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Kaitlyn E. Tucker
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Envio dos trabalhos:
Abduction, Torture, Interrogation: An Argument Against Extraordinary Rendition*

Kaitlyn E. Tucker**

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy…to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution1,2.

ABSTRACT

The dual aims of this paper are (1) to assert that the United States’ extraordinary rendition program stands in stark contrast to its international obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”), and (2) to suggest that providing specific civil remedies to the individuals who endured the program’s effects will provide deterrence from continuing the program. First, this paper defines the extraordinary rendition program and explains how it originated. Second, this paper argues that the extraordinary rendition program’s costs outweigh its benefits in the War on Terror through a specific focus on how it violates the Torture Convention and invites retribution. Finally, this paper sets forth changes to create disincentives for using the program – namely, altering the state secrets privilege and allowing corporations involved with the program to be sued – and suggests that returning to older practices such as irregular rendition could adequately meet the goals of extraordinary rendition with fewer human rights violations.

INTRODUCTION

An American citizen waits patiently in an airport terminal in Jordan for a flight back to the United States. Several men – Jordanian officials – are watching the American and waiting for the right moment to approach him. The American gets up and starts to walk away, perhaps to get a cup of coffee. The Jordanian officials stop the American quickly and take him to a secluded part of the airport. For the next several days, the Jordanians question the American relentlessly, trying to discover his connection to the torture of hundreds of Muslim and Middle Eastern individuals. They do not let him call the American consulate, an attorney, or any of his family members. After several days of non-stop interrogation, the Jordanians tell the American he is going home. They turn the American over to a group of Pakistani men who blindfold him, take him to a secluded airstrip, beat him, sodomize him, and sedate him before they put him on the plane. When the American regains full consciousness, he realizes that he is not in America. Instead, he is somewhere in Eastern Europe, forced

1 United States v. Toscanino
2 United States v. Toscanino, 500 F.2d 267, 274 (2d Cir. 1974)(quoting Olmstead v. United States, 277 U.S. 438 at 484-485 (1928)).
to spend the majority of his time locked in a very small underground cell.

For the next year, the American withstands severe interrogation techniques by the Pakistani men, who are members of Pakistan’s intelligence agency. These agents keep the American naked and exposed most of the time.3 On interrogation days, the Pakistani intelligence officers beat him, wall him,4 and force him into stress positions. The American endures sleep deprivation and waterboarding. The Pakistani intelligence officers specifically designed each extreme interrogation technique used to create the dependence necessary to collecting intelligence in a sustainable way.5

Finally, the Pakistanis release the American, broken after the year of unmitigated suffering. The American has precious few opportunities to receive a remedy for the yearslong torture and interrogation he endured in Pakistani custody. The Pakistani courts refuse to hear the case because it could endanger national security, and the Pakistani government claims that the acts were not violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”)6 because they did not take place in Pakistan.

Although American citizens have not faced scenarios like the one described above, American officers and agents have carried out missions similar to the one described above. This process, known as extraordinary rendition,7 occurs when the government agents of one nation to take physical custody of an individual and bring that person into another country for intense interrogation outlawed by the abducting nation’s laws. Over the last twenty years, American officials have used extraordinary rendition to break up terrorist cells in the Middle East, to prevent these groups from engaging in more terrorist attacks, and to circumvent bringing any of these individuals into the United States for a criminal trial.

Born out of a policy known as irregular rendition, this particularly extreme procedure may help bring about enormous results in America’s War on Terror, but it leaves the United States vulnerable in a variety of ways. The Torture Convention does not allow an individual to be tortured for any reason.8 Even beyond the breaches to the Torture Convention, the process of extraordinary rendition is diplomatically volatile and is more likely to result in retaliation and retribution.9 As a result, the United States’ current support and practice of extraordinary rendition for suspected terrorists is more dangerous than its potential results are worth.

This paper argues that the United States should stop using extraordinary rendition as a method to gain information from suspected terrorists. The extraordinary rendition program comes with detrimental ramifications in the international community—far beyond justifying any potential value. Instead, the United States government needs to create disincentives to continue the program in its current state through a variety of legal remedies for extraordinary rendition survivors. In addition, the United States government could revert to former programs that do not violate human rights.

Part I of this paper provides an overview and explanation of America’s policy on rendition. Specifically, Part I describes the two different types of extraordinary rendition—rendition to other countries for interrogation and rendition to American-run black sites.10 Addi-

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3 See International Committee of the Red Cross Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody (Feb. 2007) assets.nybooks.com/media/doc/2010/04/22/ircr-report.pdf (last visited Oct. 2, 2012) (“The most common method of ill-treatment noted during the interviews with the fourteen was the use of nudity. Eleven of the fourteen alleged that they were subjected to extended periods of nudity during detention and interrogation, ranging from several weeks continuously up to several months intermittently.”)


8 Torture Convention, supra note 5, Art. 2, ¶ 2.

9 Tococan, supra note 1. (“If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy…to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.”)

