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Extraordinary Rendition, Victims' Rights, and State Obligations

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This paper draws on the recently published reports by The Constitution Project's Task Force on Detainee Treatment and the Open Society Justice Initiative to explore the issue of human rights violations committed by the United States and its partners via the extraordinary rendition program. It focuses on two specific human rights violations, torture and *refoulement*, and the legal obligations these violations trigger. It examines the obligation to compensate victims specifically and reviews how former detainees have exercised their rights to reparation. The inquiry reflects on the challenges for those seeking reparation and opportunities for non-state actors to contribute to that effort by supporting documentation, truth-seeking, and truth-telling. The analysis concludes that although progress has been made, reparation efforts have thus far been unable to overcome the gap in accountability for human rights violations resulting from the rendition program, compromising the fulfillment of victims' rights to reparation.¹

I. Introduction

Following the September 11 terrorist attacks, the United States' intelligence service under President George W. Bush expanded its rendition program for the purpose of detaining suspected terrorists abroad and transferring them to the custody of CIA prisons or third party governments, without legal process, where they were subject to interrogation methods that included torture and other abuses (The Constitution Project 2013, 166; hereafter TCP). In the post 9/11 climate characterized by secrecy, the "gloves [came] off,"² and individuals could be picked up anywhere in the world and transferred to unknown locations for interrogation (Priest

¹ The author can be contacted at amltan@gmail.com.

² This was the characterization of Cofer Black, who was head of the CIA Counterterrorist Center in 2002, at the September 26, 2002 joint hearing before the Senate and House Intelligence Committees.

and Gellman 2002). This practice was identified as secret detention when it involved CIA custody and extraordinary rendition when it concerned third party custody. Extraordinary rendition has since been called outsourcing torture and torture by proxy (Amnesty International USA 2013; Satterthwaite 2006, 3).³ As first reported by Dana Priest and Barton Gellman in *The Washington Post* in 2002, an unidentified official explained the rationale behind the practice: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.” Extraordinary rendition will be the primary focus of this paper with the acknowledgment that detainees were frequently subject to both secret detention and extraordinary rendition, and both programs involved similar kinds of human rights violations.

The CIA went to great lengths to keep the program secret. The Obama administration continues to block efforts to bring details of the program to light via U.S. courts and still employs a version of the program. Nevertheless, evidence of the commission of torture, arbitrary arrest, and enforced disappearances resulting from extraordinary rendition has trickled into the public conscience. This has occurred as the result of former detainees being released or charged, providing them with a platform from which to expose their treatment, and the subsequent investigations launched by governments around the world, the media, international organizations, and advocacy groups. In the United States itself, a number of hearings were commissioned, investigations were launched, and civil suits were filed. What crystallized from these efforts was that American leadership was responsible for systematic torture, arbitrary detention, and enforced disappearances. Despite the emergence of evidence, none of the

³ There exists a lack of clarity regarding the usage of the term “rendition” in the war on terror, as the media and activist organizations have used it to refer to both the transfer of detainees to CIA “black sites” in other countries as well as the transfer of detainees to third party governments. This paper will primarily review the implications of the latter, though it will also reference secret detention of detainees in “black sites.”

program's architects have been held publicly accountable nor have any of the victims received reparations from the United States.

This paper seeks to reassert a focus on the victims of extraordinary rendition by examining states' human rights obligations vis-à-vis extraordinary rendition and, specifically, victims' rights to reparation. After an explanation of the development of the extraordinary rendition program, I will review the law pertaining to two specific violations that occurred as a result of the extraordinary rendition program and the obligations this triggers for states. Thereafter, I will examine how victims of extraordinary rendition have exercised the right to reparation in and outside of the U.S. This inquiry will conclude by highlighting some enduring challenges to reparations efforts in the United States, as well as a possible opportunity for non-state actors to contribute to fulfilling victims' rights to reparation through truth-seeking and documentation efforts. Thus, I hope to show that (1) there is a strong basis in international law for investigating the human rights violations associated with extraordinary rendition and providing remedy to victims, and (2) that while measures by which victims can receive reparations for harms suffered exist, the significant accountability gap on the part of the most responsible perpetrator, namely the U.S. government, compromises the completeness of any reparation efforts.

II. Rendition Becomes Extraordinary

Though the history of the rendition program is still somewhat unclear, The Constitution Project's Task Force on Detainee Treatment ("The Constitution Project's Task Force") concludes in its April 2013 report that rendition was "well in place" by the late 1980s or early 1990s (TCP 2013, 163). This section will review the development of the rendition program from

its original purpose of bringing suspected terrorists to the U.S. to its expanded purposes of detaining suspected terrorists outside of the U.S. and, following the 9/11 terrorist attacks, gathering intelligence for fighting the war on terror. What this section will develop is the paradoxical features of the rendition program that included widely networked collaboration on the one hand and extreme secrecy on the other, as well as the concomitant human rights and accountability problems.

Early Stages of the Rendition Program: “Take These Men Off the Street”

The first iteration of the rendition program was designed to capture suspected terrorists abroad and bring them to the U.S. The existence of this program was revealed in 1989, when William Webster, a former CIA and FBI head, participated in an interview in which he stated that the U.S. had created the term “rendition” to describe this process (Ibid., 165). As the program came to be seen as a useful tool by the executive and the intelligence service to neutralize individuals the U.S. identified as a threat, it developed to include sending suspected terrorists to third countries for detention. Michael Scheuer, head of the CIA’s bin Laden unit from 1996 to 1999, explained that the U.S. embraced this method of addressing suspected terrorists because it knew the location of many dangerous militants but did not want to bring them stateside (Ibid.). The program provided a way to “take these men off the street,” while capturing any information these individuals were carrying on their persons. In 2004, George Tenet testified before Congress that there had been over 70 renditions prior to 9/11, some to U.S. custody (Ibid., 166).

