Taking Remedies Seriously: The Normative Implications of Risking Torture

TANUSRI PRASANNA*

Under the international legal prohibition on torture, states must refrain from deporting persons to countries where there is a substantial risk that they would be tortured. But why and to what extent should the otherwise lawful immigration powers of a state be delimited by the potentially illegal act of another state? This Article contends that current scholarship fails to provide satisfactory answers to these questions and develops a new way to approach this puzzle. It offers a risk-differentiated framework of analysis that justifies the proscription of transfers presenting the risk of torture based on an examination of the responsibility of the transferring state through criminal and tort doctrines. This Article provides a means to identify the threshold level of risk at which the proscription is justifiably triggered through a comparative assessment of the standards of risk in international and U.S. domestic law. The Article then employs the normative and conceptual insights gained from this inquiry to assess whether the proscription can be justifiably regarded as inherent in a person’s right not to be tortured vis-à-vis the transferring state.

* Visiting Research Fellow, Columbia Law School; Associate in Law, Columbia Law School, 2008–2009 & 2010–2011; LL.M. Harvard Law School, 2004; B.C.L. Oxford University, 2003. I would like to extend a special thanks to John Finnis for his patient guidance and support. I am also extremely grateful to the following people for their insightful comments and helpful advice: Fahim Ahmed, Samuel Bray, Jessica Clarke, Erin Delaney, George Fletcher, Kent Greenawalt, Zachary Kaufman, Joseph Landau, Henry Monaghan, Anthony O’Rourke, Elizabeth Sepper, participants of the Associates’ and Fellows’ Workshop at Columbia Law School, the Law and Society Association Annual Meeting (June 2011) and the American Political Science Association Annual Meeting (September 2011).
INTRODUCTION ........................................................................................................373
I. DECONSTRUCTING THE RIGHT NOT TO BE TORTURED ...............377
   A. Contextualizing the Proscription of Torture-Risk Transfers in International Law ........................................377
      1. An Interests-Based View of the Human Right not to Be Tortured .........................................................377
      2. Legal Formulations of the Proscription of Transfers to the Risk of Torture ........................................380
   B. Current Conceptualizations of the Proscription of Transfers to the Risk of Torture ............................380
      1. The Implied Duty View ..........................................................................................................................381
      2. The Positive Duty View ..........................................................................................................................384
   C. Reconceptualizing the Proscription of Transfers to the Risk of Torture ....................................................388
II. A RISK-DIFFERENTIATED ANALYSIS OF THE PROSCRIPTION OF TRANSFERS TO THE RISK OF TORTURE ............................390
   A. Differences in the Articulation of the Standard of Risk in Legal Formulations of the Proscription of Transfers to Torture ............................................................................................................391
      1. The Standards of Risk in Current Law ........................................................................................................391
         a. The “More Likely Than Not” Standard—The U.S. Position Under Article 3 of the Convention Against Torture ..........................................................392
         c. The “Danger of Being Subjected to Torture” Standard—Article 3 of the Convention Against Torture ....395
      2. A Generalized Account of the Level of Risk of Being Subjected to Torture ..........................................398
   B. A Risk-Differentiated View of Transfers to the Risk of Torture ..........................................................................................................................399
      1. Methodology: A Historic Responsibility View of the Proscription of Transfers to Torture .........399
      2. Intrinsic and Instrumental Aspects of the Proscription of Transfers to the Risk of Torture ..........400
         a. Intrinsically Proscribed Transfers .........................................................401
b. Instrumentally Proscribed Transfers to Torture .................................................. 408
   i. The Inadequacy of Complicity-Based Justifications for “Real Risk” Transfers ..... 409
   ii. Justifying Responsibility for Reckless Transfers ........................................... 410
   iii. Identifying the Threshold Level of Risk from the Perspective of Historic Responsibility ................................................................. 413

III. THE PROSPECTIVE REMEDIAL VIEW OF THE PROSCRIPTION OF TRANSFERS TO TORTURE ................................................................. 415
   A. Justifying the Proscription of Transfers to the Real Risk of Torture in the Framework of Prospective Remedies .................................................. 415
       1. Prospective Relief for Harm to the Person ................. 416
       2. The Justifiability of Injunctive Relief Against Transfers Presenting a Real Risk of Torture .......... 417
          a. Nature of the Harm ........................................ 417
          b. Risk of Harm by a Third Party ......................... 418
   B. Determining the Level of Risk: “Unjustifiable” Risk and the Relevance of Fault .......................................................... 420
       1. Quantitative Unjustifiability: Precautionary Measures to Counter the Risk of Torture ...... 421
       2. Qualitative Unjustifiability: The Relevance of Fault ........................................ 422

IV. RECONSTRUCTING THE RIGHT NOT TO BE TORTURED ............... 426
   A. Classifying Obligations Relating to the Right not to Be Tortured ........................................ 427
       2. Rights-Implementing Obligations Generated by the Prohibition of Torture .................. 430
   B. Classifying the Proscription of Transfers to the Risk of Torture ........................................ 432
       1. Intrinsically Wrongful Transfers ................. 432
       2. Instrumentally Wrongful Transfers ................. 433
   C. Normative Implications of the Classification Mechanism ........................................ 436
1. The Author deliberately employs this hypothetical to steer clear of complexities specific to any given real life case that are unrelated to this Article. For perhaps the most well-known example in this context, see Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc). Although Arar’s case was treated by the courts as one of extraordinary rendition, he was technically transferred under U.S. immigration law provisions. See Erin Craddock, Note, Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions “Cure” the Due Process Deficiencies in U.S. Removal Proceedings?, 93 CORNELL L. REV. 621, 636 (2008); see also infra notes 161-164 and accompanying text.


3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or
This Article contends that the question of whether the proscription of transfers presenting the risk of torture, or “torture-risk transfers,” is normatively justifiable is conceptually distinct from the question of whether this proscription is “inherent” in a person’s right not to be tortured vis-à-vis the transferring state. However, this distinction has been clouded in law and scholarship by current conceptualizations of the obligation in two ways. First, such conceptualizations display gaps in reasoning when analyzing the relationship between the proscription of torture-risk transfers and prohibition of torture in international human rights instruments. Second, such conceptualizations also contain unsubstantiated assumptions about the nature of state responsibility in question when a state seeks to initiate transfers that expose the transferee to the real and foreseeable risk of torture in the receiving state.

This Article addresses both deficiencies by providing a normative justification for the proscription of such transfers that accurately captures the nature of the transferring state’s responsibility. It also identifies the appropriate threshold level of risk at which the


proscription should be triggered. This justificatory account is based on recognizing that the human right not to be tortured protects against a particular kind of wrong—harm to bodily integrity through acts that would constitute crimes and torts in all viable legal systems. By conceptualizing torture in this manner, this Article constructs a risk-differentiated framework of analysis based on comparing current formulations of the proscription of transfers presenting the risk of torture in international human rights instruments and U.S. immigration law.

This analysis reveals that the proscription operates at two levels. First, it proscribes intrinsically wrongful transfers, including transfers conducted for the purpose of exposing an individual to torture at the hands of the receiving state and transfers conducted with the knowledge that torture is virtually certain to occur in the receiving state, on the basis that the transferring state can be considered complicit in the torture itself. Second, it proscribes instrumentally wrongful transfers, including reckless transfers conducted when the transferring state is aware that a real risk of torture exists in the receiving state.

But even if the proscription of transfers to the risk of torture is normatively justifiable, is it inherent in the right not to be tortured vis-à-vis the transferring state? To conduct this inquiry, this Article draws from the classification of “rights-implementing” rules in U.S. constitutional jurisprudence to develop a methodology for classifying obligations imposed by the prohibition of torture in international human rights instruments as either “inherent” to or “affiliated” with

---

6. For a comparison of standards of risk in current law, see discussion infra Part II.A.
7. See infra notes 19–21 and accompanying text.
8. See sources cited supra note 3; discussion infra Parts I.A.2, II.A.
9. The Foreign Affairs Reform and Restructuring Act is the domestic legislation incorporating the obligations of the United States under Article 3 of the Torture Convention. See infra notes 88–92 and accompanying text.
10. See discussion infra Part II.B.2.a. Note that “wrongful” in this context does not pertain to the legality of the form of transfer but refers to the intentions of the transferring state vis-à-vis the putative torture.
the right not to be tortured. A workable test for this assessment in the context of torture is whether responsibility for the torture may be justifiably attributed to the transferring state. This Article contends that the state is intrinsically responsible in the case of purposeful and high-risk transfers and instrumentally so at lower levels of risk. Thus, in both cases the proscription operates as a logical extension of the human right not to be tortured vis-à-vis the transferring state.

The Article is divided into four parts. Part I begins by explaining the deficiencies in current conceptualizations of the proscription of transfers presenting the risk of torture and sets up a two-fold normative inquiry. Part II addresses the first leg of the inquiry by constructing a risk-differentiated analysis of this proscription based on its formulations in the Convention Against Torture, in the doctrine of the European Court of Human Rights and in U.S. domestic law. Part III demonstrates that the instrumental aspect of the proscription operates in an analytically parallel manner to the operation of prospective remedies such as injunctions and prophylactic rules because it constrains otherwise lawful transfers based on the imposition of the risk of torture. The risk-differentiated remedial framework set up in Parts II and III enables the identification of the appropriate threshold of risk of torture among the existing standards in international and domestic law. Part IV takes up the second leg of the inquiry and examines whether a proscription of torture-risk transfers is inherent in a person’s human right not to be tortured vis-à-vis the transferring state. It also identifies the implications and limits of the mode of classification developed in this process.

Finally, two caveats are in order. To avoid any confusion caused by the adoption of different terminology across jurisdictions, the Article uses the term “transfer” to mean the otherwise lawful transfer of a person from the territory of a state within the framework of its immigration laws. Thus, extra-territorial transfers are beyond the scope of this Article. Second, the Article refers interchangeably throughout to “torture-risk transfers” or “transfers presenting the risk

13. This aspect of the Article has some bearings on the jurisprudential debate in U.S. constitutional law on the relationship between rights and remedies. See Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 922 n.263 (1999); infra note 342 and accompanying text.

14. In the United States, for example, under the current statutory framework, both admitted and non-admitted noncitizens are now subject to “removal.” See generally KEVIN R. JOHNSON, UNDERSTANDING IMMIGRATION LAW (2009).

15. See sources cited infra notes 227, 320.
of torture.” This formulation is neutral as to the level of risk since one of the aims of this Article is to identify the justifiable threshold level of risk.

I. DECONSTRUCTING THE RIGHT NOT TO BE TORTURED

This Part demonstrates that current conceptualizations of the legal formulations of the proscription of torture-risk transfers in international human rights instruments are unsuccessful in justifying the obligation, the level of risk at which the obligation is justifiably triggered or its relationship to the human right not to be tortured.

A. Contextualizing the Proscription of Torture-Risk Transfers in International Law

The starting point to evaluate the proscription of torture-risk transfers is the prohibition of torture in international human rights instruments, which generates multiple obligations for states.

1. An Interests-Based View of the Human Right not to Be Tortured

The prohibition of torture has been described as embodying one of the most fundamental human rights. The articulation of this right in international human rights instruments is considered to be


the codification of existing moral considerations into legal norms.\(^\text{18}\) These considerations relate to the intrinsic wrongness of torture, stemming from its adverse impact on fundamental interests variously identified as dignity,\(^\text{19}\) the capacity to feel pain and the interest in bodily integrity.\(^\text{20}\) All of these interests can be broadly defined as relating to the “humanity” of an individual.\(^\text{21}\) The existence of a “human right” not to be tortured can be justified on the basis that such interests are sufficiently important to ground a duty\(^\text{22}\) in the state\(^\text{23}\) to refrain from violating these fundamental aspects of what it means to be human. Given the importance and complexity of the interests upon which this right is based, and the many ways in which these interests “can be served or disserved,”\(^\text{24}\) they can ground a multiplicity of


\(^{19}\) See Torture Convention, supra note 3, pmbl. (recognizing that human rights “derive from the inherent dignity of the human person”).

\(^{20}\) David Sussman, What’s Wrong With Torture?, 33 PHIL. & PUB. AFF. 1, 6–7, 20–21 (2005) (suggesting that through the infliction of pain, the victim’s “suffering is experienced as not just something the torturer inflicts on me, but as something I do to myself, as a kind of self-betrayal worked through my body and its feelings”); see also Elaine Scarry, The Body in Pain 48–49 (1985) (suggesting that torture is morally wrong because of the self-disintegrating effect of intense pain on the victim).

\(^{21}\) John Gardner, What is Tort Law For? Part I: The Place of Corrective Justice, 30 L. & PHIL. 1, 46 (2010) (suggesting that the obligation not to torture is “an obligation of humanity”).


\(^{23}\) See Torture Convention, supra note 3, art. 1 (defining torture as “any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (emphasis added)); see also Edward Peters, Torture 3 (expanded ed. 1999) (defining torture as “torment inflicted by a public authority for ostensibly public purposes”).

\(^{24}\) See Waldron, supra note 22, at 212.
duties in relation to the right. Each duty in turn generates “successive waves of duties” that “back it up and root it firmly in the complex, messy reality of political life.”

This conception of rights being based on interests that generate cascading duties is reflected in the structure of international human rights instruments, which, in recognizing a human right, also set out the obligations of states that flow from the fact of an individual having a right. The prohibition of torture has developed in particularly rich detail through the provisions of the Convention Against Torture (the Torture Convention) and the interpretation of these provisions by the Committee Against Torture (CAT) as well as the jurisprudence of the European Court of Human Rights (ECtHR) interpreting Article 3 of the European Convention on Human Rights (ECHR).

In this context, this Article justifies the existence and identifies the content of the states’ obligation to refrain from transferring individuals to another state in which they would face a substantial
risk of being tortured.

2. Legal Formulations of the Proscription of Transfers to the Risk of Torture

Article 3 of the ECHR provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The ECtHR has held that Article 3 implies an obligation to refrain from deporting someone to another country when substantial grounds exist for believing that the person would face a real risk of being subjected to treatment that, if carried out in a country party to the ECHR, would be prohibited by Article 3.

The development of this obligation in case law relating to Article 3 of the ECHR inspired early drafts of what is now Article 3 of the Torture Convention. Paragraph 1 of Article 3 provides that "[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The next section reviews the ways in which this obligation has been analyzed in legal doctrine and scholarship relating to these formulations.

B. Current Conceptualizations of the Proscription of Transfers to the Risk of Torture

Two conceptualizations of the proscription of torture-risk transfers are identifiable in legal doctrine and in recent scholarship relating to these formulations in the contexts of the ECHR and the Torture Convention. According to one account, which this Article calls the "implied duty view," the proscription is implied in a person's right not to be tortured. The conflicting account, which this Article calls the "positive duty view," holds that the proscription stems

33. See ECHR, supra note 3, art. 3.
36. Torture Convention, supra note 3, art. 3.
from an independent positive duty of lesser normative weight than the duty to refrain from torture. Both these views are problematic: the first because it is under-theorized and lacks normative justification; the second because it is implicitly based on an unjustified assumption related to the transferring state’s role.

1. The Implied Duty View

The “implied duty view” emerges from the doctrine of the ECtHR providing that where “substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3 . . . [that article] implies an obligation not to deport the person in question to that country.”35 The court has held that transfers in such cases “would plainly be contrary to the spirit and intendment”38 of Article 3 and that, though not explicit, the obligation not to transfer under these circumstances is “inherent” in the article’s meaning.39

The ECtHR justifies the imposition of this obligation on the basis that ECHR Article 3 provides for an absolute40 prohibition of

---

38. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34–35 (1989) (suggesting that to hold otherwise “would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers . . . .”).
40. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65 (1978); see also Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 80, 100–103. The right against torture is also considered to be absolute in international law. See Torture Convention, supra note 3, art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) (recognizing that the prohibition of torture is a jus cogens norm); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“[T]he prohibition on torture is a peremptory norm or jus cogens.”); Lauterpacht & Bethlehem, supra note 3, at 151–52 (suggesting that the absolute prohibition of torture constitutes a rule of customary international law and may be jus cogens); Seth F. Kreimer, Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror, 6 U. PA. J. CONST. L. 278 (2003) (arguing that torture is unconstitutional in the United States); Jordan J. Paust, The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions, 43 VAL. U. L. REV. 1535 (2009). However, the absolutist position against torture has been challenged in law and philosophy. See, e.g., Alan Dershowitz, Tortured Reasoning, in TORTURE: A COLLECTION, supra note 32, at 257, 263;
torture.\textsuperscript{41} However, there is a conceptual gap in deriving the existence of the proscription of torture-risk transfers from the absoluteness of the torture prohibition. Why should the absoluteness of a person’s right not to be tortured \textit{qua} a particular state imply that the torture of the person at the hands of \textit{another} state delimits the exercise of the transferring state’s immigration powers?\textsuperscript{42} Another possible justification in ECtHR doctrine is provided in the proposition that a state’s responsibility under Article 3 of the ECHR is “engaged” in cases of transfers that create the risk of torture.\textsuperscript{43} The justification offered for this proposition is that no distinction may be drawn “between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State.”\textsuperscript{44}

This view is also endorsed in the context of Article 3 of the

\textsuperscript{41} See \textit{Saadi}, App. No. 37201/06, 49 Eur. H.R. Rep. at 758–59 (suggesting that Article 3 proscribes such transfers because the protection against the treatment prohibited by Article 3 is “absolute”); \textit{Sarah Joseph \textit{et al.}, Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies} 33 (2006) (suggesting that the proscription on transfers to torture is a “corollar[y]” flowing from the absolute nature of the right against torture); Battjes, \textit{supra} note 5, at 593 (“The ‘absolute’ nature of Article 3 serves to express the fundamentality of its ‘underlying value,’ and informs us about the scope of the provision: it covers expulsion cases.”).

