All Party Parliamentary Group
on Extraordinary Rendition

Briefing:

Torture by proxy: International law applicable to 'Extraordinary Renditions'

December 2005

The All Party Parliamentary on Extraordinary Rendition

The All Party Parliamentary Group on Extraordinary Rendition comprises a cross party membership of over 50 MPs and Peers from the UK Parliament. It was founded by Andrew Tyrie MP to shed light on the allegations that the UK was involved in providing assistance to the practice of Extraordinary Rendition.

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Publications

A complete list of all publications of the APPG, including reports, briefings, debates and parliamentary questions tabled by Members will be available online at www.extraordinaryrendition.org. Paper copies are also available on request.

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Acknowledgements

This briefing has been kindly prepared for the APPG by the New York University Centre for Human Rights and Global Justice.

FOREWORD

This briefing paper has been prepared for the All Party Parliamentary Group on Extraordinary Rendition by the Centre for Human Rights and Global Justice, of New York University School of Law. On behalf of the Parliamentary Group, I would like to thank all those from the Centre who have contributed both their expertise and their time in putting this paper together.

One of the key objectives of the Parliamentary Group is to shed light on what has become known as Extraordinary Rendition. This is the practice of transferring an individual to a foreign state in circumstances that make it more likely than not that the individual may be subjected to torture or cruel, inhuman, or degrading treatment. It has been alleged that such transfers have taken place to countries including Egypt, Syria and Jordan.

This paper shows that there is a real and clear legal imperative to find out what is going on, and to ensure that no state engages in Extraordinary Rendition. This applies to the UK as much as it does to the US – as the authors state plainly:

> *'seemingly innocuous acts (e.g. allowing refuelling at airports of aircraft of another State) can become wrongful under international law if those acts facilitate Extraordinary Rendition.'*

Even if the legal arguments were equivocal, the moral case is unassailable: there is simply no justification whatsoever for the UK or the US engaging in torture, whether by direct or indirect means.

Nor is it likely that torturing people, if this is what is going on, can assist in combating terrorism. Information obtained in such a way is said to be highly unreliable. Worse, the knowledge that such practices were being conducted could act as a recruiting sergeant for terrorism. The case for the values of our democratic societies, which we would like to see spread around the world, will be undermined if we do not respect those values.

I very much hope that members of Parliament and members of the public will find much of interest in this excellent paper.

Yours faithfully

Andrew Tyrie MP
Chair, All Party Parliamentary Group on Extraordinary Rendition

TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS"

Briefing Paper

The Center for Human Rights and Global Justice
New York University School of Law

December 2005

About the Center for Human Rights and Global Justice

The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law (http://www.chrgj.org) focuses on issues related to "global justice," and aims to advance human rights and respect for the rule of law through cutting-edge advocacy and scholarship. The CHRGJ promotes human rights research, education and training, and encourages interdisciplinary research on emerging issues in international human rights and humanitarian law. Philip Alston is the Center's Faculty Director; Smita Narula is Executive Director; Meg Satterthwaite is Research Director; and Jayne Huckerby is Associate Research Scholar.

About this Briefing Paper

In October 2004, the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at NYU School of Law released a joint report entitled: *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004). The Report defines Extraordinary Rendition and concludes that Extraordinary Rendition is prohibited by both domestic and international law, and that, consistent with U.S. policy against torture, the U.S. government is duty bound to cease all acts of Extraordinary Rendition, to investigate Extraordinary Renditions that have already taken place, and to prosecute and punish those found to have engaged in acts that amount to crimes in connection with Extraordinary Rendition.

In June 2005, the Center for Human Rights and Global Justice released a further report entitled *Beyond Guantánamo: Transfers to Torture One Year After* Rasul v. Bush (New York: NYU School of Law, 2005), which in conjunction with *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, aims to dispel the confusion concerning various forms of transfers of persons used by the U.S. by describing what is known about such transfers and pointing to what still remains unclear.

This Briefing Paper draws on these reports to provide an outline of the body of international human rights, humanitarian, refugee and criminal law applicable to Extraordinary Rendition. For further analysis of the facts surrounding reported cases of Extraordinary Rendition; obligations of the U.S. under domestic law; and the role of diplomatic assurances, please see the Reports available at: http://www.chrgj.org. This briefing paper was prepared by Jayne Huckerby and edited by Meg Satterthwaite. Many thanks to Kirsten Hagon for research on portions of the Briefing Paper.

TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS"

How do Extraordinary Renditions fit into the "War on Terror"?

Since September 11, 2001, and especially in the aftermath of the wars in Afghanistan and Iraq, the United States (U.S.) has detained a large number of persons in various parts of the world for investigative purposes. Recently, attention has been focused on the variety of settings and circumstances in which these persons are detained, including at military installations both inside and outside the U.S. and secret detention facilities in foreign States.

Another "tactic" in the "War on Terror" that has come to light is the practice of Extraordinary Rendition. For the purpose of this Briefing Paper, Extraordinary Rendition is the transfer of an individual, with the involvement of the U.S. or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading (CID) treatment.

Some terms explained:

Renditions to justice: apprehension of suspects without recourse to judicial proceedings by U.S. officials who are brought to U.S. or another State for trial or questioning on specific crimes.

Extraordinary rendition: transfer of an individual, with the involvement of the U.S. or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman or degrading treatment.

Reverse rendition: foreign authorities picking up persons in non-combat/battlefield situations and handing over to U.S. custody without basic legal protections.

What is meant by Extraordinary Rendition?

As the term suggests, this "extraordinary" practice appears to be a perversion of what is an acknowledged practice – the covert rendition by U.S. officials of individuals suspected of involvement in terrorism to "justice"– *i.e.*, for trial or criminal investigation either to the U.S. or to foreign States. According to press reports, "regular" renditions – *i.e.*, transfers made without recourse to the regular legal procedures of extradition, removal, or exclusion, but not involving allegations of involvement in torture – have been occurring for more than a dozen years, and have included numerous transfers in the years leading up to September 11, 2001.

What is "extraordinary" about this more recent, post-September 11 form of rendition is the role of torture and CID treatment reportedly involved in such transfers: U.S. officials reportedly are seeking opportunities to transfer terrorist suspects to locations where it is known that they may be tortured, hoping to gain useful information through the use of abusive interrogation tactics. Usual destinations for rendered suspects are reported to be States such as Egypt, Jordan, Morocco, Saudi Arabia, Yemen and Syria, all of which have been implicated by the U.S. State Department in using torture in interrogation. In this way, there has been a shift that focuses less on rendition to "justice" in the form of criminal investigation and trial in the U.S. or abroad, and more on interrogation – often in circumstances that indicate torture was at least a foreseeable possibility.

Two other points about the definition of Extraordinary Rendition should be made here. First, the practice of Extraordinary Rendition entails many different levels of involvement of U.S. and other foreign State actors.. Second, the definition of Extraordinary Rendition uses the "more likely than not" standard for assessing an individual's risk upon transfer because this is the test that the U.S. employs when assessing that risk. However, the relevant human rights treaties contain significantly more protective standards concerning the level of risk of torture or CID treatment that an individual faces upon transfer and it is this body of international human rights, humanitarian (IHL), refugee and criminal law on Extraordinary Rendition that will be the focus of this Briefing Paper.

What are some examples of Extraordinary Renditions?

Extraordinary Renditions have been widely reported in the media. These public sources indicate, for example, that:

- **Ahmed Agiza** and **Mohammed al-Zari** were expelled from Sweden on December 18, 2001, and transferred to Egypt. According to the Swedish TV program *Kalla Fakta*, both men were flown on a Gulfstream V jet alleged to be owned by a U.S. company and which reportedly is used mainly by the U.S. government. The Swedish government relied upon "diplomatic assurances" from Egypt that the two men would not be tortured and would have fair trials upon return. U.S. agents were involved in the transfer of Agiza and al-Zari. The U.N. Committee against Torture recently held that in deporting Agiza and al-Zari to Egypt, Sweden violated the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

- Egyptian-born **Hassan Osama Nasr** (a.k.a. Abu Omar) disappeared from his city of residence, Milan, in February 2003. He briefly surfaced 15 months later, when he called his family in Italy claiming to have been kidnapped by U.S. and Italian forces, taken to Egypt and tortured. Based on the latest available information, Abu Omar is being held in the Tora prison on the edge of the Egyptian capital Cairo. Italian authorities are currently conducting an inquiry into Nasr's purported kidnapping. On June 23, 2005, an Italian judge issued arrest warrants for 13 alleged C.I.A agents in connection with Abu Omar's kidnapping. On the same day, another Italian judge issued an indictment against Abu Omar for crimes relating to terrorism. In July 2005, the Italian government issued warrants for 6 more alleged C.I.A. agents accused of helping plan the kidnapping. In November 2005, prosecutors requested that the Italy's Justice Ministry seek the extradition of the C.I.A. agents from the U.S.

