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Rendition in Extraordinary Times

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Margaret L. Satterthwaite and Alexandra M. Zetes

1. Introduction: Rendition as a counter-terrorism tool

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 of snatching a defendant for trial—“rendition to justice”—has been used by governments for more than a century.1 Although rendition has been controversial in human rights circles, it has been celebrated by many as crucial in the fight against impunity for grave crimes.2

Former U.S. President George W. Bush was criticized for the “novel” practice of “extraordinary rendition”—the transfer of suspects to locations known for the systematic use of torture, including secret CIA prisons (this set of practices is hereinafter referred to as the “Extraordinary Rendition Program”).3 U.S. officials at the time defended the practice, relying on justifications developed to support “rendition to justice” and arguing that the U.S. Extraordinary Rendition Program was legal.4 Despite these justifications, international human rights bodies and intergovernmental organizations including the Council of Europe, the European Union, and human rights bodies of the United Nations, determined that the extraordinary form of rendition was unlawful under human rights law.5 Although individuals have faced significant legal hurdles in fighting the

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2 For a defense of rendition to justice, see G. S. McNeal & B. J. Field, Snatch and Grab Ops: Justifying Extraterritorial Abduction, 16 TRANSNAT’L L. & CONTEMPP. PROBS. 491 (2007).

3 For a discussion of these criticisms, see M. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L. Rev. 1333 (2007). See also Satterthwaite, supra note 1 at 601, fn 50.


practice through the U.S. legal system, there is little doubt among international law experts that extraordinary rendition is prohibited. Indeed, the European Court of Human Rights (ECtHR) has found that multiple European states violated their human rights obligations by cooperating with the U.S. Extraordinary Rendition program.

Soon after former 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. While this move was a positive signal that the United States planned to bring its practice into line with international norms, the Obama Administration in fact retained a number of problematic tools developed by previous Administrations. Although Obama signed executive orders ending the use of torture and secret detention, he did not order the cessation of all informal transfers. Nor did he pursue accountability for those who designed and implemented the Extraordinary Rendition Program. Instead, his Administration continued to quash rendition-related cases with the argument that such cases dangerously threatened to reveal “state secrets,” and formed a Task Force to examine transfers and to compile recommendations about how the process could be brought back in line with U.S. law and international obligations. Although it is impossible to know precisely how many informal transfers were carried out by the Obama administration, the number plainly was significantly smaller than those conducted by the Bush

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9 See id. The Task Force’s report, which was made publicly available in 2016, indicated that the United States should continue to rely on rendition as a counter-terrorism tool, and focused on ways to improve the practice, including strengthening the requirements for diplomatic assurances (discussed later in this article). The unclassified portions of the Task Force Report was released in December of 2016, see DEPARTMENT OF JUSTICE, REPORT OF THE SPECIAL TASK FORCE ON INTERROGATION AND TRANSFER POLICIES (2009) (hereinafter “Task Force Report”)


10 See, e.g. Craig Whitlock, Renditions continue under Obama, despite due-process concerns, THE WASH. POST (Jan. 1, 2013),
Administration during the Extraordinary Rendition Program. Instead, President Obama increased the use of drones to target and kill suspected terrorists outside of the United States, and continued the use of proxy detention in the name of fighting terrorism.\(^\text{12}\) The Obama Administration also engaged in other forms of problematic terrorism-related detentions. For example, in several cases, individuals suspected of crimes of terrorism were detained and interrogated on U.S. Navy ships before they were transferred to custody on U.S. territory.\(^\text{13}\)

The Trump Administration presents alarming new risks: in addition to the anti-terrorism tools left in place by the Obama administration,\(^\text{14}\) President Trump has promised to use torture and said he would fill Guantánamo Bay with “bad dudes” captured in the fight against al-Qaeda and ISIS. While President Trump’s most disturbing campaign promises have not yet come to fruition,\(^\text{15}\) the administration’s lack of transparency surrounding counter-terrorism measures, the on-going U.S. military engagements in Afghanistan, Syria, and Iraq, and the hunt for Al Qaeda in Yemen present opportunities for the U.S. government to return to—or worsen—the abusive practices it pioneered as part of the Extraordinary Rendition Program. With the publication of the National Security Strategy in December 2017, the Trump Administration renewed its commitment to fighting terrorism in aggressive terms with little consideration for human rights.\(^\text{16}\) These risks

https://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aaa-5102-11e2-984e-f1de82a7e98a_story.html?utm_term=.2781bd83ca4c

\(^{12}\) Proxy detention has been called “rendition light” by some (Nick Baumann, Locked Up Abroad — for the FBI, MOTHER JONES (Sept./Oct. 2011), http://www.motherjones.com/politics/2011/07/proxy-detention-gulet-mohamed/). It entails a state (in this case the United States) effectuating or arranging for the transfer of an individual agreed to detain and interrogate the individual in question and return the fruits of that interrogation to the transferring state. Proxy detention raises a variety of human rights concerns, especially as receiving states often employ methods of interrogation that amount to torture and cruel and inhuman treatment under international law. Proxy detention will not be discussed in depth in this paper. For further discussion of proxy detention and its relation to extraordinary rendition, see Jonathan Hafetz, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM (New York University Press, 2011).


\(^{15}\) Although President Trump has repeatedly indicated his plans to send new detainees to Guantánamo, at the time of writing, he had not sent any newly captured individuals there. The most recent example at the time of writing was Mustafa al-Imam, a suspect in the 2012 Benghazi attacks. Al-Imam was captured by U.S. commandos on October 30, 2017, and taken to the United States to face criminal charges, see Adam Goldman and Eric Schmitt, Benghazi Attacks Suspect Is Captures in Libya by U.S. Commandos, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/world/africa/benghazi-attacks-second-suspect-captured.html.

