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The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens

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Summary

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires signatory parties to take measures to end torture within their territorial jurisdiction. For purposes of the Convention, torture is defined as an *extreme* form of cruel and unusual punishment committed under the color of law. The Convention allows for no circumstances or emergencies where torture could be permitted. Additionally, CAT Article 3 requires that no state party expel, return, or extradite a person to another country where there are substantial grounds to believe he would be subjected to torture.

The United States ratified the Convention, subject to certain declarations, reservations, and understandings, including that the Convention was not self-executing, and therefore required domestic implementing legislation to take effect. In accordance with CAT Article 3, the United States enacted statutes and regulations to prohibit the transfer of aliens to countries where they would be tortured, including the Foreign Affairs Reform and Restructuring Act of 1998, section 2340A of the United States Criminal Code, and certain regulations implemented and enforced by the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State. These authorities, which require the withholding or deferral of the removal of an alien to a country where he is more likely than not to be tortured, generally provide aliens already residing within the United States a greater degree of protection than aliens arriving in the United States who are deemed inadmissible on security or related grounds such as terrorism. Further, in deciding whether or not to remove an alien to a particular country, these rules permit the consideration of diplomatic assurances that an alien will not be tortured there. Nevertheless, under U.S. law the removal or extradition of all aliens from the United States must be consistent with U.S. obligations under CAT.

CAT obligations concerning alien removal have additional implications in cases of criminal and other deportable aliens. The Supreme Court's ruling *Zadvydas v. Davis* suggests that certain aliens receiving protection under CAT cannot be indefinitely detained, suggesting the possibility that certain otherwise-deportable aliens could be released into the United States if CAT protections make their removal impossible. CAT obligations also have implications for any existing "extraordinary renditions" policy by the United States in which certain aliens suspected of terrorist activities are removed to countries that possibly employ torture as a means of interrogation. Maher Arar, a dual citizen of Canada and Syria, has recently filed suit against certain U.S. officials that he claims were responsible for transferring him to Syria, where he was allegedly tortured and interrogated for suspected terrorist activities with the acquiescence of the United States.

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The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens

Overview of Relevant Portions of the Convention Against Torture

In the past several decades the practice of torture by public officials has been condemned by the international community through a number of international treaties and declarations,¹ leading some commentators to conclude that customary international law now prohibits the use of torture by public officials.² Perhaps the most notable international agreement prohibiting the use of torture is the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention or CAT),³ which obligates parties to prohibit the use of torture and to require the punishment or extradition of torturers found within their territorial jurisdiction. Since opening for signature in December 1984, over 140 states, including the United States,⁴ have signed and/or become parties to the Convention.⁵

¹ See, e.g., U.N. Charter art. 55 (calling upon U.N. member countries to promote “universal respect for, and observance of, human rights and fundamental freedoms for all...”); Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, at 52, UN Doc. A/6316, at art. 5 (1948) (providing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg. at 49, U.N. Doc. A/RES/2200A (XXI), at art. 7 (1966) (providing that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

² See Restatement (Third) of Foreign Relations Law of the United States § 702, Reporters note 5(d) (1987). But see A. Mark Weisbard, Customary International Law and Torture: The Case of India, 2 Chi. J. Int’l. L. 81 (Spring 2001) (arguing that widespread use of torture by states, despite existence of numerous international agreements and declarations condemning it, indicates that the prohibition on torture has not reached the status of customary international law).

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter “CAT”].

⁴ The United States has signed and ratified CAT subject to certain declarations, reservations, and understandings. See *infra* at pp. 3-5.

⁵ See United Nations, Office of the High Commissioner for Human Rights, Status of Ratifications for the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, at <http://www.unhchr.ch/html/menu2/6/cat/treaties/conratification.htm> (last viewed Feb. 22, (continued...))

CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁶ This definition does not include “pain or suffering arising only from, inherent in or incidental to lawful sanctions.”⁷

According to the State Department’s analysis of CAT, which was included in President Reagan’s transmittal of the Convention to the Senate for its advice and consent, this definition was intended to be interpreted in a “relatively limited fashion, corresponding to the common understanding of torture as an *extreme* practice which is universally condemned.”⁸ Indeed, CAT Article 16 further obligates signatory parties to take action to prevent “other acts of cruel, inhuman, or degrading punishment which do not amount to acts of torture...”⁹ According to the State Department, this distinction reflected the belief by the drafters of CAT that torture must be “severe” and that rough treatment, such as police brutality, “while deplorable, does not amount to ‘torture’” for purposes of the Convention.¹⁰ Further, CAT provides that offenses of torture require a specific intent to cause severe pain and suffering; an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of the Convention.¹¹

In accordance with Article 2 of the Convention, parties agree to take effective legislative, administrative, judicial, and other measures to prevent acts of torture from occurring within their territorial jurisdiction. Further, parties are required to ensure that all acts of torture, as well as attempts to commit torture and complicity or participation in torture, are criminal offenses subject to penalty.¹² Importantly, CAT Article 2 makes clear that “no exceptional circumstances whatsoever,” including a state of war or any other public emergency, may be invoked to justify torture.¹³ The State Department has stated that this explicit prohibition of all torture, regardless of the circumstances, was viewed by the drafters of CAT as “necessary if the Convention is to have significant effect, as public emergencies are commonly

⁵ (...continued)
2004).

⁶ CAT at art. 1(1).

⁷ Id.

⁸ President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-20, reprinted in 13857 U.S. Cong. Serial Set at 3 (1990)[hereinafter “State Dept. Summary”].

⁹ CAT at art. 16(2).

¹⁰ State Dept. Summary, *supra* note 8, at 11.

¹¹ See CAT at art. 1.

¹² Id. at art. 4.

