



**CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE**  
**LEGAL ADVISORY**  
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**MINIMUM STANDARDS FOR TRANSFER:  
INTERNATIONAL LAW CONCERNING RENDITION  
IN THE CONTEXT OF COUNTER-TERRORISM**

NYU School of Law • New York, NY 10012

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**Minimum Standards for Transfer:  
International Law Concerning Rendition in the Context of Counter-Terrorism**

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***ABSTRACT***

In January 2009, President Obama promulgated a number of Executive Orders that created several Task Forces to advise him on certain aspects of U.S. counter-terrorism policy. One of the key issues under review is the U.S. practice of rendition. Several bodies of international law binding on the United States set out rules relevant to the transfer of individuals outside the United States to U.S. territory or to the custody of another state in the context of counter-terrorism operations. International refugee law, international human rights law, and international humanitarian law apply extraterritorially and concurrently.

Examining human rights, refugee law, and humanitarian law norms together allows for the identification of a minimum baseline standard to be applied whenever the United States carries out the extraterritorial transfer of an individual within its effective control. The transfers to which this minimum standard applies include, for example, “renditions to justice” to the United States or a third state; renditions pursuant to an international arrest warrant or request for surrender by an international court; transfers carried out at the close of hostilities in the context of armed conflict (i.e. repatriations of prisoners of war or security detainees); and transfers across borders of individuals detained in the context of armed conflict.

This Legal Advisory sets out this minimum baseline standard, articulating threshold standards, substantive norms, and procedural requirements. As a threshold matter, formal transfer processes may not be intentionally bypassed and the United States must have a valid basis for apprehending an individual in contemplation of transfer. Substantively, the U.S. government may not transfer an individual to the custody of a state where he/she is at a real risk of: torture or ill-treatment; persecution; enforced disappearance; or arbitrary deprivation of life. Procedurally, an individual facing transfer must have the ability to challenge the basis for his deprivation of liberty in contemplation of transfer prior to transfer before an independent decision-maker. This challenge must allow the individual to contest the transfer on basis of fear of being subject to any of the risks protected against by international law. This Legal Advisory concludes with a discussion of human rights norms applicable to the United States’ use of diplomatic assurances.

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## **MINIMUM STANDARDS FOR TRANSFER: INTERNATIONAL LAW CONCERNING RENDITION IN THE CONTEXT OF COUNTER-TERRORISM**

In January 2009, President Obama promulgated a number of Executive Orders that created several Task Forces to advise him on certain aspects of U.S. counter-terrorism policy. One of the key issues under review is the U.S. practice of informal transfer (“rendition”). For several years, the Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law has been recognized as a leading voice on issues concerning rendition.<sup>1</sup> This Legal Advisory identifies international legal norms relevant to ongoing efforts by the U.S. government to review its rendition policy. Specifically, this Legal Advisory examines those international legal obligations of the United States relevant to the transfer of persons in the context of counter-terrorism operations.<sup>2</sup>

### **I. LEGAL NORMS PROTECTING INDIVIDUALS TRANSFERRED EXTRATERRITORIALY**

Several bodies of international law binding on the United States set out rules relevant to the transfer of individuals outside the United States to U.S. territory or to the custody of another state in the context of counter-terrorism operations.<sup>3</sup> International refugee law, international human rights law, and international humanitarian law apply extraterritorially<sup>4</sup> and concurrently.<sup>5</sup> As a general rule, the *lex generalis* of international human rights law sets out basic norms that apply in all situations, including during armed conflict.<sup>6</sup> Where there is a direct conflict of norms during armed conflict,

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<sup>1</sup> For full-text versions of these reports, see <http://www.chrgj.org/publications/reports.html#detainees>.

<sup>2</sup> With the aim of brevity, citations will be kept to a minimum and domestic legal norms will be left unexplored. Treaty law is the focus of this Legal Advisory; the reader should keep in mind the existence of customary international law norms relevant to the issues under discussion.

<sup>3</sup> Transfers from U.S. territory are not examined in this Legal Advisory since such transfers are already highly regulated under domestic law through laws concerning exclusion, removal, and extradition.