\(^{16}\) The Trump Administration released in December 2017 a National Security Strategy (touted as “America First” (i-i)), which detailed the Administration’s priorities for national security, including significant emphasis on the fight against terrorism, specifically ISIS, al-Qa’ida and Hizbollah (i, 7-11, 53), an increased military presence in Afghanistan (29, 49-50), and an enhanced role for the intelligence community in national security (32). These priorities, combined with the self-proclamation that the strategy is “guided by outcomes, not ideology” (i) presents a troubling picture for those concerned about maintaining a balance between human rights and national security. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Dec. 2017, https://www.whitehouse.gov/wp-
are made more severe by the Administration’s lack of a clear detention and transfer policy. Reports surfaced in 2017 of individuals being tortured while in U.A.E. custody in Yemen with the alleged collusion of the United States suggest that conditions are ripe for violative handover practices.\(^\text{17}\) In September 2017, a U.S. citizen who had allegedly been fighting for ISIS surrendered to Syrian rebel forces and was later handed over to U.S. officials in Iraq. He was then held without access to counsel for over three months, despite his express request for an attorney, until a U.S. district court ordered that he be allowed to remotely access an attorney.\(^\text{18}\) When news reports suggested that the U.S. government was considering transferring the individual to Saudi Arabia, the judge ordered the government to provide 72 hours’ notice before any such transfer.\(^\text{19}\) At the time of writing, there were on-going legal challenges concerning the legality of the government’s military detention of the individual without charge in an offshore facility, as well as the propriety of any pre-transfer notice requirement.\(^\text{20}\)

The threat that counter-terrorism measures will become more abusive is made more stark by the rise in nationalist governments pursuing protectionist policies with weakening regard to human rights guarantees. With governments moving to close borders,\(^\text{21}\) deport non-nationals,\(^\text{22}\) denaturalize their own citizens,\(^\text{23}\) and use informal means to transfer suspects,\(^\text{24}\) the mechanisms through which a state may transfer custody of an individual—and the permissible purposes for such handovers—have escaped careful scrutiny. In this era of global realignment, the human rights principles guiding inter-state cooperation in such matters must be reasserted. This chapter examines the legal norms governing informal transfers and detentions in this new era and sets out a minimum standard that must be upheld whenever a state renders an individual, no matter how extraordinary the context.

2. Rendition: definition and scope

Rendition is the transfer of an individual from the custody of one state to another without the benefit of a regular process by the rendering country. In the contemporary context, such transfers include the


\(^{20}\) For a compilation the filings relating to the on-going habeas case, see ACLU, Doe v. Mattis – Challenge to Detention of American by U.S. Military Abroad https://www.aclu.org/cases/doe-v-mattis-challenge-detention-american-us-military-abroad.

\(^{21}\) See e.g. Bill Frelicik, Ian M. Kysel and Jennifer Podkul, The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants, 4 JOURNAL ON MIGRATION AND HUMAN SECURITY 190 (2016).


movement of individuals captured in the fight against ISIS and Al Qaeda, transfers to the detention facility at Guantánamo, the handover of individuals captured in a variety of settings to secret proxy detention, the transfer of individuals detained by one state to the custody of the detainee’s national state, and the transfer of individuals to the territory of the transferring state to stand trial before a regular criminal court. While there is continuing controversy over the legality of many of these forms of rendition, others forms have escaped scrutiny in the face of grave concern over the abuses committed by ISIS and other terrorist groups. In all of these contexts, the absence of formal procedures places individuals at grave risk, while abandoning human rights protections risks eroding the rule of law at the moment it is needed most.

3. A minimum standard for the transfer of alleged terrorists

Because they are carried out in a wide variety of settings, the legal regime applicable to the transfer of terrorism suspects can vary. However, a close examination of the norms governing such transfers reveals important protective principles that apply across settings. This section draws on relevant rules of international human rights law, international refugee law, and international humanitarian law to distil a minimum standard that must be upheld in all settings.

These regimes of law, as a general rule, apply extraterritorially and concurrently, though some states challenge this approach. For example, the United States acknowledges it is legally bound by the obligations of non-refoulement domestically, but only enforces the obligation extraterritorially as a matter of policy. In addition, as a general rule, the lex specialis of international human rights law sets out basic norms that apply in all situations, including during armed conflict. Where there is a direct conflict of norms during armed conflict, the lex specialis

25 Indeed, although many governments have engaged in discussion aimed at clarifying the legal status of some transfers, (for example, European governments, led by the government of Denmark, have participated in the Copenhagen Process concerning battlefield transfers, see Satterthwaite, supra note 1 at 593) confusion has continued. 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. (See, e.g., Amnesty International, Afghanistan: Detainees Transferred to Torture; ISAF Complicity?, AI Index ASIA 11/011/2007, Nov. 13, 2007, 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). A number of European governments, as well as Canada and the United States, have faced litigation by individuals and groups challenging the legality of informal transfers (Sec., Al-Saadoon and Mubdhi v. United Kingdom, App No. 61498/08, para. 140 (Eur. Ct. H.R. 2010). Othman (Abu Qatada) v. United Kingdom, App No. 8139/09 (Eur. Ct. H.R., 2012). See also Belbaj and another v. Straw and others, UKSC 2014/0264 (Jan. 17, 2017). Additionally, the rendition litigation before the ECtHR has included the question of transfer as integral in assessing the relevant State’s violations of its convention obligations (see El-Masri, Al Nashiri v. Poland (2014) and Husayn (Abu Zubaydah) v. Poland (2014); Nasr and Ghaith v. Italy (2016); Al Nashiri v. Romania (pending); Abu Zubaydah v. Lithuania (pending). See also Press Release, Amnesty International, UK holds off on detainee transfers to Afghan authorities (30 Nov. 2012), AI Index: PRE01/585/2012.

26 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 (Jul. 8, 1996) (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, 83 INT’L REV. RED CROSS 651 (2001). 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. For discussion and citations, see Satterthwaite, supra note 1.


