Extraordinary Rendition and the Law of War

Ingrid Detter Frankopan

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Extraordinary Rendition and
the Law of War

Ingrid Detter Frankopan†

I. Introduction ........................................................................ 657
II. Ordinary Rendition ............................................................ 658
III. Deportation, Extradition and Extraordinary Rendition .... 659
IV. Essential Features of Extraordinary Rendition ............... 661
V. Extraordinary Rendition and Réfoulement ....................... 666
VI. Relevance of Legal Prohibitions of Torture ................. 667
VII. Torture Flights, Ghost Detainees and Black Sites .......... 674
VIII. Legality or Illegality of Extraordinary Rendition .......... 678
IX. Compatibility of Extraordinary Rendition with 
    International Law ............................................................. 678
    A. The Protected Persons Argument .......................... 679
    B. The Torture Argument ......................................... 682
    C. The Minimum Standards Argument .................. 686
X. Conclusions ...................................................................... 689

I. Introduction

There is, when discussing the now fashionable topic of 
extraordinary rendition, a certain conceptual confusion: when we 
consider semantic arguments, even the verb *rendere*, in Latin, 
would normally signify to “give something back,” normally to 
someone who has the right to ask for such restitution. The term 
rendition, as a derivation of the Latin term *rendere* thus means to 
“hand back,” a meaning which is often lost in the current debate 
about rendition.

Rendition, in legal terms, implies the transfer of a person from

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one jurisdiction to another. In the case of what is usually called "ordinary rendition," the procedure has kept its original meaning of handing over (or back) a person to another jurisdiction with better rights to instigate a trial.¹

II. Ordinary Rendition

Ordinary rendition in the United States has its historical roots in the need to recapture fugitive slaves.² Nowadays rendition often takes place between the various States of the United States when trial is more appropriate in another State.³ Rendition procedure is authorized by article 4(2) of the U.S. Constitution.⁴ Such rendition is internal to the United States in character and clearly does not involve any other countries.⁵ Such ordinary rendition continues to be used in intra-U.S. situations.

¹ BLACK’S LAW DICTIONARY 1298-99 (7th ed. 1999).
² U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."); repealed by U.S. CONST. amend. XIII.
⁴ U.S. CONST. art. IV, § 2, cl. 2.
⁵ On federal interests in interstate renditions, see Puerto Rico v. Branstad, 483 U.S. 219, 221 (1987) (holding that Puerto Rico had authority under the Extradition Act to invoke power of federal courts by mandamus action to demand extradition of fugitive from asylum state); Innes v. Tobin, 240 U.S. 127, 134-135 (1916) (stating that a state is free to surrender a fugitive to the state from which he has fled); Roberts v. Reilly, 116 U.S. 80, 94 (1885) (holding that extradition procedure is governed by U.S. Congressional legislation and that individual states do not have the discretion to deviate from its uniformity); cf. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872) (holding that the Constitutional provision requiring the surrender of a person charged in any state with treason, felony, or other crimes is obligatory upon every state and a part of the law of every state); Com. of Kentucky v. Dennison, 65 U.S. (24 How.) 66, 83-84 (1861) (holding that it is the duty of the state, upon proper demand by another state, to surrender a fugitive); Prigg v. Com. of Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618-619 (1842) (holding that, because the extradition of fugitive slaves is exclusively regulated by U.S. Congressional legislation permitting slave owners to retrieve their slaves from where they have fled, a state may not punish such an act of retrieval as unlawful). In 1934, it was made unlawful for "any person to flee from one State to another for the purpose of avoiding prosecution . . . in certain cases." Act of May 18, 1934, Pub. L. No. 73-233, 48 Stat. 782 (1934) (current version at 18 U.S.C. § 1073 (2000)).
III. Deportation, Extradition and Extraordinary Rendition

Deportation and extradition are forms of rendition, although rarely referred to as such, and involve the sending of a person to be tried or otherwise dealt with by another jurisdiction. Deportation implies the expulsion of an alien whose presence in the territory of a State is deemed undesirable. Deportation often takes place after an alien has served a prison sentence or otherwise been convicted by a court in one country; the court issues a judgment or a decision that the convicted person shall, possibly after having served a prison sentence, be sent out of the country, normally to his original home State.

There are safeguards in international law that a person lawfully residing in a country will not be deported without the judgment of a court or another State authority. Extradition, on the other hand,

6 BLACK'S LAW DICTIONARY 450, 605 (7th ed. 1999). In fact, the definitions of "extradition" and "rendition" each reference the other as an analogous term. BLACK'S LAW DICTIONARY 605, 1298-99 (7th ed. 1999).

7 BLACK'S LAW DICTIONARY 450 (7th ed. 1999).


9 "If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation." 18 U.S.C.A. § 3583(d) (2006).

10 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, Eur. T.S. No. 117. Article 1, titled "Procedural safeguards relating to expulsion of aliens," provides that:

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
   a. to submit reasons against his expulsion, b. to have his case reviewed, and c. to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Id. Furthermore, Article 13 of the International Covenant on Civil and Political Rights provides that:

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.
is performed under international agreements,\textsuperscript{11} transferring normally a person of a specific nationality to his home country or, alternatively, transferring a person to a place where he is alleged to have committed a crime.\textsuperscript{12}

Straightforward extradition implies the handing over of a person to another State, normally in order for that other State to try the person in its own courts. Extradition is usually carried out under specific treaties and numerous countries have ratified such agreements to facilitate trial in another country of persons indicted in criminal proceedings. Such procedure is sometimes called for if a person is a citizen of another State and that State claims to be better suited to try the person. There is rarely a case for claiming that extradition would violate a person's human rights.\textsuperscript{13} In other cases, a person may be extradited to a State whose interests he is said to have violated or whose citizens have had their rights infringed. In other cases, again, a person is extradited to another State as he is alleged to have committed a crime in that other State which would, in a trial, apply the \textit{lex loci delicti}, that is to say the law in the State where the crime took place.\textsuperscript{14}