<sup>4</sup> International humanitarian law was designed to apply extraterritorially and thus its application in such circumstances is uncontroversial. International human rights treaties have extraterritorial effect whenever states have effective control over territory or when they exercise effective control over an individual. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, para. 109; and U.N. Human Rights Comm., *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 12 (2004). The *non-refoulement* obligation under international refugee law has also been found to apply extraterritorially. See U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007). Congress has signaled its acceptance of the application of the *non-refoulement* obligation set out in the Convention Against Torture to extraterritorial transfers in its implementing provisions for Article 3 of the Convention, contained in the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”). Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, 112 Stat. 2681-761 (codified in scattered sections of 8, 22, and 42 U.S.C.).

<sup>5</sup> On the concurrent application of international humanitarian law and international human rights law, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25 (holding that international human rights law continues to apply in times of armed conflict). For a discussion of the concurrent application of international humanitarian law and international refugee law, see Stephane Jaquemets, *The Cross-Fertilization of International Humanitarian Law and International Refugee Law*, 83 INT’L REV. RED CROSS 651 (2001).

<sup>6</sup> This general rule is relevant to those rights considered to be non-derogable under human rights law. Such non-derogable rights include, *inter alia*, the right to be free from torture and cruel, inhuman or degrading punishment and the right to life. See, e.g., Article 4, International Covenant on Civil and Political Rights. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25. (“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of

the *lex specialis* of international humanitarian law may displace or modify a particular rule of human rights law. Relevant here, international humanitarian law contains provisions regulating or entirely prohibiting the transfer of specific categories of persons. Because these specific protections are consistent with—though often more protective than—the *lex generalis* of human rights law, the norms complement the generally applicable human rights rules on transfer.

Examining human rights, refugee law, and humanitarian law norms together therefore allows for the identification of a minimum baseline standard to be applied whenever the United States carries out the extraterritorial transfer of an individual within its effective control. The *lex specialis* rule in this context means that while certain individuals facing transfer have greater protections than those set out here, no individual would have less protection. Those accorded greater protections must be given those protections as well.<sup>7</sup> The transfers to which this minimum standard applies include, for example, “renditions to justice” to the United States or a third state; renditions pursuant to an international arrest warrant or request for surrender by an international court; transfers carried out at the close of hostilities in the context of armed conflict (i.e. repatriations of prisoners of war or security detainees); and transfers across borders of individuals detained in the context of armed conflict.<sup>8</sup>

## **A. THRESHOLD PRINCIPLES**

### **1. Formal Procedures May Not be Intentionally Bypassed**

Extradition, transfer of an individual pursuant to an international arrest warrant, deportation, and other formal processes were designed to ensure basic international law norms such as territorial sovereignty and equality, the principle of legality, and the essential rights of the person. Notwithstanding U.S. jurisprudence to the contrary, basic international legal norms require that formal procedures not be intentionally bypassed. Where formal procedures may be unavailable or have become impossible, to ensure the rights of the individual are respected, notice must be given to the country of apprehension and cooperation must be sought in apprehending the individual. Such cooperation must include the opportunity for the individual to avail him or herself of the protection of the host state; otherwise the United States will have colluded in the host state’s violation of the individual’s rights.

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the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision.”).

<sup>7</sup> See discussion of those rules at pages 6-7 below.

<sup>8</sup> The applicability of the protections to transfers of custody from one state to another in the context of armed conflict or peacekeeping operations within the borders of a single state are less clear, but in principle, because international law protects individuals within the effective control of a state or its agents regardless of the location of that custody, the protections set out here should apply to any handover of an individual from the jurisdiction of one state to another.

## **2. The Transferring State Must Have a Valid Legal Basis for Apprehending the Individual in Contemplation of Transfer**

Human rights law—through the right to be free from arbitrary detention—requires that states have a valid basis for apprehending an individual in contemplation of transfer. Such legal bases must be set out in existing law and must be valid under international norms concerning the permissible exercise of jurisdiction by states. In the context of transfer outside situations of armed conflict, such bases may include:

- An arrest warrant duly executed under U.S. law (for transfers to the United States);
- A lawful arrest warrant duly executed in the receiving state accompanied by a request for legal assistance or extradition to the transferring state;
- Certification that the individual is sought to serve a prison sentence following fair trial in the receiving state accompanied by a request for legal assistance or extradition to the transferring state;
- An international arrest warrant or request for arrest and surrender from an international court.

All such warrants or requests for surrender must have been obtained in accordance with international due process standards.

