

**GHOST PRISONERS AND BLACK SITES:
EXTRAORDINARY RENDITION UNDER INTERNATIONAL LAW**

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I. Introduction

The waging of war inevitably involves the taking of prisoners, and the U.S. “Global War on Terrorism” (“GWOT”)¹ has been no exception. Some prisoners have been detained abroad at the behest of the United States government; others are held in U.S. interrogation facilities in the U.S. or abroad, such as the prisons at Guantanamo Bay (Cuba); Bagram Air Force Base (Afghanistan) or Abu Ghraib (Iraq); others, it has even been alleged, are being held at sea.² Human Rights groups have probably over-estimated the total number of prisoners to be as high as 70,000;³ the number of known prisoners in Iraq, Afghanistan, Guantanamo Bay, and U.S. prisons according to available published

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¹ See Press Release, The White House, The Global War on Terrorism: The First 100 Days, *available at* <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html>. This article does not address the threshold question of whether it is possible to characterize the use of military force against terrorist groups as a “war” in the legal sense. Given that the Iraq and Afghanistan conflicts were clearly international armed conflicts within the meaning of international humanitarian law that determination is unnecessary to the discussion of the issues raised herein. I have expressed my views of that subject elsewhere, *see* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004) [hereinafter Sadat, *Terrorism*].

² There have been credible allegations of detention centers existing on U.S. Naval Vessels. *See* Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* 3, 3-4 n.6 (Oct. 29, 2004), *available at* <http://www.nyuhr.org/docs/TortureByProxy.pdf> [hereinafter NY City Bar Report].

³ *United States of America, Guantánamo and beyond: The Continuing Pursuit of Unchecked Executive Power*, AMNESTY INTERNATIONAL, May 13, 2005, <http://web.amnesty.org/library/print/ENGAMR510632005>.

sources is more consistent with a figure of 12,000 or 15,000.⁴ Whatever the total number of prisoners, the legal framework governing them is clear: their treatment is governed by the four Geneva Conventions of 1949, which have, since World War II, been the gold standard regarding the capture, detention, treatment and trial of prisoners of war and civilian internees.⁵ Indeed, the four Geneva Conventions enjoy unparalleled support among States, having been ratified by 192 countries, that is, virtually every country in the world, including the United States, Afghanistan and Iraq,⁶ and are, without a doubt, part of the customary laws of war.⁷ Geneva law, as it has come to be called, requires that prisoners be treated humanely, forbids secret detention sites, and appoints the International Committee of the Red Cross as the international monitor for Geneva compliance.⁸

Early in the GWOT, however, over the objections of U.S. Secretary of State,

⁴ See, e.g., Isabel Hilton, *The 800lb Gorilla in American Foreign Policy: Alleged Terror Suspects are Held Incommunicado All Over the World*, GUARDIAN (London), July 28, 2004, available at <<http://www.guardian.co.uk/print/0,3858,4980261-103390,00.html> (alleging roughly 12,000 prisoners in Iraq and another 3,000 arrested in 100 countries elsewhere).

⁵ This essay therefore does not accept the correctness of the Administration's decision not to apply Geneva law to the conflict in Afghanistan, although certainly some of the detainees who were members of al Qaeda, as opposed to Taliban military forces, might ultimately be found not to benefit from the Prisoner of War ("POW") Convention under Article 4, thereof. See generally Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Sadat, *Terrorism*, *supra* note 1, at 140-42. Nonetheless, even if not classified as POWs, they would fall within the provisions of Geneva IV, on civilians. See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; see also COMMENTARY ON GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 271 (Oscar Uhler & Henri Coursier eds., 1958) [hereinafter ICRC COMMENTARY]. The Bush administration does not agree, and this remains a controversial point as regards the Afghan conflict. See *infra* notes 9-11 and accompanying text.

⁶ ICRC, International Treaties & Documents, <http://www.icrc.org/ihl.nsf/INTRO?OpenView>.

⁷ See, e.g., The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 35, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993). This report was unanimously adopted by the Security Council. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

⁸ Protocol I elaborates upon the Geneva Conventions, and although it has not been ratified by the U.S., many of its provisions, and particularly those regarding the humane treatment of prisoners are considered part of customary international law. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3.

Colin Powell,⁹ and the State Department's Legal Advisor, William H. Taft, IV,¹⁰ lawyers in the U.S. Department of Justice argued that the United States should abandon the provisions of the Geneva Conventions in favor of a *de novo* legal regime that they believed would be superior for the capture, detention, treatment and trial of enemy prisoners, whether captured in the United States or abroad. In the words of then Counsel to the President, Alberto Gonzales:

[T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for [the Geneva Prisoner of War Convention]. . . . In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions"¹¹

President Bush ultimately accepted the Department of Justice's arguments, and issued a memoranda declining to apply Geneva law to either al Qaeda or Taliban detainees in U.S. custody.¹² A diplomatic and legal furor ensued, particularly after the transfer of prisoners from Afghanistan to Guantanamo Bay, Cuba, where bound prisoners were initially held

⁹ Memorandum from Colin Powell, Sec'y of State, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 122-23 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

¹⁰ Memorandum from William H. Taft, IV, Legal Advisor, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *reprinted in* TORTURE PAPERS, *supra* note 9, at 129. For an excellent treatment of this issue *see* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005).

¹¹ Memorandum from Alberto R. Gonzales, Counsel to the President to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 9, at 118, 119 [hereinafter Gonzales, Geneva Memo].

¹² Memorandum from George W. Bush, President to Richard B. Cheney, Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 9, at 134. The memo is rather elliptical in its reasoning, concluding that al Qaeda members do not receive the protection of the Geneva Conventions because "al Qaeda is not a High Contracting Party to Geneva." *Id.* at 134. As regards the Taliban, although the memo concludes that Geneva applies to the conflict with the Taliban, the President nonetheless determined that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.* at 135.

in outdoor cages and were denied any right to challenge the status of their detention or their treatment. The extremely negative international reaction generated by the creation and operation of the U.S. prison at Guantanamo Bay, as well as other U.S. detention centers, is summarized by the words of Amnesty International, which, in its latest annual report, suggested that the U.S. detention center at Guantanamo Bay had become the “gulag of our times.”¹³

Nearly two years after the September 11th attacks and the Afghan invasion, Iraq was invaded by the United States and a “coalition of the willing,”¹⁴ one justification for which was the continuation of the GWOT.¹⁵ Although the United States determined that Geneva law applied to the conflict in Iraq,¹⁶ the decision not to apply Geneva to the detainees captured in the Afghan conflict appears to have spilled over to the Iraq theatre, where, once again, credible allegations of prisoner mistreatment and violations of international law were made against the United States. The most visible evidence of this abuse was the shocking photos emanating from the U.S. detention facility at Abu Ghraib. Indeed, the prisoner abuse problem is much more serious, both quantitatively and qualitatively, as regards detainees in Iraq, than the human rights problems experienced at Guantanamo Bay. First, many more prisoners have been captured and held in Iraq than in

¹³ See Irene Khan, *Foreword*, AMNESTY INTERNATIONAL, 2005, available at <http://web.amnesty.org/report2005/message-eng>.

¹⁴ See Press Release, The White House, Operation Iraqi Freedom, Coalition Members (Mar. 27, 2003) <http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html>.

¹⁵ Although on September 18, 2003, President Bush stated publicly for the first time that Saddam Hussein was not directly involved in the September 11th attacks, the Bush administration repeatedly conflated al Qaeda and Iraq as enemies in the War on Terror, leading more than seventy percent of all Americans to believe that Saddam Hussein was responsible in some way for the attacks. See, e.g., *Bush Administration on Iraq 9/11 Link*, BBC NEWS, Sept. 18, 2003, available at <http://news.bbc.co.uk/2/hi/americas/3119676.stm>.

¹⁶ See, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 476-77 (2002); see also *infra* notes 77-78 and accompanying text.

Afghanistan or Guantanamo Bay. Second, as the occupying power of Iraq, the United States has special duties towards the individuals living within the territory it is administering.¹⁷ Finally, unlike Guantanamo Bay, which is within federal court jurisdiction, relatively proximate to U.S. shores and poses no security risk to U.S. citizens, Iraq is far away and remains an active theatre of hostilities in which U.S. soldiers die almost daily. It is also probably not within the jurisdiction of U.S. Article III courts, nor is it accessible to public observers.

Although the government has retreated from some of the more controversial policies adopted regarding the treatment of prisoners captured in the GWOT, particularly as regards the use of torture and cruel, inhuman and degrading treatment,¹⁸ one aspect of government policy that appears to be both ongoing and supported by U.S. officials, even if not officially, is the policy of extraordinary rendition—transferring detainees abroad for detention and interrogation either from the U.S., on behalf of the U.S., or from occupied Iraq. Although the numbers of prisoners rendered abroad has been relatively few, the covert nature of the operations, and the allegations of prisoner mistreatment raise

¹⁷ S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

¹⁸ One of the most controversial memoranda of the war was the August 1, 2002 memo from Jay Bybee to Alberto Gonzales that took the position that “[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* TORTURE PAPERS, *supra* note 9, at 172. Additionally, the memo asserted that to any effort by Congress to interfere with the “President’s conduct of the interrogation of enemy combatants would violate the Constitution’s sole vesting of Commander-in-Chief authority in the President.” *Id.* at 207. This memo was ultimately repudiated by a December 30, 2004 memorandum from Daniel Levin to James B. Comey stating “This opinion . . . supersedes in its entirety the August 1, 2002 opinion of this Office.” Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice to James B. Comey, Deputy Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* <http://www.justice.gov/olc/dagmemo.pdf>. It concluded that “‘severe’ pain under the statute [is not limited] to ‘excruciating and agonizing’ pain or to pain ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.’” *Id.* (citations omitted).

very troubling questions about the wisdom and the legality of the U.S. rendition program. At the same time, distinguished lawyers and even the U.S. Office of Legal Counsel have apparently supported the rendition policy by legal memos that have not been disavowed. In Part III, this essay examines the law governing rendition from U.S. territory or by U.S. agents—which has not been the subject of memos by government counsel, at least not insofar as is publicly known. In Part IV, the essay explores the special case of extraordinary rendition from occupied Iraq, examining the legal justifications for the U.S. rendition policy proffered by the government.

