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**Abduction, Torture,
Interrogation: An Argument
Against Extraordinary Rendition**

Kaitlyn E. Tucker

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PROTECAO INTERNACIONAL DA PESSOA HUMANA
INTERNATIONAL PROTECTION OF HUMAN PERSON

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Abduction, Torture, Interrogation: An Argument Against Extraordinary Rendition*

Kaitlyn E. Tucker**

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy...to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution!^{1,2}

ABSTRACT

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

INTRODUCTION

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

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1 United States v. Toscanino

2 United States v. Toscanino, 500 F.2d 267, 274 (2d Cir. 1974)(quoting *Olmstead v. United States*, 277 U.S. 438 at 484-485 (1928)).

to spend the majority of his time locked in a very small underground cell.

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

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

Although American citizens have not faced scenarios like the one described above, American officers and agents have carried out missions similar to the one described above. This process, known as extraordinary

rendition,⁷ occurs when the government agents of one nation to take physical custody of an individual and bring that person into another country for intense interrogation outlawed by the abducting nation's laws. Over the last twenty years, American officials have used extraordinary rendition to break up terrorist cells in the Middle East, to prevent these groups from engaging in more terrorist attacks, and to circumvent bringing any of these individuals into the United States for a criminal trial.

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

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

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

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

4 See Scott Horton, New CIA Docs Detail Brutal "Extraordinary Rendition" Process (Sept. 28, 2009), http://www.huffingtonpost.com/2009/08/28/new-cia-docs-detail-bruta_n_271299.htm (last visited Oct. 2, 2012) ("Coercive techniques' used include: walling (slamming a prisoner's head against the wall, with some protective measures to avoid serious injuries)...") [hereinafter Horton]

5 See Background Paper on CIA's Combined Use of Interrogation Techniques (Dec. 30, 2004) www.aclu.org/torturefoia/released/082409/oclemand/2004olc97.pdf (last visited Oct. 2, 2012) ("The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.")

6 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85, entered into force June 26, 1987.

7 See David Weissbrodt and Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 586-87 (Summer 2006).

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

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

10 See Ingrid Detter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C. J. INT'L L. & COM. REG. 657, 675-77 (Summer 2008). Some detainees are, according to reports, taken through secret de-

tionally, this section follows the civil suit filed by El-Masri, an innocent man subjected to an extraordinary rendition and torture at a black site.

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

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

1. AMERICAN EXTRAORDINARY RENDITION

Extraordinary rendition occurs when government agents from one country detain an individual suspected to be a terrorist in another country, kidnap that individual, and deliver him to yet another country for torturous interrogation.¹¹ In terms of American poli-

tion centres: so called "black sites" are normally used by CIA in cooperation with other governments. These sites have been claimed to exist in Afghanistan at the Bagram Air Base and in Iraq at Camp Cropper . . . Black sites are also alleged to exist in Egypt, and Morocco, for example in the al-Tamara interrogation centre near Rabat. In Thailand, the Voice of America relay station in Udorn Thani has been said to host a black site. Claims have also been made that black sites have existed in several European countries, especially in the post-communist states, such as Poland, at Mihail Kogalniceanu near Constanta, in Romania, Armenia, Georgia, Latvia, Bulgaria and Slovakia. Not only ex-communist states have been implicated, but many Western states have been accused of tolerating activities by the CIA including, Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom.

¹¹ Frankopan, *supra* note 9; see Margaret L. Satterthwaite, *De-Torturing the Logic: the Contribution of CAT General Comment 2 to the Debate Over Extraordinary Rendition*, 11 N.Y. CITY L. REV. 281 (Summer 2008); see Elizabeth Rose Bailey, *Controlling Government Secrecy: A Judicial Solution to the Internal and External Conflicts Surrounding the*

cy, this practice grew out of another practice known as irregular rendition. An irregular rendition occurs when officers or agents of one country enter another country, abduct a suspected criminal, and return that person to their country so that he or she can face criminal prosecution. Extraordinary rendition and irregular rendition are both problematic alternatives to extradition because they circumvent the internationally accepted processes for gaining control of another country's citizens.