28 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., ICCPR, art. 4. See also Abu Zubaydah § 499; Al Nashiri v. Poland § 507; Nasr and Ghaith § 280; El Masri § 195 (indicating that the prohibition of torture is non-derogable). See also Legality of the Threat or Use of Nuclear
of international humanitarian law may displace or modify a particular rule of human rights law. In the context of transfer, specific humanitarian protections concerning transfer are consistent with—though often more protective than—the lex generalis of human rights law, meaning that the humanitarian law norms complement the generally applicable human rights rules on transfer.

The applicability of the protections concerning 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. However, recent decisions by human rights bodies affirm that 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, even in the context of armed conflict. This is especially relevant today, in light of the on-going fight against ISIS, which has prompted both unilateral action and a UN call for international cooperation to defeat the organization.

Examining human rights law, refugee law, and humanitarian law norms together allows for the identification of a minimum standard to be applied whenever states carry out the transfer of an individual within their effective control, including clandestine, informal procedures such as extraordinary rendition. While certain individuals facing transfer have greater protections than those set out here (for example, specific categories of people under international humanitarian law), no individual would have less protection. 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, or 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

Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 25 (Jul. 8, 1996). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, para. 106 (Jul. 9, 2004) (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”).


For further discussion see Satterthwaite supra note 1, at 602-03, fn 55.

The UN Security Council has passed a number of Resolutions regarding the crisis in Syria and the fight against ISIS. Key resolutions include S.C. Res. 2170 (2014), U.N. Doc. S/RES/2170 (Aug. 15, 2014); S.C. Res. 2178 (2014), U.N. Doc. S/RES/2178 (Sept. 24, 2014), S.C. Res. 2199 (2015), U.N. Doc. S/RES/2199 (Feb. 12, 2015); S.C. Res. 2249 (2015), U.N. Doc. S/RES/ (Nov. 20, 2015); S.C. Res. 2253 (2015), U.N. Doc. S/RES/2253 (Dec. 17, 2015); and S.C. Res. 2332 (2016), U.N. Doc. S/RES/2332 (Dec. 21, 2016). Almost all of these Resolutions require member states “that have the capacity” to “take all necessary measures, in compliance with international law . . . including international human rights, refugee and humanitarian law . . . to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL, also known as Da’esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria.” S.C. Res. 2249, ¶¶ 5-6 (Nov. 20, 2015) (emphasis added). Although this language doesn’t speak specifically to rendition or transfer, it makes clear that any action taken by member states against ISIS must be in accordance with international law.


Individuals entitled to specific additional guarantees, whether due to lex specialis or where relevant states have ratified more protective conventions, must be given those protections as well.
relation to the substantive norms concerning transfers to a risk of grave abuse.  

Domestic courts have largely avoided the substantive questions relating to informal transfer, either by examining the case at hand as a jurisdictional issue, or in some cases by invoking rules concerning state secrets or national security to avoid any substantive discussion of the case. International human rights bodies, however, have viewed the issue of rendition differently. In recent years, the ECtHR has found European states culpable for their complicity and facilitation of the U.S. Extraordinary Rendition Program through activities on their territory. These cases have provided some clarity about state obligations regarding transfers under the European Convention on Human Rights and other relevant instruments. A similar case is pending before the African Commission on Human and Peoples’ Rights against Djibouti for its role in the Extraordinary Rendition Program. Two cases are pending before the Inter-American Commission on Human Rights against the United States for its actions in the U.S. Extraordinary Rendition Program.

The rules pertaining to transfers to a risk of grave abuse, as in extraordinary rendition, have been consistent and increasingly protective. The minimum standard articulated below is based on jurisprudence, commentary, and doctrine in the fields of international human rights law, humanitarian law, and refugee law, and draws 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). The framework set out below consists of threshold requirements regarding informal transfer—requirements that must be met before an informal transfer may happen. Working within those threshold obligations, the framework then consists of a number of substantive and procedural rights that must also be guaranteed whenever a transfer is carried out.

35 The majority of U.S. cases that have attempted to address issues of extraordinary rendition and secret detention have been dismissed after the government has invoked the state secrets privilege. (See e.g., See Mohamed v. Jeppesen Dataplan, Inc., 586 F. 3d 1108 (9th Cir. 2009); see also Mohamed v. Jeppesen Dataplan, Inc., 614 F. 3d 1070 (9th Cir. 2010) (en banc). But see Salim v. Mitchell, 183 F.Supp.3d 1121 (2016) (This case settled after surviving dismissal attempts based on the state secrets privilege).
36 See El-Masri, Al Nashiri v. Poland, Husayn (Abu Zubaydah) v. Poland, Nasr and Ghali.
37 In recent years, the European Court of Human Rights has heard six relevant cases. While two of these cases are still pending, this set of cases has started to illustrate a framework for addressing informal transfer and the procedural and substantive norms at risk in such circumstances. See generally El-Masri, Al Nashiri v. Poland, Husayn (Abu Zubaydah) v. Poland, Nasr and Ghali v. Italy, Al Nashiri v. Romania, and Abu Zubaydah v. Lithuania. Specifically, regarding transfer to torture, see Abu Zubaydah §451; Al Nashiri v. Poland § 454; Nasr and Ghali § 242; and El-Masri § 212; (decision to remove, and removal itself may give rise to an Art. 3 violation “where substantial grounds have been shown for believing that the person in question would, if removed, face a real risk of being subjected to treatment contrary to that provision in the destination country”) More generally, the ECtHR has determined that removal generally requires an individualized assessment of the transferee before removal. See, e.g. N.D. and N.T. v. Spain, App. No. 8675/15 and 8697/15 (Eur. Ct. H.R., Oct. 3, 2017) (finding that Spain had violated its obligations under Article 4 of Protocol No. 4 and Article 13 when it forcibly returned two migrants without any prior individualized judicial or administrative decisions).
40 see Borelli, at 342.
a. Thresholds regarding informal transfer: formal processes should not be bypassed; apprehension must be legally valid

International legal norms require that two threshold conditions be met for informal transfer. The first is that, where they exist, formal procedures may not be intentionally bypassed. UN bodies have repeatedly highlighted this requirement, especially in cases relating to torture through General Assembly Resolutions, reports from the Human Rights Council, and reports from the UN Special Rapporteur on Torture. 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 before apprehending the individual. To ensure that interstate 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. The consent of a host state to an informal transfer in the context of rendition, where there are no due process safeguards, will therefore 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. This consent and cooperation may be more difficult if the individual in question is either a national of the host state or an alien lawfully within the territory of the host state, or when states involved

41 In its Legal Opinion on the Decision of the United States 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. abduced 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. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE Vol. IV, at 29 (2002).