Under extradition treaties there is usually a clause that exempts "political" crimes from the list for which extradition may take place.\textsuperscript{15} Nor is a person normally extradited to a country where he

\begin{itemize}
\item BLACK'S LAW DICTIONARY 605 (7th ed. 1999).
\item The \textit{lex loci delicti} is the law of the place where the crime took place. BLACK'S LAW DICTIONARY 923 (7th ed. 1999).
\item "The first provision to protect political offenders appeared in a Belgian extradition act in 1833 and has since been incorporated into most Western extradition treaties." Antje C. Petersen, \textit{Extradition and the Political Offense Exception in the Suppression of Terrorism}, 67 IND. L.J. 767, 774 (1992); see also id. & n.23 (citing an extradition treaty with such a clause between the U.S. and Germany). The extradition treaty between the United States and the United Kingdom also contains a clause pertaining to political offenses. U.S.-U.K. Extradition Treaty, \textit{supra} note 11, art. 4. For a detailed analysis of extradition, see generally IVAN ANTHONY SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971).
\end{itemize}
may be subjected to harsh interrogation or torture, or to a country which applies the death penalty if the sending State would not impose such sanctions for the suspected crime. On the other hand, the European Convention on the Suppression of Terrorism of 1977, was adopted to avoid that specific acts, like acts of terrorists, would be classified as “political” and lead to denial of extradition. There is now a dilemma: a suspected terrorist may not be exempt from extradition as his acts are not, under the said Convention, to be considered as “political”; but, on the other hand, he must not be extradited to a country which might subject him to torture or harsh treatment, even if there are diplomatic assurances to the contrary. At times, however, it may be that diplomatic pledges are effective and prevent the real risk of torture and an extraditing State is enabled to proceed with the extradition.

Many problems concerning deportation and extradition, in particular in so far as possible torture may ensue in the destination country, also arise in the field of extraordinary rendition. Extraordinary rendition, however, involves different methods and practices than either deportation or extradition.

IV. Essential Features of Extraordinary Rendition

In the discussions on extraordinary rendition there are a host of misunderstandings and conflicting definitions. It may be possible to reach at least provisional common ground by a stringent analysis of what specific terms actually mean. Extraordinary rendition is quite different from ordinary rendition and extradition.


described above.

Extraordinary rendition signifies the handing over of a person to be questioned in another jurisdiction. The significance of extraordinary rendition changed substantially when the practice was introduced by the United States in the 1980s to transfer foreign delinquents to be tried or, more often, interrogated in other countries outside such extradition treaties, and such countries were chosen where one might suspect that a different level of treatment of detainees was afforded than what might be expected in the Western world.

The difference to ordinary rendition and to deportation or extradition is essentially that, in the case of extraordinary rendition, there is no link between the person “rendered” and the country to which he is sent. In the case of extraordinary rendition, a person is transferred to a country where he is not (normally) a citizen. Nor is that country the scene of any alleged crimes committed by the person in question.

Extraordinary rendition or irregular rendition is thus a term used to describe the transfer of a person from one State to another State, normally for the purposes of being subjected to some form of interrogation. During the last few years this practice has been criticized as some States to which such rendition has been effectuated are countries with a questionable human rights record. It has, at times, appeared that such States might use harsh interrogation techniques or torture to extract information


21 See Leila Nadya Sadat, Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law, 37 Case W. Res. J. Int’l L. 309, 320 (2006) (stating that Egypt, Syria, Saudi Arabia, Pakistan, and Uzbekistan are nations known to take part in extraordinary rendition and are identified by the U.S. State Department as countries that practice torture).

22 See A. John Radsan, A More Regular Process For Irregular Rendition, 37 Seton Hall L. Rev. 1, 62 (2006) (identifying Uzbekistan, Egypt and Syria as nations being used for extraordinary rendition even though these nations have questionable human rights records).
from the person whom has been rendered.\(^{23}\)

On the other hand, during the more or less emotional debates on extraordinary rendition, commentators have often deviated to discuss prison conditions and treatment in general of suspected terrorists.\(^{24}\) The subject of extraordinary rendition is sufficiently vast for laudable attempts to keep an analysis of the subject to narrow latitudes, corresponding to the definition set out above.

According to a Report of the Parliament of European Union (often cited but usually attributed to the Parliament of the Council of Europe, a totally different organization), extraordinary rendition could be defined as "an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves incommunicado detention and torture."\(^{25}\) This is not an acceptable definition. Numerous conditions of this attempted definition are uncertain or vague: should "illegal" be understood to mean illegal under the law of the sending and/or receiving State or under international law? Is the prohibition of being held "incommunicado" on the same level as the prohibition of torture? Does the caveat of "in majority of cases" mean that there can be legal and acceptable forms of extraordinary rendition?

It is essential to underline that extraordinary rendition is not per se illegal. It is only if torture ensues that such rendition violates legal rules. There is, in effect, an acceptable practice whereby States resort to extraordinary rendition under various Mutual Assistance Treaties to send an arrested person to be interrogated in another country.\(^{26}\) This can be done outside


\(^{24}\) See Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1211-15 (2007); Sadat, *supra* note 21, at 313.


\(^{26}\) See, e.g., Treaty on Extradition and Mutual Assistance in Criminal Matters, U.S.-Turk., June 7, 1979, 32 U.S.T. 3111; Treaty on Mutual Assistance in Criminal Matters,
extradition treaties in cases where it is more appropriate to interrogate a person elsewhere, for example under Interpol or Europol mechanisms or in procedures involving the European Arrest Warrant.\textsuperscript{27} Such procedures resemble in every detail extraordinary rendition as the term is usually understood without any indication of harsh treatment or torture.

Extraordinary rendition may not be a good term for practices where torture is actual or presumed: it would be more appropriate to speak of "outsourcing" of practices which a State would rather not perform itself. "Torture by proxy" could also be used to describe transfers of suspected terrorists to countries for harsh interrogation techniques or torture.

There is also a serious problem of proof of actual torture and it is clearly essential to establish to what extent reports are correct that suspected terrorists have been flown from the United States or from elsewhere and have subsequently been subjected to torture in a third State. It is important to clarify to what extent evidence that torture has been inflicted is reliable and, furthermore, to establish what actually constitutes torture.

Lawyers have not devoted much attention to the practices of extraordinary rendition.\textsuperscript{28} There are some factual, but often sensationalist, accounts\textsuperscript{29} written by journalists, politicians, human right movements and pressure groups on this practice. When one

\textsuperscript{27} See Council Framework Decision 2002/584/JHA, 2002 O.J. (L 190) 1, 1-2 (explaining the replacement of extradition procedures between E.U. Member States with the European arrest warrant). The European arrest warrant is designed to replace formal extradition by requiring each national judicial authority to "ipso facto recognize requests for the surrender of a person made by the judicial authority of another Member State with a minimum of formalities." Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between the Member States, at 2, COM (2001) 522 final (Sept. 25, 2001).

\textsuperscript{28} For examples of analysis by lawyers of extraordinary rendition, see Sadat, supra note 24; Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 GEO. WASH. L. REV. 1333 (2007).