\textsuperscript{42} As Finnis argues, the absoluteness of a state’s obligation not to engage in torture and other practices contrary to [ECHR Article 3] in no way entails that the person with such an absolute right has thereby the right not to be subjected to any form of treatment (e.g. deportation) that might have the . . . side effect of his being . . . tortured . . . by some other persons.


\textsuperscript{44} \textit{Saadi}, App. No. 37201/06, 49 Eur. H.R. Rep. at 761; \textit{Wouters, supra} note 3, at 243.
TAKING REMEDIES SERIOUSLY

Torture Convention. The seminal work on the drafting history of the Convention explains that under Article 3, “a State is not only responsible for what happens in its own territory, but it must also refrain from exposing an individual to serious risks outside its territory by handing him or her over to another State from which treatment contrary to the Convention might be expected.”

This Article contends that the jurisprudence of the ECHR and the Torture Convention’s drafting history correctly suggest that the proscription of transfers implicates the responsibility of the transferring state with respect to the putative torture. Mysteriously, rather than developing a justification for this proscription on these lines, doctrine in both frameworks clouds the issue of state responsibility in transfer cases by trying to derive state responsibility from the absoluteness of the torture prohibition.

A more nuanced position taken in scholarship explaining the ECtHR’s implied duty view argues that “the basis” for the proscription of torture-risk transfers is that “although placing an individual into the danger of torture does not violate the basic torture prohibition, it should because it offends the same values and defeats the prohibition’s purpose.” This construction correctly identifies that the proscription bars conduct that is “problematic because of its propen-

45. See BURGERS & DANIELIUS, supra note 35, at 125.
46. See Gianluca Gentili, European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-Treatment Is a Genuine Risk, 8 INT’L J. CONST. L. 311, 314 (2010); Richard B. Lillich, Notes & Comments, The Soering Case, 85 AM. J. INT’L L. 128, 141 (1991) (“[I]t is not readily apparent from its judgment when the extraditing state’s responsibility arises, or even why it should arise at all . . . .”); sources cited supra notes 40–41 and accompanying text. Gianluca Gentili concludes based on the decisions in Soering and Chahal that “[u]nder article 3, even those acts of torture or ill-treatment carried out by the receiving state remain the responsibility of the deporting state,” Gentili, supra (emphasis added) but does not provide or point to justifications for this proposition. Similarly in the context of the Torture Convention, see MANFRED NOWAK & ELIZABETH MCArTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 127 (2008) (“[A] State violates the absolute prohibition of torture not only if its own authorities subject a person to torture, but also if its authorities send a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.” (emphasis added)). See also Committee Against Torture, Gorki Ernesto Tapia Paez v. Sweden, Comm’n No. 39/1996, ¶ 145 U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997) (declaring that “the test of article 3 of the Convention is absolute” and that “w]henever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State.”).
47. Shah, supra note 4, at 605.
sity to create the risk of torture and ill-treatment” and thereby acknowledges the transferring state’s role in exposing the person to the risk of torture in the receiving state. However, on this account, as in the case of the positive duty view examined infra, the obligation not to conduct torture-risk transfers is presented as strictly “dis-similar” to the obligation not to torture and the link between the two obligations is justified solely by reference to the purpose of the torture prohibition. Thus, this account (as in the case of ECHR and Torture Convention jurisprudence discussed supra) also pays insufficient attention to the element of state responsibility both with respect to justifying the proscription of torture-risk transfers and its relationship to a person’s right not to be tortured qua the transferring state.

The next section examines the “positive duty” framework of justifying the proscription of torture-risk transfers which emerged in response to the ECtHR’s implied duty doctrine.

2. The Positive Duty View

A taxonomy of the various categories into which “the successive waves of duties” generated by human rights can be classified may be problematic in terms of undermining certain types of obligations generated by a right. However, the need to prioritize and classify duties generated by rights remains due to resource constraints and in order to resolve rights-based conflicts. A common approach to classifying duties generated by human rights has been to contend that such duties are either “negative,” requiring governments “to refrain from doing things,” or “positive,” requiring governments “to take positive steps such as protecting and providing.” Further, clas-

48. Id. at 610.
49. Id. at 606.
50. See discussion infra Part I.B.2.
51. Shah, supra note 4, at 605.
52. See Henry Shue, Basic Rights: Subsistence Affluence and U.S. Foreign Policy 52–53, 160 (2d ed. 1996) (urging against attempts precisely to carve out the types of duties generated by rights and stating that his own “tripartite of duties”—respect, protection and aid—was formulated not in furtherance of that aim but to highlight the necessity to “focus on the duties required to implement the right”).
53. See Waldron, supra note 22, at 220 (suggesting that in the context of conflicts of rights, “we want a way of expressing the fact that not all the duties generated by a given right have the same degree of importance.”).
sifying a duty as a positive obligation is normatively significant because positive obligations, unlike negative obligations, are in general “adjusted to the particular constraints” of states. Some states have attempted to reframe the proscription of torture-risk transfers in order to take advantage of this difference. Given the absolute nature of the torture prohibition, states have balked at the proposition that the proscription is an inherent aspect of a person’s right not to be tortured vis-à-vis the transferring state. To contest this extension, these states have sought to reframe the nature of the proscription in order to sever it from the obligation not to torture. They seek to negate the absoluteness of the proscription of torture-risk transfers by characterizing it as a protection obligation, an independent positive duty that can be balanced against competing considerations of national interest.

(Edward N. Zalta ed., Aug. 24 2010), http://plato.stanford.edu/archives/fall2010/entries/rights-human. For a definition of positive and negative duties, see SHUE, supra note 52, at 52. See also Frank B. Cross, The Error of Positive Rights, 48 UCLA L. REV. 857, 864 (2001) (arguing that the distinction between positive and negative rights is “an intuitive one” and that while the latter involves the “right to be free from government,” the former involves the “right to command government action”). In the context of duties relating to a right, the same theoretical difference holds true.

55. Radu Mares, Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations, 40 GEO. WASH. INT’L L. REV. 1157, 1202–03 (2009) (pointing out that the European Court of Human Rights has held that the scope of a positive obligation to investigate deaths or disappearances “will inevitably vary” because compliance with such obligations involves striking a “[f]air balance . . . between the general interest of the community and the interests of the individual”).

56. See sources cited supra note 40.

57. See, e.g., intervention by the United Kingdom in Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730, 757 (2008) (“[I]n the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State [is] then bound by a positive obligation of protection against torture implicitly derived from [Article] 3. Yet in the field of implied positive obligations the Court [has] accepted that the applicant’s rights must be weighed against the interests of the community as a whole.” (emphasis added)). For a theoretical account that endorses this argument and elaborates on it, see Battjes, supra note 5, at 602–03. Battjes contends that the obligation of non-refoulement under ECHR Article 3 is “structured in a way similar” to the duty to prevent or protect against torture in the domestic context by private individuals in cases “where state agents hand over the person concerned to a third party, although they foresee (or ought to foresee) that this third party will ill-treat him.” Id. at 602. Battjes argues that since “in domestic cases the Court conceives of the obligation concerned as a positive one[,] [e]nconsistency requires that the prohibition of refoulement can likewise be understood as a positive obligation.” Id. at 602–03. See also GREGOR NOLL, NEGOTIATING ASYLUM: THE EU ACQUIS, EXTRATERRITORIAL PROTECTION AND THE COMMON MARKET OF DEFLECTION 74 (2000) (suggesting that torture-risk transfers pose a “protection dilemma” for the state, in that it would have to choose between protecting the individual in question.
However, the positive duty view fails to capture an important aspect of the proscription of torture-risk transfers: that it is "primarily negative in nature" because it constrains the state from conducting the forcible transfer of a person in certain circumstances. Moreover, treating failures to prevent harm as normatively different from harm infliction has been justified by the fact that "it simply would not be fair to require persons to risk sacrificing their most important aims or interests in order to prevent a potential harm which they had no responsibility for initiating." Framing the proscription of transfers as a version of the positive duty to protect is therefore based on the assumption that the transferring state has nothing to do with the infliction of harm since it is conducted by another state. But the very issue that must be resolved in order to evaluate the proscription of torture-risk transfers, as well as the appropriate threshold of risk at which it is triggered, is whether such transfers constitute involvement in the torture by the receiving state. The positive duty framework is defi-

from ill treatment in the receiving state and exposing its own population to a potential security threat); Padmanabhan, supra note 5, at 104 (arguing that the “duty to protect provides the intellectual architecture for non-refoulement protection”).

58. See Wouters, supra note 3, at 29. Wouters suggests that the “the prohibition on refoulement also creates positive obligations for the State,” and that these positive obligations might consist of “less direct actions” such as “deprivation of basic rights and needs” that make it “virtually impossible” for the transferee to remain in the State, or the obligation to “allow people access to a protection status determination procedure.” Id. at 29. Notably this list excludes the proscription of torture-risk transfers, an obligation that Wouters calls “primarily negative.” See id.; see also Alistair Mowbray, The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights 3 (2004); Maarten den Heijer, Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights, 10 EUR. J. MIGRATION & L. 277, 290 (2008) (casting doubt on the positive duty view and pointing to scholarship identifying “the prohibition of refoulement as primarily a negative obligation—an obligation to abstain from expulsion”). Significantly, Mowbray does not include the proscription on transfers to torture in his list of positive obligations under ECHR Article 3. This list includes protective duties towards persons within the state, the provision of acceptable conditions of detention, the provision of adequate medical treatment for detainees and the duty to investigate allegations of serious ill treatment by state agents. Id. at 43–65.

59. See Joel Feinberg, Failures to Prevent Harm, in Harm to Others 167–68, 259 nn.44–45 (1984) (citing Heidi Malm, Good Samaritan Laws and the Concept of Personal Sovereignty 11 (1983) (typescript) (on file with the University of Arizona)) (emphasis added); Claire McIvor, Third Party Liability in Tort 9 (2006) (explaining the difference between misfeasance and nonfeasance as the “difference between, on the one hand, making things worse and, on the other, simply failing to make things better” (emphasis added)).
cient in its assumption of a factor that must instead be proven.

Furthermore, even if we accept for the sake of argument that the failure to protect is the appropriate framework, from a moral point of view, the assumption that it is therefore a “lesser” obligation that can be subject to national interest-based qualifications is problematic. Joel Feinberg’s account of the failure to prevent harm casts doubt on whether the distinction between inflicting harm and failing to prevent harm is necessarily morally significant. Some accounts that do assign moral significance to the distinction rest their analysis on a conception of personal autonomy. Feinberg points out that this reliance on autonomy still does not explain why the same issue of fairness does not arise in the case of obligations to refrain from imposing harms on others. On the other hand, Feinberg demonstrates that even if this distinction is always morally significant, failing to prevent harm can sometimes be the cause of harm itself, based on the principle that “when one has the power to affect events one way or another depending on one’s choice, then the way events are subsequently affected is a consequence of the way that power was exercised.” In this sense, if “nonprevention of a harm” can be considered “after the fact, the cause of that harm,” then recasting torture-risk transfers as a failure to prevent torture does not necessarily take that failure out of the framework of negative obligations because the state has the power to prevent the transfer.

That the distinction between failing to avoid torture and failing to prevent torture may lack moral significance in some cases or

---

60. FEINBERG, supra note 59, at 126–86.
61. Id. at 168. According to Feinberg:

A person can behave wrongly, and properly incur criminal liability in some cases, for allowing harm to occur to another party, even if we would not say afterward that he harmed him or caused harm to him by his omission. Simply not-preventing, in these cases, is enough, and its difference from causing (if any) is morally insignificant.

Id. at 172. Feinberg limits this view to cases where the “harm to be prevented is extreme (‘grave physical harm’) and the effort or risk required to prevent it is trivial (‘not unreasonable’).” Id. at 168.
62. Id. at 168.
63. Id.
64. Id. at 172.
65. Id. at 174.
66. Id. at 172.
67. See Shah, supra note 4, at 604 (arguing that states are under an obligation to ensure that torture does not occur to the extent that it is within their power).
that there are situations where the failure to prevent harm could justifiably be considered the cause of harm may also explain why the European Court of Human Rights did not address the United Kingdom’s “positive duty” argument in Saadi v. Italy.68 However, another explanation may rest upon the existence of Bad Samaritan statutes imposing the duty to aid, including the duty to prevent harm, in the legal codes of various European nations, statutes that find few counterparts in the Anglo-American tradition.69 So the view that both the obligation to avoid torture and the obligation to prevent torture could have, in certain cases, the same normative significance70 may have been obvious from the European Court’s perspective.

Thus, the positive duty framework does not appropriately capture significant aspects of the proscription of torture-risk transfers and begs a crucial question regarding the nature of the transferring state’s involvement. However, even viewing this proscription as one that imposes a negative duty71 “to refrain from transferring” does not resolve the question of whether it is normatively justifiable. Moreover, the negative duty view does not clarify the level of risk at which proscription of torture-risk transfers would be justifiable.

C.  
Reconceptualizing the Proscription of Transfers to the Risk of Torture

The foregoing discussion has shown that current law and

---

68. Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730, 757 (2008). See also A.S. (Libya) v. Sec’y of State for the Home Dep’t, [2008] EWCA (Civ.) 289, [64] (Eng.) ("We do not think that that jurisprudence [relating to positive obligations] is of any real relevance here. It is no doubt for that reason that it is not discussed in Saadi.").

69. FEINBERG, supra note 59, at 127.

70. For a positive duty account that nonetheless suggests that the proscription is inherent in the right against torture and therefore absolute, see Written Comments by Amnesty International Ltd. & Others, paras. 14–15, Ramzy v. Netherlands, App. 25424/05 (Eur. Ct. H.R. 2005).

71. See Battjes, supra note 5, at 600–01. While subscribing to the positive duty view, the Author points out that, in contrast to that position, the ECtHR has held that “the liability [under Article 3 is] incurred by the [transferring] State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” Id. at 601, n.63 (citing Soering v. United Kingdom, 161 Eur. Ct. H.R. 439 (ser. A) at 35–36 (1989)). Battjes contends that the “Court itself conceives of the prohibition of refoulement as a negative obligation, as it stresses the negative element as its core” and that “[l]iability for taking action is liability for a negative obligation.” Id. at 601. See also sources cited supra note 58.
scholarship do not provide convincing normative justifications for the proscription of torture-risk transfers. On the one hand, accounts that seek to justify the “implied duty” view put forth by the ECtHR have been clouded by their over-reliance on the absoluteness or overall purpose of the torture prohibition; on the other hand, accounts that resist the “implied duty” view go too far in reframing the proscription as a positive protection duty, severed from the negative right not to be tortured qua the transferring state. Further, the variations in the specification of the standard of risk among the different versions of the proscription in international and domestic law create the need to find a way to identify the threshold level of risk at which the proscription is justifiably triggered.

This Article contends that the issue of whether the proscription is justifiable can be undertaken as a conceptually distinct inquiry. The justificatory account provided in this Article is based on recognizing that the human right not to be tortured protects against the infliction of harm to bodily integrity. Torture involves a particular kind of wrong—i.e., injury to the person—that constitutes a crime under both international and domestic law. Torture is also a tort.

72. Note that “implied” in this context conveys the proposition that the proscription of torture-risk transfers is an extension of the right not to be tortured qua the transferring state. This is the essence of the view that proponents of the “positive duty” view resist. Of course, in the ECHR context, a “positive duty” against removal to the risk of torture would also be “implied” in another sense of the word—merely the opposite of an “express” obligation—because there is no express provision (unlike Article 3 of the Convention Against Torture).

73. See discussion infra Part II.A.

74. See supra notes 20–22 and accompanying text.

75. See Torture Convention, supra note 3, at art. 4:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Even within the human rights framework, the right not to be tortured has been defined as a “security right,” which implicitly acknowledges the nature of the right as protecting against a particular kind of wrong against the person.  

