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# The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism

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# *The Legal Regime Governing Transfer of Persons in the Fight against Terrorism*

Margaret L. Satterthwaite\*

## 1. Introduction: formal and informal transfer in the context of counter-terrorism

Crimes of terrorism are frequently committed by individuals and groups in countries other than those they target. Even when “home-grown” terrorists are responsible for violent acts, they often flee across borders to evade justice. States seeking to punish acts of terrorism therefore regularly need to obtain custody of individuals accused of committing such acts.<sup>1</sup> They may do so by requesting the extradition or deportation of a suspect from a state where the individual is found. States also directly apprehend suspected terrorists in other countries and deliver them to justice before their own or third states’ courts through “rendition to justice.” When terrorism occurs in the context of armed conflict, states may move suspects from one state to another through wartime processes such as the transfer of prisoners of war. In short, states use both formal and informal processes when transferring individuals suspected of terrorist crimes.

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\* Forthcoming in Larissa van den Herik & Nico Schrijver, eds., *COUNTER-TERRORISM AND INTERNATIONAL LAW: MEETING THE CHALLENGES* (forthcoming 2010). Associate Professor of Clinical Law and Faculty Director, Center for Human Rights and Global Justice, NYU School of Law. Parts of this article draw on a series of articles I have published on the topic of rendition, including CHR/GJ/Margaret Satterthwaite, *Minimum Standards for Transfer: International Law Concerning Rendition in the Context of Counter-Terrorism* (2009), M. Satterthwaite, ‘Rendered Meaningless: Extraordinary Rendition and the Rule of Law’, (2007) 75 *GEO. WASH. L. REV.* 1333; M. Satterthwaite, ‘Extraordinary Rendition and Disappearances in the “War on Terror”’, (2006) 10 *GONZ. J. INT’L L.* 70; and M. Satterthwaite & A. Fisher, ‘Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law’, (2006) 6 *THE LONG TERM VIEW* 52. Work on this Chapter was supported by the Filomen D’Agostino Research Fund at New York University School of Law. Many thanks to those with whom I have puzzled through these issues in the past few years, in particular Jayne Huckerby, Julia Hall, Alison Nathan, and Wendy Patten. Thanks to Jelena Pejic, Zoe Salzman, and the members of the January 2010 expert meeting in The Hague for invaluable comments on an earlier draft. Some of the core ideas set out here began as an *amicus curiae* brief that I worked on with Jayne Huckerby, Zoe Salzman, and Junko Tadaki; I am indebted to them. I am grateful to Niran Anketell (NYU LL.M. ’10), Tamar Feldman (NYU LL.M. ’08), Ryan Gee (NYU J.D. ’10), and Tafadzwa Pasipanodya (NYU J.D. ’08) for impeccable research assistance.

<sup>1</sup> States that have ratified international counter-terrorism conventions have obligations to prohibit certain acts of terrorism as crimes and to prosecute or extradite individuals found on their territory who are suspected of committing such crimes. Still, no international body has jurisdiction over crimes of terrorism, so punishing such acts is left to states. See (a) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 7; (b) International Convention Against the Taking of Hostages, art. 8; (c) International Convention on the Suppression of Terrorist Bombings, art. 8; (d) International Convention for the Suppression of Financing of Terrorism, art. 10; (e) International Convention for the Suppression of Acts of Nuclear Terrorism, art. 11; (f) Convention on the Suppression of Unlawful Seizure of Aircraft, art. 7; (g) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 7; (h) Convention on the Physical Protection of Nuclear Material, art. 10; (i) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 10; (j) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal, art. 3; all available at: [http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml&menu=MTDSG](http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG).

The practice of rendition—the involuntary transfer of an individual across borders without recourse to extradition or deportation proceedings—is not new. Indeed, the practice has been used by governments for more than a century. Famous renditions include that of Nazi war criminal Adolf Eichmann from Argentina to Israel, and terrorist Carlos “the Jackal” (Ilich Ramirez Sanchez) from Sudan to France. Although such renditions have been controversial in human rights circles, they have been celebrated by many as crucial in the fight against impunity for grave crimes and are sometimes called “rendition to justice.”<sup>2</sup>

The administration of former U.S. President George W. Bush was criticized for the new<sup>3</sup> practice of “extraordinary rendition”—the transfer of suspects to countries known for the systematic use of torture.<sup>4</sup> U.S. officials at the time defended the practice, relying on justifications developed to support “rendition to justice” and arguing that the practice was legal.<sup>5</sup> Despite these justifications, international human rights bodies and intergovernmental bodies including the Council of Europe, the European Union and human rights bodies of the United Nations have determined that the extraordinary form of rendition is unlawful under human rights law.<sup>6</sup> Although individuals have faced significant legal hurdles in

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<sup>2</sup> For a defense of rendition to justice, see G. S. McNeal & B. J. Field, ‘Snatch and Grab Ops: Justifying Extraterritorial Abduction’, (2007)16 *TRANSNAT’L L. & CONTEMP. PROBS.* 491. For an additional defense of rendition, alongside some recommendations for changes in the procedure to make it more “regular,” see A. J. Radsan, ‘A More Regular Process for Irregular Rendition’, (2006) 37 *SETON HALL L. REV.* 1; see also D. B. Rivkin, Jr. & L. A. Casey, ‘Europe’s Runaway Prosecutions’, *Washington Post*, Feb. 28, 2007 at 19.

<sup>3</sup> The U.S. practice of extraordinary rendition was a new form of an older practice. “Rendition to justice,” in which a suspect is apprehended and transferred to the United States for criminal prosecution, was approved and formalized by President Ronald Reagan and expanded by President George H.W. Bush. U.S. courts approved of the practice in a series of cases that culminated in the 1992 Supreme Court case *U.S. v. Alvarez-Machain*. President Bill Clinton altered the practice by initiating the transfer of suspects from one country to another, placing them into foreign legal processes rather than bringing them into the U.S. legal system. For a discussion of this history, see M. Satterthwaite & A. Fisher, ‘Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law’, (2006) 6 *THE LONG TERM VIEW* 52.

<sup>4</sup> For a discussion of these criticisms, see M. Satterthwaite, ‘Rendered Meaningless: Extraordinary Rendition and the Rule of Law’, (2007) 75 *GEORGE WASHINGTON LAW REVIEW* 1333.

<sup>5</sup> See Condoleezza Rice, U.S. Sec’y of State, U.S. Dep’t of State, Remarks upon Her Departure for Europe (Dec. 5, 2005), <http://www.state.gov/secretary/rm/2005/57602.htm> (in which Secretary Rice defends the U.S. use of rendition), and Michael Hayden, *The Charlie Rose Show: Interview with Director Michael Hayden* (PBS television broadcast Oct. 22 & 23, 2007) (transcript available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/interview-with-charlie-rose.html>) (in which CIA Director Michael Hayden explains the continuation of the U.S. Program of rendition and CIA detention).

<sup>6</sup> See UN. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999: Addendum: United States of America, UN Doc. CAT/C/48/Add.3 (2005) at page 5, (considering U.S. report submitted May 6, 2005); U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006); Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur.Parl.Doc. A6-0020/2007(2007), available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf); Draft Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur.Parl.Doc. A6-0213/2006 (2006), available at <http://www.statewatch.org/cia/reports/ep-cia-interim-report-english.pdf>; Eur. Parl. Ass. Comm. on Legal Affairs and Human Rights, Alleged Secret Detentions in Council of Europe Member States, Doc.No. AS/Jur (2006), available at [http://assembly.coe.int/CommitteeDocs/2006/20060124\\_jdoc032006\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060124_jdoc032006_E.pdf) [hereinafter *Council of Europe January 2006 Report*]; Eur. Parl. Ass. Comm. on Legal Affairs and Human Rights, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report, 64, Doc. No. 11302 rev. (2007), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> [hereinafter *Council of Europe June 2007 Report*].

fighting the practice in the U.S. legal system (most prominently in the form of the state secrets doctrine<sup>7</sup>), there is little doubt among international law experts that extraordinary rendition is prohibited.<sup>8</sup>

Despite this clear consensus, there is no similar agreement concerning the practice of informal transfers—renditions of the non-“extraordinary” kind—more generally in the context of counter-terrorism efforts. In part this lack of consensus comes from the varied contexts in which informal transfers occur. Such transfers include the movement of individuals captured on the battlefield in Afghanistan to the detention facility at Guantánamo, the transfer of individuals captured in a variety of settings to secret offshore detention centers, the transfer of individuals detained by one state to the custody of their own state of nationality (sometimes for trial, but often simply for detention), and the transfer of individuals to the territory of the transferring state to stand trial before a regular criminal court.

Soon after U.S. President Barack Obama was inaugurated in January 2009, he promised to end the most severe human rights violations carried out by the U.S. government in the name of fighting terrorism, including the use of torture and secret detention facilities.<sup>9</sup> Although he signed Executive Orders ending the use of such practices, he did not order the cessation of rendition, defined as the transfer of an individual without the benefit of judicial or administrative proceedings. Instead, he formed a Task Force to examine the issue and to compile recommendations about how the process could be brought back in line with U.S. law and international obligations.<sup>10</sup> In July 2009, this Task Force recommended some improvements in the use of diplomatic assurances—promises from countries receiving detainees upon which the United States has relied when transferring individuals to states where they may face a risk of torture.<sup>11</sup> However, the Task Force did not recommend any significant reform of rendition itself.<sup>12</sup> The U.S. practice of rendition will likely continue, and along with it controversy over the practice, since many governments have critiqued the U.S. use of rendition while failing to formulate clear policies for their own actions in connection with the transfer of terrorism suspects.<sup>13</sup>

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<sup>7</sup> One of the most famous extraordinary rendition cases, that of German citizen Khaled El-Masri, was thrown out on the grounds that defending against the case would require the exposure of state secrets. *See* M. Satterthwaite, Human Rights and Humanitarian Law in the “War on Terror”: The Story of El Masri v. Tenet, in Hurwitz & Satterthwaite, with Ford (ed.) *Human Rights Advocacy Stories* (2009).

<sup>8</sup> For legal analyses of the prohibitions relevant to extraordinary rendition, *see* Satterthwaite, *supra* notes 3, 4, and 7, and D. Weissbrodt & A. Bergquist, ‘Extraordinary Rendition: A Human Rights Analysis’, (2006) 19 HARV. HUM. RTS. J. 123, ‘Extraordinary Rendition and the Torture Convention’, (2006) 46 VA. J. INT’L L. 585, and ‘Extraordinary Rendition and the Humanitarian Law of War and Occupation’, (2007) 47 VA. J. INT’L L. 295.

<sup>9</sup> *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

<sup>10</sup> *See id.*

<sup>11</sup> Press Release, U.S. Dep’t of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009) [hereinafter “Task Force Press Release”], *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>. The recommendations themselves have not been made public.

<sup>12</sup> *Id.*

<sup>13</sup> For example, European governments have taken a series of initiatives aimed at clarifying their policies concerning the transfer of individuals suspected of terrorist offenses. Some of these initiatives have been bilateral and aimed at withdrawing assistance for transfers conducted outside normal detainee transfer rules. Other initiatives have been multilateral, such as the actions by the Council of Europe to investigate European

Indeed, European governments and Canada have endured critique for the transfer of detainees held by their armed forces in Afghanistan and Iraq to the custody of the home state or to the United States.<sup>14</sup> Although many governments have engaged in discussion aimed at clarifying the legal status of such transfers,<sup>15</sup> confusion remains, and the governments of Denmark and Canada, as well as the United States, have faced litigation by individuals and groups challenging the legality of certain battlefield transfers.<sup>16</sup> The

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involvement in the U.S. rendition program and recommend changes to policies concerning the conduct of foreign intelligence services on European soil. See Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, Doc. No. AS/Jur (2006) 03 rev. (2006), available at [http://assembly.coe.int/CommitteeDocs/2006/20060124\\_Jdoc032006\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf), and Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, ¶ 64, Doc. No. 11302 rev. (2007), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>. See also Council of Europe Parliamentary Assembly, Resolution 1507 (2006), “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states,” available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1507.htm>.

<sup>14</sup> See, e.g., Amnesty Int’l, *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?*, AI Index ASA 11/011/2007, Nov. 13, 2007, available at <http://www.amnesty.org/en/library/info/ASA11/011/2007/en> (Critiquing the transfer activities of European, U.S., and Canadian forces in Afghanistan under the rubric of ISAF forces and calling for a temporary halt of such transfers to ensure ISAF countries were living up to their international obligations pertaining to transfer).

<sup>15</sup> For example, European governments, led by the government of Denmark, have participated in the Copenhagen Process, a series of meetings in which they have sought to clarify the “legal, political, operative, and practical challenges relating to detainees in international military operations,” particularly those in Afghanistan. One of the main issues for discussion has been the legal rubric governing the transfer of detainees. See, e.g. Legal Dep’t, Ministry of Foreign Affairs of Den., Copenhagen Conference on “The Handling of Detainees in International Military Operations” – Non-Paper on Legal Framework and Aspects of Detention, Oct. 4, 2007, available at <http://www.ambottawa.um.dk/NR/rdonlyres/F5364962-DC30-4333-9EFC-1B612B43DC28/0/NonpaperCopenhagenConference.pdf>. The discussions have been ongoing; the *Copenhagen Post* reported in June 2009 that:

The latest meeting in the Copenhagen Process on the Handling of Detainees was concluded on the 16<sup>th</sup> of June 2009 with representatives from more than 20 countries around the world, as well as EU, UN, Nato and the International Red Cross Committee in attendance. Thomas Winkler, ambassador and legal advisor to the Foreign Ministry, said “we have made very good progress towards establishing a common platform for the handling of detainees” and that “the extremely complicated issues, both legal and political, mean there is a need for a lot of discussion on a huge range of subjects before a common platform can be reached.”

See ‘Progress Made in International Detainee Policy’, *Copenhagen Post*, June 17 2009, available at <http://www.cphpost.dk/news/international/89-international/45982-progress-made-in-international-detainee-policy.html>.

<sup>16</sup> Denmark was sued by a former Afghan detainee who was handed over by Danish forces to the U.S. military, in whose detention he alleged he was tortured; as of this writing, the case was pending. See ‘Afghan ex-prisoner sues Denmark over torture’, *Swedish Wire*, September 9 2009. Similarly, the United States was sued by two U.S. citizens held by the U.S. military in Iraq who alleged that they would be abused if transferred to Iraqi custody, where they faced criminal charges. The U.S. Supreme Court threw out the case, ruling that although the U.S. courts could hear the case, the Court would not interfere with the decision of the military to transfer them to a foreign government that planned to try them. See *Munaf v. Geren*, 128 S. Ct. 2207 (Supreme Court of the United States, June 12, 2008). Amnesty International Canada and the British Columbia Civil Liberties Association sued the government of Canada, alleging that Canadian forces operating in Afghanistan had a policy and practice of transferring detainees to the Afghan government, where they were at risk of torture. See P. Koring, ‘Amnesty Slams Canada Over Afghan Detainees; Rights Groups Seek to Argue Before Court that Transfer of Captives Violates Law’, *Globe and Mail* (Canada), Feb. 21 2007, at A16. The case was ultimately dismissed on the grounds that the Canadian Charter of Rights and Freedoms did not extend to the actions in question; Canada temporarily halted prisoner transfers during the suit, but resumed after it concluded an agreement with

European Court of Human Rights is set to decide on some of the key issues in the case of *Al-Saadoon and Mudfbi v. United Kingdom*, in which individuals detained by U.K. forces in Iraq challenged their transfer to Iraqi authorities on the basis that they could be subjected to the death penalty after their transfer.<sup>17</sup>

Because they are carried out in a wide variety of settings, the question of which legal regime applies to the transfer of terrorism suspects raises difficult and complex issues.<sup>18</sup> A careful examination of relevant rules of international human rights and humanitarian law is therefore needed. This article examines the legal norms governing such transfers and sets out a minimum standard that must be upheld in all settings. This standard is most relevant for informal transfers, since they are almost always accomplished without regard to the full set of protections due the individual being transferred. To the extent that formal transfers in the context of counter-terrorism also fail to duly protect individual rights, the minimum standard will be a useful reference.<sup>19</sup> Although some background will be provided in the next section concerning formal regimes of transfer, the remainder of this article focuses on the minimum rules required when states transfer individuals outside of deportation or extradition proceedings. The article will also discuss questions left unanswered by the existing law. It will conclude with recommendations for states seeking to comply with international human rights and humanitarian law when transferring individuals suspected of terrorism.