44 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).

45 Since such individuals have heightened protections against expulsion under human rights law. Note, however, that with respect to aliens, such protections have national security exceptions. See, e.g., International Covenant on Civil and Political Rights, art. 13, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter “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”).

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have ratified human rights conventions that would make apprehension, detention and transfer outside of formal procedures unlawful.46

Additionally, 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.47 Detaining individuals for the purpose of interrogation without another basis for detention amounts to arbitrary detention and thus is unlawful under human rights law.48 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.49

In practice, then, states with functioning legal systems must—before consenting to a transfer—at a minimum ensure that the transferring state has a valid basis for apprehension and detention, and that the procedural rights due to the individual will be respected.50 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.51

46 This may be the case for all European states. The Venice Commission 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 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-D1(2006)001 rev., at para. 160(f). See also Abu Zubaydah v. Poland § 452; El-Mirri § 239.

47 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, para. 1 (1982) (referring to “all deprivations of liberty,” including those for “immigration control.”). 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 (Jan. 9, 2007). Counter-terrorism laws that criminalize such freedoms may not be relied upon as a valid basis for apprehension in contemplation of transfer.

48 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 Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists, 78-90 (2009). Improper detention for the purpose of intelligence gathering is also a concern with proxy-detention, where individuals have been detained by foreign governments on behalf of the United States, without warrants or charges, and interrogated.

49 For further discussion on these requirements and differences, see Satterthwaite supra note 1, at 611-15.

50 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 extraducible 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.

51 See, e.g., D. C. Findlay, Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law, 23 TEX. INT’L L.J. 1, 16-17 (1988). 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, 31 COLUM. J.L. & SOC. PROBS. 1, 18 (1991); and (b) where the host state is knowingly harboring international terrorists, see, e.g., Rendition to Torture: The Case of Maher Arar: Joint Hearing before the U.S. House of Representatives Committee on Foreign Affairs and Committee on the Judiciary, 110th Cong. 82 (2007), (statement of Daniel Benjamin, Director, Center on the United States and Europe, Senior Fellow, Foreign Policy Studies, the Brookings Institution)
b. Substantive guarantees of non-refoulement

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 of torture or ill-treatment; persecution; enforced disappearance; and arbitrary deprivation of life. This is the principle of non-refoulement.

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

The Torture Convention (explicitly, in Article 3) and the ICCPR (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. 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. 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 as an independent, non-derogable obligation, even in the face of security risks. In the context of armed conflict—both international and non-international—these human rights protections continue to apply and are 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. 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 refoulement through transfers to such treatment.

Torture and the transfer to torture were integral parts of the U.S. Extraordinary Rendition Program. At the time of writing, it was unclear whether President Trump would officially embrace the use of torture and informal transfer to countries that use torture as he had previously said he intended to do. However, a draft executive order that was leaked to the press in early 2017 regarding anti-terrorism measures included provisions to re-open CIA detention centers, and allow for interrogation tactics that were recognized as illegal during the Obama Administration. Although President Trump has not, at the time of writing, issued an order granting the CIA new detention authorities, on January 30, 2018, he issued an executive order stating that “the detention operations at the U.S. Naval Station Guantánamo Bay are legal, safe, humane, and conducted consistent with United States and international law,” despite the manifest inaccuracy of the international law claim. While President Trump has not yet begun to transfer detainees to Guantánamo, this executive order was a preparatory step in that direction, meaning that U.S. detention and mistreatment of ISIS detainees may be around the corner, in addition to being a current possibility in U.S. proxy detention contexts. These developments have placed states on notice of the risk of torture that individuals transferred to U.S. terrorism-related detention may face, especially if handover is effected through informal mechanisms.

ii. No transfers to a risk of persecution

The 1951 Convention Relating to the Status of Refugees (“Refugee Convention”), the 1967 Protocol Relating to the Status of Refugees, and the Geneva Conventions of 1948 additionally prohibit states from transferring individuals to countries where they face a risk of persecution. Article 3(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.” While the Convention contains exclusion criteria, these clauses must be construed narrowly,

57 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 (Jun. 27, 1986).

58 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, U.N. Doc. CCPR/C/21/Rev.1/Add. 1326, para. 12 (May 2004) (interpreting Article 7 of the ICCPR) and Soering v. United Kingdom, para. 86-91 (interpreting Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). Droege, supra note 32 at 675, also makes this argument concerning Common Article 3.


61 A wide range of international human rights mechanisms have found the indefinite detention, inhumane treatment, and isolation of detainees at Guantánamo to amount to torture and/or cruel, inhuman, and degrading treatment, even following the discontinuance of so-called “enhanced interrogation techniques.” See, e.g., Inter-American Commission on Human Rights, Towards the Closure of Guantánamo, at para. 120 (2015) (“the IACHR is especially concerned with the suffering, fear and anguish caused by the situation of ongoing indefinite detention”), http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf#page=51.

and even when those criteria are met, individuals retain the protection against *refoulement* to a risk of persecution.\(^{63}\)

In the context of international armed conflict, 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.”\(^{64}\) 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.\(^{65}\) Additionally, the UN High Commissioner for Refugees (UNHCR) has become more involved in protecting former detainees when they are repatriated or released in situations of armed conflict, including working with states to assist individuals who fear persecution should they be returned to their country of nationality to find alternative settlement options.\(^{66}\) Therefore, even absent protections against *refoulement* under humanitarian law, international refugee law continues to apply in the context of armed conflict to prevent transfers to a risk of persecution.\(^{67}\)

Religious persecution and discrimination were key components of the U.S. Extraordinary Rendition Program. During transfer and in CIA prisons, detainees were routinely subjected to treatment specifically tailored to deny or interfere with their religious practices as observant Muslims (such as not allowing them to pray in the appropriate manner or at the appointed times, withholding or disrespecting the Quran, etc.), as well as torture techniques intended to abrogate U.S. understandings of Muslim traditions (such as forced nudity and invasive touching). The Trump Administration has already targeted Muslims as a group (for example, through various forms of travel restrictions put into effect in 2017), as well as through fiery anti-Muslim discourse. States cooperating with the United States must therefore weigh the risk of persecution involved in the transfer of Muslim detainees to U.S. custody, especially in the counter-terrorism context.