Human rights questions arose early with respect to the rendition program, since many of the countries to which the U.S. was sending detainees had remarkably poor human rights

records, as designated by the U.S. Department of State. In 1995, for instance, the Clinton administration approved a deal with Cairo in which the U.S. would send abducted Islamic militants to Egyptian custody, despite the Department of State's reports indicating that the *mukhabarat*, the Egyptian secret police, tortured prisoners and committed extrajudicial killings (Ibid., 165). Among the individuals rendered to Egypt by the Clinton administration was Shawki Salama Attiya. Attiya alleged that he was tortured "by being suspended by various limbs, made to stand in knee-deep filthy water, and given electric shocks to his genitals" (Ibid.). Similar allegations emerged from detainees such as Ahmed Agiza and Muhammed Alzery who were rendered to Egypt in 2001 as part of the war on terror rendition program (Ibid., 166).

Expansion of the Rendition Program: "We've Got to Spend Time in the Shadows"

After September 11, the Bush administration greatly expanded the rendition program, authorizing "the creation of joint operations centers in other states to capture terrorists abroad, render and interrogate them" (Ibid.). The shift in focus from detention to intelligence gathering would have dramatic implications for the rendition program in terms of detainee treatment by contributing to various human rights violations, including torture. As the statement from the unidentified official to *The Washington Post* cited in the introduction suggested, the purpose of transfers to countries like Egypt and Syria was explicitly to utilize torture for intelligence extraction. As told to *The Washington Post* by another official, the temptation was "to have these folks in other hands because they have different standards" (Ibid., 167). In public, the administration defended its practices to critics by pointing out it had received "diplomatic assurances" from the receiving countries that detainees would be treated in accordance with international human rights norms. However, many in the administration, including former CIA

director Porter Goss, acknowledged that while the U.S. had a responsibility to ensure the detainees were treated appropriately, there was little the U.S. could do in terms of protection once detainees were out of U.S. custody (Ibid., 169).

In addition to the infrastructure supporting the transfer of detainees to countries known to torture, the broad mandate given to the CIA also contributed to less oversight of its work with respect to the detainee program. Unlike the procedure established for approving renditions during the Clinton administration, presidential approval was provided broadly instead of on a case-by-case basis (Ibid., 166). As a consequence, the CIA exercised great discretion. Despite the regular oversight provided by the executive, the need to keep the President up to date, to demonstrate competency, and to not readily admit to mistakes may have created a culture that allowed for mistakes to be made with respect to human rights (Ibid.). These factors may have been a contributing factor to the numerous detentions based on circumstantial evidence as well to precipitating human rights abuses. Thus, despite documented individual concerns about torture, detainees targeted by the rendition program were transferred to the custody of third countries, such as Egypt or Syria, or held in CIA facilities within third countries (Ibid., 169).

Continuation of the Rendition Program

Despite its statements condemning the human rights violations committed during the war on terror, the Obama administration has not yet eliminated the practice of rendition. Instead it relies on “anti-torture diplomatic assurances from recipient countries and post-transfer monitoring of detainee treatment,” despite the failures of this approach to protect detainees during the Bush administration (Open Society Justice Initiative 2013, 7; hereinafter OSJI). President Obama did issue an executive order disavowing torture and closing secret CIA

detention facilities, but recent reports by *The Nation* (July 2011), *The Washington Post* (August 2012), and others of secret prisons in places like Somalia and Afghanistan cast doubt on the claims of closures (Ibid., 4 and 21). Moreover, the language of Executive Order No. 13491 allows room for continuation of human rights violations:

...[detainees] shall in all circumstances be treated humanely and shall not be subjected to violence to life or person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within the facility owned, operated, or controlled by a department or agency of the United States. (Barack Obama, 2009, Ensuring Lawful Interrogations, *Federal Register*, Vol. 74, no. 4893, emphasis added).

The Rendition Project, the collaborative research project of Ruth Blakeley of the University of Kent and Sam Raphael of Kingston University, points out that this means that “[a]s long as the detainee cannot be said to be ‘under effective control’ of the U.S., or in a U.S.-operated facility, CIA and DoD agents have not expressly been forbidden by the President from aiding the secret detention and torture conducted by others” (Blakely and Raphael N.D.).

Scope and International Involvement

Due to the high level of secrecy that characterized the extraordinary rendition program, many details of its scope remain unknown. This effort was, after all, a part of what Vice President Dick Cheney infamously characterized as operations in “the dark side,” in “the shadows of the intelligence world,” and the practice has remained cloaked in secrecy despite the change in administration (OSJI 2013, 5).⁴ However, recent investigations launched by groups

⁴ In its executive summary, OSJI’s report prominently features Vice President Cheney’s now infamous statement made during his September 16, 2001 *Meet the Press* appearance with NBC’s Tim Russert: “We also have to work, through, sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of

ranging from the European Parliament to the Open Society Justice Initiative (“OSJI”) have uncovered important data about the number of detainees that were part of the program, the degree of international involvement, and the involvement of private contractors. This information is vital to gaining insight into the bureaucratic mechanism utilized by the responsible parties to facilitate extraordinary rendition as well as to identifying its victims.

A number of reputable human rights organizations and scholars estimate that the number of detainees believed to be part of the extraordinary rendition program is approximately 100 to 150 (Satterthwaite 2006, 9). The methodology for achieving this number is complex and ranges from reviewing flight manifests to examining recently released government memoranda about detainee treatment. In 2007, for instance, the European Parliament issued a report estimating that the CIA had flown as many as 1,245 extraordinary rendition flights between September 2001 and February 2007. Former CIA Director Michael Hayden disputes the implications of this figure, stating in 2007 that the flights carried equipment and personnel that were not associated with the rendition program and that the actual number of CIA detainees was approximately 150, including detainees sent to Afghanistan, Guantanamo Bay, and U.S. custody elsewhere. The Constitution Project’s Task Force found that this figure conforms with the information revealed in the May 30, 2005 memorandum from Steven Bradbury, former head of the Department of Justice’s Office of Legal Counsel, to John Rizzo, former counsel for the CIA, stating that, up to that date, 94 detainees were in CIA custody (TCP 2013, 167).