In the context of armed conflict, the following bases for detention in contemplation of transfer may be invoked:

- International humanitarian law provides a basis for detention in contemplation of transfer in relation to prisoners of war, who may be lawfully detained during international armed conflict and transferred to another detaining power that will uphold their Geneva rights.<sup>9</sup>
- Prisoners of war who are lawfully detained must be released and repatriated (transferred) at the close of active hostilities.<sup>10</sup>
- Certain aliens in the territory of a party to an armed conflict may be permissibly subject to internment during international armed conflict and may be transferred to another power that will uphold their Geneva rights.<sup>11</sup>
- Civilians who are lawfully interned must be transferred or repatriated once the reasons for their internment no longer obtain, or as soon as possible after the close of hostilities.<sup>12</sup>
- Detentions in the context of non-international armed conflict must have a valid basis set out in domestic law and transfers in such situations may not violate Common Article 3 to the

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<sup>9</sup> Article 4 of Geneva Convention III allows states to detain as prisoners of war certain specified categories of individuals, and Article 12 of Geneva Convention III provides that prisoners of war may “only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”

<sup>10</sup> Article 118 of Geneva Convention III requires detaining powers to release and repatriate prisoners of war at the close of active hostilities.

<sup>11</sup> Article 45 of Geneva Convention IV states that “Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.” Note, however, that protected persons may not be transferred out of occupied territory. Article 49, Geneva Convention IV.

<sup>12</sup> Article 132 of Geneva Convention IV requires detaining powers to release and transfer internees as soon as the reasons for the detention cease to exist and Article 133 of Geneva Convention IV requires the release of internees as soon as possible after the close of hostilities.

Geneva Conventions, relevant customary international law, or applicable human rights standards.

## II. SUBSTANTIVE GUARANTEES: *NON-REFOULEMENT*

Taken together, international humanitarian law, international refugee law, and human rights law require states to refrain from transferring any individual to the custody of a state where he/she is at a real risk<sup>13</sup> of: torture or ill-treatment; persecution; enforced disappearance; and arbitrary deprivation of life.<sup>14</sup> International humanitarian law provides additional guarantees to protected persons with specific statuses in times of international armed conflict (see below).

### A. NO TRANSFERS TO A RISK OF TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (explicitly, in Article 3) and the International Covenant on Civil and Political Rights (implicitly, through Article 7) require that states refrain from transferring persons under their effective control to the custody of another state if the transfer would put the individual at a real risk of torture or cruel, inhuman or degrading treatment or punishment. In the context of armed conflict—both international and non-international—these human rights protections continue to apply and also derive from Article 3 common to the four Geneva Conventions of 1948, which forbids “cruel treatment and torture” of anyone in the custody of a High Contracting Party.<sup>15</sup> This provision should be understood to include protection against transfers to such treatment.<sup>16</sup>

### B. NO TRANSFERS TO A RISK OF PERSECUTION

The 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) and the Geneva Conventions of 1948 prohibit states from transferring individuals to countries where they face a risk of persecution. Article 33 of the Refugee Convention prohibits states from transferring an individual to a country where his or her “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>17</sup> In the

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<sup>13</sup> The various *non-refoulement* rules articulated in different treaties contain different threshold standards for the level of risk triggering the prohibition on transfer. For sake of brevity, the term “real risk” is used in this Legal Advisory to encompass these varying thresholds.

<sup>14</sup> In addition to these guarantees, emerging principles suggest that states should not transfer persons to countries where they will face arbitrary detention or severe violations of due process. These emerging principles are not discussed in this Legal Advisory.

<sup>15</sup> Common Article 3 has been found to “constitute a minimum yardstick” applicable to both international and non-international armed conflict. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 218.

<sup>16</sup> This is consistent with the way that authoritative bodies have interpreted the prohibition on torture and cruel treatment set out in human rights instruments. *See, e.g.*, U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, para. 12 (2004) (interpreting Article 7 of the ICCPR) and *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), para. 86-88 (interpreting Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

<sup>17</sup> Article 34 of the Convention Relating to the Status of Refugees excludes from the protection of Article 33 individuals about “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.” These exclusion clauses must be construed narrowly, and even when they are applicable, individuals retain the protection against *refoulement* to other risks, including the risk of torture and cruel treatment under international human rights law, which contains no exclusions.



