The Legality of Maher Arar's Treatment Under U.S. Immigration Law

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Introduction

This report analyzes the legality of Mr. Maher Arar's treatment under U.S. immigration law. The report begins with a short summary of the relevant facts concerning Mr. Arar's detention in the United States in the fall of 2002 and his subsequent "rendering" to Syria, where he was allegedly tortured and detained for a year before finally being released without charges. Section 2 briefly defines "rendition" and "extraordinary rendition." Section 3 provides an overview of the United Nations Convention Against Torture, especially Article 3 of the Convention, which prohibits a country from sending a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture. Section 4 summarizes U.S. immigration provisions for removing someone from the United States. Section 5 applies U.S. immigration law to the facts of Mr. Arar's case, and concludes that U.S. authorities probably violated Article 3 of the Convention Against Torture by rendering Mr. Arar to Syria, where he faced a known and serious risk of being tortured. Section 6 offers some modest recommendations to try to prevent another Arar-type situation from occurring.

1. Summary of Maher Arar's Detention and Rendition to Syria[1]

Maher Arar was born in Syria. He immigrated to Canada with his family when he was a teenager. He is now a Canadian citizen.

While on a family vacation in Tunisia in late September 2002, Mr. Arar received an e-mail from MathWorks, his former employer, asking him to return to Ottawa to consult with a prospective client. On September 25, 2002, Mr. Arar took a flight to Zurich, Switzerland, leaving his wife

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[1] These facts are taken from the complaint in Arar v. Ashcroft, No. 04-CV-0249-DGT-VVP (E.D.N.Y. filed Jan. 24, 2004), and from Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003, at 3, *at* http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf (last visited May 10, 2005).

and two children behind to continue their vacation. After stopping overnight in Zurich, he boarded a flight to Montreal, with a transfer stop at John F. Kennedy Airport in New York City. Upon arriving in New York, Mr. Arar went through U.S. immigration inspections to catch his connecting flight to Canada. U.S. officials detained Mr. Arar and interrogated him over several days about his alleged membership in or affiliation with various terrorist groups.

On October 1, 2002, Mr. Arar was handed a document stating that he was inadmissible in the United States because he belonged to an organization designated by the U.S. Secretary of State as a foreign terrorist organization, namely Al Qaeda. Mr. Arar asked to be removed to Canada, and expressed concern about being tortured if he was deported to Syria.

On October 8, 2002, U.S. government officials flew Mr. Arar to Jordan, where he was handed over to Syrian officials. For the next year he was detained and allegedly tortured by Syrian security officials. He was finally released without charge in October 2003.

2. Rendition and Extraordinary Rendition Defined

Rendition, or the transfer of an individual from one state to another, does not have a fixed definition in international law. The term implies consent by the rendering state to transfer an individual to the receiving state.[2] States resort to rendition when they either lack an extradition treaty with a requesting state or seek to avoid the legal constraints of formal extradition.[3]

Traditionally, rendition has been used to accommodate the receiving state's desire to place an individual on trial for a crime. More recently, however, the rendering state has been the prime motivator in sending people overseas, particularly where security or terrorism concerns exist. Such renditions are known as "extraordinary" renditions. While the full extent of extraordinary renditions are not known, it is estimated that the U.S. government has "extraordinarily" rendered over 150 people to other countries since the terrorist attacks of September 11, 2001.[4]

3. Overview of the Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or Convention) was designed to "make more effective the struggle against torture … throughout the world."[5] The Convention requires state parties to take actions to prevent torture both within and outside their jurisdictions. Article 3, the non-refoulement provision of the Convention, prohibits a state from sending a person to

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[2] Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 Loy. L.A. Int'l & Comp. L. Rev. 457, 457-58 (2002) (citing Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms 337 (1998)).
[3] *Id*.
[4] Jane Mayer, *Outsourcing Torture*, New Yorker, Feb. 14, 2005, at 106. *See also* Dana Priest, *CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, Washington Post, Mar. 17, 2005, at A1 (CIA alone has rendered over 100 people).
[5] Preamble to the Convention Against Torture, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (Dec. 10, 1984) [hereinafter CAT].

another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[6]

The General Assembly of the United Nations adopted the Convention Against Torture in 1984 and opened it for signature in 1985.[7] The Convention entered into force in 1987.[8] Over 135 states have ratified the Convention.[9]