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

Enforced disappearances are grave violations in themselves,\(^{68}\) as well as amounting to cruel, inhuman and degrading treatment and—depending on the circumstances—torture and a deprivation of the right to life

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\(^{63}\) For more information in exclusion criteria under international refugee law, and the protections that are retained even in the case of exclusion, see Satterthwaite, *supra* note 1, at 618, n. 112. *See also* Alice Farmer, *Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIG. L. J. at 1 (2008); *see also* 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, 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 (*Chahal v. United Kingdom*, para. 80).

\(^{64}\) Geneva Convention IV, Article 45. This is also emerging as a customary norm.

\(^{65}\) *See Customary International Humanitarian Law, IHL Database*, Rule 125, ICRC, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule125](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule125) (hereinafter “*Customary International Humanitarian Law*”) *see also* Hans-Peter Gasser, *Protection of the Civilian Population, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 232, 237 (Dieter Fleck, ed., 2008) (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”); Horst. 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). With regard specifically to the “war on terror” *See* ICRC, *Guantanamo Bay: Overview of the ICRC’s Work for Internes* (Jan. 30, 2004), [https://www.icrc.org/eng/resources/documents/update/5qrc5v.htm](https://www.icrc.org/eng/resources/documents/update/5qrc5v.htm)

\(^{66}\) For example, the UNHCR has worked with the United States to find settlement options for individuals set for release from detention at Guantánamo Bay.

\(^{67}\) *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.”)

\(^{68}\) Human rights bodies have found disappearances to be composite violations (citing to, among others, the rights to be
under international human rights law. As such, transfers to a risk of enforced disappearance—like transfers to a risk of other forms of cruel treatment—are prohibited under human rights law.

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. Enforced disappearance is forbidden by the Geneva Conventions and by customary international humanitarian law, meaning that prisoners of war and other protected persons may not be transferred to a risk of secret detention during international armed conflict. With respect to non-international armed conflict, both non-derogable international human rights norms, which continue to apply, and customary international humanitarian law applicable to such conflicts, prohibit enforced disappearance. 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.

Enforced disappearance was an inherent feature of the U.S. Extraordinary Rendition Program. U.S. officials refused to acknowledge detention of individuals in the program, and families of detainees were denied information about the fate or whereabouts of their loved ones, who were placed outside the protection of the law. In at least one case, the family of an individual who died in U.S. custody was not notified of his detention or death, and still does not know where his body is. In other cases, individuals were held by allied governments while their families searched for them in vain. A proxy form of this practice appears to continue: a number

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). See Satterthwaite, supra note 1, at 620, n. 119.

69 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. See Satterthwaite, supra note 1, at 620, n. 120.

70 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.

71 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. Such provisions include a wide variety of requirements concerning, inter alia, humane and fair treatment. 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.

72 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, U.N. Doc. E/CN.4/2002/71, para. 56 (Jan. 8, 2002) (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.”).

73 See Customary International Humanitarian Law, at Rule 98.

74 Id.


76 For example, Mohammed Al-Asad, a victim of CIA rendition program, was not able to communicate with his family, nor was his family made aware of his detention or location for the sixteen months he was held. See Mohammed Abdullah Saleh Al-Asad v. the Republic of Djibouti, Comm. 383/10, African Comm’n on Human and Peoples’ Rights (2014). For

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of individuals are rumored to be held incommunicado at the behest of the United States and outside the protection of the law. For example, Sharif Mobley was believed to be held in Yemen at the time of writing with the connivance of the U.S. government. States that cooperate with the United States on informal transfers as part of U.S. counter-terrorism initiatives must recognize that there is a risk that those that they transfer will be subjected to enforced disappearance.

iv. No transfers to a risk of arbitrary deprivation of life

Article 6 of the ICCPR 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 to not transfer individuals to a risk of arbitrary deprivation of life. Article 6 includes obligations of non-transfer to extrajudicial executions, the imposition of the death penalty in circumstances where basic procedural guarantees have not been observed, and targeted killings.

While the right to life is non-derogable under human rights law, in the context of armed conflict, the lex specialis of international humanitarian law modifies the right to life by allowing limited targeting of persons in specific categories. In both international and non-international armed conflict, persons deprived of their


80 See U.N. Human Rights Comm., General Comment No. 6: The Right to Life, para. 7 (Apr. 30, 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, para. 14.3 (1993). 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, para. 0.6 (1995); and Ng v. Canada, U.N. Doc. CCPR/C/49/D/469/1991, para. 16.4 (1994). 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 Droge, supra note 32 at 673.


82 See, e.g., ICCPR, art. 4.

83 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 Nils Melzer, TARGETED KILLING IN INTERNATIONAL LAW, 396 (2008), and Helen Duffy, The Interplay of Legal Regimes Governing International Peace and Security and the Protection of Persons Under International Law, at 340-44 in Larissa van den Herik and Nico Schrijver, (eds),
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.” Applying human rights law concurrently with the lex specialis of targeting rules, states are prohibited from transferring any person to a risk of acts that would constitute arbitrary deprivation of life in the context of armed conflict.