## 2. Background and current legal position

### 2.1. Formal and informal transfer

Rendition is a term that is defined in many ways by what it is not: it is not extradition

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the Afghan government concerning detainee treatment. See J. Tibbetts, 'Supreme Court Rejects Charter Protection for Afghan Detainees', *National Post*, May 21 2009, and Decision on Charter Applicability/Dismissing Application (03/12/08) (Supreme Court of Canada, May 21, 2009).

<sup>17</sup> The case was ruled admissible (although the applicants were transferred to Iraqi custody in spite of the ECHR's interim measure to the contrary). *Al-Saadoon and Mudfbi v. United Kingdom*, (2009).

<sup>18</sup> The confusion was evident in the way the U.S. Special Task Force on Interrogations and Transfer Policies understood the various forms of transfer carried out by the United States. Commenting on the Task Force's recommendations, the U.S. Attorney General explained that the Task Force "considered seven types of transfers conducted by the U.S. government: extradition, transfers pursuant to immigration proceedings, transfers pursuant to the Geneva Conventions, transfers from Guantanamo Bay, military transfers within or from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities." See Task Force Press Release, *supra* note 11. This list of types of transfer betrays a mix of categories: some transfers are described based on the legal regime underlying them, others are described according to which agency carries them out, and others are defined according to which domestic legal authorities allow for the transfer.

<sup>19</sup> Many states have altered their immigration rules to create stricter regimes for expelling or excluding individuals suspected or convicted of committing crimes of terrorism. Some reforms were called for by the Security Council, which called on states to "ensure. . . that refugee status is not abused the perpetrators, organizers, or facilitators of terrorist acts." U.N. Sec. Res. 1373 (2001). The new rules in many countries, however, have been challenged under human rights law. For a discussion of these issues, see, e.g., C. Warbrick, 'The European Response to Terrorism in An Age of Human Rights', (2004) 15 EUR. J. INT'L L. 989 (discussing laws in the United Kingdom), P. Margulies, 'Uncertain Arrivals: Immigration, Terror, and Democracy After September 11', (2002) 17 BROOK. J. INT'L L. 447 (discussing laws in the United States), I. Nazarova, 'Alienating "Human" from "Right": U.S. and U.K. Non-Compliance with Asylum Obligations Under International Human Rights Law', (2002) 25 FORDHAM INT'L L. J. 1335.

and it is not deportation, two formal means through which governments transfer individuals across international borders.<sup>20</sup> Extradition is a “formal process by which a person is surrendered by one state to another.”<sup>21</sup> It is the usual method for transfer of criminal suspects and fugitives, and it is designed to protect the sovereignty of the nation where the suspect has taken refuge (the “host state”), safeguard basic individual rights, and allow the requesting state to obtain jurisdiction over an individual who is either suspected of committing or has been convicted of committing a crime subject to its criminal jurisdiction.<sup>22</sup> Most of the key international counter-terrorism treaties contain extradite or prosecute clauses, meaning that States parties to the conventions must either prosecute individuals within their jurisdiction who are accused of committing acts of terrorism, or extradite them to a State that is willing and able to prosecute them.<sup>23</sup>

Although the exact procedures for extradition vary according to domestic law, the general practice follows a similar pattern. Extradition usually arises under a bilateral or multilateral treaty and begins with a request from the representative of a foreign state for the transfer of a named individual who is present on the territory of the host state.<sup>24</sup> The request is followed by apprehension and a proceeding in which a judicial officer determines whether the individual is extraditable; this requires a showing that the crime is one covered by a valid extradition treaty (and is an act criminalized in both jurisdictions), and a sufficient quantum of evidence to satisfy the relevant legal standard for extradition.<sup>25</sup> Once these prerequisites are satisfied, the judicial officer determines that the individual is extraditable and the decision concerning whether to extradite or not passes to an executive officer<sup>26</sup> who must then decide whether to surrender the alleged fugitive to the requesting foreign state.<sup>27</sup> Many treaties authorizing extradition include clauses allowing host states to refuse to extradite individuals who would be at risk of persecution or unfair treatment in the receiving state.<sup>28</sup> In addition, in states that have ratified major human rights treaties, the determination of whether to

<sup>20</sup> Some scholars use the term “rendition” to cover all forms of transfer—formal and informal. *See, e.g.*, J. F. Murphy, *Punishing International Terrorists: The Legal Framework for Policy Initiatives* (1985), 36. This Article uses the term to encompass only informal transfers.

<sup>21</sup> M. C. Bassiouni, *International Extradition: United States Law & Practice* (2007) Vol. I.

<sup>22</sup> V. Epps, ‘The Development of the Conceptual Framework Supporting International Extradition’, (2003) 25 *LOY. L.A. INT’L & COMP. L. REV.* 369 at 371-72.

<sup>23</sup> *See* (a) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 7; (b) International Convention Against the Taking of Hostages, art. 8; (c) International Convention on the Suppression of Terrorist Bombings, art. 8; (d) International Convention for the Suppression of Financing of Terrorism, art. 10; (e) International Convention for the Suppression of Acts of Nuclear Terrorism, art. 11; (f) Convention on the Suppression of Unlawful Seizure of Aircraft, art. 7; (g) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 7; (h) Convention on the Physical Protection of Nuclear Material, art. 10; (i) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 10; (j) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal, art. 3; all available at: [http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml&menu=MTDSG](http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG).

<sup>24</sup> *See generally* G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (1998), at 59-146. For the relevant U.S. law, see 18 U.S.C. § 3184 (2006).

<sup>25</sup> Gilbert, *supra* note 24. For a discussion of relevant U.S. law, *see* *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986).

<sup>26</sup> Gilbert, *supra* note 24. In the United States, the relevant executive officer is the Secretary of State. *See* 18 U.S.C. § 3184.

<sup>27</sup> Gilbert, *supra* note 24. For relevant U.S. law, see 18 U.S.C. §§ 3184, 3186; *see also* 22 C.F.R. § 95.2(b) (1999).

<sup>28</sup> *See, for example*, article 9 of the Hostage Taking Convention and Article 3 of the UN Model Treaty on Extradition [inset citation].

extradite an individual usually includes a consideration of any risk of torture or grave ill-treatment the individual may face upon transfer.<sup>29</sup> Individuals facing extradition may also seek asylum from persecution, though there may be separate procedures for obtaining such protection under the relevant domestic law.<sup>30</sup> Certain individuals suspected of, or who have been convicted of, terrorist crimes may be excluded from the protection against *refoulement* set out in refugee law. However, the *non-refoulement* rule relating to torture is absolute under human rights law, so individuals facing a substantial risk of torture are protected against extradition even when they are excluded from refugee protection.<sup>31</sup> In addition to these human rights protections, many extradition treaties include exceptions allowing host states to refuse extradition if the individual sought is a national of the requested state, or if the crime for which he is sought is of a “political” nature. Key states argue that these exceptions have proven to be obstacles to extraditing terrorism suspects.<sup>32</sup>

Deportation and exclusion are general terms for the multiple legal processes a country may use to expel an individual who has entered its territory, or to prevent an individual from entering that territory at the outset.<sup>33</sup> Under international law, states have the right to restrict access to their territory by non-nationals through immigration procedures. These procedures are regulated by law, and the individual subject to them is guaranteed certain rights<sup>34</sup>, though these rights have been severely restricted in some circumstances (such as in the case of admission and removal of individuals suspected of terrorist activity or connections).<sup>35</sup> Under human rights and refugee law, individuals facing transfer away from

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<sup>29</sup> Gilbert, *Chapter 4*, in *supra* note 24. This obligation is explicitly contained in article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and implicitly in article 7 of the International Covenant on Civil and Political Rights. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter “CAT” or “Convention Against Torture”]; and United Nations International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>30</sup> See Bassiouni, *supra* note 21, at 193-202 (“Interrelationship between Asylum and Extradition”). Because extradition, asylum, and withholding of deportation are separate legal claims with different procedural and substantive requirements, the decision as to one claim is not dispositive of the other. This can create anomalous results. See *id.*

<sup>31</sup> 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85; 1951 United Nations Convention Relating to the Status of Refugees art. 33, 19 U.S.T. 6259 at 6276; 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6224. The Refugee Convention prohibits states from expelling or returning a refugee to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (at 6276) These issues are discussed further, *infra*.

<sup>32</sup> For a discussion of these issues, see S. Borelli, *The Rendition of Terrorist Suspects to the United States*, in Bianchi (ed.) *Enforcing International Law Norms Against Terrorism* (2004). Despite these arguments, Borelli finds that the political offense exception has declined so much as to not pose a significant hurdle to extradition for crimes of terrorism.

<sup>33</sup> See Murphy, *supra* note 20 at 81-82.

<sup>34</sup> Under human rights law, individuals lawfully on the territory of a state are guaranteed a wide variety of rights and cannot be summarily expelled. See 1945 International Covenant on Civil and Political Rights 107 U.N.T.S. 1057 article 13 (“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”).

<sup>35</sup> See, e.g., M. Scaperlanda, ‘Are We that Far Gone? Due Process and Secret Deportation Proceedings’, (1996) 7 Stan. L. & Pol’y Rev. 23 (describing U.S. legal regime for deportation of “terrorists”); and See, e.g., S. H.

the territory of a country through immigration proceedings—like those facing transfer through extradition processes—may forward claims that their transfer should be prohibited since it would place them at risk of persecution, torture, or grave ill-treatment.

Disguised extradition is a term used to describe the reliance by a state on its immigration procedures such as exclusion, deportation, and removal to affect the transfer of an individual to the custody of another state for the purpose of punishment.<sup>36</sup> It is used in cases where extradition is impossible or deemed to be unlikely, or where extradition has been pursued but refused.<sup>37</sup> A number of states, including the United States, France, the U.K., and South Africa, have used disguised extradition with some frequency.<sup>38</sup> Individuals facing disguised extradition can use immigration proceedings to claim protection from potential persecution or torture in the same way that others facing deportation or exclusion may forward such claims.<sup>39</sup> However, since the process is one designed to deal with immigration control and not criminal matters, the safeguards built into the extradition process—such as the requirement that the requesting state bring forward sufficient evidence to justify extradition and the requirement that the crime for which the individual is sought is one specified in a valid treaty—are missing from disguised extradition.<sup>40</sup>

In the context of armed conflict, the rules of international humanitarian law both

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Legomsky, 'Immigration Law and Human Rights: Legal Line Drawing Post September 11: Symposium Article: The Ethnic and Religious Profiling of Non-Citizens: National Security and International Human Rights', (2005) 25 B.C. THIRD WORLD L. J. 161 at 162-177.

<sup>36</sup> See, *supra* note 21 at 204, 203-204 ("Disguised Extradition: The Use of Immigration laws and Alternatives to Extradition: Introduction").

<sup>37</sup> See Bassiouni, *supra* note 21 at 203-204. The expulsion of Klaus Barbie, who was convicted *in absentia* in France for crimes committed while he was an SS officer during World War II, from Bolivia to French Guyana, is a famous case of disguised extradition. The Bolivian Supreme Court had denied a French request for extradition prior to Barbie's expulsion. See Bassiouni, *supra* note 21 at 211.

<sup>38</sup> See Bassiouni, *supra* note 21 at 203-204, 209-211. For an overview of disguised renditions carried out by the United States during the first half of the twentieth century, see A. Evans, 'Acquisition of Custody Over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice', (1966) 40 BRIT. Y.B. INT'L L. 77. For information about disguised extradition in South Africa, see M.C. Cowling, 'Unmasking "Disguised" Extradition: Some Glimmer of Hope', (1992) 109 S. AFRICAN L. J. 242. Two cases in which France allegedly used disguised extradition to obtain jurisdiction over an individual sought for criminal matters were found by the European Commission on Human Rights not to have amounted to a human rights violation. See *Ilich Sánchez Ramírez v. France*, ECHR App. No. 28780/95 (1996) at 162 ("even assuming the circumstances in which the applicant arrived in France could be described as a disguised extradition, this could not, as such, constitute a breach of the Convention") and *Klaus Altmann (Barbie) v. France*, ECHR App. No. 10689/83 (1984) at 233 ("even if the applicant's extradition could be described as a disguised extradition, this would not, as such, constitute a breach of the Convention"). Another disguised extradition was found to amount to a violation of human rights by the European Court of Human Rights in large part because it was carried out in violation of domestic law. *Bozano v. France*, (1986), para. 60.

<sup>39</sup> These protections derive from international conventions such as the Refugee Convention and Protocol and the Convention Against Torture. Individuals facing disguised extradition will not have the opportunity for review of any other claims pertaining to the procedures that may face them in the country that seeks custody of them, since the exchange of custody is not a formal part of the legal proceeding.

<sup>40</sup> J. Murphy explains: "[Immigration proceedings] are not designed for the purpose of cooperation in furthering the international criminal justice system. Rather, both exclusion and deportation are civil processes, designed for immigration control and dominated by the executive. As a consequence, exclusion and deportation proceedings utilized for [disguised extradition] purposes do not apply criminal justice standard, either with respect to the interests of the states involved or to the protection of the accused." J. Murphy, *Punishing International Terrorists: The Legal Framework for Policy Initiatives* (1983), 81-82 cited in Bassiouni, *supra* note 21 at 219.

prohibit and require certain forms of transfer. Relevant here are rules concerning transfer, repatriation and release of individuals deprived of their liberty during armed conflict. Like other forms of international transfer regulated by law, the rules concerning transfer in the context of armed conflict include protections against persecution: prisoners of war may only be transferred to countries that will uphold their rights<sup>41</sup> and it is prohibited to transfer a protected person to a country “where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”<sup>42</sup> Concerning repatriation, states must repatriate prisoners of war without delay once active hostilities have ended<sup>43</sup> and civilians interned by belligerents in international armed conflict must likewise be promptly released once the reasons for their detention have resolved themselves, or—at the latest—at the close of active hostilities.<sup>44</sup> Practice has evolved to protect those subject to such transfers from involuntary transfer if they fear persecution upon return.<sup>45</sup>

International rendition is the transfer of an individual from the custody of one state to another without the benefit of any process—whether extradition or deportation—by the rendering country. Such renditions may be used by a country aiming to deliver an individual to another country or to an international court, or they may be used by a country that is itself seeking custody of an individual. There is continuing controversy over the legality of such renditions (discussed below), and the absence of formal procedures means that individuals subject to such transfers cannot avail themselves of the usual human rights protections. Notwithstanding such controversy, the rendition of terrorism suspects has been common in recent years.<sup>46</sup>

In sum, formal processes for transferring individuals across borders generally include procedures aimed at protecting those being transferred from grave human rights abuse such as the risk of torture or persecution.<sup>47</sup> While the protections afforded individuals in the different proceedings have in the past varied significantly, there has been a convergence of norms in recent years. This convergence can be understood to have produced a basic core of rights that must be upheld in relation to all transfers—formal and informal.<sup>48</sup> Although

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<sup>41</sup> See Article 12, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316; 75 U.N.T.S. 135 [hereinafter Geneva III].