10 See Ingrid Dettter Frankopan, Extraordinary Rendition and the Law of War, 33 N.C. J. Int’l L. & COM. REG. 657, 675-77 (Summer 2008). Some detainees are, according to reports, taken through secret de-
tionally, this section follows the civil suit filed by El-Masri, an innocent man subjected to an extraordinary rendition and torture at a black site.

Part II argues why the extraordinary rendition program’s cost outweighs any potential benefits to the War on Terrorism. Specifically, this section shows how the program violates the Torture Convention, despite American arguments to the contrary. Additionally, this section argues that through violating the Torture Convention and inviting retribution, extraordinary rendition’s costs outweigh the benefits.

Finally, Part III suggests ways to create disincentives for extraordinary rendition as an effort to rectify the damage caused by its use. The American government can alter how the judicial system treats the civil suits brought by extraordinary rendition’s victims and, thus, establish disincentives for the program. This section also argues that the American government could achieve its preventative goals better by returning to older practices. Finally, this section argues that the Committee Against Torture must amend the Torture Convention to prevent further confusion on what is or is not a violation under its obligations.

1. AMERICAN EXTRAORDINARY RENDITION

Extraordinary rendition occurs when government agents from one country detain an individual suspected to be a terrorist in another country, kidnap that individual, and deliver him to yet another country for torturous interrogation. In terms of American policies, this practice grew out of another practice known as irregular rendition. An irregular rendition occurs when officers or agents of one country enter another country, abduct a suspected criminal, and return that person to their country so that he or she can face criminal prosecution. Extraordinary rendition and irregular rendition are both problematic alternatives to extradition because they circumvent the internationally accepted processes for gaining control of another country’s citizens.

What began as a model of the “bad capture, good detention” thought for gaining jurisdiction over a suspected criminal has evolved into even larger, more extreme exertion of American authority. The United States government employed two forms of extraordinary rendition over the last twenty years. These two forms need to be distinguished from each other. The following subsections distinguish the two forms of extraordinary rendition and highlight rendition to black sites as the most severe and problematic. The last subsection documents the experiences of one individual who endured captivity in an American run black site facility.

1.1 Extraordinary Rendition With Assurances

Under the first extraordinary rendition form, American agents detain suspected terrorists anywhere in the

world and release them into the custody of other countries such as Jordan, Iraq, Egypt, and Afghanistan. The United States agents then ask the receiving countries for assurances that the suspected terrorist detainees will not be tortured. The Committee Against Torture determined that these assurances are insufficient to prevent any country from violating the Convention.

1.2 Extraordinary Rendition to Black Sites

Black sites are the second form of American extraordinary rendition. These black sites are CIA-established facilities set up and operated in the Middle East and in Europe by Americans. While in one of the black sites, detainees experience a series of phases that build up to interrogation.

Suspected terrorists can be detained anywhere in the world by any country before they are turned over to CIA agents. The CIA agents then render the “high value detainee” to a black site, where he “finds himself in the complete control of Americans.” Agents shave the detainees before photographing them naked and evaluating them during the Initial Conditions phase.

The second phase, Transition to Interrogation, allows interrogators to determine how receptive the each detainee is to turning over information. Because of a very high standard for willingness to provide information, most detainees become tracked for an intense level of interrogation.

During the final, full-blown Interrogation phase, interrogators use a variety of techniques to achieve a learned dependence goal. Interrogators expose the detainees to white noise, loud noises, and constant light during the interrogation. The detainees endure prolonged nakedness, sleep deprivation, and stay on a liquid diet. Interrogators use physical force on the detainees, including: slaps, walling, “water dousing,” stress

summers by the Council of Europe declined it had proof of two CIA black sites, one on the east coast of Romania, the other at an airbase in Poland.

17 See CIA Report, supra note 4 (“[T]he interrogation process can be broken into three separate phases: Initial Conditions; Transition to Interrogation; and Interrogation.”)
18 See CIA Report, supra note 4 (“The HVD is flown to a Black Site[.] A medical examination is conducted prior to the flight. During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods. There is no interaction with the HVD during this rendition movement except for periodic, discreet assessments by the on-board medical officer.”)
19 See CIA Report, supra note 4, page 4.
21 See CIA Report, supra note 4, page 4.
22 See CIA Report, supra note 4, (“The standard on participation is set very high during the Initial Interview. The HVD would have to willingly provide information on actionable threats and location information on High-Value Targets at large – lower level information – for interrogators to continue with the neutral approach.”)
23 See CIA Report, supra note 4.
24 See CIA Report, supra note 4, page 5.
26 See CIA Report, supra note 4, page 6.
27 See Horton, supra note 3.
28 See CIA Report, footnote 4, supra, (“The frequency and duration of water dousing applications are based on water temperature and other safety considerations as established by OMS guidelines. It is an effective interrogation technique and may be used frequently within those guidelines. The physical dynamics of water dousing
positions, wall standing, and cramped confinement. Additionally, some detainees allege that they endured electric shock treatments and threats of sexual torture.