Having concluded that extraordinary rendition is not permissible under existing, applicable and well-established norms of international law, Part V briefly explores the consequences of this illicit government activity. Because renditions are carried out in secret, employ extralegal means, and often result in prisoner abuse, including cruel treatment, torture, and sometimes death, they are emblematic of the larger human rights concerns that trouble many of the detention and interrogation practices employed by the U.S. government since September 11, 2001. Similarly, relying upon lawyers to pen justifications for controversial government activities has been a central feature of the conduct of the GWOT, one that resurfaces in the context of the current rendition policy. Of particular concern is that rather than explicitly amending the law or articulating clear, narrowly tailored justifications for derogating from the law, derogations that would presumably be temporary and specific, such as the derogations permitted under international human rights treaties,¹⁹ government officials have sought to redefine legal

¹⁹ *See, e.g.,* A v. Secretary of State for the Home Dep't, [2004] UKHL 56, [2005] 2 W.L.R. 87 (appeal taken from Eng. (U.K.), *available at* <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm> (discussing the U.K.

norms in an exceptional burst of “executive activism” in ways that are simply not particularly plausible or persuasive.²⁰ This use of legal subterfuge is deeply troubling in and of itself, as well as in regards to its potentially harmful consequences. Finally, the essay questions the efficacy, as well as the wisdom, of these extralegal policies. Although even some human rights advocates have argued that extraordinary measures may be necessary to win the GWOT²¹ those taken to date—ranging from military operations, to extraordinary detention and interrogation practices—have created an international backlash that has substantially eroded America’s standing in the world, and may contribute to the inability of the United States to gain real allies for its war on terror. Yet, other than the assertions of policy makers and pundits, there has been virtually no evidence that these extraordinary measures achieve their stated purpose.

II. The Practice of Extraordinary Rendition

Last Spring, an article in *The New Yorker* alleged that the U.S. government, and more particularly the Central Intelligence Agency (“CIA”), was moving individuals detained as part of the U.S. “War on Terror,” to other countries using extralegal channels.²² According to media reports, suspects are blindfolded, shackled and sedated before being transported by jet to the destination country where they are typically detained, interrogated, often tortured and sometimes killed.²³ The most common

derogations of November 11, 2001 from the European Convention on Human Rights and the ICCPR following the September 11th attacks).

²⁰ A more recent example is provided by the government’s assertion that the Authorization for the Use of Military Force (“AUMF”) provides the President with authority to engage in warrantless surveillance.

²¹ Michael Ignatieff, Op-Ed., *Lesser Evils*, N.Y. TIMES MAG., May 2, 2004, available at http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_less_evils_nyt_050204.htm.

²² Jane Mayer, *Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program*, NEW YORKER, Feb. 14, 2005, available at http://www.newyorker.com/fact/content/?050214fa_fact6.

²³ NY City Bar Report, *supra* note 2, at 9 (reporting the case of five individuals rendered from Albania to Egypt, where two were executed).

destination is apparently Egypt, although renditions have occurred involving Jordan, Syria, Morocco and Uzbekistan, as well. In the words of one former CIA agent: “If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt.”²⁴

More recently, allegations surfaced suggesting that the CIA has been hiding and interrogating detainees at so-called “black sites”—covert prisons set up by the CIA in eight countries, including Thailand, Afghanistan, several unspecified countries in Eastern Europe, and Guantanamo Bay, Cuba.²⁵ These stunning revelations might not have raised as many concerns as they did had there not already existed a substantial controversy concerning the legality and wisdom of the U.S. government’s detention and interrogation policies regarding terror suspects, prisoners of war and even civilian internees in the U.S., Afghanistan and Iraqi theatres in the War on Terror.²⁶

The practice of “outsourcing” prisoners to foreign countries for detention, interrogation, and sometimes trial, has come to be known, somewhat euphemistically, as extraordinary rendition.²⁷ The stories of the individuals detained are lurid in their details,

²⁴ ACLU, Extraordinary Rendition – FACT Sheet, <http://www.aclu.org/safefree/extraordinaryrendition/22203res20051206.html>.

²⁵ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1. Similar assertions have been made by journalist Seymour Hersh in his recent book, *Chain of Command*. See SEYMOUR M. HERSCH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 16-17, 20 (2004). Seymour asserts that pursuant to a secret finding signed by the President, the Defense Department had been authorized to set up a “specially recruited clandestine team of Special Forces operatives and others who would defy diplomatic niceties and international law and snatch—or assassinate, if necessary—identified ‘high-value’ Al Qaeda operatives anywhere in the world. Equally secret interrogations centers would be set up in allied countries where harsh treatments were meted out, unconstrained by legal limits or public disclosure.” *Id.* at 16. European officials have not confirmed the existence of secret C.I.A. prisons, Dan Bilefsky, *No Proof of Secret C.I.A. Prisons, European Antiterror Chief Says*, N.Y. TIMES, Apr. 21, 2006, at A11.

²⁶ Khan, *supra* note 13.

²⁷ The definition of “extraordinary rendition” varies depending upon the source. The New York City Bar

starting with hooded detainees being spirited away in the dead of night and sent in chartered aircrafts to remote countries where they were subjected to torture and maltreatment.²⁸ Unofficially, U.S. officials have admitted that the practice exists; officially, however, details have not been forthcoming.²⁹ Some of those rendered abroad have died or been killed; some appear to have become “ghost prisoners,” held without record either by U.S. or foreign jailers;³⁰ others, more “fortunate,” such as Maher Arar, a Syrian born Canadian citizen, have had relatives able to alert either the press or other authorities to their disappearance, and have pressed their cause in U.S. courts and before international commissions of inquiry investigating their allegations of abuse.³¹ A number of non-Iraqi prisoners were apparently secretly transferred out of Iraq from March to September, 2004, under an unpublished legal opinion by the Bush administration that permitted the military and the CIA to treat at least a small number of non-Iraqi prisoners

Association report uses the following definition: “the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.” NY City Bar Report, *supra* note 2, at 4. On the other hand, the term is sometimes referred to any extra-judicial transfer of a prisoner from U.S. custody to a country other than the U.S. *See, e.g.*, Wikipedia, Extraordinary Rendition, http://en.wikipedia.org/wiki/Extraordinary_rendition.

²⁸ *See, e.g.*, Seth Hettena, *Navy Secretly Contracted Jets Used by CIA*, ASSOCIATED PRESS, Sept. 24, 2005, <http://www.military.com/NewsContent/0,13319,77683,00.html?ESRC=topstories.RSS>.

²⁹ NY City Bar Report, *supra* note 2, at 2.

³⁰ The term was employed by the U.S. army in Iraq and relayed in the report of Major General Antonio M. Taguba, on alleged abuse of prisoners by members of the 800th Military Police Brigade at the Abu Ghraib Prison in Baghdad, Iraq. ANTONIO M. TAGUBA, MAJOR GEN., U.S. DEP’T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, *reprinted in TORTURE PAPERS, supra* note 9, at 405 [hereinafter TAGUBA REPORT]. According to General Taguba’s report, the individuals in question were apparently held by military police without knowing their identities or the reason for their detention. *Id.* These prisoners were apparently “moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team.” *Id.*

³¹ *See, e.g.*, Wendy Patten, *Human Rights Watch Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, HUMAN RIGHTS WATCH, June 7, 2005 [hereinafter HRW Report]. Arar has filed a lawsuit in U.S. District Court. *See* Complaint and Demand for Jury Trial, *Arar v. Ashcroft*, No. 04-CV-249 (E.D.N.Y. Jan. 22, 2004), *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf. Arar’s initial complaint was dismissed on February 16, 2006. *See* Memorandum and Order, *Arar v. Ashcroft*, No. 04-CV-249 (E.D.N.Y. Feb. 16, 2006), *available at* www.ccr-ny.org/v2/legal/september_11th/docs/Arar_Order_21606.pdf.

captured in Iraq in the same way as members of al Qaeda and the Taliban captured in Afghanistan, Pakistan or elsewhere.³²

Although the idea of extraordinary rendition as an investigative tool did not originate with the Bush administration,³³ there is no doubt that the advent of the GWOT has brought with it a significant expansion of the practice,³⁴ and that the emphasis has shifted from obtaining suspects for prosecution,³⁵ to transferring them for interrogation.³⁶ A full exploration of these issues and U.S. detention and interrogation policies more generally is beyond the scope of this short essay, and there is, in any event, an ever increasing literature on the subject. Instead, this essay explores two particular problems: the question of extraordinary rendition of individuals from the U.S. (or from U.S. facilities abroad or by U.S. agents) to prisons abroad; and the special problem posed by the movement of detainees out of Iraq during the U.S. occupation of that country.

III. Non-Occupation Transfers of Detainees

³² Douglas Jehl, *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1. This article refers to an earlier draft Justice Department Memorandum of March 2004 on the subject, which apparently led to the conclusions in the later memo, although government officials later reported that the text of the March 2004 document had not been incorporated into the new memo. *Id.* The Justice Department memo was apparently the basis upon which one dozen non-Iraqi prisoners were transferred out of Iraq, either to other countries (such as Egypt or Saudi Arabia) or secret U.S. prisons around the world that have been used since September 11, 2001 to house “high value” detainees. *Id.*

³³ Extraordinary rendition was inherited and reauthorized by former President Bill Clinton in a 1995 policy directive, PDD 39. Presidential Decision Directive 39: U.S. Policy on Counterterrorism (June 21, 1995), available at <http://www.fas.org/irp/offdocs/pdd39.htm> [hereinafter PDD 39]. PDD 39 is declassified, but highly redacted. It was used during his “War on Terror” in the 1990s. *See, e.g.*, Jim Harland, *Pricey Rendition*, WASH. POST, July 3, 2005, at B7. *See also* NY City Bar Report, *supra* note 2, at 9-10. A new directive was issued in May 1998, PDD-62; the existence of this directive is known, but the directive itself is still classified. HRW Report, *supra* note 31, at 4 n.7.

³⁴ HRW Report, *supra* note 31, at 6.

³⁵ PDD 39, *supra* note 33, calls for the return of terrorist suspects that are overseas to the U.S. “by force” if necessary, “[i]f we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking”

³⁶ Even though the stated purpose of PDD 39 was trial of terrorist suspects (among other things) in the United States, cases of rendition to third countries have been documented during the pre-9/11 period. *See* NY City Bar Report, *supra* note 2, at 9 (describing renditions to Egypt).

Sometimes countries, and not just the United States,³⁷ arrest an individual present within their territories and transport him abroad for the purpose of interrogation. In the U.S. case, were the individual a U.S. citizen, such an arrest and transfer would be presumptively illegal,³⁸ although there is some evidence that it has occurred.³⁹ Whatever confusion may exist in the jurisprudence of the U.S. Supreme Court as to the extraterritorial application of U.S. Constitutional law,⁴⁰ one hopes that we are not yet at the point at which it can seriously be argued that a U.S. citizen present in the United States would not receive the protections of the Fourth and Fifth Amendments of the Constitution to be “secure in their persons” and receive “due process of law” if deprived of his or her liberty through government action.⁴¹ Even to the extent the government has

³⁷ Manfred Nowak, the U.N. Special Rapporteur on Torture, recently singled out six countries—the United States, the United Kingdom, Canada, France, Sweden and Kyrgyzstan—for deporting terrorist suspects to countries where they may have been tortured. *See, e.g.,* Thalif Deen, *U.N. Blasts Practice of Outsourcing Torture*, INTERPRESS SERVICE, Nov. 10, 2005.

³⁸ Presumably, under the U.S. Constitution, the Executive would not have the authority, absent and perhaps notwithstanding Congressional authorization, to exile U.S. citizens, even temporarily, for the purposes of interrogation. The U.S. Supreme Court has held *in dicta* that U.S. citizens cannot constitutionally be deported. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

³⁹ Neil A. Lewis, *U.S. Court Asserts Authority Over American in Saudi Jail*, N.Y. TIMES, Dec. 17, 2004, at A13.