There is arguably a real risk of violations of non-refoulement to the arbitrary deprivation of life in the context of U.S. counter-terrorism operations. States cooperating with the United States by transferring an individual to a state where the United States is actively engaged in killings via armed drones puts those individuals at risk of arbitrary deprivation of life. There are at least a few confirmed incidents of the United Kingdom revoking U.K. citizenship from individuals who then became drone targets for the United States in third countries, suggesting some possible level of cooperation between the two governments. In settings such as these, the difficult question is when such a killing is permissible or whether it is an unlawful targeted assassination. The legal debate is intense, hinging on whether individuals who are not members of enemy forces have nonetheless taken on “continuous combat functions” and are therefore arguably no longer civilians and may be targeted.

There is also the risk of the arbitrary deprivation of life within U.S. custody, as at least one individual was confirmed to have died in a CIA “black site” as a result of torture. President Trump has continued the U.S. drone program and has openly praised the techniques used by the CIA during the Extraordinary Rendition Program. Any state considering the transfer of an individual the U.S may consider to be within the scope of permissible targeting to a state where drone strikes have been carried out by the United States is on notice that individuals so transferred may face a risk of arbitrary deprivation of life.

c. Procedural guarantee: the right to challenge transfer in advance before an independent decision-maker


84 See article 3 common to the Geneva Conventions of 1949; See also Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life [Advance unedited version], paras. 32, 67, July 2017.

85 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.

86 See, e.g. Chris Woods, Alice K Ross and Oliver Wright, British terror suspects quietly stripped of citizenship… then killed by drones, INDEPENDENT (Feb. 28, 2013), http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of-citizenship-then-killed-by-drones-8513858.html.


The right to challenge one’s transfer has been understood to be a procedural aspect of the guarantee of non-refoulement, and has also been considered as part of the right to an effective remedy, and inherent in the right to due process of law. Informal transfers, including rendition, generally lack these important procedural safeguards. Although some procedural rights guaranteed under human rights law may be subject to derogation, certain essential procedural guarantees, such as the right to challenge transfer, may not be restricted even in times of great strife.

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 opportunity to challenge the transfer on the basis that they fear mistreatment in the receiving country. This procedural requirement is inherent in the various norms of non-refoulement since non-refoulement standards include 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. 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 international law.

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89 See, e.g., Chahal v. The United Kingdom, 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, Ahmed Hussein Mustafa Kamal Agiza v. Sweden, U.N. Doc. CAT/C/34/D/233/2003, para. 13.5 (May 24, 2005) (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 Ahani v. Canada, U.N. Doc. CCPR/C/80/D/1051/2002, paras. 106-10.8 (2006) (“the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture”).

90 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.” (Inter-American Juridical Committee, Legal Opinion Regarding the Decision of the Supreme Court of the United States of America C.I.I./RES/II/15/91.) There are some contexts in which pro-forma assessments are made, such as in the case interdiction on the high seas. For further discussion on the nature of these varied forms of informal and formal transfer, and the risks they each present, see Satterthwaite, supra note 1, at 624.

91 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.


93 For example, 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. at paras. 167-71 (1997). A recent articulation of this requirement arose out of the Trump Administration’s travel ban in early 2017. In response to the ban, the international community highlighted that the ban inherently violated procedural guarantees; see UN Office of the High Commission for Human Rights, US travel ban: “New policy breaches Washington’s human rights obligations” – UN Experts,
Individuals facing transfer must therefore have the opportunity to mount a pre-transfer challenge on the basis of any fear of *refoulement*. Although human rights bodies have not held unequivocally that such a challenge must be heard by a court,⁹⁴ the review must be by an independent decision maker⁹⁵ with the power to suspend the transfer during the pendency of review.⁹⁶ Extraordinary rendition has historically provided no due process for those rendered, either before or after their transfer.⁹⁷ Individuals subjected to transfers outside formal procedures must be afforded the opportunity to challenge their detention and potential transfer.⁹⁸

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⁹⁴ See Droege, supra note 32 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 Office for Democratic Institutions and Human Rights, *Protecting the Rights of Victims of Terrorist Attacks, in COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL*, at 160-161 (2007). The current Special Rapporteur on Torture has said that review may be conducted by either a judicial or an administrative body. See N. Melzer, 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/##/50 (Feb. 26, 2018) (hereinafter “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”).

⁹⁵ See Agiza (2005). See also Jabari v. Turkey, App. no. 40035/98, para. 50 (Eur. Ct. H. R., 2000) (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”).


⁹⁸ 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*
Actions of the Trump Administration, including the promulgation of a series of executive orders barring travel to the United States by citizens of majority-Muslim countries, demonstrate the President’s anti-Muslim animus and contempt for individual procedural guarantees, including those against refoulement. The U.S. track record on due process in terrorism-related immigration procedures is similarly troubling.\(^9\) Taken together, these developments paint a bleak picture for the transfer of suspected terrorists, especially those that take place outside of the already-inadequate formal procedures.\(^10\)

d. Specific procedural rights regarding the use of diplomatic assurances

Diplomatic assurances, once most commonly used to protect against the risk of a transferee being subjected to the death penalty, have now become a common tool for states wishing to engage in terrorism-related transfers. A number of countries, including the United States, have developed a practice of seeking diplomatic assurances—promises by states receiving the individual that they will not subject the transferee to torture or cruel treatment—when they transfer an individual to a country where the individual may be at risk of torture or other ill-treatment.\(^10\) The human rights community decries the use of diplomatic assurances in this context, and legal challenges concerning the permissibility, form, and procedure for using such assurances have been mounted in many countries with differing results.\(^10\) Despite the human rights community’s strong objections to diplomatic assurances, many states continue to engage in the practice.\(^10\)

The international standard for when, how, and if at all diplomatic assurances may be used to satisfy a State’s obligations concerning non-refoulement is somewhat ambiguous. International human rights mechanisms

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\(^10\) This 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 Office for Democratic Institutions and Human Rights, Protecting the Rights of Victim of Terrorist Attacks, in COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL at 143-145 (2007).

