

**INTERNATIONAL AND DOMESTIC LAW STANDARDS
GOVERNING APPLICATIONS FOR RELIEF FROM
EXTRADITION UNDER THE CONVENTION AGAINST
TORTURE**

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UNDER THE CONVENTION AGAINST TORTURE**

SUBMITTED TO THE HON. DR. CONDOLEEZZA RICE, U.S. SECRETARY OF STATE

In the matter of the Extradition of Kulvir Singh Barapind, Application for Relief under the Convention Against Torture of Kulvir Singh Barapind,

The Center for Human Rights and Global Justice, New York University School of Law (the “CHRGJ”) respectfully submits this letter in support of the legal position taken by the applicant, Kulvir Singh Barapind.¹

INTEREST OF THE CHRGJ

The CHRGJ at New York University School of Law 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. The CHRGJ has been particularly active in examining international and U.S. legal standards applicable to transfers of individuals from the custody of the United States. In October 2004, the CHRGJ, together with the Association of the Bar of the City of New York issued a lengthy report, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY & NYU School of Law, 2004).

SUMMARY OF THE LETTER

The right to be free from torture and cruel, inhuman or degrading treatment is a right firmly entrenched in international law and clearly protected by U.S. law. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT” or “the Convention”)² makes it clear that the right to be free from torture is absolute and non-derogable. The treaty also sets out, in Article 3, the accompanying right to be free from extradition or other transfer to a state where there is a substantial risk of torture (also known as the right of *non-refoulement*).

¹ For purposes of the legal analysis set out in this letter, the CHRGJ assumes the facts presented by Mr. Kulvir Singh Barapind in his Application for Relief under the Convention Against Torture and in the accompanying affidavits to be true and credible. It is not our intention to assess these facts, but instead to shed light on the legal standards relevant to Mr. Barapind’s application for relief.

² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), entered into force June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535, available at <http://www.ohchr.org/english/law/cat.htm> (last visited Apr. 19, 2005).

The United States ratified CAT in October 1994 with certain reservations. Upon ratification, the United States declared that it would interpret the CAT Article 3 phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” to mean “if it is more likely than not that he would be tortured.”³

In addition to being set out in CAT, the prohibitions against torture and *non-refoulement* are included in the International Covenant on Civil and Political Rights,⁴ another treaty binding on the United States. The prohibitions are also enshrined in numerous major international and regional human rights treaties and have been recognized by international bodies and regional courts as fundamental human rights protections reflected in customary international law.

The prohibition against torture and *refoulement* also forms part of positive U.S. law. In 1994, the same year the U.S. ratified CAT, Congress enacted a federal law criminalizing acts of torture.⁵ Several years later, Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which explicitly provides that “It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”⁶ To implement the provisions of CAT that prohibit extradition and other transfers where there is a risk of torture, FARRA instructed all relevant agencies to promulgate regulations implementing this policy. In the context of extradition, “[t]he FARR Act imposes a clear and nondiscretionary duty: the agencies responsible for carrying out expulsion, extradition, and other involuntary returns, must ensure that those subject to their actions may not be returned if they are likely to face torture.”⁷

³ Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990) (Ratification Resolution) at II.(2). This is the standard commonly used by the United States in determining whether to withhold removal for fear of persecution. See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 Dec. 16, 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 (ICCPR). Although the ICCPR does not contain a direct prohibition against *refoulement*, the Human Rights Committee has interpreted Article 7 to require that states party to the ICCPR “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.” Human Rights Committee, General Comment 20, Article 7, U.N. Doc. A/47/40 (1992) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), (HRC General Comment 20), para. 9

⁵ 18 U.S.C. §2340 *et seq.* Domestic legislation was required because the Senate’s advice and consent to CAT ratification was subject to the declaration that CAT was not self-executing. See Ratification Resolution, *supra* note 3..

⁶ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242; 8 U.S.C. 1231 note (FARRA).

⁷ *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) at 1012, *rev’d*, 379 F.3d 1075 (9th Cir. 2004), *vacated as moot* 389 F.3d 1307 (9th Cir. 2004).

The regulations implementing this policy in the context of extradition refer explicitly to the standard set out in Article 3 of CAT,⁸ and describe the procedures that the Department follows when determining whether an extradition should be completed in the face of a concern about torture. The regulations provide that in order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the State Department will consider whether the requested extraditee “is more likely than not” to be tortured in the State requesting extradition.⁹ At least one Circuit Court has determined that a decision of the secretary of state may be subject to judicial review.¹⁰

ANALYSIS

A. WHERE THERE ARE SUBSTANTIAL GROUNDS FOR BELIEVING THAT AN INDIVIDUAL WOULD BE IN DANGER OF BEING SUBJECTED TO TORTURE UPON TRANSFER TO A SPECIFIC COUNTRY, THE TRANSFER OF THE INDIVIDUAL WOULD BE A VIOLATION OF U.S. OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION AGAINST TORTURE.

i. *The United States is Prohibited by CAT from Sending An Individual to a Country Where the Person Would be Subjected to Torture*

CAT defines and prohibits torture and conduct that is considered cruel, inhuman or degrading,¹¹ and prohibits the transfer or *refoulement* of a person to a state that may subject the individual to torture.¹² CAT further requires all ratifying states to prevent,

⁸ 22 C.F.R. § 95.2(a)(1).

⁹ 22 C.F.R. § 95.2(b).

¹⁰ *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) (holding that individuals who fear torture upon return to a state of extradition may present a habeas claim under the general habeas statute, 22 U.S.C. §2241, alleging violation of, CAT via the Administrative Procedure Act, following the Secretary of State’s decision to surrender the alien). Subsequently, the Ninth Circuit held that its statement in *Cornejo* was advisory and nonbinding. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075 (9th Cir. 2004). Most recently, upon a rehearing *en banc*, the Court vacated the opinion published in 379 F.3d 1085 (9th Cir. 2004) as moot, leaving the earlier decision (218 F.3d 1004 (9th Cir. 2000) undisturbed. *Cornejo-Barreto v. Seifert*, 389 F.3d 1307 (9th Cir. 2004).

¹¹ CAT, *supra* note 2, art. 1.

¹² *Id.* art. 3.1. As the Convention’s preamble notes, at the time of CAT’s formulation, torture and CID treatment were already prohibited by Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and also by the U.N. General Assembly’s Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Punishment. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) art. 5, *available at* <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited Apr. 19, 2005) (providing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 Dec. 16, 1966, *entered into force* 23 March 1976, 999 U.N.T.S. 171 *available at* <http://www.ohchr.org/english/law/ccpr.htm> (last visited Apr. 19, 2005) (ICCPR), art. 7 (“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); Declaration on the Protection of All Persons from Being

investigate and criminalize acts of torture, as well as complicity or other participation in torture by officials and individuals acting with the consent or acquiescence of an official.¹³

Torture is defined by 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.¹⁴

CAT prohibits the transfer of individuals to states where they are in danger of torture. The rule is set out in Article 3(1):

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.¹⁵

Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975), *available at*

<http://www.ohchr.org/english/law/declarationcat.htm> (last visited Apr. 19, 2005).