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

1.1 Extraordinary Rendition With Assurances

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

State Secrets Privilege, 58 BUFF. L. REV. 1187 (December 2010); see Peter Johnston, *Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States*, 16 J.L. & POL'Y 357 (2007); see Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares From the War on Terror*, 75 GEO. WASH. L. REV. 1200 (August 2007); see Astineh Arakelian, *Extraordinary Rendition in the Wake of 9/11*, 40 SW. L. REV. 323 (2010); see Melanie M. Laffin, *Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options*, 26 J. LEGIS. 315 (2000); see A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1 (2006); see John P. Blanc, *A Total Eclipse of Human Rights – Illustrated by Mohamed v. Jeppesen Dataplan, Inc.*, 114 W. VA. L. REV. 1089 (Spring 2012); see Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006); see Erin E. Bohannon, *Breaking the Silence: A Challenge to Executive Use of the State Secrets Privilege to Dismiss Claims*, 65 U. MIAMI L. REV. 621 (Winter 2011); see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (December 2010); see Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (August 2007); see Michael Byers, *Helmut Philipp Aust. Complicity and the Law of State Responsibility*. Cambridge: Cambridge University Press, 23 EUR. J. INT'L L. 586 (May 2012); see William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. J. INT'L L. 839 (Summer 2012); see David Weissbrodt and Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295 (Winter 2007).

world and release them into the custody of other countries such as Jordan, Iraq, Egypt, and Afghanistan.¹² The United States agents then ask the receiving countries for assurances that the suspected terrorist detainees will not be tortured.¹³ The Committee Against Torture determined that these assurances are insufficient to prevent any country from violating the Convention.¹⁴

1.2 Extraordinary Rendition to Black Sites

Black sites are the second form of American extraordinary rendition.¹⁵ These black sites are CIA-established facilities set up and operated in the Middle East and in Europe by Americans.¹⁶ While in one of the bla-

ck site prisons, detainees experience a series of phases that build up to interrogation.¹⁷

Suspected terrorists can be detained anywhere in the world by any country before they are turned over to CIA agents. The CIA agents then render the “high value detainee” to a black site,¹⁸ where he “finds himself in the complete control of Americans.”¹⁹ Agents shave the detainees before photographing them naked and evaluating them during the Initial Conditions phase.²⁰ The second phase, Transition to Interrogation, allows interrogators to determine how receptive the each detainee is to turning over information.²¹ Because of a very high standard for willingness to provide information, most detainees become tracked for an intense level of interrogation.²²

During the final, full-blown Interrogation phase, interrogators use a variety of techniques to achieve a learned dependence goal.²³ Interrogators expose the detainees to white noise, loud noises, and constant light during the interrogation.²⁴ The detainees endure prolonged nakedness, sleep deprivation, and stay on a liquid diet.²⁵ Interrogators use physical force on the detainees, including: slaps,²⁶ walling,²⁷ “water dousing,”²⁸ stress

12 See ACLU Fact Sheet: Extraordinary Rendition (Dec. 6, 2005), <http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition> (last visited Sept. 23, 2012) (“Foreign nationals suspected of terrorism have been transported to detention and interrogation facilities in Jordan, Iraq, Egypt, Diego Garcia, Afghanistan, Guantánamo, and elsewhere.”).

13 See Stephen Grey, Frontline: Extraordinary Rendition (November 7, 2007), http://pbs.org/frontlineworld/stories/rendition701/video/video_index.html (last visited Sept. 23, 2012) (“They claim that when they send terror suspects to other countries, they get assurances they won’t be tortured, but even former CIA officials admit those claims are worthless.”), (“You can say we asked them not to do it, but you have to be honest with yourself and say there’s no way we can guarantee they are going to do that,” says Tyler Drumheller, who ran CIA operations in Europe at the time Abu Omar was kidnapped and ‘rendered’ to Egypt. ‘Once you turn them over you have no control over that.’); See Fact Sheet, *supra* note 11. (Robert Baer: “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.”)

14 See Torture Convention, *supra* note 5, Art. 17; See Weissbrodt, *supra* note 6, quoting *Agiza v. Sweden*, Communication No. 233/2003, May 20, 2005, U.N. Doc. CAT/C/34/D/233/2003. (“[I]t was known or should have been known, to [Sweden]’s authorities at the time of complainant’s removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.”); See Torture Convention, *supra* note 5, at Art. 3 (“[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.”).

15 See Grey, *supra* note 12 (After the war began in Afghanistan in 2002, the CIA set up its first secret jails or “black sites.” “The dark prison was run by the Americans,” a former inmate, Bisher al-Rawi, tells Grey. “It wasn’t Afghani people flying the aircraft, it wasn’t Afghani people who sort of shackled me and did whatever they did to me. It was Americans.”)

16 See Grey, *supra* note 12 (One of them, located just outside Kabul, was known as the “dark prison.” By early 2003, the United States was negotiating secret agreements with governments in Eastern Europe to set up black sites on their territory. A report this

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

17 See CIA Report, *supra* note 4 (“[T]he interrogation process can be broken into three separate phases: Initial Conditions; Transition to Interrogation; and Interrogation.”).

