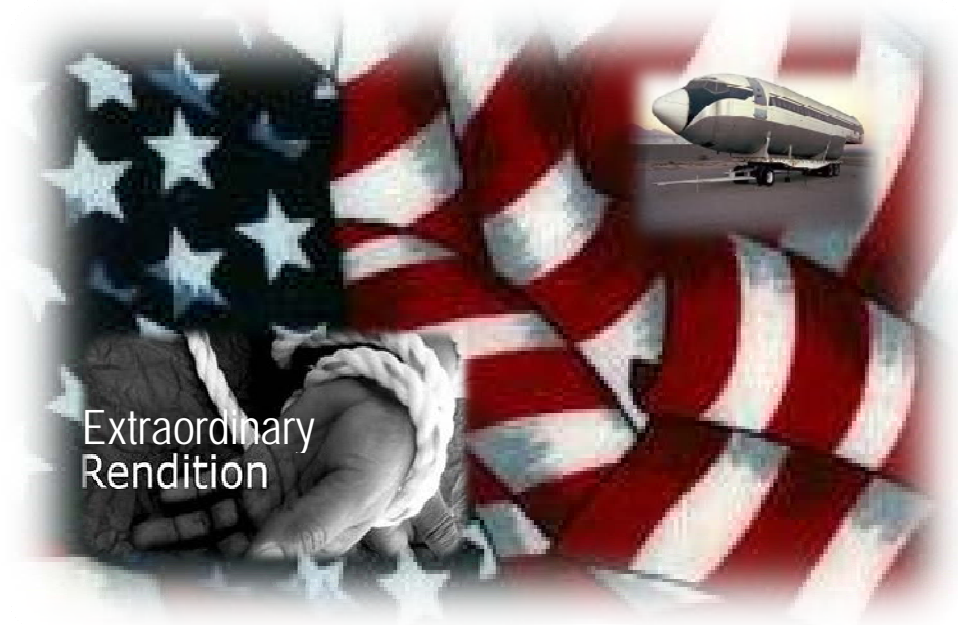


THE INTERNATIONAL LEGAL LANDSCAPE OF EXTRAORDINARY RENDITION:

U.S. OBLIGATIONS UNDER ICCPR, CAT, AND THE NUREMBERG PRINCIPLES



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INTRODUCTION

The C.I.A.'s original rendition program was first developed in the 1990s under the Clinton administration as a way to break down the terrorist network known as Al-Qaeda and to capture senior Al-Qaeda officials. At the outset, the rendition program was designed to satisfy U.S. legal obligations by providing adequate legal process for those suspects who were captured and detained. Suspects were rendered only to countries that could provide assurances to the United States that the suspects would be treated in accordance to that country's laws.¹

After September 11, 2001, the C.I.A. significantly shifted the purpose of the rendition program to the "war on terror," and began aggressively implementing policies for the purpose of gathering intelligence. The most significant change in the rendition program post 9/11 was the C.I.A.'s decision to render individuals to clandestine detention sites around the world known as C.I.A. "black sites."² Suspected terrorists were transferred from overseas U.S. bases in Iraq and Afghanistan, but many were also apprehended by officials directly off the streets as they were traveling in these countries. Thus, the focus of the post-9/11 rendition program became the capture, detention and interrogation of suspected terrorists outside the reach of federal and international laws prohibiting such treatment.³ Investigative journalists and human rights organizations have termed these extralegal post 9/11 C.I.A. renditions "extraordinary rendition."⁴ It is difficult to know exactly how many people have been extraordinarily rendered

¹ EUR. PARL. ASS., *Report of the Rapporteur on Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States* ¶¶ 27-31, Doc. No. 10957 (June 12, 2006) [hereinafter 2006 Report].

² *Id.* ¶ 38

³ *Id.* ¶¶ 35-27

⁴ See generally, Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, February 14, 2005 (using the term extraordinary rendition to describe the illegal post-9/11 U.S. government practice of extraditing terrorism suspects to other countries for interrogation and torture).

because the program is veiled in secrecy and the U.S government remains tight-lipped about the extent of its involvement.

In order to carry out these extraordinary rendition operations, the C.I.A. utilized private companies to handle aeronautical planning, to supply flight crews, and to supply the aircraft. One such company was Aero Contractors, Ltd. (Aero), a company based in Smithfield, North Carolina that operates aircraft out of Johnston County Airport.⁵ Through the work of plane spotters, investigators and journalists, and the analysis of flight records, two specific Aero-operated planes have been linked to extraordinary rendition flights to black sites around the world in the period between 2001 and 2006: the aircraft with the tail number N313P and the aircraft with the tail number N379P.⁶ Although these tail numbers have since been changed, but investigations reveal that these Aero-operated planes were used in the extraordinary rendition and torture of four specific individuals: Binyam Mohamed, Bisher Al-Raqi, Khaled El-Masri and Abou Elkassim Britel.⁷ These four individuals are British, Ethiopian, German and Italian citizens, businessmen and vacationers, and their stories reflect the circumstances under which individuals are apprehended, captured and then extraordinarily rendered.

Scholars and activists in the international community decry the practice of extraordinary rendition and the torture of detainees as violations of a host of international laws and treaties to which the United States has agreed to abide. The U.S. government, however, asserts that these international treaties and laws do not apply. This policy paper focuses on three particular international legal norms: The Covenant on Civil and Political Rights, the Convention Against

⁵ Scott Shane, Stephen Grey & Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005.

⁶ *Id.*

⁷ Partial List of Detainees Secretly Transported by Aero Contractors of North Carolina for Torture by or for the C.I.A., available at http://www.ncstoptorturennow.org/PDF_Archives/Partial_List_Detainees.pdf (prepared by N.C. Stop Torture Now, an organization that has worked since 2005 to end North Carolina's role in extraordinary rendition).

Torture, and the Nuremberg Principles, selected because the United States is a party to both the Covenant on Civil and Political Rights and the Convention Against Torture, and thus has freely assumed obligations under those treaties, and the Nuremberg Principles because the United States was a leader in its creation after WWII. This paper seeks to highlight the provisions of these treaties and principles that are most relevant to extraordinary rendition, and to reveal the obligations of the United States under these norms. Further, this paper hopes to narrow the impact of extraordinary rendition and torture from an issue of international concern to an issue of local and regional importance. Through Aero Contractors, North Carolina was directly involved in the extraordinary renditions of Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri and Bisher Al-Rawi. This involvement calls for accountability by not only the governments and officials of North Carolina complicit in carrying out extraordinary rendition, but also those who call themselves citizens of Johnston County, North Carolina, and the world.

EXTRAORDINARY RENDITION: U.S. OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

INTRODUCTION

In the aftermath of the September 11, 2001 attacks, the Bush Administration began aggressively implementing policies for the purpose of investigating terrorist activity. One such program, with the purported goal of gathering intelligence, was extraordinary rendition. Extraordinary rendition is the U.S. program implemented by the C.I.A. in which foreign nationals who are suspected of involvement in terrorist activities, are transferred to countries to be detained, tortured and interrogated.⁸ The countries where these individuals are transferred are places considered by the C.I.A. to be beyond the reach of federal and international laws prohibiting such treatment.⁹ These suspected terrorists are transferred from overseas U.S. bases in Iraq and Afghanistan, but many are also apprehended by officials directly off the streets as they are traveling in these countries. It is difficult to know exactly how many people have been extraordinarily rendered because the program is veiled in secrecy and the U.S government remains tight-lipped about the extent of its involvement.

Scholars and activists in the international community decry the practice of extraordinary rendition and the torture of the detainees as violations of a host of international laws and treaties to which the United States has agreed to abide. The U.S. government, however, asserts that these international treaties and laws do not apply. One such treaty relevant to extraordinary rendition which the United States claims lacks applicability is the International Covenant on

⁸ EUR. PARL. ASS., *Report of the Rapporteur on Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States* ¶¶ 35-37, Doc. No. 10957 (June 12, 2006) [hereinafter 2006 Report].

⁹ *Id.* ¶ 38.

Civil and Political Rights (ICCPR), which the United States signed on Oct. 5, 1977. On June 8, 1992 the United States ratified the treaty, though attaching considerable reservations, understandings and declarations.¹⁰ The ICCPR includes provisions prohibiting torture and “cruel, inhuman and degrading treatment.” However the U.S. government maintains that the treaty’s protections do not apply to individuals who are tortured through extraordinary rendition. More specifically, government officials have argued that because the capture, detention, and torture of individuals through extraordinary rendition occur outside the territory of the United States, such acts are beyond the scope of the ICCPR. This paper proceeds to analyze the history of the ICCPR, its application in the United States, the relevant provisions and interpretations of the ICCPR regarding extraordinary rendition and torture, and finally the obligations of the United States as a party to the treaty. Ultimately, by signing and ratifying the ICCPR, the United States is obligated to implement the protections found in the treaty – protections that extend to victims of extraordinary rendition and torture.

I. HISTORY OF THE ICCPR

A. Universal Declaration of Human Rights

The ICCPR draws from the principles set out in the Universal Declaration of Human Rights, as stated in the preamble: “[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights.”¹¹ Even without binding authority,

¹⁰ Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. U. J. INT’L HUM. RTS. 7, ¶ 3 (2005).

¹¹ Universal Declaration of Human Rights, G.A. Res. 217A, pmb., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

the Universal Declaration is accepted virtually universally and serves as the foundation for the comprehensive network of legally binding treaties and international instruments governing the protection of human rights today.¹² It is thus worthwhile to first explore its creation, purpose and application in the United States.

After the atrocities of World War II, the international community expressed a growing concern about the need to address human rights. The United Nations was conceived out of this concern and the desire to prevent the abuses that had occurred during the war. In 1948, the General Assembly, the chief policy-making organ of the United Nations, adopted The Universal Declaration of Human Rights (Universal Declaration) in order to clarify “human rights and fundamental freedoms.”¹³

The Human Rights Commission of the U.N. Economic and Social Council has stated that “the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial” have reached the status of customary international law and thus “cannot be open to challenge by any State as they are indispensable for the functioning of an international community based on the rule of law and respect for human rights and fundamental freedoms.”

The United States was a lead actor in the creation and drafting of the instrument. Eleanor Roosevelt, widow of the former United States President, chaired the early eight-member drafting committee.¹⁴ After input from Member States, the Committee revised the draft declaration before submitting it to the General Assembly where each provision was again scrutinized and debated. Finally, on December 10, 1948, the General Assembly unanimously adopted the

¹² A United Nations Priority: Universal Declaration of Human Rights, ¶¶ 3, 6, www.un.org/rights/HRToday/declar.htm (last visited May 4, 2010).

¹³ Universal Declaration, *supra* note 4, pmbl.

¹⁴ A United Nations Priority: Universal Declaration of Human Rights, *supra* note 5, ¶ 4.

Universal Declaration.¹⁵ In bringing together the international norms on human rights, the Universal Declaration was the first authority and guide to the rules on fundamental human rights.¹⁶ Subsequent international human rights instruments adopted by the UN General Assembly build on the principles set out in the Universal Declaration.

Article 3 of the Universal Declaration guarantees the “right to life, liberty and security of person.” The capture, detention and torture of individuals through extraordinary rendition certainly implicate individuals’ rights to liberty and security. Article 5 specifically prohibits torture and “cruel, inhuman or degrading treatment or punishment,” the same language used in ICCPR Art. 7.¹⁷ Articles 6, 8, 10 and 11 of the Universal Declaration consider the denials of process to victims of extraordinary rendition. Article 6 guarantees that “everyone has the right to recognition everywhere as a person before the law” and Article 8 guarantees “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁸ It is clear that the program of extraordinary rendition comprises these rights.¹⁹ Once rendered to another country and detained, individuals are often denied access to the recognized judicial procedures of that country, as well as access to counsel or the aid or the aid of their Embassy.²⁰ Finally, the function of extraordinary rendition to deliver individuals to other countries for the purpose of interrogation and torture is clearly a violation of Article 14 of the Universal Declaration, which guarantees “the right to seek and to enjoy in other countries asylum from persecution.”²¹

¹⁵ *Id.* ¶ 5.

¹⁶ Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* 8 (Istituto Per Gli Studi Di Politica Internazionala (ISPI) Working Paper -7, 2006).

¹⁷ Universal Declaration, *supra* note 4, art. 5.

¹⁸ *Id.* arts. 6, 8.

¹⁹ David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV.HUM. RTS. J. 123, 131 (Spring 2006).

²⁰ *Id.*

²¹ *Id.* at 132.

B. Authority of the Universal Declaration

The General Assembly resolutions are not binding on Member States. Thus the Universal Declaration does not have a specific mechanism by which it manifests its legally binding effect on the United States. Nonetheless, many legal scholars, human rights bodies, and international jurists understand its provisions to reflect customary international law.²² The Human Rights Commission of the U.N. Economic and Social Council has stated that “the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial” have reached the status of customary international law and thus “cannot be open to challenge by any State as they are indispensable for the functioning of an international community based on the rule of law and respect for human rights and fundamental freedoms.”²³ Even without a legally binding effect, the Declaration, as a “common statement of mutual aspirations,”²⁴ represents a commitment to give effect to the espoused protections and foundational principles. At the International Conference on Human Rights held in Teheran in 1968, it was proclaimed that “[t]he Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.”²⁵

This is particularly true for the United States as the leader of the drafting committee and a State so determined for the creation of a document that would ensure the protection of human rights and freedom and recognize the value and dignity of the individual. The U.S. government

²² Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996); Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture* 21, Congressional Research Service (Sept. 8, 2009).

²³ U.N. Econ. & Soc. Council, Comm. on Human Rights, *Preliminary Report by the Special Representative of the Commission, Mr. Andres Aguilar*, ¶¶ 14-15, U.N. Doc. E/CN.4/1985/20 (Feb. 1, 1985).

²⁴ A United Nations Priority: Universal Declaration of Human Rights, *supra* note 5, ¶ 2.

²⁵ Int'l Conference on Human Rights, Apr. 22-May 13, 1968, *Proclamation of Teheran* 3, U.N. Doc. A/CONF.32/41.

acknowledges its obligations under the Universal Declaration, stating that “a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights.”²⁶ Additionally, in celebration of the 61st anniversary of the Universal Declaration, Senator Dick Durbin affirmed the importance of upholding the Universal Declaration:

We take our treaty obligations seriously because it is who we are. The United States is a government of laws, not people, and we take our legal commitments very seriously. Complying with our treaty obligations also enhances our efforts to advocate for human rights around the world. The reality is that the Universal Declaration of Human Rights remains an unfulfilled promise for many, from rape victims in Eastern Congo and Bosnia, to child soldiers in Burma and Colombia, and from the oil fields in the Niger Delta and Ecuador to the internet cafes in Beijing and Havana. But with leadership from the United States, we can make universal human rights a reality – both close to home, and around the world.²⁷

It is clear that the U.S. government understands the importance of the principles found within the Universal Declaration, and purports to work towards its vision of universal human rights. However, the U.S. program of extraordinary rendition casts doubt as to its commitment to the rights and freedoms found within the Universal Declaration.

C. Creation of the ICCPR

Following the adoption in 1948 of the Universal Declaration, the UN General Assembly adopted and ratified two treaties on December 16, 1966: The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. Together, these three instruments make up the International Bill of Human Rights. The

²⁶ Human Rights, U.S. Dep’t of State, ¶ 1, www.state.gov/g/drl/hr/ (last visited May 5, 2010).

²⁷ Statement of Senator Dick Durbin, “The Law of the Land: U.S. Implementation of Human Rights Treaties.” Hearing of the Human Rights and the Law Subcommittee, Dec. 16, 2009, ¶¶ 14-16.

International Covenant on Civil and Political Rights (ICCPR) entered into force on March 23, 1976. It consists of a preamble and fifty-three articles, divided into six parts and primarily obligates State parties “to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth...in the present Covenant.”²⁸

The Human Rights Committee, established for the purpose of implementing the provisions under the ICCPR, consists of eighteen independent experts. Their role is to monitor the performance of the treaty by State parties, to offer recommendations to State parties, and to interpret ICCPR provisions regarding issues of international concern.²⁹ Currently, there are 72 signatories and 165 parties to the treaty.³⁰

II. ICCPR APPLICATION IN UNITED STATES

The United States ratified the ICCPR on June 8, 1992 and the treaty came into force on September 8, 1992. Though a party to the ICCPR, the United States maintains that its provisions are not directly applicable, and thus, claims that the treaty does not speak to extraordinary rendition and torture. This is largely due to the unprecedented number of reservations, understandings and declarations (RUDs) that the United States included upon ratification, including a declaration that Articles 1-27 of the ICCPR would be non-self-executing, and a reservation severely restricting the scope of Article 7.³¹ Under treaty law, a non-self-executing treaty means that the treaty or the relevant provisions have no domestic effect unless State

²⁸ United Nations International Covenant on Civil and Political Rights art. 3, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²⁹ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/> (last visited May 5, 2010).

³⁰ ICCPR Treaty Status, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited May 5, 2010).