¹³ CAT, *supra* note 2, art. 4.1.

¹⁴ When ratifying CAT, the United States specified its understanding concerning the definition of “torture.” The U.S. specified that the mental pain or suffering included in the definition of “torture” 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 subjected 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 the personality. *See* 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990); *see also* United Nations Treaty Collection: Declarations and Reservations, *available at*

http://www.unhcr.ch/html/menu3/b/treaty12_asp.htm (last visited Apr. 19, 2005). The understanding is discussed in Association of the Bar of the City of New York, *Human Rights Standards Applicable to the United States’ Interrogation of Detainees*, April 2004 (HR Standards Report) *available at* <http://www.abcnyc.org/pdf/HUMANRIGHTS.pdf> (last visited Apr. 19, 2005), at 20-21. Acts that the CAT Committee has held constitute torture are discussed in greater detail in the HR Standards Report, at 16-17.

¹⁵ The CAT *non-refoulement* obligation prohibits transfers to states where an individual is in danger of torture, and not transfers to states where the individual faces the danger of CID treatment or punishment. This was a deliberate choice on the part of the drafters who were concerned that although “torture” could be defined with specificity, a definition of CID treatment or punishment was less easily specified. J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR*

The scope of CAT's protection against *refoulement* is broad, imposing an obligation upon the state not only to prevent torture in its own territory, but also to ensure that an individual is not exposed to a risk of torture outside the state's own borders, including in considering whether or not to extradite a person to another state.¹⁶

The CAT *non-refoulement* obligation applies to all individuals who "would be *in danger of being subjected to torture*" (emphasis added) and not just to individuals who *would be tortured* upon transfer. The focus is on the future danger – on the potential torture that might occur. A ratifying state violates the treaty whenever it transfers an individual in the face of this risk, regardless of whether torture in fact occurs upon transfer.

In assessing whether such a risk exists, CAT requires ratifying states to determine whether "substantial grounds for believing that [an individual] would be in danger of being subjected to torture" exist. The treaty specifies that "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass

DEGRADING TREATMENT OR PUNISHMENT (1988), at 70, 74, 122-23. However, the Human Rights Committee has interpreted the ICCPR (to which the United States is also a party), to impose the prohibition against *refoulement* to states where an individual faces the danger of CID treatment as well as the danger of torture. The United States should also be guided by the jurisprudence of the European Court of Human Rights and its Commission, interpreting Article 3 of the European Convention, *infra* note 48. Article 3 of the European Convention prohibits torture and CID treatment or punishment but does not include a prohibition against *refoulement*. Nevertheless, the European Court and the European Commission have interpreted European Convention Article 3 to prohibit transfers to states in which an individual may be subjected to torture or to CID treatment or punishment. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

¹⁶ BURGERS & DANIELIUS, *supra* note 15, at 125 (stating that Article 3 "makes it clear that a State is not only responsible for what happens in its own territory, but it must also refrain from exposing an individual to serious risks outside its territory by handing him or her over to another State from which treatment contrary to [CAT] might be expected.") According to the CAT Committee, "the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited." Committee Against Torture, General Comment 1, *Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)*, U.N. Doc. A/53/44, annex IX at 52 (1998), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003) (CAT Article 3 Comment), para.2. Similarly, the U.N. Human Rights Committee has stated that under the ICCPR "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end." Human Rights Committee, General Comment 20, *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (44th Sess. 1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) (HRC General Comment 20).

violations of human rights.”¹⁷ In commentary and decisions, the CAT Committee has provided guidance on interpretation of the *non-refoulement* standard, and the considerations that should be taken into account in assessing the danger of torture.

First, the CAT Committee has interpreted “substantial grounds” to mean that “the risk of torture must be assessed [by the State Party and the Committee] on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.”¹⁸ Second, the CAT Committee has determined that the “substantial grounds for belief” standard requires both (i) a general assessment of the conditions in the state to which an individual is to be transferred,¹⁹ and (ii) a particularized assessment of the danger of torture to the individual facing a transfer.²⁰ This means that both the general country conditions and the particular situation of the individual in question are relevant considerations, though the CAT Committee has indicated that a showing of risk under either prong may be sufficient without more. For example, the CAT Committee has stated that applicants should not be returned to states where reports of conditions indicate the danger of torture and the state of return is not a party to CAT.²¹

ii. The Prohibition Against Refoulement Plainly Applies to Extradition

The scope of the CAT prohibition against *refoulement* was broadly drafted to ensure that no individual may be transferred to a state where he or she would be tortured. The provision applies to:

- (i) all types of transfer by a ratifying state (including deportations or transfers pursuant to extradition treaties); and
- (ii) all persons at risk of torture; and

¹⁷ CAT, *supra* note 2, art. 3(2).

¹⁸ CAT Article 3 Comment, *supra* note 16, para. 6.

¹⁹ Among the sources of information the CAT Committee will consider is whether the state to which an individual may be returned is “one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights.” CAT Article 3 Comment, *supra* note 16, para 8.

²⁰ According to the CAT Committee, “The grounds for belief are subjective to the individual in danger of being tortured.” *Id.* para. 7. To assess a particular individual’s risk, the CAT Committee will look to whether the individual has engaged in activity “within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question.” *Id.* para 8. *See also Mutombo v. Switzerland*, Communication No. 13/1993, Committee Against Torture, U.N. Doc. A/49/44 at 45 (1994) (applicant for CAT relief must show that the risk of torture is specific to that individual).

²¹ *See Mutombo v. Switzerland*, *supra* note 20; *Khan v. Canada*, Communication No. 15/1994, Committee Against Torture, U.N. Doc. A/50/44 at 46 (1994) (the Committee found that because Pakistan was not a party to CAT, the petitioner’s return would not only put him in danger of torture, but would strip him of any possibility of applying for protection under CAT). On the other hand, the fact that the state of return is a party to CAT does not preclude a finding that a particular person may be at risk of torture in that state. *Alan v. Switzerland*, Communication No. 21/1995, Committee Against Torture, U.N. Doc. CAT/C/16/D/21/1995 (1996).

- (iii) all countries where that risk exists.