18 See CIA Report, *supra* note 4 (“The HVD is flown to a Black Site[.] A medical examination is conducted prior to the flight. During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods. There is no interaction with the HVD during this rendition movement except for periodic, discreet assessments by the on-board medical officer.”).

19 See CIA Report, *supra* note 4, page 3.

20 See CIA Report, *supra* note 4, page 3.

21 See CIA Report, *supra* note 4, page 4.

22 See CIA Report, *supra* note 4, (“The standard on participation is set very high during the Initial Interview. The HVD would have to willingly provide information on actionable threats and location information on High-Value Targets at large – not lower level information – for interrogators to continue with the neutral approach.”)

23 See CIA Report, *supra* note 4.

24 See CIA Report, *supra* note 4, page 5.

25 See CIA Report, *supra* note 4, page 6.

26 See CIA Report, *supra* note 4, page 6.

27 See Horton, *supra* note 3.

28 See CIA Report, footnote 4, *supra*, (“The frequency and duration of water dousing applications are based on water temperature and other safety considerations as established by OMS guidelines. It is an effective interrogation technique and may be used frequently within those guidelines. The physical dynamics of water dousing

positions,²⁹ wall standing,³⁰ and cramped confinement.³¹ Additionally, some detainees allege that they endured electric shock treatments and threats of sexual torture.³²

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

Macedonian authorities apprehended Khaled El-Masri on New Year's Eve in 2003 as he tried to cross the Macedonian-Serbian border.³³ The Macedonians held El-Masri in a hotel for 23 days.³⁴ On January 23, 2004, men in civilian clothes entered the hotel room. The men in civilian clothes forced El-Masri to make a statement that no one mistreated him during captivity and that he would return to Germany soon.³⁵ These men blindfolded El-Masri and drove him to an airstrip about an hour away.³⁶ When the vehicle stopped, the men pulled El-Masri out of the vehicle and led him into a building where they beat him, stripped him naked, and sodomized him.³⁷ The men removed his blindfold and took a picture, allowing El-Masri to see seven or eight men dressed in black and wearing ski masks.³⁸ They dressed him in a diaper and tracksuit, secured earmuffs over his ears, and blindfolded him once again.³⁹ The men dressed in black dragged El-Masri to a plane and sedated him.⁴⁰ When he awoke, El-Masri realized that, instead of flying to Germany,⁴¹ his captors took him to Kabul, Afghanistan.⁴²

are such that it can be used in combination with other corrective and coercive techniques.”); see Red Cross Report, *supra* note 2. (“In each case, the person to be suffocated was strapped to a tilting bed and a cloth was placed over the face, covering the nose and mouth. Water was then poured continuously onto the cloth, saturating it and blocking off any air so that the person cannot breathe. This form of suffocation induced a feeling of panic and the acute impression that the person was about to die.”)

29 See CIA Report, *supra* note 4, page 9.

30 See CIA Report, *supra* note 4, page 9.

31 See CIA Report, *supra* note 4, page 9.

32 See Blanc, *supra* note 10. (“Plaintiff Ahmed Agiza alleged that he was ‘severely and repeatedly beaten and subjected to shock through electrodes attached to his ear lobes, nipples, and genitals’. Another plaintiff, Elkassim Britel, alleged that he was ‘deprived of sleep and food and threatened with sexual torture, including sodomy with a bottle and castration.’”)

33 *El-Masri v. Tenet*, 437 F.Supp. 2d 530, 532 (E.D.Va. 2006).

34 *Id.*

35 *Id.* at 533.

36 *Id.*

37 *Id.*

38 *Id.*

39 *El-Masri* at 533.

40 *Id.*

41 *Id.*

42 *Id.*

In Kabul, the men beat El-Masri before putting him in a “small, cold cell.”⁴³ Over the next four months, interrogators – including Americans – questioned him relentlessly about his “alleged association with terrorists.”⁴⁴ Two of the men identified themselves as Americans, and El-Masri begged for release, a criminal conviction, or the ability to call the German government.⁴⁵ Eventually, El-Masri’s captors released him.⁴⁶ They put El-Masri on a plane to Albania, and left him on the side of a road.⁴⁷ He made it back to Germany with the help of Albanian authorities.⁴⁸ El-Masri filed suit in the Eastern District of Virginia against multiple Americans for the extraordinary rendition he experienced.⁴⁹

2. DOES EXTRAORDINARY RENDITION BREAK THE LAW?

The American extraordinary rendition program sparked debate the minute its existence became public knowledge. The extreme techniques used by the extraordinary rendition program’s interrogators draw the most controversy because many believe them to amount to torture.⁵⁰ On the opposite side of that coin, the extraordinary rendition program has also received strong support, particularly since the terrorist attacks in New York City on September 11, 2001. Additionally, the Bush Administration in particular touted the necessity of the extraordinary rendition program,⁵¹ despite its creation

43 *Id.*

44 *Id.*

45 *El-Masri* at 533.

