

I. The Need for Judicial Oversight of CAT Obligations in Extradition Proceedings

Response to the 2013 Periodic Report of the United States of America to the United Nations Committee Against Torture

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II. Reporting Organization

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III. Issue Summary

The obligation of non-refoulement is a fundamental protection enshrined in the Convention Against Torture (CAT), and prohibits states from returning an individual to a country where there are "substantial grounds" to believe he or she would be subjected to torture. U.S. extradition policy leaves this determination to the sole discretion of the State Department, with no substantive judicial oversight. This practice lacks transparency and independent oversight and deserves the attention of the Committee

In its 2006 Concluding Observations, the CAT Committee emphasized that individuals facing return must have the opportunity to "challenge decisions of refoulement,"¹ focusing on the situation of individuals facing rendition. The Committee's 2006 did not specifically address the situation of individuals facing extradition, whereby a suspected or convicted criminal is transferred to another country for prosecution or punishment. Extradition involves unique procedures that are completely separate from immigration procedures or renditions.

In U.S. extradition proceedings, the determination of whether an individual is more likely than not to be tortured upon extradition is not subject to judicial oversight. Extradition matters do take place before a judge in the first instance. A judge determines whether or not probable cause exists to certify a particular individual for extradition. Because of a common law judicial doctrine, the threat of torture an individual faces upon return to the country requesting extradition is not considered by the judge. Once a judge finds probable cause to certify extradition, the State Department makes a determination

whether to issue a warrant of extradition.ⁱⁱ The State Department *may* decide to refuse extradition if there are substantial grounds to believe the individual faces danger of torture. If the State Department finds no such danger, the Secretary of State issues a warrant of extradition.

Under the common law “Rule of Non-Inquiry,” courts refuse to review executive decisions of this torture determination.ⁱⁱⁱ There is a range of interpretations of the Rule of Non-Inquiry in federal courts, but the maximum review a court has ever granted is procedural review, rather than substantive review. There, the court reviewed whether the State Department had actually completed an analysis of the torture considerations, but did not extend review to the substance of the torture claim. Individuals therefore lack the opportunity to challenge the decision of the State Department. As a result, there is virtually no transparent review or judicial oversight mechanisms to fulfill the non-refoulement obligations laid out by the Committee in the context of extradition.^{iv}

A recent case from a federal appeals court exemplifies why this procedure deserves scrutiny. There, the court found “no evidence” that the State Department had reviewed the threat of torture faced by the extraditee.^v In court, the petitioner presented evidence of torture of the conspirators of the crime for which he was sought in the Philippines; at least one conspirator confession was ultimately thrown out because a judge found it had been made under duress.^{vi} Despite this, the court lacked power to review the content of the individual’s claim that he would face torture upon return to the Philippines. The individual thus had no opportunity to challenge the extradition decision made by the State Department on the basis that he faced the threat of torture.

Still, the executive branch continues to assert the necessity of sole executive discretion over the question of torture in extradition cases.^{vii} Compounding concerns about the lack of oversight is the fact that the U.S. continues to use diplomatic assurances to fulfill its non-refoulement obligations, a practice specifically criticized by the Committee in its last review of the United States, and highlighted by civil society.^{viii}

The CAT Committee has stated that a reliance on executive discretion fails to afford individuals with sufficient refoulement protection under the Convention. Common law countries such as the United Kingdom and Canada have also rejected the rule of non-inquiry, indicating that such a doctrine is outdated and inconsistent with international practice.^{ix}

The Committee should question the US government on the lack of independent and transparent oversight of the determination whether an individual is more likely than not to face torture if extradited.

IV. Concluding Observations

The Committee’s 2006 Concluding Observations interpreted current U.S. practice of relying on executive discretion as inadequate, noting that “[t]he State party should always ensure that suspects have the possibility to challenge decisions of refoulement.”^x While

the observation addressed the situation of suspects facing *rendition*, the formal *extradition* process in the United States provides no more judicial oversight of decisions regarding the likelihood of torture. Instead, this determination is left to the sole discretion of the executive branch, with no opportunity for review.