³¹ U.S. Reservations, Declarations, and Understandings, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) [hereinafter U.S. Reservations].

government passes implementing legislation.³² The United States has not yet passed any implementing legislation for the ICCPR and thus argues that the ICCPR has no effect on domestic law. However, the Vienna Convention on the Law of Treaties which governs the interpretation of treaties provides that once a State signs a treaty, that State has an obligation “to refrain from acts which would defeat the object and purpose of a treaty.”³³ Though the United States is not a party to the Vienna Convention on the Law of Treaties, it accepts the treaty’s provisions as international customary law on treaty interpretation.³⁴ Additionally, as demonstrated below, the United States still has obligations under Article 2 of the ICCPR to take steps to give effect to the treaty’s protections.

A. Article 2 Obligation to Implement

While Congress has taken action to implement provisions of the Convention against Torture (CAT), another non-self-executing treaty, it has not taken significant steps to pass legislation to implement ICCPR provisions. Thus, when allegations of ICCPR violations arise regarding extraordinary rendition and torture, the United States points to its declaration that the ICCPR is non-self-executing. However, despite explicit declarations as to non-self-execution, all State Parties to the ICCPR still have an obligation to give effect to the rights and protections under ICCPR, and, as signatories to the treaty, each State Party must refrain from doing anything that violates its terms. This obligation is found in Article 2, which states that “each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional

³² *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (defining “self-executing” treaty as one for which “no domestic legislation is required to give [it] the force of law in the United States”).

³³ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

³⁴ U.N. Human Rights Comm., *Third Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/Q/3/Annex 1 (Oct. 21, 2005) (containing the second and third periodic reports of the United States).

processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”³⁵ Failure to pass the necessary legislation to give rise to ICCPR protections could thus be a violation of the treaty. In fact, in testimony before the Senate Judiciary Committee, Subcommittee on Human Rights and the Law, international human rights experts who were called to provide information about U.S. domestic implementation of human rights treaties noted that U.S. failure to pass federal laws and policies against extraordinary rendition falls short of treaty obligations under the ICCPR and CAT.³⁶

B. Object & Purpose of the Treaty

While the United States can point to its non-self-executing declaration, it is worthwhile to assess whether reservations, understandings, and declarations (RUDs) that challenge enforcement of a treaty’s purposes are valid. The purpose of RUDs is not to present an obstacle to effective implementation of a treaty. In fact, some RUDs have “positively contributed to evolving interpretations of rights under international law.”³⁷ In some instances, however, RUDs have been used to prevent implementation of treaty obligations. The Vienna Convention on the Law of Treaties provides that RUDs that contradict a treaty’s object and purpose are impermissible.³⁸ That the United States points to its non-self-execution declaration in order to avoid obligations under the ICCPR to prevent torture and CID treatment may itself constitute an attempt to impermissibly circumvent essential ICCPR protections.³⁹

³⁵ ICCPR, *supra* note 21, art. 2.

³⁶ World Organization for Human Rights USA, Statement to Senate Judiciary Committee, Subcommittee on Human Rights and the Law: *The Law of the Land: U.S. Implementation of Human Rights Treaties* ¶ 7, Dec. 16, 2009.

³⁷ *Id.* ¶ 8.

³⁸ Vienna Convention, *supra* note 26, art. 19.

³⁹ World Organization for Human Rights USA, *supra* note 29, ¶ 8.

The U.S. reservation regarding Article 7 faced similar objections by states who felt that it defeated the primary object and purpose of the treaty. The U.S. reservation regarding Article 7 of the ICCPR states that the article's provision applies only "to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."⁴⁰ States objected to this reservation on grounds that Article 7 was an essential article in the ICCPR and that the protection against "cruel, inhuman and degrading" (CID) treatment was an essential civil and political right that cannot be conditioned or modified.⁴¹ Finland and

If the purpose of the ICCPR is to protect human rights, as reflected by these Senate Committee deliberations, it seems incongruous to allow the practice of rendition and torture to escape its protections simply because the U.S. has not passed laws that would give the treaty domestic effect.

Sweden objected to the reservation on the basis that a state cannot use domestic law as a reason not to fulfill treaty obligations.⁴² The U.S. reservation does limit the applicability of the ICCPR in defining "cruel, inhuman or degrading treatment" as equivalent to the cruel, unusual and inhuman treatment of the Constitution of the United States. While the ICCPR art. 2 requirements suggests that additional implementation of domestic legislation is required only to the extent that there is no existing domestic legislation covering the ICCPR protections, the Constitutional provisions cited by the United States in its reservation do not provide a clear right

⁴⁰ U.S. Reservations, *supra* note 24.

⁴¹ Ash, *supra* note 3, ¶ 22.

⁴² U.S. Reservations, *supra* note 24; Ash, *supra* note 3, ¶ 22.

to be free from torture.⁴³ Even the 8th Amendment of the U.S. Constitution which prohibits “cruel and unusual punishments” does not explicitly ban torture.⁴⁴

It is also interesting to note that when deliberating as to whether to ratify the ICCPR, the U.S. Senate Committee considered two main goals. First, that ratifying the ICCPR would be affirming a commitment to the protection of human rights and second, that ratification would allow the United States to participate in the Human Rights Committee, and thus to have a role in the development and enforcement of human rights globally.⁴⁵ Thus, if the purpose of the ICCPR is to protect human rights, as reflected by these Senate Committee deliberations, it seems incongruous to allow the practice of rendition and torture to escape its protections simply because the U.S. has not passed laws that would give the treaty domestic effect.

To conclude, RUDs that are contrary to the very purpose of the ICCPR should not be used to shirk essential provisions of the treaty. Additionally, provisions regarding jurisdiction and territory should not be used to deny applicability of the ICCPR to extraordinary rendition when it is clear that the detainment, interrogation and torture of individuals violate the core object of the ICCPR to protect human rights. More specifically, the United States should not be allowed to circumvent jurisdictional requirements in order to deprive individuals of their rights to be free from torture and cruel, inhuman and degrading treatment under the ICCPR. To the extent that the underline purpose of the ICCPR is the protection of individuals’ civil and political rights including the right to be free from cruel, inhuman and degrading treatment, RUDs by State

⁴³ John T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 MELB. J. INT’L L. 516 (2005).

⁴⁴ U.S. CONST. amend. XIII.

⁴⁵ Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 7-11 (102d Sess. 1992), *reprinted in* 31 I.L.M. 645 (1992).

parties and the actions of State parties should always be considered “in light of [this] object and purpose.”⁴⁶

Thus, despite these RUDs and the assertion by the United States against application of the ICCPR, State Parties still have an obligation under the treaty to give effect to its provisions and cannot rely on impermissible RUDs to avoid its obligation. The absence of implementing legislation by Congress does not in itself make the ICCPR inapplicable to the United States. In fact, it may constitute a violation by the United States of its Article 2 obligation to take the necessary steps to give effect to ICCPR protections. Having established that the ICCPR does apply, to what extent does the ICCPR address extraordinary rendition and torture?

III. ICCPR ARTICLES RELEVANT TO EXTRAORDINARY RENDITION

A. Article 7

Article 7 of the ICCR states that “[no] one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁷ While this article prohibits outright torture and cruel, inhuman and degrading treatment, there is in fact no explicit prohibition on extraordinary rendition. In contrast, CAT explicitly prohibits refoulement, stating that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁸ This concept of refoulement is especially important for the extraordinary rendition argument as it prevents a State from forcibly transferring persons to countries in order to be tortured. While the ICCPR itself does not mention refoulement, the Human Rights Committee, the body tasked to

⁴⁶ Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1363 (2007).

⁴⁷ ICCPR, *supra* note 21, art. 7.

⁴⁸ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 2002) [hereinafter CAT].

interpret ICCPR provisions, has in fact interpreted Article 7 to encompass (and prohibit) the extradition of individuals to other countries in order to be tortured or suffer CID treatment.⁴⁹

More specifically, the Committee has stated that State parties to the ICCPR “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁵⁰

The United States does not agree with the Human Rights Committee in finding an implicit non-refoulement obligation in the ICCPR, because to do so would certainly implicate the practice of extraordinary rendition. The ICCPR protects against a broader range of abuses, including treatment that may not amount to torture. Consequently, finding the same non-refoulement obligation for State Parties under the ICCPR would be especially important for the extraordinary argument because ICCPR Article 7 protects against the torture of persons as well as cruel, inhuman or degrading treatment of persons, while CAT protects against only torture.⁵¹ The Human Rights Committee has also previously held that “If a State Party extradites within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”⁵² Thus, so long as there is a “real risk” of torture or ill treatment in the jurisdiction to which individuals are being returned, a State Party would be violating the ICCPR, regardless of whether torture or CID treatment actually occurred. The Committee does not

⁴⁹ Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* 55 (New York: ABCNY & NYU School of Law, 2004) [hereinafter *Torture by Proxy*].

⁵⁰ U.N. Human Rights Comm., *General Comment No. 20*, ¶ 9, U.N. Doc. A/47/40 (1992).

⁵¹ Satterthwaite, *supra* note 39, at 1358.

⁵² U.N. Human Rights Comm., *Communication No. 470/1991: Kinder v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

provide clear guidance as to what constitutes a “real risk.”⁵³ However, scholars have interpreted the “real risk” standard to be more stringent than the “in danger of” standard under CAT.⁵⁴

B. Article 2

The Committee also derives an inherent non-refoulement obligation from the language of Article 2 of the Covenant requiring all State parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” by the Covenant.⁵⁵ This Article 2 language of territory and jurisdiction gives rise to the central question of ICCPR applicability to extraordinary rendition. This territory and jurisdiction argument continues to spur debate in relation to extra-territorial transfers and extraordinary rendition.⁵⁶

The U.S. government maintains that regardless of whether there is a non-refoulement obligation inherent in Article 7, the ICCPR only protects individuals within U.S. territory and that extraordinary rendition, which involves extraterritorial transfers, is outside the treaty’s scope.⁵⁷ According to the Bush Administration, “The United States has maintained consistently that the [ICCPR] does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.”⁵⁸ This argument comes from the language of Article 2 specifying “all individuals within its territory and subject to its jurisdiction.”⁵⁹ According to the United States, the phrase “and subject to its jurisdiction” creates territorial and jurisdictional requirements that must be

⁵³ Torture by Proxy, *supra* note 42, at 56.

⁵⁴ *Id.*

⁵⁵ *Id.* at 55; ICCPR, *supra* note 21, art. 2.

⁵⁶ Satterthwaite, *supra* note 39, at 1362

⁵⁷ *Id.* at 1358.

⁵⁸ Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (April 4, 2003) *reprinted in The Torture Papers: The Road to Abu Ghraib* 286, 346-59 (Karen Greenberg & Joshua Dratel, eds. 2005).

⁵⁹ ICCPR, *supra* note 21, art. 2.

met before an individual who has been subjected to torture or CID may claim the protection of the treaty.⁶⁰ Thus, to come under the protection of the ICCPR, in the view of the United States, an individual must both be in U.S. territory and within the jurisdiction of the United States.

While the ICCPR may then apply to a transfer of an individual from the United States to another country, the U.S. government has argued that it does not apply to the transfer of an individual from a country outside the United States to another country.

The case of Abou Elkassim Britel demonstrates the dilemma for victims of extraordinary rendition who never set foot on U.S. territory. Britel is an Italian citizen of Moroccan descent. While traveling in Pakistan on business for his Arabic to Italian translation work, he was apprehended, detained and tortured by Pakistani officials. On May 24, 2002, Britel was handcuffed, blindfolded, stripped of his clothes, shackled and dragged aboard an Aero Contractors-operated rendition plane bound for Morocco. Once there, U.S. officials detained, interrogated and tortured him for a period of eight months. After that, he was transferred to several other prisons in Morocco. Currently, almost eight years later, Britel remains in prison, despite being found to have no involvement with any kind of terrorist activity. Throughout this ordeal, Britel never set foot in the formal U.S. territory, and thus the United States claims that the protections under the ICCPR do not extend to him.

The Human Rights Committee disagrees with the U.S. reading of Article 2. Reading the “and” as an “or,” the Committee separates the territorial and jurisdictional requirements, such that an individual in U.S. territory and an individual who is subject to U.S. jurisdiction would both be protected.⁶¹ This reading of Article 2 would certainly implicate the U.S. practice of extraordinary rendition as an ICCPR State Party. The Committee takes a broader approach in

⁶⁰ Satterthwaite, *supra* note 39, at 1359.

⁶¹ *Id.*

determining territorial jurisdiction, focusing more on the issue of who has control over the individuals rather than whether the individual is in fact in the formal territory of the United States. Under this control test, persons may come under a State's control if they are in the State's territory or if they are in the "direct personal control of the state through detention or abduction."⁶² From documented cases of extraordinary rendition, the C.I.A.'s capturing and transferring of individuals on planes and then detaining them in overseas facilities with no means of escape would be sufficient control by the U.S. to establish jurisdiction under the control test. For instance, in the case of Britel, the fact that he was in the direct control of the C.I.A. when detained and tortured in the Moroccan facility, sufficiently establishes jurisdiction of the U.S. to make the ICCPR applicable.

The Human Rights Committee has also found State parties responsible for ICCPR violations that are imputable to the State, rather than those that occur within the physical territory of the state. Imputable violations include those discussed above, where an individual is denied ICCPR protections while he/she is in the effective control of a State. The Committee has imputed to the State certain acts by the State's actors. Imputable acts include violations by State officials or agents of an individual's ICCPR protections regardless of where they occur.⁶³ The State is also held responsible when it does not carry out its obligation to investigate or address allegations of ICCPR violations by State actors or entities.⁶⁴

Considering the various U.S. actors involved in extraordinary rendition, including the aircraft carriers and corporations contracted by the C.I.A. to plan the rendition flights and to

⁶² *Id.* at 1364.

⁶³ Torture by Proxy, *supra* note 42, at 58; U.N. Human Rights Comm., *Communication No. 469/1991: Ng v. Canada*, ¶ 6.1, U.N. Doc. CCPR/C/49/D/469/1991(1994).

⁶⁴ Torture by Proxy, *supra* note 42, at 59; U.N. Human Rights Comm, *General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter HRC, *General Comment No. 31*].

provide the planes, crew and landing sites, and perhaps even to engage in the torture and cruel and inhuman treatment of those rendered overseas, there are a number of State actors whose involvement in extraordinary rendition could amount to violations of the ICCPR. News reports and investigations document the complex network of shell companies and operating companies used by the C.I.A. to transfer and torture victims on rendition flights. The obligation to investigate and address allegations of violations by private persons and entities gives States the responsibility of ensuring that private actors are not acting under the power of the State to inflict torture and CID treatment on others.⁶⁵ The Human Rights Committee finds that the failure to comply with the obligation to investigate and address allegation of ICCPR a violation of Article 7. Specifically, the Committee states that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights. . . .”⁶⁶

IV. STATUS OF ICCPR IMPLEMENTATION IN THE UNITED STATES

A. ICCPR Oversight Committee: Observations on U.S. Practice of Extraordinary Rendition

On July 28, 2006, the Human Rights Committee, upon review of the United States report of ICCPR implementation, issued Concluding Observations criticizing its human rights records and expressing concern over the lack of implementation thus far of ICCPR rights and protections.⁶⁷ In talks between the Human Rights Committee and the U.S. Delegation, the United States asserted, among other things, that the interpretations of the ICCPR by the Human

⁶⁵ Torture by Proxy, *supra* note 42, at 59.

⁶⁶ HRC, *General Comment No. 31*, *supra* note 56, ¶ 8.

⁶⁷ Press Release, United States: The UN Human Rights Committee Criticises the US Human Rights Record, July 31, 2006 (Geneva).

Rights Committee were not binding on the United States, and that ICCPR provisions did not apply to extraordinary rendition practices because they occurred outside of U.S. territory, and refused to comment on further intelligence operations.⁶⁸ The Committee rejected this argument,

The United States does not agree with the Human Rights Committee in finding an implicit non-refoulement obligation in the ICCPR, because to do so would certainly implicate the practice of extraordinary rendition.

expressing its concern over “numerous well-publicized and documented allegations that persons sent to third countries [through extraordinary rendition] were indeed detained and interrogated while receiving treatment grossly violating the prohibition contained in article 7.”⁶⁹ The Committee then recommended that the United States review its position regarding ICCPR applicability to extraordinary rendition and extraterritorial transfers, in accordance to the Committee’s interpretation of Article 7.⁷⁰ The Committee urged the United States to “conduct thorough and independent investigations into the allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no such situation will recur, and provide appropriate remedy to the victims.”⁷¹

B. Universal Periodic Review Reports

Most recently, the U.N. Universal Periodic Review for year 2011 has drawn attention to ICCPR implementation in the United States. When the Human Rights Council, the human rights

⁶⁸ *Id.*

⁶⁹ U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 16, U.N. Doc. CPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

⁷⁰ *Id.*

⁷¹ *Id.*

monitoring body of the United Nations, was created on March 15, 2006, it was tasked to oversee the Universal Periodic Review, a process seeking to review implementation of human rights treaties and fulfillment of human rights obligations by all State parties every four years.⁷² In a report submitted to the Working Group on the Universal Periodic Review in early 2010, international human rights organizations urged the United States to fully implement the human rights treaties it has ratified by withdrawing RUDs that undermine treaty compliance and enacting implementing legislation.⁷³ The submission specifically cites the U.S. failure to fulfill obligations under the ICCPR in regards to extraordinary rendition to torture. By failing to adopt domestic legislation guaranteeing the protections found in the ICCPR, the United States falls short of its obligations under that treaty.⁷⁴ The Universal Periodic Review considers these reports and recommendations from civil society in order to assess whether the United States is fulfilling its obligations under the ICCPR and other treaties to which it is a Party.