46 *Id.* at 534.

47 *Id.*

48 *Id.* at 535.

49 *El-Masri* filed a civil suit in the Eastern District of Virginia. The court dismissed the suit when the defendants raised the state secrets defense.

50 See Red Cross Report, *supra* note 2. (“The general term ‘ill-treatment’ has been used throughout the following section, however, it should in no way be understood as minimiz[ing] the severity of the conditions and treatment to which the detainees were subjected. Indeed as outlined in Section 4 below, and as concluded by this report, the ICRC clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman or degrading treatment.”)

51 See Grey, *supra* note 12. (“We have put this program in place for a reason,’ Bush told reporters. ‘When we find someone who may have information regarding a potential attack on American, you bet we’re going to detain them, and you bet we’re going to question them.’”)

during the Clinton Administration.⁵² The competing values of human rights and national security build into a significant tension between achieving victory in the War on Terrorism and meeting the human rights obligations imposed by international law. Extraordinary rendition supporters place a premium on national security and preventing another terrorist attack on American soil.⁵³ This belief justifies the black sites' extreme techniques as an effective way to reach the goal.⁵⁴ On the other hand, human rights groups claim that the extreme techniques are not as effective as they could be and that using the techniques is not worth the risks.⁵⁵

2.1 Is it Torture?

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

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁵⁶

America is a party to the Torture Convention,⁵⁷ and submitted a reservation to the Committee Against Torture in order to limit the United States' obligations un-

der the Convention. This understanding states that:

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

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.⁵⁸

Under a literal reading of both Article 1 and the United States' understanding, the acts described in Section I⁵⁹ must amount to torture.⁶⁰ Under a CIA official's admission in a memo detailing the techniques used at the black sites, the goal of the interrogations is to create the learned helplessness and dependence necessary to gather intelligence.⁶¹ Rarely do individuals engaging in questionable behavior spell out their intent so clearly and this purpose falls squarely within the realm of the Torture Convention. The techniques outlined in the redacted CIA memo⁶² and quantified in the Red Cross Report⁶³ meet three of the four options specified by the United States' understanding of torture.⁶⁴ Taking the clear intent and specific acts together, it is more than clear that the interrogation techniques employed at the CIA black sites constitute torture.

52 See Weissbrodt, *supra* note 6 at 591.

53 See Paul France, Homeland Security Tactics (Fall 2011), http://www.abchs.com/ihs/FALL2011/ihs_articles_2.php (last visited Nov. 10, 2012) ("Many supporters of extraordinary rendition use the 9/11 terrorist attack as an argument for coercive interrogation methods claiming the devastating attacks could have been averted).

54 See France, *supra* note 52. ("Vice President Dick Cheney insisted repeatedly that water boarding and other forms of torture worked exceedingly well to extract valuable information as proven by the fact that there had been no mass-casualty attacks in the United States since 9/11.")

55 See France, *supra* note 52. ("One of the most popular arguments against rendition and torture is the idea that illegally detaining an individual, denying them basic rights, and sending them to nations that regularly use torture to obtain information is inherently against the fundamental values and beliefs of the American people and is against both national and international laws.")

56 See Torture Convention, *supra* note 5.

57 See Weissbrodt, *supra* note 6, at 600 ("The United States ratified the Torture Convention in October 1994, having enacted legislation to implement the Convention.")

58 See Weissbrodt, *supra* note 6, at 600 (Citing Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990)(U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.)

59 Section I, *supra*.

60 See Sadat, *supra* note 10 at 1201. (There they are detained, interrogated, often tortured, and sometimes killed.7 The stories of the individuals "outsourced" as a result of the U.S. rendition program are lurid in their details, involving hooded detainees, who are spirited away in the dead of night and sent in chartered aircrafts to remote countries where they typically suffer torture and maltreatment.)