¹³ Id. at art. 2(2).

invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.”¹⁴

CAT also imposes specific obligations upon signatory parties with respect to their transfer of individuals to other countries. CAT Article 3 requires that no state party expel, return, or extradite a person to another country where “there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁵ In determining whether grounds exist to believe an individual would be in danger of being subjected to torture, state parties are required to 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.”¹⁶ The State Department has interpreted the words “where applicable” to indicate that competent authorities must decide whether and to what extent these considerations are a relevant factor in a particular case.¹⁷

The Committee Against Torture, the monitoring body created by the state parties to the Convention,¹⁸ has interpreted the obligations of Article 3 as placing the burden of proof on an applicant for non-removal to demonstrate that there are substantial (hereinafter “likely”) grounds to believe that he would be subjected to torture if

¹⁴ State Dept. Summary, *supra* note 8, at 5.

¹⁵ CAT at art. 3(1). There are important distinctions between the protections afforded to aliens under CAT and under general U.S. asylum law. Asylum is a discretionary remedy available to those who have a well-founded fear of persecution abroad. Whereas asylum applicants only need to prove a well-founded fear of persecution on account of their membership in a particular race, nationality, or social or political group, see Immigration and Naturalization Act [hereinafter “INA”] §§ 101(a)(42), 208(b), 8 U.S.C. §§ 1101(a)(42), 1158(b), applicants for protection under CAT must prove that it is more likely than not that they would be tortured if removed to a particular country. Proving that torture would be more likely than not to occur is a more difficult standard to meet than proving that an applicant’s fear is “well-founded,” which only requires that a fear be “reasonable.” See *INS v. Cardoza-Fonseca*, 480 US 421 (1987). In having a higher burden of proof, CAT protection is similar to withholding removal on the basis of prospective persecution. CAT protections and withholding of removal are also similar in that neither form of relief grants the recipient or his immediate family a legal foothold in the United States. Additionally, “torture” is a more particularized act than “persecution.” However, it is important to note that CAT affords certain aliens broader protection than that provided by general asylum law. An alien generally cannot receive asylum or withholding of removal if he, *inter alia*, (1) persecuted another person on account of the person’s social or political group membership; (2) committed a particularly serious crime, making him a threat to the community; or (3) is a danger to the security of the United States. See INA § 208(b)(2), 8 U.S.C. § 1158(b)(2). On the other hand, CAT protections extend to all classes of aliens, including those generally ineligible for asylum.

¹⁶ *Id.* at art. 3(2).

¹⁷ See State Dept. Summary, *supra* note 8, at 7.

¹⁸ See CAT at arts. 17-24. The Committee is not a quasi-judicial or administrative body, but rather a monitoring body with declaratory powers only.

removed to the proposed country.¹⁹ Further, the Committee has interpreted the non-removal provisions of Article 3 to refer to both direct and indirect removal to a state where the individual concerned would likely be tortured, meaning that a state cannot remove a person to a third country when it knows he would subsequently be removed to a country where he would likely face torture.²⁰

Implementation of the Convention Against Torture in the United States

The United States signed CAT on April 18, 1988, and ratified the Convention on October 21, 1994,²¹ subject to certain declarations, reservations, and understandings,²² including a declaration that CAT Articles 1 through 16 were not self-executing, and therefore required domestic implementing legislation.²³ This section will discuss relevant declarations, reservations, and understandings made by the United States to CAT, and U.S. laws and regulations implementing the Convention.

Relevant Declarations, Reservations, and Understandings Conditioning U.S. Ratification of the Convention Against Torture. As previously mentioned, the Senate's advice and consent to CAT ratification was subject to the declaration that the Convention was not self-executing.²⁴ With respect to Article 16 of the Convention, which requires states to prevent lesser forms of cruel and unusual punishment that do not constitute torture, the Senate's advice and consent was based on the reservation that the United States considered itself bound to Article 16 to the extent that such cruel, unusual, and inhumane treatment or punishment was prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.²⁵ The United States also opted out of the dispute-settlement provisions of CAT Article 30,²⁶ though it reserved the right to specifically agree to

¹⁹ United Nations Office of the High Commissioner for Human Rights, Committee Against Torture, Implementation of Article 3 of the Convention in the Context of Article 22, CAT General Comment 1, at ¶ 5 (Nov. 21, 1997), available at [http://unhchr.ch/tbs/doc.nsf/\(symbol\)/CAT+General+comment+1.En?OpenDocument](http://unhchr.ch/tbs/doc.nsf/(symbol)/CAT+General+comment+1.En?OpenDocument). The Committee's interpretation as to the scope of Article 3 was made in the context of CAT Article 22, which permits the Committee, upon recognition by a state party, to receive communications from individuals subject to the state's jurisdiction who claim to be victims of a CAT violation by a state party.

²⁰ *Id.* at ¶ 2.

²¹ *Id.*

²² See Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990) [hereinafter "Sen. Resolution"].

²³ *Id.* at III.(2).

²⁴ *Id.*

²⁵ *Id.* at I.(2).

²⁶ See *id.* at I.(3). CAT article 30 provides that disputes between two or more signatory parties concerning the interpretation and application of the Convention can be submitted to
(continued...)

follow its provisions or any other arbitration procedure in resolving a particular dispute as to the Convention's application.

In providing its advice and consent to CAT, the Senate also provided a detailed list of understandings concerning the scope of the Convention's definition of torture. These understandings are generally reflected via the specific U.S. laws and regulations implementing the Convention. Importantly, under U.S. implementing legislation and regulations, CAT requirements are understood to apply to acts of torture committed by or *at the acquiescence* of a public official or other person acting in an official capacity.²⁷ Thus, persons operating under the color of law do not necessarily need to directly engage in acts of torture to be culpable for them. For a public official to acquiesce to an act of torture, that official must, "prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."²⁸ Subsequent jurisprudence and administrative decisions have recognized that "willful blindness" by officials to torture may constitute "acquiescence" warranting protection under CAT,²⁹ but acquiescence does not occur when a government is aware of third-party torture but unable to stop it.³⁰ In addition, mere noncompliance with applicable legal procedural standards does not *per se* constitute torture.³¹

²⁶ (...continued)

arbitration upon request. CAT at art. 30(1). If, within six months of the date of request for arbitration, the parties are unable to agree upon the organization of the arbitration, any of the parties may refer the dispute to the International Court of Justice. *Id.* Article 30 contains an "opt-out" provision that enabled the United States to make a reservation to CAT's dispute-settlement procedure. *Id.* at art. 30(2).