OSJI’s February 2013 report also suggests that between 100 and 150 detainees were part of the rendition program. The report names 136 detainees but states there may be other individuals who have not yet been counted. The report emphasizes the secrecy still surrounding

what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful.”

the rendition program and notes that while President Bush acknowledged the CIA had detained approximately 100 prisoners in secret, the U.S. government has only identified 16 “high value detainees” held by the rendition program before transfer to Guantanamo Bay. Consequently, there may be many more detainees that were part of the rendition program. The total number will likely remain unknown until the United States and its partners make that information publicly available. With that said, the cumulative effort of this work indicates that the universe of potential victims may range at least from 100 to 150.

The participation of 54 countries spanning the continents of Africa, Asia, Australia, Europe, and North America in the rendition program is also chronicled by OSJI’s report (*Ibid.*).

The involvement of these countries was wide ranging, and included the following:

...hosting CIA prisons on their territories; detaining, interrogating, torturing, and abusing individuals; assisting in the capture and transport of detainees; permitting the use of domestic airspace and airports for secret flights transporting detainees; providing intelligence leading to the secret detention and extraordinary rendition of individuals; and interrogating individuals who were secretly being held in the custody of other governments (*Ibid.*, 8).

Foreign governments were complicit in two key failures—not protecting detainees from secret detention on their territories and not investigating agencies and officials who participated in the extraordinary rendition program. As evident from the OSJI report, the U.S. is not the only state that should be held responsible for the human rights consequences of the extraordinary rendition program, despite inconsistent official acknowledgment of other countries’ involvement. This matter underscores the mystifying tangle of responsibility that makes the extraordinary rendition program possible and will prove a challenge to any victim’s claims for reparations.

III. Violations of International Human Rights Principles

The U.S. and the countries that participated in its extraordinary rendition program have come under fierce criticism from a number of human rights bodies for violating their human rights obligations. “[I]n 2006 the UN Committee against Torture called on the U.S. to ‘cease the rendition of suspects’ and ‘ensure that no one is detained in any secret detention facility under its de facto effective control,’ observing that ‘detaining persons in such conditions constitutes, per se, a violation of the Convention [against Torture]’” (Ibid.). The UN Human Rights Committee has also urged the United States to cease its practice of secret detention and ensure that individuals detained outside of the U.S. are not transferred to other countries if there is a reason to believe that they would be in danger of being subject to torture or cruel, inhuman or degrading treatment or punishment (Ibid.). Moreover, in his annual report to the UN Human Rights Council, Ben Emmerson, UN Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, called on both the United States and the United Kingdom to release the reports their respective governments completed on the practice of rendition, framing this demand as exercising the right to truth (Emmerson 2013). As illustrated by these three criticisms, concerns about the rendition program attach to the illegality of the related practices themselves and the accountability gap vis-à-vis human rights violations that resulted from the program. This section will review the international law governing two specific human rights violations committed as part of the extraordinary rendition program—torture and *refoulement*.⁵

⁵ The prohibition of arbitrary detention and enforced disappearances is also a human rights principle violated by the practice of extraordinary rendition, though it will not be discussed in depth in this paper. As noted by OSJI, every instance of secret detention and extraordinary rendition amounts to arbitrary detention and enforced disappearance, which is prohibited by customary international law and the International Convention for the Protection of All Persons from Enforced Disappearances.

Prohibition of Torture and Other Cruel, Inhuman, or Degrading Treatment

The prohibition on torture is considered to be customary international law and *jus cogens*. As explained by Timothy Synhaeve in his article “Taking the War on Terror to Court,” published in the *Vienna Journal on International Constitutional Law* in March 2011, this “means that the norm enjoys a higher rank in the international hierarchy than treaty law or ordinary customary rules” (Synhaeve 2011, 447). It cannot be compromised by an agreement by any state, even during times of international and non-international armed conflicts as specified by Article 3 common to the four Geneva Conventions of 1949 (OSJI 2013, 23; Synhaeve 2011, 447). Respected international legal bodies, such as the International Criminal Tribunal for Yugoslavia, confirm this analysis (Office of the High Commissioner for Human Rights 2011, 9; hereafter OHCHR). The prohibition on torture is also codified in several human rights treaties, including the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or European Convention of Human Rights), and the International Covenant on Civil and Political Rights (ICCPR), which will be discussed below (Ibid.).

The UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987. The convention entered into force that same year, and was ratified by many of the countries responsible for the human rights violations committed as part of the extraordinary rendition program, including the United States (Bergquist and Weissbrodt 2006, 599). There are a number of provisions in the convention that are applicable to the practice of extraordinary rendition. Firstly, Article 2 expressly prohibits torture in all cases, rejecting the defense that torture was committed because it was ordered by a superior officer and/or because it was sanctioned by a public authority. It also states that “[e]ach State

Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” The Convention defines torture in Article 1 as follows:

The 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 (UNCAT 1987, emphasis added).

Further, Article 16 states that the state parties “shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1,” when public officials or other persons acting in official capacity commit the acts.

The European Convention on Human Rights and the International Covenant on Civil and Political Rights also prohibit torture and cruel, inhuman or degrading treatment (American Civil Liberties Union 2012; hereafter ACLU).⁶ Specifically, Article 3 of the European Convention on Human Rights, which entered into force on September 3, 1953, provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment” (ECHR 1950). Similarly, the International Covenant on Civil and Political Rights, which entered into force on March 23, 1976, states in Article 7 that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation” (ICCPR 1966). Neither of these conventions contains the definition of torture, unlike the UNCAT. This ambiguity has created

⁶ The U.S. ratified the ICCPR, but entered the reservation that the treaty was not self-executing, which challenges the ability of litigants to file in the U.S. court system.

confusion with respect to identifying victims of torture that merits attention. The matter was addressed by the United Nations Voluntary Fund for Victims of Torture (“UNVFVT”), which was established by the UN General Assembly in 1981 “to distribute voluntary contributions through established channels of assistance” to victims of torture and their relatives who have been directly impacted by the victim’s suffering (OHCHR 2013).