The United States did not move quickly in ratifying the Convention Against Torture. The United States did not sign the Convention until April 1988.[10] The U.S. Senate adopted its resolution of advice and consent in October 1990,[11] but the United States did not become an official party to the treaty until November 1994.[12] When the Senate ratified the Convention Against Torture it added an understanding that the "substantial grounds" language in Article 3 meant that Article 3 would apply if it is "more likely than not" that the person would be tortured.[13]

Even after ratification, U.S. agencies in charge of immigration proceedings refused to apply the non-refoulement provision of the Convention Against Torture in the absence of implementing legislation by Congress.[14] In *Matter of H-M-V-*, the petitioner claimed he would be tortured upon his return to Iran, but the U.S. Board of Immigration Appeals (BIA) refused to apply the Convention.[15] The BIA held that since Congress had not passed any legislation implementing the Convention Against Torture, and instead had passed statutes limiting the availability of a related form of immigration relief known as withholding from deportation, it did not have the authority to act.[16]

In 1998, soon after *Matter of H-M-V-* was decided, Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA).[17] The FARRA is relevant to this report in three respects. First, it states 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."[18] This language substantially tracks Article 3 of the Convention Against Torture. In addition, it protects people even if they are not physically

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[6] CAT art. 3.
[7] 24 I.L.M. 535 (1985).
[8] *See* http://www.ohchr.org/english/countries/ratification/9.htm (last visited Apr. 22, 2005). Article 27 of the Convention Against Torture states that it will enter into force upon the twentieth instrument of ratification.
[9] *Id*.
[10] 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 33.10[2] (rev. ed. 2005).
[11] 136 Cong. Rec. S17,486 (Oct. 27, 1990).
[12] *Id*.
[13] 136 Cong. Rec. S10093 (July 19, 1990).
[14] *See* Matter of H-M-V-, 22 I. & N. Dec. 256 (U.S. Board of Immigration Appeals (BIA) 1998).
[15] *Id.* at 258.
[16] *Id.* at 259. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009, 3009-586)), both of which limited certain types of relief from deportation.
[17] Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681, 2681-822 (1998) [hereinafter FARRA].
[18] *Id*. § 2242(a).

in the United States. Thus, all types of transfers are covered by this provision, including extraterritorial renditions.

Second, the FARRA required federal agencies to publish regulations implementing Article 3 of the Convention Against Torture.[19] Third, the FARRA instructed agencies that when publishing their regulations, they should, "consistent with the obligations of the United States under the Convention," exclude from protection noncitizens described in Immigration and Nationality Act (INA) § 241(b)(3)(B).[20] That provision exempts from a similar type of protection called restriction on removal a variety of noncitizens, including those who have been convicted of a particularly serious crime or where "there are reasonable grounds to believe that the alien is a danger to the security of the United States."[21]

It is important to emphasize that the FARRA did not mandate excluding security risks from protection under Article 3 the Convention Against Torture. It merely instructed U.S. agencies to do so in their regulations, but "consistent with the obligations of the United States under the Convention."

Following the FARRA's enactment, the Immigration and Naturalization Service (INS), now a part of the Department of Homeland Security, passed interim implementing regulations in 1999[22] and slightly revised them in 2000.[23] These regulations also apply to the Executive Office for Immigration Review, which is part of the Department of Justice.[24] In addition, the Department of State passed its own regulations in 1999 to apply Article 3 of the Convention Against Torture in the extradition context.[25] In contrast, other U.S. agencies, such as the Department of Defense and the Central Intelligence Agency, have not published formal regulations implementing the Convention Against Torture.[26]

The INS regulations implementing the Convention Against Torture do not make substantive exceptions to the non-refoulement provision.[27] As the United States recently noted in a report to the UN Committee Against Torture, "The United States remains committed to providing Article 3 protection to all aliens in its territory who require such protection, and recognizes that there are no categories of aliens who are excluded from protection under Article 3."[28] In three situations,

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[19] *Id*. § 2242(b).
[20] *Id*. § 2242(c).
[21] INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).
[22] 64 Fed. Reg. 8478 (Feb. 19, 1999) (interim rule with request for comments).
[23] 65 Fed. Reg. 76,121 (Dec. 6, 2000) (final rule) (codified at 8 C.F.R. § 208.16–18). There were no major differences between the interim and final regulations concerning Convention Against Torture claims.
[24] In 2003, when the INS was reorganized into the Department of Homeland Security, these regulations were duplicated to apply to the EOIR. 68 Fed. Reg. 9824, 9834, 9846 (Feb. 28, 2003); 8 C.F.R. § 1208.16–18. Since the regulations at 8 C.F.R. § 1208 are identical to the regulations at 8 C.F.R. § 208, this report only cites the § 208 regulations.
[25] 64 Fed. Reg. 9435, 9437 (Feb. 26, 1999) (codified at 22 C.F.R. § 95.1-4).
[26] The Central Intelligence Agency may have some internal policy guidelines concerning diplomatic assurances in the torture context. *See* Dana Priest, *CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, Washington Post, Mar. 17, 2005, at A1.
[27] 8 C.F.R. §§ 208.17, 208.18(d).
[28] U.S. Dep't of State, Second Periodic Report of the United States of America to the [UN] Committee Against Torture ¶ 35 (May 6, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm (last visited May 16, 2005).