EXTRAORDINARY RENDITION

examines the material on this topic, however, much consists of newspaper articles and more or less tendentious articles. Even international organizations, like the UN Human Rights Commission, the European Union and the Council of Europe, mostly cite newspaper reports when they make their own assessment as to what extraordinary rendition involves.30

Much is also written on this subject, in the United States and elsewhere, to criticize the present Republican administration in the United States for its policies in Iraq and for ensuing policies on the "War on Terror."31 Before one continues to analyze the legal position with regard to extraordinary rendition, it may be useful to underline that it was indeed a Democratic administration that initially allowed such questionable methods of interrogation of detainees. The CIA was granted permission to use rendition in a presidential directive signed by President Bill Clinton in 1995.32 Nor is there any sign that the Democrats, if they come into power after the next election, would cease the practice of extraordinary rendition.

It is, however, correct that the practice of extraordinary rendition has grown sharply under the Bush administration since the 9/11 attacks.33 There has been an enhanced need to deal with suspected terrorists by forceful interrogation tactics, clearly to preempt further attacks on the civilian population. It is important to establish where the limit goes for the permissible techniques of interrogation as balanced against the interest to safeguard citizens of the State. It is now alleged that some detainees are sent to receiving States such as Egypt, Jordan, Syria, Morocco, and Uzbekistan34 where, reportedly, some interrogation practices are

30 See, e.g., Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, supra note 25, paras. 17, 148-149.

31 See, e.g., Satterthwaite, supra note 28, at 1333-34; Sadat, supra note 24, at 1200-06.


used which might violate basic human rights. It is, on the other hand, quite obscure as to what the *quid pro quo* might be when a State sends a person to be interrogated in another State. What does the receiving State get in return for its interrogating services? This is a question rarely raised and not ever clearly addressed.

V. Extraordinary Rendition and *Réfoulement*

*Réfoulement* means the expulsion of persons who have the right to be recognized as refugees. The principle of non-*réfoulement* was first codified in 1954 in the UN Convention relating to the Status of Refugees which, in Article 33(1), provides that: "No Contracting State shall expel or return ("réfouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The principle of non-*réfoulement* does not only forbid the expulsion of refugees to their country of origin but to any other country where they might risk being persecuted. Only if the person to be expelled constitutes a danger to national security may transfer be possible under the UN Convention.

Problems still arise due to the fact that some States have not ratified the Refugee Convention. Some States might even lack formal procedures for determining refugee status. It is suggested


that the same principle applies to extraordinary rendition, that a person must thus not be rendered to a country where his life or freedom would be threatened or to a country where he can be expected to be tortured. Any State through which transit takes place would appear to assume an obligation to prevent, and preempt, that this occurs.

VI. Relevance of Legal Prohibitions of Torture

For some time there have been efforts to forbid or condemn torture by express provisions in international law. The Universal Declaration of Human Rights of 1949, in Article 5, states that "[n]o one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Declaration adopted by the General Assembly on 9 December 1975 also concerns the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

These Declarations have predominantly only declaratory force, but it could also be argued that they re-state a rule that already exists in international law. This pre-existing rule that the Declarations confirm is probably an expression of a form of minimum standards rather than any customary rule; any argument on "custom," "usage" or "practice" relies on the absurd notion of "negative custom."
The prohibition against torture is more emphatically confirmed in straightforward treaty stipulations, on a regional scale in Europe by the European Convention on Human Rights and by the specific European Torture Convention of 1987 and in North and South America by the American Convention on Human Rights of 1969 and by the Inter-American Convention of Torture of 1985. There is also a much neglected African Charter on Human and People’s Rights of 1981.

On the universal and global scene, torture is forbidden by the International Covenant on Civil and Political Rights and, above all, by the United Nations Convention Against Torture (UNCAT) of 1984, a treaty entirely dedicated to the prohibition of torture.

It is to be noted that the United States has incorporated provisions prohibiting torture in internal law in the U.S. War Crimes Act (WCA), as amended by the Military Commissions Act of “negative custom” that a prohibition becomes effective but because of an imperative diktat of conscience and of normal human attitudes, as reflected in a minimum standards of civilized behavior. Id. at 1054, 1086-87.


European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126, 27 I.L.M. 1152 (1988) (securing the prohibition against torture and inhuman or degrading treatment found in Article 3 of the European Convention on Human Rights by authorizing visits to sites where persons are being denied their liberty by a governmental authority).


ICCPR, supra note 10, art. 7.

of 2006 (MCA).\textsuperscript{53} The Torture Convention Implementation Act of 1994 also incorporate international prohibitions into domestic law of the United States\textsuperscript{54} and the Detainee Treatment Act of 2005 also prohibits torturous, or as it is often called "enhanced" interrogation practices.\textsuperscript{55}

Less attention has been devoted by commentators to the fact that "inhuman treatment" is also prohibited by the Torture Convention\textsuperscript{56} and under other international instruments.\textsuperscript{57} The difference between inhuman treatment and torture is that inhuman treatment need not be "intended" to cause suffering.\textsuperscript{58} But latitudes may change: the European Court of Human Rights held in the Ireland case that the so called "five techniques" amounted to inhuman treatment but not to torture.\textsuperscript{59} The five techniques are: wall-standing; hooding; subjection to noise; deprivation of sleep; and deprivation of food and drink.\textsuperscript{60} A later case, however, clarified that the same practices today might well be considered to amount, not only to inhuman treatment, but to torture as the high standard demanded today in the field of human rights demands more "firmness."\textsuperscript{61}

On the other hand it is important to note that, for example, deprivation of sleep, which by commentators is often regarded as outright torture, may not unquestionably be classified as torture when seeking to extract information from a suspected terrorist if such information might save the lives of other innocent citizens.

The United States admits that it has schemes allowing for extraordinary rendition, but the United States Administration has


\textsuperscript{56} Convention Against Torture, supra note 52, art. 1.

\textsuperscript{57} Council of Europe, supra note 46, art. 3.


\textsuperscript{60} Id. at 41.

formally denied that such practices entail torture. On July 20, 2007 President Bush clarified in an Executive Order the treatment that must afforded to detainees and repeated that the United States does not condone torture of captives by intelligence officials. The President insisted that Common Article 3 of the Geneva Conventions would apply: this article provides some minimum guarantees to soldiers and shipwrecked as well as to the civilian population.

The President was possibly wrongly advised by referring to the requirements of Common Article 3 of the Geneva Conventions as this article is not applicable in situations of suspected terrorists. The article only protects "real" combatants and "real" civilians and not those who do not wear a uniform but clandestinely take up arms to commit terrorist acts. Instead, the Order could have referred to international minimum human rights standards.

As has been suggested above and which will be shown later in this text, the very question of legality or illegality turns on actual proof and reliable evidence as to whether extraordinary rendition as practiced nowadays by the United States and several other consenting States actually involves an accepted definition of prohibited torture.