The UNVFVT’s *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* clarifies that, though there is no single legal definition for torture, most international bodies agree that the four constitutive elements to consider are the nature of the act, the intention of the perpetrator, the purpose of the act, and the involvement of public officials or assimilated (OHCHR 2011, 3). With respect to the nature of the act, the “legal definition of torture encompasses both acts and omissions that inflict severe pain or suffering,” and this pain can be either physical or mental (Ibid., 4). With respect to the second element, the intention of the perpetrator, UNVFVT finds that the pain and suffering must be intentionally inflicted for the act to qualify as torture. Negligence is not sufficient to meet the requirements of an act of torture under international law. Thirdly, the UNVFVT identifies the UNCAT list of different purposes for the commission of torture (i.e. for extracting a confession, for obtaining from the victim or a third person information, for punishment, for intimidation and coercion, or for discrimination) as a guideline, noting it is not exhaustive (Ibid.).

UNVFVT’s analysis of the fourth element of torture, the involvement of public officials or assimilated, is particularly germane to the matter of extraordinary rendition because it addresses the key question—who bears responsibility? As UNVFVT points out, it is relatively straightforward to establish that ill-treatment inflicted at the instigation of a public official is torture. It is much more difficult to determine if an act was committed “with the consent or

acquiescence” of a public official. The Constitution Project’s Task Force’s analysis, however, suggests that in the case of extraordinary rendition this can be established. It finds that American leaders carry some responsibility for allowing and contributing to the spread of torture, even if they did not explicitly order it in all cases. For instance, the Task Force identifies the declaration by the Bush administration that the Geneva Conventions did not apply to al Qaeda and Taliban captives, without offering replacement rules, as the most important catalyst for the systematic practice of torture. Another important factor was the authorization of “enhanced interrogation techniques,” now identified as torture, for select detainees. The consequences were as follows:

Much of the torture that occurred was ... never explicitly authorized. But the authorization of the CIA’s techniques depended on setting aside the traditional legal rules that protected captives. And as retired Marine generals Charles Krulak and Joseph Hoar have said, “any degree of ‘flexibility’ about torture at the top drops down the chain of command like a stone—the rare exception fast becoming the rule” (TCP 2013, 4).

The UNVFVT address the dilemma of establishing “consent or acquiescence” by pointing to The European Court of Human Rights’ flexible standard, which dictates that states have an obligation to refrain from “committing any act of torture or cruel, inhuman and degrading treatment, [and] also to protect persons under [their] jurisdiction from being subject to these acts by [s]tate or non-state actors” (OHCHR 2011, 5). On the basis of the existing evidence, there is strong reason to support a more robust investigation into the degree of responsibility borne by U.S. leadership.

In light of the provisions of the UNCAT, ICCPR, and ECHR, and accepting what has been uncovered about the U.S. and its partners’ treatment of detainees in the extraordinary rendition program, it is plausible to conclude that violations of international law have occurred. The nature of the acts themselves inflicted severe physical or mental pain and suffering (i.e. waterboarding in CIA detention or shocks to the genitals in Egypt), the intention of the

perpetrators was to inflict pain and suffering as part of an interrogation, and the purpose was to obtain from detainees information or a confession. As noted by The Constitution Project's Task Force, this involved the acquiescence and consent of officials at the highest levels of government. Thus, the United States and its partners that coordinated and implemented the extraordinary rendition program are likely in violation of international law and under obligation to act; this will be discussed in section IV.

Prohibition of Transfer to Torture or Cruel, Inhuman or Degrading Treatment

The transfer of detainees to countries where there is a significant risk of torture or ill-treatment is also prohibited under international law. UNCAT states expressly in Article 3: "No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The UN Human Rights Committee and the European Court of Human Rights have also interpreted the ICCPR and ECHR, respectively, to prohibit the transfer of individuals to states where they face a risk of torture or cruel, inhuman or degrading treatment. In order to determine this risk, competent authorities must take into consideration the existence of a consistent pattern of gross, flagrant or mass violations of human rights. Suspicion is not sufficient, but it is not necessary that states have actual knowledge about the likelihood of torture. If given the circumstances, a state should have known that a risk of torture existed, the obligation of *non-refoulement* is engaged.

When considering the widely reported human rights abuses by the CIA and by the interrogators and prison guards of Egypt, Syria, Jordan, and other states to which detainees were sent, it is dubious for any facilitating state to claim ignorance of the potential human rights

violations to which they were exposing detainees (Synhaeve 2011, 449). The extraordinary rendition operations relied heavily on collaboration and planning between the U.S. and other governments to secure the *secret* capture, detention, and transfer of detainees. The rendition networks had already violated international law; it strains credulity that “these governments did not know of the potential human rights violations” (OSJI 2013, 28). This mirrors the findings of the UN Secret Detention Report cited by Synhaeve’s study. It affirms that states were complicit in the extraordinary rendition program when they, among other things, “shortly held a person in secret detention before handing the person over to another state where he/she [would] be detained for a longer period in secret detention” or “actively participated in the arrest and/or transfer of a person, when [they] knew or ought to have known that the person would disappear in a secret detention facility or otherwise be detained outside the legally regulated detention system” (Synhaeve 2011, 449).