VI. FAILURE TO IMPLEMENT THE ICCPR: THE NORTH CAROLINA CONNECTION.

While the U.S. program of extraordinary rendition is in itself a violation of the ICCPR, the Human Rights Committee also states that the involvement of State actors in extraordinary rendition could also amount to violations of the ICCPR by the State Party.⁷⁵ At the very least, the United States would be obligated to investigate such allegations to ensure that State actors are not inflicting torture and cruel, inhuman and degrading treatment in violation of the ICCPR.⁷⁶ This obligation is especially relevant as the U.S. government contracted private companies in order to supply the airplanes, air crew and plan the logistics of rendition flights.

⁷² G.A. Res. 60/251, ¶17, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

⁷³ Joint Submission to the U.N. Universal Periodic Review 6, 9th Sess., Working Group on UPR (2010).

⁷⁴ *Id.* at 7.

⁷⁵ HRC, *General Comment No. 31*, *supra* note 56, ¶ 8.

⁷⁶ Torture by Proxy, *supra* note 42, at 59.

One such company was Aero Contractors, a C.I.A.-affiliated company that operates out of Johnston County, North Carolina.⁷⁷ Aero employees served as the pilots in command of rendition flights carrying individuals to Afghanistan, Morocco, and other countries where they were detained, interrogated and tortured.⁷⁸ This involvement of Aero Contractors and Aero pilots as State actors could constitute additional violations of the ICCPR by the United States.

Specifically, Aero Contractors was involved in the extraordinary rendition of four individuals: Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri and Bisher Al-Rawi.⁷⁹ All four of these men were extraordinarily rendered using two aircraft operated by Aero Contractors and registered as N379P and N313P. Their capture, rendition and detention highlight the issues of territoriality under Article 7 of the ICCPR. Abou Elkassim Britel is an Italian citizen of Moroccan descent.⁸⁰ While traveling in Pakistan for business, Pakistani officials arrested and detained Britel before handing him over to U.S. officials. On May 24, 2002, Britel was handcuffed, blindfolded, stripped of his clothes, shackled and dragged aboard the Aero Contractors-operated rendition plane, registered as N379P.⁸¹ The plane landed in Rabat, Morocco, where Britel was detained, interrogated and tortured by U.S. officials for a period of eight months.⁸² Currently, Britel is detained in a prison in Morocco despite an official determination by the Italian government that he was at no time associated with terrorist

⁷⁷ Scott Shane, Stephen Grey & Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005.

⁷⁸ *Id.*

⁷⁹ Partial List of Detainees Secretly Transported by Aero Contractors of North Carolina for Torture by or for the C.I.A., *available at* http://www.ncstoptorturennow.org/PDF_Archives/Partial_List_Detainees.pdf (prepared by N.C. Stop Torture Now, an organization that has worked since 2005 to end North Carolina's role in extraordinary rendition).

⁸⁰ Declaration of Abou Elkassim Britel in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ¶ 1, Mohamed et al. v. Jeppesen Dataplan, Inc., 539 F. Supp.2d 1128 (2008) (No. C 07-02798 JW).

⁸¹ *Id.* ¶ 11.

⁸² *Id.* ¶ 16.

activity.⁸³ Binyam Mohamed, an Ethiopian national living in the United Kingdom, was captured in Pakistan and rendered twice: once to Morocco on the Aero-operated aircraft N379P, and another time to Afghanistan on the Aero-operated flight N313P.⁸⁴ Both times, Mohamed was interrogated and tortured by U.S. officials. Khaled El-Masri, a German citizen, was arrested in Macedonia and rendered to Afghanistan on Aero-operated N313P.⁸⁵ Bisher Al-Rawi, an Iraqi citizen also living in the United Kingdom, was arrested while traveling in Gambia and then rendered to Afghanistan on Aero-operated N379P, where he was then tortured.⁸⁶

Aero employees served as the pilots in command of rendition flights carrying individuals to Afghanistan, Morocco, and other countries where they were detained, interrogated and tortured. This involvement of Aero Contractors and Aero pilots as State actors could constitute additional violations of the ICCPR by the United States.

In all four of these cases, the C.I.A. officials captured the individual overseas and then rendered them to another country for further interrogation and torture. None of these four men, ever set foot in formal U.S. territory. The United States points to the extraterritorial nature of extraordinary rendition as grounds to deny them their rights under the ICCPR. However, at all times during the rendition flight and detention in the oversea facility, each of these men was held captive by U.S. officials with no means of escape. This control is sufficient to satisfy the territorial jurisdiction requirements for ICCPR protection under the Committee's control test.

⁸³ Biography of Plaintiff Abou Elkassim Britel, ACLU, *available at* <http://www.aclu.org/national-security/biography-plaintiff-abou-elkassim-britel> (last visited May 5, 2010).

⁸⁴ Biography of Plaintiff Binyam Mohamed, ACLU, *available at* <http://www.aclu.org/national-security/biography-plaintiff-binyam-mohamed> (last visited May 5, 2010).

⁸⁵ Complaint at 7-9 ¶¶ 23–30, *El-Masri v. Tenet*, 479 F.3d 296 (2007).

⁸⁶ 1st Amended Complaint at 50 ¶¶ 198-204, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, 539 F. Supp.2d 1128 (2008) (No. C 07-02798 JW).

VII. CONCLUSION

Thus, U.S. involvement in extraordinary rendition violates provisions of the ICCPR, as interpreted by the Human Rights Committee. RUDs by the United States declaring the non-self-execution of treaty provisions and restricting the scope of relevant article provisions do not limit application of the ICCPR to the United States. The practice of extraordinary rendition where individuals are transferred to countries for the purpose of detainment, interrogation and torture outside the bounds of the law, violates an implied non-refoulement obligation under the Article 7 prohibition against torture and CID treatment. Even if there is territorial jurisdiction requirement under Article 2 of the ICCPR, as asserted by the United States, ICCPR violations may still be imputed to the State based upon the control test where extraordinary rendition victims come under the jurisdiction by nature of C.I.A. control, based upon the actions of State agents, or based upon a failure to investigate actions of private actors or entities.

The Convention Against Torture, Extraordinary Rendition, and the Prospects for Treaty Application in North Carolina

INTRODUCTION

The Convention Against Torture, and other Cruel, Inhuman and Degrading Treatment (henceforth, “CAT” or “the Convention” or “the Treaty”) is a firm declaration that torture has no place in society because the act and its supporting infrastructures violate the dignity of its victims and destroy the fabric of human society.⁸⁷ By requiring member states to take legislative, administrative, and judicial measures, the Treaty seeks to prevent torture, not only when it takes place within a member state, but where a member state’s nationals commit or conspire to commit torture anywhere else in the world.

The United States signed and ratified CAT, following up on these commitments by passing federal laws to implement the Treaty. Despite these measures, the United States’ extraordinary rendition program, by which it transfers individuals to countries where they are at a risk of torture, makes it at least a conspirator and at most an active participant in torture in violation of its obligations. This paper will describe the Convention Against Torture and analyze its application to the United States’ extraordinary rendition program. The paper will specifically focus on the involvement of Aero Contractors, Ltd., a charter flight company operating in North Carolina, which works with the Central Intelligence Agency to illegally render individuals to torture.

Part I briefly explains the C.I.A.’s practice of extraordinary rendition and the role of Aero Contractors in the transfer of four individuals to torture. **Part II** explains the operative provisions of the Convention as relevant to extraordinary rendition, including the definition of

⁸⁷ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113 [hereinafter “CAT”].

torture and the requirements upon Member States to ensure compliance with CAT. **Part III** will examine the history of United States actions with respect to CAT, including ratification of and reservations to the Treaty. Part III will also examine the federal laws passed to bring the United States nominally into compliance with CAT. **Part IV** explains that interpreting and applying CAT using basic principals of international and domestic law results in exposing the extraordinary rendition program as a violation of the Treaty and the federal statutes implemented to apply it. **Part V** interprets Aero's actions in light of CAT and U.S. law and argues that the corporation's actions are also in violation of the treaty. **Part VI** touches on how the obligations on the US as a member state under CAT can provide options for North Carolina to take action against Aero Contractors within its own borders. Finally, the paper concludes by offering concluding remarks on the scope of the United States and North Carolina's obligations and opportunities under CAT, as well as the tension between the United States' nominal acceptance of its CAT obligations and its continuing practice of rendition to torture.

I. EXTRAORDINARY RENDITION AND AERO CONTRACTORS

A. *The C.I.A.'s Rendition Program*

In the 1990s, under the administration of U.S. President William Clinton, the Central Intelligence Agency ("C.I.A.") developed the rendition program to address the threat of Al-Qaeda, an international terrorist network. The goal was not interrogation, but to incarcerate senior Al-Qaeda members and otherwise disrupt the group's activities.⁸⁸ The C.I.A. developed four requirements before it would "launch" a rendition operation: (1) "an 'outstanding legal process' against the terrorist suspect, usually connected to terrorist offenses in his country of

⁸⁸ EUR. PARL. ASS., *Report of the Rapporteur on Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States*, ¶¶28 – 29, Doc. No. 10957, (June 12, 2006), available at <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf> [hereinafter "2006 Marty Report"].

origin; (2) a “dossier” of information gathered on the subject, reviewed by U.S. government attorneys; (3) “a country willing to help” apprehend the suspect when he was present in that nation’s territory, and (4) “somewhere to take him after he was arrested.”⁸⁹ The United States would ask the receiving country to provide a diplomatic assurance that they would treat the subject according to their own laws.⁹⁰

This early form of the rendition program served as the means by which the United States and other nations “asserted their right to apprehend a terrorist suspect on foreign soil in order to bring him to [legal] justice.”⁹¹ Since the prisoner was being transferred not merely to incarceration, but to some sort of judicial process, legal scholars and NGOs described this process as “rendition to justice.”⁹² Despite its secretive nature, it was generally seen as a lawful procedure.⁹³

However, after September 11, 2001 and with the start of the “war on terror,” the rendition operations changed in scale and focus as the C.I.A. was pressured both to gain information from the detained individuals and to keep suspected terrorists “outside the reach of any justice

⁸⁹ *Id.* at ¶29, quoting Michael Scheuer, former Chief of the Bin Laden Unit in the CIA Counter-Terrorism Center, interview carried out by the Rapporteur’s representative, May 2006.

⁹⁰ 2006 Marty Report, *supra* note 2, at ¶30.

⁹¹ 2006 Marty Report, *supra* note 2, at ¶33, quoting Michael Schumer.

⁹² 2006 Marty Report, *supra* note 2, at ¶34, citing Center for Human Rights and Global Justice, NYU School of Law, *Beyond Guantanamo: Transfers to Torture One Year after Rasul v. Bush*, 28 June 2005. See also Meg Satterthwaite, Symposium on the New Face of Armed Conflict: Enemy Combatants After Hamdan v. Rumsfeld: Rendered Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L. Rev. 1333 [hereinafter “Rendered Meaningless”]. Professor Satterthwaite uses this term for “a practice that was developed in the 1980s to bring suspects before U.S. courts to face criminal charges” and draws a differentiation between this process and the process of “extraordinary rendition” described in this paper. *Id.* at 1337-1338. The definition of extraordinary rendition herein used will be as defined by Professor Satterthwaite in *Rendered Meaningless*. It is important to note that, even though the rendition program was structured to provide legal process to the detainee, it was by no means certain that the individual would receive any at all. The 2006 Marty report quotes Mr. Schumer as saying “after the transfer, the United States made no effort to assess the manner in which the detainees were subsequently treated.” 2006 Marty Report, *supra* note 2, at ¶30.

⁹³ 2006 Marty Report, *supra* note 2, at ¶34; See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding that a U.S. court did have jurisdiction of a man brought into the United States from Mexico by abduction rather than execution); See also *Ker v. Illinois*, 119 U.S. 436 (1886) (“There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will”).

system.”⁹⁴ The detainees were also subjected to Enhanced Interrogation Techniques [“EITs”], and the refocused operation led to many instances of torture under the C.I.A.’s custody.⁹⁵ The EITs, including dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap, abdominal slap, wall standing, stress positions, water dousing, sleep deprivation, and the waterboard,⁹⁶ have been identified as violations of legal norms prohibiting torture and cruel, inhuman and degrading treatment.⁹⁷

This “dangerous shift in policy” meant that “rendition to justice, a practice purportedly developed to uphold the rule of law against lawless terrorists, [became] a lawless practice which

The so-called Enhanced Interrogation Techniques, including dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap, abdominal slap, wall standing, stress positions, water dousing, sleep deprivation, and the waterboard, have been identified as violations of legal norms prohibiting torture and cruel, inhuman and degrading treatment.

perverts the rule of law in relation to terrorism - the practice of extraordinary rendition.”⁹⁸ For this paper, I will use the definition forwarded by Professor Satterthwaite: “‘extraordinary rendition’ is defined as the transfer of an individual, without the benefit of a

legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture.”⁹⁹ This definition implies that the extraordinary rendition process is at least the *means by which an individual is subjected to torture* in that the United States knowingly deposits an individual into the hands of partners who willingly inflict severe treatment rising to

⁹⁴ 2006 Marty Report, *supra* note 2, at ¶35.

⁹⁵ 2006 Marty Report, *supra* note 2, at ¶36.

⁹⁶ Memorandum from the Office of Legal Counsel to the C.I.A. 8-16 (May 30, 2005), *available at* http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf [hereinafter “May 30 OLC Memo”].

⁹⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN C.I.A. CUSTODY § 4 ¶¶ 5-6 (2007) [hereinafter “ICRC Report”].

⁹⁸ Satterthwaite, *Rendered Meaningless*, *supra* note 6 at 1333.

⁹⁹ *Id.* at 1336.

the level of torture. Thus, human rights organizations have also called the practice "torture by proxy" or "the outsourcing of torture."¹⁰⁰

B. Aero Contractors

The C.I.A.'s extraordinary rendition program is supported by a network of covert contracts with U.S. corporations who transport individuals to the torture sites. One such corporation is the C.I.A.-affiliated company Aero Contractors, Ltd. ("Aero"). Aero is based at the Johnston County Airstrip in Smithfield, North Carolina,¹⁰¹ and also operates out of the Global TransPark Authority facility in Kinston, North Carolina.¹⁰²

Aero was created by a former C.I.A. pilot at the C.I.A.'s request, and operated exclusively for and at the behest of the United States government. In the past, much of Aero's work was related to operations with American troops and providing transportation for foreign dignitaries visiting the United States. Recently, however, Aero has also performed secret transfers of prisoners to C.I.A. black sites as part of the C.I.A.'s illegal practice of extraordinary rendition. Analysis by the European Parliament's lead investigator shows that at least from 2001 to 2006, Aero operated aircraft on behalf of the C.I.A., primarily by providing pilots and flight crews.¹⁰³ According to published or otherwise available flight records, Aero was involved in the rendition of a number of individuals, including Binyam Mohamed, Khaled El-Masri, Abou El-Kassim Britel, and Bisher al-Rawi.¹⁰⁴ The men were arrested in various countries by local police, picked up by Aero, then deposited at detention centers where they were imprisoned and

¹⁰⁰ *Id.* at 1333.

¹⁰¹ Interview with Gavin Simpson, Lead Investigator for European Parliament Report by Dick Marty, Chapel Hill, N.C. April 7, 2010. [Hereinafter "Gavin Simpson interview"]

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ "Partial List of Detainees Extra-Judicially Transported by Aero Contractors," North Carolina Stop Torture Now, <http://www.ncstoptorturenw.org/resourcesplanespotting.html> (last visited May 5, 2010).

tortured.¹⁰⁵ Bisher al-Rawi and Abou elKassim Brittel were transported by the Gulfstream V, tail number N379P.¹⁰⁶ The Boeing Business Jet, tail number N313P, transported Khaled el-Masri to Afghanistan and Binyam Mohamed to Pakistan to be interrogated – and tortured – by local officials.¹⁰⁷

II. THE CONVENTION AGAINST TORTURE

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was ratified by the United Nations General Assembly on December 10, 1984.¹⁰⁸ In accordance with Article 27(1), CAT entered into force on June 26, 1987.¹⁰⁹ There are currently 146 parties and 76 signatories to the treaty.¹¹⁰ As a whole, the Treaty is both a declaration of international ethical norms relating to torture as well as a system of legal obligations upon its Member States. The Preamble sets an expansive tone for the treaty as an instrument to unite nations to prevent the morally and legally abhorrent practice of torture.¹¹¹ Part I of CAT lays out a schema defining key terms,¹¹² prohibiting certain acts,¹¹³ and placing affirmative obligations for legislative reforms to support each nation’s commitment to preventing torture.¹¹⁴ Part II of CAT creates an administrative and dispute resolution structure to support the Treaty. This part

¹⁰⁵ See Scott Shane, Stephen Grey, Margot Williams. *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*. N.Y. TIMES. May 31, 2005.