⁴⁰ In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment did not apply to a search of a Mexican national’s property in Mexico, even though the evidence seized was introduced at a U.S. trial. The Court found that the “people” protected by the Fourth, First and Second Amendments, are those “who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265.

⁴¹ U.S. CONST. amends. IV & V. The President has recently asserted the power to deprive U.S. citizens of their Constitutional rights via their classification as “enemy combatants” in the GWOT, an assertion accepted by the Fourth Circuit Court of Appeals in the *Padilla* case, but which remains controversial. *See Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert denied*, 2006 U.S. Lexis 2705 (U.S. Apr. 3, 2006). Indeed, not since *Korematsu v. United States* has the Supreme Court suggested that U.S. citizens may constitutionally be detained, without having committed a criminal offense, for indefinite periods of time during war. 323 U.S. 214, 233 (1944). The re-categorization of U.S. citizens arrested in the U.S. as “enemy combatants,” unprotected by the provisions of the U.S. Constitution, may therefore not withstand judicial review, although the resolution of this issue remains to be seen. The Fourth Circuit opinion in *Padilla* relies heavily upon the *Quirin* decision to find that “enemy combatant” citizens is a permissible category. *Padilla*, 423 F.3d at 392-97; *Ex Parte Quirin*, 317 U.S. 1 (1942). The more applicable precedent, however, would appear to be *Korematsu*, since the question at issue in *Quirin* was whether a citizen could be tried for violations of the laws and customs of war and bring a habeas corpus petition to challenge his detention in that case. *Quirin*, 317 U.S. 1; *Korematsu* 323 U.S. 214. On the other hand, as the dissents in *Korematsu*

asserted the power to detain U.S. citizens without charges as part of the GWOT, detention is not tantamount to exile, and the extralegal rendition of a U.S. citizen to a foreign government for interrogation is a power that even the government has not asserted.⁴²

As regards non-citizens, extralegal means of detention and expulsion are deeply problematic outside the normal processes of immigration law or U. S. extradition law.⁴³ Aliens whom the law regards as being within the territory of the U.S. receive Constitutional protection,⁴⁴ and even those detained in Guantanamo Bay, Cuba, have been permitted to file a writ of habeas corpus in order to challenge their detention.⁴⁵ At the same time, particularly following the September 11th attacks, detention of non-

noted, what was really at stake was the right of Korematsu to refuse his detention without charges. *Korematsu*, 323 U.S. at 225 (Murphy, J., dissenting).

⁴² As explained below, only aliens are “deportable” under the U.S. Constitution and federal law. *See supra* note 38 and *infra* note 101 and accompanying text. Of course, Yasser Hamdi was a U.S. citizen who was ultimately transferred back to his native Saudi Arabia as the result of his release from Guantanamo Bay. *See infra* note 159 and accompanying text. Note that Article 13(2) of the Universal Declaration of Human Rights provides: “Everyone has the right to leave any country, including his own, *and to return to his country.*” Universal Declaration of Human Rights art. 13(2), G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. H/810 (Dec. 12, 1948) (emphasis added). *But see* Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Deportations*, in 23 *ISR. Y. BK. HUM. RTS.* 1, 3-7 (1993) (arguing no absolute prohibition against involuntary exile) [hereinafter Dinstein, *Deportations*].

⁴³ It is obviously difficult to contemplate by what authority a person present in the U.S. may be seized and removed from U.S. territory outside the normal processes of law. If accused of an immigration violation, the individual could be deported pursuant to U.S. immigration laws. If accused of a crime by a foreign State, the individual may be extradited pursuant to a treaty with that State, but may not otherwise be rendered for criminal prosecution abroad. *See* *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 475 cmt. b n.3. In the case of rendering a suspect to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, for example, the U.S. entered into two Congressional-Executive agreements with the tribunals for the purpose of rendering suspects to them. Those agreements were implemented by a federal statute that was sustained in *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000).

⁴⁴ The Fourteenth Amendment due process and equal protection clauses, for example, expressly extend to every ‘person,’ not just citizens. U.S. CONST. amend. XIV. That choice of language was clearly deliberate; the privileges and immunities clause of the same amendment, in contrast, is confined to U.S. citizens. *Id.*; *see, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (discussing state action in section two of the Court’s opinion); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (discussing federal action). The Fourth Amendment similarly extends to aliens in the U.S. *See, e.g.*, *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (refusing to apply exclusionary rule to deportation proceedings but recognizing the applicability of the Fourth Amendment to aliens in the U.S.).

⁴⁵ *Rasul v. Bush*, 542 U.S. 466 (2004).

citizens has become increasingly common,⁴⁶ and some of those detainees may be removed or deported pursuant to federal statutes permitting the government to do so on national security grounds⁴⁷—although none permit seizure and transfer for the purposes of enabling foreign interrogation.⁴⁸

Even assuming *arguendo* that some aliens present on U.S. territory might escape the strictures of the due process clause and Fourth Amendment of the Constitution, and be therefore susceptible to seizure and transfer abroad using extralegal means, they would not be deprived of all legal protection, for international human rights law nevertheless applies, even if the non-self executing nature of the applicable human rights instruments (under U.S. law) might not offer them any specific right of action in U.S. courts.⁴⁹ The legal problems start with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”),⁵⁰ to which the United States is a party. Article 3 of the CAT provides that a State shall not expel, return (“*refouler*”) or extradite an individual to a country “where there are substantial grounds for believing that he

⁴⁶ See, e.g., Leila Nadya Sadat, *Do All Arabs Really Look Alike? Prejudice and the U.S. ‘War’ on Terror*, 50 WAYNE L. REV. 69, 75 (2004).

⁴⁷ STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 844-66 (4th ed. 2005). See also 8 U.S.C. § 1182(a)(3) (2000) (inadmissibility); 8 U.S.C. § 1227(a)(4) (2000) (deportability).

⁴⁸ There has recently been some discussion about “denaturalizing” U.S. citizens that join or support organizations deemed terrorist groups by the Executive Branch. Charles H. Hooker, *The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denaturalization*, 19 EMORY INT’L L. REV. 305, 329 (2005). This would obviously be controversial. *Id.* at 306.

⁴⁹ To the extent that they may have suffered injuries under customary international law, they might have a civil right of action under the Alien Tort Claims Act and The Torture Victim Protection Act, although the latter applies, by its terms, only to actions brought for torture and extrajudicial killings in foreign countries. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

⁵⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. Article 2 of the CAT requires the United States, as a party, to prevent torture in any territory under its jurisdiction, and does not permit derogation from this provision even during time of “public emergency,” or “threat of war.” *Id.* art. 2(2).

would be in danger of being subjected to torture.”⁵¹ This clause is sometimes misread as forbidding transfer only if the sending State “knows” that there will be torture. The error in such a reading is underlined by clause 2 of Article 3 of the treaty which provides that such grounds include the existence in the State in question of a consistent pattern of gross, flagrant or mass human rights violations.⁵² Information obtained by Human Rights groups and news sources on the practice of extraordinary rendition indicate that the countries to which individuals have been transferred include Egypt, Syria, Saudi Arabia, Pakistan and Uzbekistan,⁵³ each of which has been cited by the State Department country reports on human rights practices as engaging in torture.⁵⁴ When a State has been the subject of adverse comments in a Department of State country report it is hard to see how “grounds” to believe he would be subject to torture do not exist, meaning that rendition to those countries is presumptively illegal. It is perhaps also worth noting that the prohibition against torture is not only a principle of treaty law, but has generally been considered to be a peremptory norm of customary international law from which no

⁵¹ *Id.* art. 3. Similarly, Article 33 of the Refugee Convention forbids “*refoulement*” of a refugee who has a well-founded fear of being persecuted on certain prescribed grounds. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137. The Refugee Convention offers broader protection than the CAT, as it covers many forms of persecution, not only torture. *Id.*

⁵² CAT, *supra* note 50, art. 3(2). As the U.S. government has itself recently conceded, there are “no categories of aliens who are excluded from protection under Article 3 [of the Torture Convention].” U.N. Comm. Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999*, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), available at <http://hei.unige.ch/~clapham/hrdoc/docs/USCATreport2005.pdf> [hereinafter *Second U.S. Torture Report*].

⁵³ See, e.g., HRW Report, *supra* note 31, at 8-11; Mayer, *supra* note 22.

⁵⁴ U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, EGYPT (2004), <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>; U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SYRIA (2004), <http://www.state.gov/g/drl/rls/hrrpt/2004/41732.htm>; U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SAUDI ARABIA (2004), <http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm>; U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, UZBEKISTAN (2004), <http://www.state.gov/g/drl/rls/hrrpt/2004/41717.htm>; U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, PAKISTAN (2004), <http://www.state.gov/g/drl/rls/hrrpt/2004/41743.htm>.

derogation is permitted.⁵⁵

It could be argued that rendition for interrogation purposes to countries in which torture is regularly practiced—short of a situation in which it is “known” that torture will follow—does not violate U.S. obligations under the Torture Convention because at the time of ratification, the U.S. Senate appended an understanding to the effect that “substantial grounds” under Article 3(1) means that it is “more likely than not” that he would be tortured.⁵⁶ Yet because the “more likely than not” standard is framed as an “understanding” as opposed to a “reservation” to the Torture Convention, presumably it was not intended to actually modify U.S. obligations under the treaty. Indeed, adoption of an “actual knowledge” standard does not appear to reflect current U.S. policy regarding torture, nor would it be consonant with well established principles of treaty interpretation and international law. The Second Periodic Report of the United States to the U.N. Committee Against Torture, submitted on May 6, 2005, provides that the “more likely than not” standard is the standard applied by the government in cases involving *refoulement*,⁵⁷ but states that the “United States is unequivocally opposed to the use and practice of torture,” and repeatedly underscores the U.S. commitment to abiding by its obligations under Article 3.⁵⁸ The Committee on Torture itself has stated that “substantial grounds” requires more than “mere theory or suspicion” but need not meet the test of

⁵⁵ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (July 21, 2000), available at <http://www.un.org/icty/furundzija/appeal/judgement/index.htm>; *Regina v. Bartle – Ex Parte Pinochet*, [1999] UKHL 41, [2000] 1 A.C. 61 (appeal taken from Eng.) (U.K.); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 cmt. n (1987); THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 2 (2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf.

⁵⁶ U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36, 194 (1990).

⁵⁷ *Second U.S. Torture Report*, *supra* note 52, at ¶ 27.

⁵⁸ *Id.* at ¶¶ 2, 27.