1.3 A Personal Look at the Black Sites: El-Masri

Macedonian authorities apprehended Khaled El-Masri on New Year’s Eve in 2003 as he tried to cross the Macedonian-Serbian border. The Macedonians held El-Masri in a hotel for 23 days. On January 23, 2004, men in civilian clothes entered the hotel room. The men in civilian clothes forced El-Masri to make a statement that no one mistreated him during captivity and that he would return to Germany soon. These men blindfolded El-Masri and drove him to an airstrip about an hour away. When the vehicle stopped, the men pulled El-Masri out of the vehicle and led him into a building where they beat him, stripped him naked, and sodomized him. The men removed his blindfold and took a picture, allowing El-Masri to see seven or eight men dressed in black and wearing ski masks. They dressed him in a diaper and tracksuit, secured earmuffs over his ears, and blindfolded him once again. The men dressed in black dragged El-Masri to a plane and sedated him. When he awoke, El-Masri realized that, instead of flying to Germany, his captors took him to Kabul, Afghanistan.

In Kabul, the men beat El-Masri before putting him in a “small, cold cell.” Over the next four months, interrogators – including Americans – questioned him relentlessly about his “alleged association with terrorists.” Two of the men identified themselves as Americans, and El-Masri begged for release, a criminal conviction, or the ability to call the German government. Eventually, El-Masri’s captors released him. They put El-Masri on a plane to Albania, and left him on the side of a road. He made it back to Germany with the help of Albanian authorities. El-Masri filed suit in the Eastern District of Virginia against multiple Americans for the extraordinary rendition he experienced.

2. DOES EXTRAORDINARY RENDITION BREAK THE LAW?

The American extraordinary rendition program sparked debate the minute its existence became public knowledge. The extreme techniques used by the extraordinary rendition program’s interrogators draw the most controversy because many believe them to amount to torture. On the opposite side of that coin, the extraordinary rendition program has also received strong support, particularly since the terrorist attacks in New York City on September 11, 2001. Additionally, the Bush Administration in particular touted the necessity of the extraordinary rendition program, despite its creation...
during the Clinton Administration. The competing values of human rights and national security build into a significant tension between achieving victory in the War on Terrorism and meeting the human rights obligations imposed by international law. Extraordinary rendition supporters place a premium on national security and preventing another terrorist attack on American soil. This belief justifies the black sites’ extreme techniques as an effective way to reach the goal. On the other hand, human rights groups claim that the extreme techniques are not as effective as they could be and that using the techniques is not worth the risks.

2.1 Is it Torture?

Over the last six years, individuals and organizations have debated whether the interrogation techniques used at the CIA’s black sites equate to torture or not. Article 1, paragraph 1 of the Torture Convention defines torture as:

| 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 . . . or intimidating or coercing him or a third person, 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.

America is a party to the Torture Convention, and submitted a reservation to the Committee Against Torture in order to limit the United States’ obligations under the Convention. This understanding states that:

(a) [W]ith reference to Article 1, the United States understands that in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender’s custody or physical control.

Under a literal reading of both Article 1 and the United States’ understanding, the acts described in Section I must amount to torture. Under a CIA official’s admission in a memo detailing the techniques used at the black sites, the goal of the interrogations is to create the learned helplessness and dependence necessary to gather intelligence. Rarely do individuals engaging in questionable behavior spell out their intent so clearly and this purpose falls squarely within the realm of the Torture Convention. The techniques outlined in the redacted CIA memo and quantified in the Red Cross Report meet three of the four options specified by the United States’ understanding of torture. Taking the clear intent and specific acts together, it is more than clear that the interrogation techniques employed at the CIA black sites constitute torture.

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52 See Weissbrodt, supra note 6 at 591.
53 See France, supra note 52. (“Vice President Dick Cheney ‘insisted repeatedly that water boarding and other forms of torture worked exceedingly well to extract valuable information as proven by the fact that there had been no mass-casualty attacks in the United States since 9/11.’”)
54 See France, supra note 52. (“One of the most popular arguments against rendition and torture is the idea that illegally detaining an individual, denying them basic rights, and sending them to nations that regularly use torture to obtain information is inherently against the fundamental values and beliefs of the American people and is against both national and international laws.”)
55 See Weissbrodt, supra note 6 at 600 (Citing Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990)(U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.)
56 See Torture Convention, supra note 5.
57 See Weissbrodt, supra note 6, at 600 ("The United States ratified the Torture Convention in October 1994, having enacted legislation to implement the Convention.")
58 See Weissbrodt, supra note 6, at 600 (Citing Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990)(U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.)
59 Section I, supra.
60 See Sadat, supra note 10 at 1201. (There they are detained, interrogated, often tortured, and sometimes killed. The stories of the individuals “outsourced” as a result of the U.S. rendition program are lurid in their details, involving hooded detainees, who are spirited away in the dead of night and sent in chartered aircrafts to remote countries where they typically suffer torture and maltreatment.)
61 See CIA Report, supra note 4.
62 See CIA Report, supra note 4.
63 See Red Cross Report, supra note 2.
64 See Weissbrodt, supra note 6 at 591.
2.2 Is it Simply Intense Interrogation?