¹⁰⁶ 2006 Marty Report, Appendix No. 5, 7; Declaration of Abou Elkassim Britel in Support of Plaintiffs’ Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment ¶ 14, Mohamed et al. v. Jeppesen Dataplan, Inc., 539 F. Supp.2d 1128 (2008) (No. C 07-02798 JW) [hereinafter “Britel Declaration”].

¹⁰⁷ 2006 Marty Report, Appendix No. 1.

¹⁰⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *United Nations Treaty Collection*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last accessed May 5, 2010). [hereinafter “UN Treaty Collection”].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ CAT, *supra* note 1, Preamble.

¹¹² *Id.* at art. 1.

¹¹³ *Id.* at art. 2, 3.

¹¹⁴ See, e.g. *Id.* at art. 5

also creates the Committee Against Torture (“Committee”)¹¹⁵ a body composed of ten independent experts who monitor Member States’ implementation of CAT. States are required to submit reports to the Committee describing how they have implemented the treaty, and the Committee responds with its concerns and recommendations to bring the Member State in compliance with CAT.¹¹⁶ The Committee can also issue a interpret CAT by publishing a “General Comment” on a particular issue.¹¹⁷ Part III of CAT provides instructions on ratification,¹¹⁸ dispute negotiations,¹¹⁹ and entry into force.¹²⁰

This section will primarily examine the requirements in Part I, where most of CAT’s substantive requirements are found; it will also look at the United States’ compliance with these rules, and how these principles bear on Aero Contractors and North Carolina. It will describe the CAT Preamble, the definition of torture, what acts are prohibited by the Treaty, and what legislative reform Member States must undertake.

A. The Preamble

The Preamble lays the foundation for expansive and lasting protection against torture, and impresses upon the Member States the significance of the commitment they have made. Though the Preamble does not contain operative provisions imposing clear duties, it provides the “object and purpose” of the Treaty, which is important in framing its overall interpretation and implementation.¹²¹

¹¹⁵ *Id.* at art. 17.

¹¹⁶ CAT, *supra* note 1, art. 17.

¹¹⁷ CAT, *supra* note 1, art. 19.

¹¹⁸ *Id.* At arts. 25 – 29.

¹¹⁹ *Id.* at art. 30.

¹²⁰ *See id.* at art. 32.

¹²¹ *See* Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969), entered into force Jan. 27, 1980, art. 31(1). The phrase “object and purpose” comes from the Vienna Convention on the Law of Treaties, an international agreement used to interpret the language and effect of international treaties and declarations.

The Treaty is adopted with the assertion that “recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “those rights derive from the inherent dignity of the human person.”¹²² The Preamble goes on to charge the Member States “to promote universal respect for, and observance of, human rights and fundamental freedoms.”¹²³ The ultimate goal is solemn and optimistic: “Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”¹²⁴

The Preamble also refers to its reliance on other foundational documents of international human rights law: The U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The early reference to these other treaties is both a reminder to Member States of their other obligations, as well as an assertion that CAT is an integral part of an expansive network of protections that are due to every individual. CAT thereby affirms that it does not operate in isolation, and that any gaps or loopholes can and should be filled in by the reach of other international agreements.

B. Defining Torture

The definition of “torture” in Part 1, Article 1 of CAT has three aspects: (1) a triggering act against an individual, (2) performed for particular purpose, (3) performed by a particular individual. Article 1 defines the basic triggering act as “any act by which severe pain or

¹²² CAT, *supra* note 1, Preamble.

¹²³ *Id.*

¹²⁴ *Id.*

suffering, whether physical or mental, is intentionally inflicted” on a subject.¹²⁵ To qualify as torture, the treatment inflicted on the subject must be for particular purposes. The Treaty does not give an absolute standard; rather, it provides four examples of when the triggering act would certainly constitute torture: when “for such purposes as” (1) obtaining “information or a confession” from the subject or a third party, (2) punishing the suspect or a third party for an act he is known or suspected to have committed, (3) “intimidating or coercing” the subject or a third person, or (4) “for any reason based on discrimination of any kind.”¹²⁶ Finally, the treatment must either be inflicted by a public official or person acting in an official capacity, or must be done by the consent or acquiescence of such a person. Article 1 also establishes the only defense to this expansive definition of torture; the infliction of severe pain or suffering, physical or mental, for any of the above-mentioned purposes, is not covered by CAT when “arising only from, inherent in or incidental to lawful sanctions.”¹²⁷

CAT also defines and prohibits lesser actions that do not rise to the level of torture. Part I, Article 16 prohibits “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1.”¹²⁸ Article 16, “is in the nature of a catch-all provision,” and serves to forbid any lesser, though still revolting treatment.¹²⁹

C. Prohibited Acts under CAT

Part I of CAT lays out the basic requirements upon Member States in two ways: by prohibiting three specific acts – torture (Article 2), refoulement (Article 3), and cruel, inhuman

¹²⁵ CAT, *supra* note 1, art. 1.

¹²⁶ CAT, *supra* note 1, art. 1.

¹²⁷ *Id.*

¹²⁸ CAT, *supra* note 1, art. 16.

¹²⁹ M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389, 394 (2006).

and degrading treatment (Article 16) – and also by defining what legislative reform States must undertake to bring their criminal legal systems into compliance.

Article 2 requires that a Member State “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”¹³⁰ Article 2 is non-derogable, meaning that it is absolute regardless of the political environment and that it cannot be limited, annulled or destroyed by any contingency, excuse, or defense.¹³¹ The Article states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹³² CAT also destroys any chain of command excuse by stating that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”¹³³

Article 3, known as the non-refoulement obligation, states that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹³⁴ The Committee on Torture explains that “substantial grounds” does not require that torture is “highly probable” in the receiving country, but requires more than a “mere theory or suspicion” that someone will be tortured.¹³⁵ The Committee interpreted Article 3 to prohibit both “direct and indirect removal . . . meaning that a state cannot remove a person to a third country when it

¹³⁰ CAT, *supra* note 1, art. 2(1).

¹³¹ “Derogate,” MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/derogate>. See also Jillian Button, *Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 Fla. J. Int'l L. 531, 546 (2007).

¹³² CAT, *supra* note 1, art. 2(2)

¹³³ *Id.* at art. 2(3).

¹³⁴ CAT, *supra* note 1, art. 3.

¹³⁵ Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 Case W. Res. J. Int'l L. 309, 321 (2006), citing U.N. Comm. Against Torture, Report of the Committee Against Torture, Annex IX, U.N. Doc. A/53/44 (Sept. 16, 1998), available at http://www1.umn.edu/humanrts/cat/general_comments/CAT_CIXX_Misc1_1997.html.

knows he would be subsequently removed to a country where he would likely face torture.”¹³⁶

To determine whether substantial grounds exist, the State “shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”¹³⁷ The Committee on Torture explains that “substantial grounds” does not require that torture is “highly probable” in the receiving country, but requires more than a “mere theory or suspicion” that someone will be tortured.¹³⁸

Article 2 of the Convention Against Torture states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

The non-refoulement obligation is also non-derogable; meaning that it cannot be limited, annulled or destroyed by any contingency, excuse, or defense.¹³⁹ Article 2 of CAT clearly states that “no extraordinary circumstances whatsoever,” including war or any public emergency, can justify torture or rendition to torture.¹⁴⁰ Neither can “an order from a superior officer or a public authority . . . be invoked as a justification of torture.”¹⁴¹ Also, the UN Special Rapporteur on

¹³⁶ Michael Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, CONGRESSIONAL RESEARCH SERVICE, 4 (March 2004), [hereinafter “CRS 2004”], citing 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 ¶ 2 (Nov. 21, 1997), available at [http://unhchr.ch/tbs/doc.nsf/\(symbol\)/CA T+General+comment+1.En?OpenDocument](http://unhchr.ch/tbs/doc.nsf/(symbol)/CA T+General+comment+1.En?OpenDocument).

¹³⁷ CAT, *supra* note 1, art. 3.

¹³⁸ Sadat, *Ghost Prisoners and Black Sites*, *supra* note 47, at 321, citing U.N. Comm. Against Torture, Report of the Committee Against Torture, Annex IX, U.N. Doc. A/53/44 (Sept. 16, 1998).

¹³⁹ “Derogate,” Merriam-Webster, available at <http://www.merriam-webster.com/dictionary/derogate>. Button, *Spirited Away*, *supra* note 44, at 546.

¹⁴⁰ CAT, *supra* note 1, art. 2(2).

¹⁴¹ *Id.* at art. 2(3).

Torture stated that the ban on refoulement is non-derogable as “an inherent part of the overall absolute and imperative nature of the prohibition of torture and forms of ill-treatment.”¹⁴²

Article 16 requires a Member State to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”¹⁴³ Article 16 parallels the definition of torture in article 1, and requires state to prevent the acts when “committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁴⁴

D. Legislative, Judicial, and Administrative Reform Required under CAT

After laying out the specific prohibited acts above, CAT describes a support structure of laws and practices each State must take to bring its government in compliance with CAT. If needed, the State must pass laws or administrative regulations to ensure that the procedures are being followed.

To begin, each Member State is required to bring its system of laws into compliance with its obligation to prevent torture. The legislative reform is based on the requirement to criminalize “all acts of torture,” “an attempt to commit torture,” and “an act by any person which constitutes complicity or participation in torture.”¹⁴⁵ The state must set “appropriate penalties which take into account [the] grave nature” of the crimes.¹⁴⁶ To ensure its ability to prosecute for torture, the state must take all necessary measures “to establish its jurisdiction” over torture, attempted torture, or complicity to torture in three cases: (1) when the acts “are committed in any territory

¹⁴² Button, *Spirited Away*, *supra* note 44, at 548, *quoting* The Special Rapporteur, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 28, delivered to the Security Council and the General Assembly, U.N. Doc. A/59/324 (Aug. 23, 2004).

¹⁴³ CAT, *supra* note 1, art. 16.

¹⁴⁴ *Id.* at art. 16(1).

¹⁴⁵ CAT, *supra* note 1, art. 4(1).

¹⁴⁶ *Id.* at art. 4(2).

under its jurisdiction or on board a ship or aircraft registered in that State;” (2) “[w]hen the alleged offender is a national of that State;” and (3) “[w]hen the victim was a national of that State if that State considers it appropriate.”¹⁴⁷ Furthermore, any statement made as a result of torture may not be invoked as evidence against the victim of the alleged torture.¹⁴⁸

With respect to both torture and cruel, inhuman and degrading treatment, state parties are required: to train any civil or military officer who might have a role in custody or interrogation about these offenses;¹⁴⁹ to continue to review detention and interrogation methods “in any territory under its jurisdiction” to prevent these offenses;¹⁵⁰ to ensure prompt and impartial investigations where there is reasonable ground to believe such offenses have been committed “in any territory under its jurisdiction;”¹⁵¹ and ensure that a victim of such offenses has a right to complain and will have his case promptly and impartially heard.¹⁵²

These reforms touch on almost every aspect of governance, calling for compliance in the state’s laws, evidentiary rules, criminal investigations, extradition practices, and military and government personnel training.¹⁵³ The scope of these requirements show that CAT is meant to be a holistic commitment, such that every part of the Member State’s government and people are engaged in working to prevent torture. Member States must be fully engaged on every level to ensure compliance with CAT.

¹⁴⁷ *Id.* at art. 5(2).

¹⁴⁸ *Id.* at art. 15.

¹⁴⁹ *Id.* at art. 10.

¹⁵⁰ CAT, *supra* note 1, art. 11.

¹⁵¹ *Id.* at art. 12.

¹⁵² *Id.* at art. 13.

¹⁵³ *See* CAT, *supra* note 1, arts. 4 – 16.

III. US RESERVATIONS TO CAT

President Ronald Reagan signed the Treaty on behalf of the United States of America on April 18, 1988. In his speech to the Senate on May 20, 1988, President Reagan declared the nation's resolute dedication to the Convention.

The United States participated actively and effectively in the negotiation of the Convention. It marks a significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.¹⁵⁴

Despite this broad statement, the United States was not willing to accept the Treaty as-is. The signing came with the declaration that the United States “reserves the right to communicate, upon ratification, such reservations, interpretative understandings, or declarations as are deemed necessary.”¹⁵⁵ The Senate ratified CAT on October 21, 1994, making its advice and consent subject to eight reservations.¹⁵⁶ Some of these interpretations are expansive and further the purpose of the treaty, but the United States largely attempts to limit the application of CAT both within its own borders, and to U.S. nationals acting outside of the United States in a way that would otherwise violate CAT.

The Senate also decided that the existing schema of criminal law was enough to criminalize torture within the United States, but that more was needed to criminalize and establish jurisdiction over these acts when committed outside United States territory.¹⁵⁷ To this end, the United States passed the Federal Torture Statute, implementing jurisdiction as required

¹⁵⁴ Ronald Reagan, United States President, Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment (May 20, 1988), available at <http://www.reagan.utexas.edu/archives/speeches/1988/052088f.htm>.

¹⁵⁵ U.N. Treaty Collection, *supra* note 22.

¹⁵⁶ *Id.*

¹⁵⁷ Michael Garcia, *The U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CONGRESSIONAL RESEARCH SERVICE, 7 (January 2009), [hereinafter “CRS 2009”], available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf>.

by Articles 4 and 5, and the Foreign Affairs Reform and Restructuring Act, accepting Article 3 as a policy.¹⁵⁸

A. Reservations and interpretations of CAT Articles 1-16

The United States' understanding of CAT is based on a compilation of interpretations from the President Reagan at signing, the Senate at ratification, and various federal agencies as the Treaty began to be implemented. To begin, the Senate declared that Articles 1 through 16 were not self-executing, meaning that they had no effect within the United States unless Congress passed legislation to implement the provisions.¹⁵⁹ The Senate reiterated the importance of CAT's non-derivability, contrary to President Reagan's suggestion that the United States understand Article 2's non-derogability provision to "not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."¹⁶⁰ The Senate rejected this proposal, "indicat[ing] that the United States fully accepts the non-derogability of the prohibition on torture."¹⁶¹ The State Department has also stated that non-derogability is "necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms."¹⁶²

Regarding the Article 1 definition of torture, the Senate declared at ratification that a public official or someone acting in an official capacity could still be culpable for torture even if

¹⁵⁸ *Id.*

¹⁵⁹ CRS 2004, *supra* note 50, at 4, *citing* Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990) [hereinafter "Sen. Resolution"].

¹⁶⁰ David Weissbrodt & Amy Bergquist, Extraordinary Rendition and the Torture, 46 VA. J. Int'l L. 585, 601 (2006).

¹⁶¹ *Id.*

¹⁶² CRS 2004, *supra* note 50, at 2-3, *citing* 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"].

he only acquiesced to the act.¹⁶³ Acquiescence requires only that “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.”¹⁶⁴ “Willful blindness” that a person will be tortured may also constitute “acquiescence.”¹⁶⁵ The U.S. State Department interprets the definition of torture narrowly, understanding it to be an “extreme” practice beyond rough but not “severe” treatment such as police brutality.¹⁶⁶ Early interpretations by the Department of Justice and the Department of Defense theorize that specific intent to cause severe pain and suffering is required, and that unintentional and unanticipated circumstances do not rise to this level.¹⁶⁷ However the Department of Justice revised its approach in 2004, when President Bush directed the United States not to engage in torture, deeming it inappropriate to use a “specific intent” approach to evade the definition of torture.¹⁶⁸

Much of the United States’ objections to CAT revolve around Article 3’s non-refoulement provision. Instead of accepting the “substantial grounds” standard, the Senate declared that the Article 3 non-refoulement obligation applies only when it is “more likely than not” – or more than fifty percent likely - that an individual would be tortured in the receiving country.¹⁶⁹ The “substantial grounds” standard, by comparison, does not require that the

¹⁶³ CRS 2004, *supra* note 50, at 5.

¹⁶⁴ *Id.*, quoting Sen. Resolution, *supra* note 73.

¹⁶⁵ *Id.*, citing *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

¹⁶⁶ *Id.* at 4.

¹⁶⁷ *Id.* at 2, citing State Dept. Summary, *supra* note 76, at 11.

¹⁶⁸ CRS 2009, *supra* note 71, at 9-10.

¹⁶⁹ CRS 2004, *supra* note 50, at 6. See Restatement of the Law, Second, Torts, § 433. To prove that a factor is “more likely than not” to produce the result, means that “[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced,” the court may not find that the standard has been met. *Id.*

likelihood is “highly probable,” but just requires some knowledge “beyond mere theory or suspicion.”¹⁷⁰

Further, Article 3 uses explicit language to define the means of transporting a person - “expel, return (‘refouler’) or extradite.”¹⁷¹ The United States argues that “extraterritorial, irregular renditions are not covered by this provision” because the three specific terms used Article 3 do not completely define the process of “rendition.” Thus, “seizing a person in one country and transferring him to another would arguably not constitute ‘*expelling*’ the suspect,” and as long as the individual was rendered to a country of which he had never been a resident, the United States had not technically “‘*returned*’” the individual to a country where he faced torture.¹⁷² Lastly, if individual’s rendition was not part of an extradition agreement between the United States and the receiving country, the transfer might not constitute an “*extradition*.”¹⁷³ Thus, according to the United States, “it could be argued that the United States would not violate the explicit language of Article 3 if it rendered persons where they faced torture so long as no part of these renditions occurred within the territorial jurisdiction of the United States.”¹⁷⁴

The United States’ approach to Article 16 is mixed. The Senate declared that Article 16 binds the United States only “to the extent that such cruel, unusual, and inhuman treatment or punishment [is] prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.”¹⁷⁵ The Department of Justice takes the position that Article 16 does not explicitly prohibit subjecting a non-U.S. citizen to cruel treatment detained in another country, even if the United States has

¹⁷⁰ See Committee Against Torture, General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention Against Torture, U.N. Doc. CAT/C/IX/Misc.1, 6 (1997).