however, different procedures may apply under U.S. law to certain noncitizens seeking relief under the Convention Against Torture. The first is where the noncitizen is subject to expedited removal on security-related grounds.[29] The second is when the noncitizen is subject to certain alien terrorist removal procedures.[30] The third is where the Secretary of State seeks assurances from the noncitizen's home country that the noncitizen will not be tortured upon return. These three situations are discussed in more detail below.

4. U.S. Immigration Procedures

A. Normal Inspection Procedures

When a noncitizen of the United States arrives at a U.S. port, immigration officers conduct an inspection.[31] The noncitizen must present required documents to the inspector and establish his admissibility to the satisfaction of the inspector. Inspectors have the authority to question each entrant, with or without oath; to bar passage and to detain those whose eligibility seems debatable; and to arrest persons attempting improper entry. If the immigrant inspector is satisfied that the applicant is entitled to enter, the inspector admits the applicant to the United States. If the noncitizen's admissibility is in doubt or further inquiry is indicated, the applicant may be detained pending a final determination of admissibility by an immigration judge. The immigration judge conducts a removal proceeding to determine if the noncitizen is admissible or deportable.

B. Normal Removal Procedures[32]

Removal proceedings are considered civil, not criminal actions, and deportation is not punishment.[33] Noncitizens in removal proceedings thus have fewer due process protections than do individuals in criminal proceedings.[34] For example, noncitizens in U.S. immigration proceedings do not have a right to an appointed attorney or a jury trial. Noncitizens do have the right to hire a lawyer at their own expense to represent them in immigration proceedings.[35]

The immigration judge must determine whether the noncitizen is inadmissible or deportable. There are several steps in this process. First, the U.S. government has the burden to establish the court's jurisdiction by proving that the person in court is an "alien," meaning not a citizen of the United States.[36]

Second, the noncitizen must establish that he or she is entitled to be admitted. A noncitizen seeking transit through the United States must show that he or she is "clearly and beyond doubt

[29] INA § 235(c), 8 U.S.C. § 1225(c).
[30] INA §§ 501-07, 8 U.S.C. § 1531-37.
[31] *See generally* 2 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 12.07 (rev. ed. 2005).
[32] *See generally* 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 64.03 (rev. ed. 2005).
[33] INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
[34] *Id.*
[35] INA § 292, 8 U.S.C. § 1362.
[36] INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

entitled to be admitted and is not inadmissible."[37] This high standard is even higher that the U.S. government's burden of proof in criminal proceedings. In a criminal case, the prosecution must show that the accused is guilty "beyond a reasonable doubt." Noncitizens may be inadmissible for a variety of reasons, including ill-health, prior criminal convictions, or suspected terrorist activities.[38]

Third, if the noncitizen establishes admission, the government must affirmatively establish, by clear and convincing evidence, that the noncitizen is deportable.[39] Deportability must be based upon reasonable, substantial, and probative evidence.[40] There are many grounds of deportability, including one for engaging in "terrorist activities.[41]

Fourth, the noncitizen may attempt to establish a ground for relief from deportation. To be eligible for relief under the Convention Against Torture, the individual must show that it is more likely than that he will be tortured upon return to the proposed country of removal.[42]

Finally, if the immigration judge decides that the noncitizen is deportable, he or she must inform the individual of the opportunity to appeal the decision.[43]

C. Expedited Removal Procedures[44]

In addition to the normal removal procedures described above, "expedited" removal procedures are available in two circumstances.[45] The first is when a noncitizen lacks the necessary documentation or has used fraud or misrepresentation in obtaining documentation.[46] We call this INA § 235(b) expedited removal. The second is for a variety of security-related grounds.[47] We call this INA § 235(c) expedited removal.