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context of international armed conflict, Article 45 of Geneva Convention IV specifies that no protected person may be transferred “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.” State practice and *opinio juris* demonstrates the existence of an emerging customary international humanitarian law norm requiring states to protect those repatriated or released at the close of hostilities (such as prisoners of war and civilian internees) from transfers to a risk of persecution.<sup>18</sup> Even absent such protections under humanitarian law, international refugee law continues to apply in the context of armed conflict to prevent transfers to a risk of persecution.<sup>19</sup>

### C. NO TRANSFERS TO A RISK OF ENFORCED DISAPPEARANCE

An enforced disappearance is the deprivation of liberty of an individual by a state that either refuses to acknowledge the detention or conceals the fate and whereabouts of the detainee, placing the individual outside the protection of the law.<sup>20</sup> Enforced disappearances are considered to be violations in themselves, as well as amounting to cruel, inhuman and degrading treatment and possibly torture under international human rights law.<sup>21</sup> As such, transfers to a risk of enforced disappearance—like transfers to a risk of other forms of cruel treatment—are prohibited under binding human rights law.<sup>22</sup> In addition to these protections, which apply at all times, in the context of international armed conflict, prisoners of war and aliens in the territory of a state party may not be transferred to a country that is unwilling or unable to ensure that all the protections owed to such persons under the Geneva Conventions are upheld.<sup>23</sup> Enforced disappearance is understood as forbidden by the Geneva Conventions (via provisions of Geneva Conventions III and IV concerning registration of persons detained and provision of access by the ICRC to detainees<sup>24</sup>), meaning that prisoners of war and protected persons may not be transferred to a risk of secret detention during international armed conflict. With respect to non-international armed conflict, both international human rights norms, which continue to apply, and customary international humanitarian law applicable to such conflicts, prohibit enforced disappearance.<sup>25</sup> Insofar as disappearance amounts to torture or cruel treatment, transfers to a risk of such treatment should be understood to be prohibited by customary international humanitarian law in the context of non-international armed conflict.

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<sup>18</sup> See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 455-456 (2005). Accord Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck, ed., 2008) 237, 323 and Horscht Fisher, *Protection of Prisoners of War*, *in id.* 367, 416-417.

<sup>19</sup> See, e.g., Executive Committee, U.N. High Commissioner for Refugees, *Conclusion No. 94* (2002) (“Respect for the right to seek asylum, and for the fundamental principle of *non-refoulement*, should be maintained at all times.”)

<sup>20</sup> Article 2, International Convention for the Protection of All Persons from Enforced Disappearance, and the Inter-American Convention on Forced Disappearance of Persons.

<sup>21</sup> Enforced disappearance is also expressly prohibited by a number of international conventions to which the United States is not a party. See, e.g., the International Convention for the Protection of All Persons from Enforced Disappearance, and the Inter-American Convention on Forced Disappearance of Persons.

<sup>22</sup> In addition, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance includes an explicit prohibition of transfers to a risk of enforced disappearance.

<sup>23</sup> Article 12, Geneva Convention III; Article 24, Geneva Convention IV.

<sup>24</sup> See Articles 122, 123, 125, and 126 of Geneva Convention III (concerning prisoners of war), and Articles 136, 140, 142, and 143 of Geneva Convention IV (concerning enemy aliens and civilian internees).

<sup>25</sup> See Rule 98, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Vol. 1: Rules) (2005).

**D. NO TRANSFERS TO A RISK OF ARBITRARY DEPRIVATION OF LIFE**

Article 6 of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life. This provision, along with the general obligations set out in Article 2 to respect and ensure the rights set out in the Covenant imposes an obligation on states not to transfer individuals to a risk of arbitrary deprivation of life.<sup>26</sup> This includes non-transfer to extrajudicial executions and the imposition of the death penalty in circumstances where basic procedural guarantees have not been observed.<sup>27</sup>

In the context of armed conflict, the *lex specialis* of international humanitarian law modifies the right to life in the *lex generalis* of human rights law through rules concerning, *inter alia*, permissible targeted killing. In both international and non-international armed conflict, persons deprived of their liberty, civilians taking no active part in the hostilities, and those otherwise *hors de combat* must be protected against targeting—i.e. such targeting amounts to arbitrary killing.<sup>28</sup> With respect to prisoners of war and aliens in the territory of a state party, the Geneva Conventions expressly prohibit transfer to a country that is unwilling or unable to ensure that all the protections owed to such persons under the Geneva Conventions are upheld—including targeting rules.<sup>29</sup> Further, applying human rights law concurrently with the *lex specialis* of targeting rules, states are prohibited from transferring any person to a risk of arbitrary deprivation of life in the context of armed conflict—i.e. to a risk of unlawful targeted killings.