“highly probable.”⁵⁹ Finally, all treaties must be interpreted in accordance with their “object and purpose,”⁶⁰ and an “understanding” that was inconsistent with that object and purpose would presumably be tantamount to an illegal reservation to the treaty in question.⁶¹ Were an “actual knowledge” standard to be read into the CAT, it would contravene the plain language of the treaty and undermine its broad, humanitarian purpose to “make more effective the struggle against torture . . . throughout the world.”⁶²

Various provisions of the International Covenant on Civil and Political Rights (“ICCPR”), to which the United States is also a party, apply as well. If the person is lawfully within the territory of the rendering State, expulsion requires due process;⁶³ meanwhile the individual may choose his or her residence within the territory.⁶⁴ Furthermore, an extraordinary (extralegal) rendition frustrates the requirements of the ICCPR that *anyone* (not just those lawfully present) who is arrested or detained should have a right to challenge the validity of his or her detention.⁶⁵ Article 7 of the ICCPR prohibits torture, as well as cruel, inhuman and degrading treatment, and the Human Rights Committee has interpreted the ICCPR’s prohibition on torture to include the *nonrefoulement* obligation. In the Committee’s words:

[T]he article 2 obligation requiring that States Parties respect and ensure

⁵⁹ U.N. Comm. Against Torture, *Report of the Committee Against Torture*, Annex IX, U.N. Doc. A/53/44 (Sept. 16, 1998) (providing communications concerning the return of a person to a State where there may be grounds he would be subjected to torture), *available at* http://www1.umn.edu/humanrts/cat/general_comments/CAT_CIXX_Misc1_1997.html.

⁶⁰ Vienna Convention on the Law of Treaties art. 3, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLOT].

⁶¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28), *available at* <http://www.icj-cij.org/icjwww/idecisions.htm>.

⁶² CAT, *supra* note 50, pmb. *Cf.* Rudolf Bernhardt, *Thoughts on the Interpretation of Human Rights Treaties*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION: STUDIES IN HONOR OF GÉRARD J. WIARDA 67-71 (Franz Matscher & Herbert Petzold eds., 1988).

⁶³ International Covenant on Civil and Political Rights art. 13, Dec. 19, 1966, 999 U.N.T.S. 171.

⁶⁴ *Id.* art. 12.

⁶⁵ *Id.* art. 9.

the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as . . . [torture], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁶⁶

Finally, the seizure and rendition of suspects may be characterized as a “forced disappearance” under international human rights law, by which an individual is abducted by persons acting on behalf of or with the acquiescence of the State, followed by a denial (or obfuscation) of information or other forms of accountability by State authorities.⁶⁷ Although the text of the ICCPR does not specifically prohibit forced disappearances, the Human Rights Committee and the Inter-American Court have condemned disappearances as violations of Articles 7, 9 and 10(1) of the ICCPR,⁶⁸ as well as Articles 4, 5, and 7 of the American Convention,⁶⁹ and the Rome Statute for the International Criminal Court identifies them as crimes against humanity.⁷⁰ As the Inter-American Court emphasized in *Velasquez Rodriguez*, “those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment”⁷¹ To the extent the practice of extraordinary rendition results

⁶⁶ Human Rights Comm., International Covenant on Civil and Political Rights [CCPR], *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

⁶⁷ LOUIS HENKIN ET AL., HUMAN RIGHTS 505 (1999).

⁶⁸ See *Bleier v. Uruguay*, Hum. Rts. Comm., U.N. Doc. A/37/40 at 130 (1982); *Mojica v. Dominican Republic*, Hum. Rts. Comm., U.N. Doc. CCPR/C/51/D/449/1991 (1994).

⁶⁹ *Velásquez Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

⁷⁰ Rome Statute of the International Criminal Court, *Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, art. 7(1)(i), U.N. Doc. A/Conf.183/9 (July 1, 2002) [hereinafter *Rome Statute*]. The Statute defines enforced disappearance as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.” *Id.* art. 7(2)(i).

⁷¹ *Velásquez Rodriguez*, 1988 Inter-Am. Ct. H.R. at ¶ 156. Although the United States has not ratified the American Convention, it is a member of the Organization of American States.

in the violation of the human rights provisos referred to above, and represents official U.S. policy, it violates international law, and the State Responsibility of the U.S. government is engaged.⁷²

In some cases, a U.S. rendition operation begins in the territory of a State other than the United States. Some extraterritorial U.S. renditions take place with the consent of the foreign government upon whose territory the “seizure” of the suspect occurs, often creating an embarrassing political situation for the “host” country if the rendition operation subsequently becomes public.⁷³ Others are apparently not consented to (at least publicly)—as in the widely publicized recent case in which Italy has filed criminal charges against thirteen CIA agents for spiriting a suspect out of Italy to Egypt without the approval of the Italian government.⁷⁴ Conducting police operations in the territory of another State without its approval is, as the Permanent Court of International Justice noted in *The Case of the S.S. “Lotus,”*⁷⁵ a very basic violation of sovereign rights. In the classic rendition case, the snatching of Adolf Eichmann out of Argentina for trial in Israel, it was acknowledged that Argentina’s rights as a State had been violated,⁷⁶ although Eichmann derived no benefit from that at his trial.⁷⁷ In an extraordinarily narrow

⁷² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

⁷³ *The CIA’s “Black Sites”: Guantamos in Europe?*, SPIEGEL ONLINE, Nov. 7, 2005, <http://service.spiegel.de/cache/international/0,1518,383670,00.html>.

⁷⁴ Charles M. Sennott, *Italy Seethes at U.S. Abduction of Imam: Effort Highlights Chance for Discord on Terror Suspects*, BOSTON GLOBE, July 3, 2005, available at http://www.boston.com/news/world/europe/articles/2005/07/03/italy_seethes_at_us_abduction_of_imam/.

⁷⁵ *The Case of the S.S. “Lotus”* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/.

⁷⁶ The Security Council condemned the abduction, and Israel apologized to Argentina. The Council adopted a resolution condemning the kidnapping by a vote of 8 to 0, with two abstentions, and one member—Argentina—not participating in the vote. S.C. Res. 138, ¶¶ 1-3, U.N. Doc. S/RES/138 (June 23, 1960). Nonetheless, Eichmann stood trial for his crimes. In 1985, the U.N. Security Council recognized that “abductions are offenses of grave concern to the international community” and condemned them “unequivocally.” S.C. Res. 579, U.N. Doc. S/RES/579 (Dec. 18, 1985).

⁷⁷ CA 336/61 *Eichmann v. Attorney General* [1962] IsrSC 16(3) 2033, reprinted in 36 I.L.R. 277 (1968).

interpretation of the U.S.-Mexican extradition treaty, the U.S. Supreme Court in *Alvarez Machain*⁷⁸ arrived at a parallel result—finding that under the principle of *mala captus, bene detentus* the defendant could be tried in the United States although international law was most certainly violated as regards Mexico. A different interpreter might reach a different result,⁷⁹ and indeed the opinion generated great consternation internationally and placed considerable strain on U.S.-Mexican relations. As Abraham Sofaer, former Legal Advisor to the U.S. Department of State explained some years earlier in his testimony before the U.S. Congress, “[t]he United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity.”⁸⁰ Extraordinary rendition raises perhaps even more troubling concerns than interstate abduction cases such as *Eichmann*, for not only are there no clear legal procedures used regarding the person’s seizure and detention, but there is generally little or no opportunity to challenge either the legality of the detention and rendition, or the substance of the charges against the detainee in a subsequent judicial proceeding. Many are held for long periods without trial; some simply disappear.

IV. Transfers of Persons from Occupied Iraq

As noted earlier, there is no real dispute that U.S. (and U.K.) Coalition Forces in Iraq were subject to international humanitarian law at the time of their invasion of that

⁷⁸ *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (holding that the U.S. courts had jurisdiction to try an individual forcibly abducted from Mexico without its consent).

⁷⁹ *See, e.g., United States v. Alvarez-Machain*, 96 F.3d 1246 (9th Cir. 1996), *rev’d* 542 U.S. 692 (2004).

⁸⁰ *International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 22-23 (1989) (statement of Abraham D. Sofaer, the Legal Adviser, U.S. Dept. of State). Judge Sofaer went on to suggest that an exception arose in the case in which Article 51 of the U.N. Charter was invoked regarding the inherent right of self-defense, including “the right to rescue American citizens and to take action in a foreign State where that State is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens.” *Id.*

country. Indeed, the occupying powers never disputed this, and Security Council Resolution 1483 called upon all States to observe their obligations under the Geneva Conventions of 1949.⁸¹ As General Taguba noted in his report on conditions at Abu Ghraib prison, all prisoners of war and civilian internees held at the prison should receive the “full protection of the Geneva Conventions, unless the denial of these protections is due to specifically articulated military necessity (e.g., no visitation to preclude the direction of insurgency operations).”⁸² Thus either GC IV (Relative to the Protection of Civilian Persons in Time of War) or GC III (Relative to Prisoners of War) apply to Iraqis held by U.S. forces in occupied Iraq, depending upon their status. Civilian detainees, who apparently comprised as much as 70 to 90 percent of all those arrested in Iraq according to the ICRC,⁸³ are protected from rendition or transfer outside of Iraq by Article 49 of the Fourth Geneva Convention, which provides:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.⁸⁴

The ICRC Commentary to Article 49 states that “[t]he prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2” of Article 49,⁸⁵ which permits the evacuation of an “area if the security of the population or imperative military reasons so demand.”⁸⁶

⁸¹ S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2003).

⁸² TAGUBA REPORT, *supra* note 30 (summarizing report of Major General Ryder).

⁸³ REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION ¶ 1 (Feb. 2004), *reprinted in* TORTURE PAPERS, *supra* note 9, at 383 [hereinafter ICRC February Report].

⁸⁴ GC IV, *supra* note 5, art. 49.

⁸⁵ ICRC COMMENTARY, *supra* note 5.

⁸⁶ GC IV, *supra* note 5, art. 49(2). *See also* ICRC COMMENTARY, *supra* note 5, at 280 (discussing

On March 19, 2004, a draft opinion by the U.S. Department of Justice Office of Legal Counsel (“OLC”)⁸⁷ was issued by now Harvard Law School professor, Jack Goldsmith, III, apparently at the CIA’s request,⁸⁸ suggesting that Article 49 permits the deportation and transfer of both aliens and Iraqis out of the occupied zone. The OLC memorandum concludes that

“[T]he United States may, consistent with Article 49, (1) remove “protected persons” who are illegal aliens from Iraq pursuant to local immigration law; and (2) relocate “protected persons” (whether illegal aliens or not) from Iraq to another country to facilitate interrogation, for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them.”⁸⁹

The CIA’s request for advice, and the memorandum prepared on that basis, is bewildering, given the sharp criticism by the ICRC and General Taguba of the CIA’s practice of not reporting “ghost detainees” to the ICRC as required by the Fourth Geneva Convention. In the words of General Taguba, “[t]his maneuver was deceptive, contrary to Army Doctrine, and in violation of international law.”⁹⁰ Surely secret renditions to prisons outside of Iraq are equally problematic. These individuals would presumably be shielded from regular ICRC visits as well, in violation of the Third and Fourth Geneva

evacuation as an exception). Other “exceptions” to the prohibition are the requirement that the individuals be “protected persons” within the meaning of the Geneva Conventions, and that Iraq be “occupied,” also within the meaning of the GC IV and customary international law. As the government has neither asserted that the individuals sought to be removed from Iraq were not protected, nor that the U.S. was not the occupying power, neither of the additional grounds for avoiding the application of Article 49 applies, and will not be further discussed here. ICRC COMMENTARY, *supra* note 5.