²⁷ Sen. Resolution, *supra* note 22, at II.(1)(b).

²⁸ *Id.*

²⁹ See, e.g., *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003) (declaring that the correct inquiry in deciding whether a Chinese immigrant was entitled to relief from removal from U.S. under CAT was not whether Chinese officials would commit torture against him, but whether public officials would turn a blind eye to the immigrant's torture by specified individuals); *Ontunez-Turios v. Ashcroft*, 303 F.3d 341 (5th Cir. 2002) (upholding Board of Immigration Appeals' deportation order, but noting that "willful blindness" constitutes acquiescence under CAT); *Bullies v. Nye*, 239 F.Supp.2d 518 (M.D. Pa. 2003) (under CAT-implementing regulations, acquiescence by government to torture by non-governmental agents requires either willful acceptance by government officials or at least turning a blind eye); see also *Pascual-Garcia v. Ashcroft*, 73Fed.Appx. 232 (9th Cir. 2003) (holding that relief under CAT does not require that torture will occur while victim is in the custody or physical control of a public official).

³⁰ See, e.g., *Moshud v. Blackman*, 68 Fed. Appx. 328 (3rd Cir. 2003) (denying alien's claim to reopen removal proceedings to assert a CAT claim based on her fear of female genital mutilation in Ghana, because although the practice was widespread, the Ghanaian government had not acquiesced to the practice because it had been made illegal and public officials had condemned the practice); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) (holding that protection under CAT does not extend to persons fearing entities that a government is unable to control).

³¹ Sen. Resolution, *supra* note 22, at II.(1)(e).

The Senate's advice and consent to CAT was also subject to particular understandings concerning "mental torture," a term that is not specifically defined by the Convention. The United States understands mental torture to refer to prolonged mental harm caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration of mind-altering substances or procedures to disrupt the victim's senses; (3) the threat of imminent death; or (4) the threat of imminent death, severe physical suffering, or application of mind-altering substances to another.

With respect to the provisions of CAT Article 3 prohibiting expulsion or refoulement of persons to states where substantial grounds exist for believing the person would be subjected to torture, the United States declared its understanding that this requirement refers to situations where it would be "more likely than not" that the alien would be tortured, a standard commonly used by the United States in determining whether to withhold removal for fear of persecution.³²

Foreign Affairs Reform and Restructuring Act of 1998. The Foreign Affairs Reform and Restructuring Act of 1998 (Act) announced the policy of the United States not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture.³³

The Act also required relevant agencies to promulgate and enforce regulations to implement CAT, subject to the understandings, declarations, and reservations made by the Senate resolution of ratification.³⁴ In doing so, however, Congress required that, "to the maximum extent consistent" with Convention obligations, these regulations exclude from their protection those aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (INA).³⁵ Section 241(b)(3)(B) acts as an exception to the general U.S. prohibition on the removal of otherwise deportable aliens to countries where they would face persecution. An alien may be removed despite the prospect of likely persecution if the alien:

- (1) assisted in Nazi persecution or engaged in genocide;
- (2) ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

³² Id. at II.(2). See generally *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). This standard is in contrast to the lower standard for determining whether an alien is eligible for consideration for asylum based on a "well-founded fear of persecution" if transferred to a particular country. To demonstrate a "well-founded" fear, an alien only needs to prove that the fear is reasonable, not that it is based on a clear probability of persecution. See *INS v. Cardoza-Fonseca*, 480 US 421 (1987). See also *supra* at note 15.

³³ Pub. L. 105-277 at § 2242(a) [hereinafter "Foreign Affairs Reform and Restructuring Act"].

³⁴ Id. at § 2242(b).

³⁵ Id.

- (3) having been convicted of a particularly serious crime, is a danger to the community of the United States;
- (4) is strongly suspected to have committed a serious nonpolitical crime outside the United States prior to arrival; or
- (5) is believed, on the basis of serious grounds, to be a danger to the security of the United States.³⁶

Aliens who have engaged in terrorist activity, including those who have provided material support to terrorist organizations, are considered a security threat covered under section 241(b)(3)(B), and are thus removable and excludable from entry into the United States despite facing prospective persecution abroad.³⁷ Terrorist activity does not include material support if the Secretary of State or Attorney General, following consultation with the other, concludes in his sole, unreviewable discretion that the definition of “terrorist activity” does not apply.³⁸

The Act generally specifies that no judicial appeal or review is available for any action, decision or claim raised under CAT, except as part of a review of a final order of alien removal pursuant to section 242 of the INA.³⁹

Application of the Convention Against Torture to U.S. Regulations Concerning the Removal of Aliens. The requirements of CAT Article 3 take the form of a two-track system requiring the withholding or deferral of the alien’s removal to the proposed receiving state if it is more likely than not that he would be tortured there. Reliance on these protections by aliens in removal proceedings has been frequent, though usually unsuccessful. In 2002, for example, immigration courts completed 24,576 CAT applications, of which roughly 3 percent were granted.⁴⁰ DHS has estimated that in the first four years following the

³⁶ INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

³⁷ See INA §§ 237(a)(4)(B), 241(b)(3)(B), 8 U.S.C. §§ 1227(a)(4)(B), 1231(b)(3)(B). Aliens to be designated as engaging in “terrorist activity” include those who, acting as an individual or part of an organization, (1) commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepare or plan a terrorist activity; (3) gather information on potential targets for a terrorist activity; (4) solicit funds for a terrorist activity or organization, unless it can be demonstrated that the alien did not know and should not reasonably have known that solicitation would further terrorist activity; (5) solicit any individual for terrorist activity or membership, unless it can be demonstrated that the alien did not know and should not reasonably have known that solicitation would further terrorist activity; or (6) commit an act that the actor knows, or reasonably should know, affords material support to the terrorist organization, including providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives, or training. See INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

³⁸ INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

³⁹ Foreign Affairs Reform and Restructuring Act, *supra* note 33 at § 2242(d).