Parts II and III demonstrate that analyzing torture as a wrong in this sense enables a risk-differentiated analysis of the proscription of torture-risk transfers that both justifies the proscription itself and also identifies the appropriate threshold of risk at which the proscription should be triggered.

II. A RISK-DIFFERENTIATED ANALYSIS OF THE PROSCRIPTION OF TRANSFERS TO THE RISK OF TORTURE

This Article proposes that a wrongs-based view of the human right not to be tortured is conducive to the development of a framework within which the proscription of torture-risk transfers may be evaluated. This Part analyzes whether the obligation to refrain from transfers where there is a substantial risk that the individual in question would be subjected to torture in the receiving state is normatively justifiable.

It compares the standards of risk in current legal formulations and sets up a risk-differentiated framework within which to evaluate the proscription.


77. See JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS 93 (2d ed. 2007). Nickel suggests that “security rights . . . protect people against crimes such as murder, massacre, torture, and rape.” Id. (emphasis added). Nickel argues that since a “central human interest is security against actions of others that lead to one’s death or loss of health,” security rights involve “a claim to freedom and protection from murder, violence and harm.” Id. at 63 (emphasis added).

78. See supra notes 75–77 and accompanying text.

79. See SCOTT SHAPIRO, LEGALITY 2–3 (2011) (suggesting that “normative jurisprudence deals with the moral foundations of the law” and is concerned with analyzing whether the “moral logic” of current law is justified).
A. Differences in the Articulation of the Standard of Risk in Legal Formulations of the Proscription of Transfers to Torture

As noted above, the main formulations of the proscription of torture-risk transfers in international law are found in Article 3 of the Torture Convention and in the implied proscription in Article 3 of the ECHR. The incorporation of Article 3 of the Torture Convention into U.S. domestic law has also resulted in a third formulation. Significant differences emerge in defining the norm with respect to the element of risk across these three legal regimes.

1. The Standards of Risk in Current Law

Three standards have notably emerged with respect to the element of risk: The U.S. standard—“substantial reasons to believe that it is more likely than not that the person would be subjected to torture,” the ECHR standard—“substantial reasons to believe that the person would be exposed to the real risk of torture,” and the Torture Convention Article 3 standard—“where there are substantial grounds for believing that [a person] would be in danger of being subjected to torture.”

---

80. See Torture Convention, supra note 3, art. 3. Another formulation in international law is found in the context of the ICCPR, supra note 17. Although the ICCPR does not have an “explicit ban” on refoulement, the Human Rights Committee has taken the view that “[S]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.” See Human Rights Comm., General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), 44th Sess. (Mar. 10, 1992), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 31, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.1 (Vol. I). See also Inter-American Convention to Prevent and Punish Torture, art. 13(4), Dec. 9, 1985, O.A.S.T.S No. 67 (prohibiting the transfer of a person “when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment . . . .”); Cordula Droege, Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges, 90 INT’L REV. RED CROSS 669, 672 (2008).

81. See discussion supra Part I.B.1.

82. See infra notes 92–98 and accompanying text.

83. See discussion infra Part II.A.1.b.

84. See Torture Convention, supra note 3, art. 3(1) and infra Part II.A.1.c.
a. The “More Likely Than Not” Standard—The U.S. Position Under Article 3 of the Convention Against Torture

The United States signed the Torture Convention on April 18, 1988. Senate ratification followed on October 27, 1990, subject to various declarations, understandings and reservations, including a declaration that Torture Convention Articles 1 through 16 are not self-executing and require domestic implementing legislation. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1999 provided the necessary implementation. The regulations promulgated under this legislation permit non-citizens to apply for “withholding of removal” during the course of regular immigration removal proceedings.89 Other than judicial review of final orders of


87. See Senate Resolution, supra note 86, at ¶ III(1).


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.

Id. § 2242(a). See also LEGOMSKY & RODRIGUEZ, supra note 86, at 1103–04.

89. 8 C.F.R. § 208.16(c). Article 3 relief applications are adjudicated by immigration judges from the Executive Office for Immigration Review during regular removal proceedings. Immigration judge decisions may be appealed to the Board of Immigration Appeals (BIA). A petition for review may be filed with the federal courts of appeal against rulings from the BIA. See EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP’T OF JUSTICE, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS: RELIEF AND PROTECTIONS BASED ON FEAR OF PERSECUTION OR TORTURE (2009), available at http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtocols.pdf; see also Laura M. Hussain, Note, Enforcing the Treaty Rights of Aliens, 117 YALE L.J. 680, 713 (2008).
removal, the legislation does not provide a cause of action to contest purported violations of the provision, nor does it provide for a statutory civil remedy for violations.

The implementing legislation follows the language of Article 3 of the Torture Convention in adopting the policy of not transferring persons to states where “there are substantial grounds for believing the person would be in danger of being subjected to torture.” However, regulations promulgated under this legislation provide that the United States will not send individuals to other states only when they are “more likely than not to be tortured.” An applicant for relief from removal has the burden of meeting that standard. The U.S.

90. FARRA § 2242(d) provides:

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act [INA] (8 U.S.C. § 1252).

91. See Arar v. Ashcroft, 414 F. Supp. 2d 250, 264 (E.D.N.Y. 2006), aff’d, 532 F.3d 157 (2d Cir. 2008), vacated and superseded on reh’g en banc, 585 F.3d 559 (2d Cir. 2009) (noting that “in addition to the absence of any express right of action for damages under FARRA, Congress appears to have foreclosed the possibility of a court implying a cause of action under the statute as well.”). This conclusion derives from two factors. First, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 239, 110 Stat. 3009-546, provides that nothing within 8 U.S.C. § 1231, the statute to which FARRA forms a statutory note, “shall be construed to create any substantive or procedural right... enforceable by any party against the United States or its agencies or officers...” Secondly, INA § 242, to which the judicial review provision of FARRA (§ 2242(d)) refers, was amended in 2005 by the REAL ID Act, adding INA § 242(a)(4), Pub. L. 109-13, § 106(a)(1)(B), 119 Stat. 302, 310 (codified at 8 U.S.C. § 1252), “which makes clear that the petition for review procedure is the exclusive means of challenging administratively final denials of Torture Convention claims; even habeas corpus is expressly excluded.”

92. See FARRA, supra note 88, § 2242.


94. 8 C.F.R. § 208.16(c)(2) (2011); see also Ghebrehiwot v. Att’y Gen., 467 F.3d 344, 352 (3d Cir. 2006) (holding that the applicant for relief under the Torture Convention bears the burden of showing that it is more likely than not that he would be tortured if removed to the proposed country of removal).
standard is based on the fact that the “more likely than not” test is used for relief from removal in persecution cases.\textsuperscript{95} In \textit{Hamoui v. Ashcroft}, the Ninth Circuit stated that to obtain Torture Convention relief the applicant “has to show only a chance greater than fifty percent that he will be tortured if removed.”\textsuperscript{96} In \textit{Khup v. Ashcroft}, the Ninth Circuit followed the test in \textit{Hamoui} and granted relief from removal based on the fact that the non-citizen faced at least a fifty-one percent chance of being tortured should he be removed to Burma.\textsuperscript{97} However, this “probability-based” assessment has been criticized by commentators on Article 3 of the Torture Convention as requiring “a much stricter standard than that reflected in the . . . jurisprudence [of the Committee Against Torture].”\textsuperscript{98}


The proscription of torture-risk transfers in the context of the ECHR is not explicitly provided for but has been implied in the prohibition of torture in ECHR Article 3.\textsuperscript{99} As a result, the threshold standard of risk has been developed in the jurisprudence of the ECtHR.

In \textit{Soering v. United Kingdom}, the ECtHR held that the required standard was “a real risk of exposure” to the kind of treatment

\textsuperscript{95} S. Comm. on Foreign Rel., Convention Against Torture And Other Cruel, Inhuman, Or Degrading Treatment Or Punishment, S. Exec. Rep. No. 101-30, 101st Cong., 2d Sess. 26 at 10 (1990); see also Legomsky & Rodriguez, supra note 86, at 1107; John T. Parry, \textit{Torture Nation, Torture Law}, 97 Geo. L.J. 1001, 1039 (2009) (suggesting that “[t]he goal of the understanding was to conform the Convention to existing U.S. immigration law, which prevents a person from being deported to a country where it is more likely than not that he or she would be persecuted.”).

\textsuperscript{96} Hamoui v. Ashcroft, 389 F.3d 821, 827 (9th Cir. 2004).

\textsuperscript{97} Khup v. Ashcroft, 376 F.3d 898, 907 (9th Cir. 2004); see also Wakkary v. Holder, 558 F.3d 1049, 1067–68 (9th Cir. 2009).

\textsuperscript{98} NOWAK & MCArTHUR, supra note 46, at 154; WOUTERS, supra note 3, at 460; see also Isaac A. Linnartz, \textit{The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture}, 57 DUKE L.J. 1485, 1497–99 (2008) (arguing that the “more likely than not” standard “seems to require something greater than a 50 percent chance of torture, whereas a significantly smaller chance of torture might constitute ‘substantial grounds’ for believing that a person would be tortured” and that the U.S. standard is therefore “more permissive than the test established by the Convention Against Torture”).

\textsuperscript{99} See discussion infra Part I.B.1.
proscribed by Article 3 of the ECHR. Again, in Cruz Varaz v. Sweden, the court held that the standard of risk was “whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3.” In Vilvarajah v. United Kingdom, the court took the view that a “real risk” implies a foreseeable and personal (relating to the individual concerned) risk that exceeds the “mere possibility of ill-treatment.”

In Saadi v. Italy, the ECtHR emphatically rejected the argument of the U.K. government, intervening in the case, that in national security cases, the appropriate standard of risk should be the “more likely than not” standard. Instead it held that the “more likely than not” standard is a “higher [threshold] standard” not required by the ECHR. The court emphasized “that for a planned forcible [transfer] to be in breach of the Convention it is necessary—and sufficient—for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3.” U.K. courts have also held that a “real risk” must not be equated with a “likelihood” and that a “real risk” is “more than a mere possibility but something less than a balance of probabilities or more likely than not.” Saadi indicates that the “more likely than not” standard, in requiring a high probability of torture in the receiving state, is considerably more rigorous than the threshold of risk required by the ECHR norm.

Thus, under Article 3 of the ECHR, the proscription of trans-
fers is triggered by a threshold standard of a real risk of torture which must be personal and foreseeable but “does not need to be certain or highly probable.” Further, Soering implicitly took the view that the standard laid down in Article 3 of the Torture Convention—“substantial grounds to believe that the person would be in danger of being subjected to torture”—could be equated with assessing whether there are substantial grounds to believe that the person would be at “real risk” of being subjected to torture. The ECtHR has thus interpreted the threshold “danger” of torture under Article 3 of the Torture Convention as being satisfied by a “real risk” of torture. It also explicitly recognizes that the “real risk” standard imposes a quantitatively lower standard than the “more likely than not” standard of risk in U.S. law.

c. The “Danger of Being Subjected to Torture” Standard—Article 3 of the Convention Against Torture

Consonant with the standard articulated in the first General Comment to the Torture Convention, the Committee Against Torture has held that the standard triggering Article 3’s prohibition on transfers is a real, personal and foreseeable risk which goes beyond mere theory or suspicion but does not have to be highly probable, a

109. Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1853; see also Saadi, App. No. 37201/06, 49 Eur. H.R. Rep., at 759 (“In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.” (emphasis added)).

110. WOUTERS, supra note 3, at 247; see also id. at 458–61.


112. U.N. Comm. Against Torture, General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), U.N. Doc A/53/44 Annex IX, ¶¶ 6–7; GAOR, 53d Sess., Supp. No. 44 (1997) [hereinafter General Comment No. 1] (providing that “the risk of torture must be assessed on grounds that go beyond mere theory or suspicion” but that the “risk does not have to meet the test of being highly probable” and emphasizing that the risk or danger must be “personal and present” (emphasis added)); see also NOWAK & MCArTHUR, supra note 46, at 154.

standard of risk that closely matches the ECHR formulation. Though in its first decision on Article 3, the Committee held that torture must be “the foreseeable and necessary consequence of [the return].”

subsequent decisions followed the standard laid down in the first General Comment and did not use the term “necessary.”

Thus, the standard in Article 3 of the Torture Convention has been interpreted along the lines of the ECHR standard of a “real risk” of torture, rather than the “more likely than not” standard in the U.S. version. It has been argued that the “general feeling” during the drafting of Torture Convention Article 3 was that a rigorous evidentiary requirement would not be in keeping with the purpose of the provision, which was “to afford the greatest possible protection against torture.” Furthermore, it was also contemplated that the burden of proof should not fall solely on the person seeking protection against transfer. That is, since Torture Convention Article 3 was drafted with a view to providing the “greatest possible protection against torture,” it was deliberately intended to be over-inclusive. The U.S. standard is therefore arguably not in keeping with the spirit and purpose of the Convention.


116. Nowak & McArthur, supra note 46, at 134; see also Burgers & Danielius, supra note 35, at 127.


118. Id.

119. See Alan W. Clarke, Rendition to Torture: A Critical Legal History, 62 Rutgers L. Rev. 1, 4–5 n.20 (2009) (suggesting that “in ratifying [the Convention Against Torture], the United States narrowly construed Article 3’s ‘substantial grounds for believing that he would be subjected to torture’ as only requiring nonrefoulement where ‘the United States determines whether it is more likely than not that a person would be tortured’ thus rejecting the Committee Against Torture’s more restrictive view that it should not send anyone to a nation where ‘a person faces a real risk of torture’” (internal quotation marks omitted));
It should be noted that the question of which standard of risk is the appropriate, normatively justified threshold of risk remains unresolved. This sub-Part of the Article merely serves to demonstrate that the Torture Convention standard of risk has been interpreted as being substantially similar to the ECHR standard, such that the two standards may be regarded as one for the purposes of analysis.

2. A Generalized Account of the Level of Risk of Being Subjected to Torture

The three legal formulations of the proscription of transfers to the risk of torture described above ultimately result in two different threshold standards of risk: the standard common to the ECHR and Article 3 of the Torture Convention—a real, personal and foreseeable risk, which goes beyond mere theory or suspicion but does not have to be highly probable\(^{120}\)—and the “more likely than not” standard in U.S. immigration law.\(^{121}\)

Given that the minimum threshold standard is either a “real risk” of torture or the “more likely than not” standard of risk,\(^{122}\) each legal regime recognizes that the proscription applies at some threshold of risk of torture in the receiving state. It is disagreement relating to the appropriate threshold that results in the two standards of risk identified above. This Article presents a risk-based account that is conscious of these differing standards of risk, with the object of ana-

---

Linnartz, *supra* note 98, at 1498–99 (arguing that “the United States’ implementation of the Convention Against Torture distorts the original standard, replacing a standard that seeks to avert all substantial dangers of torture with one that seeks only to prevent torture that will more likely than not actually occur.”).

120. See Lauterpacht & Bethlehem, *supra* note 3, at 162 (describing this standard as the “fullest formulation of the threshold articulated in international practice”); *supra* Parts II.A.1.b–c.

121. See *supra* notes 93–95.

122. But see El Rgeig v. Switzerland, Commc’n No. 280/2005, ¶ 7.4, U.N. Doc. CAT/C/37/D/280/2005 (Jan. 22, 2007) (where the Committee against Torture declared that the state party had not demonstrated “a complete absence of risk” of torture in the receiving state). However, this is a much lower standard of risk than that required by the Torture Convention. It would impose a zero-tolerance standard, such that any risk of torture in the receiving state would bar transfers. See generally Wouters, *supra* note 3, at 460–61 (arguing that imposing such a standard “is not the Committee’s intention” and that “such formulations are not beneficial to a better understanding of the risk criterion and the Committee’s determination thereof”). See infra Part III for the argument that the threshold of risk should be fault-based and that the “real risk” standard fulfills this criterion.
lyzing whether the proscription of torture-risk transfers is a logical extension of the obligation not to torture and, if so, at what threshold of risk.

B. A Risk-Differentiated View of Transfers to the Risk of Torture

Torture is susceptible to analysis within a framework of wrongs.\footnote{See supra notes 75–77 and accompanying text.} Theories of responsibility pertaining to participation in wrongdoing or attribution of wrongdoing in cases involving third parties are useful in evaluating whether the transfer of an individual by a state, involving the putative torture of that individual by another state, is normatively justifiable.