⁸⁷ Memorandum from Jack Goldsmith, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William H. Taft, IV, Gen. Counsel, U.S. Dep’t of State, et al., Memorandum for Alberto R. Gonzales, Counsel to the President, Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq (Mar. 19, 2004), *reprinted in* TORTURE PAPERS, *supra* note 9, at 366 [hereinafter OLC Memorandum].

⁸⁸ Although the OLC Memorandum has “Draft” stamped on it, it was taken as a “green light” for transferring protected persons out of occupied Iraq, according to intelligence officials, and has thus apparently guided and informed U.S. policy in Iraq. Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

⁸⁹ OLC Memorandum, *supra* note 87, at 368-69.

⁹⁰ TAGUBA REPORT, *supra* note 30.

Conventions, and customary international law.⁹¹ Moreover, OLC issued its memorandum at a time when ongoing abuses at Abu Ghraib were known to the U.S. government, even if they were not yet fully revealed to the public at large.⁹² Finally, OLC's willingness to endorse the practice of renditions from Occupied Iraq was particularly risky, given that the violation of this provision is one of the most serious offenses that can be perpetrated under the Geneva Conventions, and is condemned in Article 147 as a "grave breach," which must be suppressed and punished.⁹³ Although the final footnote of the OLC memorandum notes that "violations of Article 49 may constitute '[g]rave breaches'" and even a war crime under federal criminal law, and recommends "case-by-case" evaluation of potential relocations of "protected persons" from Iraq under the guidance of OLC itself,⁹⁴ surely that information would best have been communicated right up front, rather than buried in a footnote at the end of the document.

This essay analyzes the arguments on these issues, first in terms of the justifications offered by OLC to support the practice of rendition from occupied Iraq, and second in terms of the background of the Fourth Convention and its purposes. Although the OLC memorandum was apparently not included in later Bush administration legal opinions justifying rendition from Occupied Iraq, it has been reported that it was relied

⁹¹ GC III, *supra* note 5, art. 126 (providing that the ICRC has full liberty to select the places it wishes to visit and must be able to interview the detainees without witnesses. The only exception is that a State may refuse visits for reasons of imperative military necessity as an "exceptional and temporary measure."). See also GC IV, *supra* note 5, arts. 76, 143.

⁹² See Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL INSIGHT, May, 2004, <http://www.asil.org/insights/insigh134.htm> (noting that the Taguba Report was issued on February 26, 2004 but was not made public until after *60 Minutes* aired photos of U.S. soldiers abusing Iraqi prisoners).

⁹³ GC IV, *supra* note 5, art. 147. Renditions also violate the Convention's prohibition on unlawful confinement. Indeed, the detention and rendition for purposes of interrogation of individuals from Occupied Iraq, and particularly Iraqis, constitutes a violation of Article 8(2)(a)(vii) of the Rome Statute's provisions on unlawful deportation or transfer and unlawful confinement. See *Rome Statute*, *supra* note 70, arts. 7, 8. See also GC IV, *supra* note 5, arts. 27, 42, 78.

⁹⁴ OLC Memorandum, *supra* note 87, at 379 n.14.

upon in the case of at least a dozen prisoners who were transferred out of Iraq during the U.S. occupation of that country.⁹⁵ Moreover, the OLC memorandum is similar in tone and content to many of the other memoranda used in support of GWOT detention, interrogation and treatment policies, making an exegesis of the text and legal analysis it contains important for systemic reasons, as well as particular applications. Indeed, a careful analysis of the text suggests that the OLC memorandum is deficient in three major respects: its approach to the *text and spirit* of the Fourth Geneva Convention itself; its *highly selective approach* to the applicable legal authorities combined with reliance upon *inapposite legal authority* and appeals to “*common sense*,”⁹⁶ and its misapprehension of the *historical context* that gave rise to the prohibition embodied in Article 49. This, in turn, raises some troubling issues regarding the proper role of government lawyers in giving advice, particularly as regards conduct that may have far-reaching policy, and even criminal, consequences.

A. *Taking Text Seriously*

The OLC memorandum does not directly dispute the ICRC’s position—it ignores it. In support of its assertion that “illegal aliens” are not protected by the prohibition contained in Article 49, the memorandum employs a “de novo” approach to the language of Article 49, focusing upon the use of the term “deport” and bypassing the fact that the relevant phrase uses the term “forcible transfer” in a way that clearly indicates that it is broader than the idea of “deportation” which is included within it.⁹⁷ The memorandum

⁹⁵ Jehl, *supra* note 32.

⁹⁶ OLC Memorandum, *supra* note 87, at 372.

⁹⁷ This identical approach was probably borrowed from one of the authorities cited by Goldsmith, Judge Schomburg’s separate opinion in *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶¶ 1-17 (Sept. 17, 2003), paragraph 15 of which is cited by the OLC Memorandum. OLC Memorandum, *supra* note 87, at

develops an argument based upon a non-common sense understanding of the word “deport” as applying only to the movement of *citizens* away from their homes. This, OLC argues, is justified by reference to a Roman law understanding of the word which, the argument goes, has been embodied in customary international law. Thus, the OLC memorandum concludes that the “deportation” of non-citizens who are illegal aliens is permitted by Article 49.⁹⁸ As explained below, the memorandum supports this conclusion by referring to crimes against humanity cases that have little or nothing to do with Article 49.⁹⁹

As noted earlier,¹⁰⁰ it is hornbook (international) law that a treaty is “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰¹ One looks to subsidiary means of interpretation only if the ordinary meaning is either “ambiguous or obscure,”¹⁰² or “leads to a result which is manifestly absurd or unreasonable,”¹⁰³ which is not the case here. In the case of Article 49, the “ordinary meaning” of the term “deport” in English, particularly in conjunction with the term transfers, plainly appears to cover all protected persons, citizens and non-citizens alike, as the ICRC Commentary suggests. In the United States, we do not use the term “deport” in connection with “transfers” of our

371. However, as we shall see *infra*, citing crimes against humanity cases to determine the meaning of Article 49 of GC IV is unhelpful, and even misleading.

⁹⁸ Goldsmith suggests that Roman law supports this view. OLC Memorandum, *supra* note 87, at 368.

⁹⁹ Although one can find French writers using the term *déporter* in connection with non-French persons, the usage seems general, and operations that we call “deportations” are typically (but not always) referred to as *expulsions* in French. See *infra* note 105 and accompanying text.

¹⁰⁰ See *supra* notes 58-60 and accompanying text.

¹⁰¹ VCLOT, *supra* note 60, art. 31(1).

¹⁰² *Id.* art. 32(a).

¹⁰³ *Id.* art. 32(b).

citizens because U.S. citizens cannot constitutionally be “deported” abroad.¹⁰⁴ In U.S. practice, “deportation” always refers to aliens, as OLC admits, so there is little support for the assertion that the word excludes illegal aliens as a matter of either plain language or common sense. Certainly, one could try to make an argument based upon the French text of the Fourth Convention, which refers to the “*déportations de personnes protégées*,”¹⁰⁵ because sometimes the French employ the term *expulsion* rather than *déportation* regarding aliens removed from the territory pursuant to immigration laws,¹⁰⁶ and sometimes use the notion of *déportation* to mean “banishment” (of citizens) in the Roman law sense.¹⁰⁷ This might provide some support for OLC’s conclusions that the word “deportation” or “*déportation*” in Article 49 excludes aliens from its purview, particularly given the influence of Roman law on the French legal system. Yet neither a linguistic nor a Roman law analysis helps much in this regard. To begin with, in France the term *déportation* in international humanitarian law is not used in an immigration law sense, but as a term of art, meaning the “forced transfer of individuals or groups of civilians (protected persons) outside of occupied territory,”¹⁰⁸ without mentioning citizenship. Harrap’s *New Standard Dictionary* refers to *déportation* as the “deportation

¹⁰⁴ See *supra* notes 38-42 and accompanying text.

¹⁰⁵ Convention de Genève relative à la protection des personnes civiles en temps de guerre art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.icrc.org/dih.nsf/FULL/380?OpenDocument>.

¹⁰⁶ VOCABULAIRE JURIDIQUE 340 (Gérard Cornu ed., 2d ed. 1990).

¹⁰⁷ This is the argument made by the Memorandum based on a citation in Black’s Law Dictionary noting the Roman law meaning of “deportation” as “banishment.” OLC Memorandum, *supra* note 87, at 368 n.3. Curiously, the Memorandum relies upon an old Fourth Edition (1951) of Black’s Law Dictionary, perhaps because the most recent edition, published in 2004, would seem to directly refute the Memorandum’s argument. The latest edition of *Black’s* has two separate entries on this question. The first, for “*deportatio*,” refers to the Roman law punishment of permanent exile for citizens. The second, for “deportation,” refers to the expulsion or transfer of an alien. BLACK’S LAW DICTIONARY 471 (8th ed. 2004).

¹⁰⁸ JEAN SALMON, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 323-24 (2001).

(of undesirable alien, etc.)”¹⁰⁹ and Cornu’s *Vocabulaire Juridique* defines it as permanent exile from the territory of continental France, making no mention of the nationality of the individual thus banished.¹¹⁰ This suggests that the English and French meanings of the term deportation or *déportation* are the same, at least as they are used in the Geneva conventions.¹¹¹ Thus, an exegesis of the French text provides little support for OLC’s position.

At best, if there were a terminological difficulty, this potential linguistic conflict should be examined through the lens of Article 150 of the Fourth Geneva Convention,¹¹² which renders the French and the English texts of the Geneva Conventions “equally authentic,” and suggests no rationale for preferring one to the other. Moreover, the Vienna Convention on the Law of Treaties provides that in the case of multilingual texts “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”¹¹³ Such a reconciliation suggests, as does the ICRC Commentary, that the term “deport” in Article 49 covers both citizens and non-citizens alike.

The OCL memorandum’s Roman law argument is intriguing, although similarly unpersuasive. According to *A Dictionary of Greek and Roman Antiquities*, *deportatio* was a species of *exsilium*, whereby an individual was banished and lost certain elements of his citizenship—“if he was a father, his children ceased to be in his power; and if he

¹⁰⁹ 1 HARRAP’S STANDARD FRENCH AND ENGLISH DICTIONARY 251 (J.E. Mansion ed., 1966).

¹¹⁰ See VOCABULAIRE JURIDIQUE, *supra* note 106, at 259 (“[À] demeurer à perpétuité dans un lieu déterminé par la loi, hors du territoire continental de France.”).

¹¹¹ See also *infra* notes 142-44 (discussing Judge Schomburg’s analysis of the term in the ICTY Statute).

¹¹² GC IV, *supra* note 5, art. 150; Convention de Genève relative à la protection des personnes civiles en temps de guerre, *supra* note 105, art. 150.

¹¹³ VCLOT, *supra* note 60, art. 33(4).

was a son, he ceased to be in his father's power”¹¹⁴ The punishment of *deportatio* was inflicted only on persons “of consideration,” that is, the upper classes, and only for serious crimes, such as perversion of religion, for example, adopting Christianity or Judaism.¹¹⁵ The banishment imposed was generally to either an island or oasis.¹¹⁶ Because the Geneva conventions were negotiated in the immediate aftermath of World War II during which there had been mass forcible displacements of both citizens and refugees, as explained in greater detail below, it is difficult to see how these Roman law conceptions would be relevant in any way to a contemporary understanding of Article 49.