<sup>42</sup> See Article 45, 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

<sup>43</sup> See Geneva III at art. 118.

<sup>44</sup> See Geneva IV at arts. 132-133.

<sup>45</sup> See J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (2005) Vol. I, [hereinafter *Customary International Humanitarian Law*] at Rule 128.

<sup>46</sup> One prominent national security expert asserts that “In the national security area, extraordinary renditions are not extraordinary at all. Informal processes of transfer are the prevalent method for obtaining custody over fugitives abroad. This reflects the security risk inherent in initiating formal extradition requests. It also permits governments who are either unwilling or unable to transfer fugitives publicly via extradition to do so through quiet means.” J. E. Baker, *In the Common Defense: National Security Law for Perilous Times* (2007) at 165. This is in contrast to the assessment of an earlier commentator, who explained that “Illegal methods of rendition—that is, abduction and unlawful seizure—have apparently not yet been utilized with respect to international terrorists.” J. F. Murphy, *Punishing International Terrorists: The Legal Framework for Policy Initiatives* (1985), 81.

<sup>47</sup> For an additional discussion of these protections, see Borelli, *supra* note 32 at 338-350.

<sup>48</sup> Droege also argues that *non-refoulement* protections should be applied to all forms of transfer since such norms were developed to apply across the spectrum of transfer processes. See C. Droege, ‘Transfers of Detainees: Legal Framework, Non-Refoulement, and Contemporary Challenges’, (2008) 90 Int’l Rev. Red Cross 669 at 677.

there is a well-developed case law concerning formal transfer, domestic and international bodies have had limited opportunities to review informal transfers and to opine on the norms applicable to such procedures. Despite this, the contents of the basic core rights that apply to all transfers can be discerned and should be upheld by states when transferring terrorism suspects. The next section of this Article will set out these core rights.

## **2.2. Current legal position concerning the transfer of terrorists: a minimum standard**

Several bodies of international law set out rules relevant to the transfer of individuals from the custody of one state to another in the context of counter-terrorism operations. International refugee law, international human rights law, and international humanitarian law are the most relevant frameworks. These regimes of law, as a general rule, apply extraterritorially and concurrently.<sup>49</sup> International humanitarian law was designed to apply extraterritorially and thus its application in such circumstances is uncontroversial. Although there have been debates over the circumstances in which international human rights treaties have extraterritorial effect, human rights bodies have found that such norms apply whenever states have effective control over territory or when they exercise effective control over an individual.<sup>50</sup> An individual facing transfer is plainly within the control of the state conducting the transfer so the application of human rights law to such transfers should be less controversial than the general extension of such norms to territory outside the state. The applicability of the protections to transfers of custody from one state to another in the context of armed conflict in which states are cooperating pursuant to collective defense regimes or peacekeeping operations within the borders of a single state have been subject to intense debate, but in principle, because international law protects individuals within the effective control of a state or its agents regardless of the location of that custody, the protections of human rights law should apply to any handover of an individual from the jurisdiction of one state to another.<sup>51</sup>

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<sup>49</sup> On the concurrent application of international humanitarian law and international human rights law, *see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 25 (holding that international human rights law continues to apply in times of armed conflict). For a discussion of the concurrent application of international humanitarian law and international refugee law, *see* S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', (2001) 83 INT'L REV. RED CROSS 651.

<sup>50</sup> For a discussion of the extraterritorial application of human rights treaties to transfers, *see* R. Goldman, 'Extraterritorial Application of the Rights to Life and Personal Liberty, Including *Habeas Corpus*, During Situations of Armed Conflict', in this collection, and Satterthwaite, *supra* note 8. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, para. 109; and U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 12 (2004). The *non-refoulement* obligation under international refugee law has also been found to apply extraterritorially. *See* U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007).

<sup>51</sup> The U.N. Committee Against Torture has found that the Convention Against Torture applies to transfers carried out by a state's troops abroad. *See* U.N. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America (2006), para. 20 (calling on the U.S. government to "apply the *non-refoulement* guarantee to all detainees in its custody"), and U.N. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: Sweden, para. (clarifying, in the context of the transfer of prisoners in Afghanistan by Swedish military personnel, that "it is the Committee's constant view, as reiterated in its General Comment on article 2 of the Convention (CAT/C/GC/2) that article 3 of the

As a general rule, the *lex generalis* of international human rights law sets out basic norms that apply in all situations, including during armed conflict.<sup>52</sup> Where there is a direct conflict of norms during armed conflict, the *lex specialis* of international humanitarian law may displace or modify a particular rule of human rights law. Relevant here, international humanitarian law contains provisions regulating or entirely prohibiting the transfer of specific categories of persons. Because these specific protections are consistent with—though often more protective than—the *lex generalis* of human rights law, the norms complement the generally applicable human rights rules on transfer.<sup>53</sup>

Examining human rights, refugee law, and humanitarian law norms together therefore allows for the identification of a minimum baseline standard to be applied whenever states carry out the transfer of an individual within their effective control.<sup>54</sup> The

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Convention and its obligation of non-refoulement apply to a State party's military forces, wherever situated, where they exercise effective control, de jure or de facto, over an individual. With regard to the possible transfer of detainees within a State party's effective custody to the custody of any other State, the State party should ensure that it complies fully with article 3 of the Convention in all circumstances." See also Droege, *supra* note 48 at 677 and 682-683, who argues that *non-refoulement* rules should apply to all transfers from the effective control of one state to another, whether they take place within or across borders, since "it is the only interpretation compatible with the very object and purpose of the *non-refoulement* principle." The U.N. Committee Against Torture has also repeatedly emphasized that the Convention's protections against *refoulement* apply to individuals in the custody of state agents regardless of their participation in a multilateral operation. See U.N. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: Denmark (2007), UN Doc. CAT/C/DNK/CO/5 paragraph 13 ("The Committee recalls its constant view. . . that article 3 of the Convention and its obligation of non-refoulement applies to a State party's military forces, wherever situated, where they exercise effective control over an individual. This remains so even if the State party's forces are subject to operational command of another State. Accordingly, the transfer of a detainee from its custody to the authority of another State is impermissible when the transferring State was or should have been aware of a real risk of torture."). For a discussion of the obligations of international organizations for transfers carried out by troops under its command, see Droege, *supra* note 48 at 683-687. The Human Rights Committee has also emphasized that the Covenant applies to the actions of troops abroad, including when they are part of a peacekeeping mission. See U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 10 (2004) (the Covenant applies "to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.").

<sup>52</sup> This general rule is relevant to those rights considered to be non-derogable under human rights law. Such non-derogable rights include, *inter alia*, the right to be free from torture and cruel, inhuman or degrading punishment and the right to life. See, e.g., Article 4, International Covenant on Civil and Political Rights. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25. ("The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision."). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, para. 106 (explaining that some rights are regulated by either human rights or humanitarian law while "others may be matters of both these branches of international law").

<sup>53</sup> Droege, *supra* note 48 at 676 similarly argues that the *non-refoulement* rules of human rights law complement international humanitarian law and should be applied in conjunction with such rules.

<sup>54</sup> See Droege, *supra* note 48 for a similar argument and set of complementary norms. The transfers to which this minimum standard applies include, for example, "renditions to justice" to the territory of the transferring state or a third state; renditions pursuant to an international arrest warrant; transfers carried out at the close of hostilities in the context of armed conflict (i.e. repatriations of prisoners of war or security detainees); and transfers of individuals detained in the context of armed conflict.

*lex specialis* rule in this context means that while certain individuals facing transfer have greater protections than those set out here, no individual would have less protection. Individuals entitled to specific guarantees must be given those protections as well.<sup>55</sup> This will be the case not only where *lex specialis* so dictates, but also where relevant states have ratified conventions with rules that are more protective than those set out in the minimum standard.

The minimum standard is derived from both procedural and substantive norms set out in the major international human rights treaties. The relevant substantive norms concern protections from transfer to a risk of certain types of grave human rights violations, including torture or cruel, inhuman or degrading treatment, enforced disappearance, persecution, arbitrary deprivation of life, as well as specific rules concerning wartime transfers. Relevant procedural norms have been articulated in the context of detention and formal transfer as well as in relation to the substantive norms concerning transfers to a risk of grave abuse.

The status of customary international law rules concerning informal transfer *qua* transfer is hard to decipher with precision. This is in part due to the difficult practical situation facing many individuals who have been subject to informal transfers—only a subset of whom will ever have the opportunity to challenge their treatment in court—and in part due to the very different approaches taken by domestic and international courts when faced with questions concerning the informal transfer of criminal suspects to regular criminal processes (“rendition to justice”).<sup>56</sup> The domestic courts of countries that have examined rendition to justice have usually done so in the context of challenges to their ability to exercise adjudicatory jurisdiction over an individual who alleges to have been unlawfully transferred, rather than human rights-based challenges to the transfer itself. In so doing, they have generally come to one of two opposite conclusions, relying on different Latin maxims: *male captus, bene detentus*, according to which a court will not inquire into the manner by which an individual comes before it so long as it can otherwise properly adjudicate the case, and *ex injuria ius non oritur*, according to which the court must not allow an egregiously illegal action to lead to conviction, even if the individual may indeed be guilty of the crime of which he is accused.<sup>57</sup> Some systems have adopted rules that essentially use the two maxims as opposite ends of a continuum.<sup>58</sup> In the face of such contradictory results, state practice cannot be said to have coalesced around a particular norm concerning domestic courts’ ability to exercise jurisdiction following rendition.<sup>59</sup>

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<sup>55</sup> See discussion of those rules below.

<sup>56</sup> R. J. Currie, ‘Abducted Fugitives before the International Criminal Court: Problems and Prospects’, (2007) 18 CRIM. L. FORUM 349.

<sup>57</sup> For a discussion of domestic caselaw, see Currie, *supra* note 56. See also J. Cazala, ‘L’adage male captus bene detentus face au droit international’, (2007) 134 JOURNAL DU DROIT INTERNATIONAL 837 (examining the use of the adage and finding the number of cases where it was actually relied upon to justify the exercise of jurisdiction to be very limited); and Borelli, *supra* note 32 at 353-362 (finding that the *male captus* rule has been in decline in national courts in recent years). See also McNeal & Field, *supra* note 2 at 510-519.

<sup>58</sup> The courts of the United States, including the Supreme Court, have embraced the *male captus* doctrine, but have also stated—largely in *obiter dictum*—that egregious abuses could lead to divestment of jurisdiction to try the individual. See Center for Human Rights & Global Justice & City Bar of N.Y., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS” (2004).

<sup>59</sup> Currie, *supra* note 56, at 360 and Borelli, *supra* note 32 at 361-362.

International courts have recently weighed in on the issue, seeming to adopt the *male captus, bene detentus* rule, with some modification, for the purpose of their exercise of jurisdiction over individuals accused of grave international crimes. Most importantly, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held in the case of Dragan Nikolic, that the Tribunal would not be divested of jurisdiction over an accused unless his transfer entailed “serious” human rights violations akin to torture or cruel, inhuman or degrading treatment.<sup>60</sup> Nikolic had been transferred to the ICTY by Stabilization Forces after they took custody of him in Bosnia following his kidnapping in Serbia and Motenegro. Examining domestic case law, the Appeals Chamber found that breach of sovereignty was not a bar to the exercise of the Court’s jurisdiction over an individual.<sup>61</sup> Concerning human rights, the Chamber first stated, in *obiter dictum*, that “certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction to be declined.”<sup>62</sup> In making this observation, the Appeals Chamber referred an ICTY Trial Chamber case and an ICTR Appeals Chamber case in which the principle that the tribunals should decline jurisdiction due to egregious human rights violations were set out.<sup>63</sup> The Appeals Chamber then determined that since no such egregious violations were present in the case at hand, the Tribunal could properly exercise jurisdiction over Nikolic. In coming to this conclusion, the Chamber emphasized the importance of striking a balance “between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”<sup>64</sup>

International human rights bodies have viewed the issue of rendition differently, since the individuals challenging informal transfers before such forums are in a very different posture than defendants seeking relief before domestic and international criminal courts. While such defendants seek the specific remedy of dismissal of jurisdiction to adjudicate, petitioners to human rights bodies seek vindication of the full range of their human rights. The Human Rights Committee’s earliest jurisprudence concerning the extraterritorial reach of the ICCPR related to the abduction of individuals by officials of Uruguay in Argentina and Brazil. These abductions, followed by detention and mistreatment on foreign and Uruguayan soil, were found to violate the Convention in numerous respects.<sup>65</sup> The abductions themselves, which Uruguay sought to justify on security grounds, were found to constitute arbitrary arrest and detention.<sup>66</sup> The Human Rights Committee found the alleged

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<sup>60</sup> *Prosecutor v. Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-PT, Appeals Chamber, 5 June 2003 at 11-12.

<sup>61</sup> *Id.* at 9-10. To reach this conclusion, the Court examined domestic courts’ treatment of the issue and concluded that they tended to exercise jurisdiction in two circumstances notwithstanding international law violations: where “Universally Condemned Offences” were concerned, and where the state of refuge refrained from lodging a complaint. Since both principles were at play in *Nokolic*, the Chamber reasoned, breaches of state sovereignty should not bar the ICTY’s exercise of jurisdiction over the defendant.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.* at 11 (citing to *Prosecutor v. Dokmanovic*, Case No. IT-95-13a-PT and *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72)

<sup>64</sup> *Id.* at 12.

<sup>65</sup> See U.N. Human Rights Comm., *Communication No. R.12/52: Burgos v. Uruguay*, 12.3, at 176, Supp. No. 40, U.N. DOC. A/36/40 (1981) [hereinafter HRC, *Burgos v. Uruguay*]; U.N. Human Rights Comm., *Communication No. 56/1979: Celiberti de Casariego v. Uruguay*, 10.3, at 92, U.N. DOC. CCPR/C/13/D/56/1979 (1981) [hereinafter HRC, *Celiberti de Casariego v. Uruguay*].