- **Khaled El-Masri**, a German citizen born in Lebanon, was arrested by police at the Macedonian border on December 21, 2003. He was then reportedly held in a Macedonian hotel room for 23 days. During this time he says he was constantly interrogated by Macedonian agents about connections to Islamic organizations and accused of having been in a terrorist training camp in Jalalabad. At the end of this time he was allegedly beaten, stripped, shackled, blindfolded, and placed aboard a plane. El-Masri was delivered to a prison in Afghanistan that he says was nominally run by Afghan officials but was actually under U.S. control. While in the prison he was repeatedly interrogated, and photographed naked by individuals el-Masri identified as U.S. agents. U.S. authorities have neither confirmed nor denied these allegations. In May of 2004, el-Masri was returned to Europe, having never been charged with a crime. A reporter, Stephen Grey and the ZDF television show *Frontal 21*, have independently determined that the details of al-Masri's statement coincide with the flight schedule of a U.S-charted Boeing 737 used by the C.I.A. El-Masri's release was reportedly personally ordered by the U.S. Secretary of State Rice after she learned the man had been mistakenly identified as a terrorist suspect. German authorities are currently investigating the case, and have determined that he was in Afghanistan during the time of his disappearance by using isotope analysis of his hair.

- In October 2001, **Jamil Qasim Aseed Mohammed**, a Yemeni microbiology student, was allegedly flown from Pakistan to Jordan on a U.S. -registered Gulfstream jet after Pakistan's intelligence agency reportedly surrendered him to U.S. authorities at the Karachi airport. U.S. officials alleged that Aseed Mohammed was an Al Qaeda operative who played a role in the bombing of the USS *Cole*. The handover of the shackled and blindfolded Aseed Mohammed reportedly took place in the middle of the night in a remote corner of the airport, without the benefit of extradition or deportation procedures.

- Apparently on information provided by the C.I.A, Indonesian authorities reportedly detained **Muhammad Saad Iqbal Madni** in early January 2002. Iqbal Madni is suspected by the CIA of having worked with Richard Reid (the "shoe-bomber"). According to a senior Indonesian official, a few days later, Egypt formally asked Indonesia to extradite Iqbal, who carried an Egyptian as well as a Pakistani passport. The request did not specify the crime, noting broadly that Egypt

sought Iqbal in connection with terrorism. On January 11, allegedly without a court hearing or a lawyer, Iqbal was put aboard an unmarked U.S. -registered Gulfstream V jet and flown to Egypt. A senior Indonesian official said that an extradition request from Egypt provided political cover to comply with the CIA's request. "This was a U.S. deal all along," the senior official said, "Egypt just provided the formalities".

- In September 2002, U.S. immigration authorities, reportedly with the approval of then-Acting Attorney General Larry Thompson, authorized the "expedited removal" of a Syrian-born Canadian citizen, **Maher Arar**, to Syria under section 235(c) of the *Immigration and Nationality Act* 1952. U.S. authorities alleged that Arar had links to Al Qaeda. While in transit at John F. Kennedy International Airport in New York, Arar was taken into custody by officials from the F.B.I. and Immigration and Naturalization Service (since reorganized into the Department of Homeland Security) and shackled. Arar's requests for a lawyer were dismissed on the basis that he was not a U.S. citizen and therefore he did not have the right to counsel. Despite the fact that he is a Canadian citizen and has resided in Canada for seventeen years, Arar's pleas to return to Canada were ignored. Officials repeatedly questioned Arar about his connection to certain members of Al Qaeda. Arar denied that he had any connections whatsoever to the named individuals. He was eventually put on a small jet that first landed in Washington, D.C., and then in Amman, Jordan. Once in Amman, Arar was allegedly blindfolded, shackled and transferred to Syria in a van. Arar was then placed in a prison where he was allegedly beaten for several hours and forced to falsely confess that he had attended a training camp in Afghanistan in order to fight against the U.S. Arar remained in Syria for ten months during which he was repeatedly beaten, tortured, and kept in a shallow grave. Arar has subsequently been released and returned to Canada. No charges were ever filed against him in any of the countries involved in his transfer. Following intense public pressure, Canada initiated a public inquiry into the circumstances surrounding Arar's transfer. The U.S. has refused the invitation to participate in the Canadian inquiry. U.S. officials, speaking on condition of anonymity, have said that the Arar case fits the profile of extraordinary rendition.