The Torture Convention builds in an alternative preventative measure for acts that do not quite meet the level of torture defined in Article 1.\textsuperscript{65} For those who maintain that the techniques used at the black sites are nothing more than intense interrogation techniques, Article 16 provides the alternative to Article 1.\textsuperscript{66} Article 16 requires State Parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity.”\textsuperscript{67} Extended exposure to white noise,\textsuperscript{68} light,\textsuperscript{69} prolonged nakedness,\textsuperscript{70} sleep deprivation,\textsuperscript{71} a liquid diet,\textsuperscript{72} and the physical force certainly rises to the level of “cruel, inhuman or degrading treatment or punishment,”\textsuperscript{73} if they do not meet the definition of torture.\textsuperscript{74} Furthermore, these interrogation techniques came about at the insistence of public officials. Even if the interrogation techniques do not rise to the level of torture, they certainly fall well within the range of Article 16.\textsuperscript{75}

2.3 Do Black Sites Fall Outside of Scope of the Torture Convention?

Comparing the acts of extraordinary rendition to the articles of the Torture Convention, there are not as many express violations as could be expected. Certainly, express violations exist, as indicated in the previous section.\textsuperscript{76} Yet, reading through the Red Cross Report on the experiences of fourteen “high value detainees,”\textsuperscript{77} the CIA Report detailing the interrogation techniques used at black sites,\textsuperscript{78} and El-Masri’s personal account creates the impression that there is no legal argument available to proponents of the extraordinary rendition black sites.

Members of the Bush administration advanced the argument that “foreign nationals held at [black site] facilities, outside U.S. sovereign territory, are unprotected by federal or international laws.”\textsuperscript{79} In fact, Article 2 requires Convention signers to “take measures to prevent acts of torture in any territory under its jurisdiction.”\textsuperscript{80} The phrase “territory under its jurisdiction” also appears in three additional articles to the Torture Convention that further set out a State Party’s obligations.

The black sites exist outside of the physical boundaries of the United States. In fact, black sites are located within other countries, such as Afghanistan\textsuperscript{82} - certainly not a “territory under [American] jurisdiction.”\textsuperscript{83} As a result, some potential for a very strict interpretation of the Torture Convention exists. Under this narrow reading, so long as American officials do not torture people – in this case, the suspected terrorists captured through the extraordinary rendition program – within the physical borders of America, there is no violation to the Torture Convention. These extraterritorial locations are in other countries, countries that certainly are not within a “territory under [American] jurisdiction.”

As described in Section I,\textsuperscript{84} Americans run the black sites, even though they are located within another country. Not only do statements made by former “high value detainees”\textsuperscript{85} show this, but CIA officials have also made it clear that these facilities are American-run.\textsuperscript{86} As for Guantanamo Bay, American courts have recounted how the United States government acquired the property and have begun extending small amounts of rights to the facility’s detainees. As a result, it is quite a leap to argue that the black site facilities are not under the “territory under [American] jurisdiction” designation. Americans established and operated the facilities, acting under orders from high-ranking officials. Any torture there constitutes a violation of the Torture Convention.

\begin{itemize}
\item \textsuperscript{65} See Torture Convention, supra note 5.
\item \textsuperscript{66} See Torture Convention, supra note 5.
\item \textsuperscript{67} See Torture Convention, supra note 5, at Art. 17.
\item \textsuperscript{68} See CIA Report, supra note 4, page 5.
\item \textsuperscript{69} See CIA Report, supra note 4, page 5.
\item \textsuperscript{70} See CIA Report, supra note 4, page 6.
\item \textsuperscript{71} See CIA Report, supra note 4, page 6.
\item \textsuperscript{72} See CIA Report, supra note 4, page 6.
\item \textsuperscript{73} See note 60.
\item \textsuperscript{74} See note 60.
\item \textsuperscript{75} See Torture Convention, supra note 5, at Art. 16.
\item \textsuperscript{76} See Section II, subsection A.
\item \textsuperscript{77} See Red Cross Report, supra note 2.
\item \textsuperscript{78} See CIA Report, supra note 4.
\item \textsuperscript{79} See Fact Sheet, supra note 11.
\item \textsuperscript{80} See Torture Convention, supra note 5, at Art. 2.
\item \textsuperscript{81} See Torture Convention, supra note 5, at Art. 5, Art. 7, Art. 11.
\item \textsuperscript{82} See Grey, supra note 12. (“One of them, located just outside Kabul, was known as the “dark prison.” By early 2003, the United States was negotiating secret agreements with governments in Eastern Europe to set up black sites on their territory. A report this summer by the Council of Europe declared it had proof of two CIA black sites, one on the east coast of Romania, the other at an airbase in Poland.”)
\item \textsuperscript{83} See Torture Convention, supra note 5.
\item \textsuperscript{84} Supra Section I.
\item \textsuperscript{85} Supra note 14; supra note 2.
\item \textsuperscript{86} See CIA Report, supra note 4.
\end{itemize}
One easily arrives at this conclusion through the Torture Convention’s express purpose to end torture globally. Reviewing the first sixteen articles, it is abundantly apparent that the Convention’s designers and drafters meant to eradicate torture worldwide. This intent manifests itself as early as Article 2 of the Torture Convention, which establishes that there are “no exceptional circumstances whatsoever” that warrant using torture. Beyond the declaration that no circumstance warrants torture, the Convention also forbids orders from high-ranking officers or officials to justify torture.88 The no exceptions requirements work hand-in-hand with later provisions in the Convention that mandate every State Party to institute training and education on torture and non-torturous techniques for every person involved detainee, arrestee, or prisoner treatment.89