Some claim that extraordinary rendition violates Article 3(2)

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64 See Detter, Illegal Combatants, supra note 45, passim (discussing reasons why Common Article 3 may not apply to terrorists).

65 Id. at 1058-60.

66 Id. at 1086-92.
The article provides that:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The prohibition derives its phrasing from the prohibition of réfoulement in refugee law, in the rules concerning extradition, and other rules in the field of conflict of laws.

But Article 3(2) of the Torture Convention does not really cover extraordinary rendition involving torture: the United States is not "expelling" or "returning" persons under this scheme. Suspected terrorists are dispatched for interrogation elsewhere and, furthermore, at no stage does the United States relinquish control of the fate of the detainees sent for such questioning.

Even if the Torture Convention were applicable, the question arises as to whether a State might be relieved from certain obligations in the case of national emergency. This question thus concerns the right of derogation. A most important question concerns whether a situation of national emergency dispenses with obligations assumed under the Torture Convention and under other international engagements. It is to be noted that the Convention


68 Convention Against Torture, supra note 52, art. 3.

69 Refugee Convention, supra note 36, art. 33.


71 See Convention Against Torture, supra note 52, art. 3.

for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights") allows a contracting State to derogate from certain obligations "[i]n time of war or other public emergency threatening the life of the nation" to the extent that this is strictly required "by the emergencies of the situation" and on the condition that such derogations "are not inconsistent with other obligations under international law."73 A State bound by the Convention may thus derogate from the obligation under Article 5 of not depriving a person of his liberty and under Article 6 to give a fair trial within a certain time period.74 However, derogations from Article 3, which deals with the prohibition of torture, inhuman or degrading treatment, are not permitted.75

The International Covenant on Civil and Political Rights also provides for the possibility of derogations in time of national emergencies.76 The Torture Convention, however, excludes all such possibility of derogation, even in the case of serious national emergency.77

There is no doubt that the United States did find itself in a situation of national emergency after 9/11 but, as shown above, relevant conventions do not allow for derogation even in such situations. On the other hand, national courts have not found any

73 Council of Europe, supra note 46, art. 15.
74 Id. arts. 5, 6.
75 Id. art. 3.
(a) Affects the whole of the population and either the whole or part of the territory of the State, and (b) Threatens the physical integrity of the population, the political independence of the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.
Id.
77 Convention Against Torture, supra note 52, art. 2.
need for relaxation of stringent rules forbidding enhanced interrogation methods.\textsuperscript{78}

It is futile to rely on the Torture Convention or other formal treaties to prove the illegality of extraordinary renditions involving torture. Numerous States have not ratified these agreements and it is essentially to these non-party States to which suspected terrorists have been sent under the extraordinary rendition schemes.\textsuperscript{79}

There may, however, be other rules of international law more on point than the Torture Convention and other formal treaties to


\textsuperscript{79} For a list of countries to which suspected terrorists have been rendered, see sources cited supra notes 21–22; see also supra note 34 and accompanying text. For an updated list of countries who have ratified (or failed to ratify) the Torture Convention, see United Nations, Office of the United Nations High Commissioner for Human Rights, 9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, http://www2.ohchr.org/english/bodies/ratification/9.htm (last visited Mar. 7, 2008).
clarify the prohibition of extraordinary rendition involving torture. For example, the question as to whether extraordinary rendition would have been compatible with international law before the adoption of the Torture Convention in 1984 is usually avoided in subsequent discussions. Yet, extraordinary rendition cases involving torture have been reported before this date but, still, the question of ancillary prohibitive rules is rarely, if ever, raised in discussions on extraordinary rendition. Yet, it is fairly certain that practices involving subjecting detainees to torture were prohibited even before 1984, as perhaps most strikingly shown by evidence given in the Nuremberg and Tokyo Trials.

VII. Torture Flights, Ghost Detainees and Black Sites

A whole new language has evolved around the relatively new practice of extraordinary rendition. Many now speak of “torture flights” to signify the chartered planes that have taken some detainees to be interrogated in specific countries known to practice harsh interrogation methods and torture. Most of these countries have not ratified the Torture Convention.

A number of airlines, for example, Jeppesen, a subsidiary of Boeing and Tepper Airlines, are said to be involved in such torture flights. It is clear that actual precise evidence is not available: most consist of reports in newspapers which may or may not be reliable. It is, however, highly likely that at least some of these

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80 For further discussion on fundamental or intrinsic human rights, see Detter, International Legal Order, supra note 43, at 288-305; Ingrid Detter, Concept of International Law 46-51, 119 (2d ed. 1995).


82 See Complaint, Mohamed v. Jeppesen Dataplan, Inc., No. C 07-2798 (N.D. Cal. May 30, 2007) (asserting that Jeppesen aided the CIA in its extraordinary rendition practices). See also Bob Egelko, Judge Dismisses Renditions Lawsuit in San Jose, San Francisco Chronicle, Feb. 13, 2008, at B2 (reporting that Judge Ware in a San Francisco Court blocked the hearing of a case brought by the American Civil Liberties Union against Jeppesen Data Plan, alleging that the airway company ran “torture flights.” The Judge held that such matters were a “state secret.”).

83 See, e.g., Dan Bilefsky, European Inquiry Says C.I.A. Flew 1,000 Flights in
flights have taken place, and that detainees have been taken from one jurisdiction to another, usually to one of these countries where torture is likely to be used.\textsuperscript{84}

The CIA is also said to hold certain “ghost detainees,” that is to say detention of prisoners who are not officially registered. Such “ghost detainees” are kept outside of judicial oversight, sometimes without ever entering US territory.\textsuperscript{85}

Some detainees are, according to reports, taken through secret detention centres: so called “black sites” are normally used by the CIA in cooperation with other governments.\textsuperscript{86} States that cooperate in such schemes may have their international responsibility engaged under various international agreements if such detention precludes the defence rights of a detainee,\textsuperscript{87} especially if detention is prolonged in time.\textsuperscript{88}

It is this cooperation by other states that has provoked a series of investigations and reports in various international organizations.


\textsuperscript{85} See, e.g., INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, Cm. 7171.

\textsuperscript{86} Id.


A number of states, such as France, Spain, Sweden, Denmark, Norway, Germany, Portugal, Austria, Italy, Poland, Romania, United Kingdom and Ireland have all been accused of facilitating extraordinary rendition by allowing transit of such flights. In most countries investigations have been launched only to result in statements that no evidence has been found to support the claim of such cooperation.