\(^10\) See Diplomatic Assurances Against Torture – Inherently Wrong, Inherently Unreliable, Amnesty International, April 2017; see also Transnational Injustices, supra note 24, at 64-69; see also Still at Risk: Diplomatic Assurances No Safeguard Against Torture, Human Rights Watch, Apr. 2005, at 47–57 (Canada); 57–66 (Sweden); 67–72 (United Kingdom); 72–76 (The Netherlands); 75–79 (Austria); and 79 (Turkey). For an outstanding review of U.S. practice, see also Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers, Columbia Law School Human Rights Institute, 2010.

and human rights organizations have repeatedly spoken out against the use of diplomatic assurances in the context of torture, and various courts and states have articulated different substantive and procedural rules governing the practice.\textsuperscript{104} The CAT Committee has determined that diplomatic assurances cannot be considered as a safeguard against torture or ill-treatment where there are substantial grounds for believing such a risk exists,\textsuperscript{105} and that states should refrain from seeking or relying upon them in such circumstances.\textsuperscript{106}

In early 2017 the CAT Committee proposed a draft General Comment on article 3 of CAT that considered diplomatic assurances “contrary to the principle of ’non-refoulement’, such that “they should not be used as a loophole to undermine that principle, where there are substantial grounds for believing that [a transferee] would be in danger of being subjected to torture in that State.”\textsuperscript{107} Many member States challenged the CAT Committee’s position. At the time of writing, the final version of the General Comment had not yet been published, though an advance unedited draft was adopted on 6 December 2017 that did not include language

\textsuperscript{104} For a brief overview of the various approaches to diplomatic assurances, see Philip Alston and Ryan Goodman, \textit{International Human Rights}, 445-456 (Oxford University Press, 2013).

\textsuperscript{105} U.N. Committee against Torture, \textit{Concluding observations on the third periodic report of Slovakia}, CAT/C/SVK/CO/3, para. 17 (Sept. 8, 2015) (“The Committee recommends that the State party: (c) Refuse to accept diplomatic assurances in relation to the extradition of persons from its territory, since those assurances cannot be considered as a safeguard against torture or ill-treatment in States in which there are substantial grounds for believing that such persons would be in danger of being subjected to torture upon their return.”); U.N. Committee against Torture, \textit{Concluding observations on the seventh periodic report of Switzerland}, CAT/C/CHE/CO/7, para. 13 (Sept. 7, 2015) (“The Committee recalls that it has adopted the position that under no circumstances should a State party regard diplomatic assurances as being a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture upon his or her return.”)

\textsuperscript{106} U.N. Committee against Torture, \textit{Concluding observations on the sixth periodic report of Spain}, U.N. Doc. CAT/C/ESP/CO/6, para. 12 (May 29, 2015) (“the State party should refrain from seeking or accepting diplomatic assurances as a safeguard against torture or ill treatment in such cases.”); U.N. Committee against Torture, \textit{Concluding observations on the combined third to fifth periodic reports of the United States of America}, U.N. Doc. CAT/C/USA/CO/3-5, para. 16 (Dec. 19, 2014) (The Committee “urges the State party to refrain from seeking and relying on diplomatic assurances ‘where there are substantial grounds for believing that [a person] would be in danger of being subjected to torture’.”); U.N. Committee against Torture, \textit{Concluding observations on the third periodic report of Kazakhstan}, U.N. Doc. CAT/C/KAZ/CO/3, para. 16 (12 Dec. 2014) (“The State party should: (f) Refrain from the use of an reliance on diplomatic assurances, which should not be used to alter the absolute prohibition of non-refoulement”); U.N. Committee against Torture, \textit{Concluding observations on the sixth and seventh periodic reports of Sweden}, U.N. Doc. CAT/C/SWE/CO/6-7, para. 11 (Dec. 12, 2014) (the State should respect its non-refoulement obligations by “(d) Refraining from the use of diplomatic assurances as a means of returning a person to another country where the person would face a risk of torture.”); U.N. Committee against Torture, \textit{Concluding observations on the third periodic report of Belgium}, CAT/C/BEL/CO/3, para. 22 (Jan. 3, 2014) (“States parties may in no circumstances rely on diplomatic assurances rather than observing the principle of non-refoulement, which may alone service as a guarantee of adequate protection against the risk of torture or ill-treatment when there are substantial grounds for believing that a person would be in danger of being subjected to torture.”); U.N. Committee against Torture, \textit{Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland}, CAT/C/GBR/CO/5, para. 18 (Jun. 24, 2013) (“[the Committee] urges the State party to refrain from seeking and relying on diplomatic assurances ‘where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture’ (art 3). The more widespread the practice of torture or other cruel, inhuman or degrading treatment, the less likely the possibility of the real risk of such treatment being avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.”)

\textsuperscript{107} CAT Committee, \textit{General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22}, U.N. Doc. CAT/C/60/R.2, para. 20 (2017). See also U.N. Human Rights Committee, \textit{Concluding Observations of the Human Rights Committee: United States of America}, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 21 (2006) (“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”). However, the ECtHR has recently accepted assurances given by a state where torture was ‘widespread and routine’ \textit{Abu Qatada} (2012), para. 191; \textit{Saadi v. Italy}, para. 257.
indicating that diplomatic assurances are “contrary to the principle of ‘non-refoulement’”. The Human Rights Committee has found that diplomatic assurances should be evaluated with the “utmost care” and that states should “refrain from relying on such assurances where [they] are not in a position to effectively monitor the treatment of such persons” after their transfer. A series of experts who held the position of Special Rapporteur on Torture have set out a more stringent rule, suggesting that any use of diplomatic assurances to protect against torture and ill-treatment is impermissible.

International and regional human rights courts have, however, conceded that diplomatic assurances can, if they fulfill certain conditions, theoretically be sufficient to obviate the risk of refoulement, though the bar is very high. For example, in Othman (Abu Qatada) v. the United Kingdom the ECtHR identified some key problems with diplomatic assurances in general, but decided that it would, on a case-by-case basis, assess the quality of the assurances given, and determine whether in light of the receiving State’s practices those assurances could be relied upon, and that only in rare cases would the general situation within a country preclude considering assurances in a specific case. Specifically, the Court said “it is not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine

108 On February 9, 2018, the CAT Committee made public an Advance Unedited Version of the renamed General Comment, see General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, http://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf. Paragraph 20 reads, in its entirety: "The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State."


