

THE UN SYSTEM AND EXTRAORDINARY RENDITION

Prevention through international law and norms, and protection via mechanisms for redress



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OVERVIEW: extraordinary rendition is covered by the right to be free from torture

International law and existing UN system mechanisms offer robust protection against extraordinary rendition (i.e. the extrajudicial transfer of individuals from one state to another). The term has been specifically applied in recent years to the transfer of suspects to states where interrogation techniques can be applied that would be prohibited as torture or cruel, inhuman or degrading treatment in the sending country.

The right not to be subjected to torture (and by extension – albeit to a lesser extent – other ill-treatment) is arguably the best-protected human right, given 1) its coverage within 'jus cogens' and 2) the applicability of universal jurisdiction to torture.

1) 'Jus cogens': the right not to be tortured is a widely-accepted principle that covers all states and from which no state can derogate

Although there is no formal agreement stating which norms are regarded as 'jus cogens', there is general consensus among academics and practitioners that the prohibition of torture is a norm from which no state is permitted to deviate regardless of the circumstances.¹ Furthermore, even states that have not ratified the relevant legal instruments are nonetheless bound by this principle. States are also required to bring their domestic laws in line with the international prohibition.

2) Universal jurisdiction: torture is a crime against all

The UN Convention Against Torture includes innovative provisions on its incorporation into domestic law. States are obliged to 'combat impunity' by establishing different types of jurisdiction, including universal jurisdiction – a first in international human rights law according to Manfred Nowak, UN Special Rapporteur on torture. Universal jurisdiction permits states to claim criminal authority for the gravest of crimes (eg. crimes against humanity) over any person, including government leaders, regardless of whether that person or their alleged crime has any relation to the prosecuting country. The intention of the Convention is to safeguard victims' rights to effective remedy and to guard against 'safe havens' for perpetrators.

PREVENTION: treaties and treaty monitoring bodies

The following is a list of treaties that pertain to extraordinary rendition. (Britain has further relevant obligations, in particular, under the European Convention on Human Rights, the UK Human Rights Act and UK Criminal Justice Act.)

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984): The most explicit provision on extraordinary rendition is Article 3, which says that no state party 'shall expel, return ('refouler') or extradite a person to

¹ Shortly after 9/11, the UN Committee Against Torture issued a statement condemning the attacks, which stressed that obligations under the UN Convention against Torture (CAT) applied regardless of the circumstances, and expressed 'confidence' that any counter-terrorism measures adopted would have to conform to these obligations. CAT/C/XXVII/Misc.7, 22 November 2001

another State where are substantial grounds for believing that he would be in danger of being subjected to torture'. This is far stronger than the non-refoulement principle in Article 33 of the 1951 UN Refugee Convention, under which a refugee can be returned if there are reasonable grounds to consider him or her a security risk to the host country. CAT, however, guarantees an absolute right, even if there is a threat to national security. Other important CAT provisions are Article 2 (on non-derogability); Article 4 (on the obligation to criminalise torture); and Articles 5 to 7 (on measures to combat impunity).

The Committee Against Torture is CAT's treaty monitoring body, a group of independent experts which examines states' adherence to CAT and provides guidance on how to interpret the Convention in the form of general comments. Although not legally binding, general comments are important in terms of norm-setting. The Committee has issued comments on Articles 2 and 3 to broaden their remit to include cruel, inhuman and degrading treatment, and torture perpetrated by non-state actors. It also considers complaints relating to states that have 'opted in' to Article 22 on 'communications from or on behalf of individuals...who claim to be victims of a violation'.

Optional Protocol to the UN Convention Against Torture (2002): The objective of the Protocol is to establish a system of regular visits by independent international and national bodies to places where people are deprived of their liberty (eg. a prison or detention facility). Its primary relevance to extraordinary rendition is that it is a useful way to gather evidence.

UN International Covenant on Civil and Political Rights (ICCPR, 1965): Article 7 of the ICCPR prohibits torture and cruel, inhuman and degrading treatment. Like CAT, the ICCPR has a treaty monitoring body – the Human Rights Committee - to which states parties must submit reports every four years. The Committee has affirmed that no derogation from Article 7 is possible. It has also issued strong statements on the prohibition on refoulement in relation to Articles 7 and 2 (General Comments 20 and 31 respectively).