¹⁷¹ CAT, *supra* note 1, art. 3.

¹⁷² CRS 2004, *supra* note 50, at 18. Emphasis added.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 4.

territorial jurisdiction there.¹⁷⁶ However, at least one former State Department official who was involved in the treaty negotiation and ratification process has asserted that the purpose of this reservation was only to clearly define what Article 16 treatment means, not to limit CAT’s protection.¹⁷⁷

B. Implementing Legislation

1. Federal Torture Statute: 18 U.S.C. §§ 2340 and 2340A

At ratification, the Senate declared that it did not need to enact new criminal provisions to criminalize torture because “it was presumed that such acts would ‘be covered by existing applicable federal and state statutes,’ such as those criminalizing assault, manslaughter, and murder.”¹⁷⁸ However, the United States enacted the Federal Torture Statute [“FTS”] to comply with Article 5 and Article 6 requirements to establish jurisdiction over acts of torture committed outside the United States and to provide appropriate punishments for the crime.

The FTS begins by defining torture, drawing its definition directly from Article 1,¹⁷⁹ and then criminalizes torture, attempted torture, and conspiracy to commit torture.¹⁸⁰ If anyone commits or attempts to commit torture outside the United States, that individual can be fined and/or punished for up to 20 years, and can face life imprisonment or death if the victim dies from the torture.¹⁸¹ The FTS establishes jurisdiction over torture committed outside the United States where: “(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 alleged

¹⁷⁶ CRS 2009, *supra* note 71, at 14.

¹⁷⁷ *Id.*

¹⁷⁸ CRS 2009, *supra* note 71, at 7.

¹⁷⁹ Weissbrodt & Bergquist, *supra* note 74, at 604.

¹⁸⁰ 18 U.S.C. 2340A (1994). [hereinafter “Federal Torture Statute”]

¹⁸¹ Federal Torture Statute, *id.* at 2340A(a),(c). A conspirator faces the same punishments as the principal actors, but cannot be put to death. *Id.*

offender.”¹⁸² “The Senate Report strongly suggests that the Senate intended the geographic scope of jurisdiction to be all-encompassing.”¹⁸³ Notably, for purposes of this paper, the FTS also leaves room for enforcement by individual states, declaring that “[n]othing in this chapter shall be construed as precluding the application of State or local laws on the same subject.”¹⁸⁴

The United States believes that 2340A “[does] 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

Although the Federal Torture Statute clearly gives the U.S. criminal courts the ability to prosecute even the conspiracy to commit torture when the alleged offender is present within the United States, it has never been used to prosecute any individual for torture.

torture.”¹⁸⁵ To date, the FTS has never been used to prosecute any individual for torture. However, since the FTS clearly gives U.S. criminal courts the ability to prosecute even the conspiracy to commit torture when the alleged offender is present within the United

States, an American official who took any part in torture occurring overseas could be brought to court using this statute.

2. *The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)*¹⁸⁶

FARRA has two main provisions; it accepts Article 3 as a policy of the United States, and directs government agencies to make regulations to uphold this policy subject to the Senate’s reservations to CAT. FARRA states that: “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to

¹⁸² *Id.* at 2340A(b).

¹⁸³ Weissbrodt & Bergquist, *supra* note 74, at 604.

¹⁸⁴ Federal Torture Statute, *supra* note 94, at 2340B.

¹⁸⁵ CRS 2004, *supra* note 50, at 17.

¹⁸⁶ Foreign Affairs Reform and Restructuring Act, Pub. L. 105-277, div. G, Title XXII, § 2242 (2008). [hereinafter “FARRA”].

torture, regardless of whether the person is physically present in the United States.”¹⁸⁷ So far, only the Departments of Homeland Security, Justice, and State have passed regulations to comply with FARRA. Significantly, the Department of Defense, the FBI, and the CIA have not passed any such regulations.¹⁸⁸

This policy is mainly used to prevent removal where undocumented residents claim asylum or refugee status. “Some courts have held that FARRA does not extend legal rights beyond the removal setting, including cases alleging fear of extraordinary rendition.”¹⁸⁹ However, FARRA is still relevant here as an explicit acceptance of the non-refoulement policy. Furthermore, no statute or regulation has excluded the departments and agencies who manage the extraordinary rendition program from their obligations to implement procedures to comply with FARRA.

3. Other domestic laws prohibiting torture

Though FARRA and the FTS are the most directly related to the United States’ obligations under CAT, various other regulations and statutes have been passed to make torture illegal. The Eighth Amendment of the U.S. Constitution prohibits “cruel and unusual punishment;”¹⁹⁰ and the Uniform Code of Military Justice (UCMJ) prohibits torture by U.S. military personnel and other individuals.¹⁹¹ This network of laws created to apply to domestic and international operations shows that, at least on paper, the United States accepts as binding the prohibition against torture and cruel, inhuman, and degrading treatment both within U.S. territory and abroad.

¹⁸⁷ *Id.* at 2242(a).

¹⁸⁸ Satterthwaite, *Rendered Meaningless*, *supra* note 6 at 1377.

¹⁸⁹ Weissbrodt & Bergquist, *supra* note 74 at 608.

¹⁹⁰ *See* U.S. CONST. amend. VIII.

¹⁹¹ *See* Uniform Code of Military Justice, 10 U.S.C. 47.

C. Summary of US interpretation of CAT

President Reagan's comments to the Senate in 1988 and the Senate's subsequent declarations upon ratification set the tone for the nation's approach to the Treaty, and federal agencies provided further interpretation. As a whole, the U.S. commitment to undertake the obligations imposed by the treaty is less than firm; some declarations show dedication to the principles of CAT, while others attempt to limit the force of some provisions. On the one hand, the Senate emphasized CAT's non-derogability in the face of President Reagan's suggestion otherwise. "Acquiescence" and "willful blindness" were declared to be equally as culpable as actual participation in the torture of an individual. The FTS provided U.S. courts with jurisdiction over acts of torture committed abroad, and FARRA both declared a policy of non-refoulement and instructed every federal agency to become compliant with this commitment.

However, the United States attempts to evade the non-refoulement obligation by claiming that since "extraordinary rendition" is not specifically encompassed by expelling, returning, or extraditing an individual, the practice does not violate Article 3. The United States also forwards a heightened standard of proof for Article 3, giving itself more room to deny having enough knowledge that a person is at risk of a torture in the host country. The validity of these and other narrow interpretations is questionable, as the Committee Against Torture and other international legal bodies have raised concerns about the United States' attempts to limit CAT.

IV. APPLYING CAT TO THE U.S. EXTRAORDINARY RENDITION PROGRAM

A. Basic Principles

The Convention Against Torture, read alone, provides clear points of binding law for its Member States, and the Treaty is even stronger when read in light of international principles of

treaty interpretation. Furthermore, the Treaty becomes clearer and broadens in scope when the obligations are read with an understanding of the protective and preventative purposes of CAT. In the case of applying CAT to the United States' extraordinary rendition program, it is also helpful to understand the true nature of U.S. involvement in individual transfers, detentions, and interrogations.

1. The Vienna Convention Law of Treaties

The Vienna Convention on the Law of Treaties “applies to treaties between states”¹⁹² and is an international agreement on the interpretation and applicability of treaties.¹⁹³ The US signed the Vienna Convention in 1970, but the Senate has not ratified it. However, the U.S. State Department and the U.S. Justice Department both assert that “the United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”¹⁹⁴ The Vienna Convention guides the analysis of CAT with respect to the United States' reservations and attempt to limit the Treaty's applications. Article 19(3) states that a Member State may only make reservations to a treaty in a manner consistent and compatible with the object and purpose of the treaty.¹⁹⁵ Article 31(1) establishing

¹⁹² Vienna Convention, *supra* note 35, at art. 1.

¹⁹³ *See generally Law of Treaties*, INTERNATIONAL LAW COMMISSION, Jan. 19, 2009, available at http://untreaty.un.org/ilc/summaries/1_1.htm.

¹⁹⁴ “Is the United States a party to the Vienna Convention on the Law of Treaties?” U.S. Department of State Website, available at <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last accessed May 5, 2010). A declassified memo from the U.S. Department of Justice to the Central Intelligence Agency states that “the United States is not a party to the Vienna Convention and is therefore not bound by it.” However, the memo uses the interpretive provisions of the Vienna Convention to analyze CAT because it “reflects international interpretive practice.” The Justice Department and State Department's willingness to use the Convention to advise the C.I.A. makes it a legitimate measure of the United States' international obligations. C.I.A., Background Paper on C.I.A.'s Combined Use of Interrogation Techniques n.12 (Dec. 30, 2004) [hereinafter “C.I.A. Background Paper”].

¹⁹⁵ Vienna Convention, *supra* note 35, art. 19(3).

that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁹⁶

The "object and purpose" comes primarily from the CAT Preamble, but also emanates from the broad and protective language of the entire Treaty. Every branch of government is called on to be fully engaged in preventing any level of torture, and even cruel, inhuman, and degrading treatment. The ultimate goal is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." Thus, any reservations and interpretations of CAT that attempt to evade responsibility - whether by looking for loopholes in wording, trying to remove certain territory from the Treaty's reach, or passing the "act" of torture onto another party - are completely invalid and may themselves violate U.S. international obligations.

2. "Territory under its jurisdiction"

The United States claims that the Article 3 non-refoulement clause and other obligations do not apply to extraordinary rendition since the transfer and detainment takes place entirely outside the United States, outside its territorial jurisdiction.¹⁹⁷ The United States defines "territory under its jurisdiction" as an area "where a State exercises territory-based jurisdiction; that is, areas over which the State exercises at least de facto authority as the government." However, this is a very narrow reading of "jurisdiction." Working papers from the drafting phase of the Convention Against Torture indicate that "territory under its jurisdiction" was meant

¹⁹⁶ *Id.* at art. 31(1).

¹⁹⁷ Satterthwaite, *Rendered Meaningless*, *supra* note 6 at 1367.

to encompass “territories under military occupation, to colonial territories and to any other territories over which a state has factual control.”¹⁹⁸

A government can have control over an act in two ways relevant to jurisdiction over extraordinary rendition: (1) by having control over the people involved, namely the individual who is the object of rendition (the “personal control” test) and (2) control over the territory, (the “effective control” test).¹⁹⁹ Both of these tests are useful in analyzing whether the United States has control and jurisdiction over the facilities where the individual are sent and tortured, regardless of where the process begins. While the individual is rendered on an aircraft flown by a C.I.A.-operated company like Aero Contractors, the C.I.A. certainly has personal control over him. The “effective control” parallels the state of “factual control” over a territory, as mentioned in the Convention’s working papers, and is the one the CAT Committee has used when measuring Member State compliance with CAT.²⁰⁰ Because of its control over the territory, the obligations of Article 2, 3, 11, 12, 13, and 16 would apply. If it could be proven that the United States has effective or factual control over the facilities to which the extraordinary rendition program takes the individual, the United States’ obligations under CAT would apply there as well.²⁰¹

Naturally, the information surrounding the extraordinary rendition program is highly controlled, but some facts are available from unclassified memos and victim accounts

¹⁹⁸ Satterthwaite, *Rendered Meaningless*, *supra* note 6 at 1367.

¹⁹⁹ Satterthwaite, *Rendered Meaningless*, *supra* note 6 at 1368. See also Weissbrodt and Bergquist, *supra* note 74 (Using a habeas corpus approach to prove that the United States has control over the detainees themselves).

²⁰⁰ Satterthwaite, *Rendered Meaningless*, *supra* note 6, at 1367, *citing* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm. Against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, P 4(b), U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004) (“[T]he Committee observes that the Convention protections extend to all territories under the jurisdiction of a State Party and that this principle includes all areas under the de facto effective control of the State party’s authorities.”)

²⁰¹ Satterthwaite, *Rendered Meaningless*, *supra* note 6, at 1367. (stating that the effective/factual control test would obligate the United States “to prevent torture and cruel, inhuman, or degrading treatment and punishment in such areas as Guantanamo, where it exercises effective control, as well as other locations where the United States has factual control over the territory.”)

legitimized through investigations by legal bodies such as the Council of Europe. A 2004 declassified memo from the Office of Legal Counsel to the Department of Justice Command Center details the day-by-day guide of how the CIA creates an “effective interrogation” environment, “based on the concept of using both physical and psychological pressures in a comprehensive, systematic and cumulative manner,” to obtain information from “High-Value Detainees.”²⁰² The memo advocates the so-called enhanced interrogation techniques (EITs), including dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap, abdominal slap, wall standing, stress positions, water dousing, sleep deprivation, and the waterboard; EITs have been identified as violations of legal norms prohibiting torture and cruel, inhuman and degrading treatment.²⁰³ Evidence from past interrogations also shows that the United States maintains strict control over the procedures and facilities: The United States has been known to provide questions to interrogators;²⁰⁴ a high-ranking official of Yemen, another nation where individuals have been rendered, answered “yes” “without hesitation” when he was

²⁰² C.I.A. Background Paper, *supra* note 108. “The purpose of interrogation is to persuade the High-Value Detainees (HVD) to provide threat information and terrorist intelligence in a timely manner.” According to the CIA Background Paper, these procedures began with the “capture” of the individual. During the rendition flight, individuals are shackled, blindfolded and hooded so that they were unable to see or hear. The individuals are deprived of any interaction during the flight. Once the plane arrived at the destination, the individual are transferred to a facility under the same conditions and was under the complete control of the CIA to undergo so-called “enhanced interrogation techniques.” *See id.*

²⁰³ INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN C.I.A. CUSTODY § 4 ¶¶ 5-6 (2007) [hereinafter “ICRC Report”]. In recently unclassified documents from the U.S. Department of State, the C.I.A. acknowledged that of the 94 detainees held in 2005, 28 of them were subjected to so-called enhanced interrogation techniques. See Memorandum from the Office of Legal Counsel to the C.I.A. 5 (May 30, 2005), *available at* http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf [hereinafter “May 30 OLC Memo”].

²⁰⁴ Button, *Spirited Away*, *supra* note 44, at 536, *citing* Dana Priest and Barton Gellman, U.S. Turns to Torture to Crack Prisoners of War, *Sydney Morning Herald*, Dec. 27, 2002, at <http://www.smh.com.au/articles/2002/12/26/1040511135568.html?oneclick=true>. The United States has “been reported to provide a list of questions they want answered when handing over suspects and to accept intelligence from these countries.” 46 Va. J. Int’l L. 585 n. 161 Mayer, *supra* note 16 (reporting that CIA officials would give Egyptian interrogators a list of questions in the morning, and receive a list of answers the same evening);

asked “if the men would be released if the U.S. requested it;”²⁰⁵ U.S. officials in Saudi Arabia observed live interrogations through two-way mirror.²⁰⁶

V. EXTRAORDINARY RENDITION – A SYSTEMIC VIOLATION OF CAT

A. A Violation of the Letter and Principles of the Treaty

To reiterate, extraordinary rendition is the practice by which an individual is transferred without legal proceeding to a country where he or she is at risk of being tortured.²⁰⁷ The term focuses on the illegal transfer itself, but inevitably includes the eventual result – depositing the individual into the waiting hands of international partners who actually perform the barbaric act of torture.²⁰⁸ By creating and operating the structure that investigate, capture and transport individuals to and from the host nation, the United States is at best an inciter of and conspirator in torture, and at worst – especially violating the non-refoulement obligation - is an active and actual participant in the illegal act.

²⁰⁵ Weissbrodt & Bergquist, *supra* note 74, n.160, quoting Amnesty Int'l, United States of America / Yemen, Secret Detention in CIA "Black Sites," Nov. 2005, at 1, 7-8, 17 (Yemen, Jordan), ("When asked if the men would be released if the U.S. requested it, [the Yemeni Undersecretary of the Central Organ for Political Security] said, without hesitation, "yes."").

