereinafter *Wall*].

124. *Id.* para. 108.

125. *Burgos*, *supra* note 122, para. 13-14; U.N. Comm. Against Torture [UNCAT], *Casariago v. Uruguay*, para. 12, U.N. Doc. CCPR/C/OP/1 (July 29, 1981).

126. *Wall*, *supra* note 123, para. 111.

127. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo. v. Uganda)*, 2005 I.C.J. No. 116, para. 173, at 59 (Dec. 19).

Likewise, the European Court of Human Rights has also established the application of human rights treaties where states act outside their respective territories. For example, the Court asserted that areas of Northern Cyprus occupied by Turkey incurred Turkey's responsibility in upholding human rights of local citizens.¹²⁸ Such occupation, or effective control, is established when the occupying power "exercises all or some of the public powers normally to be exercised by [the occupied Government]."¹²⁹ Thus, these cases only apply to the situation where a government has established control of territory such that it has the responsibility to uphold the customary norm of *non-refoulement* when acting outside its territory.

The challenge, then, is to determine whether a state may be held accountable for human rights violations when not in effective control of the territory, but where the state maintains jurisdiction over persons who are improperly rendered to third countries where they face torture and CIDT.

B. Effective Control over Persons to Establish Jurisdiction and an Obligation to Uphold Human Rights Obligations

It is apparent that it may be difficult to establish effective control over territory in each instance where the United States acts to render a person to a country where he or she will be subject to torture or CIDT. Under such circumstances, it is necessary that countries like the United States be held to the same standard as countries with effective control of territory outside their traditional jurisdiction such that where a state has effective control over a person, that state is responsible for ensuring that person's human rights remain intact.

There is some support for this notion in Article 2 of the ICCPR which provides that Member States have the responsibility to protect persons within their jurisdiction regardless of nationality.¹³⁰ This was further supported by the Human Rights Committee comment to Article 2 which states that anyone within the power or jurisdiction of a State must be afforded protections pursuant to the covenant by that state.¹³¹ The General Assembly also supported this notion in its recent resolution regarding protections for terrorists who might be subject to *refoulement*.¹³²

International law also restricts a state's ability to premise failure to protect human rights on the basis that domestic laws are contrary to treaty protections.¹³³ Thus, even where the United States may justify return on the application of withholding or deferral of removal under domestic laws, those provisions may not be used to excuse an improper return that violates the ICCPR and the CAT.

128. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser A) para. 62, at 23-24 (1995).

129. *Hussein v. 21 States*, App. No. 23276/04, 42 Eur. H.R. Rep. SE16 at 223, 224-25 (Mar. 14, 2006) (Court Decision on Admissibility).

130. ICCPR, *supra* note 2, art. 2.

131. Human Rights Comm., *General Comment 31 [80]: Nature of the General Legal Obligations on State Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

132. G.A. Res. 63/185, paras. 9-10, U.N. Doc. A/RES/63/185 (Mar. 3, 2009).

133. VCLT, *supra* note 19, art. 27.

Because of the *jus cogens* nature of the prohibition on torture and the customary status of *non-refoulement*, the United States must be held responsible for acts of improper rendition which occur outside of United States territory even though effective control of that territory might not be established. Instead, effective control, or jurisdiction, over the person should be sufficient to invoke United States treaty and human rights obligations.

C. Acts of United States Rendition and Extraterritorial Obligations

The most widely publicized acts of United States sponsored renditions which result in torture and CIDT occur outside of United States territory, but pursuant to United States command authority. For example, there have been an increased number of renditions taking place between Somalia and Ethiopia at the instruction of United States officials.¹³⁴ There, persons of Canadian, American, Ethiopian, Kenyan and Somali nationality have been removed from Somalia and Kenya without administrative process and detained in Ethiopia without access to legal counsel and without notification to family.¹³⁵ While these renditions benefit Ethiopian authorities, they also allow United States officials to engage in improper interrogations of detained individuals outside of United States territory.¹³⁶

The transport of Agiza in the aforementioned *Agiza v. Sweden* decision, took place via United States aircraft.¹³⁷ United States Central Intelligence Agents were also allegedly involved in the transfer of Hassan Osama Nsar from Italy to Egypt where Nsar was subject to torture.¹³⁸ Jamil Qasim Aseed Mohammed was extradited from Pakistan to Jordan via United States aircraft without any administrative process and subject to improper treatment.¹³⁹

In each of these circumstances, it is questionable whether the United States had effective control of the territory where these persons were transferred. However, in each case it does appear that United States officials had a significant degree of control over capturing and transferring these people to detention in third countries where they were subject to improper treatment. Where it appears that a state has such a degree of control over a person in custody outside that state's territory, the state should still be obligated to uphold human rights obligations and refrain from *refoulement* of persons who will be subject to torture.

Presumably, United States government officials are working within an undefined loophole of international law by which they have not been held accountable for being complicit in the improper treatment to which these individuals are subject. The resolutions coming out of the General Assembly combined with reports from the Human Rights Committee and cases out of the

134. Jennifer Daskal, *More Blowback from the War on Terror*, HUM. RTS. WATCH, Oct. 1, 2008, <http://www.hrw.org/en/news/2008/10/01/more-blowback-war-terror>.

135. *Id.*

136. *Id.*

137. TORTURE BY PROXY, *supra* note 8, at 7.

138. *Id.*

139. *Id.*

European Court of Human Rights seem to suggest that the trend in international law is moving toward holding states accountable for human rights violations that occur to people within a state's jurisdiction even where control of the territory might be absent.

VI. CONCLUSIONS

The reality of "extraordinary" renditions is one that we cannot ignore in today's world. Because of this practice, people are subject to torture and cruel, inhuman and degrading treatment that only international norms seek to address. When states such as the United States refuse to comply with the provisions set forth in international instruments that address issues of torture and CIDT, it is the responsibility of the international community not to condone such acts.

Refugee law and policy seek to provide remedies for people who are in danger of being sent back to countries that engage in unlawful practice. Extraterritorial application of this law and policy is the only way to ensure that unlawful renditions do not continue to take place. Such acts offer countries like the United States a manner in which they can escape responsibility for serious breaches of international law and *jus cogens* norms which are not acceptable under any circumstances. The strong weight the international community has put behind the prevention of torture and the obligation states have to uphold the prevention of torture is justification in and of itself for this extraterritorial application – with or without effective control of territory.