There has been some controversy with respect to the obligation to prevent *refoulement* in the United States. The U.S. maintained under the Bush administration that it did not send individuals to locations where they would be mistreated or tortured as a matter of policy, but it claimed it did not have a legal obligation to prevent *refoulement*. “Former Bush administration officials argued that, for the purpose of rendition, the UNCAT’s prohibition on *refoulement* [did] not apply extraterritorially to the transfer of detainees (in U.S. custody) from locations outside the U.S. to a third country” (TCP 2013, 171). Juan Mendez, current UN Special Rapporteur on Torture, specifically rejects this interpretation stating that it violates the object and purpose of the UNCAT, making it illegal (Ibid.).

Though the circumstances of transfer are different, reports indicate that the Obama administration has sidestepped concerns about *non-refoulement* also with respect to at least one

detainee of the war on terror. Abdul Aziz Naji was transferred from Guantanamo Bay to Algeria in July 2010, despite his protestations and legitimate concerns about cruel, inhuman, and degrading treatment (Inter-American Commission on Human Rights 2010). The U.S. State Department's own 2010 human rights report expressed concern over Algeria's "poor prison conditions, abuse of prisoners, and lack of judicial independence" (U.S. Department of State 2010). He was sentenced by the Algerian Supreme Court to a three year prison sentence in January 2012, after a brief trial that accused him of the same crimes he had been cleared of by U.S. authorities (Reprieve 2013). This example raises questions about the current administration's understanding of its responsibility to prevent *refoulement* with respect to the rendition program.

IV. Legal Obligations: Investigation, Remedy, and Reparation

The violations of international human rights law outlined above each trigger specific obligations for states—the duty to investigate the allegation of violation and the duty to provide an effective remedy and full and adequate reparation to victims of the violation. This section will explore these responsibilities by first outlining the duties that arise with respect to torture and *non-refoulement* in the UNCAT, ICCPR, and ECHR. Then it will elaborate on the meaning of the right to reparations, drawing again on Synhaeve's work as well as on writings by REDRESS and Pablo de Greiff. Thus, this section will identify the obligations that exist under international law vis-à-vis torture and *refoulement*. Secondly, it will outline a framework for best understanding a particular element of these obligations, namely issuing reparations.

States' Responses to the Commission of Torture or Cruel, Inhuman or Degrading Treatment and *Refoulement*

The UNCAT, the ICCPR, and the ECHR require states to investigate allegations of torture or cruel, inhuman or degrading treatment. Article 12 of the UNCAT provides that the investigation must be “prompt and impartial” in cases where there are “reasonable grounds” to believe torture has occurred. Per the OSJI report, the UN Committee against Torture has further explained that “the investigation must be conducted by qualified individuals, must be effective, and must attempt to determine both what happened and who is responsible” (OSJI 2013, 23). In the ICCPR, the requirement to investigate can be deduced from a joint reading of Articles 7 and 2 which inform states of their obligation to provide any person whose rights or freedoms have been violated with effective remedy, and the opportunity to have their claim determined by competent authorities (implying an investigative component), and the enforcement of such remedies when granted. The European Convention on Human Rights has been interpreted by the European Court of Human Rights to oblige states with similar responsibilities as the UNCAT and the ICCPR for breaches of Article 3. As explained by OSJI, states are required to conduct effective investigations capable of “leading to the identification and punishment of those responsible” (OSJI 2013, 24).

The UNCAT, the ICCPR, and the ECHR also codify states' commitments to provide effective remedy and reparations for torture victims. As noted in Article 14 of the UNCAT, states must ensure that a victim of torture “obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” This applies to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment. The Committee against Torture has also determined that Article 14 compels states to:

...enact legislation and establish complaint mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims (OSJI 2013, 24).

The ICCPR recognizes the right to an effective remedy in Article 2(3), which the Human Rights Committee defines to include the right to compensation (Ibid.). Article 13 of the ECHR also recognizes the right to an effective remedy: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Article 41 provides for reparations, setting forth that “[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

As in the case of torture, *refoulement* also carries with it the right to an investigation of the commission of the transfer and a right to remedy and reparation. These rights are codified in Article 3 of the UNCAT, Articles 2 and 7 of the ICCPR, and Articles 3 and 13 of the ECHR. The ECHR, for instance, implies that all potential victims of *refoulement* must be able to lodge their complaints with a competent authority and obtain a comprehensive and rigorous evaluation of their requests before a transfer is enforced (European Court of Human Rights 2013, 2).

The extraordinary rendition program triggers all of the above obligations. To summarize, the reasons for that include (1) detainees’ allegations of torture or cruel, inhuman or degrading treatment; (2) detainees’ transfer to the custody of other governments despite a real risk of torture or cruel, inhuman or degrading treatment; and (3) the lack of effective, independent, and impartial review of their transfers. The United States and its partners therefore owe

investigations, effective remedy, and reparations to those individuals subject to torture or cruel, inhuman or degrading treatment and/or *refoulement* as part of the extraordinary rendition program.

Exploring the Right to Reparation

The previous section has established the legal right to an investigation of alleged human rights violations and the right to remedy and reparation for victims. However, the legal texts provide little guidance with respect to how these rights can be exercised and fulfilled. I will now explore their meaning by elaborating on the right to reparation, showing it can provide a useful framework for addressing the human rights violations committed as part of the extraordinary rendition program.

The foundational belief supporting the right to reparations is that the state holds a special obligation to repair victims of serious human rights violations, in addition to punishing the perpetrators of those violations. Pablo de Greiff, an expert on reparations in the field of transitional justice, provides an analysis of reparations that is useful to consider. While there is a clear distinction between the extraordinary rendition situation and post-conflict societies in transition, transitional justice measures are developed, after all, in order to address systemic human rights violations. To repair a violation, the state must provide the victim with restitution to the status quo ante or, when that is not possible, compensation in proportion to harm, though this is understandably problematic when it comes to irreversible harms such as harm from torture (de Greiff 2008, 167). REDRESS' 2001 report *Torture Survivors' Perceptions of Reparation* adds that reparation is couched in restorative justice theory, instead of retributive justice, which places an emphasis on repairing as far as possible the damage and hurt caused to a victim by a

crime. Through its emphasis, this approach tackles problems with the extraordinary rendition program through victims' needs, not perpetrator punishment.