⁴⁰ U.S. Department of Justice, Executive Office of Immigration Review, *Statistical Yearbook 2002*, at A-1 (Apr. 2003).

implementation of regulations implementing CAT Article 3, approximately 1,700 aliens were granted deferral or withholding of removal based on CAT protections.⁴¹

General Removal Guidelines Concerning the Convention Against Torture. CAT-implementing regulations concerning the removal of aliens from the United States are primarily covered under sections 208.16-208.18 and 1208.16-208.18 of title 8 of the Code of Federal Regulations (C.F.R.), and prohibit the removal of aliens to countries where they would more likely than not be subjected to torture. The DHS has primary day-to-day authority to implement and enforce these regulations, with the DOJ, through the Executive Office of Immigration Review (EOIR), having adjudicative authority over detention and removal. For purposes of these regulations, “torture” is understood to have the meaning prescribed in CAT Article 1, subject to the reservations and understandings, declarations, and provisos contained in the Senate’s resolution of ratification of the Convention.⁴² In accordance with this definition, indefinite detention in substandard prison conditions has been recognized as not constituting torture when there is no evidence that such detention and conditions are intentional and deliberate.⁴³ In at least certain circumstances, however, EOIR or courts reviewing EOIR rulings have found that rape,⁴⁴ domestic violence permitted by local law enforcement,⁴⁵ and intentional and repeated cigarette burns coupled with severe beatings,⁴⁶ may constitute torture under the Convention and prevent an alien’s removal to a particular country.

Generally, an applicant for non-removal under CAT Article 3 has the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country.⁴⁷ If credible, the applicant’s testimony may be sufficient to sustain this burden without additional corroboration.⁴⁸ In assessing whether it is “more likely than not” that an applicant would be tortured if removed to the proposed country, all

⁴¹ See Immigration Relief under the Convention Against Torture for Serious Criminals and Human Rights Violators; Hearing Before the House Subcomm. on Immigration, Border Security, and Claims of the House Comm. on the Judiciary, 108th Cong., 1st Sess. 45, Serial No. 34, at 11 (2003) (prepared statement of C. Stewart Verdery, Asst. Secretary for Policy and Planning, Border and Transportation Security Directorate, U.S. Dept. of Homeland Security) [hereinafter “DHS Testimony”].

⁴² 8 C.F.R. § 208.18(a). For example, for purposes of U.S. rules and regulations concerning the expulsion of aliens, torture is specified as being an “extreme” form of cruel and unusual punishment that “does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture.” 8 C.F.R. § 208.18(a)(2).

⁴³ Matter of J-E-, 23 I&N Dec. 291 (Board of Immigration Appeals (BIA) 2002).

⁴⁴ See *Zubeda v. Ashcroft*, 333 F.3d 463 (3rd Cir. 2003).

⁴⁵ See *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (rejecting applicant’s CAT claim on other grounds).

⁴⁶ See *Al-Shaer v. INS*, 268 F.3d 1143 (9th Cir. 2001).

⁴⁷ 8 C.F.R. § 208.16(c)(2).

⁴⁸ *Id.* See also *Sarsoza v. INS*, 22 Fed. Appx. 719 (9th Cir. 2001) (recognizing that BIA has discretion in determining whether or not applicant’s credible testimony satisfies burden for non-removal under CAT).

evidence relevant to the possibility of future torture is required to be considered, including, *inter alia*, (1) evidence of past torture inflicted upon the applicant; (2) a pattern or practice of gross human rights violations within the proposed country of removal; and (3) other relevant information regarding conditions in the country of removal.⁴⁹ The Board of Immigration Appeals (BIA), the appellate administrative body within EOIR, has recognized that evidence concerning the likelihood of torture must be particularized; evidence of torture of similarly situated individuals is insufficient alone to demonstrate that it is more likely than not that an applicant would be tortured if removed to a proposed country.⁵⁰

If the immigration judge considering a CAT application determines that an alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention.⁵¹ Protection will either be granted through the withholding of removal or deferral of removal. Unless the alien is of a class subject to mandatory denial of withholding of removal on security, criminal, or related grounds, as provided by section 241(b)(3)(B) of the INA, CAT-based relief is granted in the form of withholding of removal. However, aliens falling under a category listed under INA section 241(b)(3)(B) cannot have their removal withheld, but only deferred.⁵² A number of courts has recognized that an alien's inability to establish a more general claim for asylum, which is based on a well-founded fear of persecution on account of belonging to one of five designated types of groups, does not necessarily preclude a separate claim of relief under CAT.⁵³

Deferral of removal is a lesser protection than the withholding of removal, and arguably reflects Congress's intent that aliens falling under a category established by INA section 241(b)(3)(B), "to the maximum extent possible," be excluded from protections afforded to other classes of aliens under regulations implementing CAT requirements.⁵⁴ Aliens granted deferral of removal to the country where they are more likely than not to be tortured may be removed at any time to another country where they are not likely to be tortured.⁵⁵ Further, such aliens are subject to post-

⁴⁹ 8 C.F.R. § 1208.16(c)(3).

⁵⁰ See *Matter of M-B-A*, 23 I&N Dec. 474 (BIA 2002).

⁵¹ 8 C.F.R. § 1208.16(c)(4).

⁵² *Id.*

⁵³ See, e.g., *Li v. INS*, 33 Fed. Appx 353 (9th Cir. 2002) (affirming immigration judge's decision denying relief under CAT, but noting that failure of petitioner to meet general standard for asylum eligibility did not preclude, separate, distinct relief available under CAT); *Xu v. INS*, 18 Fed. Appx. 542 (9th Cir. 2001) (noting that the BIA erred in concluding that because petitioner failed to establish asylum eligibility, he necessarily failed to establish a *prima facie* case for relief under CAT); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) (holding that inability to state cognizable asylum claim does not necessarily preclude relief under CAT Article 3).

⁵⁴ Foreign Affairs Reform and Restructuring Act, *supra* note 33, at § 2242(d).