²⁰⁶ Weissbrodt & Bergquist, *supra* note 74, n.161; See *United States v. Abu Ali*, 395 F. Supp. 2d 339, 343 (E.D. Va. 2005 (reporting that in Saudi Arabia, U.S. officials provided questions to Saudi interrogators and observed live interrogations through a two-way mirror); Jane Mayer, Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program, *New Yorker*, Feb. 14, 2005, at 106 (reporting that CIA officials would give Egyptian interrogators a list of questions in the morning, and receive a list of answers the same evening); Arie O'sullivan, Jordanian Intelligence Usurps Mossad as CIA's Best Regional Ally, *Jerusalem Post*, Nov. 13, 2005, at 3 ("The CIA had technical personnel "virtually embedded" at [Jordan's General Intelligence Directorate] headquarters."); Dana Priest & Barton Gellman, U.S. Decries Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, *Wash. Post*, Dec. 26, 2002, at A1 ("Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said;" noting that the CIA gives intelligence services in Egypt, Jordan, and Morocco lists of questions it wants answered when it transfers suspects to them); Dana Priest & Joe Stephens, Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light, *Wash. Post*, May 11, 2004, at A1; (The fate of terror suspects when detained in Saudi Arabia "is controlled by Saudi-based joint intelligence task forces, whose members include officers from the CIA, FBI and other U.S. law enforcement agencies."); *But see* *Abu Ali*, 395 F. Supp. 2d at 381-83 (rejecting the allegation that U.S. and Saudi officials were engaged in a "joint venture" in arresting, detaining, and interrogating the defendant, Abu Ali).

²⁰⁷ See Satterthwaite, *Rendered Meaningless*, *supra* note 6, at 1336.

Information from government sources shows a highly regulated procedure managed by the United States, asserting its effective and factual control over the areas and procedures, and even personal control over the detainees who are being interrogated. By claiming that it has no jurisdiction over the areas where the individuals are captured and the torture occurs – despite its personal control over the individual and effective control over the facilities and interrogation process - the United States is at most intentionally violating its Treaty obligations and is at least defying its duty to uphold the objects and purposes of the Treaty.

Neither can the United States ignore its non-refoulement obligation simply because “extraordinary rendition” is not specifically listed in Article 3. The Treaty’s drafters could not predict the US practice of extraordinary rendition, but their decision to add “extradition” to expulsion and refoulement shows an intention “to cover [and prohibit under Article 3] all measures by which a person is physically transferred to another State.”²⁰⁹ “This failure of imagination,” for who could predict that one of the foremost proponents of international human rights would end up finding new ways violating them, “should not be construed as an affirmative decision to exclude such transfers from the scope of the treaty.”²¹⁰

Individual acts within the network of extraordinary rendition are also violations of the Treaty. For example, when the United States provides questions to interrogators, it not only provides a catalyst for torture, but may be in violation of Article 15, which prohibits the use of evidence obtained through torture.²¹¹ Although Congress has not passed legislation to

²⁰⁹ Id. at 1368, *citing* Human Rights Watch, *The Road to Abu Ghraib* 11 (2004), <http://www.humanrightswatch.org/reports/2004/usa0604/usa0604.pdf>; Comm. on Int'l Human Rights of the Ass'n of the Bar of the City of N.Y. & Ctr. for Human Rights & Global Justice, N.Y. Univ. Sch. of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 40 (2004) [hereinafter *Torture by Proxy*], available at <http://www.nyuhr.org/docs/TortureByProxy.pdf>., quoting J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 126 (1988)..

²¹⁰ Satterthwaite, *Rendered Meaningless*, *supra* note 6, at 1368.

²¹¹ Button, *Spirited Away*, *supra* note 44, at 536.

implement Article 15, its failure to do so runs contrary to the objects and purposes of CAT. It could be argued that in addition to fueling the torture, providing questions and taking the answers as evidence destroys the purpose behind the non-derogability, which the U.S. State Department hailed as “necessary if the Convention is to have significant effect.”²¹²

B. Willful blindness to domestic law

Not only does United States attempt to create loopholes in its Treaty obligations, especially by claiming that it has no jurisdiction over the extraordinary rendition process, but it willfully ignores the tools granted by domestic law. The Federal Torture Statute expressly criminalizes torture, attempted torture, and conspiracy to commit torture.²¹³ It gives establishes jurisdiction over all three of these acts, even when they are committed outside the United States.²¹⁴ However, there no Americans have been taken to task for their participation in creating and executing the procedures of terror by proxy. Furthermore, neither Congress nor the Executive Branch have followed up to require the CIA, the FBI, or the DHS to enact regulations under FARRA and ensure that their officials do not violate their obligations under the Treaty. Even if it could be true that the United States has no jurisdiction over the individuals once they are deposited with the nation who ends up detaining and torturing them, Aero’s part in the transportation of the individuals shows that a substantial of the conspiracy to torture takes place on United States – namely, North Carolina – soil.

These evasive actions not only dilute the legitimacy of the American legal system as whole, but are also in violation of the United States’ duty to act within the objects and purposes

²¹² CRS 2004, *supra* note 50, at 2-3.

²¹³ Federal Torture Statute, *supra* note 94, at 2340(b)

²¹⁴ *Id.* “(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 alleged offender.” *Id.*

of CAT. Moreover, the C.I.A. cannot conceal its participation in extraordinary rendition by hiding behind chartered Aero-operated flights. As the Senate emphasized when it upheld the Treaty's non-derogability, no excuse – or method of transportation - can be used to justify the United States' participation in torture and its inaction in the face of evidence that its officers and agents participate in this illegal act.

VI. CAT'S IMPACT ON AERO CONTRACTORS

Aero is an essential part of the United States' extraordinary rendition program; in the case of at least four men – Khaled El-Masri, Bisher Al-Rawi, Abou elKassim Brittel, and Binyam Mohamed – Aero provided the flight crew which transported victims of extraordinary rendition to detention facilities where they were harshly interrogated. The extent of Aero's involvement is yet unclear, but it is apparent that Aero's pilots, staff, planes, and operations are deeply rooted on North Carolina soil, and that these facilities support the illegal network of extraordinary rendition. The Council of Europe has already tracked two Aero-operated aircraft, the Gulfstream Jet and the Boeing Business Jet, in the rendition of these four men.²¹⁵ The violent transfers followed the template laid out by the C.I.A. in the 2004 declassified memo and were carried out by so-called "Rendition Teams" of masked figures dressed in black who would beat, cut, shackle, and hood the individuals before placing them onto the Aero-operated aircraft.²¹⁶ In transporting the individuals, Aero's Pilots-in-Command (PICs), willingly flew on undeclared flight plans or deviated from flight plans filed with international aviation agencies.²¹⁷ These horrific or at least highly unusual events, occurring by the actions of the Aero pilots or right

²¹⁵ See 2006 Dick Marty Report, *supra* note 2.

²¹⁶ Gavin Simpson Interview, *supra* note 17.

²¹⁷ *Id.*

under their noses, show at least willful blindness to the illegal nature of the transfers they completed.

The information already available is enough for North Carolina to be deeply concerned about the involvement of its own citizens as the deliverymen of torture. Further investigation into Aero's role will provide even more evidence that Aero is in violation of CAT through its participation in extraordinary rendition. To the extent that an investigation could strengthen the already-established connection between Aero and the C.I.A.'s extraordinary rendition operations, both Aero's pilots and staff and any N.C. state or local government officials who know of operations could be at least complicit and compliant in torture by proxy. According to the Senate's own interpretation of Article 1, outright knowledge is not even required, but willful blindness or mere acquiescence by an Aero pilot or N.C. government officials to where an individual is being deposited and what may happen to him when he gets there could put them in violation of CAT.²¹⁸

VII. TRICKLE DOWN OPTIONS

International legal norms, the CAT treaty itself, and United States' own federal laws provide multiple options for a state if it is willing to investigate the illegal actions occurring within its own territory. To be sure, there can be difficulties to bringing international law into North Carolina's reach, as an administrative territory within a CAT Member State. However, legal scholars have theorized that "sub-federal entities can integrate treaty norms by passing

²¹⁸ Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, *supra* note 42, at 412. This article makes a parallel argument connecting the C.I.A. to torture by providing the structures for extraordinary rendition - "If it is possible to establish a connection in terms of knowledge or reasonable foreseeability between the CIA agents who deliver such victims to foreign government agents and the subsequent torture by these governments, then clearly these CIA agents have committed an international crime under the CAT and can be prosecuted under this convention by any country that can exercise jurisdiction over them." *Id.*

legislation that self-consciously implements treaty provisions or by approving ordinances and resolutions that urge federal treaty ratification.”²¹⁹ This idea comes from the realization that in the absence of action by the federal government, states and cities have used the principles behind international treaties to enact laws implementing parts of the treaty within their own territories.

For example, the Senate did not ratify the 2001 Stockholm Convention on Persistent Organic Pollutants, but Maine has passed legislation using exact language from the treaty to implement pollutant-reducing measures in its own state.²²⁰ The United States is a “notable holdout” to ratifying the United Nations Convention on the Elimination of All Forms of

In transporting the individuals, Aero’s Pilots-in-Command (PICs), willingly flew on undeclared flight plans or deviated from flight plans filed with international aviation agencies. These horrific or at least highly unusual events, occurring by the actions of the Aero pilots or right under their noses, show at least willful blindness to the illegal nature of the transfers they completed.

Discrimination Against Women (CEDAW), but nine U.S. states including North Carolina have passed resolutions to ratify the treaty and the city of San Francisco has integrated it into its city agency framework.²²¹ States will individually or collectively call for action by the federal government; this approach was adopted when a group of state mayors passed the 2006 U.S. Mayors Climate Protection Agreement, encouraging the federal government and states governments to enact policies in compliance with the Kyoto Protocol.²²²

²¹⁹ Lesley Wexler, Take the Long Way Home: Sub-federal Integration of Unratified and Non-self-executing Treaty Law, 28 Mich. J. Int’l L. 1, 3 (2006).

²²⁰ *Id.* at 21-22.

²²¹ *Id.* at 24-25.

²²² *Id.* at 18.

There are certainly limits on how much a state may actively legislate in foreign policy affairs or make agreements with international parties.²²³ However, North Carolina has many options to assert its powers to investigate and hold accountable Aero as a corporate entity, or perhaps even individuals who work for Aero, for violating federal law and international law. As a state with special interest, North Carolina can pass legislation or make declarations encouraging the federal government to comply with its obligations under CAT.²²⁴ The federal statutes dealing with the United States' obligations under CAT are particularly helpful, if North Carolina is willing to act. The FTS declares that “[n]othing in this chapter shall be construed as precluding the application of State or local laws on the same subject.”²²⁵ This arguably leaves room for North Carolina to its own laws to give itself the power to investigate, and even have jurisdiction over, CAT-violating acts that occur within its own territory. Moreover, North Carolina has authority over Aero just as it does over any other corporation operating within the state and can use this authority to regulate Aero's actions to the extent allowed by state law.

Apart from the possibilities coming from the FTS and international-minded actions from other states, North Carolina also faces legal and moral obligations. North Carolina must uphold the federal laws prohibiting torture, including the FTS and FARRA, just as it would any other federal law, and must do its part to investigate and take action against violations of the law occurring within its own territory. North Carolina cannot ignore violations the United States' obligations under CAT and the reach of its own implementing legislation, just as, by analogy, North Carolina would not ignore a counterfeiting operation based within its borders.²²⁶ Thus,

²²³ *See id.*

²²⁴ In 2007, Representative Paul Luebke presented a bill to the North Carolina House to criminalize torture and enforced disappearance. The bill would also provide for investigation of claims by grand jury. However, the bill did not pass into law. N.C. House Bill 2417 (2007), *available at* <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/PDF/H2417v0.pdf>.

²²⁵ Federal Torture Statute, *supra* note 94, at 2340B.

²²⁶ The state may even have the upper hand when applying its own criminal laws within its territory. *See* Medellin

when at least part of the non-refoulement violation or the conspiracy to commit torture is occurring on North Carolina soil by Aero's actions, North Carolina has a duty to take action.

VIII. CONCLUSION

The Convention Against Torture is more than a treaty with legal obligations, and by ratifying it, Member States are signing on to more than just legislative reform. The Treaty is an assertion each State makes on behalf of its own people; it binds a nation on every level, both to prevent torture within its borders and to prevent its citizens from participating in torture in any way. A Member State also speaks out against torture in a unified voice with the international community; the nation promises that every individual is safe from its hands and will never be tortured despite any exigent circumstance. The CAT Preamble also places the Treaty within a network of obligations based on other international treaties and agreed-upon norms, reminding each Member State that CAT is only one of many agreements that bind them to protect the “inherent dignity of the human person.”²²⁷

When it ratified the Treaty, the United States accepted all of these obligations, furthering them with both expansive understandings of “acquiescence” and non-derogability and passing federal statutes to bring itself into compliance. But not only has the United States fallen far short of the high moral ground the Treaty requires, it is actively violating the treaty by searching for legal loopholes and executing the extraordinary rendition program. At least at ratification, the United States thought it a valuable endeavor to hold the government and its agents to the

v. Texas, 552 U.S. 491, 531-533 (2008) (refusing to grant federal executive privilege, even in implementing international treaty obligations, to the point of pre-empting a state's supremacy in implementing its own criminal laws).

²²⁷ CAT, *supra* note 1, Preamble ,(referring to its reliance on other foundational documents of international human rights law: The U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Treaty's standards. Without an explicit repudiation of the Treaty and the anti-torture laws and policies, the United States must still be held to this standard. By carving out exceptions to CAT, the United States violates international law. By not applying its own laws, the United States weakens the entire net of its own justice system.

North Carolina is as essential a part of the struggle to prevent torture as Aero is in the extraordinary rendition process. As territorial host to the corporation, North Carolina may already have the ability to regulate or at least investigate Aero. The state can further augment its authority through policy resolutions inspired by CAT, and the Federal Torture Statutes might even leave room for North Carolina to supplement its jurisdictional reach. Undoubtedly, the North Carolina cannot turn a blind eye to the violations of the Convention Against Torture that are occurring on its territory.

The Nuremberg Principles and Extraordinary Rendition

INTRODUCTION

Extraordinary rendition is a policy of the US government or its agents in which an individual is transferred to a foreign state in circumstances that make it more likely than not that he will be subjected to cruel, inhuman, or degrading treatment.²²⁸ The policy involves an element of kidnapping in that a person is taken while outside the United States and rendered to foreign sites where he is generally interrogated and tortured.

North Carolina has been a staging ground for several of the flights that transport victims of extraordinary rendition to and from secret detention facilities around the world. Planes that fly in and out of Johnston County, North Carolina that are owned and operated by Aero Contractors based in North Carolina have been tracked by professional and amateur plane spotters. These planes have rendered men like Binyam Mohamed to far-flung secret detention facilities in Morocco and Afghanistan. In these centers, Mr. Mohamed was beaten, tortured, threatened with murder, subjected to degrading treatment, and was kept from contact with attorneys, his family, or his government for several years.²²⁹

The ways in which the State of North Carolina, as well as corporations based in the state and individuals who reside in the state have been complicit in Mr. Mohamed's treatment – as well as hundreds like him – are currently in question. The fact that North Carolina has allowed the Johnston County airstrip to be used for extraordinary rendition flights and its active support for Aero Contractors, the organization that arranges these flights, triggers various violations

²²⁸ THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NEW YORK UNIVERSITY OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS," (2004, 2006), at 4.

²²⁹ REPRIEVE, HUMAN CARGO: BINYAM MOHAMED AND THE RENDITION FREQUENT FLYER PROGRAMME, (June 10, 2008), <http://www.reprive.org.uk/humancargo>

under international law. The Nuremberg Principles, codified after the Nazi Holocaust in the late 1940s, provides a foundation for many international principles that give rise to these violations. They have served as inspiration for several of the most influential human rights treaties that inform extraordinary rendition and govern the acts that occur in North Carolina. The Principles, articulated more than half a century ago, continue to have enduring impact and have evolved to serve as the framework for the recent tribunals for the former Yugoslavia and for the genocide in Rwanda.²³⁰ The Nuremberg Principles define international criminal acts and establish the basis for liability for an individual who has committed such acts.²³¹ This section will address the United States' program of extraordinary rendition and the role in which the Nuremberg Principles establishes a framework by which to assess the legality of the program.

I. THE NUREMBURG PRINCIPLES AND THE FUNDAMENTAL PRINCIPLES AGAINST EXTRAORDINARY RENDITION AND TORTURE

A. History of the Nuremberg Principles

The Nuremberg Principles, adopted in the shadows of the Holocaust and signed by the Allied powers in 1945, were enacted in response to the human rights abuses systematically committed by the Nazis. The Principles laid the foundation for modern-day human rights law and helped inform the basis of the Geneva Convention of 1949.²³² Among other guidelines

²³⁰ See, e.g. Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013 (2005).

²³¹ See, e.g. *id.*

²³² See, e.g. Henry T. King, Theodore C. Theofrastaus, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 51-52 (1999).

regarding prisoners during times of war, the Convention specifically forbids secret detention centers, which is relevant for victims of extraordinary rendition.²³³

At the time, the Principles heralded an “unconscious expression of the universal desire for a broader legal structure, and hence for a higher social structure.”²³⁴ The Principles were an articulation of the moral indignation that the Allied governments carried in the wake of the war. They codified a global expectation for the protection of human rights and the international rule of law to address any violations thereof.

The charter of the International Military Tribunal (the London Charter) establishing the Nuremberg Trial was signed on August 8, 1945.²³⁵ This charter established a military tribunal of one judge and one alternate from each Allied nation: France, Great Britain, the Soviet Union, and the United States. The tribunal had the authority to prosecute individuals who, while acting “in the interest of the European Axis countries,” had committed one of the new crimes that had been defined for the tribunal: conspiracy, crimes against the peace, war crimes, and crimes against humanity.²³⁶ The Judgment of the Trial (later codified by the United Nations) broadly stated that international law may criminalize any of these acts and the prohibition may be enforced by an

²³³ See GENEVA CONVENTION (NO. IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²³⁴ Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, (Winter 2010), citing *The Talk of the Town*, THE NEW YORKER, Sept. 15, 1945, at 17.