<sup>66</sup> *Burgos v. Uruguay* at para. 13; *Celiberti de Casariego v. Uruguay* at para. 11.

consent of the host state irrelevant in assessing the violations: the Covenant' jurisdictional article "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."<sup>67</sup> In contrast, the European Court of Human Rights has accepted informal transfers in the counter-terrorism context when they are carried out with the consent of the host state and in conformity with the transferring state's domestic law. In the case of *Öcalan v. Turkey*, the Court examined the case of an individual suspected of crimes of terrorism who was apprehended informally in Kenya and handed to Turkish officials, who then flew him to Turkey and placed him into criminal proceedings.<sup>68</sup> The Court accepted as valid the "cooperation" between Turkey and Kenya, and emphasized the importance of the host state's consent in the operation: "An arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned's individual rights to security."<sup>69</sup>

In contrast to the conflicting case law concerning the propriety of informal transfer to regular criminal proceedings, the rules pertaining to transfers to a risk of grave abuse have been consistent and increasingly protective.<sup>70</sup> Since most states conducting informal transfers of the type examined in this Article are parties to the relevant human rights treaties, customary international law will not be examined in depth. Instead, the Article will focus mostly on relevant human rights and humanitarian treaty law.<sup>71</sup>

The minimum standard is based on jurisprudence, commentary, and doctrine in the fields of international human rights law, humanitarian law, and refugee law, and it draws especially on the norms set out in international human rights conventions, especially the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture and All Forms of Cruel, Inhuman or Degrading Treatment ("CAT" or "Torture Convention"). Regional jurisprudence is drawn on where relevant, though a comprehensive examination of regional law is not included. While the analysis is meant to be a fair description of current law, international human rights bodies have not had the opportunity to comprehensively set out the rules pertaining to the informal transfer of an individual from the custody of one state to the custody of another.<sup>72</sup> In some respects, therefore, the

<sup>67</sup> *Burgos v. Uruguay* at ¶ 12.3; *Celiberti de Casariego v. Uruguay* at ¶ 10.3.

<sup>68</sup> *Öcalan v. Turkey*, 41 Eur. H.R. Rep. 985 (2005). See also *Sánchez Ramírez v. France*, Eur. Commission on Human Rights, No. 28780/95 (1996) at 162 (noting the importance of cooperation among states in terrorism cases).

<sup>69</sup> *Id.*

<sup>70</sup> For a similar view, see Borelli, *supra* note 32 at 342.

<sup>71</sup> It should be observed nonetheless that the main components of the norms set out here are protected by customary international law. For a discussion of the status of these norms under customary law, see Lauterpacht & Bethlehem, *supra* note 31, at 155-164.

<sup>72</sup> The U.N. Special Rapporteur on Promoting and Protecting Human Rights and Fundamental Freedoms While Countering Terrorism, Professor Martin Scheinin has made the following statement about rendition: "The transfer of a person from one jurisdiction to another (or from the custody and control of one State to another) can occur by various means, including: rendition under established extradition rules; removal under immigration law; resettlement under refugee law; or 'rendition to justice', where a person is outside formal extradition arrangements but is nevertheless handed to another State for the purpose of standing trial in that State. As long as there is full compliance with the obligation of non-refoulement, these mechanisms may be lawful, although it should be noted that the particular circumstances in which a person is "rendered to justice" may involve an unlawful detention." Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Addendum: Mission to the United

minimum standard may reflect a progressive view of the law.

## 2.2.1. Threshold principles

### 2.2.1.1. Formal procedures may not be intentionally bypassed

Extradition, deportation, and other formal processes were designed to protect basic international law norms such as territorial sovereignty and equality, the principle of legality, and the essential rights of the person. Notwithstanding domestic jurisprudence to the contrary, international legal norms require that, where they exist, formal procedures not be intentionally bypassed.<sup>73</sup> Where formal procedures may be unavailable or have become impossible, to ensure the rights of the individual are respected, notice must be given to the host state and cooperation—or at a minimum, consent—must be sought in apprehending the individual.<sup>74</sup> Although the original purpose of rules requiring the consent of the host state was to protect the sovereign integrity of the state,<sup>75</sup> sovereignty has become a human rights issue insofar as every individual within the jurisdiction of a state is protected by human rights law vis-à-vis that state; abductions that take the individual forcibly out of the host state may deprive the individual of the ability to avail himself of the state’s legal system and other protections. To ensure that inter-state cooperation does not amount to collusion in the violation of the individual’s rights, the host state and transferring state should ensure that the minimum procedural and substantive standards applicable to transfer are guaranteed and that the transferring state is not, by consenting to such a transfer, otherwise infringing the individual’s human rights.<sup>76</sup> This may be difficult in circumstances where individuals are either nationals of the host state or are aliens lawfully within the territory of the host state,

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States of America, U.N. Doc. A/HRC/6/17/Add.3 (2007).

<sup>73</sup> In its *Legal Opinion on the Decision of the Supreme Court of the United States of America* critiquing the U.S. Supreme Court’s decision in *United States v. Alvarez-Machain* (in which the U.S. abducted an individual in Mexico despite the existence of an extradition treaty), the Inter-American Juridical Committee underscored the requirement that states uphold extradition treaties in good faith. See Organization of American States Permanent Council, *Legal Opinion on the Decision of the Supreme Court of the United States of America*, 4 CRIM. L.F. 119, 131 (1993). Similarly, Bassiouni explains that when a state uses informal transfer in a case where formal methods exist, the transfer “circumvents the intent of states who enter into extradition treaties for the specific purpose of avoiding disguised extradition” and as a result, “detrimentally affects the international rule of law.” M. C. Bassiouni, *International Extradition: United States Law & Practice* (2002) Vol. IV, at 29.

<sup>74</sup> See *Öcalan v. Turkey*, 41 Eur. H.R. Rep. 985 (2005) (noting that “An arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned’s individual rights to security under Article 5 § 1 [of the European Convention].”); *Sánchez Ramírez v. France*, Eur. Commission on Human Rights, No. 28780/95 (1996) at 162 (noting the importance of cooperation among states in terrorism cases).

<sup>75</sup> As the Security Council underscored following Israel’s abduction of Adolf Eichmann in Argentina, “the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations.” UN Doc. S/4349 (June 23, 1960) (entitled *Question Relating to the Case of Adolf Eichmann*).

<sup>76</sup> The Inter-American Commission has explained, in the context of counter-terrorism, that “As with all acts and omissions attributable [to] a state and its agents, these human rights protections oblige states to refrain from supporting or tolerating methods of inter-state cooperation that fail to conform with their international human rights commitments.” The Commission cites as an example of such cooperation “extraterritorial abduction or kidnapping of a subject present in one state for prosecution in another state.” Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 (2002) at 159. Depending on the circumstances, the individual may have rights under domestic law or additional rights under international human rights law (such as rights accruing to aliens lawfully in the territory of the state).

since such individuals have heightened protections against expulsion under human rights law.<sup>77</sup> It may also be difficult—if not impossible—in some states that have ratified human rights conventions that would make apprehensions and transfers outside of formal procedures unlawful.<sup>78</sup> The consent of a host state to an informal transfer in such circumstances will need to be carefully scrutinized, since the state conducting the transfer may have derivative liability under the rules of state responsibility if its actions amount to assistance in the host state’s violation of the rights of the transferee.<sup>79</sup>

In practice, then, states with functioning legal systems must—before consenting to the apprehension—at a minimum ensure that the transferring state has a valid basis for apprehension and detention, and that the procedural rights due the individual will be respected.<sup>80</sup> In countries without an effective government or functioning judicial system, it may be lawful to conduct a transfer without the consent of the state without such action amounting to the deprivation of rights vis-à-vis that state so long as the human rights of the individual are otherwise protected by the transferring authority.<sup>81</sup>

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<sup>77</sup> Note, however, that with respect to aliens, such protections have national security exceptions. *See, e.g.*, Article 13, ICCPR. (guaranteeing aliens lawfully within the territory of a state the ability to challenge the decision to expel them “except where compelling reasons of national security otherwise require”).

<sup>78</sup> This may be the case for all European states. The Venice Commission has stated that “There are only four legal ways for Council of Europe member States to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfer of convicts for the purpose of their serving the sentence in another country. Extradition and deportation proceedings must be defined by the applicable law, and the prisoners must be given access to the competent authorities.” European Commission for Democracy Through Law (Venice Commission), *Draft Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Detainees*, Opinion No. 363/2005 (March 8, 2006), Doc. No. CDL-DI(2006)001rev, at para. 160(f).

<sup>79</sup> Article 16 of the Articles of State Responsibility provide that “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.” The International Law Commission gave as an example of this form of responsibility “facilitating the abduction of persons on foreign soil.” *See* J. Crawford, *The International Law Commission’s Articles On State Responsibility: Introduction, Text And Commentaries* (2002), 148-151.

<sup>80</sup> Another way of viewing the host state’s human rights obligations would be to conclude that only individuals who have been found by a local court to be deportable or excludable are eligible for informal transfer, since informal apprehension would not thereby deprive the individual of the opportunity to avail himself of the protection of local law.

<sup>81</sup> *See, e.g., see, e.g.*, D. C. Findlay, ‘Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law’, (1988) 23 *TEX. INT’L L.J.* 1, at 16-17. In addition to the potential acceptability of transfers from failed states, some authors and policy-makers argue that the consent of the host state is not required in two other circumstances: (a) when the host state has failed to either prosecute or extradite an individual suspected of committing a grave international crime, *see, e.g.*, B. Izes, ‘Drawing Lines in The Sand: When State-Sanctioned Abductions Of War Criminals Should Be Permitted’, (1991) 31 *COLUM. J.L. & SOC. PROBS.* 1, at 18; and (b) where the host state is knowingly harboring international terrorists, *see, e.g.*, D. Benjamin, “Rendition to Torture: The Case of Maher Arar,” testimony before the U.S. House of Representatives Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight (Oct. 18, 2007), available at <http://www.brookings.edu/testimony/2007/1018rendition.aspx>.

### 2.2.1.2. The transferring state must have a valid legal basis for apprehending the individual in contemplation of transfer

Human rights law—through the right to be free from arbitrary detention—requires that states have a valid basis for apprehending an individual in contemplation of transfer. Such bases must be set out in existing law and must be valid under international norms concerning arrest and detention.<sup>82</sup> The substance of the norms governing the legality of the detention will depend on whether the transfer occurs within or outside the context of armed conflict. Detaining individuals for the purpose of interrogation without another basis for detention amounts to arbitrary detention and thus is unlawful under human rights law.<sup>83</sup>

Outside the context of armed conflict, states conducting transfers to their soil may rely on lawful bases such as an arrest warrant duly executed under their domestic law<sup>84</sup> or a prison sentence imposed following a trial in accordance with due process.<sup>85</sup> The basis for apprehension and detention by one state in contemplation of transfer to another state is more complex. States are permitted—and in some circumstances, mandated—to assist one another in the fight against terrorism. This does not mean, however, that they may resort to unlawful measures.<sup>86</sup> States assisting other states by transferring individuals to the receiving state's custody must therefore ensure that their cooperative efforts are permissible by determining that the receiving state has a lawful basis for apprehension and detention such

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<sup>82</sup> Under human rights law, no one may be deprived of their liberty “except on such grounds and in accordance with such procedure as are established by law.” ICCPR, art. 9(1). The Human Rights Committee has made clear that the substantive and procedural aspects of article 9(1) apply to all deprivations of liberty by the state. *See* U.N. Human Rights Committee, *General Comment No. 8: Right to Liberty and Security of Persons*, U.N. Doc. CCPR/30/06/82 (1982) at paragraph 1 (referring to “all deprivations of liberty,” including those for “immigration control.”) [Hereinafter “General Comment No. 8”]. States may not detain individuals “to repress the exercise of fundamental freedoms, such as freedom of religion, freedom of opinion, freedom of association.” *See* U.N. Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/4/40 (2007). Counter-terrorism laws that criminalize such freedoms may not be relied upon as a valid basis for apprehension in contemplation of transfer.

<sup>83</sup> The goal of intelligence-gathering rather than prosecution has been one of the hallmarks of recent rendition operations in the context of counter-terrorism. *See* INTERNATIONAL COMMISSION OF JURISTS, *ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS* (2009) at 78-90.

<sup>84</sup> *See* Eur. Comm'n Hum. Rts., *Ilich Sánchez Ramírez v. France*, App. No. 28780/95 (1996) at 162 (holding that the applicants rights were not violated when he was transferred to France from Sudan via cooperative efforts between the two governments; the fact that the underlying French arrest warrant was valid only inside France did not give rise to a human rights violation so long as the domestic courts had determined that the arrest was legal) *see also* Eur. Comm'n Hum. Rts., *Klaus Altmann (Barbie) v. France*, App. No. 10689/83 (1984) at 234-235 (finding no human rights violation where the domestic courts found the arrest of the applicant, which allegedly occurred by disguised extradition, to be valid under French law).

<sup>85</sup> Arrest warrants and criminal sanctions must be for acts that are lawfully proscribed under international law. This means that not only may such warrants or convictions not be for the exercise of protected freedoms, but they must also be sufficiently precise and established to ensure that the rule of *nullum crimen sine lege* is not violated. This is especially important in the context of counter-terrorism, where states have used imprecise definitions of crimes of terrorism to repress legitimate forms of protest. For a discussion of these issues, *see* R. Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, in Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (2004).

<sup>86</sup> Indeed, doing so will not only constitute unlawful action by the transferring state, but may also amount to the assistance by the transferring state in the wrongful act of the receiving state under the law of state responsibility.

as an arrest warrant or certification that the individual is sought to serve a prison sentence following fair trial. Both of these bases for apprehension must be accompanied by a request for legal assistance to the transferring state.<sup>87</sup> All warrants or requests for surrender must have been obtained in accordance with international due process standards<sup>88</sup> as well as rules concerning the permissible exercise of jurisdiction by states.<sup>89</sup>

In the context of international armed conflict, prisoners of war may be lawfully detained by a party to an international armed conflict and transferred to another detaining power that will uphold their Geneva rights.<sup>90</sup> As discussed earlier, prisoners of war who are lawfully detained must be released and repatriated (transferred) at the close of active hostilities.<sup>91</sup> Certain protected persons in the territory of a party to an armed conflict may be permissibly subject to internment during international armed conflict and may be transferred to another power that will uphold their Geneva rights.<sup>92</sup> Civilians who are lawfully interned must be transferred or repatriated once the reasons for their internment no longer obtain, or as soon as possible after the close of hostilities.<sup>93</sup> Detentions in the context of a “classical” non-international armed conflict—i.e. between a state and a rebel group on the territory of that state—must have a valid basis set out in domestic law and must not amount to violations of Common Article 3 to the Geneva Conventions or applicable human rights standards.<sup>94</sup>

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<sup>87</sup> See *Öcalan v. Turkey*, *supra* note 74 at para. 89 (As the European Court of Human Rights explained, “Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive’s arrest is an arrest warrant issued by the authorities of the fugitive’s State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention.”) While it may seem that the nationality of Öcalan was a crucial factor in the court’s holding here, the court cites to the case of *Sánchez Ramírez v. France*, Eur. Commission on Human Rights, No. 28780/95 (1996) at 162, in which state issuing the arrest warrant underlying the transfer was not the state of nationality of the transferee. In that case, the European Commission underlined the relevance of inter-state cooperation in counter-terrorism measures to human rights analysis: “It does not appear to the Commission that any cooperation which occurred in this case between the Sudanese and French authorities involved any factor which could raise problems from the point of view of Article 5 of the Convention, particularly in the field of the fight against terrorism, which frequently necessitates cooperation between States.”) The court has not addressed the question of whether a state may consent to the transfer of a detainee through cooperation (i.e. rendition) if it is relying on an arrest warrant issued by the receiving state and not one its own authorities have issued.