It is unclear whether Mr. Arar went through any kind of expedited removal procedures. If he did, it would have been expedited removal under INA § 235(c), for security reasons. We say this because nothing indicates that there was anything wrong with Mr. Arar's documents that would have made him subject to expedited removal under INA § 235(b). We start with a discussion of INA § 235(b) expedited removal procedures, however, because those procedures differ from the procedures for expedited removal under INA § 235(c).

(1) Expedited Removal under INA § 235(b)

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[37] INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A).
[38] The grounds of inadmissibility are set forth in INA § 212, 8 U.S.C. § 1182. *See generally* 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure ch. 63 (rev. ed. 2005).
[39] INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).
[40] *Id.*
[41] INA § 237(a)(4), 8 U.S.C. § 1227(a)(4).
[42] 8 C.F.R. § 208.16(c)(2).
[43] INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4).
[44] *See generally* 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 64.06 (rev. ed. 2005).
[45] INA § 235(b), (c), 8 U.S.C. § 1225(b), (c).
[46] INA § 235(b), 8 U.S.C. § 1225(b).
[47] INA § 235(c), 8 U.S.C. § 1225(c).

If an INS inspector determines that the individual is subject to expedited removal under INA § 235(b) based on fraud, misrepresentation, or a lack of immigration documents, the inspector must take a sworn statement from the noncitizen.[48] In taking this sworn statement, the inspection officer must ask the noncitizen whether he has any fear of returning to his home country. If the noncitizen does not express a fear of return or a desire to apply for asylum, the individual may be ordered removed without further process. The order becomes final after review and approval by a supervisory immigration officer.[49] An immigration judge cannot review such an order.[50]

By contrast, if a person in INA § 235(b) expedited removal proceedings expresses a fear of persecution or torture, the immigration officer cannot immediately proceed with a removal order but instead must refer the noncitizen to a "credible fear" interview with an asylum officer.[51] For this procedure, noncitizens have the right to a lawyer at their own expense.[52] The asylum officer must determine whether the asylum seeker has a "credible fear," meaning "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."[53] The asylum officer will also determine whether the person has a credible fear of torture for purposes of consideration for protection under Article 3 of the Convention Against Torture.[54]

If the asylum officer finds a credible fear of persecution or torture, the officer refers the asylum seeker into regular removal proceedings.[55] The person is no longer subject to expedited removal proceedings and may have their applications for asylum and related protections heard by an immigration judge in regular removal proceedings.

If a credible fear of persecution or torture is not found, the applicant may request a review by an immigration judge of the negative credible fear determination.[56] This review may occur within 24 hours[57] and may be conducted by telephone conference rather than in person.[58] The immigration judge must determine whether there is a "significant possibility," taking into account the credibility of the noncitizen's statements and other facts, that the individual could establish eligibility for asylum or relief under the Convention Against Torture.[59] If the immigration judge concludes that the noncitizen has a credible fear of persecution or torture, the judge refers the asylum seeker into regular removal proceedings.[60] If the immigration judge concludes that a noncitizen does not have a credible fear of persecution or torture, the judge must

[48] INA § 235(b)(1), 8 U.S.C. § 1225(b)(1); 8 C.F.R. § 208.30.
[49] INA § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I).
[50] *Id*.
[51] INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii).
[52] INA § 235(b)(1)(B)(iv), 8 U.S.C. § 1225(b)(1)(B)(iv).
[53] INA § 235(b)(I)(B)(v), 8 U.S.C. § 1225(b)(I)(B)(v).
[54] 8 C.F.R. § 208.30(e)(3).
[55] 8 C.F.R. §§ 208.30(f), 235.3(b)(4).
[56] INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III).
[57] INA § 235(b)(1)(B)(iii)(III), 8 U.S. C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(e).
[58] 8 C.F.R. § 1003.25(c).
[59] 8 C.F.R. § 1003.42(d).
[60] 8 C.F.R. § 1003.42(f).

affirm the asylum officer's determination and remand the case for execution of the expedited removal order.[61]

(2) Expedited Removal under INA § 235(c)

INA § 235(c) states that "[i]f an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible … [for a security-related ground], the officer or judge shall … order the alien removed."[62] One security-related ground is when "the Attorney General knows, or has reasonable ground to believe, [that the alien] is engaged in or is likely to engage after entry in any terrorist activity."[63] The Attorney General must review this order. If the Attorney General finds that the noncitizen is inadmissible for a security-related ground, and that "disclosure of the information would be prejudicial to the public interest, safety, or security," he may "order the alien removed."[64] The Attorney General's decision is not reviewable by an immigration judge.[65]

INA § 235(c) does not explicitly provide for relief under the Convention Against Torture, but the regulations do.[66] The regulations state that the immigration agency "shall not execute a removal order under [INA § 235(c)] … under circumstances that violate … Article 3 of the Convention Against Torture."[67] The regulations, however, do not specifically set forth the procedures for considering Convention Against Torture claims in the INA § 235(c) expedited removal context. They simply state that the immigration agency will "assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3."[68] The regulations add that the normal asylum procedures "shall not apply."[69] Thus, it is unclear what procedures the U.S. immigration agency had to follow to consider Mr. Arar's request to avoid being tortured.