- Australian citizen **Mamdouh Habib** was arrested in Pakistan in October 2002 and, reportedly at the request of the U.S. authorities, flown to Egypt where he was allegedly severely tortured. Habib remained in Egypt for six months, after which he was transferred to Guantánamo. On January 11, 2005, Habib was released from Guantánamo without charge and subsequently transferred to Australia.

How do Extraordinary Renditions violate international human rights law, IHL and refugee law?

The key international instruments applicable to Extraordinary Rendition are:

- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 (CAT);
- *International Covenant on Civil and Political Rights* 1966 (ICCPR);
- *Convention relating to the Status of Refugees* 1951 (1951 Refugee Convention) and its Protocol; and
- *Geneva Convention relative to the Treatment of Prisoners of War* 1949 (Geneva III), *Geneva Convention relative to the Protection of Civilian Persons in Time of War* 1949 (Geneva IV).

Taken as a whole, these treaties, together with customary international law, set out three relevant obligations on States:

- prohibition on torture, and to varying degrees, a prohibition on CID treatment;
- prohibition against the *refoulement*, or transfer, of an individual to another State where that individual faces the risk of torture; and
- requirement to prevent, criminalize, investigate and punish acts of torture, conspiracy in torture, and aiding and abetting in acts of torture.

The prohibition on torture and CID treatment

CAT prohibits both torture and CID treatment. Torture is defined in Article 1 of CAT as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

CAT makes it clear, therefore, that the torture prohibition includes conduct undertaken for the purposes of obtaining information by State actors, or by other persons acting with the consent or acquiescence of a State actor. CAT does not define CID treatment, but the jurisprudence of the CAT Committee makes clear that CID punishment or treatment is on a continuum with torture, through Article 16, which requires ratifying States to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."

The ICCPR also explicitly prohibits both torture and CID treatment in Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Geneva Convention (III) (e.g. Articles 13,14 and 17) and Geneva Convention (IV) (Articles 31 and 32) prohibit both torture and the inhuman treatment of prisoners of war and civilians classified as "protected persons" in the context of armed conflict. The 1951 Refugee Convention may also afford protection against torture and *refoulement* to individuals with a "well-founded fear of persecution" on specific enumerated grounds (Article 1(A)(2)).

The prohibition against torture has been universally recognized as a customary international law norm and as a *jus cogens* norm applicable in times of war and peace, from which no derogation is permitted.

Non-refoulement

CAT's prohibition against the transfer of individuals to States where they are in danger of torture is absolute and unqualified. CAT Article 3(1) states: "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." The CAT prohibition on *refoulement* does not apply to CID treatment, but this protection is provided elsewhere, including in the ICCPR (to be discussed below) and at the regional level (e.g. the European Court and the European Commission's interpretation of European *Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (European Convention) Article 3 to prohibit transfers to States in which an individual may be subjected to torture or to CID treatment or punishment) which though not binding on the U.S., constitute persuasive authority on the international community's approach to this issue. In determining whether these "substantial grounds" for the danger of torture exist, the State is to "take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" (Article 3(2)).

In commentary and decisions, the CAT Committee has provided further guidance on how to interpret the *non-refoulement* standard. It has made clear that under CAT, the prohibition against *refoulement* to torture requires both an objective assessment of the conditions in the State to which an individual may be transferred, and a subjective assessment of the danger particular to the individual. CAT protections apply when these assessments lead to a substantial likelihood of a danger of torture that is greater than "mere suspicion," but the likelihood does not have to rise to the level of "high probability." In the context of extraordinary renditions, the objective component can be made out by looking, for example, to the U.S. Department of State's own annual human rights reports on each of the States to which individuals have allegedly been transferred (including Egypt, Jordan, Syria, Saudi Arabia, Morocco, and

Yemen). Many of these States have been identified by the U.S. as States that commonly use torture against individuals detained for alleged security reasons or because they are suspected of terrorism.