2.4 Do Black Sites Invite Retaliation?

In addition to violating the Torture Convention, America’s use of extraordinary rendition could be counterproductive to its very goal – preventing more terrorist attacks on American soil. As the introductory quote indicates, when a government breaks the law, it invites lawlessness.90 Put in the context of the extraordinary rendition program, the actions and techniques utilized invite retaliation.91 Although there has not been a major terrorist attack on American soil since September 11, 2001, the hostility built up by abducting individuals, torturing them, interrogating them, and holding many of them indefinitely is not something to take lightly.92

3. Solutions for Black Sites

The United States government institutionalized torturing “high value detainees” at CIA-run facilities across the globe in order to break up terrorist cells in the Middle East and to prevent future terrorist attacks. This practice is in direct violation of multiple requirements within the Torture Convention, and the United States must correct the situation. Any solution to this problem must balance to diametrically opposed viewpoints in order to be successful.

One segment of the nation’s population accepts the War on Terrorism as it is, including potential torture. This “ends justify the means” has an extreme impact on the extraordinary rendition program. It single-handedly lead to removing the safeguards from the program.94

On the other hand, another segment of the population does not believe that the program is worth the human rights interests and Torture Convention violations. As evidenced by the Red Cross report and many other individuals, organizations, and countries outside the United States fall in line with this viewpoint. Although these two positions are contradictory to one another, policy makers must address both in order to produce a viable solution to the black sites.

To further complicate finding a workable solution, international solutions are problematic at best. Many countries disregard their obligations under international law.

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means— to declare that the government may commit crimes in order to secure the conviction of a private criminal— would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.93

Notes:

87 See Torture Convention, supra note 5, at Art. 2, ¶ 2.
88 See Torture Convention, supra note 5, at Art. 2, ¶ 3.
89 See Torture Convention, supra note 5, at Art. 10, Art. 11.
90 Supra note 8.
91 See Grey, supra note 12. (Former FBI special agent Jack Cloonan [said]: “The thing you saw in Africa where people are being held incommunicado and have no legal representation and potentially abused, is unacceptable. You’re setting yourself up for revenge by al Qaeda and other Islamists.”)
92 See Grey, supra note 12. (“‘We really have created a mess here, a terrible mess,’” says Lawrence Willkerson, who served in the U.S. State Department during the Bush administration. “For the people who are involved in it. For the legal system that will have to sort it out, under a new president. For the country. For our reputation. For our prestige around the world. This has been incredibly damaging.’” Supra note 1 at 274 (quoting Olmstead v. United States, 277 U.S. 438 at 484-485 (1928)
Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously.
93 See Weissbrodt, supra note 6, at 590. (“One former CIA official argued that ‘the rendition program has been the single-most successful American counterterrorism program since 1995.’”)
94 See Peter Johnston, Leaving the Invisible Universe: Why All Victims of Extraordinary rendition Need a Cause of Action Against the United States, 16 J.L. & Pol’y 357, 364 (2007). [These early extraordinary renditions still had more safeguards than the programs used today: every rendered individual was convicted in absentia, and all renditions were approved by CIA legal counsel on the basis of a substantive dossier. After the September 11, 2001 attacks, however, the extraordinary rendition program changed drastically . . . . The initial safeguards were eliminated due to the intense pressure on the CIA after September 11 to prevent another potential attack.
95 See Red Cross Report, supra note 2.
The arguments America put forth justifying the extraordinary rendition program, for example, make light of the Torture Convention. When nations do not actually abide by the treaties and conventions they sign, it diminishes the likelihood of utilizing international remedies.

As a result, this section sets forth a suggested plan to rectify the extraordinary rendition program’s wrongs and removes the incentives for continued use of the program. The potential solutions, most of which are American created and executed, will work best if used in conjunction with one another; however, each would produce positive results on its own. The potential solutions will work primarily to create more accountability for public officials who authorize extraordinary rendition.