These sites have been claimed to exist in Afghanistan at the Bagram Air Base91 and in Iraq92 at Camp Cropper.93 It has also been claimed that the Abu Ghraib prison worked as a black site, but there is less evidence of this assertion.94 In addition Jordan95 and Pakistan have been claimed to be black site hosts.96 Black sites are also alleged to exist in Egypt,97 and Morocco, for example at the al-Tamara interrogation centre near Rabat.98 In Thailand, the Voice of America relay station in Udon Thani has been said to host a black site.99 Claims have also been made that black sites have existed in several European countries, especially in the post-communist states, such as Poland,100 at Mihail Kogălniceanu near Constanța, in Romania,101 Armenia,102 Georgia,103 Latvia,

90 See Intelligence and Security Committee, supra note 85.
92 Josh White, Army, CIA Agreed on ‘Ghost’ Prisoners, WASH. POST, Mar. 11, 2005, at A16.
94 White, supra note 92.
96 Amnesty Report, supra note 84, at 8
100 Amnesty Report, supra note 84, at 15; European Parliament Report, supra note 25, at 174 (mentioning Szymany Airport as involved in rendition flights).
101 See The Associated Press, Romanian President Says CIA Flights May Have
Bulgaria\textsuperscript{104} and Slovakia.\textsuperscript{105} Not only ex-communist states have been implicated, but many Western states have been accused of tolerating activities by the CIA including, Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom.\textsuperscript{106}

As for documentary proof of such sites, it is sadly lacking. It is obviously in the nature of things that first hand sources will not be readily available. However, one would have expected some form of effort on behalf of organizations of human rights to seek some form of primary sources, at least as far as pronouncements, and denials, of by United States government are concerned. Even parliamentary reports like those of the EU Parliamentary Assembly\textsuperscript{107} and of the Parliament of the Council of Europe\textsuperscript{108} (two bodies often confused), as well as the UN High Commission for Human Rights,\textsuperscript{109} generally refer only to newspaper articles, and refrain from citing any first hand documentary sources. This practice of resorting to secondary and even tertiary sources is even used for references to statements of the United States government, such as denials or for the Executive Orders prohibiting torture for which official documents are readily available.\textsuperscript{110}

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\textsuperscript{102} Amnesty Report, supra note 84, at 16.

\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} European Parliament Report, supra note 25.

\textsuperscript{107} See e.g., European Parliament Report, supra note 25.


VIII. Legality or Illegality of Extraordinary Rendition

Some international bodies have criticized the system of extraordinary rendition. On May 19, 2006, the United Nations Committee Against Torture, the U.N. body that monitors compliance with the United Nations Convention Against Torture, recommended that the United States cease holding detainees in alleged secret detention facilities and stop the practice of rendering prisoners to countries where they are likely to be tortured.\footnote{Office of the United Nations High Commissioner for Human Rights, Committee Against Torture, \textit{Conclusions and recommendations of the Committee against Torture}, 36\textsuperscript{th} Session, CAT/C/USA/CO/2 (May 1-19, 2006).}


Such attitudes, however, may fail to take into consideration that a state’s most important duty is to its own citizens and in the present volatile world a state is certainly expected to do its utmost to protect its citizens from terrorist attacks.

It is possible that this duty cannot be discharged unless certain suspected terrorists are allowed to be subjected to fierce and effective interrogation. If there is no mistaken identity and the arrested person actually is a genuine risk to the citizens in a state, officials must be entitled to question him using some form of pressure, where the limits of such pressure are a matter of common sense. It cannot not be right – or even efficient – to subject a person to torture. Nor can it be right to be so lenient that the arrested person feels no pressure to part with vital information, for example with regard to a planned terrorist attack.

IX. Compatibility of Extraordinary Rendition with International Law

There are three main questions that should be raised when assessing the legality or illegality of extraordinary rendition.

One question is whether suspected terrorists that have been subjected to extraordinary rendition are “protected persons” under
the Geneva Conventions, specifically whether they form part of
the group of persons who, cannot be forcibly moved under Article
49 of the Geneva Convention Relative to the Protection of Civilian
Persons in Time of War ("Geneva Convention IV").

A second question concerns whether the Torture Convention
or any other rules in international law prohibits torture to
interrogate suspected terrorists, and whether or not they qualify as
protected persons. An additional question under this heading
concerns whether torture is only prohibited in the territory of states
bound by the Torture Convention or are signatories bound outside
of their territory.

A third question relates to the view that there are binding rules
on minimum standards of behavior with regard to the treatment of
individuals, rules which form part of international peremptory
norms or jus cogens.

It is important to keep these three questions distinguished.

A. The Protected Persons Argument

The first question must probably be answered in the negative
as the Geneva Convention IV is designed to protect "real"
civilians, and those who take up arms and engage in hostilities,
which at least some suspected terrorists certainly do, fall outside
all protection under the Convention. However, this does not
necessarily mean that there are not other rules under international
law which protect persons from torture or other harsh forms of
interrogation, as will be explored later in this text.

In 2004 United States Assistant Attorney General Jack
Goldsmith stated that "protected persons" apprehended in Iraq
could be subjected to so called extraordinary rendition and sent to

113 Geneva Convention Relative to the Protection of Civilian Persons in Time of
War, supra note 63, art. 49.

114 Id. art. 3. "Civilians" are "persons taking no active part in the hostilities,
including members of armed forces who have laid down their arms and those placed hors
de combat by sickness, wounds, detention, or any other cause, shall in all circumstances
be treated humanely, without any adverse distinction founded on race, colour, religion or
faith, sex, birth or wealth, or any other similar criteria ..." and under Article 4 are
"persons protected by the Convention are those who, at a given moment and in any
manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a
Party to the conflict or Occupying Power of which they are not nationals." Id. arts. 3-4.

115 See Detter, Illegal Combatants, supra note 45, at 1060.
be “interrogated” in another state. ... protected persons” are those who form part of the civilian population in an occupied area. Under the Geneva Convention IV on Civilians such people must not be moved. Article 49 of IV Geneva Convention of 1949 concerning Civilians states that:

“Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”

However the captured persons to whom the Assistant Attorney General referred are not any such civilians: they are unlawful or illegal combatants and do not enjoy any protection under the Law of War. It was indeed unfortunate that the Attorney General referred to “protected persons.” There is no question that if real “protected persons” had been at issue it would certainly be illegal under international law to remove such civilians from the territory in question. However, the whole point is that at least some of the persons removed were not such civilians and thus not “protected persons.” If a person takes up arms and engages in hostilities, as some of the transferred person are alleged to have done, they have lost their status of “civilians” and are no longer “protected persons.” It was also unfortunate that the Memorandum specifically refers to Article 49, claiming that transfers would be compatible with this provision in the case of “illegal aliens.” The Memo states that:

“The United States may, consistent with Article 49:

(1) remove “protected persons” who are illegal aliens from Iraq


117 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note 63, art. 49.