⁵⁵ See 8 C.F.R. § 208.17(b)(2).

removal order detention for such periods as prescribed by regulation.⁵⁶ Deferral may be terminated either at the request of the alien or on a determination by an immigration judge that the alien would no longer likely be tortured in the country to which removal has been deferred.⁵⁷

Summary Exclusion of Arriving Aliens Inadmissible on Security and Related Grounds. U.S. law designates certain arriving aliens as inadmissible on security and related grounds, including having engaged in terrorist activities.⁵⁸ The regulatory framework for removal proceedings for such aliens, outlined in 8 C.F.R. section 235.8, is more streamlined than the general regulatory framework for alien removal, providing more discretion to the Attorney General or DHS Secretary with respect to the method in which CAT obligations are assessed.

When an EOIR judge or, more likely, DHS Bureau of Customs and Border Protection (CBP) officer *suspects* that an arriving alien is inadmissible on security or related grounds, the officer or judge is required to temporarily order the alien removed and report such action promptly to the CBP district director with administrative jurisdiction over the place where the alien has arrived or is being held.⁵⁹ If possible, the relevant officer or judge must take a brief statement from the alien, and the alien must be notified of the actions being taken against him and of his right to submit a written statement and additional information for consideration by the Attorney General, who has authority to assess whether grounds exist to remove the alien.⁶⁰ The CBP district director's report is forwarded to the regional director for further action. Essentially, this process ensures that final decisions to remove aliens on security or related grounds are made at the highest levels.

If the Attorney General concludes, on the basis of confidential information, that the alien is inadmissible on security or terror-related grounds and the release of such information would be prejudicial on security or safety grounds, the CBP regional director is authorized to deny any further inquiry as to the alien's status and either order the alien removed or order disposal of the case as the director deems appropriate.⁶¹ If the alien's designation as inadmissible is based on non-confidential information, however, the regional director has discretion to either conduct a further examination of the alien concerning his admissibility or refer the alien's case to an immigration judge for a hearing prior to ordering removal.⁶² The regional director's written, signed decision must be served to the alien unless it contains confidential information prejudicial to U.S. security, in which case the alien shall be served a

⁵⁶ See 8 C.F.R. § 241.13-14.

⁵⁷ See 8 C.F.R. §§ 208.17(d)-(e).

⁵⁸ INA § 212(a)(3), 8 U.S.C. § 1182(a)(3).

⁵⁹ 8 C.F.R. § 235.8(a).

⁶⁰ *Id.*; INA § 235(c)(2)(B), 8 U.S.C. § 1225(c)(2)(B).

⁶¹ See 8 C.F.R. § 235.8(b)(1).

⁶² 8 C.F.R. § 235.8(b)(2).

separate written order indicating disposition of the case, but with confidential information deleted.⁶³

The regional director has broad discretion in determining application of CAT Article 3 to removal decisions made under section 235.8. The regulatory provisions of part 208 relating to consideration or review by EOIR are explicitly deemed inapplicable in the cases described above.⁶⁴ Instead, the regional director is generally required “not to execute a removal order under this section under circumstances that violate...Article 3 of the Convention Against Torture.”⁶⁵ No further guidance is provided with respect to determining whether or not an alien is more likely than not to be tortured in the proposed country of removal. Unlike in cases involving CAT applications of non-arriving aliens, the regional director’s decision for arriving aliens deemed inadmissible on security or related grounds is final when it is served upon the alien, with no further administrative right to appeal.⁶⁶

Effect of Diplomatic Assurances on Removal Proceedings. U.S. regulations implementing CAT include a provision concerning “diplomatic assurances,” which may terminate deliberation of an alien’s claim for non-removal. Pursuant to this provision, the Secretary of State is permitted to “forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.”⁶⁷ If such assurances are forwarded for consideration to the Attorney General or DHS Secretary, the official to whom this information is forwarded shall then determine, in consultation with the Secretary of State, whether such assurances are “sufficiently reliable” to permit the alien’s removal to that country without violating U.S. obligations under CAT Article 3.⁶⁸ If such assurances are provided, an alien’s claims for protection under Article 3 “shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer” and the alien may be removed.⁶⁹

It should be noted that CAT Article 3 provides little guidance as to the application of diplomatic assurances to decisions as to whether to remove an alien to a designated country. While Article 3 obligates signatory parties to take into account the proposed receiving state’s human rights record, it requires the proposed sending state take into account “all relevant considerations” when assessing whether to remove an individual to the proposed receiving state.⁷⁰ Further, Article 3 does not provide guidelines for how these considerations should be weighed in determining

⁶³ 8 C.F.R. § 235.8(b)(3).

⁶⁴ 8 C.F.R. § 235.8(b)(4).

⁶⁵ Id. See also 8 C.F.R. § 208.18(d).

⁶⁶ 8 C.F.R. § 235.8(c).

⁶⁷ 8 C.F.R. § 235.8(c)(1).

⁶⁸ 8 C.F.R. § 235.8(c)(2).

⁶⁹ 8 C.F.R. § 208.18(c)(3).

⁷⁰ CAT at art. 3(2).

whether substantial grounds exist to believe an alien would be tortured in the proposed receiving state. Accordingly, it does not necessarily appear that the use of diplomatic assurances by the U.S. conflicts with its obligations under CAT. However, the United States has an obligation under customary international law to execute its Convention obligations in good faith,⁷¹ and is therefore required under international law to exercise appropriate discretion in its use of diplomatic assurances. It could be argued, for example, that if a country demonstrated a consistent pattern of acting in a manner contrary to its diplomatic assurances to the United States, the United States would need to look beyond the face of these assurances before permitting transfer to that country.

Application of the Convention Against Torture in Extradition Cases.

CAT Article 3 also has implications upon the extradition policy of the United States. Pursuant to sections 3184 and 3186 of the United States Criminal Code, the Secretary of State is responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. Decisions on extradition are presented to the Secretary of State following a fugitive being found extraditable by a United States judicial officer.⁷² In cases where torture allegations are made or otherwise brought to the State Department's attention, appropriate Department officers are required to review relevant information and prepare for the Secretary a recommendation as to whether or not to extradite and whether to surrender the fugitive subject to certain conditions, such as an assurance from the requesting state that the person will not be tortured.⁷³

As with U.S. regulations concerning the deportation of aliens, regulations concerning the extradition of fugitives reflect the Convention requirements. Before permitting the extradition of a person to another country, the State Department must determine whether the person facing extradition is more likely than not to be tortured in the requesting state if extradited.⁷⁴ For the purpose of determining whether such grounds exist, the State Department must 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."⁷⁵ Extraditions are prohibited in cases where the State Department concludes that it is more likely than not that the person facing extradition would be tortured.⁷⁶ A person subject to extradition may petition the courts for review under CAT, and the courts

⁷¹ See Restatement (Third) of Foreign Relations § 321 (1987) (Recognizing that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith").