1. Methodology: A Historic Responsibility View of the Proscription of Transfers to Torture

Theories of responsibility suggest that prospective responsibility—the question of what our responsibilities are\footnote{PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 5, 31 (2002) (prospective responsibility looks to the future and is concerned with establishing norms of behavior, obligations and duties for the future).}—should not be viewed in terms of either the liability to incur sanctions\footnote{Id. at 30. \textit{But see} H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 222, 225 (2d ed., 2008).} or accountability,\footnote{CANE, supra note 124, at 30 n.6 (citing TONY HONORE, RESPONSIBILITY AND FAULT 125 n.11 (1999)) (suggesting that the “underlying idea” of responsibility is “being the cause of something . . . with the corollary of having to answer for it, not necessarily before a court”). However, this may be unfair to Honore, who also recognizes that the primary function of the “institution” of responsibility is “to promote self-respect and individual and social well-being.” See HONORE, supra, at 131.} because that process is “backward-looking and essentially negative, whereas the idea of being a responsible person is forward-looking and positive.”\footnote{CANE, supra note 124, at 33.} However, evaluating the issue of torture-risk transfers through the lens of historic responsibility,\footnote{Id. at 5, 31 (defining “historic responsibility” as the issue of “what it means to be responsible” and concerned with “ideas such as accountability, answerability and liability [which] look backwards to conduct and events in the past.”).} especially legal responsibility, provides insight into the content of existing pro-
spective legal responsibilities in this regard. This historic view of legal responsibility is employed in providing a risk-differentiated normative justification of the proscription of torture risk-transfers. It does not speak to state liability for transfers conducted in violation of the obligation not to transfer to torture.

2. Intrinsic and Instrumental Aspects of the Proscription of Transfers to the Risk of Torture

The content of the human right not to be tortured is influenced by the fact that torture can be conceptualized as a wrong under the principles of both criminal and tort law. Since torture is a wrong in this sense, it gives rise both to the obligation not to be complicit in its commission as well as the obligation not to be reckless as to its commission by another. Drawing from the doctrine of complicity (which imposes liability for participation in or knowing facilitation of the wrong), purposive transfers as well as transfers conducted with the knowledge of virtually certain torture can be regarded as intrinsically wrongful. On the other hand, transfers that

129. See supra Part I.A for a survey of prototypical constraints on transfers to torture.

130. Responsibility and liability, though related, are conceptually distinct concepts. See Cane, supra note 124, at 1–2 (suggesting that while liability “refers primarily to . . . sanctions and penalties, which are characteristic of law and legal systems but not of morality,” responsibility “refers to the human conduct and consequences thereof that trigger such responses”); Hart, supra note 125, at 222. There is an increasing body of legal scholarship debating the propriety of using doctrines that have evolved in domestic systems in deciding issues of state criminal liability. See Aditi Bagchi, Intention, Torture, and the Concept of State Crime, 114 Penn St. L. Rev. 1, 44–47 (2009); Saira Mohamed, State Responsibility for Genocide, 80 U. Colo. L. Rev. 327, 397–98 (2009). See generally George Fletcher, Tort Liability for Human Rights Abuses (2008). While this is not the place to engage fully with this debate, the methodology adopted in this Article demonstrates that concepts that have developed historically in domestic criminal and tort law can be usefully employed in understanding state responsibility, without necessarily forming the basis for liability. Liability depends on the “extrinsic functions of law,” including policy decisions relating to the various functions of the law, and the “distributional impacts of legal responsibility.” See Cane, supra note 124, at 188; see also Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases, 60 Hastings L.J. 61 (2008) (suggesting that international criminal law and rules of state responsibility in international law are often influenced by notions of sovereignty and immunity).

131. See supra notes 75–77 and accompanying text.

132. See infra note 138 and accompanying text.

133. See infra notes 200–201 and accompanying text.

134. See infra Part II.B.2.a.
are conducted with the knowledge of a substantial risk of torture (not rising to an extremely high probability or a near-certainty) that would impose historic legal responsibility for having acted recklessly in creating that risk of torture, but not for participating in the torture itself, are instrumentally wrongful.\textsuperscript{135} However, the fact that a transfer is intrinsically or instrumentally wrong with respect to involvement in torture is not the same as suggesting that such a transfer is always unjustifiable without exception.\textsuperscript{136}

\textit{a. Intrinsically Proscribed Transfers}

The term “complicity” has been used in justifications offered for the proscription of torture-risk transfers. Drawing from Article 4 of the Torture Convention, UN Special Rapporteur on Torture, Manfred Novak, states in his commentary on the Torture Convention:

\begin{quote}
Torture is one of the most serious human rights violations, and \textit{complicity or participation} in torture, which \textit{includes sending a person to a country notwithstanding a high risk of torture}, constitutes a crime which, according to Article 4 Torture Convention, shall be punished by appropriate penalties.\textsuperscript{137}
\end{quote}

The doctrine of complicity in criminal law governs situations in which “a person who does not personally commit a proscribed harm may be held accountable for the conduct of another person . . . if he assists the other in committing an offense.”\textsuperscript{138} The two factors that are required for the secondary party to be an accomplice are mens rea—the secondary party must intend to assist in the crime—and \textit{actus reus}—the secondary party must, in fact, assist in the crime.\textsuperscript{139}

There is limited consensus on the elements of a theory of liability based on complicity given that there are massive variations in

\begin{thebibliography}{99}
\bibitem{135} See discussion \textit{infra} Part II.B.2.b.
\bibitem{136} See \textit{infra} notes 325–328 and accompanying text.
\bibitem{137} \textsc{Nowak \& McArthur, supra note 46, at 128 (emphasis added)}.
\bibitem{138} \textsc{Joshua Dressler, Understanding Criminal Law} 497 (2005); see also \textsc{George Fletcher, Rethinking Criminal Law} § 8.5, at 635 (2000) (suggesting that in cases involving liability for aiding and abetting, “there is a primary process generating harm and the actor is held accountable by virtue of his position relative to that process,” which includes “lend[ing] aid to the criminal plan of another”).
\bibitem{139} \textsc{Dressler, supra note 138, at 498}.
\end{thebibliography}
the doctrine across criminal and private law and further differences between complicity-based liability in municipal systems versus international law regimes. However, the concept of complicity remains useful in understanding why certain transfers can be considered intrinsically wrong with respect to torture.

Under the doctrine of complicity, the derivative liability of the secondary party attaches to the act constituting the crime that has been committed by the primary party—it is liability for committing the offense itself that is at stake for the secondary party. For example, under the Model Penal Code, a person is guilty of an offense if he commits it “by his own conduct or by the conduct of another person for which he is legally accountable, or both.” Legally accountable conduct can include solicitation of the commission of the offense or aiding its commission. The doctrine of complicity in tort law also imposes liability for the tortious conduct of another person.

140. See Markus D. Dubber, Criminalizing Complicity: A Comparative Analysis, 5 J. INT’L CRIM. JUST. 977 (2007) (comparing German and American criminal law on the issue of accomplice liability). Dubber argues that international criminal law “must find its own way in the doctrine of accomplice liability.” Id. at 1001; see also sources cited supra note 130 and accompanying text.

141. For a nuanced account of “how the doctrine of complicity can best be interpreted as a coherent concept,” see Sanford Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CAL. L. REV. 323, 324 (1985).

142. DRESSLER, supra note 138, at 498; see also Robert Weisberg, Reappraising Complicity, 4 BUFF. CRIM. L. REV. 217, 222 (2000) (“[T]o find that someone is an accomplice is to punish her as if she were the principal.”).


144. Id. § 2.06(3)(a); see also Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (as amended) (Eng.) (providing that “anyone who shall aid, abet, counsel or procure the commission of any indictable offence shall be liable to be tried, indicted and punished as a principal offender.”); THE LAW COMM’N, PARTICIPATING IN CRIME, app. B, at 175 (Eng. 2007) [hereinafter LAW COMMISSION REPORT], available at http://www.justice.gov.uk/lawcommission/docs/lc305_Participating_in_Crime_report.pdf (Section 8 embodies a common law principle).

145. See RESTATEMENT (SECOND) OF TORTS § 877 (1979) (providing that “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own . . . .”); id. § 877 cmt. a (1979) (providing that “[o]ne who orders [or induces] an act to be done is liable for its consequences as he would be for his own personal conduct if he has or should have knowledge of the conditions under which it is to be done.” (emphasis added)); id. § 876 cmt. a (1979) (providing that “[w]henever two or more persons commit tortious acts in concert, each becomes subject to
A critical examination of the normative justifications for complicity is outside the scope of this Article, but it is worth noting that these justifications rely on the secondary party’s intentionality. Based on the requirement of intentionality, a state’s decision to transfer a person for the purpose of subjecting that person to torture in the receiving state is a paradigm case of complicity in torture because this act fulfills both the mental state and act requirements. Since in this scenario the transferring state would be responsible for the torture committed by the receiving state, such purposeful torture-risk transfers constitute intrinsic wrongdoing by the transferring state. In terms of risk, such transfers would impose a 100 percent risk of torture.

Complicity liability requires that the secondary party (the accomplice) must intend to aid in the commission of the wrong. Under some theories and legal frameworks, the intent requirement is restricted to purpose, while in others, knowing facilitation of the

---

146. See Dressler, supra note 138, at 499; Joshua Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem, 37 Hastings L.J. 91, 111 (1985) (offering another justification based on “forfeited personal identity,” which treats the accomplice as having authorized the primary party’s conduct and thereby forfeiting her “right to be treated as an individual”); Sanford Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 354–55 (1985) (the intentional conduct of the accomplice is equated with “manifesting consent to liability under the civil law”).

147. See John Cerone, Re-Examining International Responsibility: “Complicity” in the Context of Human Rights Violations, 14 ILSA J. INT’L & COMP. L. 525, 527 (2008) (suggesting one sense in which “complicity [may be used to determine] when one state is derivatively responsible for assisting another state in the commission of an internationally wrongful act”).


150. For example, the Model Penal Code requires that the accomplice act “with the purpose of promoting or facilitating the commission of the offense.” Model Penal Code § 2.06(3)(a) (Proposed Official Draft 1962); see also People v. Beeman, 674 P.2d 1318 (Cal. 1984) (reversing a conviction based on the defendant’s knowledge of the intent of the principal to commit the crime and holding instead that the accomplice must act with “an intent or purpose either of committing, or of encouraging or facilitating the commission of,
principal actor’s wrongdoing is sufficient to impose liability on the secondary party.151 Under the latter, knowledge is considered sufficient on the theory that purpose may be inferred from knowledge or on the alternative theory that knowledge of the essential matters relating to the conduct of the offense should be enough in and of itself.152 Even in the United States, where purpose is generally required,153 courts have at times issued ambiguous opinions with respect to whether knowledge suffices, and there is some basis to believe that knowledge may suffice for serious crimes.154 Further, in private law, knowledge suffices to ground complicity-based liability for the offense itself.155

Although the Model Penal Code recommends a requirement of purpose, this choice seems to be the result of a policy-based compromise, rather than of the view that it would be unprincipled to extend complicity liability to encompass mere knowledge.156 The original draft of the complicity provision included cases of those who, “with knowledge that another was committing or had the purpose of

---

151. The common law took this approach, which is still the position in the United Kingdom. See Johnson v. Youden, [1950] 1 K.B. 544, 546 (the secondary party must know the essential matters of the offense that the primary commits); see also LAW COMMISSION REPORT, supra note 144, at 3, 37 (discussing this case and suggesting that complicity liability may lie even where the secondary party knows that the principal might commit the offence); Paul S. Davies, Accessory Liability for Assisting Torts, 70(2) C.L.J. 353, 356–57 (2011).

152. See supra note 151, and accompanying text.


154. See People v. Lauria, 59 Cal. Rptr. 628 (1967) (where “the misdemeanor nature of the crime of prostitution” rather than the lack of intent, apparently influenced the decision not to hold the defendant liable as an accomplice). But see United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985) (where the defendant was held liable for the act of murder for knowingly but unpurposefully providing the perpetrator with the murder weapon). See CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 214 nn.30–31 (2000); Dubber supra note 140, at 993 n.46.

155. See RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (providing that “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ” (emphasis added)).

156. MODEL PENAL CODE § 2.06 cmt. 6(c), at 314 (Proposed Official Draft 1962 and 1985 Commentaries).
committing an offense, knowingly facilitated that commission.”

To mitigate the effects of a broad liability in this context, the Code included the proviso that knowledge-based complicity required “substantially facilitating” the commission of the offense. The Commentaries indicate that it was thought to be within the bounds of complicity liability to include cases of knowing and substantial facilitation where, “[even though] the only interest of the actor is his wish to forego concern about the criminal purposes of others [and not a purpose to further the crime] . . . his interest is properly subordinated generally to the larger interest of preventing crime.” The idea, expressed by the Chief Reporter in the original draft that included knowing and substantial facilitation, was that conduct based on “guilty knowledge,” which is “knowledge both that there is a purpose to commit a crime and that one’s own behavior renders aid,” is “a proper object of preventive effort by the penal law.”

Thus, there is a reason to regard transfers conducted with the knowledge that the person would be subjected to torture in the receiving state as intrinsically wrong. Indeed, in practice, in the case of states that are known “torturers,” it is often difficult to distinguish between these types of transfers and purposeful transfers. The case of Maher Arar provides a good example in this regard. Arar, a dual Canadian-Syrian citizen, was transferred by the U.S. government to Syria, where he was tortured, forced to falsely confess and released after one year without being charged. At the time of the U.S. government’s decision to transfer him, Arar was personally at risk of being tortured in Syria. Further, it is arguable that diplomatic assurances that the U.S. authorities received from Syria should have been largely discredited because Syria appears on the U.S. government’s

157. Id.
158. Id. at 315 n.47.
159. Id. at 319.
160. Id. at 318 n.58.
162. See Craddock, supra note 1, at 635 n.128.
list of states that use torture. Therefore, it could be argued that even if purpose could not be proven, the U.S. authorities had “knowledge” of the Syrian government’s likely use of torture.

Furthermore, for knowledge-based cases of transfer to torture, the “substantial facilitation” of the torture is satisfied because, but for the fact that the transferring state delivers the person so that he could be taken into the custody of the receiving state, the latter state would have no access to the person and therefore no opportunity to torture him.

One major difference between purposeful and knowledge-based transfers, from the a priori perspective (the prospective responsibility of states with respect to torture-risk transfers), is the level of risk at the time of transfer that would render the transferring state complicit in the torture. How do we determine a priori whether the transferring state “knew” of the torture or not? To ascribe knowledge within the complicity framework would appear to require a high (near-certain) level of risk.


164. However, this may still not have sufficed to hold U.S. authorities liable for Arar’s torture at the hands of the Syrian authorities. For sources suggesting that international law endorses the knowledge-based complicity standard but indicating that, in international law, the knowledge-based standard does not always impose liability for the offence itself, see generally Keitner, supra note 130 and Mares, supra note 55; see also discussion supra note 130.


166. One of the reasons not to make knowledge alone enough for complicity liability is that the secondary actor may be sure someone else would provide the aid if he or she does not (for example, where the aid involves giving directions or filling a gas tank at a gas station). That reason is not relevant here because no one else is in a position to give the necessary aid (making the person available for torture). The Author is indebted to Kent Greenawalt for this point.
In the United Kingdom, the intent requirement, unlike in most jurisdictions in the United States, has been held to include knowledge of the “essential elements” of the commission of the offence. As far as what constitutes “knowledge of the essential elements,” it has been suggested that, to be an accomplice, the secondary party “must know or believe that . . . [the putative perpetrator] is committing or will commit the conduct element; and . . . is doing or will do so in the circumstances and with the consequences (unless the offence is a constructive liability offence) proof of which is required for conviction of the offence.”

However, U.K. law does not strictly follow this standard for knowledge-based complicity. Instead, “courts have demonstrated a readiness to dilute the stringent fault requirement of knowledge.”

There are four legal standards in this regard: (1) the belief that the principal might commit the conduct element, (2) foresight of the risk of a strong possibility that the principal will commit it, (3) contemplation of the risk of a real possibility that the principal will commit it and (4) foresight that it is likely that the principal will commit it.

Thus, under current U.K. law, even knowledge of a foreseeable risk appears to fulfill the requirements for complicity-based liability. However, it is important to note that the determination of the level of risk is made on an ex post basis in all these cases—that is, the offence has been perpetrated. Furthermore, the lack of consistency in the standard to determine knowledge has been criticized. The Law Commission Report on complicity therefore recommends that the intent requirement be extended to knowledge in cases in which it

168. LAW COMMISSION REPORT, supra note 144, at 39–40, § 2.64.
169. Id. at 40, § 2.65.
170. Id.
171. Id.
172. Id.
173. Id.
174. See Kadish, Reckless Complicity, supra note 153, at 387 (citing Blakely v. Dir. of Pub. Prosecutions, [1991] R.T.R. 405 (Eng.), where the court held that for an aiding and abetting charge “it would have been sufficient that the defendant was reckless”) (suggesting that English law has “moved in this direction” of recognizing liability for reckless aid). But see infra notes 180–184 and accompanying text.
175. See Glanville Williams, Complicity, Purpose and the Draft Code-1, 1990 CRIM. L. REV. 4 (criticizing the confusion in English law on this point).
was “virtually certain” that with the “assistance or encouragement” of the secondary party, the principal “would engage in the conduct element of the principal offence.”\textsuperscript{176} Thus, the \textit{a priori} test for knowledge would be “foresight of virtual certainty.”\textsuperscript{177} This standard for knowledge-based complicity is also consistent with the Model Penal Code’s standard of knowledge-based culpability, which requires “practical certainty.”\textsuperscript{178} Given that the standard of complicity-based liability in question attributes liability for the offense committed by the principal perpetrator, a high level of certainty for knowledge-based complicity is a principled standard.