D. Alien Terrorist Removal Procedures[70]

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[71] established special removal procedures for "alien terrorists."[72] AEDPA creates a special removal court consisting of five federal district court judges. They are appointed by the Chief Justice of the United States.[73]

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[61] *Id.*
[62] INA § 235(c)(1), 8 U.S.C. § 1225(c)(1).
[63] INA § 212(a)(3)(B)(i)(II), 8 U.S.C. § 1182(a)(3)(B)(i)(II).
[64] INA § 235(c)(2), 8 U.S.C. § 1225(c)(2).
[65] INA § 235(c)(2)(B), 8 U.S.C. § 1225(c)(2)(B).
[66] 8 C.F.R. §§ 208.18(d), 235.8(b)(4).
[67] 8 C.F.R. § 235.8(b)(4).
[68] 8 C.F.R. §§ 208.18(d), 235.8(b)(4).
[69] 8 C.F.R. §§ 208.18(d), 235.8(b)(4).
[70] *See generally* 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 64.11 (rev. ed. 2005).
[71] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258 (enacting a new Title V within the INA), *as amended by* the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 354, 110 Stat. 3009, 3009-641).
[72] INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).
[73] INA § 502(a), 8 U.S.C. § 1532(a).

The Attorney General begins these special removal proceedings by filing an application with the removal court. The application must establish probable cause that the individual is an alien terrorist, is physically present in the United States, and that the standard removal procedures would pose a risk to national security.[74] A single judge on the removal court determines whether to grant the application to hold the removal proceeding.

This special removal proceeding shares many similarities with a criminal trial. It is open to the public.[75] The noncitizen has a right to representation by counsel and a right to appointed counsel if he cannot afford one.[76] The noncitizen can introduce evidence, examine and cross-examine witnesses, and request subpoenas for witnesses and documents.[77] The Federal Rules of Evidence do not apply,[78] however, and evidence may be withheld if disclosure would endanger national security.[79]

The government must justify removal by a preponderance of the evidence.[80] This is a lower burden on the government than in a normal removal proceedings. Both the government and the noncitizen may appeal the court's decision to the U.S. Court of Appeals for the D.C. Circuit.[81] Following a decision by the D.C. Circuit, either party may ask the U.S. Supreme Court to review the case.[82]

The immigration statute does not explicitly state whether "alien terrorists" in these special proceedings may apply for relief under the Convention Against Torture. In any event, the United States did not invoke these procedures against Mr. Arar. Indeed, in the nine years since their enactment the United States has never used the special removal proceedings against alien terrorists.

E. Diplomatic Assurances Obtained by the Secretary of State

The Secretary of State may seek assurances from the country to which the noncitizen would be removed that the noncitizen would not be tortured upon return. In evaluating such assurances, the State Department uses a "more likely than not" test, *i.e.*, is it more likely than not that the individual will be tortured in the country to which he is being returned.[83]

If the State Department provides such assurances, "the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against

[74] INA § 503(a)(1), 8 U.S.C. § 1533(a)(1).
[75] INA § 504(a)(2), 8 U.S.C. § 1534(a)(2).
[76] INA § 504(c)(1), 8 U.S.C. § 1534(c)(1).
[77] INA § 504(c)-(d), 8 U.S.C. § 1534(c)-(d).
[78] INA § 504(h), 8 U.S.C. § 1534(h).
[79] INA § 504(e)(1)(A), 8 U.S.C. § 1534(e)(1)(A).
[80] INA § 504(g), 8 U.S.C. § 1534(g).
[81] INA § 505(c), 8 U.S.C. § 1535(c).
[82] INA § 505(d), 8 U.S.C. § 1535(d).
[83] Al-Anazi v. Bush, Civil Action No. 05-0345 (JDB), 2005 U.S. Dist. LEXIS 6803, at *9 (D.D.C. Apr. 21, 2005) (citing declaration of State Department official Pierre-Richard Prosper).