Rome Statute of the International Criminal Court: According to Article 7, torture is a crime against humanity, and the definition provided in this treaty is broader in scope than that in CAT Article 1. The Rome Statute includes 'other inhumane acts' in its list of crimes against humanity and places no limitations on who can be prosecuted, thus allowing for the inclusion of both government leaders and non-state actors.

The Geneva Conventions: The provisions of the Geneva Conventions are significant because they prohibit torture and other inhuman treatment of protected persons (including civilians and prisoners of war) in times of armed conflict or occupied territories, thus underscoring the non-derogable nature of this human right. Transferring civilians and prisoners of war to any state where they are likely to be tortured or inhumanely treated is also forbidden. The Conventions also address the issue of evidence extracted by torture, stating that no form of coercion may be exercised against protected persons to obtain information from them or from third parties.

Convention on International Civil Aviation (1944): The process of flying individuals across borders comes under the remit of the International Civil Aviation Organization (a specialised agency of the UN). The Convention states that all government aircraft need tacit approval to enter another country's airspace. So, if there were reasonable concerns that flights through a country's airspace were being used for extraordinary rendition, that country could refuse entry. States also have the right under Article 3bis (b) to ask any aircraft flying over its territory to land at a designated airport for inspection.

UN International Convention for the Protection of All Persons From Enforced Disappearance (adopted by the UN General Assembly in 2006, not yet in force): Article 2 of this Convention is the main provision that applies to extraordinary rendition, as it applies to any 'form of deprivation of liberty by agents of the State or groups of persons acting with the authorization, support or acquiescence of the State...which place [an individual] outside the protection of the law'.

REDRESS: key UN mechanisms

Victims of extraordinary rendition – because of its inherently extrajudicial and secretive nature – can find it difficult to exercise their right to effective remedy.² But avenues for redress do exist within the UN system. The work of the Special Procedures and treaty monitoring bodies in particular can help bolster legal claims.

Treaty monitoring bodies: Both CAT and ICCPR allow for individual complaints. Although the conclusions of monitoring bodies are not legally binding, they contribute to the development of customary law.³ The Committee Against Torture can also make pronouncements on what constitutes a 'substantial risk' of torture, based both on accounts of an individual's circumstances and on evidence that torture and/or inhuman treatment is systematic or widespread.

Human Rights Council and its Special Procedures (which are supported by the Office of the High Commissioner for Human Rights): While the Council has strongly condemned extraordinary rendition, the most valuable work has perhaps been done by its Special Procedures, especially the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion and protection of human rights while countering terrorism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Working Group on Arbitrary Detention; and the Working Group on Enforced or Involuntary Disappearances. Often described as the 'secret army of UN', Special Procedures are considered to be the most effective, flexible and responsive mechanism within the UN human rights system. They have been crucial in raising awareness of extraordinary rendition and, most importantly, in diligently documenting individual cases and systemic patterns of violations.

Voluntary Fund for the Victims of Torture: Created by the General Assembly in 1982, the fund receives voluntary contributions and distributes them to non-governmental organisations and treatment centres to help victims of torture and their relatives, including by providing medical and legal assistance.

CONSENSUS: 'diplomatic assurances' are not acceptable

Several UN entities – from treaty monitoring bodies to the High Commissioner for Human Rights – have condemned the practice of using 'diplomatic assurances' as a means to circumvent international obligations to prohibit torture. 'Diplomatic assurances' is the term given to formal representations on the part of one government to another – they are, in essence, promises that no individual will be subjected to torture or any other form of cruel, inhuman or degrading treatment.

Expert opinion and evidence gathered, among others by Manfred Nowak and Martin Scheinin, the Special Rapporteur on protecting human rights while countering terrorism, indicates that such assurances cannot and do not protect people. There is often no mechanism to monitor the fate of individuals after they have been transported (both the ICRC and Amnesty International have refused requests to act as monitors). Furthermore, the sending state has little incentive to uncover instances of torture, as it would in effect be admitting to violating non-refoulement obligations. Perhaps most damningly, as Martin Scheinin has pointed out, the very fact that a country is perceived as needing to provide diplomatic assurance implies that a well-documented risk of torture exists.

² One of the few successful compensation cases is that of Maher Arar, who was received CAN 10.5 million and an apology by the government of Canada, for the ten months he spent in Syria where he was tortured.

³ *Agiza v. Sweden*, for example, where the Committee Against Torture decided that Sweden was in breach of its CAT obligations and that the assurances provided by Egypt did not suffice, is widely cited.