This section has demonstrated that, when the transferring state transfers a person either with the purpose of having the person tortured by the receiving state or with the knowledge that the person is virtually certain to be tortured in the receiving state, the transferring state’s conduct should be considered intrinsically wrongful. Further, from the perspective of risk, the doctrine of complicity is useful in demonstrating that purposeful transfers should not be viewed as a completely separate phenomenon from other kinds of torture-risk transfers but instead should be considered to be on a risk-based continuum with the latter.

\textbf{b. Instrumentally Proscribed Transfers to Torture}

As preceding sections have demonstrated, the risk-based standard common to the ECHR and Article 3 of the Torture Convention as articulated by the European Court of Human Rights and the Committee Against Torture bars transfers when there is a real, personal and foreseeable risk that the person would be subjected to torture, a risk that goes beyond mere theory or suspicion but need not reach high probability (“real risk” transfers).\textsuperscript{179} This section argues that transfers at that level of risk are \textit{instrumentally} wrongful.

\textsuperscript{176} See \textsc{LAW COMMISSION REPORT, supra} note 144, at 72, § 3.88.

\textsuperscript{177} Id.

\textsuperscript{178} See \textsc{MODEL PENAL CODE} § 2.02(2)(b)(ii) (Proposed Official Draft 1962) (providing that “[a] person acts knowingly, with respect to a material element of an offense when... if the element involves a result of his conduct, he is aware that it is \textit{practically certain} that his conduct will cause such a result.” (emphasis added)).

\textsuperscript{179} See discussion \textit{infra} Part II.A.2.
i. The Inadequacy of Complicity-Based Justifications for “Real Risk” Transfers

Complicity-based justifications for proscriptions of transfers, undifferentiated on the basis of risk, gloss over the question of whether it is normatively justifiable to proscribe transfers conducted without the purpose of enabling torture and where the risk of torture is not high enough to reach virtual certainty.\(^{180}\) It is problematic to invoke the doctrine of complicity to analyze such transfers. Even if, in theory, the doctrine coherently extends to cases of “reckless complicity,”\(^{181}\) there is limited support for this view in U.S. law.\(^{182}\) Even though U.K. law appears to include a recklessness standard for complicity, this has been criticized and no consistent standard has been articulated in this regard.\(^{183}\)

Further, Kadish suggests that recklessness-based complicity would carry an “appropriately modulated penalty.”\(^{184}\) So even under a theory of reckless complicity, it is not clear that the attribution of liability would be for the underlying offense. It is therefore not feasible to analyze “real risk” transfers in a way that would hold the

\(^{180}\) See, e.g., NOWAK & McARTHUR, supra note 46, at 128.

\(^{181}\) See generally Kadish, supra note 153. Kadish contends that the culpability and policy-based considerations in complicity doctrine can accommodate reckless complicity. However, he suggests that for prudential reasons he does not advocate that the law necessarily accommodate this view. Id. at 370–71.

\(^{182}\) Kadish points out that the Model Penal Code makes it criminal to recklessly kill another, § 210.3, to recklessly endanger another person, § 211.2, to recklessly risk a catastrophe, § 220.2, and to recklessly destroy property, § 220.3, “[b]ut it does not make it criminal to recklessly occasion any of these harms through the actions of another.” Kadish, supra note 153, at 384–85; see also LAW COMMISSION REPORT, supra note 144, at 71–72 (taking the view that the intent requirement for complicity should require purpose or intent inferred from knowledge of “virtual certainty”).

\(^{183}\) See Glanville Williams, Complicity, Purpose and the Draft Code–2, 1990 CRIM. L. REV. 98, 103. Williams suggests that there is a normative distinction between “knowing for a fact that crime is afoot” and “knowing that a crime may be afoot” and that:

A person does not become an accessory on the ground of helping unless (a) he purposed to help—directly intends to help—in the commission of the crime, or (b) he knows that a particular person (or, of course, particular persons) intends (not may intend) to commit the crime (or intends to do acts that in law will amount to the crime in the circumstances that exist, or if a specified result follows), and knows that his own act is or will be (not may be) a help to that person in carrying out his criminal intention.

Id. at 103. While both purposeful and knowing (or near-knowing) transfers to torture are well within the scope of this definition, it does not extend to reckless transfers.

\(^{184}\) Kadish, supra note 153, at 384.
transferring state responsible for participation in or knowing facilita-
tion of torture. Differentiating transfers on the basis of risk illum-
nates the need for independent normative justification for the pro-
scription of transfers involving a threshold level of risk that does not
support treating those transfers as intrinsically wrongful.

ii. Justifying Responsibility for Reckless Transfers

The law ascribes wrongfulness to the act of an agent who cre-
ates a risk of injury ultimately imposed by an intervening agent on
the grounds that the first agent is responsible for the consequences of
even patently unreasonable acts of others so long as they are foresee-
able.185

In the United States, Section 19 of the Restatement (Third) of
Torts defines as negligent conduct by defendants that increases the
likelihood that a plaintiff will be injured on account of the miscon-
duct of a third party, including situations where such “conduct may
bring the plaintiff to a location where the plaintiff is exposed to third-
party misconduct.”186 The misconduct in question can include inten-
tional and even criminal conduct of the third party.187

In seeking to transfer a person to another state where it is
foreseeable that the person would be tortured, the state creates the
risk of such torture.188 Therefore, such transfers, even if otherwise
lawful,189 at the very least constitute negligent behavior on the part of
the transferring state. Section 19 also contrasts such cases “in which

185. See ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 111, 130 (1999);
(2001) (Eng.) (suggesting that UK law recognizes that one of the circumstances in which it
may be justifiable to hold one liable for injuries caused by the criminal act of a third party is
when one “negligently causes or permits to be created a source of danger” (citing Lord
taken from Eng.)).

186. Restatement (Third) of Torts: Liab for Physical and Emotional Harm § 19, at 263
(2005).

187. See RESTATEMENT (SECOND) OF TORTS § 302B at 88 (1965) (“An act or an
omission may be negligent if the actor realizes or should realize that it involves an
unreasonable risk of harm to another through the conduct of the other or a third person
which is intended to cause harm, even though such conduct is criminal.”).

188. See FEINBERG, supra note 59 (suggesting that in such cases, carrying out transfers,
even viewed as failures to prevent harm, can be considered the “cause” of such harm, based
on the “power” to prevent harm).

189. See sources cited supra note 2; text accompanying supra note 15.
the defendant’s conduct creates or increases the possibility of harm caused by third-party misconduct” from those in which “the defendant merely takes no action to protect the plaintiff against the possibility of third-party misconduct.”\textsuperscript{190} This rule therefore reaffirms the argument against viewing the proscription of torture-risk transfers in the “failure to prevent” framework.\textsuperscript{191}

Transfers that create the foreseeable risk of torture fall under the rubric of “legal cause” and should be differentiated from cases in which the “duty to act” is required to find liability for negligence.\textsuperscript{192} The issue of legal cause in cases of harms by third persons is determined by the “standard foreseeability approach.”\textsuperscript{193} That is, if the defendant should have foreseen the risk of harm to the plaintiff posed by the crime or intentional tort of a third person, the defendant can be liable for creating the opportunity for the third-party conduct to occur.\textsuperscript{194} Thus, in cases where “the risk of harm by [the third party] was one of the central reasons for deeming [the first party’s] conduct negligent, the legal cause issue should present no obstacle to recovery.”\textsuperscript{195} In these cases, where actions by an intervening party represent the very risk that renders the conduct of the first party, in exposing the person to such risk, negligent or reckless in the first place, judicial decisions in the United States support the view that “it makes no sense to exonerate [the first party] on intervening cause

\textsuperscript{190.} \textsc{Restatement (Third) of Torts: Liability Physical Harm} § 19, at 263–64 (2005) (“Because as a general rule the law does not impose an obligation to protect or rescue, defendants are liable in such cases only if they are subject to some affirmative duty providing an exception to the general rule.”).

\textsuperscript{191.} See discussion supra Part I.B.2.

\textsuperscript{192.} See David W. Robertson, \textit{Negligence Liability for Crimes and Intentional Torts Committed by Others}, 67 \textit{Tul. L. Rev.} 135, 138 (1992) (“The legal cause issue is highlighted in virtually every decision in which D is sought to be held liable for negligence in causing, permitting, or allowing X to harm P. Many (but by no means all) of these decisions also highlight the duty-to-act issue. Often the two issues are commingled in a way detrimental to clear understanding of the bases for the decision. Keeping the two issues separate promotes clarity.”). Robertson suggests that the argument that one has no duty to take affirmative steps to protect another person from harm is misplaced in such cases because it confuses them with cases in which such an \textit{a priori} duty to aid/protect must be shown to determine liability. \textit{Id.; see also} Jane Stapleton, \textit{Legal Cause: Cause-In-Fact and the Scope of Liability for Consequences}, 54 \textit{Vand. L. Rev.} 941, 998–99 (2001).

\textsuperscript{193.} Robertson, supra note 192, at 138.

\textsuperscript{194.} \textit{Id.}

\textsuperscript{195.} \textit{Id.} at 139.
Thus, on the basis that one can be held legally responsible for the outcomes of one’s acts if one has created a foreseeable risk of that outcome, a transferring state, by creating the risk that a person would be subjected to torture, is historically responsible for the torture, should it materialize.

The lowest standard at which the proscription of torture-risk transfers is triggered is a “substantial” risk, interpreted by the ECtHR as a “real, personal and foreseeable” risk. Given that the transferring state is aware of the risk, conduct imposing a substantial risk of torture can be considered not just negligent, but also reckless. Reckless conduct that exposes the person to the foreseeable

196. Id. at 140 (citing Argus v. Scheppegrell, 472 So.2d 573, 577 (La. 1985) (“[Someone’s fault] cannot be both the foreseen risk which imposes the duty . . . and at the same time a defense to an action . . . for breach of the . . . duty.”); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34, at 667 (2005) (“When a force of nature or an independent act is also a factual cause of physical harm, an actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”) (emphasis added)). Comment d to this Section explains the rule in Section 19 of the Third Restatement as follows:

In some instances, the risks posed by even an extraordinary force of nature or by a culpable (or, a fortiori, nonculpable) human act may be precisely the risks that render tortious an actor’s failure to adopt adequate precautions. Thus, § 19 addresses the basis for an actor to be found negligent when there is a foreseeable risk of improper conduct, including criminal activity, by another.

Id. § 34 cmt. d, at 672 (emphasis added).

197. Outcome responsibility is responsibility for the unintentional but “foreseeable and avoidable” results of our actions. Stephen Perry, Risk, Harm and Responsibility, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 344–45 (David G. Owen ed., 1995).

198. Torture Convention, supra note 3, art. 3.

199. See supra Parts II.A.1.b–c.

200. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 2, at 18 (2005) (“A person acts recklessly in engaging in conduct if . . . the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation . . . .”); Peter Cane, The Anatomy of Tort Law 33–34 (1997) (“A person is reckless as to an outcome only if that person actually knew that there was a risk that his or her conduct would produce that outcome.”); see also MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962) (“A person acts recklessly with respect to the material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”). The difference in the Model Penal Code’s definitions of recklessness and negligence is not in the standard of risk but relates to the state of mind of the actor in being aware of the risk. See MODEL PENAL CODE § 2.02(2)(c) cmt. 4 at 240 (Proposed Official Draft 1962 and 1985 Commentaries) (“A person acts negligently under this section when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware.”).
risk of harm by another, with awareness or conscious disregard of such risk, leads to legal responsibility with an even higher level of culpability. The doctrine of the ECtHR relating to the proscription of transfers presenting a “real risk” of torture is also amenable to the recklessness-based explanation presented in this section. The ECtHR has held that in cases where there is a real risk that the person would be subjected to torture in the receiving state, “[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the [transferring] Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” Historic legal responsibility of the transferring state in such cases would be for reckless conduct leading to torture rather than for participating in or knowingly facilitating the torture by ignoring the virtual certainty of its occurrence. Therefore, the risk-differentiated framework presented in this Article indicates that such transfers should be regarded as instrumentally wrongful.

iii. Identifying the Threshold Level of Risk from the Perspective of Historic Responsibility

The proscription of torture-risk transfers operates at different standards of risk in international and domestic law. However, the standards of risk in the ECHR and in the Torture Convention frameworks are substantially similar, thereby creating a unified standard in international law. This standard of “real risk,” foreseeable and personal, rises above mere suspicion but need not reach high probabil-

201. See John Murphy, Rethinking Injunctions in Tort Law, 27 O.J.L.S. 509, 531 (“The fact that X intends to harm Y, or is reckless as to Y sustaining harm makes any resulting harm far more reprehensible in moral terms than if that harm had been sustained accidentally.”).

202. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 36 (1989); see also Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730, 758 (2008) (reaffirming the responsibility of the contracting states for “tak[ing] action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment”); Mamatakulov & Askarov v. Turkey, 2005-I Eur. Ct. H.R. 293, 320; Vilvarajah v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) at 7 (1991); WOUTERS, supra note 3, at 188 (suggesting that the ECtHR decisions on this point are “based on the idea that a State [violates] Article 3 if its act of [transfer] constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment” (quoting B.P. Vermeulen, Chapter 7: Freedom from Torture and Other Inhuman or Degrading Treatment or Punishment, in Theory and Practice, supra note 39, at 429)); Gentili, supra note 46, at 314; supra note 46 and accompanying text.

203. See discussion supra Part II.A.
Jurisprudence relating to both the ECHR and Torture Convention formulations explicitly rejects the “more likely than not” standard present in U.S. law.\(^\text{205}\)

The intrinsic and instrumental aspects of the proscription operate on a continuum of risk. That is, from the point of view of risk, purposeful transfers can be considered to impose a 100% risk of torture. On the other hand, instrumental wrongfulness defines the threshold at which the proscription begins to operate. Transfers that pose a higher level of risk are closer to being intrinsically wrongful and transfers at a lower level of risk are more likely to be instrumentally wrongful. The U.S. standard of whether it is “more likely than not” that a person would be subjected to torture if transferred (defined as a greater than 50% chance of torture)\(^\text{206}\) does not set the threshold so high that it only bars purposeful transfers, or transfers involving knowledge of a virtual certainty of torture in the receiving state.\(^\text{207}\) However, the “more likely than not” standard sets the threshold of risk higher than the “real risk” standard.\(^\text{208}\) Therefore, on the continuum of risk, the U.S. standard includes all intrinsically-barred transfers but excludes transfers that are defined at a lower standard of risk that would still meet the foreseeability test for outcome-based historic responsibility.\(^\text{209}\) Thus, from a historic responsibility perspective, the “real risk” standard is more justifiable as the appropriate threshold of risk that triggers the proscription of torture-risk transfers.

Part III examines the proscription of torture-risk transfers in the framework of prospective remedies. This analysis enables an account of the content of the proscription that also justifies adopting the “real risk” standard as the appropriate threshold rather than the higher “more likely than not” standard in U.S. law.

\(^{204}\) See id.

\(^{205}\) See supra notes 98, 104–108 and accompanying text.

\(^{206}\) See supra notes 97–98 and accompanying text.

\(^{207}\) But see Leila Nadya Sadat, Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror, 75 GEO. WASH. L. REV. 1200, 1221–22 (2007) (appearing to equate the “more likely than not” standard with an “actual knowledge standard,” which the author then contends is against the “plain language” of the Torture Convention).

\(^{208}\) See supra notes 104–108 and accompanying text.

\(^{209}\) See supra notes 98, 106–108 and accompanying text; see also discussion supra Part II.B.2.b.
III. THE PROSPECTIVE REMEDIAL VIEW OF THE PROSCRIPTION OF TRANSFERS TO TORTURE

Part II demonstrated that the characteristics of the proscription of torture-risk transfers are better understood through an analysis that differentiates between levels of risk. On the one hand, the proscription bars intrinsically wrongful transfers in which the transferring state is complicit in the putative torture because the state’s conduct constitutes participation or knowing facilitation of torture.