3.1 Providing a Remedy for Victims

If the American government – through the judicial process – truly offered extraordinary rendition victims a remedy, it would help create a disincentive to continue the program. Further, it shows a concerted effort to rectify the grave breech to human rights interests created with the black sites, which is an equally important consideration and an essential first step forward. Finally, this step would also help put the United States more in line with its obligations under the Torture Convention. The Torture Convention requires State Parties like the United States to provide a remedy to anyone tortured by a State actor. The United States could better provide a civil remedy to the individuals who endured the extraordinary rendition program by altering how the state secrets privilege gets asserted and by removing the effects of Mohamad v. Palestinian Authority.

3.1.1 The State Secrets Privilege

Several former high value detainees like El-Masri have filed legal actions against government actors in the United States. In each instance, trial judges dismissed the suits before trial. The extraordinary rendition victims appeal these dismissals; however, appellate courts uphold the lower decisions. These suits typically get dismissed because the defendants assert the state secrets privilege or for other extremely technical, procedural reasons. Men like El-Masri may be able to bring forth an action initially, but these suits do not have a real opportunity to move forward. As a result, the individuals who experienced the extraordinary rendition wind up without an adequate remedy.

In reality, judges dismiss the suits before thoroughly considering the validity of the claims in the complaints. This is particularly the case with suits dismissed by the state secrets privilege. When El-Masri, detailed in Section I, filed suit against American men and corporations he believed participated in his extraordinary rendition, the court did not determine the validity or truthfulness of El-Masri’s complaint because the defendants asserted the state secrets privilege to all of the claims. Instead, the court dismissed the case because “any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument.”

Maher Arar encountered a similar issue when he filed suit against the men who participated in his extraordinary rendition. Arar filed suit against federal officials for relief under the Torture Victim Protection Act and under the Fifth Amendment for his detention in the United States and his torture and detention in Syria. The district court dismissed all four of Arar’s claims; however, the court allowed Arar to re-plead the claim that American officials violated his due process rights. Just like the El-Masri court, this court asserted that the judicial branch has no authority to provide a remedy to people who have endured extraordinary rendition and torture in the course of the War on Terrorism.

Despite a swift dismissal and an unwillingness to create a remedy, the El-Masri court acknowledged the

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96 America’s own federal law is supposed to afford torture victims a remedy. Torture Victim Protection Act, 28 U.S.C. § 1350.
99 Supra Section I.
100 See El-Masri, supra note 32.
101 Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).
102 See El-Masri, supra note 32; see Arar, supra note 100.
103 Supra Section I.
104 Supra Section I.
105 See El-Masri at 539.
106 See Arar at 567.
107 Id.
108 Id. at 581.
109 Id.
need for one. This opens the door for creating a remedy. Courts do not have to dismiss claims simply because the defendants validly assert the state secrets privilege. The doctrine itself allows claims to continue forward even with a properly asserted and accepted state secrets defense. As indicated in El-Masri, when government officials assert the state secrets privilege, the court has discretion to "proceed in some fashion that adequately safeguards any state secrets." The standard for determining the necessity of dismissing the case rests on whether or not "there is 'no way [the] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case."

Thoroughly dismissing the victims' suits because of a validly asserted state secrets privilege is not the way to handle these cases, especially with the legitimate need described in El-Masri. When courts dismiss the suits, it denies victims the right to remedy required by the Torture Convention. If, instead, judges removed the cases to a hybrid military trial, perhaps both interests – preserving state secrets and providing a remedy – could occur. This hybrid model would allow for the same rules of civilian trial while operating in a closed proceeding. It also shows a clear intent on the American government's part to rectify a long line of abuses justified by preventing terrorism.

3.1.2 The Palestinian Authority Decision

Mohamad v. Palestinian Authority is a landmark change in providing torture victims across the board a remedy under the TVPA, despite being a recent decision. The United States Supreme Court held that the TVPA only imposes liability on natural people. In the majority opinion, Justice Sotomayor confirmed two lower court decisions to dismiss this case because the Palestinian Authority is an organization, not an individual. Although a case has not yet gone before the Supreme Court, this holding will provide another legal escape for corporations who transport detainees to the black sites. Although corporations like Jeppesen Dataplan, Inc., that assisted in transporting the high value detainees have already maintained liability exemption from the Alien Tort Statute through government intervention and the state secrets doctrine, they now gain exemption from the TVPA on their own. Anyone who endured extraordinary rendition and detention at a black site is now without a legal remedy from the government and any corporation or organization involved. Essentially, this United States Supreme Court decision removes disincentive for corporate participation in extraordinary rendition – there will be no backlash, criminally or civilly, for assisting in detainee transportation, thus allowing corporations to continue to assist with extraordinary renditions.