Additionally, Article 49 refers to “*transfers*, as well as deportations.”¹¹⁷ The OLC memorandum is particularly inadequate as it leaps to the conclusion that its restrictive interpretation of the term “deport” also constricts the application of the term “transfer.”¹¹⁸ The term transfer appears at various places in the Fourth Geneva Convention in ways that indicate it is to be interpreted broadly. For example, Article 106 requires the issuance of a new internment card in case of “transfer to another place of internment or to a hospital”¹¹⁹ Humanitarian conventions should be interpreted to promote their purpose: to protect individuals.¹²⁰ The better reading of the text, therefore, would not deny protection

¹¹⁴ Anthony Rich, *Exsilium*, in A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 515-517 (William Smith ed., 1875), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Exsilium.html.

¹¹⁵ PATRICK MAC CHOMBAICH DE COLQUHOUN, 3 A SUMMARY OF THE ROMAN CIVIL LAW § 2400 (1854); GEORGE MOUSOURAKIS, THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW 314 (2003).

¹¹⁶ MOUSOURAKIS, *supra* note 115, at 314.

¹¹⁷ GC IV, *supra* note 5, art. 49(1) (emphasis added).

¹¹⁸ See OLC Memorandum, *supra* note 87, at 371-72.

¹¹⁹ GC IV, *supra* note 5, art. 106; see also *id.* art. 128 (giving notice of transfer to internees); see also *id.* art. 45 (no transfer to a Power not a party to the Convention).

¹²⁰ Another part of the text argues against the exclusion of categories of persons: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” GC IV, *supra* note 5, art. 4. That breadth is emphasized by an explicit exclusion: for citizens of a neutral state which has normal diplomatic representation with the Occupier.

to those who find themselves in occupied territory without the mantle of citizenship, and indeed, some authorities simply apply the term “inhabitants” to those individuals benefiting from international humanitarian law protections.¹²¹ This reading of the text was explicitly confirmed in the adoption of the Elements of Crimes for the Rome Statute for the International Criminal Court, whereby the drafters *explicitly rejected* Goldsmith’s proposed new understanding of Article 49:

The Preparatory Commission felt that the suggested requirement that a protected person must be transferred from his or her “lawful place of residence,” as is required for the crime against humanity of deportation or forcible transfer (art. 7(2)(d) of the Statute) *is not an element of unlawful deportation or transfer as defined in the Geneva Conventions*.¹²²

Indeed, despite the best efforts at Goldsmith’s *de novo* interpretation of Article 49, and the citation of many references in the first eight pages of the OLC Memorandum (none of which directly contradict the plain meaning of Article 49) the clear understanding that emerges from both a textual and referential analysis is that both individual and mass deportations and transfers, of both citizens and non-citizens, are categorically prohibited.

The second conclusion of the OLC memorandum is that it is lawful to “relocate ‘protected persons’ . . . to another country to facilitate interrogation.”¹²³ This presumably refers to both Iraqis and non-Iraqis, although OLC concludes that only those not yet accused of an offense could be subject to rendition.¹²⁴ Once again, the argument relies upon linguistic ploys directly contradicted by the text of the Fourth Geneva Convention itself, and there is an aura of subterfuge about the intended purpose. How can the transfer

¹²¹ The OLC memorandum admits as much, but argues that “nothing in the historical record suggests that this term was intended or understood to include illegal aliens” OLC Memorandum, *supra* note 87, at 369.

¹²² THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 137 (Roy S. Lee ed., 2001) (emphasis added) [hereinafter ELEMENTS OF CRIMES].

¹²³ OLC Memorandum, *supra* note 87, at 368.

¹²⁴ *Id.* at 374-75 (citing GC IV, *supra* note 5, art. 76(1)).

“facilitate interrogation” except by removing protected individuals from the watchful eye of the ICRC? As aforementioned, the Fourth Geneva Convention requires that the ICRC be notified of all transfers, including ones within the occupied territory or temporary ones.¹²⁵ The memorandum notably does not remind the CIA of that obligation.

B. Customary International Law and State Practice

Given that neither a textual nor linguistic analysis supports OLC’s conclusions regarding the meaning of Article 49, what of customary international law? Again, there is virtually no support in either State or international practice to support OLC’s *de novo* interpretation of Article 49, and indeed, the memorandum points to no authorities supporting its proposed reading of that provision, relying instead upon selective and inapposite sources. In fact, a review of the ICRC’s recently published authoritative summary of State practice regarding deportations and transfers supports the notion that the prohibition in Article 49 is absolute.¹²⁶ The only arguable exception appears to be the jurisprudence of Israel’s High Court, which most recently in *Affo v. IDF Commander (West Bank)*,¹²⁷ adopted a non-literal reading of Article 49. The Court in *Affo*, confirming its earlier jurisprudence,¹²⁸ held that Article 49 does not apply to “removal from the

¹²⁵ See GC III, *supra* note 5, art. 126; see GC IV, *supra* note 5, arts. 76(6), 143. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 2824-41 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (describing legal instruments and practice of ICRC access to persons deprived of their liberty).

¹²⁶ INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 125, at 2913-33 (citing military manuals, national legislation, national case law, national practices of numerous States and international organizations and conferences that have adopted Article 49’s prohibitions on deportations and transfers).

¹²⁷ HCJ 785/87 *Affo v. Commander Israel Defence Force in the West Bank* [1988] IsrSC 42(2), *reprinted in* 83 I.L.R. 122 (1990). Goldsmith cites the *Affo* case following a “*cf.*” signal, but does not properly distinguish or explain it. OLC Memorandum, *supra* note 87, at 372-73. *Affo* makes the argument that the prohibition against transfers and deportations applies, under customary international law, only to mass deportations, such as those carried out by Hitler, and not to individual transfers, such as those carried out by Israel in the occupied territories. *Affo*, 83 I.L.R. 122. However, what Goldsmith does not say is that *Affo* does not speak to the issue of transfers of aliens at all.

¹²⁸ See, e.g., Justus R. Weiner, *Israel’s Expulsion of Islamic Militants to Southern Lebanon*, 26 COLUM.

territory of a terrorist, infiltrator or enemy agent,” which allowed the Israeli authorities to undertake the deportation of lawfully present Palestinians from the Occupied Territories if they had taken part in activities hostile to Israeli authorities.¹²⁹ *Affo* does not support OLC’s specific position on Article 49’s inapplicability to illegal aliens, of course, given that it carved out an exception to Article 49 for Palestinian individuals who were otherwise *lawfully present*. Nonetheless, if *Affo* was accepted internationally, it could indicate some support for carving out similar exceptions in other cases. *Affo* has not, however, been either followed by other States or accepted internationally, and Israeli deportations of Palestinian citizens have been vociferously criticized by the United Nations, including the Security Council.¹³⁰ Moreover, even within Israel, *Affo*’s holding is controversial; indeed, the majority opinion was issued over a vigorous dissent by Justice Bach, who found the language of Article 49 to be “unequivocal and explicit”¹³¹ and emphasized that distinguished Israeli scholars did not share the Court’s view of Article 49.¹³²

HUM. RTS. L. REV. 357, 361 n.17 (1995) (citing HCJ 97/79 Abu Awad v. Regional Commander of Judea and Samaria [1979] IsrSC 33(3); HCJ 320/80 Kawasma v. Minister of Defence [1981] IsrSC 35(3); HCJ 513/85 Nazal v. Israel Defense Forces (IDF) Commander of Judea and Samaria [1985] IsrSC 39(3)). These deportations, unlike U.S. extraordinary renditions, are public, not covert, and the individuals concerned generally have the opportunity to challenge their deportation in a court of law.

¹²⁹ *Affo*, 83 I.L.R. at 140. For a similar view see Emanuel Gross, *Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action Against His Own State?*, 72 UMKC L. REV. 51, 88 (2003).

¹³⁰ S.C. Res. 607, U.N. Doc S/RES/607 (Jan. 5, 1988) (deploring Israel’s decision to continue deporting civilians).

¹³¹ *Id.* at 188 (Bach, J., dissenting).

¹³² *Id.* at 191-92 (Bach, J., dissenting) (citing Yoram Dinstein, *Settlements and Deportations in the Occupied Territories*, in 7 IYUNEI MISHPAT 188 (1979-80)); YORAM DINSTEIN, *THE LAWS OF WAR* 225 (1983); Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 104, 123 (1978). Dinstein vigorously critiques the Israeli jurisprudence in a later article, Dinstein, *Deportations*, *supra* note 42, but does indirectly lend some support to OLC’s thesis by arguing, in passing, that perhaps “infiltrators” could be *excluded* from occupied territories, even if Article 49 forbade their deportation. *Id.* at 18. The Israeli position has been rejected by several General Assembly Resolutions, and in resolutions adopted in 1988 and 1989 the U.N. Sub-Commission on Human Rights considered that the expulsion and deportation of civilians from their homeland by force was a war

As to international practice, what little there has been does not support OLC's sweeping assertions. Particularly unfortunate is the memorandum's reliance on two opinions cited from the International Criminal Tribunal for the Former Yugoslavia and Article 7(2)(d) of the Rome Statute for the International Criminal Court.¹³³ The OLC memorandum is correct in stating that deportations and forcible transfers may constitute crimes against humanity as well as war crimes, depending upon the circumstances. Where it errs, however, is in assuming that the definitions of the two crimes are identical. Because crimes against humanity may be committed in peacetime as well as war time, and most or all States carry out legitimate acts of deportation on a frequent basis, the "unlawful" element of deportation as a crime against humanity was thought necessary so as not to criminalize perfectly lawful State activities. Thus, although the Rome Statute's definition of forcible transfer and deportation as a crime against humanity (Article 7 of the Statute) *includes* the notion that the individuals must be "lawfully present,"¹³⁴ the "lawful presence" requirement is *specifically excluded* from the war crimes element of deportation and forcible transfer (Article 8 of the Statute). Curiously, Goldsmith makes no reference whatsoever to Article 8 (war crimes) of the Rome Statute, which would be the relevant provision in the instant case.¹³⁵ Instead, he refers to two paragraphs from two

crime under international law. Behnam Dayanim, *The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy*, 30 STAN. J. INT'L L. 115 (1994).

¹³³ OLC Memorandum, *supra* note 87, at 371 (citing Prosecutor v. Krnojelac, Case No. IT-97-25, Appeals Chamber Judgment, Separate Opinion of Judge Schomburg, ¶ 15 (Sept. 17, 2003) and Prosecutor v. Blaskic, Case No. IT-95-14, Trial Chamber Judgment, ¶ 234 (Mar. 3, 2000) for the actus reus standard of forcible deportation; citing *Rome Statute*, *supra* note 70, art. 7(2)(d), which defines "deportation or forcible transfer of population").