**E. SPECIFIC GUARANTEES FOR PROTECTED PERSONS IN THE CONTEXT OF INTERNATIONAL ARMED CONFLICT**

In addition to the protections discussed above, states must observe additional norms in relation to particular categories of persons; such norms are not thoroughly examined in this Legal Advisory. By way of example, in the context of international armed conflict, humanitarian law identifies particular requirements and bars certain transfers. Article 12 of Geneva Convention III provides that prisoners of war may “only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” Article 45 of Geneva Convention IV includes an almost identical provision concerning aliens in the territory of a party to an international armed conflict. These provisions mean that a state may not transfer prisoners of war or aliens to states that will not, in practice, apply all of the provisions of the Geneva Conventions relevant to those persons.<sup>30</sup> Such provisions include a wide variety of requirements concerning, *inter alia*, humane and fair treatment. In addition to these protections, Article 49 of Geneva Convention IV categorically bars transfers of protected persons out of occupied territory, and Article 147 makes

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<sup>26</sup> See U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, para. 12 (2004).

<sup>27</sup> See U.N. Human Rights Comm., *General Comment No. 6: The Right to Life*, para. 7 (1982).

<sup>28</sup> See Article 3 common to the Geneva Conventions of 1948; Article 46, Geneva Convention I; Article 47, Geneva Convention II; Article 13, Geneva Convention III; Article 33, Geneva Convention IV.

<sup>29</sup> Article 12, Geneva Convention III; Article 24, Geneva Convention IV.

<sup>30</sup> The Geneva Conventions also impose on the transferring state the obligation to “take effective measures to correct the situation or shall request the return” of the prisoners of war or protected persons. Article 12, Geneva Convention III; Article 45, Geneva Convention IV.

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such transfers a grave breach of the Convention.<sup>31</sup> Individuals who are not covered by these protections set out in Geneva Conventions III and IV must nonetheless be protected against transfer to a situation in which the fundamental guarantees set out in Article 75 of Additional Protocol I to the Geneva Conventions, which reflects customary international law, would be violated.

### **III. PROCEDURAL GUARANTEES: RIGHT TO CHALLENGE TRANSFER IN ADVANCE BEFORE AN INDEPENDENT DECISION-MAKER**

Formal processes for the transfer of individuals such as extradition and deportation are structured to include basic human rights guarantees and to respect the sovereignty of states. These procedures include mechanisms that allow individuals to challenge their transfer in advance. This right to challenge has been understood to be an aspect of the substantive guarantee of *non-refoulement*, and has also been considered as part of the right to an effective remedy, and inherent in the right to due process of law.<sup>32</sup> Individuals subjected to transfers outside these procedures must similarly be afforded the opportunity to challenge their potential transfer. The minimum requirements for such challenges are set out below.

#### **A. ABILITY TO CHALLENGE BASIS FOR APPREHENSION**

The right to be free from arbitrary detention requires that an individual have the ability to challenge the basis for any deprivation of liberty in contemplation of transfer. This right is protected by Articles 9 and 14 of the International Covenant on Civil and Political Rights. Individuals detained under the laws of armed conflict have the right to challenge their detention as well; such protections are set out in Article 5 of Geneva Convention III and Articles 43 and 78 of Geneva Convention IV.<sup>33</sup> For this right to be meaningful in the context of transfer, the state carrying out an apprehension in contemplation of transfer must be able to demonstrate a valid basis set out in law for the apprehension and transfer and to produce sufficient evidence to support the applicability of that basis to the individual being apprehended.

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<sup>31</sup> Exceptions are made for evacuations from specific areas for the security of the population; individual transfers are not countenanced in this formulation. Article 147, Geneva Convention IV.

<sup>32</sup> See, e.g., Eur. Ct. Hum. Rts., *Chahal v. The United Kingdom* (1996), para. 80 (holding that independent review of a decision to transfer in the face of a claim of *refoulement* must be independently scrutinized); U.N. Committee Against Torture, *Agiza v. Sweden* (2005), para. 13.5 (finding that “the right to an effective remedy contained in article 3 requires, in this context, 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”); U.N. Human Rights Comm., *Mansour Abani v. Canada* (2006), para. 106.-10.8 (“the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture”); Inter-Am. Comm. Hum. Rts., *Extension of Precautionary Measures (N. 259) regarding Detainees in Guantánamo Bay, Cuba* (2005) (finding that the right to determination of protection from *refoulement* applies to individuals held by the United States at Guantánamo and requesting that the United States provide to detainees facing transfer “an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker”).