Given the object and purpose of CAT and international human rights principles, the *non-refoulement* obligation should be applied not only to prohibit transfers by the State of an individual from its own territory to another State where the individual is in danger of torture, but also to (i) the transfer of an individual located outside the State but under the control of the State or its agents, and (ii) the transfer of an individual to a second State that is likely to transfer the individual to any subsequent State in which the individual faces the danger of torture.

The Human Rights Committee has interpreted the ICCPR to prohibit the *refoulement* of individuals to States where they may be "at risk of" either torture or CID treatment (or both). In order for ICCPR protections to apply, the individual must face a "real risk" of danger. This standard has also been interpreted to contain a subjective and an objective assessment, although the "real risk" standard is higher that the CAT "in danger of" threshold.

In terms of international humanitarian law, the transfer of a prisoner of war (POW) to a State where the POW is likely to be tortured or inhumanely treated is a violation of Geneva III (Article 12). The unlawful transfer of a civilian classified as a "protected person" to such a State has harsher consequences–the transfer is a "grave breach" under Geneva IV, and is a criminal act (see Articles 45,147 and 148 particularly). The 1951 Refugee Convention also affords protection against *refoulement* to individuals with a "well-founded fear of persecution" on identified grounds.

International law on Extraordinary Renditions:

*__Prohibits__ torture, aiding and abetting in torture, conspiracy to torture, and to varying degrees, prohibits CID treatment;

*__Prohibits__ the *refoulement*, or transfer, of an individual to another State where that individual faces the risk of torture; and

*__Requires__ States to prevent, criminalize, investigate and punish acts of torture.

Prevent, criminalize, investigate and punish acts of torture

CAT, the ICCPR and the Geneva Conventions have each been interpreted to require that States investigate and criminalize torture by their own officials and those acting at the officials' direction.

The relevant provisions of CAT are Articles 1, 4, and 5. Article 1 sets out *who* is responsible for acts of torture; stating that torture is an act that 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." Article 4 details the obligation on the State to criminalize acts of torture, attempts to commit torture, or complicity or participation in torture. Finally, Article 5 requires the State to assert jurisdiction over these offences set out in Article 4 where the offences: are committed in territory under the State's jurisdiction (interpreted to include territory over which the States has factual control); occur on board of State-registered ships or aircraft; are committed by State nationals (or non-State actors acting with the consent or acquiescence of a State actor) anywhere in the world; and take place against a victim who is a national of the State. Depending on their degree of involvement in Extraordinary Renditions, State officials and non-State actors acting with the consent or acquiescence of a State official could therefore be liable directly for torture or complicity to torture, and could also incur liability for complicity, attempt, or aiding and abetting torture through the facilitation of the transfer or *refoulement* of an individual to a State where that individual is in danger of torture.

In addition to the individual liability for torture, acts of torture by State actors or those acting with their consent or acquiescence may also render a State directly liable. Failure to investigate and prosecute could constitute violations of CAT on the part of the State: CAT Article 6 obligates a State to investigate (if circumstances warrant), assert jurisdiction over, and take into custody an individual who is alleged to have committed torture or is complicit in or has participated in torture, and investigate the circumstances surrounding the allegations. CAT Article 7 also sets out the obligation to prosecute or extradite in cases of violations of the prohibition against torture. CAT also requires the State to ensure that any alleged victim

has timely recourse to an impartial authority that will examine allegations of torture (Article 13) and that victims of torture by a State's officials must have access to redress and compensation through the State's legal system (Article 14)

In addition, CAT requires the State to ensure that civil or military personnel involved in the custody, interrogation, and treatment of any detainees be trained in the prohibition against torture (Article 10). CAT also requires the State to review systematically and on an on-going basis, the rules and practices regarding the custody and interrogation of detainees in order to prevent any cases of torture (Article 11).