The van Boven/Bassiouni principles, developed by Theo van Boven and M. Cherif Bassiouni, are the most well-known and comprehensive principles regarding the elements necessary for a complete reparation strategy. According to the principles, the victims' right to remedy and reparation encompasses access to justice, reparation for the harm suffered, and access to factual information concerning the violations. Reparation "should be adequate, effective, prompt, proportional to the gravity and the harm suffered, and should include various forms" (Cullinan 2001, 13). Four main forms of reparation are restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. Restitution means reestablishing the victim's status quo ante. Compensation, which de Greiff states is essential and preferred, involves granting the victim monetary compensation for every quantifiable harm. Rehabilitation calls for adequate medical and psychological care for victims of human rights violations. Lastly, satisfaction and guarantees of non-recurrence requires the cessation of the violations, verification of the facts, apologies to victims and legal rulings, disclosure of the truth, sanctions on perpetrators, and institutional reform (de Greiff 2008, 167). Establishing the truth is an important component of reparations. Casting clear light on the rendition network in its totality offers tangible benefits to victims, allows for a full assessment of the appropriate reparations in the context of extraordinary rendition, and affords all actors the best means to unbiasedly represent what actually happened. Establishing truth, whether through truth-telling or the creation and publication of an official report and judgment, is an important starting point. While acknowledging that accountability is essential, the "[d]isclosure of the truth...is one of the

psychological premises that must be fulfilled in order to obtain justice” and pave the way for that accountability (Cullinan 2001, 17).

V. Paths to Reparation

To recap, Sections II and III established that the extraordinary rendition program violated a number of human rights codified in international law, including the prohibition of torture and cruel, inhuman or degrading treatment and the principle of *non-refoulement*. Section IV outlined the legal obligations triggered by these violations—the duty to investigate and provide remedy and reparations—with a special focus on how the right to reparation should be emphasized and fulfilled through restitution, compensation, rehabilitation, and satisfaction and guarantees of non-recurrence. This section evaluates how the right to reparation has actually been claimed in the war on terror context. While the right has been exercised, significant obstacles remain that compromise the completeness of reparations.

Exercising the Right to Reparation

The primary mechanism that states have used to address allegations of human rights violations resulting from extraordinary rendition is investigation. While it is a starting point for providing reparations, the investigations have often been kept confidential and therefore fall below the standard for truth-seeking as contemplated by the van Boven/Bassiouni principles. The second vehicle through which victims have sought reparations is litigation. Both of these efforts have been significantly more successful in securing reparations outside of the United States, though the U.S. has made some efforts. This section will analyze what states have done to

respond to allegations about human rights violations consequent to the rendition program and the gaps in the various approaches.

In terms of its obligation to investigate, the U.S. has taken some steps in the right direction. These efforts are not complete, however, because they appear to have been limited in scope and focus on CIA secret prisons, which are only a part of the extraordinary rendition landscape. For example, there was a House Committee on Foreign Affairs hearing in 2007 on extraordinary rendition, but the majority of the attention was focused on “black sites” (TCP 2013, 175). There was also an inquiry by the Department of Justice into the U.S.’s rendition practices, but this was limited to ill-treatment by U.S. officials beyond what its own Office of Legal Counsel authorized, which included the redefinition of torture from the infamous “torture memos” (Hafetz 2013). Furthermore, in December 2012, the U.S. Senate Select Committee on Intelligence voted to approve a comprehensive report on CIA detention and interrogation. Although the report is classified, and is currently not publicly available, the committee chairman, Senator Dianne Feinstein, stated that she and a majority of the committee believed that the creation of “black sites” and the use of so-called enhanced interrogation techniques were “terrible mistakes.” She added that the report would “settle the debate once and for all over whether our nation should ever employ coercive interrogation techniques such as those detailed in the report” (OSJI 2013, 7).

It is commendable that these investigations occurred, especially considering that the more recent ones took place despite President Obama’s intention of “looking forward,” but they are clearly deficient in numerous ways (TCP 2013, 1). The scope of the Senate report, for instance, is still unclear and its contents remain classified; it is impossible to know what attention was paid to victims’ issues, if any. Further, whether the report addressed the transfer of detainees to the

custody of third party states and how they were treated while in custody remains unknown. The investigations have also failed to lead to accountability for the commission of torture and cruel, inhuman or degrading treatment, assuming that that was their objective at all. Considering these investigations comprise a great portion of the official truth-seeking efforts, the entire reparations project becomes less effective than it could be.

Investigations outside the U.S. have also suffered as a result of great American secrecy surrounding the practice of extraordinary rendition, though there has been some progress in these inquiries too. Canada, for instance, commissioned a comprehensive review of the extraordinary rendition of its citizen Maher Arar, though it resisted doing so when Arar first made his allegations (O'Connor 2006). The commission found that Canada's intelligence services were responsible for providing the U.S. with false information that led to Arar's rendition, prompting the Canadian government to issue an official apology (TCP 2013, 172). Canada also provided compensation to Arar for CA\$10.5 million plus legal fees (*CBC News*, January 25, 2007). Moreover, the Royal Canadian Mounted Police ("RCMP") commissioned a review of its role in Arar's rendition. It has issued a number of recommendations and is reported to be reforming. One of the proposed reforms, for instance, involves increasing civilian oversight of the RCMP (*The Toronto Star*, June 22, 2012).