¹³⁴ ELEMENTS OF CRIMES, *supra* note 122, at 86-87. Interestingly, the Drafters left open the question whether national or international law should be referred to in determine the notion of "lawful presence." *Id.* at 87.

¹³⁵ *Rome Statute*, *supra* note 70, art. 8(2)(a)(vii) (making "unlawful deportation or transfer or unlawful confinement" a war crime and noting that these are grave breaches of the Geneva Conventions). The element of this offense provides that the person must have "deported or transferred one or more persons to

ICTY opinions, *Prosecutor v. Krnojelac* (citing paragraph 15 of Judge Schomburg's separate opinion)¹³⁶ and *Prosecutor v. Blaskic* (citing paragraph 234 of the opinion).¹³⁷

Yet these opinions do not bear on the subject at hand.

In *Krnojelac*, the defendant, Milorad Krnojelac, was charged with forced labour, deportation and expulsion as the crime against humanity of persecution under Article 5(h) of the ICTY Statute.¹³⁸ He was the warden of a large prison complex situated in the town of Foca, in the Eastern part of Bosnia, where a large number of non-Serbian men were detained for long periods of time during the war. The Prosecution alleged that the accused had assisted in the deportation and expulsion of Muslim and non-Serbian men from the Foca region, by transferring them from the prison to other facilities or to Montenegro where they were told they would be exchanged for other prisoners, although none were ever seen alive again.¹³⁹ Trial Chamber II acquitted Krnojelac of this count of the indictment, finding that it was not clear that the individuals transferred from the prison had crossed a national border, or, even if they had, had been forced to do so. The Appeals Chamber reversed, finding that at the time of the Yugoslav conflict, forcible displacements within a State and across a national border violated customary international law,¹⁴⁰ and, "if committed with the requisite discriminatory intent,

another State or to another location" and that "Such person or persons were protected under one or more of the Geneva Conventions of 1949." *Id.*

¹³⁶ OLC Memorandum, *supra* note 87, at 371 (citing *Prosecutor v. Krnojelac*, Case No. IT-97-25, Appeals Chamber Judgment, Separate Opinion of Judge Schomburg, ¶ 15 (Sept. 17, 2003)).

¹³⁷ *Id.* (citing *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Chamber Judgment, ¶ 234 (Mar. 3, 2000)).

¹³⁸ Statute of the International Tribunal art. 5(h), May 25, 1993, 32 I.L.M. 1192; *Prosecutor v. Krnojelac*, Case No. IT-97-25-I, Third Amended Indictment, ¶ 5.2 (June 25, 2001), *available at* <http://www.un.org/icty/indictment/english/krn-3ai010625e.htm>.

¹³⁹ *Krnojelac*, Case No. IT-97-25-I, Third Amended Indictment.

¹⁴⁰ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgment, ¶ 223 (Sept. 17, 2003).

constitute[d]” the crime against humanity of persecution.¹⁴¹ Refusing to reach the issue whether the crossing of a national border was an element of the offense, or not, the majority held only that such acts of forcible displacement could constitute the crime of persecution (Article 5(h) of the Statute), noting that Article 5(d), the crime of deportation, had not been specifically charged, and, therefore need not be addressed.¹⁴² Concurring, but writing separately, Judge Schomburg thought the majority should have reached the issue whether acts of “deportation” required the traversing of a national border, and, construing the Statute broadly, in light of the humanitarian purposes of the drafters, determined that “a fixed destination” was not necessary for the crime to occur; what was essential was the forcible displacement of the victims, whether across a national border, or not.¹⁴³ Interestingly, he observed that the French text of the ICTY Statute *improperly* translated deportation as *expulsion*¹⁴⁴ and expressly declined to address the question whether the meaning of the term deportation in Article 5 of the ICTY Statute (crimes against humanity) and the Geneva Conventions was the same.¹⁴⁵ This determination of deportation as a crime against humanity of persecution has little or nothing to add to the interpretation of Article 49 of the Fourth Geneva Convention.

Like *Krnjelac, Prosecutor v. Blaskic* does not address the question OLC’s memorandum is directed to, namely the meaning of deportation as a war crime pursuant to Article 49 of the Fourth Geneva Convention. Rather, it too relates to the inclusion of

¹⁴¹ *Id.* ¶ 222.

¹⁴² *See id.* ¶ 224.

¹⁴³ *Id.* Separate Opinion of Judge Schomburg, ¶ 15.

¹⁴⁴ *Id.* ¶ 11.

¹⁴⁵ *Id.* ¶ 14.

“deportation, forcible transfer, and forcible displacement”¹⁴⁶ as a possible *actus reus* for the crime against humanity of persecution under Article 5(h) of the ICTY Statute. For that reason, particularly given the paucity of discussion on the question in the case, it is of little value in interpreting Article 49.

C. The Evocation of Common Sense

In an effort to shore up its conclusion that Article 49 permits the deportation of illegal aliens, OLC argues that if its proposed interpretation was not accepted, the Fourth Geneva Convention would become “a welcome mat to occupied territory,”¹⁴⁷ insinuating (through reference to *Affo*, discussed above) that otherwise “a murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction.”¹⁴⁸ Yet the Fourth Geneva Convention clearly anticipates this precise situation, providing in Article 45 that there is no “obstacle to the extradition . . . of protected persons accused of offences against ordinary criminal law.”¹⁴⁹ Of course, international humanitarian law and international human rights law contemplate the transfer of a prisoner pursuant to legal processes and humane conditions; neither regime would support the extralegal transfer of detainees to secret prisons for the purpose of interrogation, particularly if that interrogation was accompanied by the use of torture or other forms of cruel, inhumane or degrading treatment.

D. Historical Background

It is not surprising that the OLC approach has little or no acceptance in

¹⁴⁶ Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 152 (July 29, 2004). The OLC memorandum actually cites to the Trial Chamber judgment, rather than the Appeals Chamber judgment, although neither is particularly on point. OLC Memorandum, *supra* note 87, at 371.

¹⁴⁷ OLC Memorandum, *supra* note 87, at 372.

¹⁴⁸ *Id.* at 373.

¹⁴⁹ GC IV, *supra* note 5, art. 45.

international law and practice given the historical background against which the deliberations at Geneva took place in 1949. It must be recalled that German, particularly Jewish, nationals fled Germany for other parts of Europe that were subsequently occupied, and many would have been “illegal aliens” (to use Goldsmith’s term) in their countries of refuge.¹⁵⁰ For example, with respect to the Jewish refugee population of France, the classic history of Vichy notes that “the most bestial of the German depredations” was the “massive deportation of foreign refugee Jews from France to the extermination camps in Poland and eastern Germany.”¹⁵¹ Indeed, the most prominent deportees of all, Anne Frank and her family, were Germans living in Holland and by the time of their arrest and deportation to Auschwitz probably did not have legal papers.¹⁵² As Anne wrote in her diary, concerning the fate of the Jews of Holland, particularly those who had sought refuge there:

Countless friends and acquaintances have been taken off to a dreadful fate. Night after night, green and gray military vehicles cruise the streets. They knock on every door, asking whether any Jews live there. If so, the whole family is immediately taken away. . . . In the evenings when it’s dark, I often see long lines of good, innocent people, accompanied by crying children, walking on and on, ordered about by a handful of men who bully and beat them until they nearly drop. No one is spared.¹⁵³

The images of heartbreaking scenes like these were fresh in the minds of those who

¹⁵⁰ Goldsmith provides many statements about the particular hardships of deporting people from their country of citizenship. OLC Memorandum, *supra* note 87, at 369-372. This is not the same as finding that the drafters affirmatively intended to exclude aliens from the protected class.

¹⁵¹ ROBERT O. PAXTON, VICHY FRANCE: OLD GUARD AND NEW ORDER, 1940-1944 311-12 (1972). Paxton estimates that of the 60-65,000 Jews deported from France only 6,000 were French citizens. *Id.* at 183. Another category of unlawful aliens were agents of the allies such as Flight Commander Yeo-Thomas of the Royal Air Force who was captured by the Nazis after being parachuted into France and was sent to Buchenwald camp in Germany. Wikipedia, F.F.E. Yeo-Thomas, http://en.wikipedia.org/wiki/F._F._E._Yeo-Thomas.

¹⁵² ANNE FRANK, THE DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION 7-8 (Otto H. Frank & Mirjam Pressler eds., 1991). I am particularly indebted to Detlev Vagts for bringing the example of Anne Frank to my attention. As he notes, Anne and her family could not have gone to the local police to renew their residency permits, and by the time of their capture were undoubtedly without lawful papers.

¹⁵³ *Id.* at 72-73.

drafted the Geneva Conventions.¹⁵⁴ Indeed, as the OLC memorandum itself notes, the drafters concerned themselves not only with citizens of occupied territories, but the rights of aliens. Footnote 11 of the OLC memorandum suggests this, referring to the comments of the Norwegian delegate about the status of “ex-German Jews” who found themselves in occupied territories. In fact, Article 70 of the Fourth Geneva Convention specifically protects from deportation nationals of the occupying power; that is, Germans, in the context of World War II.¹⁵⁵ Clearly, refugees were a major target of Nazi deportations, and the inclusion of Article 49 and other provisions in the 1949 Geneva Conventions was a direct response.

The CIA’s rendition plan is in some ways eerily reminiscent of the Nazi operation called *Nacht und Nebel* or “Night and Fog,” although presumably it pales in comparison to the systematic atrocities perpetrated by the Third Reich. The *Nacht und Nebel* program was established by a directive issued by Hitler on December 7, 1941.¹⁵⁶ Pursuant to this policy, individuals were taken from the occupied territories, where they were accused of resistance activities against German occupying forces, and were then spirited away for secret trial by special courts in Germany. As the Nuremberg trial record explains, “the

¹⁵⁴ In the words of the ICRC commentaries, “[t]here is doubtless no need to give an account here of the painful recollections called forth by the ‘deportations’ of the Second World War, for they are still present in everyone’s memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions.” ICRC COMMENTARY, *supra* note 5.

¹⁵⁵ Article 70(2) provides:

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

GC IV, *supra* note 5, art. 70(2).

¹⁵⁶ U.S. v. Altstoetter, *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1033 (1951).

[defendant's] whereabouts, trial, and subsequent disposition were kept completely secret . . . [for] the dual purpose of terrorizing the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defense."¹⁵⁷ The proceedings often resulted in the torture, ill-treatment and death of those captured; those who were acquitted were nonetheless kept in the "protective custody" of the Gestapo for the rest of the war.¹⁵⁸ This practice, which was condemned by the International Military Tribunal at Nuremberg,¹⁵⁹ was also a major focus of the American war crimes trial known as the *Justice Case*, so called because all the defendants in that case held positions in the Reich system of Justice, either as officials of the German Ministry of Justice, or as judges or prosecutors of the Extraordinary Courts established under Nazi law. As a result of that trial, various German lawyers employed by the Ministry of Justice to handle the *Nacht und Nebel Erlass* were found guilty of committing offenses against the laws and customs of war and sentenced to terms that ranged from five years confinement (with credit for time served) to life imprisonment for the Minister of Justice himself and his assistant.¹⁶⁰

V. Conclusion

Acts of international terrorism pose a genuine danger to the safety and well-being

¹⁵⁷ *Id.* at 1031.