The ICCPR has been interpreted to require a State party to prevent, punish, investigate and redress harm caused by acts of both torture and CID treatment, and complicity to torture and CID treatment, by State actors and by private parties. Failure to investigate and prosecute may result in liability on the part of the State itself. The scope of applicability of ICCPR protections is similar to CAT, but has been interpreted more broadly to include State responsibility for violations of an individual's ICCPR protections (i) in the physical territory of the State or (ii) that may be imputed to the State if the individual was in the power or effective control of the State (even if outside its territory) or (iii) acts within a State's territory where the effects occur outside that territory or (iv) if the violations were committed by State actors, regardless of where they took place or (v) if the State fails to exercise its due diligence obligations in relation to violations by state actors or private persons or entities. The protections of the Geneva Conventions apply in situations of armed conflict, and to individuals who qualify as "protected persons" under the Conventions.

"…there was a before 9/11 and there was an after 9/11. After 9/11 the gloves come off."

Statement by Cofer Black, former Chief of the Counterterrorist Center, Central Intelligence Agency during testimony before the House of Representatives and U.S. Senate Intelligence Committees on 26 September 2002.

How is international law on criminal liability relevant to Extraordinary Renditions?

Reflecting the seriousness of the offense of torture, an evolving body of international law also requires criminalization and prosecution of ancillary acts, such as complicity to, and aiding and abetting, torture. This body of law is reflected in multilateral treaties that set out legal standards and a basis for criminal sanctions, and also in the norms of customary international law. The provisions of the *Rome Statute of the International Criminal Court* 1998 (Rome Statute), as well as the statutes and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are relevant in this regard. Just as the evolving body of international criminal law provides guidance on criminalization and prosecution of acts of torture and complicity to torture, so too does it provide guidance on the status of certain defenses to criminal liability under international law.

Relevant crimes: Complicity, Conspiracy, and Aiding and Abetting

The requirement of criminalization of complicity under CAT is not unusual in international law. Accomplice liability has been recognized in international criminal law since at least the post-World War II Nuremberg Trials. More recently, the ICTY and ICTR statutes have criminalized these acts. Liability for planning or conspiring to commit acts that violate international criminal law as set out in treaties or customary international law can also be traced through the Nuremberg tribunals and recent case law of the ICTY and the ICTR. More recently, however, the Rome Statute provisions governing co-perpetrator liability do not expressly include conspiracy as a basis for prosecution. A basis for prosecution on grounds similar to conspiracy may be Rome Statute Article 25(3)(d) which establishes criminal liability for an individual who "contributes to the commission or attempted commission of ... a crime by a group of persons acting with a common purpose." Aiding and abetting liability has also been recognized under customary international law.

Status of Certain Defenses to Criminal Liability under International Law

The status of five defenses can be briefly considered here:

- **The Doctrine of Command Responsibility**: Criminal liability under international law has been interpreted to expand beyond those individuals who directly take part in the action and includes individuals throughout the chain of command. The doctrine of command responsibility has been recognized since the International Military Tribunal at Nuremberg; is codified in Articles 86 and 87 of Protocol 1 of the Geneva Conventions (1977); and has since been cemented in the decisions of the ICTY and ICTR.
- **Individual criminal responsibility of commanders**: Any superior involved in the commission of a criminal act may be individually liable. This principle is recognized in the Geneva Conventions, and codified in Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute, and Article 25(3)(b) of the Rome Statute.
- **Superior orders defense**: Under the superior orders defense, a subordinate who is legally obligated to follow the orders of his or her superiors is not liable for carrying out those orders. This defense is unavailable in customary international law and given the absolute prohibition against torture, would not likely excuse conspiracy to commit torture. Article 2(3) of CAT states that, "An order from a superior officer or a public authority may not be invoked as a justification of torture." While the Rome Statute (Article 33) leaves open the possibility of a defense of superior orders, this is not available for offenses that are commonly known to be unlawful, which would exclude availability of the defense for torture. The statutes and jurisprudence of the ICTY and ICTR make it very clear that superior orders may in certain circumstances mitigate punishment, but will not resolve an individual of criminal responsibility.
- **Duress and Necessity:** should not be available for violations of CAT. CAT Article 2(2) makes clear that, "no 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 prohibition against torture is a norm that is not derogable even in times of public emergency.
- **Self-Defense:** While self-defense is recognized in international law, it applies narrowly, to excuse illegal conduct carried out to protect oneself or another person against an imminent unlawful use of force. Both Article 31(1)(c) of the Rome Statute and jurisprudence of the ICTY make it clear that it is not a defense to argue, for example, that in conspiring to commit torture, an individual is protecting his or her State from a suspected terrorist attack.