If the court reversed the effects of Mohamad v. Palestinian Authority or if the legislature passed an amendment to the TVPA, then, perhaps, the former detainees could exercise the full extent of their judicial rights. Allowing detainees to utilize this avenue for a remedy would also help put the United States in line with its obligations under the Torture Convention, as described in Section II. This could also help the United States to show its

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110 See El-Masri at 535.

111 See El-Masri 538 (citing sterling, 416 F.2d at 347-48, quoting Fitzgerald v. Penthouse Int'l., Ltd., 776 F.2d 1236, 1243 (4th Cir. 1985)).

112 See Mohamad v. Palestinian Authority, supra note 97 at 1705 (2012). "We hold that the term 'individual' as used in the Act encompasses only natural persons. Consequently, the Act does not impose liability against organizations."

113 Id. at 1703-04. ("The District Court dismissed the suit, concluding, as relevant here, that the TVPAs authorization of suit against "[a]n individual extended liability only to natural persons. The United States Court of Appeals for the District of Columbia circuit affirmed. Held: As used in the TVPA, the term 'individual' encompasses only natural persons. Consequently, the Act does not impose liability against organizations.")

114 Id. at 1703-04. ("The District Court dismissed the suit, concluding, as relevant here, that the TVPAs authorization of suit against "[a]n individual extended liability only to natural persons. The United States Court of Appeals for the District of Columbia circuit affirmed. Held: As used in the TVPA, the term 'individual' encompasses only natural persons. Consequently, the Act does not impose liability against organizations.")


116 See El-Masri at 535.

117 See Mohamad v. Palestinian Authority, supra note 97 at 1705 (2012). ("We hold that the term 'individual' as used in the Act encompasses only natural persons. Consequently, the Act does not impose liability against organizations.")
commitment to rectifying the wrongs of the extraordinary rendition program.

3.2 A Return to Former Policies

In addition to creating a disincentive for using extraordinary rendition in the War on Terrorism, America can also distance itself by returning to older practices. The United States government endorsed other policies for bringing foreign, out-of-the-country individuals to justice in its borders. For more than a century, the government condoned gaining jurisdiction over defendants through the irregular rendition process. Additionally, the extraordinary rendition program began as a far more stringent operation than it became after the September 11, 2001, attacks. Both of these practices, though problematic, provide a much better option to preventing another terrorist attack without completely sacrificing human rights obligations under the Torture Convention.

3.2.1 Irregular Rendition

America can distance itself from extraordinary through a return to irregular rendition. As a default policy, irregular rendition is by no means a perfect answer. Irregular rendition comes with its own laundry list of criticism and international law issues. These potential problems, however, are less severe than extraordinary rendition’s human rights concerns and international law violations.

The United States Supreme Court first approved the use of irregular rendition in Ker v. Illinois. Ultimately, the United States Supreme Court opted not to decide “the question of how far [Ker’s] forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the state court.” To justify the decision, the Court stated that they “do not see that the constitution or laws or treaties of the United States guaranty [Ker] any protection.” Justice Miller, however, did look to other countries’ positions on extraordinary rendition’s effect on jurisdiction before shifting gears in this opinion. This Court discussed utilizing the “bad capture, good detention” reasoning taken from other courts, and stated that “such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.”

The United States Supreme Court denied Ker’s assignments of error and upheld the Illinois Supreme Court’s decision. Even though the Ker decision did not explicitly decide the particular issue of whether or not an extraordinary rendition voids an American court’s jurisdiction, many court decisions have cited Ker as the beginning of the rule to allow any individual brought to court through extraordinary rendition to stand trial.

By returning to this procedure instead of using extraordinary rendition, America removes incentive or temptation to use harsher interrogation techniques. The individuals rendered cycle through the American judicial system, maintained by certain trial standards, instead of detention at facilities operating outside the law.

3.2.2 Original Extraordinary Rendition

The United States government could also opt to reinstate the extraordinary rendition safeguards and practices in place prior to the September 11, 2001, attacks. Although the original program still involved capturing suspected terrorists and rendering them to foreign countries for interrogation, each person subjected to an extraordinary rendition also received a trial in absentia. Additionally, the CIA’s legal counsel approved

118 Supra Section 1.
119 Supra note 1 at 272. This doctrine “reward[s] police brutality and lawlessness in some cases.”
120 Supra note 1.
121 Ker v. Illinois, 119 U.S. 436, 438 (1886). The trial court convicted Frederick Ker, the defendant, of larceny. Before trial, Ker fled the United States and hid in Peru. The United States government issued an extradition order to a Pinkerton agent, who was charged with traveling to Peru and bringing Ker back to the United States for trial. When the Pinkerton agent arrived in Peru, the country was engulfed in war. As a result, the Pinkerton agent did not execute the extradition order through the Peruvian government, and, instead, abducted Ker. The agent brought Ker back to the United States through an “irregular rendition.”