<sup>88</sup> Substantial violations of due process render the subsequent detention arbitrary under international human rights law. See, e.g., *Jacobo Silva Nogales et al. v. Mexico*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2002/77/Add.1 at 28 (2000).

<sup>89</sup> For a discussion of the permissible bases of jurisdiction for crimes of terrorism, see Kolb, *supra* note 85.

<sup>90</sup> Article 4 of Geneva Convention III allows states to detain as prisoners of war certain specified categories of individuals, and Article 12 of Geneva Convention III provides that prisoners of war may “only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”

<sup>91</sup> Article 118 of Geneva Convention III requires detaining powers to release and repatriate prisoners of war at the close of active hostilities.

<sup>92</sup> Article 45 of Geneva Convention IV states that “Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.” Note, however, that protected persons may not be transferred out of occupied territory. Article 49, Geneva Convention IV.

<sup>93</sup> Article 132 of Geneva Convention IV requires detaining powers to release and transfer internees as soon as the reasons for the detention cease to exist and Article 133 of Geneva Convention IV requires the release of internees as soon as possible after the close of hostilities.

<sup>94</sup> The legal bases for detention in “multinational” non-international armed conflict are more complex; see discussion in J. Pejic, “The Legal Regime Governing Treatment and Procedural Guarantees for Persons

The question of whether a state may apprehend an individual in order to transfer the person for preventive detention outside the context of armed conflict is a complex one that has not been comprehensively addressed by human rights bodies. “Preventive” or “administrative” detention for reasons of national security without trial is only allowed in very rare circumstances where the country has officially derogated from normal human rights norms and when such schemes still comply with the essential rights regarding liberty and freedom from arbitrary detention.<sup>95</sup> Apprehension in contemplation of transfer to such detention schemes must therefore also be limited to circumstances in which the state has officially derogated from the usual protections and where the preventive detention scheme is otherwise in accord with human rights norms.

In addition to these bases, a state may lawfully apprehend and detain an individual pursuant to an international arrest warrant or request for arrest and surrender from an international court, though these bases are rarely relevant in the context of terrorism.<sup>96</sup> Regarding the permissible duration of detention prior to transfer, although there is not a great deal of jurisprudence on the issue, existing norms suggest that an individual can only be held for a reasonable period needed to effect the transfer; detention in excess of this period or when transfer becomes impossible becomes arbitrary.<sup>97</sup>

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Detained in the Fight Against Terrorism,’ in this volume. The question of whether a state that is not engaged in an armed conflict may transfer an individual considered by the requesting state to be an individual subject to its detention under the laws of armed conflict (as a prisoner of war or a security detainee, for example) is complex. Some would argue that under public international law, the requesting state may request cooperative measures—i.e. assistance by the requested state in transferring the individual to its custody—on the basis that the individual is detainable under the laws of war rather than on suspicion of criminal activity. In such cases, however, the requested state must assess whether the detention would be lawful.

<sup>95</sup> Human rights bodies have frequently critiqued the use of “administrative” or “preventive” detention schemes and have made clear that such arrangements must still comply with the basic, non-derogable aspects of the right to liberty and security. For example, the U.N. Working Group on Arbitrary Detentions has concluded that administrative detention for those suspected of crimes of terrorism is “inadmissible” under human rights law. See U.N. Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/10/21 (2009) at para. 54. See H. Duffy, *The War on Terror and the Framework of International Law* (2005) 315-316, 404-407, and OSCE/ODIHR, *Protecting the Rights of Victim of Terrorist Attacks*, in COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL (2007).at 156-7.

<sup>96</sup> For example, the ad hoc criminal tribunals may request the surrender of individuals sought for trial; these requests are understood to be mandatory on member states of the United Nations since the courts were created by the Security Council acting under Chapter VII of the U.N. Charter. See Statute of the ICTY, Article 29 (directing states to cooperate with the ICTY by complying with requests to “arrest” and “surrender or transfer” individuals sought by the Court); the Report of the Secretary General analyzing the proposed statute at the time of the ICTY’s creation explained that “an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.” *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993) At para. 126. The regime for apprehension and surrender under the ICC Statute is less robust and not mandatory on states that are not a parties to the Statute, in part because the Court was created by multilateral treaty and not the Security Council. See Rome Statute of the International Criminal Court, Article 89 (Surrender of Persons to the Court) (providing that State parties shall comply with requests in accordance with the Statute and procedures established under national law). For a discussion, see G. Sluiter, ‘The Surrender of War Criminals to the International Criminal Court’, (2003) 25 LOY. L.A. INT’L & COMP. L. REV. 605.

<sup>97</sup> See, for example, U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/10/21 (2009) at para. 67, and Eur. Ct. Hum. Rts., *Shamsa v. Poland* (2003), paras. 48-60 (holding that detention in contemplation of deportation could not be justified if the deportation proved

### 2.2.2. Substantive guarantees: *non-refoulement*<sup>98</sup>

Taken together, international humanitarian law, international refugee law, and human rights law require states to refrain from transferring any individual to the custody of a state where he is at a real risk<sup>99</sup> of: torture or ill-treatment; persecution; enforced disappearance; and arbitrary deprivation of life.<sup>100</sup> International humanitarian law provides additional guarantees to protected persons with specific statuses in times of international armed conflict.

#### 2.2.2.1. No transfers to a risk of torture or cruel, inhuman or degrading treatment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (explicitly, in Article 3) and the International Covenant on Civil and Political Rights (implicitly, through Article 7) require that states refrain from transferring persons under their effective control to the custody of another state if the transfer would put the individual at a real risk of torture or cruel, inhuman or degrading treatment or punishment.<sup>101</sup> Indeed, the protection against transfer to a risk of torture or cruel treatment is understood to be so essential to the norm against such treatment that it is not considered to be a separate rule at all.<sup>102</sup> Human rights bodies have repeatedly underscored the importance of upholding the prohibition on transfers to a risk of torture with respect to individuals suspected of crimes of terrorism since such persons are often at risk of ill-

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to be impossible and there was no other basis for detention under domestic law), and U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Belgium, para. 17 (2004) (finding that detention of individuals awaiting deportation for several months in transit area of airport were “akin to arbitrary detention” and should cease).

<sup>98</sup> For two excellent summaries of the *non-refoulement* obligations relevant to states when transferring individuals, see E. Gillard, ‘There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons’, (2008) 90 Int’l Rev. Red Cross 703 and Droege, *supra* note 48.

<sup>99</sup> The various *non-refoulement* rules articulated in different treaties contain different threshold standards for the level of risk triggering the prohibition on transfer. For sake of brevity, the term “real risk” is used in this Article to encompass these varying thresholds. For a discussion of the differing standards, see Gillard, *supra* note 98, at 725-725.

<sup>100</sup> In addition to these guarantees, emerging principles suggest that states should not transfer persons to countries where they will face arbitrary detention or an unfair trial. See Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/4/40 (2007), paras. 47-49 (concerning transfer to a risk of arbitrary detention); and Borelli, *supra* note 32 at 349-350 (concerning transfer to a risk of unfair trial). These emerging principles are not discussed in this Article, except to the extent that a transferring state must satisfy itself that the receiving state has a valid basis for detention. Further, to the extent that extreme forms of arbitrary detention may amount to cruel, inhuman and degrading treatment, transfers to a risk of such detention are unlawful. See *id.* at para. 48.

<sup>101</sup> See CAT, *supra* note 29 Article 3; ICCPR Article 7, as interpreted in General Comment No. 20. See U.N. Human Rights Comm., *General Comment No. 20: Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment*, para. 9 (1992). See also *Byaburanga v. Denmark*, U.N. Doc. CCPR/C/82/D/1222/2003, (Aug. 15, 2003) (finding that the transfer of an individual to a risk of treatment contrary to Article 7 was a violation of the ICCPR).

<sup>102</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/59/324 (2004), para. 28. See also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), para. 91 (finding that protection against transfer to a real risk of torture or cruel treatment was inherent in Article 3 of the European Convention on Human Rights).

treatment.<sup>103</sup> The norm against torture is a *jus cogens* norm, and the prohibition on ill-treatment is non-derogable.<sup>104</sup> In the context of armed conflict—both international and non-international—these human rights protections continue to apply and are also found in Article 3 common to the four Geneva Conventions of 1948 (“Common Article 3”), which forbids “cruel treatment and torture” of anyone in the custody of a party to the conflict.<sup>105</sup> In light of the humanitarian nature of the norm and the interpretations of similar provisions under human rights law, Common Article 3 should be understood to include protection against transfers to such treatment.<sup>106</sup>

### 2.2.2.2. No transfers to a risk of persecution

The 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) and the Geneva Conventions of 1948 prohibit states from transferring individuals to countries where they face a risk of persecution. Article 33(1) of the Refugee Convention prohibits states from transferring an individual to a country where his or her “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 33(2) of the Convention Relating to the Status of Refugees excludes from the protection of Article 33(1) individuals about “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.” These exclusion clauses must be construed narrowly<sup>107</sup>, and even when they are applicable, individuals retain the

<sup>103</sup> See, e.g., U.N. Committee Against Torture, *Communication No. 39/1996: Paez v. Sweden*, ¶ 14.5, U.N. Doc. CAT/C/18/D/39/1996 (“the text of article 3 is absolute. . . The 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.”); *Saadi v. Italy*, Application No. 37201/06, (2008), para. 137 (“The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. . . It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.”) The European Court of Human Rights has also emphasized that the determination of a *non-refoulement* claim must be decided independently of consideration of national security concerns. See Eur. Ct. Hum. Rts., *Chahal v. The United Kingdom* (1996).

<sup>104</sup> For a discussion of the nature of the prohibition on torture in the context of transfer, see Borelli, *supra* note 32 at 343-345. Some authors consider the *non-refoulement* rule itself to be a *jus cogens* norm. See Bruin & Wouters, *supra* note 31 at 25-26, and J. Allain, ‘The jus cogens Nature of non-refoulement’, (2001) 13 INT’L J. REFUGEE L. 533.

<sup>105</sup> Common Article 3 has been found to “constitute a minimum yardstick” applicable to both international and non-international armed conflict. *Nicaragua v. United States of America*, 1986 I.C.J. 14, para. 218.

<sup>106</sup> This is consistent with the way that authoritative bodies have interpreted the prohibition on torture and cruel treatment set out in human rights instruments. See, e.g., U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, para. 12 (2004) (interpreting Article 7 of the ICCPR) and *Soering v. United Kingdom*, *supra* note 102, at para. 86-91 (interpreting Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). Droege, *supra* note 48 at 675 also makes this argument concerning Common Article 3.

<sup>107</sup> See A. Farmer, ‘Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection’, (2008) 23 GEO. IMMIG. L. J. at 1 (arguing that “we must insist on strict limits to the exceptions to non-refoulement articulated in the 1951 Convention on the Status of Refugees, given current state obligations under international law. There is great potential for refugee-receiving states to rely heavily on the exceptions to non-refoulement in enacting anti-terrorism policies, to the detriment of refugee protection. And yet, non-refoulement – the doctrine central to refugee protection that prohibits return of an individual to a country in which he or she may be persecuted – is emerging as a new *jus cogens* norm.”)

protection against *refoulement* to other risks, including the risk of torture and cruel treatment under international human rights law, which contains no exclusions.<sup>108</sup>

In the context of international armed conflict, as stated above, Article 45 of Geneva Convention IV specifies that no protected person may be transferred “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.” State practice and *opinio juris* demonstrates the existence of an emerging customary international humanitarian law norm requiring states to protect those repatriated or released at the close of hostilities (such as prisoners of war and civilian internees) from transfers to a risk of persecution.<sup>109</sup> With respect to persons detained in connection with non-international armed conflict, the International Committee of the Red Cross (“ICRC”) has found that practice establishes that all individuals subject to repatriation or release have protection from such repatriation or release if they fear persecution.<sup>110</sup> Furthermore, in the context of U.S.

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<sup>108</sup> Under the Convention, individuals who have committed war crimes, crimes against humanity, serious nonpolitical crimes, or acts contrary to the purposes of the United Nations may not qualify as refugees. United Nations Convention Relating to the Status of Refugees, *supra*, art. 1, para. F, 19 U.S.T. at 6263, 189 U.N.T.S. at 156. Even those who count as refugees are not protected by the Convention’s *non-refoulement* rule if “there are reasonable grounds for regarding [them] as a danger to the security of the country” or if they “constitute[] a danger to the community” because they have been convicted of a “particularly serious crime.” *Id.* art. 33, 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. Individuals who have committed certain terrorist crimes may fall within these exclusions; indeed, the Convention includes the exclusion to ensure that refugee status would not serve as a vehicle of safe haven for certain criminals. *See* J. Fitzpatrick, ‘Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond’, (2003) 25 LOY. L.A. INT’L & COMP. L. REV. 457 at 472. Not all terrorism suspects will fall within these categories, however, and refugee law requires safeguards to ensure that individuals have the opportunity to forward a claim for protection on the basis of the Convention. *See id.* at 471–76 (discussing substantive and procedural obstacles for terrorism suspects); *see also* R. Bruin & K. Wouters, ‘Terrorism and the Non-derogability of Non-refoulement’, (2003) 15 INT’L J. REFUGEE L. 1. *See also* Sir E. Lauterpacht and D. Bethlehem, The Scope and Content of the Principle of Non-Refoulement, at in Feller, Türk & Nicholson (ed.) *Refugee Protection in International Law* (2003) at 134-138 (analyzing the national security exception). Unlike article 33 of the Refugee Convention, the *non-refoulement* obligation in the CAT is subject to no exclusions; even individuals who committed the gravest crimes have protection against the return to countries where they may be maltreated. The Committee Against Torture made this clear in the 1997 case *Paez v. Sweden*, where it held that “[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a [*non-refoulement*] determination under Article 3 of the Convention.” U.N. Committee Against Torture, *Communication No. 39/1996: Paez v. Sweden*, ¶ 14.5, U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997). The Committee’s finding echoed the holding of the European Court of Human Rights, in *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. (ser. A) 413, 457, ¶ 80 (1996), which found that “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration” in determining whether an expulsion would be legal under article 3 of the ECHR.

<sup>109</sup> *See Customary International Humanitarian Law*, at Rule 128, H. Gasser, Protection of the Civilian Population, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), 237 at 323 and H. Fisher, Protection of Prisoners of War, in *ibid* at 367, 416-417.

<sup>110</sup> *See Customary International Humanitarian Law* at Rule 128 (“practice since 1949 has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC’s conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).” *Accord* Hans-Peter Gasser, *Protection of the Civilian Population*, in *The Handbook of International Humanitarian Law* (Dieter Fleck, ed., 2008) 237, 323 (explaining that the refusal of transfer by a former internee to a country where he or she faces persecution “must at all times be respected”); H. Fisher, *Protection of Prisoners of War*, in *ibid* 367, 416-417 (concluding that although practice is mixed, the duty to repatriate prisoners of war (POWs) has in recent practice been modified by need to assess, on an individual basis, whether former POWs fear persecution upon repatriation).