In this sense the proscription translates to the command, “do not transfer individuals with the purpose of having them tortured, or with the knowledge that they are virtually certain to be tortured.” On the other hand, the proscription also bars instrumentally wrongful transfers. In this sense the proscription translates to the command “do not transfer individuals to the foreseeable risk of torture.” It proscribes conduct that would otherwise be lawful but is instrumentally wrongful because it causes future wrongdoing by another. But why does outcome responsibility for such instrumentally-wrongful transfers justify imposing an a priori proscription of transfers that would otherwise be lawful?

This Part justifies the instrumental aspect of the proscription by analogizing to prospective remedies long-established in the law, such as injunctions and prophylactic measures. Furthermore, this Part demonstrates that the prospective remedial view of the proscription, informed by the historic responsibility of the transferring state, indicates that imposing the proscription at the threshold level of a “real risk” of torture is justifiable.

A. Justifying the Proscription of Transfers to the Real Risk of Torture in the Framework of Prospective Remedies

The preventive injunction “which seeks to prohibit some discrete act or series of acts from occurring in the future” is most comparable to the “liability rule or the criminal prohibition,” both of which are “addressed to the future and neither [of which] requires a
past wrong in order to become operative.”

Thus, preventive injunctions can constitute “rules of conduct.” The proscription of torture-risk transfers is also a rule of conduct in this sense because it prohibits otherwise-lawful conduct of a state in conducting transfers in accordance with its immigration laws when that conduct imposes a certain level of risk of torture by another state on the transferee.

The priority of prospective responsibility over historic responsibility lies in the fact that “prevention is better than cure, and fulfillment of prospective legal responsibilities is more to be desired than punishment of nonfulfillment, or repair of its consequences.”

The forward-looking approach provided by the prospective remedial view focuses squarely on the nature of the interests at stake in the case of torture and captures the fundamental justifications for the rule more meaningfully.

The following section develops the analogy between the proscription of torture-risk transfers and injunctive relief.

1. Prospective Relief for Harm to the Person

Although the common law traditionally confined injunctions to cases of nuisance or cases involving damage to property interests, the view that injunctions should be available in cases involving the risk of harm to the person is normatively defensible. Given the importance of the right to bodily integrity, it is arguable that in-

215. Id.

216. Id.

217. See sources cited supra note 2; text accompanying supra note 15.

218. See CANE, supra note 124, at 35.

219. See id. at 206 (“[U]nder the civil law paradigm, liability in relation to harm is typically for doing harm, not for creating risks of harm. It is true that a “quia timet” injunction may be awarded in a tort action for nuisance before any harm has been done, provided harm is immanently likely; but such awards are comparatively rare. More commonly, injunctions restrain the continuance of harm-causing conduct.”).

220. CANE, supra note 200, at 100–02.

221. See OWEN FISS, INJUNCTIONS 2 (1972) (suggesting that the view confining injunctions to cases of property rights is discredited given that, in some cases, the “principle is simply ignored,” while in others, it “is so manipulated as to include any interest worthy of judicial protection”); Developments in the Law—Injunctions, 78 HARV. L. REV. 994 (1965).

222. See George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 568 (1972) (including bodily integrity among the interests that “might claim insulation [through ‘injunctive prohibitions’] from deprivations designed to further other interests”);
junctions should be available to restrain reckless conduct that imposes an unjustifiable risk of harm to the person. 223

However, “unjustifiability” in this sense should not be assessed in a purely quantitative sense but should be based on “a qualitative assessment of the interest put at risk.” 224 That is, depending on the nature of the interests at stake, even a “moderate probability of harm” 225 could justify an injunction. These contentions are assessed below in the context of the proscription of torture-risk transfers.

2. The Justifiability of Injunctive Relief Against Transfers Presenting a Real Risk of Torture

Based on principles developed in relation to the availability of injunctive relief for harm to bodily integrity and injuries to the person, it is possible to evaluate the proscription of transfers presenting a real risk of torture within the framework of injunctions.

a. Nature of the Harm

Torture violates fundamental aspects of humanity and is one of the “primary evils” of society. 226 The “irreparable” nature of the

Murphy, supra note 201, at 525; David G. Owen, Philosophical Foundations of Fault in Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT, supra note 197, at 201, 217–18 (suggesting that ranking or ordering interests such that the “bodily integrity interest is accorded a higher abstract value than property and economic interests [and] has a long and deep tradition in the law of torts”). See generally John Finnis, The Priority of Persons, in OXFORD ESSAYS IN JURISPRUDENCE 1 (Jeremy Horder ed., 4th ed. 2000) (suggesting that “human persons and their interests and well-being” constitute the “point of the law”).

223. See Murphy, supra note 201, at 511, 512–14. Murphy suggests that “[i]f the hierarchy of protected interests is to be fully meaningful it should count for something in its own right that the threat posed by the defendant’s activities or omissions relates to bodily interests . . . .” Id. at 532.

[If negligence law were seen as a tort that embraces not just careless, but also deliberate and reckless conduct, it could be used as a basis for granting injunctions in a number of important circumstances that would help to restore the right to bodily integrity to its rightful place at the top of the hierarchy of protected interests in tort law.

Id.

224. Id. at 531.

225. Id.

226. See STUART HAMPSHIRE, JUSTICE IS CONFLICT 43 (2000) (arguing that torture is one of the “primary evils [that] stay constant and undeniable as evils to be at all costs averted, or almost all costs”). See generally, sources cited supra note 20.
harm,\textsuperscript{227} and the fact that “prevention is better than cure,”\textsuperscript{228} is therefore over-determined in the case of torture. Furthermore, although it is arguable that the adequacy of \textit{ex post} remedies should not factor into this analysis, especially when the constraint in question aims to prevent torture,\textsuperscript{229} it is worth noting that seeking a remedy for torture committed by another state can be problematic.\textsuperscript{230} This intensifies the need to take the preventive constraint on torture-risk transfers very seriously.

\textbf{b. Risk of Harm by a Third Party}

Injunctions may be granted “to restrain conduct that is neither

\begin{itemize}
\item \textsuperscript{228}See Bolton \textit{v.} Stone, [1951] A.C. 850, 867 (Lord Reid) (suggesting that in determining whether there is a “substantial” risk of causing bodily injury to a person by one’s actions, it would not be appropriate “to take into account the difficulty of remedial measures”); Fiss, supra note 214, at 6 (suggesting that the exhaustion of alternative remedies should not be necessary for the availability of the injunction and defending instead a “nonhierarchical conception of remedies, where there is no presumptive remedy, but rather a context-specific evaluation of the advantages and disadvantages of each form of relief”); see also Fiss, supra note 221, at 9; Doug Rendleman, \textit{The Inadequate Remedy at Law Prerequisite for an Injunction}, 33 U. FLA. L. REV. 346, 348 (1981) (assessing the “foundation of the inadequacy prerequisite” in the face of Fiss’ criticism, and suggesting that “if judges view the plaintiff’s interest as too morally or economically important to allow defendant to simply pay for its injury and if persuasive administrative arguments against an injunction are lacking, then the remedy at law will be inadequate”).
\item \textsuperscript{229}See Arar \textit{v.} Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc). See generally \textit{ARAR COMMISSION REPORT}, supra note 161.
\end{itemize}
illegal in itself, nor even prospectively the proximate cause of harm.”231 In this sense, the transferring state’s conduct under its immigration laws is not illegal in itself,232 but instrumentally so because it imposes the real and foreseeable risk of torture.233 Furthermore, the transfer itself is not the proximate cause of harm, given that intervention by the receiving state is necessary for the harm to materialize.

Philosopher J.L. Mackie, in discussing situations of consequences that “come about partly though the choices of other agents,” suggests that “if [agent B’s] action, though neither defensible nor excusable, could be confidently anticipated as a response to [agent A’s action], then [agent A] must take some responsibility for the result.”234 Mackie suggests that the rationale for this principle is “to reduce the likelihood of a certain kind of evil being brought about by a pattern of two-agent performances of which A’s action followed by B’s response to it is an instance.”235 Mackie contends that “where actions such as B’s practically cannot be discouraged, even though there is no moral obstacle to discouraging them, it may still be necessary to discourage such actions as A’s.”236 Even though the risk in question relates to harm that would be committed by the receiving state B, the prospective responsibility of the transferring state A (delimited by a fault-based threshold level of risk)237 justifies restraining its conduct.

Thus, evaluating the proscription of torture-risk transfers within the framework of injunctive relief indicates that a preventive constraint is warranted in these cases (i) because the interest in question is qualitatively of extremely high priority,238 and (ii) on the principle that relief can be granted in cases where the conduct proscribed is not the proximate cause of harm but affiliated with the harm-inflicting conduct. In this sense, the proscription of transfers to the

231. Murphy, supra note 201, at 509–10.
232. See sources cited supra note 2; text accompanying supra note 15.
233. See discussion supra Part II.B.2.b.
234. J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG, 163–66 (1977). Of course, one could argue that “confidently anticipated” may not cover “real risk” situations. However, since purposeful and knowledge-based transfers would be considered intrinsically wrongful, and Mackie appears to be talking about otherwise not-wrongful acts of agent A, his theory can legitimately be brought to bear to real risk cases of torture.
235. Id. at 164.
236. Id. at 165.
237. See discussion infra Part III.B.2.
238. See supra note 20 and accompanying text.
real risk of torture can be considered a “prophylactic” remedy in the way that the term is used in some U.S. legal remedies scholarship.\(^\text{239}\)

How do we determine what constitutes an “unjustifiable” risk for the purpose of the preventive constraint? The risk-differentiated framework developed in this Article demonstrates that the proscription operates on a continuum of risk and that the “real risk” standard is the lowest threshold prescribed in current law.\(^\text{240}\) But at this level of risk, even if the transferring state could be regarded as historically responsible for torture that occurs in the receiving state, from a forward-looking perspective, because the conduct of the transferring state would be otherwise lawful, the question must be whether an a priori constraint on such transfers is warranted in the absence of a high probability of the risk materializing. In other words, does the “real risk” standard make the cut from the prospective view as well, or is the justifiable threshold instead the “more likely than not” American standard?\(^\text{241}\)

B. Determining the Level of Risk: “Unjustifiable” Risk and the Relevance of Fault

It has been argued that whether a risk of serious bodily harm qualifies for a preventive injunction should depend not on the level of risk but instead on a qualitative analysis of the nature of the interests at stake.\(^\text{242}\) An “unjustifiable risk”\(^\text{243}\) in this context is one that cannot

\(^{239}\) See Douglas Laycock, Modern American Remedies: Cases and Materials 282 (2002) (describing a “prophylactic remedy” as an “injunction against conduct that is not itself a violation of anything” and questioning whether such an injunction could be justified by “the risk of a future violation”). According to Laycock, “prophylactic injunctions necessarily interfere with lawful conduct.” Id. at 283; see also Thomas, supra note 11, at 314, 317 n.69 (suggesting that “two key attributes of prophylactic relief, then, are its preventive goal and its enjoining of legal conduct” and that “[p]rophylactic relief . . . addresses conduct preceding a threatened harm in order to prevent that harm; it does not reach out to correct the consequences of that harm”). Another analogous concept is that of “power rules.” See Samuel Bray, Power Rules, 110 COLUM. L. REV. 1172, 1173 n.3 (2010) (distinguishing between “harm rules” that “directly regulate conduct perceived to be harmful” from “power rules,” which “regulate conduct or conditions that are not themselves perceived as harmful but which contribute to human power or vulnerability”).

\(^{240}\) See discussion supra Part II.B.3.

\(^{241}\) See discussion supra Part II.A.1.a.

\(^{242}\) See Murphy, supra note 201, at 532 (“The gravity of a risk is not simply a linear function of its likelihood, but a more complex function of the value that we place on the interest at stake combined with the likelihood of harm to that interest occurring.”).
be outweighed by any amount of precaution or social cost. There are two claims in this contention: first, the quantitative claim that there are certain types of interests for which, at a certain level of risk, no amount of precaution can serve to diminish the risk; and second, the qualitative claim that the risk cannot be outweighed by considerations of utility or benefit external to the risk itself. Does the “real risk” of torture qualify as an “unjustifiable” risk in this sense?

1. Quantitative Unjustifiability: Precautionary Measures to Counter the Risk of Torture

States claim that seeking and receiving diplomatic assurances from a receiving state to the effect that a transferee would not be subjected to torture eliminates or greatly reduces the risk of torture, such that the threshold for the proscription of the transfer is not met because there is no longer awareness of the risk at the time of transfer. There is a vast body of empirical literature from human rights monitoring bodies, as well as legal scholarship on diplomatic assurances, which indicates that these claims should, for the most part, be viewed with suspicion. However, whether diplomatic assurances can, in fact, diminish the risk of torture relates to the viability of the assurances and the possibility of monitoring and enforcing them,

243. Id. at 534.

244. Murphy suggests that an “unjustifiable risk [is one] . . . that can never be justified no matter how carefully the defendant acts and no matter what supposed benefit it generates for the defendant and third parties.” Id. at 527. Murphy qualifies this interpretation by adding that to avoid “a flood of claims based on highly unlikely events,” “[t]here should always be a serious prospect of harm materializing” in order to characterize a risk as unjustifiable. Id. at 534.


an inquiry that is beyond the scope of this Article. Thus, while there are good reasons to believe that the “real risk” of torture meets the quantitative unjustifiability claim—that the risk of torture cannot be lowered or eliminated through assurances of non-torture—as far as the argument here is concerned, that factor remains an open question.

2. Qualitative Unjustifiability: The Relevance of Fault

Given the importance of the interest in bodily integrity and the irreparable nature of the harm, it should follow that even a small probability of torture qualifies as an unjustifiable risk. Furthermore, the prohibition of torture is absolute precisely because no amount of benefit or utility can outweigh its proscription. But from this point of view, why shouldn’t the proscription of torture-risk transfers justifiably operate in such a manner that even a small probability of the person being tortured is enough to constrain transfers? In other words, why should there even be a “serious prospect of harm materializing”? Justifying the appropriate level of risk therefore also requires an account of why the interests at stake in torture do not justify a zero-tolerance policy with respect to transfers at any amount of risk. From the point of view of historic responsibility, such a policy would amount to imposing near-strict liability on states for torture even in cases where there was very little risk at the time of transfer.

However, such a policy is unprincipled in that it completely elides the legitimate liberty interest of the state in exercising its powers of transfer. A strict liability rule would chill all transfers and completely disregard legitimate state interests. On the other hand, a rule that would only constrain intentional transfers takes almost no account of the individual’s fundamental interest in not being tortured.

As Coleman and Ripstein point out in the context of tort law:

248. See supra note 163 and accompanying text.

249. See sources cited supra note 40.

250. See Shue, supra note 40, at 231 (contending that “all actual arrangements for torture are inexcusable, in spite of the fact that we can imagine hypothetical cases, like the notorious ticking-bomb cases in which it seems excusable.”).

251. Murphy, supra note 201, at 534.

252. See Honore, supra note 126, at 28 (suggesting that “strict liability attaches when we choose a course of action to which special risks attach”).

253. See, e.g., sources cited supra note 2; text accompanying supra note 15.

254. See infra note 265 and accompanying text.
If all of the risk were to lie with the defendant—strict liability, in other words—the defendant would always act at his peril. If all the risk were to lie with the plaintiff—holding the defendant liable only for intended consequences—the plaintiff’s security would be hostage to the defendant’s action. Since neither extreme treats liberty or security interests equally or fairly, neither alternative is acceptable as a way of giving expression to the liberal idea of fairness or equality. The fault system solves this problem by supposing that the dividing line must be somewhere in between.255

Coleman and Ripstein offer a relational account of causation and fault under which the risk is distributed between the parties based “on the liberty and security interests that are at stake, which in turn depends on the importance of the activity in which the defendant is engaged and the significance of the plaintiff’s interest that might be injured.”256

The attribution of outcome-based historic responsibility for transfers involving a “real risk” of torture is fault-based in this relational sense. That is, the proscription of transfers is not concerned with protecting against just any risk of torture, which could be posed by transfers to almost any state in the world today.257 Instead, fault is calibrated so that only transfers presenting a risk of torture at or above the threshold standard of risk defined as a “real, personal and foreseeable risk”258 are constrained based on the state’s instrumental role in causing torture in those cases.259 Furthermore, given the state


256. Id. at 91.

257. See generally Oona Hathaway, The Promise and Limits of the International Law on Torture, in Torture: A Collection, supra note 32, at 199, 200 (exploring the role of international law in efforts to prohibit torture and demonstrating that many states—including Saudi Arabia, Egypt, Jordan and the United States—that have ratified the Torture Convention “and thereby made an international legal commitment not to use torture . . . are known to have continued, if not expanded, its use”).