<sup>33</sup> Article 43 of Geneva Convention IV, which pertains to internees in the territory of a party to the conflict, provides that any interned person is “entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.” Article 78, pertaining to internees in occupied territory, specifies that the decision to intern “shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.”

**B. ABILITY TO CHALLENGE TRANSFER ON BASIS OF FEAR OF REFOULEMENT TO ANY OF THE RISKS PROTECTED AGAINST BY INTERNATIONAL LAW**

The most commonly—and clearly—set out procedural obligation in the context of transfer is the requirement that states provide individuals being transferred with the opportunity to challenge the transfer on the basis that they fear mistreatment in the receiving country. This procedural requirement has been understood to be inherent in the various norms of *non-refoulement* set out in section 2 of this Legal Advisory.<sup>34</sup> This is because *non-refoulement* standards have both a subjective and an objective element: the individual must demonstrate his or her fear of mistreatment, and an official of the state proposing transfer must objectively weigh this fear in light of relevant evidence.<sup>35</sup> This requires a process that allows the individual the opportunity to make out his or her claim, and to challenge the evidence brought forward by the state proposing transfer. Any process whereby the transferring state purports to make the *non-refoulement* assessment on its own and without the participation of the individual facing transfer is impermissible under relevant international law.

**C. ABILITY TO CHALLENGE TRANSFER MUST TAKE PLACE PRIOR TO TRANSFER AND BEFORE AN INDEPENDENT DECISION-MAKER**

To make real the substantive protections of international human rights law set out above, individuals facing transfer must have the opportunity to mount a pre-transfer challenge to the basis for their apprehension and any fear of *refoulement*.<sup>36</sup> Such a challenge must be heard by an independent decision maker with the power to suspend the transfer during the pendency of review.<sup>37</sup>

**IV. SPECIFIC REQUIREMENTS REGARDING THE USE OF DIPLOMATIC ASSURANCES**

In recent years, international bodies have expressed concern about the use of so-called “diplomatic assurances,” identifying four basic requirements for the use of such assurances in countering a risk of torture:

- 1) Assurances may not be used in relation to a country that systematically violates the prohibition on torture.
- 2) Assurances must be obtained using “clear” and established procedures.
- 3) Assurances must be subject to judicial review.
- 4) Assurances must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.<sup>38</sup>

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<sup>34</sup> See citations at note 32.

<sup>35</sup> See, e.g., Article 1, Convention Relating to the Status of Refugees.

<sup>36</sup> See citations at note 32.

<sup>37</sup> *Id.*

<sup>38</sup> See U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, para. 10 (2006), and U.N. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, para. 13 (2006).

## Minimum Standards for Transfer: International Law Concerning Rendition in the Context of Counter-Terrorism

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The use of assurances in transfer proceedings concerning individuals who are present within the United States is governed by regulations promulgated pursuant to U.S. statute.<sup>39</sup> While Congress has explicitly recognized the application of the rule of *non-refoulement* to extraterritorial transfers<sup>40</sup>, the agencies with lead responsibility for such transfers in recent years—the Department of Defense and the Central Intelligence Agency—have not promulgated regulations implementing the rule or governing the use of diplomatic assurances. This failure places those agencies in violation of Congressional command, and puts the United States plainly in contravention of its international obligations. Further, existing regulations are insufficient under international human rights law as set out above.

Any use of diplomatic assurances in the context of extraterritorial transfers by the United States, therefore, are currently impermissible under human rights law. They are not obtained using “clear” and established procedures (but are rather concluded informally), they are not subject to judicial review, and they are not accompanied by effective post-return monitoring.

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<sup>39</sup> The Department of Justice and the Department of State created regulations to uphold the *non-refoulement* obligation in the context of summary removal, removal, and extradition (transfers from U.S. territory). For a discussion of the regulations, see NEW YORK CITY BAR & CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO “EXTRAORDINARY RENDITIONS,” at 50–54; available at <http://chrgj.org/projects/detainees.html#torturebyproxy05>.

<sup>40</sup> See FARRA, *supra* note 4.