V. U.S. Government Report & One Year Response to the Concluding Observations

In its 2006 response to the Concluding Observations, the U.S. noted that, “Although there is no requirement under the Convention that individuals should have the possibility to challenge refoulement, United States practice in the different areas in which this provision comes into play is designed to ensure that any torture concerns, whenever raised by the individual to be transferred, are taken into account.”^{xi}

In its 2013 report to the Committee, the U.S. notes that decisions by the Secretary of State regarding whether or not to extradite a fugitive is not subject to judicial review, “based upon the longstanding Rule of Non-Inquiry and statutes adopted by Congress.” This includes decisions on whether to seek diplomatic assurances in any particular case as well as on whether to extradite a fugitive subject to such assurances. The U.S. further explains that the Secretary’s decisions are based upon (a) “extensive State Department review of the human rights conditions in a country before an extradition relationship is established”; (b) “Senate review and approval of all U.S. extradition partners,” (c) “strong incentives for countries to treat extradited individuals appropriately so as not to jeopardize their ongoing relationship with the United States,” as well as “the complex, delicate and confidential judgments concerning conditions in foreign countries that the Secretary must make in assessing torture claims.”^{xii} This report also confirms that there continues to be no opportunity to challenge extradition on the basis that an individual is more likely than not to face torture in the country requesting extradition.

VI. Legal Framework

- Article 3; General Comment 2

VII. CAT Committee General Comments and List of Issues

Non-refoulement

In Question 10, the Committee addressed the non-refoulement guarantee, and requested information on the steps the U.S. has taken to establish adequate judicial mechanisms for individuals to challenge all refoulement decisions.^{xiii}

General Comment 2 provides that “States parties may choose the measures through which they fulfill these obligations, so long as they are effective and consistent with the object and purpose of the Convention.”^{xiv} There are, however, limitations on state discretion, including a requirement that there is a meaningful avenue to challenge decisions of refoulement, as noted in the 2006 Concluding Observations.^{xv}

VI. Recommended Questions

We respectfully recommend that the Committee ask the U.S. delegation to:

- Please describe any plans to revisit the Rule of Non-Inquiry, in line with other common law countries.
- Please indicate (a) what measures the United States is taking to guarantee the opportunity to challenge decisions of refoulement in the extradition context; (b) how the federal government is ensuring that refoulement determinations are subject to adequate and independent review, including information on steps taken to ensure judicial oversight of torture claims in refoulement determinations.

VII. Suggested Recommendations

To ensure compliance with the CAT, the United States should ensure transparency and accountability for determinations whether an individual is more likely than not to face torture upon extradition, including:

- Support to abolish the Rule of Non-Inquiry.
- Support for judicial oversight of torture determinations while legislative change is sought.

ⁱ Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2 ¶ 20 (Jul. 25, 2006).

ⁱⁱ Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 559. Incorporated by reference in 2013 Periodic Report of the United States of America to the United Nations Committee Against Torture ¶ 68.

ⁱⁱⁱ *See generally* M. Cherif Bassiouni, International Extradition: United States Law and Practice 569-86 (2002).

^{iv} Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 559. Incorporated by reference in 2013 Periodic Report of the United States of America to the United Nations Committee Against Torture ¶ 68.

^v *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012), cert. denied, 133 S.Ct. 845 (2013).

^{vi} Brief for Appellee at 8-9, *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (No. 09-56999).

^{vii} U.S. Opposition to Motion to Stay, Declaration of Clifton M. Johnson at 3, *Trinidad y Garcia v. Benov*, No. 08-cv-07719, 2009 WL4250694 (C.D. Cal. Nov. 17, 2009).

^{viii} Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2 ¶ 21 (Jul. 25, 2006). *See also* Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers, Columbia Law School Human Rights Institute (December 2010).

^{ix} John T. Parry, International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty, 90 B.U. L. Rev. 1973, 2010 (2010)

^x Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2 ¶ 20 (Jul. 25, 2006).

^{xi} United States Response to Specific Recommendations Identified by the Committee Against Torture (2006), 1.

Id. at 2-3.

^{xii} Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 559. Incorporated by reference in 2013 Periodic Report of the United States of America to the United Nations Committee Against Torture ¶ 68.

^{xiii} List of Issues Prior to the Fifth Periodic Report of United States of America, U.D. Doc. CAT/C/USA/Q/5 ¶ 10(a) (Jan. 20, 2010).

^{xiv} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment no. 2, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

^{xv} Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2 ¶ 20 (Jul. 25, 2006).