258. See discussion supra Part II.B.3.

259. Supra Part II.B.ii; see also Honore, supra note 126, at 76; Perry, supra note 197, at 344 (rejecting Honore’s suggestion that outcome responsibility exists “even in the absence of fault”). Instead, in Perry’s account, such responsibility is based on the “general capacity to foresee and avoid harm.” Perry, supra; see also Cane, supra note 124, at 185–86 (suggesting that “fault” plays a role in determining outcome responsibility).
interests in question, the “real risk” standard requires more than just foreseeability. The risk-assessment methodology is conducted not through probability analysis but based on evidence relating to “the facts presented, the credibility of the author and claim and its plausibility in light of the situation in the country of origin.”

Therefore, the risk needs to be real, in the sense of epistemic, demonstrable, personal risk, and must rise above mere suspicion. The “real risk” standard in taking fault into consideration pays due attention to the liberty interest of the state in retaining the right to conduct lawful transfers up to the point at which the transfer instrumentally implicates the state’s responsibility for torture.

The fault-based identification of the threshold level of risk that triggers the proscription of torture-risk transfers is also consistent with the analogy to “prophylactic” remedies. This is because “courts have restricted the use of the prophylactic remedy by permitting it to address only those facilitators that are causally linked to the proven harm.”

The real risk standard ensures that “the affiliated conduct”—otherwise lawful transfers—that is “included in the prophylactic relief must demonstrate a sufficient causal nexus to the

260. WOUTERS, supra note 3, at 247; see also Torture Convention, supra note 3, art. 3(2) (providing, “the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”); Committee Against Torture, N.S. v. Switzerland, Comm'n No. 356/2008, CAT/C/44/D/356/2008, ¶ 7.2 (June 3, 2010) (suggesting that the conditions in the receiving state as well as the personal situation of the individual are both equally important in determining the existence of a real risk); WOUTERS, supra note 3, at 460 (pointing out that “[t]he Committee refrains from formulating the risk criterion in a probability calculus, but focuses on the facts” (emphasis added)); Gentili, supra note 46, at 316 (“Traditionally, the [ECHR] has relied on reports drafted by independent international human rights organizations or government sources to assess the risk of ill-treatment.”). See generally Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730 (2008) (scrutinizing 2006 and 2007 Amnesty International reports, the 2007 Human Rights Watch report and a 2006 report on “human rights practices” compiled by the U.S. State Department in order to assess whether the person in question would be at real risk of being tortured in Tunisia).

261. A similar move is noticeable in the realm of constitutional rights in U.S. law. See Evan H. Caminker, Miranda and Some Puzzles of “Prophylactic” Rules, 70 U. CIN. L. REV. 1, 24–25 (2001) (“[E]ven for rights we call ‘absolute’ and refuse to balance away at the back end, there has already been some calibration of government interests worked into the front-end definition of doctrinal protection.”) (emphasis added)).

262. See supra note 239 and accompanying text.

263. See Thomas, supra note 11, at 330.
established harm” — torture by the receiving state. This nexus is established as long as there is a “foreseeable and proximate causal link between the measures and the harm.” The prophylactic view of instrumentally proscribed transfers is also evident in early scholarship on Article 3 of the ECHR, suggesting that “it is the act of the sending State which is in issue if that act of [transfer], while not as such unlawful, may . . . infringe the Convention.”

The fault-based account also serves to clarify ECtHR doctrine to the effect that considerations of national security or the dangerousness of the person in question should not impact the risk assessment of torture. The point is not that the incommensurability of the state’s interest in national security and the person’s interest in not being tortured makes balancing difficult. The incommensurability of interests does not preclude the use of “judgment” in resolving “problems created by a disparity between the fragmentation of value and the singleness of decision.” Instead, the “real risk” standard, by taking “fault” into consideration, has already taken into account the liberty interest of the state in being able to conduct lawful transfers

264. Id. at 332.

265. Id. at 343. Thomas suggests:

The nexus required for prophylactic measures is not a close or strict requirement. For if the attendant conduct itself were so closely intertwined with the harm, it would likely constitute primary conduct directly causing the harm that would be subject to regular, rather than prophylactic, injunctive relief. The nexus for prophylactic conduct must be something less than that connection which makes the conduct itself illegal in order to have a meaningful distinction apart from other liability and remedies. Thus, it is sufficient to satisfy the nexus test if it is shown that the affiliated conduct sought to be included in the prophylactic order has a tendency or potential to facilitate the harm or its prevention.

Id. at 345–46 (emphasis added) (footnotes omitted).


267. See Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730, 762 (2008) (rejecting arguments “to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment”).

268. See Padmanabhan, supra note 5, at 112 n.267 (suggesting that the ECtHR’s proposition is based on the assumption that the interests in question are incommensurable).

269. See Thomas Nagel, The Fragmentation of Value, in Mortal Questions 128, 134–35 (1979); see also Coleman & Ripstein, supra note 255, at 129–30 n.58. The authors refute the charge that the putative incommensurability of liberty and security interests renders their theory of fault impracticable and arbitrary. They suggest that social and legal “practices incorporate contestable viewpoints” and that to deny the possibility of legitimate compromises between such viewpoints is incoherent because it amounts to denying the existence of “difficult choices.”
up to the point at which the transfer instrumentally implicates the responsibility of the transferring state in torture. Whether or not an all-things-considered, absolute proscription of such transfers is justifiable, conflicting considerations make their way at the “front-end” into defining the content of the proscription.

Therefore, subject to the justifiability of an all-things-considered “back-end” balancing test, and of the use of diplomatic assurances, both qualitatively and quantitatively, transfers involving a real risk of torture impose an unjustifiable risk warranting proscription. Since a high probability of risk is not a prerequisite of unjustifiability given the nature of the interest at stake, the “more likely than not” standard adopted in U.S. law imposes a higher threshold of risk than that which should be required to preventively constrain torture-risk transfers.

Parts II and III conducted the first leg of the normative inquiry undertaken in this Article, and demonstrated that the proscription of transfers to the risk of torture is normatively justifiable both in the context of intrinsically and instrumentally wrongful transfers. Further, it is justifiably triggered at the threshold level of a “real risk” of torture—the standard articulated in the ECHR context and endorsed in the Torture Convention framework. Part IV examines whether the proscription is inherent in the human right not to be tortured.

IV. RECONSTRUCTING THE RIGHT NOT TO BE TORTURED

Under the interest-based account, the prohibition of torture in international human rights law grounds several duties on behalf of states. In particular, this Article is concerned with the obligation not to transfer persons to states in which they would face the risk of torture. This Part examines whether the proscription of transfers is inherent in the right not to be tortured vis-à-vis the transferring state. Part I demonstrated that the negative/positive duty framework, which is based on the somewhat facile difference between “what a State

270. See infra notes 325–328 and accompanying text.
271. See supra note 261 and accompanying text.
272. Id.
273. See supra notes 245–247 and accompanying text.
274. See discussion supra Part I.A.1.a.
275. See supra Part I.A.1.
must do” (positive) versus “what [a state] must not do” (negative), does not provide a means of assessing the content of the obligation, nor does it satisfactorily account for how it relates to the right not to be tortured. To be able to define this relationship, it is important to find a method of classification of the obligations deriving from rights that can also speak to the content of the obligations thus classified.

This Part draws from scholarship on the classification of “rights-implementing” rules in U.S. constitutional jurisprudence to develop a framework for classifying the duties emanating from the prohibition of torture. The following section explains the normative implications of the method of classification developed in this Article.

A. Classifying Obligations Relating to the Right not to Be Tortured

The right not to be tortured has been developed in international human rights law through the provisions of the Torture Convention as well as the jurisprudence of the ECtHR. An analytically parallel development of “rights-implementing” rules can be found in U.S. constitutional law. While a substantive discussion on the doctrine itself exceeds the scope of this Article, some background on the scholarship in this area is illuminating with respect to the methodology for classifying the obligations stemming from human rights.


According to Owen Fiss, the “task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals.” In a similar vein,
according to Henry Monaghan, the U.S. Supreme Court “has both the power and the duty to fashion ‘interpretative’ implementing rules to fill out the meaning of generally framed constitutional provisions.” Monaghan suggests that “substantive constitutional guarantees can have important remedial dimensions, and it seems clear that state courts must, in the exercise of their general jurisdiction, provide remedies thought ‘indispensable’ to the underlying guarantee.” These rules constitute “‘true’ constitutional interpretation,” rules that are “‘part and parcel’ of the underlying constitutional guarantee” and therefore indispensable to the source-right. Monaghan distinguishes implementing rules that constitute “constitutional common law” and are subject to legislative revision based on policy or factual changes. Rules in the latter category, though derived from the constitutional right in question, are “not integral” to that right and “go beyond its minimum requirements.” It is tempting to view all

279. Monaghan, supra note 12, at 22–23 (stating that this power of the Court “is simply an ancient aspect of the judicial function in construing the meaning of any text—constitutional, statutory, contractual, etc.”); see also Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 56–57 (1997) (suggesting that even if there is agreement on a particular conception of a constitutional value or right, “questions of implementation often remain”).


281. Id. at 32.

282. Id. at 23–24.

283. Id. at 23. Monaghan classifies both the Miranda rule and the Fourth Amendment exclusionary rule as common law, id. at 33, 40, both of which can be regarded as prophylactic. See Susan R. Klein, Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1032–34 (2001); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978) (“[T]here is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.”).

284. Monaghan, supra note 12, at 30–31. But see Caminker, supra note 261, at 22 (refuting this distinction and arguing that, “[c]ontrary to some previous claims [here referring to Monaghan’s theory], the Miranda rule is not some form of judge-made federal common law, subject like all common law to being overridden by statute”). See also David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 190 (1988) (prophylactic rules “are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law.”).


286. Id.
“prophylactic rules” as falling under the latter category.\textsuperscript{287} However, it is important to note that Monaghan also recognizes that “[a] prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice.”\textsuperscript{288} Thus, the question is not whether a rule is prophylactic or not, but its relation to the core obligation stemming from a right. Indeed, this Article demonstrates that although the proscription of torture-risk transfers can be analogized to prophylactic remedies,\textsuperscript{289} it is nonetheless inherent in a person’s right not to be tortured \textit{qua} the transferring state.\textsuperscript{290}

According to Monaghan, “the distinction between true constitutional rules and constitutional common law lies in the \textit{clarity with which the former is perceived to be related to the core policies underlying the constitutional provision}.”\textsuperscript{291} In other words, the former but not the latter type of rule is a “logical extension” of the core right.\textsuperscript{292} However, Monaghan’s theory has been criticized for not providing a principled means to differentiate between the two types of norms.\textsuperscript{293} The main criticism is that the test does not make “workable criteria” available to differentiate between rules on this basis.\textsuperscript{294}

This Article contends that the test conceptualized by Monaghan can be usefully employed in the context of fleshing out the obligations stemming from the prohibition of torture. This method of classification is more effective in capturing important normative distinctions between obligations stemming from a right (“rights-
implementing obligations”) than the negative/positive duty classification. A rights-implementing rule can either be “inherent,” meaning that it is a “logical extension”\textsuperscript{295} of the core right, or “affiliated,” meaning that it is an important mechanism to effectuate the right.\textsuperscript{296} Further, on the theory of rights based on interests,\textsuperscript{297} workable criteria to differentiate between rights-implementing obligations can only be evaluated on a case-by-case basis after identifying the ultimate interest that generates the right. The sub-Part below undertakes this analysis.

2. Rights-Implementing Obligations Generated by the Prohibition of Torture

In order to safeguard the prohibition of torture in Article 3 of the ECHR, the ECtHR has recognized various rights-implementing rules that are not explicit in the Convention, including the preventive remedial proscription of transfers involving a real risk of torture,\textsuperscript{298} as well as several affirmative obligations.\textsuperscript{299} Furthermore, it should not be inferred from the explicit provision in Article 3 of the Torture Convention that there is thereby a freestanding right not to be transferred to the real risk of torture.\textsuperscript{300} Instead, the Torture Convention fleshes out the prohibition of torture expressed in international human rights instruments and lays out the doctrinal rules required to actualize it. The general aims and purposes of the Torture Convention as embodied in the preamble support this view.\textsuperscript{301} Thus, a holistic

\textsuperscript{295} Landsberg, supra note 287, at 958.

\textsuperscript{296} The parallel in Monaghan’s theory is the category of constitutional common law. See supra note 283 and accompanying text.

\textsuperscript{297} See supra note 22 and accompanying text.

\textsuperscript{298} See discussion supra Part I.A.2.

\textsuperscript{299} See generally Mowbray, supra note 58 (discussing the content of various affirmative obligations imposed by the prohibition of torture in ECHR Article 3).

\textsuperscript{300} See Nowak & McArthur, supra note 46, at 9 (referring to the “principle of non-refoulement” in Article 3 of the Torture Convention). This view of the proscription on transfers to the risk of torture as a rights-implementing remedial provision is consistent with the fact that in U.S. immigration law, FARRA does not provide an independent cause of action. See supra note 91 and accompanying text.

\textsuperscript{301} See Nowak & McArthur, supra note 46, at 87-88 (“The Convention does not contain any provision providing for [the human right not to be tortured] similar to Article 7 CCPR or respective provisions in regional human rights treaties. By making reference to Article 7 CCPR in the Preamble, the Convention rather presupposes the existence of this human right and in ‘desiring to make more effective the struggle against torture’ and cruel,
view reveals that the Torture Convention is a compendium of rights-implementing rules developed in light of the need to flesh out the content of the prohibition of torture.

The “central value” that the prohibition of torture seeks to protect is the interest in not having one’s humanity destroyed.\textsuperscript{302} Thus, as against any particular state, the core of the human right embodied in the prohibition of torture is quite simply a person’s right not to be tortured.\textsuperscript{303} Therefore, obligations that can be considered to follow logically from the core right not to be tortured can be considered inherent in it, whereas obligations that are aimed at maximizing the actualization of the torture prohibition\textsuperscript{304} can be considered “affiliated” with this core right. In other words, the prohibition of torture is wider than any one person’s right not to be tortured. It imposes obligations on states that are both inherent in the human right not to be tortured vis-à-vis a given state as well as obligations relating to state conduct that do not correlate to any one person’s right not to be tortured, but are aimed at bolstering the right in general.\textsuperscript{305}

But how do we know which of these obligations is indispensable to, and therefore inherent in, a person’s right not to be tortured \textit{qua} a given state? We need further criteria to flesh out the content of the obligations of states beyond the obligation not to engage in the category of action defined as torture.\textsuperscript{306} The sub-Part below develops
these criteria in the context of evaluating whether the proscription of torture-risk transfers is inherent in the right not to be tortured vis-à-vis the transferring state.

B. Classifying the Proscription of Transfers to the Risk of Torture

Based on analyzing torture as a wrong, the risk-differentiated remedial framework presented in Parts II and III demonstrated that the proscription of torture-risk transfers prohibits conduct that is intrinsically wrongful because it constitutes participation in or knowing facilitation of torture. It also proscribes conduct that is instrumentally wrongful because it creates the real risk of torture. The relationship of the proscription of transfers at each level to the right not to be tortured is examined below.

1. Intrinsically Wrongful Transfers

A person’s right not to be tortured imposes a correlative obligation on states not to torture that person. The concept of complicity provides a useful framework for understanding why certain kinds of transfers are intrinsically wrong because they constitute participation in or the knowing facilitation of torture. Moreover, the consequence of attributing responsibility for the torture committed by another state to the transferring state is that these transfers can be considered violations of the state’s duty not to torture without necessarily constituting an aspect of the torture itself. As John Gardner points out, “[m]any moral wrongs, such as torture and rape and betrayal and deceit, are committed only by performing non-proxyable actions, such that anyone who contributes to their commission through another person’s commission of them is an accomplice, not a principal, in their commission.” So the transferring state’s obligation not to torture a person extends to the obligation not to transfer that person to a state for the purpose of being tortured or to knowing-

---

307. See id. arts. 1–2.
308. See infra Part II.B.2.a.
309. John Gardner, *Complicity and Causality, in Offences and Defences: Selected Essays in the Philosophy of Criminal Law* 57, 70 (2007). Gardner borrows the term “non-proxyable” in this context from Kadish, *Complicity, Cause and Blame*, supra note 146, at 373 (defining “nonproxyable actions” as “actions [that] can be done by the actor only with his own body and never through the action of another”).
ly transfer a person to a state where it is virtually certain that they would be subjected to torture, without implying that the definition of torture includes such transfers.