Torture."[84] It is unclear whether the Attorney General is bound by the "more likely than not" standard, as this may apply only to determinations by an immigration judge.[85] The Attorney General's decision is not reviewable by an immigration judge or the Board of Immigration Appeals.[86]

The United States has acknowledged that it has removed several individuals to their home countries since the September 11 terrorist attacks based on diplomatic assurances from the receiving country that they would not be tortured.[87]

5. Legal Analysis

A. Mr. Arar's Rights Under the Convention Against Torture

The Convention Against Torture does not contain any exceptions to the non-refoulement provision. Nor did the U.S. Senate endorse any exceptions to the non-refoulement provision when it ratified the Convention Against Torture. Thus, Maher Arar's removal to Syria violated the Convention as adopted by the United States if it was more likely than not that he would be tortured in Syria.

Syria's record of torture is well known. President Bush has described Syria's "legacy of torture, oppression, misery, and ruin."[88] The State Department's annual human rights report for 2002, the year the United States sent Mr. Arar to Syria, stated that "there was credible evidence that [Syrian] security forces continued to use torture," and that torture methods included "administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine."[89]

Mr. Arar repeatedly told U.S. agents that he feared torture if he was removed to Syria.[90] Mr. Arar explained that he left Syria before doing his military service and that the Syrian government accused a family member of being affiliated with a terrorist organization called the Muslim

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[84] 8 C.F.R. § 208.18(c)(2). Although the regulations continue to state that the U.S. Attorney General will consult with the U.S. State Department concerning the reliability of diplomatic assurances, in all likelihood the Department of Homeland Security (DHS) has taken over this role since the transfer of the immigration agency from the Justice Department to the DHS. *See* U.S. Dep't of State, Second Periodic Report of the United States of America to the [UN] Committee Against Torture ¶ 30 (May 6, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm (last visited May 16, 2005).

[85] 8 C.F.R. § 208.16(c)(4).

[86] 8 C.F.R. § 208.18(c)(3).

[87] U.S. Dep't of State, Second Periodic Report of the United States of America to the [UN] Committee Against Torture ¶ 30 (May 6, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm (last visited May 16, 2005).

[88] *See* BBC News, Excerpts from speech by U.S. President George W. Bush to the National Endowment for Democracy (Nov. 6, 2003), *available at* http://news.bbc.co.uk/2/hi/americas/3248639.stm (last visited Apr. 30, 2005).

[89] U.S. Department of State, Country Reports on Human Rights Practices, Syria, 2002 (Mar. 2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm (last visited May 10, 2005).

[90] Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003, at 3, *at* http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf (last visited May 10, 2005).

Brotherhood.[91] Given Mr. Arar's particular situation and Syria's history of torture, it seems clear that Mr. Arar would be tortured if he was removed to Syria.

The United States may have sought assurances from Syria that Mr. Arar would not be tortured. However, it would be preposterous for the United States to even seek such assurances, given that Mr. Arar is a Canadian citizen, has lived in Canada since about 1987,[92] and the overwhelming evidence suggested that he would be tortured in Syria. Even if such assurances were obtained from the Syrian government, they could not have been taken seriously, given Syria's history of torture.

B. Mr. Arar's Procedural Rights in U.S. Removal Proceedings

The INS had several procedural options available to it in determining Mr. Arar's admissibility to the United States: normal removal procedures, expedited removal procedures for security risks, and alien terrorist removal procedures.[93] Since Mr. Arar was not afforded any trial-type procedures, the INS may have applied expedited removal proceedings. In expedited removal proceedings under INA § 235(c), the standard for justifying removal for alleged security risks is quite low. The Attorney General needs only a "reasonable ground to believe [that the noncitizen] is engaged in or is likely to engage … in any terrorist activity."[94]

Mr. Arar has stated that while he was detained in the United States he was given a document indicating that he was inadmissible under INA "Section 235C" [sic] because he was supposedly a member of Al Qaeda.[95] Unfortunately, we do not know the factual basis for that allegation. Even if Mr. Arar had been able to challenge that allegation in court, a U.S. court would probably have upheld it as legal. Under a U.S. Supreme Court case called *Kleindienst v. Mandel*, immigration authorities only need a "facially legitimate and bona fide" reason to support a decision that someone is inadmissible.[96] It is likely that U.S. immigration authorities could meet this low test in justifying Mr. Arar's removal under INA § 235(c).