118 Id.

119 See Detter, Illegal Combatants, supra note 45, at 1060; see also INGRID DETTER, THE LAW OF WAR 136-37, 148 (2d ed. 2000) (explaining that because civilians who take up arms and engage in hostilities are not protected as soldiers, they are not regarded as POWs under Geneva Convention II and, unless they wear uniforms and fulfill other criteria of a soldier, they are “illegal” or “unlawful” combatants).
pursuant to local immigration law; and
(2) relocated "protected persons" (whether illegal aliens or not)
from Iraq to another country to facilitate interrogation, for a
brief but not indefinite period, as long as adjudicative
proceedings have not been initiated against them."\(^\text{120}\)

Geneva Convention IV provides that violations, \textit{inter alia}, of
Article 49 concerning forced transfers constitutes a "grave breach" of
the accord, and thus a "war crime" under U.S. federal law,
according to a footnote in the Justice Department draft.\(^\text{121}\) "For
these reasons," the footnote reads, "we recommend that any
contemplated relocations of "protected persons" from Iraq to
facilitate interrogation be carefully evaluated for compliance with
Article 49 on a case by case basis."\(^\text{122}\) It says that even persons
removed from Iraq retain the treaty's protections, which includes
the right to humane treatment and to contact with international
monitors.\(^\text{123}\)

It is of considerable importance, however, that the often cited
Memorandum of March 19, 2004 is marked as a "Draft." It is not
compatible with correct legal assessment to treat this document as
if it were an official and final document authorizing extraordinary
rendition.

According to unconfirmed claims that surrounds the process of
extraordinary rendition, the CIA is said to have "used" the March
draft memo as legal support for secretly transporting detainees out
of Iraq to be interrogated elsewhere for a "brief but not indefinite
period" and has permanently removed persons deemed to be
"illegal aliens" under "local immigration law." Another OLC draft
memorandum from August 1, 2002 is said to exist that again
authorizes the removal of suspected terrorists from Iraq and from
other locations.\(^\text{124}\)

A point may be made initially about the importance of

\(^{120}\) March Draft Memo, \textit{supra} note 116, at 367-68.
\(^{121}\) \textit{Id.} at 379.
\(^{122}\) \textit{Id.}
\(^{123}\) \textit{Id.} at 379-80.
\(^{124}\) See, \textit{e.g.}, Memorandum Jay S. Baybee, Assistant U.S. Attorney General, to
Alberto R. Gonzales, Counsel to the President, regarding Standards of Conduct for
establishing the true identity of a suspected terrorist. There have been some scandals involving cases when innocent persons have been held and treated as possible terrorists. In some cases persons have certainly been subjected to erroneous rendition, usually as a result of mistaken identity. In December 2005 the CIA’s Inspector General admitted that the CIA was investigating what the Agency called “erroneous renditions.” Khalid El-Masri is one such case. Another incident concerned the radical Islamist cleric Hassan Mustafa Osama Nasr, also known as Abu Omar, who was kidnapped in Milan on February 17, 2003, and sent to Egypt, where he was held until February 11, 2007, when an Egyptian court ruled his imprisonment was “unfounded.”

It is important to retain the qualification of “combatants” to ensure that the Law of War protects those that most deserve to be protected, that is to say real soldiers and real civilians. To enjoy full protection under the Law of War a combatant must wear a distinctive sign or uniform showing that he is a soldier, be under military command, carry arms openly and follow himself the rules of the Law of War.

B. The Torture Argument

The second question concerns precisely what limits international law poses to prevent suspected terrorists form being tortured or subjected to other forms of harsh treatment.

In this context it must first be analyzed what actually constitutes “torture.” It is clear that to some extent some forms of treatment may be experienced differently by different people.

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126 Id.


128 See Detter, The Law of War, supra note 119, at 136-148; Detter, Illegal Combatants, supra note 45, at 1058-59. For a questionable decision regarding the requirement that lawful combatants wear distinctive insignia, see Military Prosecutor v. Omar Mahmud Kassem and Others, 42 I.L.R. 470 (Israeli Military Ct. at Ramallah, 1969) (holding that "dark green dress and mottled peaked caps" do fulfill the requirement because "civilians resident in the area where the encounter with the Israeli forces took place do not usually wear green clothes or mottled caps."); see also Dinstein, Conduct of Hostilities Under the Law of International Armed Conflict 48 (2004).
Some, with a low threshold of pain, may consider even light pressure as unbearable and would consider this as torture. Other more courageous persons may find, when subjected to fierce interrogation, that they do not place this on the level of torture.

The inevitable subjective element, that is to say how different persons experience specific interrogation methods, is also reminiscent of the discrepancy between the English and French versions of the Geneva Conventions. The English version speaks of “unnecessary suffering” which certainly involves a subjective evaluation. The French version, on the other hand, speaks of \textit{maux superflus}, (“excessive wounds”), which, of course, has a far more objective meaning.

Nevertheless there is normally a vague agreement that any considerable physical harm inflicted on a person does constitute torture. What is more difficult to ascertain is whether psychological pressure, which can be far more effective in terms of interrogation, amounts to torture. There is also an ancillary question as to whether threats to harm other members of a person’s family amounts to torture; such threats can cause immense suffering to a person held for questioning.

It is also relevant that the United States has made some significant reservations to the Torture Convention. The term “cruel, inhuman or degrading treatment” will be interpreted according to United States rules. This evokes the famous reservation that the United States appended to its accession to the Statute of the International Court of Justice, stating that the United States itself would decide what question concerns national security for which the ICJ is not competent.

\textsuperscript{129} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, 1125 U.N.T.S. 3 (English language); see also Detter, \textit{The Law of War}, supra note 119, at 165.

\textsuperscript{130} Geneva Conventions \textit{supra}, note 129 (French language).

\textsuperscript{131} Namely, “cruel, unusual and inhumane treatment” or punishment is interpreted through the law of the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. \textit{See} 136 Cong. Rec. 17,486 (1990) (resolution of ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

\textsuperscript{132} \textit{See} Reservation to the Optional Clause of the ICJ by the United States, 61 Stat. 1218, 1946 WL 25470 (US Treaty).
The Torture Convention is slightly unhelpful with regard to the definition of torture. Article 1 provides that:

"For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."\(^{133}\)

It is vital to note the very last sentence, which removes all sense to the prohibition as any state involved in extraordinary rendition programs would argue that the interrogation methods are, indeed, part of lawful sanctions in the case of suspected terrorists. Furthermore, the condition that pain and suffering must have been inflicted by an "official," or by someone with "official" sanction, also removes certain scenarios from the ambit of the Convention.

In any event, the states to which extraordinary rendition flights are said to have been sent are virtually all non-signatories of the Torture Convention.