2. Instrumentally Wrongful Transfers

Transfers at the threshold level of real risk of torture are instrumentally wrongful.\textsuperscript{310} However, even if a preventive constraint on imposing a real risk of torture is justifiable,\textsuperscript{311} how can that proscription be considered as part of the obligation not to torture, especially when the transfers in question are otherwise justifiable? Workable criteria to identify whether the proscription of transfers to the risk of torture is inherent in the core right can be developed from the fact that the right not to be tortured is a right against a particular kind of harm infliction on one’s person,\textsuperscript{312} which enables an analysis of whether responsibility for committing that wrong can be attributed to the transferring state. That is, the category of state action proscribed by the right not to be tortured cannot be defined to include the content of all the obligations entailed by the prohibition of torture, but only those actions that constitute involvement in the (putative) torture of a person.

The proscription of torture-risk transfers is based on the unjustifiability of being reckless as to the violation of core interests in humanity\textsuperscript{313} protected by each person’s right not to be tortured.\textsuperscript{314} So a state can violate this right by torturing the person or by transferring the person in circumstances where the state is intrinsically involved in the putative torture. It can also violate the person’s right not to be tortured through transfers that impose a real risk of torture where the state is instrumentally involved in the putative torture. This does not mean that the proscription in its instrumental aspects is a part of the obligation not to torture. But from the point of view of the core value of the right, this proscription is still inherent in the right of the person not to be tortured qua the transferring state.

However, the proposition that the right not to be tortured is not strictly correlative to the obligation not to torture may be objected

\textsuperscript{310} See supra Part II.B.2.\textsuperscript{a.}
\textsuperscript{311} See supra Part III.
\textsuperscript{312} See supra notes 75–77 and accompanying text.
\textsuperscript{313} See supra note 20 and accompanying text.
\textsuperscript{314} See supra Part III.
to on the grounds that rights operate as side-constraints\(^{315}\) only agent-relatively, such that “each agent is taken to be concerned only with his own observance of the constraints.”\(^{316}\) On this view, while a person’s right not to be tortured vis-à-vis a state imposes a negative restriction\(^{317}\) requiring that state to abstain from torturing the person, it cannot be considered inherently to extend to a further proscription of transfers involving a real risk of torture by another state.\(^{318}\) Two points may be offered in response.

First, it is not clear why state responsibility for reckless transfers should be viewed strictly agent-relatively. On a relational and victim-based view of responsibility,\(^{319}\) it is not unprincipled to consider a state that instrumentally causes a person in its protection\(^{320}\) to be tortured to have violated the person’s right not to be tortured. This account also makes sense of the ECtHR’s doctrine to the effect that no difference can be made on the basis of which state inflicts the treatment proscribed by ECHR Article 3.\(^{321}\)

Second, the proscription of transfers involving a real risk of torture can be considered inherent in a person’s right not to be tortured \textit{qua} the transferring state because although the proscription is broad in its terms—it reaches not just intrinsically wrongful transfers but also otherwise lawful conduct that is “affiliated” with the harm—its aim is narrowly tailored towards preventing the violation of the person’s right not to be tortured.\(^{322}\) Furthermore, the “real risk”

\begin{itemize}
\item \textit{315.} See Nozick, \textit{supra} note 22, at 29; Waldron, \textit{supra} note 22, at 204 (Rights as side-constraints are restrictions on action that require agents “to refrain from performing actions of the specified type.”).
\item \textit{316.} See Waldron, \textit{supra} note 22, at 204.
\item \textit{317.} Id.
\item \textit{318.} See, e.g., Padmanabhan, \textit{supra} note 5, at 79 (“[U]nderstanding non-refoulement as a protection duty provides an intellectual architecture to separate it from the \textit{jus cogens} prohibition on committing acts of torture . . .”).
\item \textit{319.} See Cane, \textit{supra} note 124, at 3–4. Cane suggests that “legal responsibility is relational in the sense that it is concerned not only with the position of individuals whose conduct attracts responsibility, but also with the impact of that conduct on other individuals and on society more generally.” Cane argues that “[b]y contrast, [agent-relative accounts of responsibility focus] on agents at the expense of ‘victims’ and of society.” Id. at 4.
\item \textit{320.} Whether and to what extent the proscription of transfers to the risk of torture extends extraterritorially to those “beyond protection” is a separate inquiry, beyond the scope of this Article. See Hamburger, \textit{supra} note 305, at 1828.
\item \textit{322.} See Thomas, \textit{supra} note 11, at 332–33 (suggesting that prophylactic relief that is “narrowly targeted at redressing the proven harm” does not overreach even though its terms
threshold at which this proscription is triggered is a fault-based standard\footnote{323} that presupposes the involvement of the transferring state in the putative torture. Given that there could be error in calibrating risk, the proscription of transfers involving a real risk of torture may include situations where an individual would never actually have ended up being tortured. The proscription would then function as an over-inclusive prophylactic rule that may bar justifiable transfers. However, such rules can still be inherent to the core right that they protect.\footnote{324}

This response is still open to the objection that the absolute-\footnote{ness of the torture prohibition does not necessarily entail the corresponding absoluteness\footnote{325} of the proscription of instrumentally-\footnote{wrongful transfers to the risk of torture.\footnote{326} It is arguable that the proscription of transfers in such cases should be subject to justifiable exceptions.\footnote{327} This inquiry is beyond the scope of this Article, but it should be noted that even viewing the proscription of transfers as inherent in the right not to be tortured does not resolve the question of whether, all things considered, such a proscription would be justifiably absolute.\footnote{328}}}

The final section considers the normative implications and

\begin{itemize}
\item \footnote{323. See supra Part II.}
\item \footnote{324. See supra notes 287–290 and accompanying text.}
\item \footnote{325. The ECtHR has held that the proscription of transfers which would subject the transferee to a real risk of torture is just as absolute as the right not to be tortured. See Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1855; see also Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 730 (2008); Theory & Practice, supra note 39, at 441; Wouters, supra note 3, at 307–14. Article 3 of the Torture Convention has also been understood to be absolute. See Nowak & McArthur, supra note 46, at 119, 127, 147.}
\item \footnote{326. See, e.g., Finnis, supra note 42, at 145 n.58. Finnis bases his criticism of the contrary position on the distinction between intentional actions and side-effects and by reference to his theory of moral absolutes.}
\item \footnote{327. See Suresh v. Canada (Minister of Citizenship and Immigration), [2002] S.C.R. 3, ¶ 78 (Can.) (“We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified . . . .''); see also David Jenkins, Rethinking Suresh: Refoulement to Torture Under Canada’s Charter of Rights and Freedoms, 47 Alta. L. Rev. 125, 127 (2009–10). By contrast, under U.S. law, once the likelihood of torture is proven, regardless of other considerations, the person will be granted at the very least “deferral of removal.” 8 C.F.R. § 208.17.}
\item \footnote{328. See Waldron, supra note 22, at 219 (“Though the right not to be tortured is more important than many other rights, it does not follow that every duty associated with it is more important than any duty associated with any of the others.’’).}
\end{itemize}
limits of the justificatory process by which the proscription of torture-risk transfers can be viewed as inherent in the right not to be tortured.

C. Normative Implications of the Classification Mechanism

Extrapolating from the mechanism developed above to classify the proscription of torture-risk transfers, other obligations stemming from the prohibition of torture can also be classified based on an assessment of the relationship between a given obligation and the core right not to be tortured. The assessment relates to how closely the obligation is tailored to the right not to be tortured *qua* a particular state and the fulfillment of a fault requirement under which there must be a causal link between the action proscribed or required by the obligation in question and a specific instance of putative torture. As the section below demonstrates, this assessment enables the identification of certain “affiliated” obligations in the torture framework. However, there are also limits to this justificatory mechanism.

1. Identifying “Affiliated” Obligations in the Torture Framework

The discussion above has shown that the proscription of transfers to the real risk of torture is an example of a rights-implementing rule that is a logical extension of the core right not to be tortured. On the other hand, some of the other obligations in the torture framework can be shown to be affiliated to rather than inherent in the core right not to be tortured. Take, for example, the obligation to provide education and training to law enforcement and other personnel, the obligation to systematically review interrogation methods and conditions of detention, the obligation to investigate *ex officio* possible acts of torture and obligations relating to the criminal prosecution of perpetrators of torture. These obligations can be considered affiliated rather than inherent because the existence of these mechanisms guarantees the maximum protection of

329. See NOWAK & MCARTHUR, supra note 46, at 88.
330. Torture Convention, supra note 3, art. 10.
331. Id. art. 11.
332. Id. art. 12.
333. Id. arts. 4–9.
the right not to be tortured.

The difference between the inherent nature of the proscription of transfers and the affiliated nature of the obligations referred to above is usefully demonstrated in the remedial framework. If the proscription of transfers can be analogized to a prospective remedy, aims of affiliated obligations in the torture context are very similar to those of structural remedies that evolved in the civil rights era in U.S. law.

According to Owen Fiss, the structural injunction “seeks to effectuate the reorganization of an ongoing social institution.” It is not concerned with particular incidents of wrongdoing but with “a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition.” The structural remedy is “decidedly instrumental” in the sense that it does not have to be tailored to a specific violation of the right in question.

Rights-affiliated obligations developed to “actualize” the prohibition of torture have similar goals. The “ultimate subject matter” of such obligations in the torture context is about reforming “a social condition that threatens” core values relating to humanity itself and the recognition that a full-scale reorganization of institutional priorities is required in order to give effect to a fundamental norm of human existence—the prohibition of torture. While some of these obligations also have reparative implications, their main purpose is

334. See Thomas, supra note 11, at 320 (suggesting that structural relief is a hybrid form of injunctive relief that has aspects of “both preventive and reparative relief”).

335. Fiss, supra note 214, at 7; see also Thomas, supra note 11, at 320–21 (suggesting that the “important characteristic of structural relief as compared with other categories is its alteration of the very structure of an institution as opposed to the behavior of the institutional actors”).

336. Fiss, supra note 278, at 23.

337. Id. at 18.

338. Id. at 47.

339. Id. at 52 (stating that “[r]ights operate in the realm of abstraction” and form the declarative aspect of public value. Remedies, which, together with rights, constitute public value, “constitute[] the actualization of the right”).

340. For example, the torture-evidence exclusionary rule in Article 15 of the Torture Convention applies to a state irrespective of whether it had a hand in having the person tortured. See A v. Sec’y of State (No. 2), [2006] 2 A.C. 221 (Eng.) (ruling that the complicity of the British authorities in the use of torture would not be a condition precedent to excluding torture-evidence in legal proceedings); NOWAK & McARTHUR, supra note 46, at 504, 526–30. The justification for the exclusionary rule seems to go beyond deterrence to
to effectuate the right not to be tortured and to maximize the protection that it provides. Thus, as opposed to inherent obligations, affiliated obligations in the torture framework are not strictly tailored to prevent specific violations of the right not to be tortured. They often go beyond this purpose to maximize the actualization of the right through means directed at prevention and eradication of torture from all state institutions.

2. Limits of the Inherent-Obligation View of the Proscription of Transfers to the Risk of Torture

The test developed in this Article to assess the relationship between the proscription of transfers to the risk of torture and the core right not to be tortured is limited in two significant ways.

First, this justificatory mechanism does not extend to certain broader applications of the proscription of transfers involving a real risk of torture. A recent example in the ECHR context is the question of whether the transfer of a person to a state in which there is a real risk that evidence obtained by the use of torture would be used at trial also include a form of reparative justice, as well as a symbolic importance. See Monaghan, supra note 12, at 40–41 (emphasizing the institutional impact of the “social disapproval” invoked by violations of the Fourth Amendment, drawing from Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 734 (1970)); see also Klein, supra note 283, at 1033 (describing the exclusionary rule as an “incidental right” that “seeks to advance the text of or values underlying the constitutional rule violated by either deterring future violations of that clause or reducing the harm visited upon an aggrieved party”).

341. See Gardner, supra note 21, at 46 (pointing out that notions of justice, though important, are secondary in the context of the right not to be tortured, which is primarily concerned with preventing a fundamental assault on humanity itself).

342. But see Thomas, supra note 11, at 327 (characterizing such measures as “affirmative” prophylactic relief and contending that they are nonetheless tailored “to protect against the threatened harm”). This view does not seem principled in the case of a particular individual’s right not to be tortured qua the state. Thomas’ account is based on a view of remedial incorporation. Insofar as this article contends that some of the institutional remedies in the torture framework are not strictly tailored to a person’s right not to be tortured, it espouses the “rights-essentialist” view ascribed to Fiss and Monaghan. See generally Levinson, supra note 13.

343. Analogizing affiliated obligations with structural reform is agnostic as to the further categorization of these obligations as reparative, symbolic and so on. Affiliated obligations need not be of the same type or share the same characteristics. See Shue, supra note 52, at 160 (discussing the futility of setting a number on categories of duties emanating from rights).
violates this proscription. Another example is the application of the proscription in cases where the person is not at risk of being tortured in the receiving state, but is at risk of being transferred from the receiving state to a third state where that person is in danger of being tortured. More must be said to justify such extensions, at least as far as the instrumental aspect of the proscription is concerned, because they elide the fault requirement that renders such transfers wrongful.

Second, the workable test developed in this Article to classify obligations is limited to the context of torture. It does not translate to assessing proscriptions of transfers that risk the putative violation of other rights where the harm caused by the right’s infringement may not be identifiable as a “wrong” in the same sense as torture. For example, different criteria would be required to assess whether a person’s due process right vis-à-vis a state (such as the right to fair trial) extends to a proscription of transfers to states where this right is at risk of being violated.

Human rights instruments are increasingly being interpreted in a way that militates against restricting the obligations imposed on states so that “states are required to actively protect human rights.” A principled way to differentiate between the resulting profusion of duties generated by any given right enables the identification of obligations that are indispensable to achieving the core right.


345. See WOUTERS, supra note 3, at 320–23 (suggesting that ECHR Article 3 also proscribes such “indirect refoulement”); see also Mutombo v. Switzerland, COMM ’93, ¶ 10, U.N. Doc. CAT/C/12/D/13/1993 (Apr. 27, 1994) (“[T]he State party has an obligation to refrain from expelling [the applicant] to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture.” (emphasis added)).

346. See discussion, supra Part III.B.2. If the purpose of the first state in this chain is to have the person tortured by the ultimate receiving state, it is arguable that such transfers could be intrinsically wrongful.

347. See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 45 (1989) (stating that Article 6 of the ECHR which provides the right to fair trial potentially creates an obligation of non-refoulement); WOUTERS, supra note 3, at 348–53.


349. See id. at 46 (The interpretation of human rights instruments requires a “constructive approach” involving engagement with the interests and an approach “that is
Through the lens of the proscription of torture-risk transfers, this Part has shown that obligations inherent in a person’s right not to be tortured vis-à-vis a state presuppose a relationship of responsibility between the state and that particular person with respect to a specific instance of putative torture. The view of torture as a wrong enables this assessment. On the other hand, obligations imposed to bolster the prohibition of torture are affiliated with rather than inherent in a person’s right not to be tortured. This distinction strengthens this fundamental human right by providing a principled way to interpret and implement its core aspects.

CONCLUSION

The subject of rights in modern political discourse is fraught with disagreement. In particular, the boundaries of human rights-based constraints on state power form the subject of profound disagreement between states on the one hand and international human rights regimes on the other.

There is reason for those on either side of this debate to define the boundaries of basic rights and their implications in ways that best justify their respective points of view. Existing normative and conceptual doubts about the content, scope and nature of fundamental human rights are exacerbated by this constant process of agenda-based redefinition, leading to a weakening of the notion of rights as an indispensable concept in delineating limits on state power. For human rights to function as justifiable and practically useful constraints on state power, we need normative and conceptual clarity regarding their existence and parameters, as well as the remedies that are available to enforce them.

This Article furthers this enterprise through the lens of a central controversy at the intersection of immigration law and torture jurisprudence, the justifiability and content of the obligation imposed on states in international law not to transfer individuals to countries where they face a substantial risk of being tortured.

First, the Article has rescued this obligation from attempts at justification that overly rely on rhetoric relating to the absoluteness of the torture prohibition and fail to correctly identify the nature of the transferring state’s responsibility in such cases. Instead, it justifies

principled, practical, coherent, and remains sensitive to local contextual considerations”

the obligation through a risk-differentiated framework based on analyzing torture as a wrong in criminal and tort doctrine. Furthermore, this Article has shown that the fault-based “real risk” standard common to the ECHR and Torture Convention frameworks constitutes a justifiable threshold level of risk. Therefore, the higher standard of risk in U.S. law is not only contrary to international law but also unjustifiable from a normative point of view because it permits some instrumentally wrongful transfers.

Second, the Article has argued that the obligation to refrain from both intrinsically and instrumentally wrongful torture-risk transfers is a logical extension of a person’s right not to be tortured vis-à-vis the transferring state. In the course of this inquiry, the Article has also developed a useful heuristic to classify obligations generated by the prohibition of torture in international human rights instruments based on their relationship to the core aspect of this prohibition, the fundamental human right not to be tortured.