⁷² 22 C.F.R. § 95.2(a).

⁷³ *Id.*

⁷⁴ 22 C.F.R. § 95.2(b).

⁷⁵ 22 C.F.R. § 95.2(a)(2).

⁷⁶ 22 C.F.R. § 95.2(a)(2).

may set aside extradition decisions by the Secretary that are not in accordance with U.S. laws implementing CAT.⁷⁷

Criminalization of Torture Occurring Outside the United States.

Articles 4 and 5 of CAT obligate each state party to criminalize torture and establish jurisdiction over offenses when such offenses are (1) committed within their territory or aboard a registered vessel or aircraft of the state; (2) committed by a national of the state; or (3) are committed by a person within its territory and the state chooses not to extradite him.⁷⁸ Following ratification of the Convention, the United States enacted section 2340A of the United States Criminal Code to criminalize acts of torture occurring outside its territorial jurisdiction.⁷⁹ Pursuant to section 2340A, any person who commits or attempts to commit an act of torture outside the United States is subject to a fine and/or imprisonment for up to 20 years, except in circumstances where death results from the prohibited conduct, in which case the offender faces life imprisonment or the death penalty.⁸⁰ Persons who conspire to commit an act of torture outside the United States are generally subject to the same penalties faced by those who commit or attempt to commit acts of torture, except that they cannot receive the death penalty.⁸¹ The United States claims jurisdiction over these prohibited actions when (1) the alleged offender is a national of the United States or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or offender.⁸² A legal search by CRS did not surface any cases in which the DOJ relied on this statutory authority.

Potential Issues Arising Under Implementation of the Convention Against Torture

Implications of the Convention Against Torture on U.S. Policy Concerning the U.S. Detention Policy. The provisions of CAT Article 3 appear to protect all individuals from removal to a state where they are likely to be tortured, regardless of whether these individuals engaged in criminal practices themselves.⁸³ However, while CAT obligates the United States not to remove aliens to countries where they are likely to be tortured, the Convention does not require the United States to permit these aliens' open presence in its territory. The question thus occurs, however, as to what happens in the case of an alien who is deportable for an immigration violation but whose removal is effectively barred because of CAT.

⁷⁷ See *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) (finding that the duty to consider prospective torture in making an extradition decision is a clear and nondiscretionary duty, and therefore such consideration is subject to the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq.).

⁷⁸ See CAT at art. 5.

⁷⁹ Prior to ratifying CAT, acts of torture committed within the United States were already subject to various state and federal criminal statutes.

⁸⁰ 18 U.S.C. § 2340A(a).

⁸¹ *Id.*

⁸² 18 U.S.C. § 2340A(b).

⁸³ See CAT at art. 3(1).

In *Zadvydas v. Davis*, the Supreme Court held that Due Process requirements of the U.S. Constitution require that the detention period of deportable aliens following a final order of removal is limited to such duration as is “reasonably necessary to bring about that alien’s removal from the United States, and does not permit indefinite detention.”⁸⁴ Recent decisions at the federal appellate level also suggest that there might be certain categories of inadmissible and criminal aliens that cannot be detained indefinitely.⁸⁵ It is important to note, however, that despite generally rejecting the practice of indefinite detention, the *Zadvydas* Court nevertheless suggested that indefinite detention of particular, deportable aliens might be warranted in limited cases where the alien is “specially dangerous.”⁸⁶ Though the Court only specifically mentioned mental illness as a special circumstance perhaps warranting indefinite detention, it appears that aliens detained on security or related grounds, such as terrorists, might also be considered “specially dangerous” and warrant indefinite detention as well.

Following the Court’s ruling in *Zadvydas*, new regulations were issued to comply with the Court’s holding.⁸⁷ After a six-month detention period, which the *Zadvydas* Court found to be presumptively reasonable, an alien’s request for release from detention, accompanied by evidence that his removal would not otherwise be effected in the reasonably foreseeable future, may be reviewed by the DHS’s Bureau of Immigration and Customs Enforcement (ICE).⁸⁸ Following consideration of this evidence, the ICE is required to issue a written decision either ordering the alien released or continuing his detention.⁸⁹ DHS regulations permit the continued detention of certain classes of aliens on account of special circumstances, including, *inter alia*, (1) aliens detained on account of serious adverse foreign policy consequences of release; (2) aliens who have committed certain violent crimes; and (3) aliens with a mental condition that makes them prone to violence.⁹⁰ These regulations applying the standards announced in *Zadvydas* do not apply to aliens

⁸⁴ 533 U.S. 678, 679 (2001). For a more detailed background on U.S. detention policy of noncitizens, see CRS Report RL31606, Detention of Noncitizens in the United States (Nov. 4, 2002).

⁸⁵ 85 See, e.g., *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) (holding that inadmissible alien who did not pose security concern could not be detained indefinitely post-removal proceedings). The application of *Zadvydas* to inadmissible aliens who were part of the Mariel boat lift has resulted in conflicting circuit decisions. Compare *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (holding that a Cuban citizen who was part of the Mariel boatlift could not be indefinitely detained) with *Sierra v. Ashcroft* (3rd Cir. 2003) (upholding continued detention of unadmitted, inadmissible alien who entered United States as part of Mariel boat lift). In January 2004, the Supreme Court agreed to hear a case concerning the indefinite detention of such aliens, but it has yet to issue a decision. See *Benitez v. Wallis*, 124 S.Ct. 1143 (Mem.) (2004).

⁸⁶ *Zadvydas*, 533 U.S. at 679.