“War on Terror” repatriations, where the ICRC has had access to detainees, it interviews them prior to repatriation “to ensure [the detainee] agrees to be repatriated.”<sup>111</sup> Finally, the U.N. High Commissioner for Refugees (UNHCR) has recently become more involved in protecting former detainees when they are repatriated or released in situations of armed conflict. The UNHCR has worked with states to assist individuals who fear persecution should they be returned to their country of nationality to find alternative settlement options.<sup>112</sup> Even absent such protections under humanitarian law, international refugee law continues to apply in the context of armed conflict to prevent transfers to a risk of persecution.<sup>113</sup>

### 2.2.2.3. No transfers to a risk of enforced disappearance

An enforced disappearance is the deprivation of liberty of an individual by a state that either refuses to acknowledge the detention or conceals the fate and whereabouts of the detainee, placing the individual outside the protection of the law.<sup>114</sup> Enforced disappearances are considered to be violations in themselves,<sup>115</sup> as well as amounting to cruel, inhuman and degrading treatment and—depending on the circumstances—possibly

<sup>111</sup> See ICRC, Operational Update: Guantanamo Bay: Overview of the ICRC’s Work for Internees (Jan. 30, 2004), <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/951C74F20D2A2148C1256D8D002CA8DC>.  
available at

<sup>112</sup> For example, the UNHCR has worked with the United States to find settlement options for individuals set for release from detention at Guantánamo Bay.

<sup>113</sup> See, e.g., Executive Committee, U.N. High Commissioner for Refugees, *Conclusion No. 94* (2002) (“Respect for the right to seek asylum, and for the fundamental principle of *non-refoulement*, should be maintained at all times.”)

<sup>114</sup> Article 2, International Convention for the Protection of All Persons from Enforced Disappearance, and the Inter-American Convention on Forced Disappearance of Persons. The Rome Statute establishing the International Criminal Court defines the crime of enforced disappearance more stringently, requiring intent to remove the victim from the protection of the law “for a prolonged period of time.” See Rome Statute of the International Criminal Court, art. 7(2)(i).

<sup>115</sup> Human rights bodies have found disappearances to be composite violations (citing to, among others, the rights to be free from arbitrary detention, the right to security of the person, the right to be free from torture or ill-treatment, the right to due process, and the right to life). The Human Rights Committee has found disappearances to constitute violations of the International Covenant on Civil and Political Rights. See, e.g., *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003), para. 9.3. The Committee Against Torture has determined that secret detention is a “per se” violation of the Convention Against Torture. See Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture; United States of America, UN Doc. CAT/C/USA/CO/2 (2006) (finding that enforced disappearances constitute a “per se” violation of the Convention). The Inter-American Court of Human Rights has held that enforced disappearances violate the American Convention on Human Rights. See, e.g., *Velásquez Rodríguez Case*, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), para. 155. The European Court of Human Rights has held that enforced disappearances constitute violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See, e.g., Eur. Ct. Hum. Rts, *Kurt v. Turkey*, (15/1997/799/1002) (1998). The African Commission on Human and Peoples’ Rights has determined that enforced disappearances are a violation of the African Charter of Human and Peoples’ Rights. See, e.g., *Mouvement Burkinabé des Droits de l’Homme et des Peuples v. Burkina Faso*, African Commission on Human and Peoples’ Rights, Comm. No. 204/97 (2001). Enforced disappearance is also expressly prohibited by a number of international conventions. See, e.g., the International Convention for the Protection of All Persons from Enforced Disappearance, and the Inter-American Convention on Forced Disappearance of Persons.

torture and a deprivation of the right to life under international human rights law.<sup>116</sup> As such, transfers to a risk of enforced disappearance—like transfers to a risk of other forms of cruel treatment—are prohibited under binding human rights law.<sup>117</sup>

In addition to these protections, which are non-derogable and apply at all times, in the context of international armed conflict, prisoners of war and aliens in the territory of a state party may not be transferred to a country that is unwilling or unable to ensure that all the protections owed to such persons under the Geneva Conventions are upheld.<sup>118</sup> Enforced disappearance is understood as forbidden by the Geneva Conventions (via provisions of Geneva Conventions III and IV concerning registration of persons detained and provision of access by the ICRC to detainees<sup>119</sup> and by customary international law<sup>120</sup>), meaning that prisoners of war and protected persons may not be transferred to a risk of secret detention during international armed conflict. With respect to non-international armed conflict, both international human rights norms, which continue to apply, and customary international humanitarian law applicable to such conflicts, prohibit enforced disappearance.<sup>121</sup> Insofar as disappearance amounts to torture or cruel treatment, transfers to a risk of such treatment should be understood to be prohibited by customary international humanitarian law.

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<sup>116</sup> The Human Rights Committee has determined that being disappeared amounts to cruel and inhuman treatment, and may also amount to torture, depending on the duration and circumstances. For example, the Committee found that “being subjected to prolonged incommunicado detention [for three years] in an unknown location” amounts to “torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1” of the International Covenant on Civil and Political Rights. *El-Megreisi v. Libyan Arab Jamabiriya*, Communication No. 440/1990, UN Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4. In another case, the Committee held that being abducted and denied contact with the outside world amounted to cruel and inhuman treatment. *Basilio Laureano Atachabua v. Peru*, Communication No. 540/1993, UN Doc. CCPR/C/56/D/540/1993 (1996), para. 85. The Human Rights Committee has also repeatedly emphasized that, where the victim dies, enforced disappearances often amount to violations of the right to life. *See, e.g., Elcida Arévalo Perez et al. v. Colombia*, Communication No. 181/1984, U.N. Doc. CCPR/C/37/D/181/1984 (1989), para. 10 (noting that enforced disappearances may amount to a violation of the right to life). Similarly, the Inter-American Court of Human Rights has held that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.” *Velásquez Rodríguez Case*, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), para. 156. The European Court of Human Rights has viewed this issue differently, declining to find inherent in disappearances violations of the detainee’s right to be free from torture and cruel treatment. *See, e.g., Urban v. Turkey* (Application no. 25656/94) (2002).

<sup>117</sup> In addition, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance includes an explicit prohibition of transfers to a risk of enforced disappearance.

<sup>118</sup> Article 12, Geneva Convention III; Article 24, Geneva Convention IV.

<sup>119</sup> See Articles 122, 123, 125, and 126 of Geneva Convention III (concerning prisoners of war), and Articles 136, 140, 142, and 143 of Geneva Convention IV (concerning enemy aliens and civilian internees). *See also* Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71 at para. 56 (explaining that “While international humanitarian law does not utilize the term “enforced disappearances” as such, there is no doubt that many of its provisions are aimed at preventing enforced disappearances in the context of armed conflict.”).

<sup>120</sup> *See Customary International Humanitarian Law*, at Rule 98.

<sup>121</sup> *See Customary International Humanitarian Law*, at Rule 98.

#### 2.2.2.4 No transfers to a risk of arbitrary deprivation of life

Article 6 of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life. This provision, along with the general obligations set out in Article 2 to respect and ensure the rights set out in the Covenant imposes an obligation on states not to transfer individuals to a risk of arbitrary deprivation of life.<sup>122</sup> This includes non-transfer to extrajudicial executions and the imposition of the death penalty in circumstances where basic procedural guarantees have not been observed.<sup>123</sup> States that have abolished the death penalty may not transfer individuals to countries that retain it unless they obtain firm assurances that the transferee will not be subject to capital punishment.<sup>124</sup>

While the right to life is non-derogable,<sup>125</sup> in the context of armed conflict, the *lex specialis* of international humanitarian law modifies the right to life as protected by the *lex generalis* of human rights law through rules concerning, *inter alia*, permissible targeting.<sup>126</sup> In both international and non-international armed conflict, persons deprived of their liberty, civilians taking no active part in the hostilities, and those otherwise *hors de combat* are protected against “violence to life and person, in particular murder of all kinds.”<sup>127</sup> Applying human rights law concurrently with the *lex specialis* of targeting rules, states are prohibited

<sup>122</sup> See U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, para. 12 (2004).

<sup>123</sup> See U.N. Human Rights Comm., *General Comment No. 6: The Right to Life*, para. 7 (1982). The Human Rights Committee has held, in *Kindler v. Canada*, that a state would violate the right to life as protected by the ICCPR if it transferred an individual within its jurisdiction to the custody of a state where the individual faced a real risk of having his or her right to life violated. See *Kindler v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991 (1993), para. 14.3. This includes transfer to a real risk of the imposition of the death penalty in circumstances where procedural guarantees are not upheld and no appeal is possible, or where the method of execution itself amounts to torture or cruel, inhuman or degrading treatment. See *Wright v. Jamaica*, U.N. Doc. CCPR/C/55/D/459/1991 (1995), para. 0.6; and *Ng v. Canada*, U.N. Doc. CCPR/C/49/D/469/1991 (1994), para. 16.4. While the European Court of Human Rights has determined that capital punishment carried out following unfair trial amounts to a violation of the right to life, it has not had the opportunity to rule on the issue of protections against transfer to a risk of such treatment. See Droege, *supra* note 48 at 673.

<sup>124</sup> This rule has been set out most clearly by the European Court of Human Rights. See, e.g., *Soering v. U.K.*, *supra* note 102 at para. 98. The Council of Europe has emphasized this obligation in its *Guidelines on Human Rights and the Fight Against Terrorism*; see Guideline XIII on Extradition. See Borelli, *supra* note 32 at 346-349 for a discussion of this issue.

<sup>125</sup> See, e.g., ICCPR article 4.

<sup>126</sup> See Article 3 common to the Geneva Conventions of 1949; Article 46, Geneva Convention I; Article 47, Geneva Convention II; Article 13, Geneva Convention III; Article 33, Geneva Convention IV. For a discussion of the distinction between permissible targeting and unlawful killings in the context of counter-terrorism, see N. Melzer, *Targeted Killing in International Law* (2008), at 396 (explaining that targeted killings cannot be analyzed under the laws of war unless they are part of the conduct of hostilities and characterizing as a “misconception by the US government” that its “large-scale counter-terrorism campaign” is “an actual war, the so-called ‘war on terrorism’ . . . this misleading rhetoric conflates diplomatic efforts, economic measures, law enforcement operations, international and non-international armed conflicts in a manner that does not withstand juridical scrutiny.”), and Duffy, *supra* note 95 at 340-344.

<sup>127</sup> See Article 3 common to the Geneva Conventions of 1949.

from transferring any person to a risk of acts that would constitute arbitrary deprivation of life in the context of armed conflict.<sup>128</sup>

#### **2.2.2.5. Specific guarantees for protected persons in the context of international armed conflict<sup>129</sup>**

In addition to the protections discussed above, states must observe additional norms in relation to particular categories of persons; such norms are not thoroughly examined in this Article. By way of example, in the context of international armed conflict, humanitarian law identifies particular requirements and bars certain transfers. Article 12 of Geneva Convention III provides that prisoners of war may “only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” Article 45 of Geneva Convention IV includes an almost identical provision concerning aliens in the territory of a party to an international armed conflict. These provisions mean that a state may not transfer prisoners of war or aliens to states that will not, in practice, apply all of the provisions of the Geneva Conventions relevant to those persons.<sup>130</sup> Such provisions include a wide variety of requirements concerning, *inter alia*, humane and fair treatment. In addition to these protections, Article 49 of Geneva Convention IV categorically bars transfers of protected persons out of occupied territory, and Article 147 makes such transfers a grave breach of the Convention.<sup>131</sup> Individuals who are not covered by these protections set out in Geneva Conventions III and IV must nonetheless be protected against transfer to a situation in which the fundamental guarantees set out in Article 75 of Additional Protocol I to the Geneva Conventions, which reflects customary international law, would be violated.<sup>132</sup>

#### **2.2.3. Procedural guarantees: right to challenge transfer in advance before an independent decision-maker**

Formal processes for the transfer of individuals such as extradition and deportation are structured to include basic human rights guarantees and to respect the sovereignty of states. These procedures generally include mechanisms that allow individuals to challenge their transfer in advance. This right to challenge has been understood to be an aspect of the substantive guarantee of *non-refoulement*, and has also been considered as part of the right to

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<sup>128</sup> Applying human rights law concurrently with the *lex specialis* of targeting rules, states should be understood to be prohibited from transferring any person to a risk of arbitrary deprivation of life in the context of armed conflict—i.e. to a country where they may be at a risk of unlawful targeted killing.

<sup>129</sup> For a discussion of these protections, see Gillard, *supra* note 98.

<sup>130</sup> The Geneva Conventions also impose on the transferring state the obligation to “take effective measures to correct the situation or shall request the return” of the prisoners of war or protected persons. Article 12, Geneva Convention III; Article 45, Geneva Convention IV.

<sup>131</sup> Exceptions are made for evacuations from specific areas for the security of the population; individual transfers are not countenanced in this formulation. Article 147, Geneva Convention IV.

<sup>132</sup> Droege, *supra* note 48, at 675 argues that the protective principles concerning transfer applicable in international armed conflict should also apply in situations of non-international or internationalized armed conflict. Droege also points out that Article 5(4) of Additional Protocol II to the Geneva Conventions requires that detaining powers should “ensure [the] safety” of persons being released after detention; this rule is relevant to transfers in the context of non-international armed conflict. *Id.*

an effective remedy, and inherent in the right to due process of law.<sup>133</sup> Individuals subjected to transfers outside these procedures must similarly be afforded the opportunity to challenge their detention and potential transfer.<sup>134</sup> As the Inter-American Juridical Committee has stated, there is an inherent “incompatibility of the practice of extraterritorial abduction with the rights of due process to which every person is entitled, no matter how serious the crime they are accused of, a right protected by international law.”<sup>135</sup> The minimum requirements for challenges to apprehension and transfer are set out below. Although some procedural rights guaranteed under human rights law may be subject to derogation in times of emergency that threaten the life of a nation, certain essential procedural guarantees may not be restricted even in times of great strife.<sup>136</sup> I argue that in the context of transfer, the rights set out below such be understood to be such non-derogable procedural rights because without them, the substantive guarantee of *non-refoulement* would lose meaning. Finally, the practice in recent years of obtaining “diplomatic assurances”—promises by states receiving individuals that they will not subject the transferee to torture or cruel treatment—is subject to stringent procedural requirements; these requirements apply to all forms of transfer where such assurances are used.

### 2.2.3.1. Ability to challenge transfer on basis of fear of *refoulement* to any of the risks protected against by international law

The most commonly—and clearly—set out procedural obligation in the context of transfer is the requirement that states provide individuals being transferred with the

<sup>133</sup> See, e.g., Eur. Ct. Hum. Rts., *Chahal v. The United Kingdom* (1996), para. 80 (holding that independent review of a decision to transfer in the face of a claim of *refoulement* must be independently scrutinized); U.N. Committee Against Torture, *Agiza v. Sweden* (2005), para. 13.5 (finding that “the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise”); U.N. Human Rights Comm., *Mansour Abani v. Canada* (2006), para. 106-10.8 (“the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture”).

<sup>134</sup> See Inter-Am. Comm. Hum. Rts., *Extension of Precautionary Measures (N. 259) regarding Detainees in Guantánamo Bay, Cuba* (2005) (finding that the right to determination of protection from *refoulement* applies to individuals held by the United States at Guantánamo and requesting that the United States provide to detainees facing transfer “an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker”). The U.N. Committee Against Torture has found that the *non-refoulement* provision of the Convention was violated when an individual was transferred informally by French authorities to Spanish police officers. The Committee stressed “its concern at the practice whereby the police hand over individuals to their counterparts in another country . . . without the intervention of a judicial authority . . . That meant that a detainee’s rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse.” Committee Against Torture, *Arana v. France*, Communication No. 63/1997, U.N. Doc. CAT/C/23/D/63/1997 (2000), at 11.5 & n.12. For a discussion of how rendition violates procedural guarantees, see OSCE/ODIHR, *supra* note 95 at 143-145.