61 See CIA Report, *supra* note 4.

62 See CIA Report, *supra* note 4.

63 See Red Cross Report, *supra* note 2.

64 See Weissbrodt, *supra* note 6 at 591.

2.2 Is it Simply Intense Interrogation?

The Torture Convention builds in an alternative preventative measure for acts that do not quite meet the level of torture defined in Article 1.⁶⁵ For those who maintain that the techniques used at the black sites are nothing more than intense interrogation techniques, Article 16 provides the alternative to Article 1.⁶⁶ Article 16 requires State Parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity.”⁶⁷ Extended exposure to white noise,⁶⁸ light,⁶⁹ prolonged nakedness,⁷⁰ sleep deprivation,⁷¹ a liquid diet,⁷² and the physical force certainly rises to the level of “cruel, inhuman or degrading treatment or punishment,”⁷³ if they do not meet the definition of torture.⁷⁴ Furthermore, these interrogation techniques came about at the insistence of public officials. Even if the interrogation techniques do not rise to the level of torture, they certainly fall well within the range of Article 16.⁷⁵

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

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

Members of the Bush administration advanced the argument that “foreign nationals held at [black site] facilities, outside U.S. sovereign territory, are unprotected by federal or international laws.”⁷⁹ In fact, Article 2 requires Convention signers to “take measures to prevent acts of torture in any territory under its jurisdiction.”⁸⁰ The phrase “territory under its jurisdiction” also appears in three⁸¹ additional articles to the Torture Convention that further set out a State Party’s obligations.

The black sites exist outside of the physical boundaries of the United States. In fact, black sites are located within other countries, such as Afghanistan⁸² - certainly not a “territory under [American] jurisdiction.”⁸³ As a result, some potential for a very strict interpretation of the Torture Convention exists. Under this narrow reading, so long as American officials do not torture people – in this case, the suspected terrorists captured through the extraordinary rendition program – within the physical borders of America, there is no violation to the Torture Convention. These extraterritorial locations are in other countries, countries that certainly are not within a “territory under [American] jurisdiction.”

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

65 See Torture Convention, *supra* note 5.

66 See Torture Convention, *supra* note 5.

67 See Torture Convention, *supra* note 5, at Art. 17.

68 See CIA Report, *supra* note 4, page 5.

69 See CIA Report, *supra* note 4, page 5.

70 See CIA Report, *supra* note 4, page 6.

71 See CIA Report, *supra* note 4, page 6.

72 See CIA Report, *supra* note 4, page 6.

73 *Supra* note 60.

74 *Supra* note 50.

75 See Torture Convention, *supra* note 5, at Art. 16.

76 *Supra* Section II, subsection A.

77 See Red Cross Report, *supra* note 2.

78 See CIA Report, *supra* note 4.

79 See Fact Sheet, *supra* note 11.

80 See Torture Convention, *supra* note 5, at Art. 2.

81 See Torture Convention, *supra* note 5, at Art. 5, Art. 7, Art. 11.

82 See Grey, *supra* note 12. (“One of them, located just outside Kabul, was known as the “dark prison.” By early 2003, the United States was negotiating secret agreements with governments in Eastern Europe to set up black sites on their territory. A report this summer by the Council of Europe declared it had proof of two CIA black sites, one on the east coast of Romania, the other at an airbase in Poland.”)

83 See Torture Convention, *supra* note 5.

84 *Supra* Section I.

85 *Supra* note 14; *supra* note 2.

86 See CIA Report, *supra* note 4.

One easily arrives at this conclusion through the Torture Convention's express purpose to end torture globally. Reviewing the first sixteen articles, it is abundantly apparent that the Convention's designers and drafters meant to eradicate torture worldwide. This intent manifests itself as early as Article 2 of the Torture Convention, which establishes that there are "no exceptional circumstances whatsoever" that warrant using torture.⁸⁷ Beyond the declaration that no circumstance warrants torture, the Convention also forbids orders from high-ranking officers or officials to justify torture.⁸⁸ The no exceptions requirements work hand-in-hand with later provisions in the Convention that mandate every State Party to institute training and education on torture and non-torturous techniques for every person involved detainee, arrestee, or prisoner treatment.⁸⁹

2.4 Do Black Sites Invite Retaliation?

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

87 See Torture Convention, *supra* note 5, at Art. 2, ¶ 2.

88 See Torture Convention, *supra* note 5, at Art. 2, ¶ 3.

89 See Torture Convention, *supra* note 5, at Art. 10, Art. 11.

90 *Supra* note 8.

91 See Grey, *supra* note 12. (Former FBI special agent Jack Cloonan [said,] "The thing you saw in Africa where people are being held incommunicado and have no legal representation and potentially abused, is unacceptable. You're setting yourself up for revenge by al Qaeda and other Islamists.")

92 See Grey, *supra* note 12. ("We really have created a mess here, a terrible mess," says Lawrence Wilkerson, who served in the U.S. State Department during the Bush administration. "For the people who are involved in it. For the legal system that will have to sort it out, under a new president. For the country. For our reputation. For our prestige around the world. This has been incredibly damaging."); *Supra* note 1 at 274 (quoting *Olmstead v. United States*, 277 U.S. 438 at 484-485 (1928)

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously.