⁸⁷ See 8 C.F.R. §§ 241.13-14.

⁸⁸ 8 C.F.R. §§ 241.13(b)-(e).

⁸⁹ 8 C.F.R. § 241.13(e).

⁹⁰ See 8 C.F.R. § 241.14.

seeking initial entry into the United States,⁹¹ who generally lack constitutional protections.⁹²

As a result of the *Zadvydas* decision, certain criminal aliens afforded non-refoulement protection under CAT may be required to be eventually released from detention, even though such aliens would otherwise be deemed deportable.⁹³ According to the DHS, “in all but the most serious cases, a criminal alien who cannot be returned—regardless of the reason—may be subject to release after six months.”⁹⁴ In practice, the DHS has stated that less than one percent of criminal aliens who have received CAT protection have been released from custody following a final order of removal.⁹⁵ However, given the Court’s ruling in *Zadvydas* and subsequent jurisprudence suggesting that the use of indefinite detention may be severely limited, the magnitude of this potential obstacle to alien removal may increase over time.

It is important to note that CAT only prohibits signatory parties from expelling persons to states where they are likely to be tortured—it does not provide aliens with protection from removal to states where they will not be tortured. Reaching agreements with countries to permit the removal of criminal aliens to these countries (possibly for the purpose of prosecuting them), subject to the condition that they will not be tortured, could be one possible method for handling this potential problem, although it is unclear whether other states would be receptive to such agreements.

Implications of the Convention Against Torture on the Practice of “Extraordinary Renditions”. When immigration officials identify a suspected foreign terrorist or similar security threat at a port of entry, the government’s interest in the alien likely extends beyond simply assuring that the suspect does not enter the United States. Security and criminal law enforcement interests may also come into play. Controversy over how CAT applies in reconciling these diverse interests is illustrated by the case of Maher Arar.

⁹¹ See 8 C.F.R. § 241.13(b)(3)(i).

⁹² See, e.g., *Zadvydas*, 533 U.S. at 693 (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, (1950) (“At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660 (1892) (“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe”).

⁹³ See *Matter of Kebbem* (BIA 2000) (upholding CAT relief for a Gambian national who had fled to the United States after murdering another man); *Matter of Gazlev/Gazieva* (BIA 2002) (permitting CAT relief for man implicated in a shootout resulting in five dead in Uzbekistan).

⁹⁴ DHS Testimony, *supra* note 41, at 13.

⁹⁵ *Id.* at 11.

In September 2002, U.S. authorities arrested Mr. Arar, a Canadian citizen born in Syria, at John F. Kennedy Airport in New York while he was waiting for a connecting flight to Canada. According to news reports, U.S. officials allege that Mr. Arar was on a terrorist watch list after “multiple international intelligence agencies” linked him to terrorist groups, though Mr. Arar has denied any knowing connection to terrorism.⁹⁶ Though the particulars remain unclear, Mr. Arar alleges that he was detained for several days of interrogation in the United States and asked to voluntarily agree to be transferred to Syria. Mr. Arar claims he refused to approve such transfer, but was nevertheless transferred to Jordan and then to Syria, where he was reportedly imprisoned for ten months.⁹⁷ At the time of Mr. Arar’s transfer, Syria was listed by the State Department as a regular practitioner of torture.⁹⁸ Syria is not a party to CAT. Upon release and his subsequent return to Canada, Mr. Arar claims that he was tortured by Syrian officials in an effort to compel him to confess to terrorist activities. Canada has begun a public inquiry as to what role, if any, Canada played in Mr. Arar’s transfer to Syria.

In January 2004, Mr. Arar filed a civil suit against Attorney General John Ashcroft, FBI Director Robert Mueller, and a number of other federal officials for their role in Mr. Arar’s transfer and subsequent, alleged torture.⁹⁹ Attorney General Ashcroft is quoted as stating in late 2003 that “In removing Mr. Arar from the U.S., we acted fully within the law and applicable treaties and conventions.”¹⁰⁰ The United States reportedly received assurances from Syria that Mr. Arar would not be tortured prior to removing him there, and Syria has reportedly stated that Mr. Arar was not tortured.¹⁰¹ It is unclear whether Mr. Arar’s rendition complied with any legal procedures governing covert renditions that are not handled through either extradition or the general process for alien removal. Further, there appears to be no public information concerning what assurances, if any, were given by Syria to the United States prior to Mr. Arar’s transfer.

It is presently unclear what legal authority controlled the removal of Mr. Arar to Syria. Mr. Arar’s lawsuit claims in part that his removal was in violation of

⁹⁶ DeNeen L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria*, Wash. Post, Nov. 5, 2003, at A1.

⁹⁷ DeNeen L. Brown, *Ex-Detainee Details Fearful Path to Syria*, Wash. Post, Nov. 12, 2003, at A14.

⁹⁸ U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2002* (Mar. 31, 2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm> (last accessed Feb. 26, 2004).

⁹⁹ A copy of Mr. Arar’s complaint, filed with the U.S. District Court for the Eastern District of New York, is available at http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf (last accessed Feb. 26, 2004) [hereinafter “Arar Complaint”].

¹⁰⁰ *Canadian Sues U.S. Officials*, Wash. Post, Jan. 23, 2004, at A17.

¹⁰¹ DeNeen L. Brown, *Canadian Sent to Middle East Files Suit*, Wash. Post, Nov. 25, 2003, at A25.

regulations concerning the removal of arriving aliens.¹⁰² On the other hand, it is possible that Mr. Arar's rendition was conducted at least in part pursuant to a law-enforcement action relating to the war on terror rather than pursuant to U.S. immigration laws. Whether Mr. Arar's removal to Syria constituted a violation of U.S. obligations under CAT and CAT-implementing laws and regulations may require a finding of fact as to the particular nature of the assurances provided to the United States and the role they played in the decision to remove Mr. Arar.