110 This position was first espoused by Special Rapporteur Manfred Nowak, was taken up by his successor, Special Rapporteur Juan Mendez, and then by his successor, Special Rapporteur Nils Melzer. See 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, para. 51, U.N. Doc. A/60/316 (Aug. 30, 2005); Juan Mendez, Special Rapporteur 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, para. 79, U.N. Doc. A/HRC/25/60 (Apr. 10, 2014) and N. Melzer, 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, para. 50, U.N. Doc. A/HRC/30/43 (Feb. 26, 2018) (use of diplomatic assurances are impermissible in the face of a substantial risk of torture or cruel, inhuman or degrading treatment because they are “inherently incapable of providing sufficient protection against such abuse”).

111 See Abu Qatada (2012). This was the first case to challenge the UK’s recent practice of engaging in a Memorandum of Understanding (MOU) with a state seeking assurances in the face of an established history of torture. While the ECtHR ruled that Qatada could not be deported to Jordan, the court did indicate that diplomatic assurances could be relied upon in some circumstances to obviate the otherwise manifest risk of refoulement. For analysis of the Abu Qatada case, and its implications for diplomatic assurances more broadly, see Mariagiulia Giuffre, An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v. United Kingdom (2012), 2 INT’L HUMAN RIGHTS L. REV. 266 (2013), see also Andrew Jilions, Torture, diplomatic assurances, and the politics of trust, 91 INTERNATIONAL AFFAIRS 489, 495 (2015) (“The impact of [Abu Qatada] has essentially been to establish that where [diplomatic assurances] incorporate sufficiently robust monitoring provisions they are capable of protecting the integrity of non-refoulement or other human rights obligations. It also established that the practical sufficiency of [diplomatic assurances] in safeguarding the individual will depend on a range of criteria. . . In other words, this judgment is evidence that the scope of a state’s liability for or complicity with torture can be limited by taking reasonable measures to ensure an individual’s safety. By the same token it also sends the signal that there are now few countries . . which are so bad that assurances cannot be sought to enable deportation, subject to sufficiently rigorous safeguards being put in place to prevent ill-treatment”) (internal citations omitted).

112 Abu Qatada (2012), paras. 186-188.
whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.”

Importantly, the fact that the ECtHR, a human rights court, examined the issue suggests that those subjected to transfer with the use of such assurances can seek their review as a human rights matter.

In Abu Qatada, the Court set out stringent criteria to evaluate whether the diplomatic assurances provide “a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.” Those criteria are: transparency of the terms of the assurances; specificity of the assurances; authority of the individual/entity providing the assurances; whether the assurances are legally binding and enforceable; whether the treatment feared is legal or illegal in the receiving state; the quality of interstate relations; whether the assurances can be objectively verified; whether there is an effective system of protection against torture, including the acceptance of international monitoring; any history of ill-treatment of the individual; and whether reliability of the assurances has been examined by domestic courts in the sending state. The ECtHR reaffirmed this list of criteria for evaluating diplomatic assurances in Azimov v. Russia a year later. The ECtHR has repeatedly held that diplomatic assurances are “highly unlikely” to provide sufficient guarantees that the transferees “will be protected against the risk of prohibited treatment sufficient to allow a transfer to countries where there are reliable reports that the authorities resort to or tolerate torture or other ill-treatment.”

Although European human rights jurisprudence is not binding on states outside the Council of Europe such as the United States, it provides authoritative guidance on how diplomatic assurances should be assessed, and has been relied upon by many states in interpreting their obligations under CAT. Indeed, in their Joint Observations on the CAT Committee’s Draft General Comment in early 2017, Canada, Denmark, the United Kingdom, and the United States relied on Abu Qatada and other regional case law to support their argument that diplomatic assurances are a valid tool to protect against refoulement, as long as they meet certain requirements.

The United States has relied on, and continues to rely on, diplomatic assurances, even in circumstances where international law suggests it may not. The continuing lack of transparency related to the U.S. use of diplomatic assurances is extremely concerning, and places third party states that engage in transfers to U.S. custody on notice of potential violations in circumstances where a detainee may be transferred on to another state.

4. Conclusion: Rendition in these extraordinary times

The Obama Administration’s efforts to halt blatantly abusive detainee transfers in the context of counter-terrorism may soon be a faint memory. As Human Rights Watch Executive Director Kenneth Roth said toward the end of Obama’s second term in office, “Obama is essentially leaving the door open for some future, unscrupulous president to re-embark on the torture policies of the Bush administration.” This risk is

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113 Id. at para. 186.
114 Id. at para. 187.
115 Id. at para. 189.
117 See Transnational Injustices at 65 (referencing ECtHR jurisprudence) (internal citations omitted).
now manifest, and informal transfers may once again become a key tool in U.S. counter-terrorism practice. Some cross-border transfers and proxy detentions are already taking place; the question is how much the practice will increase under the Trump Administration and whether critical safeguards will remain absent.\footnote{Betsy Woodruff, Spencer Ackerman, \textit{U.S. Military: American Fighting for ISIS ‘Surrenders’}, \textsc{The Daily Beast} (Sept. 14, 2017), http://www.thedailybeast.com/us-military-american-isis-fighter-reportedly-surrenders?source=twitter&via=mobile; Maggie Michael, \textit{In Yemen’s secret prisons, UAE tortures and US interrogates}, \textsc{AP News} (Jun. 22, 2017), https://apnews.com/4925f7f0fa654853bd6f2f57174179fe.} States that would cooperate with the United States on counter-terrorism measures—including informal transfers—are on notice concerning these risks and must ensure that they actively protect the range of procedural and substantive rights for any detainee facing transfer by the United States or to U.S. custody, whether physical or by proxy.