<sup>135</sup> Inter-American Juridical Committee, Legal Opinion Regarding the Decision of the Supreme Court of the United States of America C.J.I./RES/II/15/91.

<sup>136</sup> The Human Rights Committee has made clear that states may not derogate from the right to challenge the basis of detention—even in the context of administrative detention imposed as a counter-terrorism measure. See U.N. Human Rights Committee, *General Comment No. 29: States of Emergency*, UN doc. CCPR/C/21/Rev.1/Add.11, para. 16 and n9 (citing concluding comments concerning Israel’s administrative detention scheme). Further, the *non-refoulement* obligation is non-derogable and has been found to include the right to challenge transfer on a basis of a fear of *refoulement*. See discussion *infra*.

opportunity to challenge the transfer on the basis that they fear mistreatment in the receiving country. This procedural requirement has been understood to be inherent in the various norms of *non-refoulement* set out earlier in this Article.<sup>137</sup> This is because *non-refoulement* standards have both a subjective and an objective element: the individual must demonstrate his or her fear of mistreatment, and an official of the state considering transfer must objectively weigh this fear in light of relevant evidence.<sup>138</sup> This requires a process that allows the individual the opportunity to make out his or her claim, and to challenge the evidence brought forward by the state proposing transfer. Any process whereby the transferring state purports to make the *non-refoulement* assessment on its own and without the participation of the individual facing transfer is therefore impermissible under relevant international law.<sup>139</sup>

### 2.2.3.2. Ability to challenge transfer must take place prior to transfer and before an independent decision-maker

To make real the substantive protections of international human rights law set out above, individuals facing transfer must have the opportunity to mount a pre-transfer challenge on the basis of any fear of *refoulement*.<sup>140</sup> Although human rights bodies have not held unequivocally that such a challenge must be heard by a court<sup>141</sup>, the review must be by

<sup>137</sup> See citations at note 133. See also U.N. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, para. 20 (finding that “The State party should always ensure that suspects have the possibility to challenge decisions of *refoulement*.”) (2006).

<sup>138</sup> See, e.g., Article 1, Convention Relating to the Status of Refugees. See also Lauterpacht and Bethlehem, *supra* note 31 at 128.

<sup>139</sup> For example, in the case of *U.S. Interdiction of Haitians on the High Seas*, the Inter-American Commission on Human Rights found that the United States violated the rights of individuals it interdicted at sea when it transferred them to their country of origin without a hearing concerning their fear of *refoulement*. See *The Haitian Centre for Human Rights et al. v. United States (U.S. Interdiction of Haitians on the High Seas)*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/ser. L/V.II. 95 doc. 7 rev. ¶¶ 167-71 (1997).

<sup>140</sup> See citations at note 133. In its critique of the U.S. practice of “rendition of suspects,” the U.N. Committee Against Torture has called on the U.S. to provide *non-refoulement* protections to individuals subject to transfer, end transfers to a risk of torture, and “...always ensure that suspects have the possibility to challenge decisions of *refoulement*.” See U.N. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America (2006), para. 20. The Human Rights Committee has emphasized that “By the nature of *refoulement*, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.” *Alzery v. Sweden*, Communication No. 1416/2005, Human Rights Committee, UN Doc. CCPR/C/88/D/1416/2005 (2005), ¶ 11.8. Similarly, the European Court of Human Rights has held that a state violates the rights of a transferee if it does not affording the transferee the opportunity to challenge the transfer on the basis of a fear of torture. See *Eur. Ct. Hum. Rts., Shamayev v. Georgia & Russia*, No. 36378/02 (Apr. 12, 2005).

<sup>141</sup> See Droege, *supra* note 48 at 680. The issue of whether a court is required or not depends in part on whether human rights bodies construe a pre-transfer process as more akin to a deportation hearing, a criminal proceeding, or an extradition hearing. Different standards have been applied to these different procedures by various human rights bodies. For example, the Human Rights Committee, has held that all detainees challenging the legality of their detention should have access to a court for such determination. See *OSCE/ODIHR, supra* note 95 at 160-161.

an independent decision maker<sup>142</sup> with the power to suspend the transfer during the pendency of review.<sup>143</sup>

### 2.3.3.3. Specific requirements regarding the use of diplomatic assurances

A number of countries have developed a practice of seeking diplomatic assurances when they extradite, deport, or expel an individual to a country where the individual may be at risk of torture.<sup>144</sup> In the aftermath the events of September 11, 2001, countries including Austria, Canada, the Netherlands, Sweden, Turkey, the United Kingdom, and the United States have sought and accepted assurances concerning torture and ill-treatment in the context of legally regulated transfers from the territory of the country; legal challenges concerning the permissibility, form, and procedure for using such assurances have been mounted in each country with differing results.<sup>145</sup> In the face of this state practice, human rights bodies have developed an emerging rule concerning the use of diplomatic assurances against torture and ill-treatment. This rule begins with the bedrock principle that the norm of *non-refoulement* is a direct outgrowth of the prohibition of torture, and is absolute, applying to everyone in all circumstances.<sup>146</sup> In this context, U.N. human rights bodies have set out

<sup>142</sup> See U.N. Comm. Against Torture, *Agiza v. Sweden*. See also Eur. Ct. Hum. Rts., *Jabari v. Turkey* (2000) para. 50 (stressing that the prohibition on *refoulement*, combined with the right to a remedy requires “independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3”).

<sup>143</sup> See Eur. Ct. Hum. Rts., *Gebremedhin v. France* (2007) para. 66 (“In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materializes. . . [the right to a remedy] requires that the person concerned should have access to a remedy with automatic suspensive effect.”). See also Eur. Ct. Hum. Rts., *Chabal v. The United Kingdom* (1996), para. 80; Eur. Ct. Hum. Rts., *Conka v. Belgium* (2002); U.N. Comm. Against Torture, *Agiza v. Sweden* at ¶ 13.5; Inter-Am. Comm. Hum. Rts., Extension of Precautionary Measures (N. 259) regarding Detainees in Guantánamo Bay, Cuba (2005). See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, para.29, U.N.Doc. A/59/324 (2004), available at <http://daccess-ods.un.org/TMP/1436731.html> (“...in cases where the risk of torture and ill-treatment is elevated, it is particularly important that proceedings leading to expulsion respect appropriate legal safeguards, at the very least a hearing before a judicial instance and the right to appeal.”). The High Commissioner for Human Rights has stressed that “judicial oversight and review must be available prior to any transfer” of a terrorism suspect. See U.N. High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. DOC. A/HRC/4/88 (2007). On the requirement that transfer be suspended during review of the decision to transfer, see Eur. Ct. Hum. Rts., *Jabari v. Turkey*, (2000), para. 50 (holding that the right to a remedy in the context of *non-refoulement* requires the suspension of transfer during review of a claim of *refoulement*), U.N. Human Rights Comm., *Concluding Observations of the Committee Against Torture: Australia*, UN Doc. CAT/C/AUS/CO/3 (2008), para. 17 (expressing concern that transfer was not automatically stayed pending review of a claim of *refoulement*).

<sup>144</sup> Historically used in relation to promises not to use capital punishment, assurances have been accepted when used to obtain promises from a country seeking custody over a fugitive who could face the death penalty if transferred. Human rights bodies’ acceptance of assurances in the death penalty context has not translated into their acceptance in the torture and ill-treatment context.

<sup>145</sup> See *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, 17 HUM. RTS. WATCH, Apr. 2005, at 47–57 (Canada); 57–66 (Sweden); 67–72 (United Kingdom); 72–76 (The Netherlands); 75–79 (Austria); and 79 (Turkey).

<sup>146</sup> See, e.g., U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture, Canada*, U.N. Doc CAT/C/CR/34/CAN (2005) (“Given the absolute nature of the prohibition against *refoulement* contained in article 3 of the Convention, the State party should provide the Committee with details on how many cases of extradition or removal subject to the receipt of ‘diplomatic assurances’ or guarantees have occurred since 11 September 2001 . . .”).

minimum procedural rules governing any use of assurances against torture. Assurances not meeting this threshold are considered by U.N. bodies to be violations of the sending state's human rights obligations. According to the Human Rights Committee and the Committee Against Torture, there are three basic requirements for the use of assurances to counter a risk of torture<sup>147</sup>:

- (1) Assurances must be obtained using “clear” and established procedures.<sup>148</sup>
- (2) Assurances must be subject to judicial review.<sup>149</sup>
- (3) Assurances must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.<sup>150</sup>

In addition to the procedural requirements set out above, the CAT Committee has also indicated that assurances may not be relied upon when transferring an individual to a country that systematically violates the Torture Convention.<sup>151</sup> While the Human Rights Committee has not categorically rejected the use of assurances in relation to such countries, it has indicated that assurances are unlikely to mitigate the risk of torture upon return, thus indicating that they will rarely enable permissible transfers to such countries by states that have ratified the ICCPR.<sup>152</sup> The Special Rapporteur on Torture has set out a more stringent

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<sup>147</sup> These specific requirements concerning assurances draw upon the CAT Committee's and the Human Rights Committee's recent statements which support a more general procedural right to appeal a state's decision to transfer an individual. *See supra* notes 148–150. The European Court of Human Rights has also emphasized that the review of assurances must be on a case-by-case basis, taking into account the “circumstances prevailing at the material time.” *Saadi v. Italy*, para. 147-148.

<sup>148</sup> *See* U.N. Human Rights Comm., Concluding Observations of the U.N. Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006) [hereinafter “U.S. Concluding Observations”]; *See* U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 21, U.N. DOC. CAT/C/USA/CO/2 (2006) [hereinafter “U.S. Conclusions”].

<sup>149</sup> *See* U.N. Human Rights Comm., U.S. Concluding Observations, at 16; U.N. Human Rights Comm., Concluding Observations of the U.N. Human Rights Committee, Sweden, U.N. Doc. CCPR/C/SWE/CO/6 (2009). The availability of judicial review was also suggested by the CAT Committee's findings in the *Agiza* case against Sweden. *See* U.N. Comm. Against Torture, *Agiza v. Sweden* at 13.4. The 2002 Canadian case *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* supports this reasoning as well. *See* *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney Gen. of Canada*, 2002 SCC 1. (Jan. 11, 2002), available at <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html>. In that case, the Court examined the adequacy of procedural safeguards in the context of the *non-refoulement* obligation set out in Article 3 of CAT. The court held that “[g]iven Canada's commitment to the CAT, we find that . . . the phrase ‘substantial grounds’ raises a duty to afford an opportunity to demonstrate and defend those grounds.” *Id.* ¶ 119. The court added that “[w]here the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.” *Id.* ¶ 123.

<sup>150</sup> *See* U.N. Human Rights Comm., Concluding Observations of the U.N. Human Rights Committee, United States of America, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006); *Alzery v. Sweden*, Communication No. 1416/2005, Human Rights Committee, U.N. Doc. CCPR/C/88/D/1416/2005 (2005), at 11.5 (post-return monitoring must meet “key aspects of international good practice.”).

<sup>151</sup> *See* U.N. Comm. Against Torture, U.S. Conclusions at 21; U.N. Human Rights Comm., Concluding Observations of the U.N. Human Rights Committee, Sweden, 16, U.N. Doc. CCPR/C/SWE/CO/6 (2009) (“the more systematic the practice of torture or cruel, inhuman or degrading treatment, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be.”).

<sup>152</sup> *See* U.N. Hum. Rts. Comm., U.S. Concluding Observations, at ¶ 16 (reminding the U.S. that “the more

rule, suggesting that *any* use of diplomatic assurances to protect against torture and ill-treatment is impermissible:

It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that states cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.<sup>153</sup>

The acceptance of diplomatic assurances by third states that seek to ensure that their territory or facilities—such as airports—are not used to facilitate informal transfers that breach human rights law presents a different set of issues.<sup>154</sup> In such cases, third states seek assurances from the transferring state concerning the propriety of the transfer in order to comply with their positive obligations to prevent abuses under human rights law and to ensure they do not incur derivative liability under the rules of state responsibility. Human rights bodies have not yet addressed the standard to be used in such circumstances to assess such assurances, though they have recommended that third states undertake investigations in cases where the circumstances placed the credibility of the promises in doubt.<sup>155</sup>

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systematic the practice of torture or cruel inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be”).

<sup>153</sup> M. Nowak, Special Rapporteur of the Commission on Human Rights on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 51, U.N. Doc. A/60/316 (2005). This approach has been underlined in relation to specific country practices. *See, e.g.*, Special Rapporteur of the Commission on Human Rights on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/10/44/ADD.2 (2009). This approach is more stringent than that adopted by the previous Special Rapporteur, Theo van Boven, who set out the following “essential requirements for diplomatic assurances” in 2004:

[A]ssurances should as a minimum include provisions with respect to prompt access to a lawyer, recording (preferably video-recording) of all interrogation sessions and recording the identity of all persons present, prompt and independent medical examination, and forbidding incommunicado detention or detention at undisclosed places. Finally, a system of effective monitoring is to be put in place so as to ensure that assurances are trustworthy and reliable. Such monitoring should be prompt, regular and include private interviews. Independent persons or organizations should be entrusted with this task and they should report regularly to the responsible authorities of the sending and receiving States.

Special Rapporteur of the Commission on Human Rights on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 41–42, U.N. Doc. A/58/324 (2005) (prepared by Theo van Boven) (internal citation omitted).

<sup>154</sup> For a discussion of such issues, *see* F. de Londras, ‘Ireland’s Potential Liability for Extraordinary Renditions Through Shannon Airport’, (2007) 25 IRISH LAW TIMES 106.

<sup>155</sup> The Human Rights Committee has recommended that Ireland investigate potential cases of extraordinary

### 3. Practical Challenges and Outstanding Legal Issues

#### 3.1. Outstanding Legal Issues

Existing jurisprudence and authoritative interpretations of human rights, humanitarian law, and refugee law do not answer all of the legal questions pertaining to the inter-state transfer of individuals suspected of terrorism. Some significant questions remain open to debate. Perhaps the most important is whether the full panoply of procedural protections are required in cases where an individual is apprehended on foreign territory by a single state and brought back to that same state for a regular criminal proceeding. Are such “renditions to justice” lawful when the host state consents to the apprehension, even without a pre-transfer hearing? With respect to the transferring state, and under the case law of the European Court of Human Rights, the answer may be yes, so long as the transferring state abides by the substantive protections concerning basis for arrest and *non-refoulement*.<sup>156</sup> But what about the individual’s rights vis-à-vis the host state? The host state’s consent will contribute to relieving the transferring state of any wrongfulness for the apprehension and transfer under existing case law<sup>157</sup>, but it is not clear whether this has an impact on its own human rights obligations.<sup>158</sup>

Under human rights law, the host state may be liable for violating the suspect’s rights if the individual would normally have had the opportunity to avail himself of the protection of domestic law before expulsion. Thus, while the transferring state may be able to design a regime through which it would not directly violate the individual’s human rights, such careful planning may not alone ensure that the individual’s rights would not be violated during the transfer. To achieve an entirely rights-protecting transfer scheme, the transferring state must ensure that its actions do not amount to collusion with the host state in violation of the individual’s rights in that jurisdiction.<sup>159</sup> Thus, the consent of the host state should be understood as necessary but not sufficient to protect the rights of the individual.<sup>160</sup>

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rendition by the United States that stopped at an Irish airport despite the use of diplomatic assurances. *See* U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Ireland, UN Doc. CCPR/C/IRL/CO/3/ (2008). De Londras identifies three criteria from human rights jurisprudence for the acceptable use of diplomatic assurances by third states: “(i) the promise must be adequate; (ii) the matter in relation to which the promise is made must be within the control of the promisor; and (iii) the promisor must enjoy credibility in relation to the matter at hand and in relation to the promise state.” *See* de Londras, *supra* note 154.