More information also came to light regarding extraordinary rendition via two Council of Europe reports issued in 2006 and 2007, a release from the European Parliament in 2007, and a follow-up report from the European Parliament's Civil Liberties Committee in 2012. These reports concerned the creation of "black sites" in Europe and the complicity of European governments in alleged CIA human rights abuses. The more recent European Parliament's Civil Liberties Committee report focused also on renditions to Lithuania, Poland, and Romania.

Among its findings were that no EU member state fulfilled its obligation to hold an open and effective investigation into collaboration with the CIA rendition program (TCP 2013, 164). However, as a result of the U.S. refusing to respond to requests for information, allied governments have been struggling with “being held accountable both by their citizens and by international organizations, while ... being discouraged from making any public disclosures through direct and indirect warnings from the United States” (Ibid.).

Obtaining effective remedy and reparation has proven even more problematic than the investigations. Only a few victims have been successful, and none of them in the U.S., despite efforts of several victims to claim reparations through the U.S. court system. Cases related to the details of extraordinary rendition just do not make it through the system as a result of the government’s early invocation of the “state secrets” privilege and the courts’ deference to the executive’s national security decisions (Baumann 2011). The one exception to that is *Richmor v. Sportsflight Aviation*, a legal dispute over unpaid bills between two small aviation companies in upstate New York contracted by the CIA to fly and operate rendition flights. The British organization Reprieve found that, in the documents filed with the court, both airlines acknowledged the nature of the flights, referring to detainees as “invitees” (Baumann 2011). To my knowledge, this is the only known rendition-related case in which the U.S. failed to invoke the “state secrets” privilege (Finn and Tate 2011).

As was the case with investigation, litigation outside the United States has been more successful in obtaining reparations for victims. Former detainees Ahmed Agiza and Mohammed Al-Zery received financial compensation in Sweden, resulting from a combination of litigation and investigation, and Osama Mustafa Hassan Nasr (a.k.a. Abu Omar) received reparations in Italy via litigation (OSJI 2013, 110; Synhaeve 2011, 440). Australia and the United Kingdom

also issued compensation to extraordinary rendition victims, but in the context of confidential settlements that sought to avoid litigation relating to the associated human rights violations (OSJI 2013, 7). Most recently in December 2012, the European Court of Human Rights issued a landmark decision in former detainee Khaled El-Masri's case against Macedonia for its role in his rendition. In the case of *Khaled El-Masri v. The Former Yugoslav Republic of Macedonia* (2012), the Court ordered Macedonia to pay El-Masri €60,000 for the seriousness of the violations of the European Convention, finding Macedonia violated Article 3 of the ECHR. The reasons were twofold. Firstly, the Court decided that even though it was the CIA rendition team that tortured El-Masri in Macedonia, Macedonia was also considered responsible. Secondly, the Court found that because Macedonia transferred El-Masri unlawfully to U.S. custody, knowing he was at risk of torture or other cruel, inhuman or degrading treatment, it violated Article 3 of the ECHR (Ibid., 60-66). Additionally, the Court found Macedonia in violation of Article 5 of the European Convention prohibiting arbitrary detention, Articles 2, 3, and 5 for the failure to investigate El-Masri's allegations sufficiently, and Article 13 for infringing upon El-Masri's right to an effective remedy (Ibid., 80).

Most of the efforts to address the human rights problems of the rendition program have, thus, taken the form of incomplete investigations or frustrated litigation. Yet, truth has emerged, financial compensation has been remitted in some cases, and a few official apologies have been issued. Proceedings seem to fare significantly better outside of the U.S., though they are hampered by a lack of cooperation on the part of the American government as well as by the domestic politics of the state conducting investigations or hosting litigation regarding its practices vis-à-vis rendition. Evaluating all of this together, it is clear there are still significant accountability gaps that impact the right to reparation for victims.

VI. Challenges and Opportunities to Fulfill Victims' Claims

As this discussion has hopefully clarified, there is strong evidence to support a thorough, public investigation into all aspects of extraordinary rendition. There is also a legal basis to hold the U.S. accountable for the human rights violations it is believed to have committed via the rendition program. The United States is not the only blameworthy party, considering the network it utilized for the rendition program. However, it stands out because of its leadership role and its failure to publicly acknowledge any wrongdoing, offer official apology, or provide victims with any form of reparations. The final section of this inquiry will identify a few of the challenges that contribute to this stasis, which victims and advocates may want to consider when moving forward with victims' claims, as well as a potential opportunity to contribute to victim reparation by focusing on the right to truth.⁷

One of the first challenges is the unknown scope of the rendition program. A number of consequences flow from this, one being that the population of victims and perpetrators remains in question. Notably, two of the most successful detainee cases profiled above (i.e. Maher Arar and Khaled El-Masri's cases) featured victims who had the advantage of Canadian and German citizenship. Despite the initial resistance of both of those governments, Canada and Germany ultimately ended up supporting their citizens' human rights efforts. Consider the number of detainees that were part of the rendition program that are not citizens of responsive governments that can advocate for their rights or that are still in detention at the GTMO detention facility, with limited access to attorneys, let alone avenues for remedy. Also, OSJI's report outlines the accounts of 136 detainees it believes to have been part of the extraordinary rendition program, but the report points out that there could be many more individuals who have yet to be identified.

⁷ For more discussion on the right to truth, refer to the Joint Concurring Opinions in *El-Masri v. Yugoslavia*.

As for the population of perpetrators, the extraordinary rendition program required deep collaboration among and between government agencies and private companies. The extent to which these parties were involved in the program, what they knew about detainee treatment, and what they did to facilitate or prevent torture and cruel, inhuman, and degrading treatment is unclear.

The second greatest challenge to victims' reparation claims is politics, chiefly U.S. policy with respect to the war on terror and truth. It seems the continuity of the war is one of the strongest elements that buttresses the "state secrets" privilege, which has thus far upset all of the cases brought in U.S. courts on behalf of victims of extraordinary rendition. As a result, none of the "big fish" have actually been held accountable for their roles in the systematic violation of human rights that occurred as a result of the extraordinary rendition program. Moreover, the Obama administration has decided to forego investigation into allegations of wrongdoing on the part of former Bush administration officials and continues to employ the rendition program. This will be an obstacle to establishing an accurate account of the program through cooperation with those at the highest levels of government in this and the previous administration.