²³⁵ The London Charter of the International Military Tribunal, 82 U.N.T.S. 280, (usually referred to simply as the London Charter or Nuremberg Charter) was the decree issued on August 8, 1945, that set down the laws and procedures by which the Nuremberg trials were to be conducted.

²³⁶ United States Holocaust Memorial Museum. “How were the crimes defined?.” *Holocaust Encyclopedia*. <http://www.ushmm.org/wlc/en/?ModuleId=10005143> (accessed April 4, 2010).

international tribunal against individual persons, so that no person – including a head of state - may act with impunity.²³⁷

B. The Historic Role of the United States in the Development of the Nuremberg Principles

The United States assumed leadership at the Nuremberg trials, dictating many terms of the new international framework. Robert H. Jackson, took a leave of absence from his position as Supreme Court Justice to serve as the U.S. Prosecutor at the Tribunal. He selected the term “crime against humanity” to describe the Nazi atrocities and was a leader at the trials, not in establishing victor’s justice, but rather in creating a new system of international law.²³⁸

However, notwithstanding their exemplary initiative and influence during the Nuremberg trials and its imprint on the subsequent development and codification of the laws, the United States has been subject to criticism by legal scholars and human rights activists for its failure to uphold the principles and its unwillingness to adopt the ideals into the jurisprudence of the nation and foreign policy.²³⁹ While the United States has signed and even ratified several human rights treaties whose ideals are derived from the Nuremberg Principles, most notably the International Convention on Civil and Political Rights,²⁴⁰ many of these conventions are non-self executing, in that they require implementing legislation in order to have domestic effect. The failure of

²³⁷ THE 1946 RESOLUTION BY THE UNITED NATIONS GENERAL ASSEMBLY, 1 U.N. GAOR (Part II) at 188, U.N. Doc. A/61/Add.1 (1946). *See also* REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY, 4 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/925 (1949).

²³⁸ David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L. LAW 85, 86 (2004); *See also* King, Theofrastaus, *supra* note 5, at 51-52.

²³⁹ *See generally* Sadat, *supra* note 7. (The author highlights the differences between France’s decision to adopt many of the principles into their domestic law and the U.S.’s failure to do so, given that both were leaders at the trials. She asserts that international law is only “superficially and sporadically” enforced in the United States in comparison to France.)

²⁴⁰ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 UNTS 171, 6 ILM 368 (1966).

Congress to provide implementing legislation for these vital treaties has resulted in lofty policies that lack judicial ‘teeth.’ Thus while the U.S. expressed a desire for ideas that would bind the nations of the world, it has not applied those policies to domestic practice.

C. Legal Aspects of the Nuremberg Principles

1. The New Crimes and their Legacy

a. The Nuremberg Principles

Following the trials, the International Law Commission of the United Nations codified the legal principles of the Nuremberg Trials into seven principles.²⁴¹

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior

²⁴¹ PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NUREMBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL, 1950 U.N. GOAR, 5th Sess., Supp. No. 12 (A/1316)

does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution

of or in connection with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

b. The Nuremberg Trials

The Trials consisted of a series of military tribunals that prosecuted various prominent members of the political, military and economic leadership of Nazi Germany. The indictments included:

1. “Crimes against the peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
2. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
3. Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection

with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”²⁴²

These guidelines and the definitions of crimes served as the inspiration for several human rights treaties including the Genocide Convention and the Geneva Convention of 1949.²⁴³ The Nuremberg Trials also served as the model for the International Military Tribunal for the Far East which tried Japanese officials at the conclusion of World War II for crimes against peace and crimes against humanity.²⁴⁴

2. *Individual Responsibility under the Nuremberg Principles*

In addition to delineating crimes, the theory regarding individual responsibility for criminal acts in the international context was expanded and codified in the various tribunals. The concepts regarding individual responsibility have been interpreted by the following standard, articulated at the International Military Tribunal for the Far East which utilized the Nuremberg standards: “Anyone with the knowledge of illegal activity and an opportunity to do something about it is a potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes.”²⁴⁵

²⁴² 82 U.N.T.S. 280, signed on August 8, 1945, at London, cited in *THE LAWS OF WAR*, (Michael Reisman and Chris T. Antoniou ed. 1994).

²⁴³ *See, e.g.* King and Theofrastaus, *supra* note 5; CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE, Dec. 9, 1948, at art. 1, 78 U.N.T.S. 277.

²⁴⁴ *See* TOKYO WAR CRIMES TRIAL, *reprinted in* 2 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 1029, 1283 (L. Friedman ed. 1972).

²⁴⁵ Arthur W. Campbell, *The Nuremberg Defense to Charges of Domestic Crime: A Non-Traditional Approach for Nuclear-Arms Protestors*, 16 *CAL. W. INT’L. L.J.* 93, 96 (1986) citing 2 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 1029 (L. Friedman ed. 1972).

An example of this standard is the *Flick Case*, the fifth Subsequent Nuremberg Proceeding prosecuted by the Allies against German industrialists in April 1947.²⁴⁶ The case focused on a group of defendants who were charged with committing war crimes and crimes against humanity through the use of slave labor at their coal, iron, and steel plants in German-occupied territory during World War II. Two defendants were charged with war crimes and crimes against humanity as a result of their participation in the Nazi atrocities, namely slave labor and the

The Nuremberg Principles were an articulation of the moral indignation that the Allied governments carried in the wake of the war. They codified a global expectation for the protection of human rights and the international rule of law to address any violations thereof.

“Aryanization” of Jewish businesses.²⁴⁷ Friedrich Flick, the director of a conglomerate of companies who had assisted the Nazis, was found guilty of several charges, including crimes against humanity and war crimes.²⁴⁸ The case underscored the role of personal responsibility and found that individuals could not find relief solely due to their civilian status.

The United States has long advocated the proposition that individuals may be held responsible for their actions under the Nuremberg Principles. The United States Prosecutor at Nuremberg, Robert H. Jackson, upon signing the binding agreement at Nuremberg stated: “For the first time four of the most powerful nations have agreed not only upon the principles of

²⁴⁶ United States Holocaust Memorial Museum. “Subsequent Nuremberg Proceedings, Case #5, The Flick Case.” *Holocaust Encyclopedia*. <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007076> (accessed April 4, 2010).

²⁴⁷ L.M. Stallbaumer, “Frederick Flick’s Opportunism and Expediency.” *Dimensions*, vol. 13, no. 2, A Journal of Holocaust Studies, published by the Anti-Defamation League’s Braun Holocaust Institute http://www.adl.org/Braun/dim_13_2_flick_print.asp

²⁴⁸ Flick maintained his innocence during and after the trial, asserting that he had committed no crimes. He reasoned: “After the [Nazi] seizure of power, every industrialist in the long run had to get into some sort of relationship with the new holders of power.” He was sentenced to seven years in prison but was released after three for good behavior. Flick Testimony, *Trials of War Criminals before the Neurnberg [sic] Military Tribunals under Control Council Law No. 10: Case 5. The Flick Case*, vol. 6 (Washington, D.C.: 1952), 394, quoted in *Id.*

liability for war crimes of persecution, but also upon the principle of individual responsibility for the crime of attacking international peace.”²⁴⁹ This concept of individual responsibility was one of the most significant legal theories to emerge from the Nuremberg Trials. Individual responsibility encompasses the idea that “following orders” is an unacceptable defense and gave rise to the bystander theory which will be discussed below. If a North Carolina state actor had knowledge of illegal activities (in this case, one of the crimes enumerated by the Nuremberg Principles) and failed to act, that actor could be held liable under international law.

D. The Nuremberg Principle’s Influence on the Development of International Legal Norms

The Nuremberg principles were developed under a limited mandate, although their development and codification in 1950 laid the groundwork for several revolutionary treaties that are considered binding law. For example, these principles can be found in the Rome Statute which charters the International Criminal Court (ICC).²⁵⁰ The Court seeks to prosecute the same crimes that Nuremberg outlined: crimes against humanity, war crimes, and crimes of aggression (i.e. crimes against the peace.) The Charter also adds “genocide” to the list of crimes which trigger the court’s jurisdiction.²⁵¹

The Rome Statute defines crimes against humanity, war crimes, and other crimes that may be prosecuted in the court. The Rome Statute’s definition of war crimes and crimes against

²⁴⁹ Campbell, *supra* note 18, at 96, citing Jackson, *Statement of Chief U.S. Counsel Upon Signing of the Agreement*, 19 TEMPLE L.Q. 169 (1946).

²⁵⁰ See, e.g. King and Theofrastaus, *supra* note 5; ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT [hereinafter Rome Statute], Jul. 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 (1998). (For example, Article 33(1) of the Rome Statute is an articulation of Principle IV, the inability to claim a “Nuremberg Defense.” Furthermore, the preamble of the Rome Statute is a nod to many of the ideals of Nuremberg, i.e. “Recognizing that such grave crimes threaten the peace, security and well-being of the world” the nations of the world have engaged to establish the international court system.)

²⁵¹ Rome Statute at Article 5.

humanity may be useful for victims of extraordinary rendition since they provide an evolved definition of principles originally codified over sixty years ago.

Nuremberg Principle IV which is particularly pertinent to issues relating to accountability for extraordinary rendition and torture, famously articulated the Nuremberg Defense which asserts that “the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided moral choice was in fact possible to him.”²⁵² This principle guides the bystander theory discussion which will be enumerated below.

Although the United States has not signed the Rome Statute and the ICCPR is non-self executing, their fundamental principles serve a vital component of American jurisprudence and inform this debate. However, most recently, the state-sanctioned policy of extraordinary rendition stands as an example of the way in which the United States has reneged on its human rights obligations with regard to the treatment of prisoners and its commitments to hold individuals who act in the name of the state responsible for their actions. While new Obama policies²⁵³ have begun to address the atrocities of the extraordinary rendition program, victims have yet to achieve redress in an American court, undercutting the Nuremberg Trials’ legacy to try individual actors and give victims a day in court. The United States played a pivotal role in the Nuremberg Trials and carrying out these ideals should continue to form an integral part of our foreign policy endeavors.

²⁵² Nuremberg Principles, *supra* note 24.

²⁵³ See, e.g. Jeff Mason and Randall Mikkelsen, *Obama sets deadline to close Guantanamo*, THE VANCOUVER SUN, Jan. 21, 2009, <http://www.vancouversun.com/news/Obama+sets+deadline+close+Guantanamo/1203575/story.html>; David Johnston and Elisabeth Bumiller, *Obama faces hurdles in closing Guantanamo*, THE NY TIMES, Jul. 13, 2009, http://www.nytimes.com/2009/07/14/us/politics/14gitmo.html?pagewanted=2&_r=1.

II. NORTH CAROLINA'S CONNECTION TO EXTRAORDINARY RENDITION AND TORTURE TRIGGERS THE APPLICATION OF THE NUREMBERG PRINCIPLES²⁵⁴

The universal acceptance of the Nuremberg Principles was meant to end impunity for human rights abusers even when acting under color of state. With regard to the extraordinary rendition program, two connected fundamental principles have consequences for implicating North Carolina state actors for their involvement in extraordinary rendition and torture: 1) the likelihood that the extraordinary rendition program rises to the level of a war crime and/or a crime against humanity and; 2) the acceptance and support of Aero Contractors which carries out functions that comprise extraordinary rendition by North Carolina state actors and individuals, thereby triggering individual responsibility and the bystander theory. North Carolina actors will be implicated as violators of the Nuremberg Principles if their actions rise to the level of “core crimes” of international law, i.e. war crimes and crimes against humanity.²⁵⁵

A. *Crimes Against Humanity*

1. *Nuremberg and The Theory of Crimes Against Humanity*

The prosecutors at Nuremberg elected the term “crime against humanity” to illustrate the immensity of the acts and the way in which the crimes perpetrated by the Nazis offended the “humaneness” of their victims and their society.²⁵⁶ Hannah Arendt, in analyzing the Eichmann prosecution in Israel and the Nazi atrocities, described the Holocaust as "new crime, the crime against humanity - in the sense of a crime 'against the human status,' or against the very nature

²⁵⁴ The Nuremberg Trials identified the following prosecutable crimes: a) crimes against peace; b) war crimes; and c) crimes against humanity. The last two will be explored here.

²⁵⁵ Ingrid Detter, *THE LAW OF WAR* 424 (2ed. 2000).

²⁵⁶ Luban, *supra* note 11, at 87.

of mankind.”²⁵⁷ As such, a crime against humanity implicates not only the individual but against the community from which they are a part.²⁵⁸

International law scholar Mary Ann Glendon described crimes against humanity as defined for the Nuremberg trials and wrote: “To wage a war of aggression was a crime against international society and. . . to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, was a crime against humanity.”²⁵⁹ Scholars synthesize these definitions by calling crimes against humanity those which are an affront to humankind and humanness.²⁶⁰

2. *Nuremberg’s Influence on The Rome Statute’s Definition of Crimes Against Humanity*

As discussed, the Nuremberg Principles served as the basis for the Rome Statute which established the International Criminal Court (ICC), described as a “realization of Justice Jackson’s dream: a permanent and independent institution for maintaining international peace and justice by means of an international Rule of Law.”²⁶¹ In addition to establishing the ICC, the Rome Statute elaborates upon the definition of crimes against humanity. The Rome Statute entered into force in 2002 and was established with the purpose to serve as a permanent

²⁵⁷ *Id.* citing Hannah Arendt, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 268 (rev. ed. 1965)

²⁵⁸ *Id.*

²⁵⁹ Luban, *supra* note 11, at 89-90, citing Mary Ann Glendon, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 9 (2001).

²⁶⁰ *Id.* at 90

²⁶¹ *See, e.g.* King and Theofrastaus, *supra* note 5.

international tribunal to punish individuals who commit genocide and other grave international crimes.²⁶²

Article 7 of the Rome Statute defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”²⁶³ Torture²⁶⁴, imprisonment in violation of international law standards,²⁶⁵ the enforced disappearance of persons,²⁶⁶ and other acts that cause great suffering, or serious bodily injury or injury to mental or physical health²⁶⁷ are included on the list. The statute further expands attacks against a civilian population to mean those which involve the “multiple commission of attacks.”²⁶⁸ The crimes enumerated have their roots in the Nuremberg Trials, but have been expanded to account for a broader spectrum of international crime.

3. Crimes Against Humanity and Extraordinary Rendition as Evolved Under the Nuremberg Principles

Under the Nuremberg Principles, extraordinary rendition arguably falls within the purview of crimes against humanity. Victims of extraordinary rendition have repeatedly described a process in which they are detained and interrogated without access to a legal counsel for weeks, months, or even years. The program of extraordinary rendition wrests victims away from their families without knowledge of their whereabouts. They are subsequently transported

²⁶² Rome Statute, at Article 7.

²⁶³ *Id.* at Article 7.

²⁶⁴ *Id.* at Article 7(f).

²⁶⁵ *Id.* at Article 7(1)(e)

²⁶⁶ *Id.* at Article 7(1)(i)

²⁶⁷ *Id.* at Article 7(1)(k).

²⁶⁸ *Id.* at Article 7(2)(a)

to various secret detention facilities around the world, including sites in Afghanistan, Morocco, and Syria, among others.²⁶⁹ In these locations they face gruesome torture techniques and are isolated from legal assistance, denied the opportunity for a trial or other legal process, and in many cases, consular or medical aid.²⁷⁰ As such, these practices violate various human rights statutes, and likely rise to the level of a crime against humanity under the Rome Statute and the Nuremberg Principles. The “humanness” of victims is compromised and a deleterious effect on their communities is suffered. Thus, Arendt and Glendon’s definitions encompass these individuals.

The state-sanctioned policy of extraordinary rendition stands as an example of the way in which the United States has reneged on its human rights obligations with regard to the treatment of prisoners and its commitments to hold individuals who act in the name of the state responsible for their actions.

It is difficult to obtain a definitive count of those rendered since 9/11, yet estimates place the figure close to one hundred.²⁷¹ While victims of extraordinary rendition have suffered greatly, the number of victims does not reach the same level as those who perished and were tortured under the Nazi Holocaust, the former Yugoslavia, or even the Argentina Dirty War, in which estimates of as many as 30,000 were disappeared.²⁷² Some may argue that describing the circumstances of victims of extraordinary rendition as rising to the level of a crime against humanity could threaten to minimize the gravity of genocides in recent memory. However, the

²⁶⁹ See e.g. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

²⁷⁰ See e.g. *id.*

²⁷¹ MEMORANDUM FROM THE OFFICE OF LEGAL COUNSEL TO THE C.I.A. 5 (May 30, 2005), available at http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf

²⁷² *Argentina’s ‘dirty war’ files released*, BBC (Aug. 21, 2002), <http://news.bbc.co.uk/2/hi/americas/2206534.stm>

systematic and state-sanctioned nature of this program should be interpreted as violative and against the spirit of the Principles and triggering accountability.