3. SOLUTIONS FOR BLACK SITES

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

One segment of the nation's population accepts the War on Terrorism as it is, including potential torture.⁹³ This "ends justify the means" has an extreme impact on the extraordinary rendition program. It single-handedly lead to removing the safeguards from the program.⁹⁴

On the other hand, another segment of the population does not believe that the program is worth the human rights interests and Torture Convention violations. As evidenced by the Red Cross report and many other individuals, organizations, and countries outside the United States fall in line with this viewpoint.⁹⁵ Although these two positions are contradictory to one another, policy makers must address both in order to produce a viable solution to the black sites.

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

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

93 See Weissbrodt, *supra* note 6, at 590. ("One former CIA official argued that 'the rendition program has been the single-most successful American counterterrorism program since 1995'")

94 See Peter Johnston, *Leaving the Invisible Universe: Why All Victims of Extraordinary rendition Need a Cause of Action Against the United States*, 16 J.L. & Pol'y 357, 364 (2007).

[T]hese early extraordinary renditions still had more safeguards than the programs used today: every rendered individual was convicted in absentia, and all renditions were approved by CIA legal counsel on the basis of a substantive dossier. After the September 11, 2001 attacks, however, the extraordinary rendition program changed drastically . . . The initial safeguards were eliminated due to the intense pressure on the CIA after September 11 to prevent another potential attack.

95 See Red Cross Report, *supra* note 2.

The arguments America put forth justifying the extraordinary rendition program, for example, make light of the Torture Convention. When nations do not actually abide by the treaties and conventions they sign, it diminishes the likelihood of utilizing international remedies.

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

3.1 Providing a Remedy for Victims

If the American government – through the judicial process – truly offered extraordinary rendition victims a remedy, it would help create a disincentive to continue the program. Further, it shows a concerted effort to rectify the grave breach to human rights interests created with the black sites, which is an equally important consideration and an essential first step forward. Finally, this step would also help put the United States more in line with its obligations under the Torture Convention. The Torture Convention requires State Parties like the United States⁹⁶ to provide a remedy to anyone tortured by a State actor.⁹⁷ The United States could better provide a civil remedy to the individuals who endured the extraordinary rendition program by altering how the state secrets privilege gets asserted and by removing the effects of *Mohamad v. Palestinian Authority*.⁹⁸

3.1.1 The State Secrets Privilege

Several former high value detainees like El-Masri⁹⁹ have filed legal actions against government actors in the United States. In each instance, trial judges dismissed the suits before trial. The extraordinary rendition victims appeal these dismissals;¹⁰⁰ however, appellate courts

uphold the lower decisions.¹⁰¹ These suits typically get dismissed because the defendants assert the state secrets privilege or for other extremely technical, procedural reasons.¹⁰² Men like El-Masri¹⁰³ may be able to bring forth an action initially, but these suits do not have a real opportunity to move forward. As a result, the individuals who experienced the extraordinary rendition wind up without an adequate remedy.

In reality, judges dismiss the suits before thoroughly considering the validity of the claims in the complaints. This is particularly the case with suits dismissed by the state secrets privilege. When El-Masri, detailed in Section I,¹⁰⁴ filed suit against American men and corporations he believed participated in his extraordinary rendition, the court did not determine the validity or truthfulness of El-Masri's complaint because the defendants asserted the state secrets privilege to all of the claims. Instead, the court dismissed the case because "any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument."¹⁰⁵

Maher Arar encountered a similar issue when he filed suit against the men who participated in his extraordinary rendition. Arar filed suit against federal officials for relief under the Torture Victim Protection Act and under the Fifth Amendment for his detention in the United States and his torture and detention in Syria.¹⁰⁶ The district court dismissed all four of Arar's claims; however, the court allowed Arar to re-plead the claim that American officials violated his due process rights in the United States.¹⁰⁷ Arar appealed, and the appellate court affirmed the lower court's decision to dismiss all four claims.¹⁰⁸ Just like the El-Masri court, this court asserted that the judicial branch has no authority to provide a remedy to people who have endured extraordinary rendition and torture in the course of the War on Terrorism.¹⁰⁹

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

96 America's own federal law is supposed to afford torture victims a remedy. Torture Victim Protection Act, 28 U.S.C. § 1350.

97 See Torture Convention, *supra* note 5, at Art. 12, Art. 13, Art. 14.

98 *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

99 *Supra* Section I.

100 See El-Masri, *supra* note 32.

101 *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

102 See El-Masri, *supra* note 32; see Arar, *supra* note 100.

103 *Supra* Section I.

104 *Supra* Section I.

105 See El-Masri at 539.

106 See Arar at 567.

107 *Id.*

108 *Id.* at 581.