It is important to note that both CAT and section 2340A of the U.S. Criminal Code do not appear to preclude the United States from removing a person to a country where he may suffer injury not rising to the level of torture. As discussed previously, CAT recognizes that there are lesser forms of cruel and unusual punishment than torture.¹⁰³ Despite this recognition, CAT Article 3 only obligates parties to refrain from transferring a person to a country where he is likely to face torture, as opposed to lesser forms of mistreatment. Likewise, "torture" is defined under the U.S. Criminal Code as constituting an infliction of "severe" pain and suffering.¹⁰⁴ It therefore appears that a person could acquiesce to certain acts by a foreign government, such as harsher interrogation techniques than those employed by the United States that nevertheless do not rise to the level of torture, and not violate the requirements of section 2340A.

It is arguably unclear as to whether CAT obligations would limit a country's ability to seize suspects *outside* of its territorial jurisdiction and directly render them to another country. The *Washington Post* has reported that U.S. intelligence and law-enforcement officials have, on occasion, seized a terrorist suspect abroad and rendered him to a foreign intelligence service known to employ torture with a list of questions that these U.S. officials want answered.¹⁰⁵

Presuming for purposes of discussion that such renditions occur, the question as to whether such actions would violate U.S. obligations under CAT is subject to some debate. Some commentators have alleged that the position of recent U.S. Administrations appears to be that protections afforded under CAT and other human rights treaties do not apply extraterritorially.¹⁰⁶ Indeed, it could be argued that, based on the explicit language of CAT, its provisions do not apply to certain actions taken by signatory parties outside of their own territorial jurisdiction. While CAT Article 2 requires each signatory party to take effective measures to prevent torture, for example, this obligation is only with respect to "acts of torture *in any territory under*

¹⁰² See Arar Complaint, *supra* note 98.

¹⁰³ See *supra* at pp. 1-2.

¹⁰⁴ 18 U.S.C. § 2340(1).

¹⁰⁵ See Dana Priest and Barton Gellman, U.S. Decries Abuse but Defends Interrogations, *Wash. Post.*, Dec. 26, 2002, at A1.

¹⁰⁶ See Joan Fitzpatrick, Rendition and Transfer in the War against Terrorism: Guantanamo and Beyond, 25 *Loy. L.A. Int'l & Comp. L. Rev.* 457, 480-81 (Summer 2003); Theodor Meron, Extraterritoriality of Human Rights Treaties, 89 *Am. J. Int'l Law* 78 (1995) (discussing human rights treaty application with respect to U.S. action towards Haiti in 1994).

its jurisdiction.”¹⁰⁷ Further, it could be argued that the provisions of CAT Article 3 do not apply to extraordinary renditions occurring outside the United States. Article 3 states that no party shall “expel, return (‘refouler’) or extradite a person” to a country where there are substantial grounds to believe that he will be tortured.¹⁰⁸ It could be argued, however, that extraterritorial, irregular renditions are not covered by this provision. Seizing a person in one country and transferring him to another would arguably not constitute “expelling” the suspect. So long as these persons were rendered to countries where they had not previously resided, it also could not be said that the United States “returned” these persons to countries where they faced torture. In addition, if such renditions were not executed via an extradition agreement, it could be argued they did not constitute extraditions for the purposes of Article 3. Accordingly, it could be argued that the United States would not violate the explicit language of Article 3 if it rendered persons to countries where they faced torture so long as no part of these renditions occurred within the territorial jurisdiction of the United States.

Opponents of this interpretation could argue that such a narrow interpretation of CAT defeats the purpose of the Convention’s efforts to combat torture and is therefore improper. The fact that CAT requires member parties to take legal steps to eliminate torture within their respective territories and to impose criminal penalties on torture offenders, coupled with the Convention’s statement that “no exceptional circumstances whatsoever” can be used to justify torture, arguably imply that a state party may never exercise or be complicit in the use of torture, even when it occurs extraterritorially. It could be further argued that the drafters of CAT did not explicitly discuss extraterritorial renditions because they were either not contemplated or, in cases where such renditions might occur absent the consent of the hosting country, these actions were arguably already understood to be impermissible under international law.¹⁰⁹ Opponents of a narrow interpretation of CAT would likely argue that it is contrary to the purpose of CAT to interpret the Convention as prohibiting legal transfers of persons to states where they face torture while still allowing such transfers through other, non-legal channels.

¹⁰⁷ CAT at art. 2(1) (emphasis added).

¹⁰⁸ Id. at art. 3(1).

¹⁰⁹ In 1980, the DOJ Office of Legal Counsel issued an opinion that irregular renditions were a violation of customary international law because it would be an invasion of sovereignty for one country to carry out law enforcement activities in another without that country’s consent. Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B. Op. Off. Legal Counsel 543 (1980). Article 2(4) of the U.N. Charter, the body under which CAT was implemented, prohibits member states from violating the sovereignty of another state. In 1989, five years after CAT was established and a year after the United States signed the Convention, the Office of Legal Counsel repudiated the 1980 opinion, though not on the grounds that such renditions may violate customary international law. Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Activities, 13 Op. Off. Legal Counsel 163 (1989). While upholding court jurisdiction over a Mexican national brought to the United States via rendition, the Supreme Court nevertheless noted that such renditions were potentially “a violation of general international law principles.” U.S. v. Alvarez-Machain, 505 U.S. 655, 669 (1992).

CAT Article 4 and corresponding domestic U.S. legislation perhaps definitively resolve the question of CAT applicability to renditions occurring extraterritorially. Article 4 requires that “all acts of torture,” as well as attempted torture and acts complicit with torture, are made offenses under the criminal law of each signatory party, with no limitation made with respect to the party’s territorial jurisdiction.¹¹⁰ Section 2340A of the United States Criminal Code, which serves as enacting legislation for this requirement, provides the United States with criminal jurisdiction over acts of torture occurring outside the United States when the offender is found within U.S. territory. This jurisdiction extends to persons who conspire to commit acts of torture abroad. Although the scope of section 2340A apparently remains untested, it appears that based on an express reading of the statute, U.S. officials could not conspire with foreign intelligence services to torture persons seized outside of the United States. As mentioned previously, however, the express language of section 2340A does not appear to prevent the United States from rendering a person to another country so that he could be treated harshly, so long as such treatment does not rise to the level of torture.

¹¹⁰ CAT at art. 4.