¹⁵⁸ *Id.* at 1031-32.

¹⁵⁹ International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 226 (1947).

¹⁶⁰ Paragraph 13 of the indictment (war crimes) charged defendants Altstoetter, von Ammon, Engert, Joel, Klemm, Mettgenberg, and Schlegelberger with responsibility for and participation in crimes committed pursuant to the Nazis' "Night and Fog" program. U.S. v. Altstoetter, *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 21 (1951). Altstoetter received the lightest sentence (5 years); he was the Chief of the Civil Law and Procedure Division of the Reich Ministry of Justice; Klemm (State Secretary in the Reich Ministry of Justice) and Schlegelberger (State Secretary; Acting Minister of Justice) were sentenced to imprisonment for life. The other accused (von Ammon, Joel, and Mettgenberg) received sentences of ten years. A mistrial was declared as to the defendant Engert, whose physical condition prevented his presence in court for most of the trial. U.S. v. Altstoetter, *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 3 (1951).

of Americans, and the U.S. government is entitled, indeed required, to meet that threat. However, just as the Geneva Conventions and international human rights law did not create the threat, eviscerating those legal instruments will not eliminate it. Indeed, the provisions of international humanitarian law and international human rights law were formulated, during extensive and painstaking multilateral treaty negotiations, to meet the needs of governments during war time as well as peace. Moreover, international human rights instruments specifically permit governments to derogate from certain of their provisions during times of emergency, as the United Kingdom did, for example, after September 11, 2001, but which the U.S. has not done.¹⁶¹ The bending of law to suit government aims in the manner exemplified by the OLC memorandum and the government's extraordinary rendition policies writ large bodes ill for protection of human rights and has little support in either international law or the practice of "civilized nations."¹⁶²

The OLC memorandum, like many of the other memoranda issued to cover GWOT policies, appears as one of a series of administration documents raising three very troubling human rights concerns. First, it departs from existing and conventional interpretations of the law, both domestic and international, and instead promotes novel, *de novo*, and often misleading legal arguments—without highlighting the radical departure adopting them represents, or the costs that may be entailed in following the advice they contain. In this way it is similar to the earlier, and in retrospect fateful,

¹⁶¹ See *A v. Secretary of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 W.L.R. 87 (appeal taken from Eng. (U.K.) ¶ 11 (opinion of Lord Bingham of Cornhill)).

¹⁶² *Cf.* Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (detailing what international law and other customs the ICJ shall use to resolve disputes, including "the general principles of law recognized by civilized nations").

memoranda penned by Yoo, Delahunty,¹⁶³ and Gonzales, determining that Geneva law would not apply to the GWOT,¹⁶⁴ and the “Torture Memos” that followed.¹⁶⁵ The theories articulated in these documents have each enhanced Executive Branch authority, often leaving detainees in U.S. custody with few, if any, opportunities to challenge either the legality of their detention, or the treatment they have received. They provide no opportunity for any real oversight either by Congress or the courts, particularly as regards extraordinary rendition, for the renditions are carried out in secret and the prisoners’ situations may never be brought to light. Under these circumstances, law becomes an instrument of oppression, rather than protection, and fails in its most fundamental purpose to provide the basis for a fair and free society.

Second, U.S. detention policies generally, and rendition in particular, are problematic because those targeted are overwhelmingly Muslim or Arab. At a time when relations with the Muslim world appear to be at an all-time low,¹⁶⁶ this would seem to be an ineffectual strategy for the United States, and counter to the articulated objectives of

¹⁶³ See Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice to William J. Haynes, II, Gen. Counsel, U.S. Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in* TORTURE PAPERS, *supra* note 9, at 38. Yoo and Delahunty argued that “neither the Geneva Conventions nor the [War Crimes Act] regulate the detention of al Qaeda prisoners . . . [or members of the Taliban militia] captured during the Afghanistan conflict.” *Id.* at 39. They further contend that “customary international law . . . does not bind the President [or the U.S. military] because it does not constitute federal law . . .” *Id.*

¹⁶⁴ See Gonzales, Geneva Memo, *supra* note 11, at 119-20. In fairness to Gonzales, his memorandum does include a “balance sheet” of positive and negative implications regarding the decision not to apply Geneva law to the Afghanistan conflict. *Id.*

¹⁶⁵ See *supra* note 18 and accompanying text. On the ethics of the memos, see, e.g., Kathleen Clark, *Torture Memos, Ethics & Accountability*, J. NAT’L SECURITY L. & POL’Y (forthcoming 2006).

¹⁶⁶ See *How the United States is Perceived in the Arab and Muslim Worlds: Hearing before the Subcomm. On Oversight and Investigations*, 109th Congress (2005) (statement of Andrew Kohut, President, Pew Research Center), available at <http://pewglobal.org/reportscommentary/display.php?ReportAnalysisID=1001>. The recent furor over the publication of cartoons in Denmark satirizing the Prophet Muhammad suggests the ease with which tension can be provoked between the Western and Islamic worlds. See, e.g., Hassan M. Fattah, *At Mecca Meeting, Cartoon Outrage Crystallized*, N.Y. TIMES, Feb. 9, 2006, at A1.

U.S. public diplomacy policies. Certainly it diminishes, rather than enhances, U.S. efforts to engage moderate Muslims as allies in its “War on Terror.”¹⁶⁷

Finally, the volatile combination of prejudice and the enhancement of Executive authority has been a potent one, leading sadly, but perhaps unsurprisingly, to a catastrophic failure to protect the basic human rights of those presently held in U.S. detention facilities, many of whom, and indeed, at some facilities *most of whom appear not to be terrorist suspects at all*. Recall that the catalog of abuses at Abu Ghraib prison included physical violence, “videotaping and photographing naked male and female detainees; [f]orcibly arranging detainees in various sexually explicit positions for photographing; [f]orcing detainees to remove their clothing and [remain] naked for several days at a time; [and] [u]sing military working dogs (without muzzles) to intimidate and frighten detainees.”¹⁶⁸ Yet the Red Cross report states that military intelligence officers estimate that between 70 and 90 percent of the thousands of prisoners held by the U.S. in Iraq may have been brought there *by mistake*.¹⁶⁹ Recent releases of prisoners at Guantanamo Bay also suggests that many of those “high value” prisoners in fact had very little information to share; or at the very least, were perhaps not so dangerous after all,¹⁷⁰ as does the release of Yasser Hamdi, the accused Taliban fighter who was held in Guantanamo for nearly three years without charges.¹⁷¹ There have also

¹⁶⁷ See Sadat, *Do All Arabs Really Look Alike?*, *supra* note 46, at 76-78.

¹⁶⁸ TAGUBA REPORT, *supra* note 30.

¹⁶⁹ ICRC February Report, *supra* note 83, at 8.

¹⁷⁰ See Lisa Hajjar, *Torture and the Future*, MIDDLE EAST REP. ONLINE, May, 2004, http://www.merip.org/mero/interventions/hajjar_interv.html. See also Corine Hegland, *Guantanamo's Grip*, NAT'L J., Feb. 4, 2006, at 20 (alleging that an examination of the files of 132 enemy combatants held at Guantanamo Bay shows that most are not accused of engaging in hostilities against the United States).

¹⁷¹ Although a citizen of the U.S., Hamdi was apparently born in Saudi Arabia. He returned there under the terms of an arrangement worked out with U.S. government attorneys. Transcript of CNN Live at Daybreak, *Yasser Hamdi Returns to Native Saudi Arabia*, CNN.COM, Oct. 11, 2004,

been mistakes in those transferred under the extraordinary rendition program, as amply demonstrated by the situation of Maher Arar, who was allegedly hung upside-down, subjected to electric shock treatments, and put into a “grave-like cell.”¹⁷² leaving him “a ruined man at just 55 years of age.”¹⁷³

Proponents of these policies no doubt sincerely believe that they are justified, indeed, necessary to win the GWOT. Yet as I hope this essay has demonstrated, they are surely not “legal” as that term is customarily understood. Nor do they seem to be particularly effective, suggesting that whatever utilitarian rationale might be proffered in their defense cannot be sustained: According to recent statistics the number of “significant terrorist attacks” in 2004 was 655, triple the year before,¹⁷⁴ and well-seasoned interrogators have questioned the efficacy of torture and cruel treatment in obtaining useful and reliable evidence from prisoners. Moreover, the question remains, having abandoned the rule of law for some new shadowy “paradigm,” even if we “won,” would we recognize what we have become?¹⁷⁵ The current policies apply primarily to non-citizens, however U.S. citizens such as Jose Padilla have been ensnared in the legal limbo the government has established.

The President, the Courts, the Congress and we, as the people of the United States, must choose how to wage this so-called war: what strategies to employ, what tactics to embrace, what means to use. As the world’s only superpower, the United States must also always be cognizant of its tremendous power and ability to influence other nations. Secret

<http://transcripts.cnn.com/TRANSCRIPTS/0410/11/lad.04.html>.

¹⁷² NY City Bar Report, *supra* note 2, at 18.

¹⁷³ Bob Herbert, *Our Dirty War*, N.Y. TIMES, Apr. 20, 2006, at 27.

¹⁷⁴ Tom Regan, *Global Terror Attacks Tripled in 2004*, CHRISTIAN SCI. MONITOR, April 28, 2005, available at <http://www.csmonitor.com/2005/0428/dailyUpdate.html>.

¹⁷⁵ See, e.g., David J. Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

prisons, secret prisoners, indefinite detention and the use of torture and cruel, inhuman and degrading treatment, all in violation of international human rights law and international humanitarian law should be uniformly and categorically rejected, not embraced, by all citizens of the United States, and particularly by lawyers, who understand the complexities of the law and its central role in holding a society together when it is tested by adversity and difficult times. Other democracies, even those which have directly experienced terrorist attacks, have rejected the U.S. approach in favor of a more measured and legalistic path, more carefully balancing the need for extraordinary measures against the deprivations of liberty such an approach might entail. As Lord Hoffman wrote in the 8-1 House of Lords opinion striking down Britain's indefinite detention of aliens who were suspected of being concerned in terrorism:

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.¹⁷⁶

Just as the United States survived the terrible wars of the last Century and emerged stronger and more powerful than many other countries thereafter, it can weather the criminal attacks of international terrorists without sacrificing its principles and ideals. Indeed, it is only by transcending the fear that terrorism brings, and maintaining a steady composure and a clear mind, that U.S. leaders can overcome this threat not only to Americans' physical safety but their emotional well-being. Torturing the alleged terrorist; holding him in secret; transferring him across borders to shadowy prisons in the dark of

¹⁷⁶ A v. Secretary of State for the Home Dep't, [2004] UKHL 56, [2005] 2 W.L.R. 87 (appeal taken from Eng. (U.K.)) ¶ 96 (opinion of Lord Hoffman).

night—these actions might assuage the angry feelings wrought by September 11th, 2001, but they are unlikely to produce much in the way of positive good. Particularly if the individual in question happens not to be a terrorist at all.