109 *Id.*

need for one.¹¹⁰ This opens the door for creating a remedy. Courts do not have to dismiss claims simply because the defendants validly assert the state secrets privilege. The doctrine itself allows claims to continue forward even with a properly asserted and accepted state secrets defense. As indicated in *El-Masri*, when government officials assert the state secrets privilege, the court has discretion to “proceed in some fashion that adequately safeguards any state secrets.”¹¹¹ The standard for determining the necessity of dismissing the case rests on whether or not “there is ‘no way [the] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff’s case.’”¹¹²

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

3.1.2 The Palestinian Authority Decision

Mohamad v. Palestinian Authority is a landmark change in providing torture victims across the board a remedy under the TVPA, despite being a recent decision. The United States Supreme Court held that the TVPA only imposes liability on natural people.¹¹³ In the majority

110 See *El-Masri* at 535.

...if *El-Masri*’s allegations are true, or essentially true, then all fair-minded people, including that who believe state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that *El-Masri* has suffered injuries as a result of our country’s mistake and deserves a remedy. Yet it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.

111 See *El-Masri* at 535.

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

113 See *Mohamad v. Palestinian Authority*, *supra* note 97 at 1705 (2012). (“We hold that the term ‘individual’ as used in the Act encompasses only natural persons. Consequently, the Act does not im-

pose liability against organizations.”)
 opinion, Justice Sotomayor confirmed two lower court decisions to dismiss this case because the Palestinian Authority is an organization, not an individual.¹¹⁴ Although a case has not yet gone before the Supreme Court, this holding will provide another legal escape for corporations who transport detainees to the black sites.¹¹⁵ Although corporations like *Jeppesen Dataplan, Inc.*, that assisted in transporting the high value detainees have already maintained liability exemption from the Alien Tort Statute¹¹⁶ through government intervention and the state secrets doctrine, they now gain exemption from the TVPA on their own. Anyone who endured extraordinary rendition and detention at a black site is now without a legal remedy from the government and any corporation or organization involved. Essentially, this United States Supreme Court decision removes disincentive for corporate participation in extraordinary rendition – there will be no backlash, criminally or civilly, for assisting in detainee transportation, thus allowing corporations to continue to assist with extraordinary renditions.

If the court reversed the effects of *Mohamed v. Palestinian Authority* or if the legislature passed an amendment to the TVPA, then, perhaps, the former detainees could exercise the full extent of their judicial rights. Allowing detainees to utilize this avenue for a remedy would also help put the United States in line with its obligations under the Torture Convention, as described in Section II.¹¹⁷ This could also help the United States to show its

pose liability against organizations.”)

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

115 *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1075 (Court of Appeals, Ninth Circuit 2010).

The complaint asserts ‘Jeppesen [Dataplan, Inc., a U.S. corporation] played an integral role in the forced’ abductions and detentions and ‘provided direct and substantial services to the United States for its so-called ‘extraordinary rendition program,’ thereby ‘enabling the clandestine and forcible transportation of terrorism suspects to the secret overseas detention facilities.’ It also alleges that Jeppesen provided this assistance with actual or constructive ‘knowledge of the objectives of the rendition program,’ including knowledge that the plaintiffs ‘would be subjected to forced disappearance, detention, and torture’ by U.S. and foreign government officials.

116 28 U.S.C. § 1350.

117 *Supra* Section II.

commitment to rectifying the wrongs of the extraordinary rendition program.

3.2 A Return to Former Policies

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

3.2.1 Irregular Rendition

America can distance itself from extraordinary rendition through a return to irregular rendition.¹¹⁸ As a default policy, irregular rendition is by no means a perfect answer. Irregular rendition comes with its own laundry list of criticism¹¹⁹ and international law issues.¹²⁰ These potential problems, however, are less severe than extraordinary rendition's human rights concerns and international law violations.

The United States Supreme Court first approved the use of irregular rendition in *Ker v. Illinois*.¹²¹ Ultimately, the United States Supreme Court opted not to decide "the question of how far [Ker's] forcible seizure in another country, and transfer by violence, force, or

118 *Supra* Section 1.

119 *Supra* note 1 at 272. This doctrine "reward[s] police brutality and lawlessness in some cases."

120 *Supra* note 1.