Another challenge to fulfilling victims' rights to reparation is rallying domestic support for establishing accountability mechanisms related to human rights abuses committed against suspected terrorists in the war on terror. While Maher Arar and Khaled El-Masri were cleared of any wrongdoing, a number of the individuals subjected to torture and other cruel, inhuman or degrading treatment are not in the same position, especially not in the public's imagination. Abu Zubaydah, for instance, was characterized as "an admitted operational planner, financier and facilitator of international terrorists and their activities... [and as having] participated in hostilities against the U.S., its interests, and allies" in his November 2008 JTF-GTMO Detainee

Assessment, though this characterization has been disputed by his attorney (Department of Defense 2008; Margulies 2012). Zubaydah was also vilified in the recent blockbuster *Zero Dark Thirty*. At the same time, in 2008 CIA director Gen. Michael Hayden confirmed that Zubaydah was subject to torture and the rendition program (*The New York Times*, April 28, 2013; Margulies 2012). It is difficult to rally sympathy for individuals like Zubaydah in a political climate with heightened sensitivity to terrorism and national security concerns, despite how he has been treated. He is unlikely to inspire a groundswell of support for an inquiry into his treatment and for financial compensation supported with American tax dollars.

U.S. public opinion on human rights and humanitarian law is another factor militating against publicly supported accountability mechanisms. As shown by a public opinion survey conducted in February 2011 by the American Red Cross, “55% of adults surveyed felt that they were somewhat or very familiar with the Geneva Conventions, but 51% also stated that they believed it was acceptable to torture enemy soldiers” (DeCristofaro, Gutierrez, and Woods 2011, 1010). Considering the American debate about whether to consider combatants like Zubaydah to be soldiers, the percentage of those who believed it was acceptable to torture the enemy might be even higher if the question were asked with respect to the individuals who were subject to extraordinary rendition.

However, there are still opportunities to pursue reparations in the United States for victims of extraordinary rendition. Recall that the four types of reparations contemplated by the van Boven/Bassiouni principles are restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. Satisfaction and guarantees of non-recurrence include the cessation of the violations, verification of the facts, apologies to victims and legal rulings, disclosure of the truth, sanctions on perpetrators, and institutional reform (de Greiff 2008, 167). This element

contains an entry point for actors besides those directly involved in the violations perpetrated via the rendition program to contribute to the disclosure of the truth, and thereby partially fulfill victims' rights to reparation.

Documentation as a vehicle for truth-seeking and truth-telling has already proven active in this case. For instance, the documentation completed by The Constitution Project's Task Force and the Open Society Justice Initiative, which provided much of the factual information that served as the basis for this inquiry, played important roles in contributing to the pool of uncovered truths about the extraordinary rendition program. Through the OSJI report, for instance, the accounts of 136 detainees were catalogued and distributed around the world. Of course, the veracity of former detainee accounts must be investigated for these efforts to have validity, but these challenges can be met. For instance, The Constitution Project's Task Force cross-checked and independently corroborated detainee accounts with the recollections of other witnesses as well as publicly available data. A similar approach could be adopted by other truth-seeking efforts.

Another interesting project also working in the documentation/truth-seeking space is *Witness to Guantanamo*, started by Peter Jan Honigsberg, a Professor of Law at the University of San Francisco. The project was inspired by the Shoah model and the work of Steven Spielberg in response to Holocaust denial. Spielberg filmed video accounts of the experiences of survivors, and to date over 52,000 survivors have told their personal stories. *Witness to Guantanamo* is currently conducting in-depth interviews of former Guantanamo detainees, and the website already features short video clips of those interviews. It is intended to provide an archive of experiences to preserve individual truths and also to provide scholars and researchers with documentation of what happened during the war on terror at the GTMO detention facility. A

similar model could potentially be adopted for victims of extraordinary rendition (*Witness to Guantanamo* 2013).

Perpetrators' acknowledgement of and apology for their actions are important to a complete reparations plan. Perhaps in their absences, however, one can consider the efforts of advocacy groups, researchers, and lawyers as commendable steps towards establishing at least some of the truth of what happened, through investigations and truth-telling. Hopefully, this in turn will fuel another step towards victim reparation.

VII. Conclusion

When the Bush administration decided to expand the rendition program in response to the 9/11 terrorist attacks on the United States, it created a complex web of human rights problems that spanned across the world, involved collaboration with numerous other governments and private companies, and ultimately created an environment in which detainees were subject to torture or cruel, inhuman, and degrading treatment and to a host of other human rights violations. These violations occurred in contravention to international human rights principles, and while this in theory triggered specific obligations on states to investigate claims of violations and provide effective remedy and reparations to victims, this has only occurred in a piecemeal way. On top of that, the Obama administration has continued to use rendition as a tool in its counterterrorism strategy. Individual detainees have had the opportunity to bring claims and, in some cases, have received certain measures of reparation, but this has been most successful outside of the United States. This has resulted in effective impunity for those who originated the policies, and it is unlikely this will change in the near future given the various logistical and political challenges to bringing forth victims' claims.

All things considered, though, there are still many opportunities for strategic activism on victims' rights. Civil society groups are leveraging their skills to gain an entry point into providing reparations by promoting documentation, truth-seeking, and truth-telling. Also, the progress towards reparations claims outside of the U.S. judicial system is promising in that it provides victims with financial compensation and contributes to the sum of public knowledge about the extraordinary rendition program. These developments will hopefully inspire movement towards similar results in the United States, through the work of lawyers, researchers, activists, and others dedicated to ending impunity for human rights abuses.

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