That does not end the matter, however. Even if U.S. immigration authorities followed proper procedures in finding Mr. Arar deportable under INA § 235(c), their own regulations prevented

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[91] *Id.*

[92] http://www.maherarar.ca/ (last visited May 10, 2005).

[93] Another procedural option is administrative removal. *See* 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 64.08 (rev. ed. 2005). Administrative removal applies to noncitizens convicted of an "aggravated felony," an immigration term of art defined at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). Mr. Arar would not be eligible for administrative removal since he has not been convicted of an aggravated felony.

[94] INA § 212(a)(3)(B)(i)(II), 8 U.S.C. § 1182(a)(3)(B)(i)(II).

[95] Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003, at 3, *at* http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf (last visited May 10, 2005). The State Department has corroborated this fact. U.S. Dep't of State, *U.S. Views Concerning Syrian Release of Mr. Maher Arar* (Oct. 6, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/24965.htm (last visited May 11, 2005) ("Mr. Maher Arar was detained in New York on September 26, 2002 by United States immigration and law enforcement authorities after his name appeared on an immigration watch list. He was subsequently refused entry into the United States under Section 235C [sic] of the United States Immigration and Nationality Act based on information in the possession of United States law enforcement officials.").

[96] 408 U.S. 753, 769 (1972).

them from actually deporting him to Syria if he faced a risk of being tortured there. Thus, U.S. immigration authorities violated Article 3 of the Convention Against Torture by rendering Mr. Arar to Syria.[97]

C. Mr. Arar's Right to be Deported to Canada and not Syria

The U.S. immigration statute specifies the countries to which a noncitizen may be removed.[98] Noncitizens arriving at the United States who are placed in normal removal proceedings are to be removed to the country from which they came.[99] In Mr. Arar's case, that would have been to Switzerland, where his flight to New York had originated. Because Mr. Arar was not placed in a normal removal proceeding, however, he did not have that choice. Nevertheless, noncitizens like Mr. Arar who are not put in normal removal proceedings may designate one country to which they want to be removed.[100] The immigration agency "shall" remove the noncitizen to that country,[101] except in four circumstances: (1) the noncitizen fails to designate a country promptly; (2) the foreign county does not tell the United States within 30 days if it will take the individual; (3) the foreign country is not willing to accept the noncitizen; or (4) the immigration agency decides that removing the noncitizen to that country would prejudice the United States.[102] If any of those exceptions apply, the immigration agency may remove the noncitizen to another country in which he is a citizen.[103]

Mr. Arar has stated that he told U.S. immigration authorities that he wanted to be removed to Canada.[104] We do not have enough facts to determine whether one of the four exceptions applied to allow the United States to deport Mr. Arar to Syria rather than Canada. Even if one of the exceptions arguably gave the United States discretion to remove Mr. Arar to a country other than Canada, Article 3 of the Convention Against Torture should have prevented the U.S. government from deporting Mr. Arar to Syria, where he faced a known and serious risk of torture.

D. Possible Remedies for Mr. Arar

Mr. Arar has filed a civil lawsuit in the United States against U.S. officials.[105] His lawyers have alleged several violations of U.S. law. The U.S. government is vigorously defending itself against the allegations. It remains to be seen whether Mr. Arar will prevail. In the meantime, the following discussion outlines Mr. Arar's claims.

(1) Due Process

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[97] 8 C.F.R. § 235.8(b)(4).
[98] INA § 241(b), 8 U.S.C. § 1231(b).
[99] INA § 241(b)(1)(A), 8 U.S.C. § 1231(b)(1)(A).
[100] INA § 241(b)(2), 8 U.S.C. § 1231(b)(2).
[101] INA § 241(b)(2)(A)(ii), 8 U.S.C. § 1231(b)(2)(A)(ii).
[102] INA § 241(b)(2)(C), 8 U.S.C. § 1231(b)(2)(C).
[103] INA § 241(b)(2)(D), 8 U.S.C. § 1231(b)(2)(D).
[104] Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003, at 3, *at* http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf (last visited May 10, 2005).
[105] Arar v. Ashcroft, No. 04-CV-0249-DGT-VVP (E.D.N.Y. filed Jan. 24, 2004). Many of the litigation documents are at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377 (last visited May 10, 2005).

The U.S. Constitution states that no person shall be deprived of life, liberty, or property without due process of law.[106] Mr. Arar claims that the U.S. government violated his due process rights by detaining him without access to an attorney or the court system, both in the United States before being rendered and while detained by the Syrian government, whose actions were complicit with the United States. He also alleges that the U.S. immigration officials who carried out his deportation violated his right to due process by recklessly subjecting him to torture at the hands of a foreign government that they had every reason to believe would carry out abusive interrogations.