The original draft of Article 3(1) referred to expulsion and return only. The reference to extradition was added to make clear that Article 3 would “cover all measures by which a person is physically transferred to another state.”²² Because of the breadth of this provision’s scope, concerns were raised during the drafting of CAT about whether the *non-refoulement* obligation could conflict with states’ obligations under existing extradition treaties. According to a report of the Working Group of states responsible for negotiating the text of CAT:

Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by Article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not Party to the Convention under extradition treaties concluded before the date of the signature of the Convention.²³

Thus, states were aware of and on notice that a reservation or declaration asserting the primacy of extradition treaties over the CAT prohibition against *refoulement* could be made at the time of ratification. In fact, the initial package of declarations, reservations and understandings to accompany CAT sent by President Reagan to the Senate for ratification included a recommended reservation that “[t]he U.S. does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not a party to the Convention under bilateral extradition treaties with such states.”²⁴ This proposed reservation was excluded from the final instrument of U.S. ratification. The rejection of this requested reservation was in line with procedures established prior to the ratification of CAT. The U.S. government has explained that, before ratification of CAT, “the Department of State relied on the law and practice of the United States to provide authority *for declining to extradite a fugitive to another State*

²² BURGERS & DANIELIUS, *supra* note 15, at 126. The reference to *refoulement* originates in, but differs from, Article 33 of the Refugee Convention, which states that “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152, *entered into force* Apr. 22, 1954, *available at* <http://www.ohchr.org/english/law/refugees.htm> (last visited Apr. 19, 2005). While the Refugee Convention protects only persons who meet one of five specified categories that form a basis for persecution under the Refugee Convention, CAT was intended to apply to “any person who, for whatever reason, is in danger of being subjected to torture if handed over to another country.” BURGERS & DANIELIUS, *supra* note 15, at 125.

²³ U.N. Doc. E/CN.4/1367, para. 18, *cited in* BURGERS & DANIELIUS, *supra* note 15, at 126-27. In fact, no such reservation was made by any state.

²⁴ S. Treaty Doc. No. 100-20, at iii, 9-14 (1988) (adding that “This reservation would eliminate the possibility of conflicting treaty obligations. This is not to say, however, that the United States would ever surrender a fugitive to a State where he would actually be in danger of being subjected to torture. Pursuant to his discretion under domestic law, and existing treaty bases for denying extradition, the Secretary of State would be able to satisfy himself on this issue before surrender.”).

party where there are substantial grounds to believe he would be in danger of being subjected to torture.”²⁵ (emphasis added). The proposed reservation to CAT Article 3 was out of step with the historical leadership of the U.S. as a “vigorous supporter of the international fight against torture,” where “[torture] is categorically denounced as a matter of policy and as a tool of state authority.”²⁶ In the years since the U.S. ratified the Convention, regulations and procedures have been promulgated to give full force to Article 3’s prohibition on *refoulement* in the context of extradition.

iii. *The Prohibition Against Refoulement is Absolute and Non-derogable*

Article 2(2) of CAT provides that

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.²⁷

The absolute nature of the prohibition of torture was specifically referenced in CAT to clarify that freedom from torture is one of “the few fundamental rights of the individual” from which no derogation is permitted under international law, even in times of war or other emergency.²⁸ After the terrorist attacks of September 11, 2001, the CAT Committee issued a statement in which it condemned the attacks, expressed “profound condolences to the victims, who were nationals of some 80 countries, including many States parties to [CAT],” and reminded states of the non-derogable nature of their CAT obligations.²⁹ The CAT Committee highlighted the obligations contained in article 2 (prohibition of torture under all circumstances), article 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and article 16 (prohibiting CID treatment or punishment). The Committee added that these provisions must be observed

²⁵ Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention; Initial reports of States parties due in 1995: United States of America, CAT/C/28/Add.5, Feb. 8, 2000, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.28.Add.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.28.Add.5.En?OpenDocument) (last visited April 19, 2005) (U.S. Initial CAT Report), para. 165.

²⁶ *Id.* The same sentiment was expressed by President Bush on the United Nations International Day in Support of Victims of Torture: “The United States is committed to the world-wide elimination of torture and we are leading this fight by example.” President George W. Bush, Statement by the President on the United Nations International Day in Support of Victims of Torture (June 26, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html> (last visited Apr. 19, 2005).

²⁷ CAT, *supra* note 2.

²⁸ BURGERS & DANIELIUS, *supra* note 15, at 124.

²⁹ Committee against Torture, U.N. Doc. No. CAT/C/XXVII/Misc.7, Nov. 22, 2001; *see also* Committee Against Torture U.N. Doc. No. A/52/44, para. 258 (1997) (“[A] State party to the Convention [against Torture] ... is precluded from raising before [the] Committee [against Torture] exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention.”); Committee Against Torture, U.N. Doc. No. A/51/44, paras.180-222 (1997), Inquiry under Article 20 (same).

in all circumstances, and expressed confidence that “whatever responses to the threat of international terrorism are adopted by States parties, such responses will be in conformity with the obligations undertaken by them in ratifying the Convention against Torture.”³⁰

The CAT Committee has specifically addressed the *non-refoulement* obligations of ratifying states when considering the return of asylum seekers and other foreigners who may present a security risk:

[T]he test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.³¹

The CAT Committee’s holding has been echoed by the Human Rights Committee, which is charged with monitoring the implementation of the ICCPR.³² In its General Comment No. 20 on article 7 of the ICCPR, the Human Rights Committee commented on the link between removal, expulsion or *refoulement* of non-nationals and torture noting that:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.³³

The Human Rights Committee has also acknowledged the difficulties that a state faces in a prolonged fight against terrorism, but has determined that “no exceptional circumstances whatsoever can be invoked as a justification for torture.”³⁴

³⁰ Committee against Torture, U.N. Doc. No. CAT/C/XXVII/Misc.7, Nov. 22, 2001. Similarly, although not binding under international law, a resolution specifically focusing on the need to protect human rights and fundamental freedoms while countering terrorism was adopted for the first time by the General Assembly on 18 December 2002 (General Assembly, *Protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. No. A/RES/57/219 (Feb. 27, 2003). It affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

³¹ *Paez v. Sweden*, Communication No. 39/1996, Committee Against Torture, U.N. Doc. CAT/C/18/D/39/1996 (1997).

³² The U.S. Senate ratified the ICCPR on April 2, 1992, and the ICCPR came into force for the United States on September 8, 1992. See 138 Cong. Rec. S4783-84 (daily ed. Apr. 2, 1992); United Nations Treaty Collection: Declarations and Reservations, available at http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm (last visited Apr. 21, 2005). Thus, interpretation of the *non-refoulement* principle under the ICCPR is helpful to the interpretation of the norm under CAT.