Similarly, since the Rome Statute was borne from the Nuremberg Principles, victims of extraordinary rendition would fit within the definition of those who have suffered crimes against humanity. Recently the United Nations Human Rights Council has addressed the issue of secret detention centers asserting that the system could rise to the level of a crime against humanity. A new report by various working groups at the United Nations utilizes the Rome Statute as well as other human rights treaties to legitimize its position.²⁷³ According to the Rome Statute, crimes against humanity are those:

odious offences. . . that. . . constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings;. . . not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a **wide practice of atrocities** tolerated or condoned by a government or a de facto authority.²⁷⁴ (*Emphasis added*)

Thus, one instance of an individual extraordinarily rendered, with its implications of torture, violates human rights standards. However, the extraordinary rendition program would rise to the level of a crime against humanity when proven that the practice was widespread. Given the hundreds of hours of flight logs and tail-spotting accounts of flights associated with

²⁷³ See JOINT STUDY ON GLOBAL PRACTICES IN RELATION TO SECRET DETENTION IN THE CONTEXT OF COUNTERING TERRORISM OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM, THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, THE WORKING GROUP ON ARBITRARY DETENTION AND THE WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES, (Jan. 26, 2010), A/HRC/13/42 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.doc>

²⁷⁴ COMMENTARY ON THE ROME STATUTE, RSICC/C, Vol. 1 p. 360. cited by Guy Horton in *Dying Alive - A Legal Assessment of Human Rights Violations in Burma* April 2005, co-Funded by The Netherlands Ministry for Development Co-Operation. See section "12.52 Crimes against humanity", at 201.

extraordinary rendition, as well as the thousands of pages of direct testimony of witnesses, advocates can successfully demonstrate a widespread practice.

Specifically, the pilots and flight specialists that systematically engage in flight support for extraordinary rendition missions to secret detention sites around the world would arguably be in violation of Rome Statute, Article 7(1)(i) and if torture were involved, 7(1)(f).²⁷⁵ Given the confidentiality surrounding the program, it may be difficult for advocates to gather all the desired evidence to demonstrate each element of the crime. Yet, as described above, eyewitness testimony and flight logs provide substantive evidence to attest to a widespread and systematic program. As more victims come forward and as the intricate system of documentation progresses, a finding of “widespread and systematic” would easily be triggered.

Although the United States has not ratified the Rome Statute,²⁷⁶ they are still responsible for helping promote the rule of rule around the world. The United States is not a party to the Rome Statute nor to the International Criminal Court, and if faced with such a charge would likely argue that victims of the extraordinary rendition program should not be considered part of the “civilian population.”²⁷⁷ Governments often seek to legitimize their actions by labeling actors as non-civilians or enemy combatants.

²⁷⁵ Pilots interviewed by journalists regarding the extraordinary rendition program have denied the arrest, detention or abduction of the people involved nor have they given information about the fate of those involved in violation of 7(1)(i): “Article 7, Crimes against humanity 1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (f) Torture; (i) Enforced disappearance of persons.”

²⁷⁶ Clinton signed the Rome Statute but Bush “unsigned” it in 2002. THE INTERNATIONAL CRIMINAL COURT FACT SHEET, Amnesty International USA, http://www.amnestyusa.org/international_justice/ICCfactsheet.pdf

²⁷⁷ Article 7 requires that the practice be targeted against the civilian population. The United States has argued that those subjected to extraordinary rendition are unlawful enemy combatants and are therefore, not civilians. However, the UN report directly confronts this issue, asserting that “unlawful enemy combatant” is not a category that is recognized by international law. Furthermore, the Geneva Convention system is predicated on the concept that all detainees must be held in cognizable detention facilities. *See supra* note 46, at 14

Certainly, the U.S. government and its allies face existential threats from global terror, yet the themes and ideas contained in the Nuremberg Principles and the Rome Statute must be upheld, regardless of U.S. hesitancy. The original intent of the Nuremberg Principles necessitates this interpretation and as discussed above, the United States played a pivotal role in its inception. While the United Nations was not granted with the authority to bind countries to the seven Nuremberg Principles after World War II, the understanding among the parties – particularly the Allied parties – was to uphold the ideals and disseminate them through foreign policy and subsequent treaties.²⁷⁸ In order to realize the essential aims and the evolution of the Nuremberg Principles, the United States should follow the warnings of the special report from the Human Rights Council, viewing detention centers as a practice nearing, if not falling over, the precipice of a crime against humanity.

B. War Crimes

The Nuremberg Principles included a definition of war crimes and declared its commission as a crime punishable under international law:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment of prisoners of war or of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.²⁷⁹

For purposes of this paper, it is assumed that the victims of extraordinary rendition are prisoners of war, as envisioned by the Nuremberg definition. As discussed above, the Nuremberg Principles served as a basis for the codification of the 1949 Geneva Conventions, a body of international humanitarian law which provides a framework for the treatment of prisoners. The

²⁷⁸ See, e.g. *supra* note 5.

²⁷⁹ 1950 U.N. GAOR, 5th Sess., Supp. No. 12 (A1316)

Conventions, as well as other relevant treaties and domestic laws, directly apply to the legal status and treatment of prisoners.²⁸⁰ They provide a modern-day interpretation of many of the standards first articulated in the shadows of World War II. Although the Nuremberg Principles were never codified into an international treaty, their vestiges can be seen in the customary international law principles and pertinent treaties of today.

Consequently, it is worthwhile to examine the definition of war crimes under the Nuremberg Principles and to recognize the prominent role it has played in American jurisprudence. The Principles make clear that the ill-treatment of prisoners of war and torture are violations of international law and may be punishable as a war crime. This concept, as articulated in Nuremberg, has been expressed in American courts. In the landmark 1992 9th circuit case, *Siderman de Blake v. Republic of Argentina*, a family sued the nation of Argentina for torture committed under color of law against one of the plaintiffs, Jose Siderman, on the eve of the military coup d'état in Argentina. The court determined that Argentina had waived its foreign immunity and was competent to stand trial. Eventually the case was remanded to the district court to assess damages regarding the torture and prosecution of Jose Siderman.²⁸¹ One of the most compelling aspects of the case is the court's invocation of the Nuremberg Principles in order to express the fundamental international legal norms that had been violated at Mr.

²⁸⁰ As Professor Margaret Satterthwaite has discussed, there is a great deal of uncertainty regarding which provisions of the Geneva Conventions apply to prisoners. The Supreme Court in *Hamdan v. Rumsfeld* held that certain provisions of Common Article 3 would apply to detainees at Guantanamo Bay. For an extended discussion, see *supra* note 42, at 1350-1353 and *supra* note 1, at 60-68. A thorough analysis of the applicability of Geneva is beyond the scope of this paper.

²⁸¹ *Siderman de Blake*, 965 F.2d 699, 723 (9th Cir. 1992) (“Only because the Sidermans have presented evidence indicating that Argentina’s invocation of United States judicial authority was part and parcel of its efforts to torture and persecute Jose Siderman have they advanced a sufficient basis for invoking that same authority with respect to their causes of action for torture. It will be up to the district court on remand to determine whether the requisite direct connection exists. If it does, Argentina will be subject to the court’s jurisdiction for the torture claims.” Eventually the Argentine government settled with Mr. Siderman for an undisclosed sum.)

Siderman's expense. The *Siderman de Blake* court describes the universality of the norms outlined at Nuremberg:

The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal. The universal and fundamental rights of human beings identified by Nuremberg — rights against genocide, enslavement, and other inhumane acts.²⁸²

Although the court could not rely on a “Nuremberg Treaty” by which to decide the case, they were still able to invoke the Nuremberg Principles to inform their understanding of international standards accepted decades prior, and still relevant to U.S. courts. The same spirit of Nuremberg must be invoked when seeking justice for victims of extraordinary rendition.

III. THE BYSTANDER THEORY AND NORTH CAROLINA'S RESPONSIBILITY

Under international law, individuals are held responsible for committing war crimes and crimes against humanity. The concept of individual liability has been recognized since World War I but was expanded and codified by the Nuremberg Trials and subsequent international and domestic tribunals influenced by Nuremberg.²⁸³

A. The “Bystander test” Under the Rome Statute

The test used to determine individual responsibility at the Nuremberg Trials included an examination as to “whether a moral choice was in fact possible” to the actor.²⁸⁴ If so, the actor

²⁸² *Id.* at 715.

²⁸³ *Kadic v. Karadzic*, 70 F. 3d 232, 244 (2nd Cir. 1995), *citing* Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 Int'l Conciliation 304 (April 1949) (collecting cases). Female plaintiffs in this case successfully won a \$745 million judgment against Bosnian Serb leader Radovan Kardzic for his role in “genocidal sexual atrocities perpetrated as a result of [his] policy of ethnic cleansing.”

could not claim that he was insulated from prosecution for having followed the chain of command (a defense that became known as the Nuremberg Defense).²⁸⁵ The Nuremberg Defense not only failed at the Nuremberg Trials but has also been rejected in subsequent international tribunals and the norms that prohibit the invocation of such defense have been codified in the Rome Statute, Article 33, “Superior Orders and Prescription of Law.”²⁸⁶ The United States Army Field Manual also incorporates this concept: “Any person, civilian or military, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.”²⁸⁷

B. Individual Responsibility and the Tokyo War Crimes Tribunal

The concept of individual responsibility was expanded from Nuremberg and laid the framework for the prosecutions at the Tokyo War Crimes Tribunal (TWCT), a court established to try war criminals in the Asian theatre of World War II. The TWCT implemented many of the norms of the Nuremberg Principles, but expanded upon personal responsibility claiming that: “Anyone with knowledge of illegal activity and an opportunity to do something about it is a

²⁸⁴ Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 400 (1989).

²⁸⁵ *See, e.g. id.*

²⁸⁶ Rome Statute, Article 33: (1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.” Interestingly enough, the Rome Statute allows superior orders as a defense to war crimes in certain circumstances but only in trials that occur before the International Criminal Court. This is a lessening of the rule that was defined at Nuremberg. For a more detailed explanation, *see* AMNESTY INTERNATIONAL, COMOROS: ANALYSIS OF THE DRAFT IMPLEMENTING LEGISLATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, <http://www.amnesty.org/en/library/asset/AFR21/001/2007/en/e5fbd7e8-d40e-11dc-ae76-cd9a3dc63251/afr210012007eng.html>

²⁸⁷ UNITED STATES ARMY FIELD MANUAL, § 498.

potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes.”²⁸⁸ These principles applied to government officials, policy makers, military personnel, and private citizens.²⁸⁹

The TWCT definition is more expansive and has the potential to implicate a wide swath of actors in North Carolina with regard to the extraordinary rendition program. As a result of ongoing protests and educational activities, it would be difficult for county or state officials, directors and employees of Aero Contractors, Johnston county residents, or North Carolina residents in general to deny knowledge about the actions of Aero. NC Stop Torture Now,²⁹⁰ an advocacy organization in Johnston County, holds near-monthly vigils to raise awareness about the role of Aero Contractors in torture and extraordinary rendition. Community members have seen their signs and banners indicting Aero in the program and the rendition flights. Would ordinary citizens, driving on their way to soccer games or the grocery store, be considered “anyone with knowledge of illegal activity?” Certainly the aim of anti-torture advocates is not to implicate neighbors, especially when it is unclear whether these people would have had “an opportunity to do something about it.” However, it is important to recognize the scope of the definition employed by the Tokyo War Crimes Tribunal.

C. Bystander Responsibility as Applied

In contrast to ordinary citizens, North Carolina state officials, who do possess the opportunity to act and investigate crimes, should feel compelled by the precepts of the Nuremberg principles to do so. State officials cannot be bystanders to the egregious human

²⁸⁸ Tokyo War Crimes Trial, *supra* note 17.

²⁸⁹ Lawrence, *supra* note 57, at 404, *citing* The Zyklon B Case, *reprinted in* THE LAW OF WAR, *supra* note 24, at 1487, in which civilians were charged with providing Zyklon B (prussic acid) which was used to exterminate prisoners in concentration camps. This case also dealt with the question of civilian liability for complicity with international crimes.

²⁹⁰ NC STOP TORTURE NOW, www.ncstoptorturenw.org

rights abuses that have originated in North Carolina as a result of Aero's actions. As the Tokyo War Crime Tribunal exhorts, a person must take *affirmative* measures to prevent crimes from taking place. Thus, NC officials should follow through on their promises to investigate torture that stems from their state in order to prevent their complicity in the action and to avoid becoming a bystander to human rights abuses.

In U.S. courts, human rights advocates have utilized the bystander principle that emanates from the Nuremberg Principles and the Tokyo War Crimes Tribunal to establish two defenses that would shield them from criminal liability were they to be indicted for affirmatively working to promote a human rights abuse. Analyzing these legal theories underscores the importance of the Nuremberg principles in American jurisprudence. For example, in *Vermont v. Keller* (1984),²⁹¹ a group of protesters carried out a sit-in in the offices of Senator Robert T. Stafford in response to human rights abuses in Central America. After they were criminally charged, they successfully utilized the Nuremberg Principles to demonstrate that they had a Citizen's Duty to act in order to prevent international crimes from taking place since they had knowledge that such a crime was occurring.

Other scholars have written, particularly with regard to mass atrocities, bystanders may be considered part of the problem rather than part of the solution.²⁹² In the context of mass atrocities, one scholar writes that once the mass killing starts, "the majority will either willingly join the violence or they will comply, submit, and remain passive when faced with brutality." As such, perpetrators are assisted by those who have failed to act.²⁹³

²⁹¹ *Vermont v. Keller*, No. 1372-4-84 (D. Vt., filed Nov. 13, 1984).

²⁹² *See, e.g.* Fletcher, *supra* note 3.

²⁹³ *Id.* at 1026.

With regard to the extraordinary rendition program and torture, the bystanders of North Carolina have contributed to the state's apathy. Certainly, the role of Aero and North Carolina state officials can be distinguished from other mass atrocities: in this case, there are a few known cases that have been carried out by the government. The information is public – cognizable by a few and ignored by many. Perhaps N.C. citizen complacency is due to the fact that while the genesis of the atrocity is occurring in the backyards of civilians, the full realization of the atrocity takes place overseas. Yet as legal scholar Laurel Fletcher writes, “[b]ystanders play a role in the descent of their communities into violence. And they will inform the way their children, friends, and colleagues perceive the past.”²⁹⁴ While the community is not affected in a

North Carolina state officials, who do possess the opportunity to act and investigate crimes, should feel compelled by the precepts of the Nuremberg principles to do so. State officials cannot be bystanders to the egregious human rights abuses that have originated in North Carolina as a result of Aero's actions.

tangible way by the extraordinary rendition program in a way communities like Bosnia and Rwanda were, it is likely that North Carolina will be judged by future generations by the actions their government took and did not take.

Legal scholars differ as to whether bystanders should be criminally prosecuted for their role in allowing human rights abuses to take place. One school of thought does not consider these individuals blameless, nor should they be “entitled to the law’s intervening in a matter that pronounces their innocence. Trying the most notorious should not ineluctably lead to absolving the rest.”²⁹⁵ Yet, the prevailing thought is that bystanders should not be criminally prosecuted,

²⁹⁴*Id.* at 1027.

²⁹⁵ *Id.* at 1037, citing Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005) (Drumbl argues that the qualitative difference of mass atrocities requires

nor has such been the aim of advocacy groups like NC Stop Torture Now.²⁹⁶ The circumstances of bystanders to extraordinary rendition and torture differ from previous bystander scenarios: The extraordinary rendition program is shrouded in secrecy which contrasts with crematoriums that were part of a common landscape in Nazi Germany, for example. However, powerful advocacy and investigative journalism has meant an explosion of information available to most. Furthermore, these wrongs must be addressed in order for a society to come to terms with its moral failures. In a liberal state, an individual should be held to social and legal norms.²⁹⁷ If bystanders aren't "put on trial," how will they "confront and acknowledge the ways in which their inaction or passive participation contributed to the atrocities conducted?"²⁹⁸

In order to move past the abuses that have been committed in our midst, we must "embrace a new collective future."²⁹⁹ Generally, this challenge is accomplished when citizens of the same community reach out to one another and reconcile the misdeeds of the past. In this situation, the men who have been victims of extraordinary rendition and torture do not necessarily have to be part of the collective future of the communities in which North Carolinians live. Many of these men have foreign names and foreign addresses. Their anonymity has been exploited by the government. This is the challenge. Their future should be intertwined with North Carolina's. Their ability to reconcile the past is inextricably bound to North Carolina's and therefore, North

different theories of punishment).

²⁹⁶ *Id.* at 1016, 1031, *citing* Karl Jaspers, *The Question of German Guilt* 73-74 (E.B. Ashton trans., 1947). (Fletcher writes: "International humanitarian law cannot and should not criminalize the conduct of bystanders." While she quotes German philosopher Karl Jasper as advocating: "Legal sanction of bystanders or collectives is antithetical to legal liberalism.")

²⁹⁷ *Id.* at 1031.

²⁹⁸ *Id.* at 1034.

²⁹⁹ *Id.* at 1015.

Carolina citizens must be proactive in extending a hand to allow the process to take place.

Together, victims of extraordinary rendition, the perpetrators, and bystanders can unite to ensure a collective global future free from torture and forgiving of the past.