(2) Torture Victim Protection Act

The Torture Victim Protection Act allows a torture victim to sue his foreign torturer in U.S. court.[107] Mr. Arar's claim under the Torture Victim Protection Act against U.S. officials is based on their complicity in bringing about the torture he suffered in Syria.

(3) Alien Tort Claims Act

A 1789 law allows a noncitizen to sue in U.S. court for a tort committed "in violation of the law of nations."[108] U.S. courts have held that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights and thus accords a noncitizen jurisdiction to sue in federal court.[109] The Supreme Court has held that the Alien Tort Claims Act is solely a grant of jurisdiction to U.S. courts and that a cause of action must be found elsewhere.[110] Nevertheless, depending on the facts, this statute may give Mr. Arar another jurisdictional hook to sue in U.S. courts over his unlawful detention and torture.

6. Recommendations

Canada and the United States have taken certain steps to try to prevent another Canadian from being involuntarily rendered to a third country to be tortured. In January 2004 U.S. Secretary of State Colin Powell and Canadian Minister of Foreign Affairs William Graham exchanged letters expressing the two countries' understanding concerning removals of each other's nationals to third countries.[111] The letters provide for notification and expeditious consultation between the two countries of any intended removal of a citizen of the other country to a third country. In announcing the exchange of letters Foreign Affairs Minister Graham hailed the understanding as "an unprecedented step."[112]

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[106] U.S. Const. amend. V.
[107] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note).
[108] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350).
[109] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
[110] Sosa v. Alvarez-Machain, __ U.S. __, 124 S. Ct. 2739, 2754-55 (2004).
[111] Letters between U.S. Secretary of State Colin Powell and Canadian Minister of Foreign Affairs William Graham (Jan. 13, 2004) (copies on file with author).
[112] *Id.*

Unfortunately, the understanding does not go nearly far enough. It only provides for notification and consultation; it does not require Canada to consent before the United States can remove a Canadian to a third country. For example, Mr. Arar was granted access to a Canadian consular official while he was detained in the United States.[113] A report by the Royal Canadian Mounted Police also shows that U.S. and Canadian officials consulted about Mr. Arar while he was detained in the United States (although on the basis of the publicly available record, it is difficult to assess whether they consulted about deporting him to Syria).[114] Yet despite such notification and consultation, Mr. Arar was involuntarily removed to Syria. The understanding does not necessarily prevent a similar situation from arising again.

Canada and the United States should negotiate a stronger understanding about involuntary removals of each other's nationals to a third country. The United States should agree not to remove a Canadian citizen to a third country unless Canada explicitly agrees in advance, in writing. If such an understanding cannot be reached, then at the very least the United States should agree that if a Canadian expresses a fear of torture or persecution by being removed to a third country, the United States will not remove that person until after he or she applies for asylum or relief under the Convention Against Torture before a U.S. immigration judge, and the judge has ruled on that claim. (Canada should agree to similar measures for U.S. citizens it may want to remove to a third country.) As Mr. Arar's case shows, the current procedures concerning expedited removal of suspected terrorists from the United States are too vague to guarantee compliance with Article 3 of the Convention Against Torture.

Mr. Arar's case also shows the inadequacy of diplomatic assurances. As the accompanying Human Rights report for this commission indicates in more detail, diplomatic assurances are not effective, both legally and as a practical matter. Both Canada and the United States should abolish diplomatic assurances in Convention Against Torture cases.

Conclusion

The U.S. immigration statute gives great authority and discretion to U.S. officials in deciding who to remove from the United States and how. Such authority, however, is not unfettered. Article 3 of the Convention Against Torture prohibits U.S. officials from sending a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture. In my view, ample evidence existed that Syrian officials would torture Mr. Arar if he was sent there. Moreover, Mr. Arar told U.S. officials he feared being tortured if sent to Syria. For these reasons, it appears that U.S. government officials violated Article 3 of the Convention Against Torture by rendering Mr. Arar to Syria.

[113] Maher Arar: Chronology of Events: September 26, 2002 to October 5, 2003, at 3, *at* http://www.maherarar.ca/cms/images/uploads/mahersstory.pdf (last visited May 10, 2005).
[114] Final Report by Brian S. Garvie, Chief Superintendent, Royal Canadian Mounted Police, File # 2003A-5075 (undated), *available at* http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377 (last visited May 10, 2005).