³³ HRC General Comment 20, *supra* note 16, para. 9.

iv. *Application*

CAT specifies certain considerations that must be taken into account when a state is deciding whether or not there are substantial grounds for believing that an individual would be in danger of being tortured. Article 3 requires the relevant decision-maker to weigh all relevant evidence, including the existence, in the state of destination, of a consistent pattern of gross, flagrant or mass violations of human rights.³⁵ In addition, as stated above, the fact that a country of destination has not ratified CAT is also a relevant consideration.

Although India signed CAT in 1997, it has not ratified the Convention.³⁶ While this fact is not dispositive, it is relevant to the assessment of the extraditee's risk. In addition, the most recent Department of State Country Report on Human Rights Practices in India pointed to a widespread pattern of torture in India, noting that although

[t]he law prohibits torture, and states that confessions extracted by force generally are inadmissible in court ... authorities often used torture during interrogations Because many alleged torture victims died in custody, and others were afraid to speak out, there were few firsthand accounts, although marks of torture often were found on the bodies of deceased detainees. The prevalence of torture by police in detention facilities throughout the country was reflected in the number of cases of deaths in police custody. Police and jailers typically assaulted new prisoners for money and personal articles. In addition, police commonly tortured detainees during custodial interrogation. Although police officers were subject to prosecution for such offenses under the Penal Code, the Government often failed to hold them accountable. According to [Amnesty International], torture usually took place during criminal investigations and following unlawful and arbitrary arrests.³⁷

The affidavits submitted in support of the Application for Relief under the Convention Against Torture suggest that an individual in the position of Mr. Kulvir Singh Barapind will more likely than not be tortured if extradited to India. Accordingly, a decision to extradite Mr. Kulvir Singh Barapind under such circumstances would constitute a violation of Article 3 of CAT.

³⁴ Conclusions and recommendations of the Committee against Torture, Egypt, U.N. Doc. CAT/C/CR/29/4 (2002), para. 4.

³⁵ CAT, *supra* note 2, art. 3(2).

³⁶ U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, *status of ratifications*, United Nations, *Treaty Series*, vol. 1465, p. 85, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (last visited Apr. 19, 2005).

³⁷ U.S. DEP'T. OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003: INDIA (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41740.htm> (last visited Apr. 19, 2005).

B. WHERE CIRCUMSTANCES INDICATE THAT THERE ARE SUBSTANTIAL GROUNDS FOR BELIEVING THAT UPON TRANSFER TO A STATE AN INDIVIDUAL WOULD BE IN DANGER OF BEING SUBJECTED TO TORTURE, THE TRANSFER OF THE INDIVIDUAL TO SUCH STATE COULD BE A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

The prohibition against torture and ill-treatment has risen to the level of *jus cogens* – a peremptory norm of international law.³⁸ The prohibition against *refoulement* is also often recognized as a norm of customary international law.³⁹ The U.N. Special Rapporteur on Torture has stated that “The principle of *non-refoulement* is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.”⁴⁰

That the prohibition against *refoulement* to states where an individual faces the danger of torture is a broadly accepted norm is also shown in part by the large number of

³⁸ See *Case of Al-Adsani v. United Kingdom*, [2001] Eur. Ct.H.R. 752 (21 November 2001) (expressly finding that the prohibition on torture is a *jus cogens* norm); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986) (same). See also *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1006 (9th Cir. 2000); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 Supp. 2d 1322 (N.D. Ga.2002); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998); *Doe v. Unocal*, 963 F. Supp. 880, 890 (C.D. Cal. 1997); Human Rights Watch, *Still at Risk: Diplomatic Assurances no Safeguard against Torture* (2005), Human Rights Watch vol. 17, No.4(D).

³⁹ GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 141 (1978); G. STENBERG, NON-EXPULSION AND *NON-REFOULEMENT*: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES (1989); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Court and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 Am. U.J. Int'l L. & Pol'y 559, 579 (1996); David Weissbrodt and Isabel Hörtreitere, *The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties*, 5 Buff. Hum. Rts. L. Rev., 1, 7 (1999); Arthur Helton, *Applying Human Rights Law in U.S. Asylum Cases*, 3 Int'l Civ. Liberties Rep. 1, 2 (2000); A. Montavon-McKillip, *CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration*, 44 Ariz. L. Rev. 247, 269 (2002). The Inter-American Court of Human Rights has similarly held that the prohibition against torture is a *jus cogens* norm, which prohibits an individual from return to a country where that person is likely to be tortured, even if the individual is suspected of terrorist activities. Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Court H.R., OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000 (para. 154). (“[T]he prohibition of torture as a norm of *jus cogens* – as codified in the American Declaration generally, and Article 3 of the U.N. Convention against Torture in the context of expulsion – applies beyond the terms of the 1951 [Refugee] Convention. The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue.”).

⁴⁰ Report by the Special Rapporteur on Torture, Theo van Boven to the United Nations General Assembly, U.N. Doc.A/59/324, Aug. 23, 2004, paras. 25-29, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement>.

treaties that incorporate the prohibition, and the number and variety of states that have ratified them.⁴¹ CAT has been ratified by an overwhelming majority of states.⁴² The states that have not signed or ratified CAT are states that have yet to recognize fully the prohibition against torture in their own domestic law or practice. The practice of the states that have ratified or signed CAT also supports the conclusion that the *non-refoulement* principle embodied in CAT is widely accepted.⁴³

The inclusion of similar prohibitions in a number of multinational or regional treaties enacted before CAT also supports the status of *non-refoulement* as a rule of customary international law, and shows that the protection afforded by the principle has expanded over time.⁴⁴ For example, Article 13 of the Inter-American Torture Convention provides that:

⁴¹ To determine whether a principle included in international treaties is a part of customary international law, U.S. courts will look to, *inter alia*, the “relative influence of [non-ratifying or signatory states] in international affairs. *Flores v. Peru*, 343 F.3d 140 (2nd Cir. 2003) at 163. States that are not party to CAT include: Angola, the Bahamas, Barbados, Bhutan, Brunei Darussalam, the Central African Republic, Democratic People’s Republic of Korea, the Dominican Republic, Gambia, Guinea-Bissau, India, Madagascar, Nauru, Nicaragua, Pakistan, San Marino, Sao Tome and Principe, Thailand and Sudan. For a full list of states that are not party to CAT, *see*

<http://www.unhchr.ch/tbs/doc.nsf/newhvtstatbytreaty?OpenView&Start=1&Count=250&Expand=1.1#1.1> (last visited Apr. 19, 2005). Many of these states have a relatively low profile in international affairs. Significantly, many of these states have committed themselves to the *non-refoulement* principle by ratifying other treaties that include the principle, including, for example, the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, *concluded on* Sept. 10, 1969, *entered into force* June 20, 1974, 1001 U.N.T.S. 45 (ratified by 44 states to date). For ratification status of these treaties, *see* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, *available at* <http://www.unhchr.ch/pdf/report.pdf> (Status of Ratifications) (last visited Apr. 19, 2005).