What are the international law obligations of States with regard to acts of Extraordinary Rendition by other States?

International law not only prohibits Extraordinary Rendition; it also sets out obligations of States with regard to the practice of Extraordinary Rendition by other States. For example, under international law, a State is obligated to:

- **Not knowingly aid or assist in the practice of Extraordinary Rendition by another State(s)**. Article 16 of the *International Law Commission's Draft Articles on State Responsibility* provides in full that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

Some points are worth noting here. First, the wrongfulness arises when there is a causal link between the aid and assistance of a State and the commission of Extraordinary Rendition by another State. This means that seemingly innocuous acts (e.g. allowing refueling at airports of aircraft of another State) can become wrongful under international law if those acts facilitate Extraordinary Rendition (e.g. if it could be shown that a plane carrying rendered persons would not be able to make it to a destination where the person will be subject to torture unless it was able to refuel in a particular State). Indeed, the Commentary to an earlier version of Article 16 makes it clear that this causal link will be made out, for example, where a State grants over flight or landing rights to another State for an unlawful military operation. However, even where a causal link is shown, under Article 16, a State will only be responsible for its aid or assistance when it knows about the circumstances of the Extraordinary Rendition. In other words, the standard under international law is not one of strict liability; it must instead be shown that a State is aware of the unlawful act that it is facilitating.

International law on responsibility of a State with regard to unlawful acts of other States:

*__Prohibits__ the knowing aid or assistance in the practice of Extraordinary Rendition;

*__Requires__ a State to assert jurisdiction over Extraordinary Rendition in defined circumstances; and

*__Requires__ a State to take into custody, investigate and then extradite or prosecute an alleged offender when that offender is on its territory.

- **Assert jurisdiction** over the offences of torture, aiding and abetting in torture, and conspiracy to torture set out in Article 4 of CAT where the offences: are committed in territory under the State's jurisdiction; occur on board of State-registered ships or aircraft; are committed by State nationals (or non-State actors acting with the consent or acquiescence of a State actor) anywhere; are perpetrated against a national of the State (Article 5(1) of CAT); or where the alleged offender is "present in any territory under its jurisdiction" and the State does not extradite the offender (Article 5(2)).

- **Take into custody, investigate and then extradite or prosecute a person who is alleged to have committed torture or is complicit in or has participated in torture** (Articles 6, 7 of CAT). This obligation is triggered when that person is on a State's territory and the State is "satisfied, after an examination of information available to it, that the circumstances so warrant" (Article 6(1) of CAT). The State is then required to make an immediate, preliminary inquiry into the facts of the case (Article 6(2) of CAT) and then decide whether to extradite or prosecute in accordance with Articles 7 and 8 of CAT.

To what extent does international law apply in the "War on Terror"?

International law prohibits both torture and complicity to torture in the context of terrorism and national security emergencies. The absolute nature of this prohibition in CAT Article 2(2) was specifically included in CAT to distinguish freedom from torture as one right from which no derogation is permitted under international law, even in times of war or other emergency. Unlike CAT, the ICCPR (Article 4(1)) and the European Convention (Article 15) contains provisions permitting certain derogations from human rights obligations in specific circumstances. Each of these conventions is clear, however, that certain rights are always non-derogable. Paradigmatic among these is the prohibition against torture. Like CAT's non-derogability provision, the Geneva Conventions' obligation to investigate and prosecute individuals who are alleged to have committed "grave breaches" of the Geneva Conventions is not derogable. Thus Geneva III's prohibition against torture and inhumane treatment of POWs and Geneva IV's prohibition against torture, inhumane treatment and unlawful transfers of civilians to States where they may be subject to Geneva Convention violations apply during war.

International and regional law uniformly provides that regardless of whether the transfer of a person occurs as part of an extradition request and regardless of any exceptional circumstances such as efforts to combat terrorism or another threat against national security, the anti-torture and *non-refoulement* principles would be violated if, as a result of such transfer, the person is at risk of being subjected to torture or other ill-treatment.