The question as to what sort of pressure can be allowed in order to extract information from suspected terrorists must also be addressed. Some forms of interrogations have clearly produced important results. It is clear that some interrogations have yielded valuable results in the sense that projected terrorist attacks have been foiled. According to White House, interrogation by CIA has often preempted serious terrorist attempts.\(^{134}\) For example, the interrogation of Abu Zubaydah and Ramzi Binalshibh helped to break up a cell of Southeast Asian terrorist operatives preparing

\(^{133}\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 112.

attacks in the United States, foil an al Qaeda operation to develop anthrax, expose planned strikes on a U.S. Marine camp in Djibouti, as well as on the U.S. Consulate in Karachi, and finally thwart plots to hijack passenger planes and to fly them into installations and buildings at Heathrow Airport and in London’s Canary Wharf.\textsuperscript{135}

Further, on December 26, 2005, it was reported that the capture of al Qaeda leaders Ramzi Binalshibh in Pakistan, Omar al-Faruq in Indonesia, Abd al-Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen were all partly the result of information gained during interrogations.\textsuperscript{136}

The core of the question is actually a matter of the territorial reach of prohibitions of torture. Some assume that states which have not adhered to the Torture Convention (or other binding treaty on the matter) are free to practice torture. Others appear to think, as some in the US Administration do, that, although a ratifying state is not free to practice torture in its own territory, it is free to do so elsewhere or that it is free to delegate the process of applying such pressure in interrogations.\textsuperscript{137} Hence the expression “torture by proxy.”\textsuperscript{138}

But this is a fallacy. To apply some historical perspective to the question, the German government during World War II had not signed any treaties or conventions on genocide; the Genocide Convention had not even come into existence. Nor had wartime Germany adhered to any binding agreements forbidding torture (or

\begin{footnotes}
\item[136] \textit{Id.}
\end{footnotes}
other gruesome practices) outside its own territory, for example in Auschwitz in Poland. Yet the War Crime Tribunal in Nuremberg came to the conclusion that Germany had severely violated international law for which even individual responsibility could be incurred.\textsuperscript{139}

The question concerning the territorial reach of the prohibition of torture is linked to the next problem discussed here, that concerning minimum standards in international law.

\textit{C. The Minimum Standards Argument}

There is room for suggesting that even though certain countries have not ratified the Torture Convention, and even though the harsh interrogations takes place outside the territory of the United States, all states have an obligation under international law to behave in a civilized way and refrain from torture or other inhumane treatment of individuals.\textsuperscript{140}

One question concerns whether the application of the Law of War has territorial limitations. The theatre of the War on Terror may be global, and the rules which are part of the Law of War, for example those concerning the prohibition of torture, may \textit{appear} to apply. Some then insist that it is by virtue of the rules of the Law of War that the torture of suspected terrorists is prohibited, while others would contend that this is so on the basis of the Torture Convention.\textsuperscript{141} On closer analysis, neither of these assumptions may be correct: there might be a prohibitive rule because of another basis of obligation, for example a prohibition under peremptory rules of international law.

These are the other rules of international, outside formal treaties, which cannot be ignored when assessing the legality or illegality of torture.

The International Court of Justice has repeatedly insisted that all states are bound to respect \textit{fundamental human rights}.\textsuperscript{142} Some


\textsuperscript{140} See Detter, \textit{Illegal Combatants}, supra note 45, at 1089.


\textsuperscript{142} See, e.g., Legal Consequences for States of the Continued Presence of South
EXTRAORDINARY RENDITION

twenty-eight years ago the Court confirmed this view in the Hostage Case and stated:

"Wrongfully deprive human beings of their freedom and subject them to physical hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the Universal Declaration of Human Rights."\(^{143}\)

Here the Court did not even mention torture but only "hardship" which clearly sets a lower level for what is acceptable as treatment of others. The Court, however, inserts the proviso of "wrongfully" which just might exclude certain forms of interrogation of suspected terrorists.

Courts in many countries have also claimed that torture is forbidden under general international law.\(^{144}\) In other words, states may be held responsible for acts they have procured or allowed in areas under their control or occupation, or, indeed, for acts committed in territories to which they have deliberately dispatched a person for interrogation.\(^{145}\) States, companies and individuals that connive in such transport where torture might be the

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\(^{143}\) (1980) ICJ Reports 1980, 42.

\(^{144}\) See Detter, \textit{INTERNATIONAL LEGAL ORDER}, \textit{supra} note 43, at 290. General international law is clearly a wider concept than "customary international law," even though many in the United States use the terms interchangeably. But general international law obviously also includes treaties and agreement, as well as rules on ethics and on \textit{jus cogens}. None of which are necessarily tied to "customary" law; see also Detter, \textit{Illegal Combatants, supra} 45, at 1054 (noting the absurdity of a "negative custom").

foreseeable result may also have their responsibility engaged as they, too, have the duty to prevent torture.\textsuperscript{146}

It is essential to establish that the minimum standards evoked in this context are not necessarily those found in treaties and international conventions. It may be that the rules laid down in Articles 27-78 of the Fourth Geneva Convention and the provisions of Article 75 of the Second Protocol of 1977 to the Geneva Conventions correspond, roughly, to the minimum standards. But it is most important to underline that terrorists are not protected by the Law of War as they do not wear uniforms and do not qualify as soldiers, nor as civilians.\textsuperscript{147}

When the Red Cross attempted to suggest that “no one must be left unprotected” by the Law of War, that organization did not service to the soldier in the field, nor to the real civilian: both would suffer by this dissipation of the rules of protection under the Law of War.\textsuperscript{148} If we dilute the contents of protection to protect those who do not deserve to be protected we will alter the whole essence of the Law of War and make such rules worthless, and the soldier and the civilian will be exposed to much danger.

This is not to say that states may treat suspected terrorists as they please. Although, it must be insisted, the suspected terrorist does not have the right to be protected as a prisoner of war nor as a civilian, there are some minimum standards that apply. It is clear he must not be subjected to torture. But one comes back to the question of definition: water-boarding and outright physical harm is certainly prohibited under general international law (not under

\begin{footnotesize}

\textsuperscript{147} See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (explaining the criteria that establish whether a combatant will be protected by the Geneva Conventions, including the requirement that a soldier wear a uniform or other distinctive dress). The point about uniforms is clearly the question of \textit{distinction} that you show to your enemy that you are a member of the armed forces. Although the Law of War allows ruses and surreptitious practices, it does not allow soldiers to be disguised as civilians; see also Detter, The Law of War, supra note 119, at 135.