⁴² As of June 9, 2004, CAT had been ratified by 136 states and signed by 12 additional states. Only two states, the United States and Germany, entered reservations to Article 3. *See* Status of Ratifications, *supra* note 41 (last visited Apr. 19, 2005). Neither reservation indicates an intent to derogate from CAT’s *non-refoulement* requirement. The U.S. ratification of CAT states its understanding that Article 3.1’s requirement of “substantial grounds” to mean “if it is likely than not that he would be tortured.” *Id.* Germany declared its opinion that Article 3 expressed an obligation on the part of a state, which was met by existing German domestic law. *Id.*

⁴³ Fifty-four states have recognized the competence of the Committee against Torture to receive and process individual communications concerning those states’ practices under CAT Article 22. *See* Status of Ratifications, *supra* note 41.

⁴⁴ *See, e.g.*, American Convention on Human Rights, Nov. 22, 1969, KAV 2305, 9 ILM 673 (1970), O.A.S. Treaty Series No. 36, art. 5, P 2, OEA/Ser. L./V/II.23 doc. rev. 2, art. 5 *entered into force* July 18, 1978, *available at* <http://www.cidh.org/Basicos/basic3.htm> (last visited Apr. 19, 2005) (American Convention). Article 22(8) of the American Convention states that “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinion.” However, Article 27 of the American Convention allows a state to derogate from Article 22 (and other provisions) during “times of war or other public emergency that threaten the independence and security of the State party.” *See also* 1987 Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, *entered into force* February 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992), *available at*

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting States.⁴⁵

In Africa, regional treaties containing a *non-refoulement* standard include the Convention Governing the Specific Aspects of Refugee Problems in Africa⁴⁶ and the African [Banjul] Charter on Human and Peoples' Rights.⁴⁷

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)⁴⁸ does not contain an explicit prohibition against *refoulement*. However, Article 3 of the Convention provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Court has interpreted Article 3 to encompass a prohibition against *refoulement*, based on what it expressly identifies as a set of shared norms: the “common heritage of political traditions, ideals, freedom and the rule of law” of the states party to the European Convention.⁴⁹ In the seminal case of *Soering v. United Kingdom*, the European Court of

<http://www.oas.org/juridico/english/Treaties/a-51.html> (last visited Apr. 19, 2005).

⁴⁵ Unlike CAT and the European Court of Human Rights' case law on *refoulement*, the Inter-American Convention threshold for knowledge of likelihood of torture is not “substantial” grounds, but rather, *any* ground for belief that a person will be subject to torture or CID treatment.

⁴⁶ The Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted* 1974, *entered into force* June 20, 1974, 1001 U.N.T.S. 45, *available through* <http://www.africa-union.org/home/Welcome.htm> (last visited Apr. 19, 2005), art. 2(3) (“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened....”).

⁴⁷ *Adopted* 26 June 1981, *entered into force* Oct. 21, 1986, OAU Doc. CAB/LEG/67/3, Rev. 5, *reprinted in* 21 I.L.M. 58 (1982), *available through* <http://www.africa-union.org/home/Welcome.htm> (last visited Apr. 19, 2005), art. 2(3) (“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2”).

⁴⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *opened for signature* Nov. 4, 1950, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 which *entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, *available at*

<http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Apr. 19, 2005) (European Convention).

⁴⁹ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), para. 88. The jurisprudence of the European Commission in interpreting the principle of *non-refoulement* under the European Convention is particularly instructive because CAT Article 3's prohibition of *refoulement* is based in part on the jurisprudence of the European Commission of Human Rights. According to Burgers and Danelius (who participated in the drafting of CAT and whose authoritative text on the treaty includes discussion of the CAT *travaux préparatoires*), CAT Article 3 was “inspired by the case law of the European Commission of Human Rights with regard to Article 3 of the European Convention The Commission has considered that the prohibition of torture and inhuman or degrading treatment in

Human Rights held that the extradition to the United States of a German citizen accused of murder in the United States and arrested in the United Kingdom would be a violation of Article 3 of the European Convention. The court emphasized the absolute, non-derogable prohibition on torture and of other inhuman or degrading treatment and held that:

Article 3 makes no provision for exceptions and no derogation from it is permissible in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognized as an internationally accepted standard.⁵⁰

The court also examined whether the European Convention's Article 3 prohibition against torture and CID treatment also applied to the extradition of an individual to a state where the individual was at substantial risk for torture or CID treatment. The court concluded that it did:

The fact that [CAT] should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed [I]n the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.⁵¹

article 3 of the European Convention does not only oblige a State to prevent torture within its own territory, but also to refrain from handing a person over to another State where he might, with some degree of probability, be subjected to torture." BURGERS & DANELIUS, *supra* note 15, at 125; *see also id.* at 125-128 (describing European Commission case law and the negotiations and discussions among states that lead to the final version of CAT Article 3, incorporating the European Commission's interpretation of Article 3 of the European Convention).

⁵⁰ *Soering v. United Kingdom*, *supra* note 49.

⁵¹ *Id.*

The European Court subsequently confirmed its decision and extended the prohibition on *refoulement* to any kind of forced removal or transfer of an individual where there are substantial grounds to believe the person would face torture or ill-treatment.⁵²

The European Court of Human Rights has also addressed the norm of *non-refoulement* in the context of terrorism and national security. The Court has held that the prohibition against *refoulement* is based on “one of the most fundamental values of democratic society,”⁵³ and may not be violated even on national security grounds.⁵⁴ In *Chahal v. United Kingdom*,⁵⁵ the government of the United Kingdom claimed that the petitioner was a threat to the United Kingdom’s national security, refused his claim for asylum and issued a deportation order. The Court found that Chahal would be in danger of ill-treatment if sent to India, and stated that the absolute nature of Article 3 applied to expulsion cases to block risky transfers. With respect to the United Kingdom’s claim that the petitioner posed a threat to its national security, the Court stated that:

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. . . . The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.⁵⁶

The jurisprudence of these regional courts is not binding on the United States. The uniformity with which these courts renounce *refoulement* to states where a person would be in danger of being subjected to torture, however, reinforces the status of the

⁵² *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) (1989) paras. 69-70 (holding that European Convention Article 3’s prohibition against a state’s transfer of an individual to another state where the person will face a real risk of torture or CID treatment applies to expulsions as well as extraditions); *Vilvarajah and Others v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) (1991) para 103 (same).