<sup>156</sup> *See, e.g., Öcalan, supra* note 74, *Barbie, supra* note 38, and *Ilich Sánchez Ramírez, supra* note 38 (accepting rendition to justice and disguised extradition).

<sup>157</sup> *See, e.g., Öcalan, supra* note 74 (noting with approval that the host and transferring states had cooperated in informal transfers).

<sup>158</sup> The cases most often addressed by human rights bodies have not presented the question of the human rights obligations of the host state for informal transfers to which it has consented. For example, the European Court of Human Rights has either addressed the obligations of host states carrying out formal transfers (i.e. deportation and extradition from European states) or the obligations of receiving states following informal transfers (i.e. renditions to justice in European states).

<sup>159</sup> The test for such collusion would be the standard set out in the ILC’s Articles on State Responsibility. *See* discussion *supra*.

<sup>160</sup> The host state may not waive individual rights such as those to seek the protection of the law in its courts. While under general public international law the host state’s consent may be sufficient to obviate the wrongfulness of a transferring state’s actions on its territory, from a rights perspective this consent may instead

In addition to these issues, additional questions remain under human rights law concerning the procedural rights of the individual facing transfer. For example, does the individual have a right to counsel during the pre-transfer hearing? Would he also have a right to appeal the decision of the independent decision-maker? Is the state conducting the transfer required to open such procedures to the public? Could it use classified materials or withhold evidence from the individual and/or his attorney? These questions need further clarification and depend, in part, on whether human rights bodies would view a pre-transfer proceeding as more akin to a criminal proceeding, a deportation hearing, or an extradition procedure, since different rules have been developed for these settings. Certain key human rights principles such as the principle of legality and due process would apply to these proceedings regardless of their form, meaning that any state that constructs a transfer regime must ensure that the procedures are set out clearly in domestic law and that the individual facing transfer is guaranteed a fair hearing.

Another set of legal issues that need further clarification are the responsibilities of third states to ensure that their actions do not either breach their own direct obligations or amount to assistance in the human rights violations of the transferring state.<sup>161</sup> In particular, the responsibility of states that are used for stopovers, refuelling, and fly-over need to be clearly articulated. Under human rights law, states have positive obligations to prevent and investigate human rights violations.<sup>162</sup> With respect to torture or cruel treatment, states are required to investigate acts of torture and cruel treatment or participation or conspiracy in such acts by individuals within their jurisdiction.<sup>163</sup> These obligations mean that when there is credible evidence that transfers involving *refoulement* are occurring that rely on the assistance of a state, that state must take action to investigate the allegations and withdraw its support.<sup>164</sup> The exact level of information required to trigger this obligation needs further elaboration. In addition to these direct obligations, states may attract derivative liability if their actions amount to assistance in the wrongful acts of the transferring state. Under the rules of state responsibility, states will be responsible for the acts of other states if they

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amount to a violation. On the other hand, human rights law should not be allowed to prohibit transfers from failed and weak states if such states harbour suspected terrorists. Although the issue has not been squarely addressed in the case law, states lacking functioning judicial systems and effective legal protections for individuals facing expulsion should not be able to block rendition through failure to consent to a transfer. If recourse to domestic law in such situations would be meaningless, it should be understood to be unnecessary.

<sup>161</sup> For an excellent discussion of this issue, see J. Huckerby/NYU Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Acts of Other States* (2006).

<sup>162</sup> These obligations are both explicitly laid out in the text of human rights conventions and have been understood as part of the substantive prohibitions on torture and ill-treatment. For a discussion of these obligations in the context of extraordinary rendition, see Huckerby, *supra* note 161.

<sup>163</sup> For a discussion of these obligations, see Huckerby, *supra* note 161 at 10-12.

<sup>164</sup> The Human Rights Committee has called on European states to investigate allegations that their territory was being used for extraordinary rendition. See U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CCPR/C/GBR/CO/6/ (July 30, 2008) (The State party should investigate allegations related to transit through its territory of rendition flights and establish an inspection system to ensure that its airports are not used for such purposes.); See U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Denmark*, U.N. Doc. CCPR/C/DNK/CO/6/ (Dec. 16, 2008) (same) U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Ireland*, U.N. Doc. CCPR/C/I/CO/3/ (July 30, 2008) (calling on Ireland to “establish a regime for the control of suspicious flights and ensure that all allegations of so-called renditions are publicly investigated”).

knowingly assist in the commission of a wrongful act that would be wrongful had the state carried out the act itself.<sup>165</sup> These elements are present in the case of stopovers, refuelling, and even over-flight, so long as the state providing such assistance did so knowing of the wrongful act. States will often be aware of informal transfers; the difficult questions concern the level of knowledge about the wrongful act—i.e. *refoulement*—required.<sup>166</sup> Also in need of clarification is the standard that should be used to assess the reliance by third states on diplomatic assurances from transferring states that use their facilities or air space.<sup>167</sup>

In addition to these issues, open questions relevant to all counter-terrorism operations—such as when and to what extent international humanitarian law applies to counter-terrorism measures and thus which regime of law applies to various transfers—are relevant to the transfer of terrorism suspects but are too broad to be examined here. Additional—more finite and limited—legal issues are addressed in the text and footnotes above.<sup>168</sup> Like all legal issues that have not been adequately presented to a court or authoritative human rights body, a wide range of additional legal issues could arise when applying the legal principles set out above to the complex facts presented in the context of counter-terrorism.

### 3.2. Practical Challenges

National courts have often taken significantly more conservative approaches to the legal questions analyzed in this Article. To cite a single example, courts in the United States have rejected the extraterritorial application of refugee law, dismissed the ability of courts to halt the transfer of individuals held by U.S. forces abroad on the basis of a fear of ill-treatment; and declined to reject the use of diplomatic assurances in some cases where individuals fear torture upon transfer.<sup>169</sup> The most pressing practical challenge, therefore, is how to ensure that domestic courts, legislatures, and executive authorities will integrate the more protective norms into national practice.

Even with respect to states that actively seek to ensure that their policies are

<sup>165</sup> See Huckerby, *supra* note 161 for a discussion of this issue in the context of extraordinary rendition.

<sup>166</sup> Jayne Huckerby cogently explains the test this way: “the question of whether a State is responsible for complicity in the wrongful acts of Extraordinary Renditions and Disappearances requires a fact-intensive inquiry into exactly what it is that a State(s) is aware of with respect to the use of its territory for human rights violations. This inquiry will take place in the context of what has been described by the U.N. Committee Against Torture in *Agiza v. Sweden*

as ‘...progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad...’” Huckerby, *supra* note 161, at 13.

<sup>167</sup> For a discussion of these issues, see de Londras, *supra* note 154.

<sup>168</sup> For example, it is not clear whether access to a court is required for the procedural rights of the individual to be protected or if another type of independent body may be acceptable. See *supra*.

<sup>169</sup> See *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (U.S. Supreme Court held that Article 33, the provision of the Refugee Convention concerning *non-refoulement*, does not apply outside the United States); *Munaf v. Geren*, *supra* note 16 (U.S. Supreme Court held that detainees held by U.S. forces in Iraq could not obtain relief from a U.S. court on the grounds that their transfer to Iraqi authorities would place them at risk of torture); and *Sameh Sami S. Khouzam v. Attorney General, et al.; Sameh Sami S. Khouzam v. M Chertoff, Secretary of Department of Homeland Security, et al.*, Nos. 07-2926 & 08-1094 (U.S. Court of Appeals for the Third Circuit, 2008) (holding that while diplomatic assurances may be used, an individual facing transfer on the basis of their existence must have the chance to challenge them).

compliant with humanitarian, refugee, and human rights law, a wide range of practical challenges remain. Some examples include:

- What should be done with individuals suspected of crimes of terrorism who cannot be transferred due to *non-refoulement* concerns and who also cannot be tried due to the host state's lack of evidence? This scenario is not unlikely, since the quantum of evidence needed to justify apprehension and transfer is significantly below that needed for criminal conviction.
- Could a transfer process that upholds the rights of the individual be sufficiently quick to ensure that individuals suspected of planning crimes of terrorism can be apprehended before plots are carried out? Rendition has often been justified by its relative celerity in comparison with extradition or even deportation. Would formalized processes allow states to apprehend terrorism suspects quickly enough to thwart plots?<sup>170</sup>
- Could rendition processes be designed to avoid common legal problems such as the bar on extradition of nationals<sup>171</sup>, the absence of dual criminality<sup>172</sup>, and the failure of key states to agree to extradition treaties? What about common political problems, such as the need for a host state to be seen as protecting its nationals or the desire on the part of host state politicians to avoid overtly cooperating with the transferring state?<sup>173</sup>
- How can transferring states comply with procedural guarantees extraterritorially? What forum would be used to allow the suspect to challenge his transfer? Where would the detainee be held during this process, and for how long?
- If the transfer rules apply to situations of collective self defense, assistance in peacekeeping, or other lawful collective military operations, how can the international community avoid creating a situation where the detaining power is permanently responsible for those it detains when the local authorities cannot credibly guarantee the individual will not be subject to ill-treatment?<sup>174</sup>
- What kind of information, and in what form, should third states require from transferring states to ensure that they are not facilitating wrongful acts by allowing the use of their air space, airports, or other facilities?
- How can the international community ensure that procedural protections for individuals suspected of terrorism do not create perverse incentives—such as the

<sup>170</sup> See Borelli, *supra* note 32 at 338. See also L. Wright, *The Looming Tower: Al Qaeda and the Road to 9/11* (2007) at 231-234 (describing a rendition to the United States and how it was designed to get around logistical problems with extradition).

<sup>171</sup> This is a common bar to extradition.

<sup>172</sup> This would occur, for example, when a state has not adequately criminalized all acts of terrorism.

<sup>173</sup> See McNeal & Field, *supra* note 2 at 492-493 (citing examples of instances in which the United States tried to get custody of an individual suspected of terrorism but could not due to the non-cooperation of foreign states or a failed state).

<sup>174</sup> See Droege, *supra* note 48 at 693 (“Clearly, if states are present in situations of armed conflict, it is foreseeable that they will have to take people into their effective control, in which case they will be responsible for those persons’ well-being.”) Droege also offers a potential solution: “states have sometimes found alternative solutions, such as prolongation of temporary detention; release of individuals who do not pose a serious risk, accompanied by surveillance measures and regular appearances before government authorities; transfers to third states; or transfers limited to specific detention facilities where the person does not run a risk or specifically excluding detention facilities where he or she would run a risk.” *Id.* at 693-694.

incentive to kill a suspected terrorist instead of detaining and transferring him?<sup>175</sup>

#### 4. Recommendations

To ensure that human rights, humanitarian law, and refugee law are upheld in the transfer of individuals suspected of crimes of terrorism, the following recommendations are offered.

##### 4.1. Recommendations to transferring states

- Transferring states should use all available formal processes of transfer, such as deportation or extradition and may not intentionally bypass them. States seeking individuals for crimes of terrorism should pursue formal arrangements such as bilateral or multilateral extradition treaties with the widest possible range of states, and should address the practical and political obstacles to their use. States contemplating transfer should consider alternative means, such as cooperation with the judicial authorities of the host state in prosecuting the individual.
- Transferring states should seek the consent of the host state if contemplating a transfer and should not accept that consent where it would amount to assistance in violating the rights of the individual sought (for example, if the suspect has valid rights to assert in the host state's courts).
- Transferring states must have a valid legal basis for apprehending the individual in contemplation of transfer. They must not rely on overly broad conceptions of terrorism or armed conflict to justify detentions that would otherwise be arbitrary.
- Transferring states may not transfer individuals to a risk of: torture or cruel, inhuman or degrading treatment; persecution; enforced disappearance; or arbitrary deprivation of life.
- Transferring states must extend the right to challenge the basis for the transfer and any fear of *refoulement* in advance before an independent decision-maker.
- Transferring states may only rely on diplomatic assurances if they are obtained using "clear" and established procedures, subject to judicial review, and followed by effective post-return monitoring of the treatment of the individual returned subject to assurances. Assurances from states that systematically violate the prohibition on torture or ill-treatment may never be relied upon.

##### 4.2. Recommendations to host states

- States that have not ratified the major international conventions on terrorism should do so.
- All states should ensure that crimes of terrorism are established in domestic law.
- States should work to eliminate the practical obstacles to prosecution by establishing

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<sup>175</sup> This scenario could arise when a transferring state asserts the right under international humanitarian law to lawfully target a suspected terrorist (for example, when the individual is directly participating in hostilities against it or is a member of an irregular armed force) and does not wish to prosecute the individual criminally. For more on targeted killings in the context of counter-terrorism, see David Kretzmer, 'The Legal Regime Governing the Use of Lethal Force in the Fight Against Terrorism,' in this volume.

- judicial cooperation agreements.
- States should actively pursue prosecution of individuals present on their territory who are suspected of crimes of terrorism, including through legal cooperation regimes and the sharing of evidence. Where it is not possible to prosecute such individuals, they should be subject to extradition to a state capable of prosecuting them.
  - States should not harbor individuals sought for crimes of terrorism by failing to prosecute or extradite.
  - States should work to eliminate the legal obstacles to extradition.
    - States should eliminate the rule against extraditing nationals.
    - States should ensure that the political offense exception does not apply to crimes of terrorism.
  - A host state should not consent to a transfer from its territory until it has satisfied itself that the transferring state will comply with the minimum substantive and procedural guarantees owed to an individual subject to transfer.
    - To do so, host states should require documentation confirming the legal basis for any transfer that would be initiated from its territory.
    - States should not consent to transfers from their territory when doing so would otherwise violate the human rights of that individual.
  - Host states should exercise due diligence to ensure that foreign agents do not violate the human rights of individuals on their territory or in their effective control.
    - States should not tacitly consent to apprehensions and transfers that would involve human rights violations.
    - States should seek information about the activities of foreign agents on their soil and should, where credible allegations arise, initiate investigations into violations by such agents.

#### 4.3. Recommendations to third states

- Third states should ensure that their actions in allowing transit, refuelling, or other logistical assistance, do not amount to the aid or assistance in acts that are wrongful under international law.
  - Third states should require explicit assurances that any aircraft used by a state that will transit through its airspace or use its facilities is doing so in full respect of human rights.
  - Third states should require documentation confirming the status and legal basis for the transport of any detainees through its airspace or territory.
- States should take prompt action to investigate whenever credible allegations arise that their airports, airspace, or other territories have been used to transfer individuals contrary to human rights protections.
  - In such cases, the establishment of inspection systems at airports or other positive measures may be required.