\textsuperscript{148} See ICRC 2003 Report, supra note 141; see also Detter, \textit{Illegal Combatants}, supra note 45, at 1058-59.
\end{footnotesize}
customary law, as some pretend as "negative custom" is an absurd notion).\footnote{See Detter, \textit{Illegal Combatants}, supra note 45, at 1054.} But some pressure must be allowed, such as sleep deprivation, in cases such as when a suspected terrorist has information as to where there is a bomb which might kill a great number of people. It is not that the suffering of one is worth that of thousands, but a matter of common sense, that interrogation must be allowed to use some form of minor force.\footnote{See The Ireland Case, \textit{supra} note 59; see also the text accompanying Refugee Convention, \textit{supra} note 36.}

\textbf{X. Conclusions.}

No state can escape responsibility for inflicting harm on individuals during interrogations. It should also be underlined that the state cannot claim that its security services have exceeded their power as the state has a duty to supervise and closely monitor such activities.\footnote{See Klass and Others v. F.R.G No. 5029/71, 2 Eur. H.R. Rep. 214 at para. 71 and 75 (1980), available at http://www.echr.coe.int/eng. See also Leander v. Swed., No. 9248/81, 9 Eur. H.R. Rep. 433 at para. 84 (1987), available at http://www.echr.coe.int/eng.}

On the other hand, it is clear that some pressure is allowed to extract information from suspected terrorists but there is also a certain level beyond which questioning should not proceed.

The whole system of extraordinary rendition has overemphasized the territoriality aspect. If captives cannot be subjected to techniques of interrogation legally in the United States, some find it acceptable that they are sent abroad to states where such methods are not illegal. But all this ignores the fact that the procedure might be illegal under \textit{international law} and it may be futile to use domestic law arguments to evade obligations under the international legal system.\footnote{See Detter, \textit{International Legal Order}, \textit{supra} note 43, at 168-170.} In \textit{Filartiga v Pena-Irala} a United States court held that the torturer has become "like the pirate and the slave trader before him – \textit{hostis humani generis}, an enemy of all mankind."\footnote{D. Filartiga and J. Filartiga, v. Pears-Irala, 630 F.2d 876, 890 (2d Cir. 1980).} Recently it has been possible to claim that it is the terrorist who has become such an outlaw and enemy of mankind.\footnote{See Detter, \textit{Illegal Combatants}, supra note 45, at 1096.} But by resorting to torturer the torturer thus places ...
himself on the same unacceptable level as the terrorist.

A state may not use its own legislation to escape obligations under international law. The Alabama Arbitration illustrates that a state is under a duty to make sure that its internal laws comply with international law and, if they do not, the state may incur responsibility for consequences of the discrepancy between international law and municipal law. The Permanent Court of International Justice also held in *Polish Nationals in Danzig* that a state cannot invoke its own constitution or other internal rules to escape obligations under international law. In the same way, then, the United States cannot justify moving detainees to other locations only on the ground that the interrogations techniques to be used are illegal under US law. Such methods are also illegal under international law and the state’s responsibility is engaged when seeking to evade obligations under internal law which, ironically, also apply world wide under the minimum standard rules of the international legal system.

Furthermore, the International Court of Justice has also spoken to a state’s responsibility for of extraterritorial acts in *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Just as much as those responsible for Germany’s practices during the Second World War could not escape responsibility for war crimes by claiming that acts committed were legal (and even commended) by the internal legal system, so a state cannot now claim that because something is illegal in its own state, it would be legal to arrange to have such acts carried out elsewhere.

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155 *Id.*


157 Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1933 P.C.I.J. (ser A/B) no. 44 (Feb. 4).

158 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I. C. J. 136 (July 9).
The argument that a state is not liable for what it allows or organizes in the territory of other states, indeed, in territories outside its sovereignty like Guantanamo Bay, is a fallacy. The arguments is based on the faulty premise that territoriality is all and that actions beyond a state’s territory can somehow be distanced from government action. This is not correct and there is still a question of liability for such action which in due course might mature.

The United States would probably gain far more sympathy even for fierce or enhanced interrogation practices of suspected terrorists if such questioning took place in the United States. But what is not acceptable in international law is to seek to escape liability by organizing interrogations clandestinely, involving torture flights (at what cost?) and black sites.

It is also beyond doubt that information obtained through torture is notoriously unreliable and it is therefore perhaps not wise to engage the state’s responsibility (and probably damage its good name) by arranging torture flight abroad.

The European Court of Human Rights has also confirmed that the prohibition of torture extends to areas under effective control of the state. The same attitude has been taken by English courts. Occupied territories over which a state has established authority thus come within the ambit of the human rights obligations of the state.

Delegation of interrogation procedures to another state can thus not rid a state of its responsibility for torture if it arranges flights to areas outside its own territory. On the other hand, at the root of the problem, it is not quite established what sort of practices and in how many cases interrogations practices have exceeded what is permissible under international law. Newspaper reports and evidence given by released detainees, possibly

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159 See Loizidou v. Turkey, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) 513, 515 (1995) (preliminary objections) ("The responsibility of a Contracting State can also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory.")


161 See, e.g., EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga, eds. 2004) for a comprehensive publication devoted to this subject.
delivered during a post-traumatic state of mind, must be largely discarded and only clear evidence as to excessive interrogation methods must be accepted.\textsuperscript{162} The truth about such practices is not easy to establish. Nor is the truth of what is revealed under torture easy to ascertain.

On the other hand, it is clear that the prohibition of torture is one of the basic tenets of \textit{jus cogens}, the peremptory rules from which no derogation is permitted.\textsuperscript{163} Along with genocide, slavery and genocide, it must be noted that torture is also forbidden by these fundamental and intrinsic rules of international law.\textsuperscript{164}

In a landmark case in the House of Lords in England it was decided that evidence obtained through torture is not allowed in English courts.\textsuperscript{165} The main reason for this attitude is clearly that such evidence is not sufficiently reliable to form the basis for ensuing convictions. The same attitude should prevail in the international field and it should be accepted that torture is rarely the appropriate method to arrive at the truth.


\textsuperscript{164} See, e.g., The Tokyo and Nuremberg Trials, \textit{supra} note 81; see also Prosecutor \textit{v} Furundzija, 38 ILM 317, 349 (1999).

\textsuperscript{165} \textit{A(FC) and Others v Secretary of the Home Department}, 2005 \textit{U.K.H.L. 71} (2005). The unanimous judgment confirmed that, under English law, "torture and its fruits" could not be used in evidence in court. \textit{See id.} at para 51. But the information obtained could be used by the police as "it would be ludicrous for them to disregard information [about a ticking bomb] if it had been procured by torture." \textit{Id.} at para 68. The Law Lords thus dismissed, to some extent, concerns about the accuracy of information obtained under torture.