⁵³ *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413 (ser. A) (1996), para. 79.

⁵⁴ *Tomasi v. France*, 15 Eur. Ct. H.R. 1 (Ser. A) (1992), para. 1 15 (“The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”).

⁵⁵ 23 Eur. Ct. H.R. 413 (ser. A) (1996).

⁵⁶ *Id.* paras. 79-80. *See also Ahmed v. Austria*, 24 Eur. H.R. Rep. 278, 287 and 291 (1997) (even individuals that a transferring state classifies as “undesirable or dangerous” may not be extradited or transferred to a state “where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture.”).

prohibitions against torture and *refoulement* as fundamental norms of international law. The extradition of an individual like Mr. Kulvir Singh Barapind to India under circumstances which indicate that he would be in danger of being tortured would thus be a violation of such norms.

C. WHERE CIRCUMSTANCES INDICATE THAT IT IS MORE LIKELY THAN NOT THAT AN INDIVIDUAL WOULD BE TORTURED UPON TRANSFER TO A STATE, THE TRANSFER OF THAT INDIVIDUAL TO SUCH STATE WOULD BE A VIOLATION OF U.S. LAW

When Congress implemented CAT's *non-refoulement* provisions through FARRA, it required relevant agencies to promulgate all regulations necessary to ensure that the U.S. does not risk contravening the rule.⁵⁷ The FARRA Regulations broadly protect three categories of people: (i) individuals subject to "summary exclusion" (also known as "expedited removal"), (ii) individuals subject to removal orders, and (iii) individuals subject to extradition orders. The various executive agencies use different procedures when applying CAT protections to these categories of individuals. Since the matter at hand relates solely to an extradition order, the discussion here is restricted to legal standards applicable to the process of extradition.

i. U.S. Law Governing Extradition

Generally, extradition from the United States is governed by 18 U.S.C. § 3184, which confers jurisdiction on "any justice or judge of the United States" or any authorized magistrate to conduct an extradition hearing under the relevant extradition treaty. Under this statutory scheme, the extradition judge conducts a hearing in which the government must establish the following elements: (1) the court has jurisdiction over the subject matter and individual; (2) the crime charged is an extraditable offense under the relevant extradition treaty; (3) there is probable cause that the detainee committed the alleged offenses; and, (4) the detainee has not shown by a "preponderance of the evidence" a valid defense to the extradition.⁵⁸ If, based on the evidence presented in the extradition hearing, the government establishes these factors then the court may certify a detainee's extraditability. Such judicial determination is "neither a final determination of guilt or innocence nor a final determination of [the state's] treaty and foreign policy obligations;" rather, it is a preliminary jurisdictional and evidentiary finding.⁵⁹ If the judge certifies a detainee as extraditable, the process shifts to the secretary of state.

⁵⁷ FARRA, *supra* note 6, §2242(b).

⁵⁸ 18 U.S.C. § 3184; *see also* *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 932, 58 L. Ed. 2d 327, 99 S. Ct. 323 (1978); *In re Petition of France for the Extradition of Philippe Sauvage*, 819 F. Supp. 896, 897 (S.D. Ca. 1993); *Matter of Demjanjuk*, 603 F. Supp. 1468, 1470 (N.D. OH 1985), *citing*, *Bingham v. Bradley*, 241 U.S. 511, 60 L. Ed. 1136, 36 S. Ct. 634 (1916); *In Re Extradition*, 915 F. Supp. 206 (D. Guam 1995); *Quinn v. Robinson*, 783 F.2d 887, 783 (9th Cir. 1986); *Cornejo-Barreto v. Seifert*, 218 F.2d 1004, 1009-1010.

⁵⁹ 18 U.S.C. § 3184; *In Re Extradition*, 915 F. Supp. 206 (D. Guam 1995).

Sections 3184 and 3186 vest the secretary of state with the responsibility for the final determination of whether to surrender an alleged fugitive to a foreign state by means of extradition.⁶⁰ The regulations pertaining to extradition quote Article 3 of CAT,⁶¹ and specify that “in order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the State Department considers the question of whether a person facing extradition from the United States ‘is more likely than not’ to be tortured in the State requesting extradition when appropriate in making this determination.”⁶² Using the language of CAT Article 3, the regulations stipulate that in making this determination, the authorities must 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.”⁶³

ii. Standard of Proof and Evidence Required in CAT Claims

The type of evidence needed to establish that an individual is “more likely than not” to be tortured upon extradition is not set out in the regulations. However, for CAT claims in the context of immigration proceedings, the following evidence is generally considered:⁶⁴ (i) evidence of past torture inflicted upon the applicant;⁶⁵ (ii) evidence that

⁶⁰ 22 C.F.R. §95.2(b).

⁶¹ 22 C.F.R. § 95.2(a)(1).

⁶² 22 C.F.R. § 95.2(b).

⁶³ 22 C.F.R. § 95.2(a)(2).

⁶⁴ 8 C.F.R. § 208.16(c)(3), § 1208.16(c)(3). *See generally* Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, in 1 American Immigration Lawyers Association, 2001-02 Immigration and Nationality Law Handbook 414 (Randy P. Auerbach et al. eds., 2001). Jurisprudence of the Board of Immigration Appeals (BIA) is not very helpful here. The BIA generally determines each applicant's claim on a case-by-case basis, looking to factors such as the applicant's race, ethnicity, religion and sex, specific country conditions and the nature of the crime the applicant committed. *Matter of M-B-A-*, 23 I. & N. Dec. 474 (BIA 2002); *Matter of G-A-*, 23 I. & N. Dec. 366 (BIA 2002). For example, in 2002 the BIA granted protection to an Iranian Christian of Armenian descent, who had been convicted for drug crimes in the United States, based on his religion, ethnicity, U.S. drug convictions, and the length of time he spent in the United States. *Matter of M-B-A-*, *supra*. At the same time, the BIA denied protection to a Nigerian woman who was also convicted of a drug-related crime. *Matter of G-A-*, *supra*. In each case, the BIA looked to the applicants' testimony as well as the findings of the Department of State and various human rights groups about the conditions in the applicants' respective countries. *Compare Matter of M-B-A-*, *supra* at 479 (citing the State Department's human rights report to determine that in Nigeria "domestic and international rights groups generally operate without government restriction"); *Matter of G-A-*, *supra* (quoting the 1999 State Department human rights report entry for Iran that there is “widespread use of torture and other degrading treatment” in Iran). According to Gordon, Mailman and Yale-Loehr, the authors of an authoritative treatise on U.S. immigration law and procedure, “[e]ssentially, while the ‘more likely than not’ standard requires only ‘preponderance of the evidence,’ the [BIA] in practice is looking for current and meaningful evidence pertaining to how individuals similarly situated have been treated, not ‘a chain of assumptions and a fear of what might happen.’” CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE (Matthew Bender & Co. 2005), (GORDON & MAILMAN) ch. 33.10 (citations omitted).