122 Id. at 443.
123 Id.
124 Ex parte Scott, 9 Barn. & C. 446, (1829); Lopez v. Satter’s Case, 1 Dearsl. & B. Cr. Cas. 525; State v. Smith, 1 Bailey, 283 (1829); State v. Brewster, 7 Vt. 118, (1835); Dow’s Case, 18 Pa. St. 37, (1851); State v. Ross, 21 Iowa, 467, (1866); The Richmond v. U. S., 9 Cranch. 102.
125 See Ker at 443.
126 See Johnston, supra note 10 at 364.
every single individual for the extraordinary rendition program based on a substantive dossier.\footnote{Id.}

Under this program, the CIA employed safeguards that kept several important checks on the system. Due to the requisite approval prior to subjecting anyone to an extraordinary rendition, the United States government avoided abducting innocent people, such as El-Masri or Maher Arar. By putting these cases through trial, even in absentia, each instance of extraordinary rendition received a certain amount of due process. Adding even a minimal amount of due process to the extraordinary rendition program helps to remove the incentive to engage in behaviors that violate international laws.

### 3.3 An International Option: Amending the Torture Convention

In order to prevent further abuse under the guise of a legal loophole,\footnote{See Fact Sheet, supra note 11. “Foreign nationals held at [black site] facilities, outside U.S. sovereign territory, are unprotected by federal or international laws.”} the Torture Committee must amend the Torture Convention to make it absolutely clear that torture at the insistence of any government official counts, regardless of location. The phrase “territory under its jurisdiction”\footnote{See Torture Convention, supra note 5.} needs its own definition in a new paragraph under Article 1. This definition must state that any facility set up or operated by the agents of one State Party, regardless of this facility’s physical location within another country’s borders, constitutes territory under that State Party’s jurisdiction. The definition must go on to incorporate the language in Article 5 to include “on board a ship or aircraft registered in that State.”\footnote{See Torture Convention, supra note 5, at Art. 5.

By adding this language to the Torture Convention, the Committee Against Torture gains a foothold against American arguments that black sites do not constitute a violation.\footnote{Supra Section II.} By taking the proverbial “wind out of the sails” of these arguments, the Committee Against Torture assumes a position to better prosecute legally manipulated violations. The Committee Against Torture already ruled that assurances that a receiving country will not torture an individual picked up through extraordinary rendition do not create immunity.\footnote{Supra note 11; Supra Section I.} The Committee Against Torture desperately needs to be able to combat both forms of the American extraordinary rendition program. With these linguistic changes, the Committee can meet this goal and make it abundantly clear that torture of any kind, under an circumstance violates the Torture Convention.

As necessary as this potential solution is, it is by no means without flaws. The language of the Torture Convention, even if amended, could still be subject to legal manipulation. Countries party to the Torture Convention still have the ability to claim that the Convention is not self-executing – and, therefore, nonbinding – in addition to new arguments about why the program still does not violate the Torture Convention.

### 4. Conclusion

Through the extraordinary rendition program, agents of the American government enter into other sovereign jurisdictions, kidnap individuals, and render them to CIA-run facilities across the globe. There, these individuals endure a variety of “intense interrogation techniques” at the hands of Americans. These techniques are specifically designed or selected to degrade, to mentally defeat, and to physically overpower the detainees, for the sole purpose of uncovering information about suspected terrorist activity. Many of these techniques, particularly waterboarding, have come under harsh scrutiny in the international community, which believes that the techniques rise to the level of torture. The ACLU, the Committee Against Torture, and the International Committee of the Red Cross, specifically, denounce the “interrogation techniques” used in the black site facilities. Further, these practices rise to the level of torture under the Torture Convention, which American officials purported to follow.

Despite international outcry and outrage within the United States, multiple presidential administrations authorized or encouraged extraordinary rendition. Promoting the use of such extreme measures grew in popularity particularly after the terrorist attacks on American soil on September 11, 2001. The American government actively sought methods and practices to achieve its goal...
to prevent further attacks. It did so, however, by sacrificing human rights interests and by placing the country in jeopardy of violating its own international treaties. Further, setting a precedent that this type of program is acceptable invites retribution — the exact issue supposedly at the heart of the policy decision to engage in extraordinary rendition in the first place.

Because this program violates human rights and establishes a resoundingly negative international precedent, it must become a less attractive option to the American government and, ultimately, must end. To meet this end, the American government should pursue establishing civil remedies for the extraordinary rendition program’s victims as a disincentive for continuing the program. This is practicable in altering the states secret privilege so that claims related to this program can survive to judicial scrutiny and through requiring corporations involved in extraordinary rendition liable for their actions. Both of these options work as disincentives for continuing the use of extraordinary rendition. In addition, the government has two more legitimate former practice options — irregular rendition and the original extraordinary rendition program — that it could use to meet the goal of preventing another substantial terrorist attack on American soil. Finally, the Committee Against Torture must amend the Torture Convention in order to ensure that no country party to its obligations can legitimately argue that a black site-style program is not torture.
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