121 *Ker v. Illinois*, 119 U. S. 436, 438 (1886). The trial court convicted Frederick Ker, the defendant, of larceny. Before trial, Ker fled the United States and hid in Peru. The United States government issued an extradition order to a Pinkerton agent, who was charged with traveling to Peru and bringing Ker back to the United States for trial. When the Pinkerton agent arrived in Peru, the country was engulfed in war. As a result, the Pinkerton agent did not execute the extradition order through the Peruvian government, and, instead, abducted Ker. The agent brought Ker back to the United States through an "irregular rendition."

fraud to this country, could be made available to resist trial in the state court."¹²² To justify the decision, the Court stated that they "do not see that the constitution or laws or treaties of the United States guaranty [Ker] any protection."¹²³ Justice Miller, however, did look to other countries' positions on extraordinary rendition's effect on jurisdiction before shifting gears in this opinion. This Court discussed utilizing the "bad capture, good detention" reasoning taken from other courts,¹²⁴ and stated that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court."¹²⁵

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

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

3.2.2 Original Extraordinary Rendition

The United States government could also opt to reinstate the extraordinary rendition safeguards and practices in place prior to the September 11, 2001, attacks. Although the original program still involved capturing suspected terrorists and rendering them to foreign countries for interrogation, each person subjected to an extraordinary rendition also received a trial in absentia.¹²⁶ Additionally, the CIA's legal counsel approved

122 *Id.* at 443.

123 *Id.*

124 *Ex parte Scott*, 9 Barn. & C. 446, (1829); *Lopez v. Sattler's Case*, 1 Dears. & B. Cr. Cas. 525; *State v. Smith*, 1 Bailey, 283 (1829); *State v. Brewster*, 7 Vt. 118, (1835); *Dow's Case*, 18 Pa. St. 37, (1851); *State v. Ross*, 21 Iowa, 467, (1866); *The Richmond v. U. S.*, 9 Cranch. 102.

125 *See Ker* at 443.

126 *See Johnston*, *supra* note 10 at 364.

every single individual for the extraordinary rendition program based on a substantive dossier.¹²⁷

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

3.3 An International Option: Amending the Torture Convention

In order to prevent further abuse under the guise of a legal loophole,¹²⁸ the Torture Committee must amend the Torture Convention to make it absolutely clear that torture at the insistence of any government official counts, regardless of location. The phrase “territory under its jurisdiction”¹²⁹ needs its own definition in a new paragraph under Article 1. This definition must state that any facility set up or operated by the agents of one State Party, regardless of this facility’s physical location within another country’s borders, constitutes territory under that State Party’s jurisdiction. The definition must go on to incorporate the language in Article 5 to include “on board a ship or aircraft registered in that State.”¹³⁰

By adding this language to the Torture Convention, the Committee Against Torture gains a foothold against American arguments that black sites do not constitute a violation.¹³¹ By taking the proverbial “wind out of the sails” of these arguments, the Committee Against Torture assumes a position to better prosecute legally manipulated violations. The Committee Against Torture already ruled that assurances that a receiving country will not torture an individual picked up through extraor-

dinary rendition do not create immunity.¹³² The Committee Against Torture desperately needs to be able to combat both forms of the American extraordinary rendition program. With these linguistic changes, the Committee can meet this goal and make it abundantly clear that torture of any kind, under an circumstance violates the Torture Convention.

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

4. CONCLUSION

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

Despite international outcry and outrage within the United States, multiple presidential administrations authorized or encouraged extraordinary rendition. Promoting the use of such extreme measures grew in popularity particularly after the terrorist attacks on American soil on September 11, 2001. The American government actively sought methods and practices to achieve its goal

127 *Id.*

128 *See* Fact Sheet, *supra* note 11. “Foreign nationals held at [black site] facilities, outside U.S. sovereign territory, are unprotected by federal or international laws.”

129 *See* Torture Convention, *supra* note 5.

130 *See* Torture Convention, *supra* note 5, at Art. 5.

131 *Supra* Section II.

132 *Supra* note 11; *Supra* Section I.

to prevent further attacks. It did so, however, by sacrificing human rights interests and by placing the country in jeopardy of violating its own international treaties. Further, setting a precedent that this type of program is acceptable invites retribution – the exact issue supposedly at the heart of the policy decision to engage in extraordinary rendition in the first place.

Because this program violates human rights and establishes a resoundingly negative international precedent, it must become a less attractive option to the American government and, ultimately, must end. To meet this end, the American government should pursue establishing civil remedies for the extraordinary rendition program's victims as a disincentive for continuing

the program. This is practicable in altering the states secret privilege so that claims related to this program can survive to judicial scrutiny and through requiring corporations involved in extraordinary rendition liable for their actions. Both of these options work as disincentives for continuing the use of extraordinary rendition. In addition, the government has two more legitimate former practice options – irregular rendition and the original extraordinary rendition program – that it could use to meet the goal of preventing another substantial terrorist attack on American soil. Finally, the Committee Against Torture must amend the Torture Convention in order to ensure that no country party to its obligations can legitimately argue that a black site-style program is not torture.

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