the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (iii) evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable;⁶⁶ and (iv) other relevant information regarding conditions in the country of removal.⁶⁷ The regulations state that the applicant's own credible testimony, without corroboration, may be sufficient to establish whether the "more likely than not" standard has been met.⁶⁸ Similar considerations are relevant here, and should guide the secretary of state's determination.

iii. *The Process of Extradition*

Generally, a decision to certify a detainee as extraditable is made initially by a judicial officer, and then the decision is presented to the secretary of state. If the individual subject to an extradition order asserts that he or she will be subject to torture in the state of extradition, "appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant."⁶⁹ Even if the individual does not make a claim pursuant to CAT, the State Department will give consideration "to the requesting country's human rights record, as set forth in the annual Country Reports on Human Rights Practices, from the perspective of Article 3 [of CAT]."⁷⁰

The details of the process by which the secretary of state considers CAT claims in the context of extradition is not known as this process has not generally been made public. However, some guidance can be gleaned from the manner in which the secretary of state makes determinations regarding the transfers of individuals outside the extradition process. For example, according to the Ambassador-at-Large for War Crimes

⁶⁵ 8 C.F.R. § 208.16(c)(3)(i), § 1208.16(c)(3)(i). See also e.g., *Kioski v. Sweden*, Comm. No. 41/1996, Committee Against Torture, 16th Sess., P 9.3, CAT/C/16/D/41/1996 (1996) available at http://www.asylumlaw.org/docs/CAT/Kioski_v_Sweden.pdf (last visited May 23, 2001) (claimant's "history of detention and torture should be taken into account when determining whether she would be in danger of being subjected to torture upon her return"); GORDON AND MAILMAN, *supra* note 64.

⁶⁶ See 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

⁶⁷ GORDON AND MAILMAN, *supra* note 64.

⁶⁸ 8 C.F.R. § 208.16(c)(2), § 1208.16(c)(2). See *Matter of Ibez-Gamboa*, File No. A74-129-892 (BIA May 24, 2000), reported in 5 Bender's Immigr. Bull. 571 (June 15, 2000) (deferral of removal granted based on respondent's own testimony regarding past torture and threatened future abuse, as well as the State Department's findings regarding the strong likelihood of persecution in Cuba of former political prisoners). See also *Matter of [name not provided]*, [Number not provided] (BIA Aug. 9, 2000), reported and discussed in 77 Interpreter Releases 1224 (Aug. 28, 2000) (grant of deferral of removal upheld for respondent who credibly testified regarding his particular danger of being tortured because of his sexual orientation if returned to El Salvador). But see *Wang v. Ashcroft*, 320 F.3d 130, 144 (2nd Cir. 2003) (in the context of a deportation, the court found that a testimony of a claimant who deserted the Chinese army "(1) that he was beaten for his first [military desertion] attempt [in China], (2) that he was told that he would be beaten to death if he deserted again, (3) that he was likely to be imprisoned if returned to China, and (4) that persons he knew had not fared well in Chinese prisons" was "not sufficient to establish that Wang is "more likely than not" to be tortured if returned to China."))

⁶⁹ U.S. Initial CAT Report, *supra* note 25, para. 167.

⁷⁰ *Id.*

Issues, in the context of transfers of individuals from Guantánamo to foreign states, the main concern of the State Department is to ensure that:

the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion. The Department is particularly mindful of the longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds.⁷¹

Thus, acting under her obligation to implement FARRA’s codification of the prohibition on *refoulement*, the secretary of state will decline to authorize transfer of an individual who is more likely than not to be tortured upon return.

iv. Review of the Decision of the Secretary of State to Transfer a Detainee in the face of a risk of torture

The DOS regulations implementing the *non-refoulement* obligation assert that decisions of the secretary of state concerning surrender of alleged fugitives for extradition “are matters of executive discretion not subject to judicial review.”⁷² The regulations further provide that

pursuant to FARRA Section 2242(d), notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in Section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the convention or Section 2242, or any other determination made with respect to the application of the policy set forth in Section 2242(a), except as part of the review of a final order of removal pursuant to Section 242 of the INA.⁷³

As the regulations note, the final clause allowing for review in the context of final orders of removal is not applicable to extradition.⁷⁴ Despite the language in the regulation precluding other forms of judicial review, in at least one case, the Ninth Circuit Court of Appeals has held that a petitioner may seek judicial review of a decision to extradite him

⁷¹ *Mahmoad Abdah et. al. v. Bush*, Civil Action No. 04-1254 (D.D.C. 2005), Exhibit: *Declaration of Pierre-Richard Prosper* (on file with the Center for Human Rights and Global Justice) (“Prosper Declaration”).

⁷² 22 C.F.R. § 95.4.

⁷³ *Id.*

⁷⁴ *Id.*

by the secretary of state.⁷⁵ This holding was based in part on the concern by the Court that while FARRA imposed on the secretary of state a duty to ensure that individuals are not returned to states where they will be tortured, the DOS regulations appear to give the secretary of state the discretion to decide to return an individual even in the face of such a risk.⁷⁶ Reasoning that the agency's treatment of the mandatory duty not to return as a discretionary matter would be "contrary to both the statute and the Convention," the Court held that the petitioner would have the ability to seek review via a habeas petition once the Secretary had decided to surrender him to the requesting state.

Such a conclusion is consistent with CAT, which requires each state party to enact legislative and administrative measures to prevent torture.⁷⁷ Interpreting these obligations, the CAT Committee has expressed particular concern about instances in which individuals are transferred to requesting states without the right to appeal the decision to surrender them.⁷⁸ Most recently, the CAT Committee, in *Agiza v. Sweden*,⁷⁹

⁷⁵ See text accompanying note 10. In addition, in *Mironescu v. Costner et al.*, 345 F. Supp. 2d 538 (D.C. N.C. 2004), the U.S. District Court for the Middle District of North Carolina left open the possibility that a decision on extradition by the Secretary of State could be subject to judicial review, noting simply that the issue was not ripe since in that case the Secretary had not yet rendered the decision.

⁷⁶ See *Cornejo-Barreto*, *supra* note 7 at 1014 ("Although the statute imposes a mandatory duty on the Secretary to implement the FARR Act, the regulations promulgated by the Department of State indicate that the Secretary's duty is discretionary. . . We generally defer to an agency's construction of the statute it administers. . . We are required, however, to reject those interpretations that are contrary to Congressional intent. . . We therefore reject the argument, advanced by the government, that these regulations preclude judicial review of the Secretary's extradition decisions. . . Congress indicated its preference for agency enforcement of the U.S. obligations under the Torture Convention in the FARR Act. This scheme is consistent with Article 3 of the Torture Convention, which states that "the competent authorities" are required to ensure that extraditees are not returned if there "are substantial grounds for believing" that the fugitive "would be in danger of being subjected to torture." What *would* be contrary to both the statute and the Convention, is a finding that the Secretary's decisions are wholly discretionary. Article 3 is written in mandatory, not precatory language: "no State Party shall . . . extradite" a person likely to face torture. . . The FARR Act is similarly forceful: U.S. agencies are directed to "implement the obligations of the United States under Article 3" of the Torture Convention. As a principle of statutory construction, "we generally construe Congressional legislation to avoid violating international law." . . . In this case, the most straightforward construction is perfectly consistent with international law. (citations omitted).

⁷⁷ See CAT, *supra* note 2, art. 2(1) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction") and Article 2(2) ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.").

⁷⁸ Committee Against Torture, *Concluding Observations*, Sweden, U.N. Doc. CAT/C/XXVIII/CONCL.1, para. 6 (2002) ("The Committee [against Torture] . . . records its concern at the following: . . . (b) The Special Control of Foreigners Act, known as the anti-terrorism law, allows foreigners suspected of terrorism to be expelled under a procedure which might not be in keeping with the Convention, because there is no provision for appeal.").

⁷⁹ *Agiza v. Sweden*, Communication No. 233/2003, Committee Against Torture, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005. In *Agiza v. Sweden*, Ahmed Agiza was expelled from Sweden to Egypt. Agiza sought asylum in Sweden, but was excluded from refugee status based on evidence he was associated with Islamist groups responsible for acts of terrorism. To justify the expulsions, the Swedish government relied upon "diplomatic assurances" or formal guarantees from the Egyptian government that the two men would not be tortured and would have fair trials upon return. Agiza

held that article 3 of CAT must be interpreted as encompassing a remedy for its breach.⁸⁰ Specifically, the CAT Committee stated that “the right to an effective remedy contained in article 3 requires...an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.”⁸¹ The CAT Committee further noted that “[w]hile national security concerns might justify some adjustment to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3’s requirements of effective, independent and impartial review.”⁸²

The CAT Committee’s decision in *Agiza v. Sweden* is consistent with the Committee’s prior jurisprudence. In *Arana v. France*, the CAT Committee found violations of CAT Article 3, in part because the handover of the detainee by the French police to the Spanish police was not subject to judicial oversight:

The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police.... At the time of the consideration of the [previous] report..., the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country ...without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee’s rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.⁸³

The reasoning of the CAT Committee finds resonance in the case of *Shamayev and others v Georgia and Russia*,⁸⁴ decided by the European Court of Human Rights on April 12, 2005. *Shamayev* concerned individuals who were subject to extradition from Georgia to Russia on the basis of a request by the government of Russia. The Russian

alleged that while in detention in Egypt he was subjected to torture. The CAT Committee found that Sweden breached its obligations under articles 3 and 22 of CAT.

⁸⁰ *Agiza v Sweden*, *supra* note 79, para.13.7

⁸¹ *Id.*

⁸² *Agiza v. Sweden*, *supra* note 79, para. 13.8

⁸³ *Arana v. France*, Communication No. 63/1997, Committee Against Torture, U.N. Doc. CAT/C/23/D/63/1997 (2000), para. 11.5. In *Arana v. France*, an individual who had been convicted in France of belonging to the Basque separatist group ETA was sought by Spanish police on suspicion that he was a member of the ETA leadership. Spain sought deportation from France through an administrative procedure, whereby detainees could be exchanged between the two nations’ police forces without judicial oversight or *intervention*.

⁸⁴ *Affaire Chamalev et 12 autres c. Géorgie et Russie (Shamayev and others v. Georgia and Russia)*, ____ Eur. H.R. Rep. ____ (2005).(not yet available in English).

authorities sought the men for various crimes of terrorism. The applicants were detained by Georgian officials and transferred to Russia without having been informed of the decision to extradite them, and without having an opportunity to challenge the decision to return them, despite their fear of torture. The European Court of Human Rights found that Georgia had violated the applicants' right to an effective remedy, combined with the right to be free from torture, as guaranteed by Articles 13 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁵ The Court found that the Convention had been violated when the Georgian authorities prevented the applicants from seeking relief from transfer on the basis that they feared torture if returned to Russia.⁸⁶

A 2002 case decided by the Supreme Court of Canada also supports the reasoning of the CAT Committee.⁸⁷ In *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada*, the Court examined the adequacy of procedural safeguards in the context of the *non-refoulement* obligation set out in CAT Article 3. The Court held that “[g]iven Canada’s commitment to the CAT, we find that ... the phrase ‘substantial grounds’ raises a duty to afford an opportunity to demonstrate and defend those grounds.”⁸⁸ The court added that “[w]here the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.”⁸⁹ While this case is of course not legally binding on the United States, it offers useful guidance on the interpretation of U.S. CAT obligations.

⁸⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 48.

⁸⁶ *Chamaļev*, *supra* note 84. at paras. 460-461.

⁸⁷ *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002 available at http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html (last visited Apr. 19, 2005).

⁸⁸ *Id.* para. 119.

⁸⁹ *Id.* para. 123.


v. *Application to the Facts*

Based on the analysis above, we conclude that the secretary of state is under an obligation to consider all relevant facts when exercising her duty to withhold extradition of an individual who is more likely than not to be tortured upon surrender. The relevant facts in this case include the existence in India of a consistent pattern of gross, flagrant or mass violations of human rights, the experience of other similarly situated returnees to India who report that they were tortured upon return, and the particularized circumstances facing Mr. Kulvir Singh Barapind himself. Extradition of Mr. Barapind to India under circumstances which indicate that it is more likely than not that he would be tortured would plainly violate U.S. law and policy. Finally, because of the mandatory nature of the duty imposed on agencies in FARRA, it is likely that the Ninth Circuit Court of Appeals would subject a decision by the secretary of state to extradite Mr. Barapind to judicial review using the rule set out in *Cornejo-Barreto v. Siefert*.

* * * * *

For the foregoing reasons, we urge the secretary of state to exercise her duty to withhold extradition where the relevant facts demonstrate that it is more likely than not that an individual will be subjected to torture upon return. Assuming the facts are true as alleged in the case of Mr. Barapind, extradition should be withheld in this case.

Respectfully submitted.



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