EXTRAORDINARY RENDITION, TORTURE AND OTHER NIGHTMARES FROM THE WAR ON TERROR

by

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Introduction

Men in black arrived . . . and he remembers one shouting at him through an interpreter: ‘You are in a place that is out of the world. No one knows where you are, no one is going to defend you.

He was chained by one hand to the wall in a windowless cell and left with a bucket and a bottle in lieu of a latrine. He remained there for nearly a week, he said, and then was blindfolded and bound again and taken to another prison. ‘There they put me in a room, suspended me by my arms and attached my feet to the floor,’ he recalled. ‘They cut off my clothes very fast and took off my blindfold.’

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He said the interrogators left him chained for five days without clothes or food. ‘They beat me and threw cold water on me, spat at me and sometimes gave me dirty water to drink,’ he said. ‘The American man told me I would die there.’

Story of rendered suspect Laid Saidi, as reported in The New York Times.

On September 6, 2006, President Bush finally admitted publicly what had been surmised for some time: That the United States government was holding unnamed alleged “terrorist” “enemy combatants” in secret detention centers throughout the world as part of the Global War on Terror (GWOT). Some prisoners are in U.S. custody; others have been rendered to third countries. This

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3See, e.g., The White House, The Global War on Terrorism, available at <http://www.whitehouse.gov/news/releases/2001/12100dayreport.html> (last visited, Feb. 3, 2006). This Article does not address the threshold question 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. UNIV. GLOBAL STUDIES L. REV. 135 (2004).
“extraordinary rendition” program, as it has euphemistically been dubbed, has been vociferously criticized both in the United States and abroad as both unlawful and ill-conceived. Although the President announced on September 6th that “the United States does not torture,” according to the media, as well as interviews with rendition victims such as Laid Saidi, suspects are blindfolded, shackled and sedated before being transported to the destination country, where they are detained, interrogated, often tortured and sometimes killed. The stories of the individuals “outsourced” as a result of the U.S. rendition program are lurid in their details, involving hooded detainees spirited away in the dead of night who are sent in chartered aircrafts to remote countries where they have suffered torture and maltreatment. 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.”

The use of torture by Americans and governments acting as surrogates for the United States should not come as a surprise. Given the wealth of information on coercive interrogation tactics that has emerged from reports emanating from

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4The definition of “extraordinary rendition” varies depending upon the source. The New York City Bar 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.” 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”, 4 (Oct. 29, 2004) available at http://nyuhr.org.docs.TortureByProxy.pdf [hereinafter NY CITY BAR REPORT]. 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 United States. See, e.g., Wikipedia, Extraordinary Rendition, available at <http://en.wikipedia.org/wiki/Extraordinary_rendition>.

5For an earlier treatment of some of the legal and policy issues raised by the U.S. rendition program, see Leila Nadya Sadat, Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law, 37 CASE WESTERN RES. J. INT’L L. 309 (2006).

6September 6 Presidential statement, supra note 2.


The government arguably retreated from some of the more controversial policies adopted regarding the treatment of prisoners captured in the GWOT, particularly as regards the explicit use of torture and cruel, inhuman and degrading treatment against detainees in U.S. custody. 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 for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, August 1, 2002, reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel, 2005) [hereinafter TORTURE PAPERS]. 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 Memorandum dated December 30, 2004, to James B. Comey, Deputy Attorney General from Daniel Levin, Acting Assistant Attorney General Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A. The December 30th memo states “This opinion . . . supersedes in its entirety the August 1, 2002 opinion of this Office.” It concluded that “‘severe’ pain under the statute is not limited to ‘excruciating or agonizing’ pain or pain ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.’”

The Detainee Treatment Act of 2005 prohibits the use of cruel, inhuman or degrading treatment or punishment against any individual in the “custody of physical control of the United States Government regardless of nationality or physical location . . .”. DTA, Sec. 1003(a). President Bush threatened to use veto the bill, arguing that it unduly limits American interrogators. War on Terror detainee legislation, available at, <http://www.sourcewatch.org/index.php?title=War_on_Terror_detainee_legislation # McCain_torture_ban_amendment>.

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.” President’s Statement on Signing H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations Act of 2006,” available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.
demonstrated subsequently in this Article. It is also hard to ignore the tacit admission in the recently enacted “Military Commissions Act” (MCA) that the U.S. has embarked upon an official policy inconsistent with current international definitions of torture given the insistence of the White House on provisions retroactively amending the federal war crimes act of 1997, effectively providing amnesty to those having committed offenses under the prior law.

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; others, more “fortunate,” such as Algerian Laid Saidi, or 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, so far unsuccessfully, and before international commissions of inquiry investigating their allegations of abuse. Recently, the European Parliament conducted an investigation

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13In November, 2006, the existence of a memorandum, signed by President Bush, that authorizes the CIA to detain and interrogate terror suspects overseas became public, although the contents of the memorandum are not yet available. David Johnston, C.I.A. Tells of Bush’s Directive on the Handling of Detainees, N.Y. TIMES, Nov. 15, 2006, at A14.


15MCA, supra note 14, at Section 6(b)(2). The MCA does not criminalize outrages upon personal dignity, including humiliating and degrading treatment, which are prohibited by common article 3 of the four Geneva Conventions of 1949. If these amendments were determined to be an amnesty provision of the law, as some have asserted, they may be inconsistent with international law given the status of certain war crimes, including grave breaches, torture, and cruel, inhuman and degrading treatment as jus cogens norms that give rise to a duty to try or extradite individuals accused of committing such crimes, and over which all States may exercise universal jurisdiction under certain conditions. The amendments may also violate U.S. obligations under the Torture Convention, International Covenant on Civil and Political Rights, and Geneva Conventions of 1949. See Leila Nadya Sadat, Exile, Amnesty and International Law, 81 NOTRE DAME L. REV. 955, 970-72 (2006). The MCA also strips the federal courts of habeas review, leaving those detained indefinitely without charge no meaningful opportunity to assert their innocence.

16The 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, dated February 26, 2004, at p. 18 [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. 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.

and concluded that there exists a “widespread, methodical practice of extraordinary rendition following precise rules carried out by certain U.S. Secret Services.” The Report notes that even though the Committee was able to examine only ten cases directly, the existence of more than 1200 C.I.A. flights involving European airspace, suggested that the program was much more extensive than initial reports suggested. In addition, a number of non-Iraqi prisoners were apparently secreted 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 captured in Iraq in the same way as members of al Qaeda and the Taliban captured in Afghanistan, Pakistan or elsewhere.

Although it was initially believed that the numbers of prisoners rendered abroad has been relatively few, it now appears that the number may be scores or even hundreds. The covert nature of the operations and the allegations of prisoner mistreatment raise very troubling questions about the U.S. rendition program, which has been labeled by the EU Parliamentary Committee as “criminal” and “illegal.” Indeed, as Part V discusses, the U.S. rendition program contains elements that evoke the Nazi practices of Nacht und Nebel (Night and Fog) in design if not in scale,
particularly as regards occupied Iraq. After exploring why these policies are in violation of basic principles and precedents of international law first laid down at Nuremberg following World War II (Part II), this Article briefly 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) and subsequently explores the special case of extraordinary rendition from occupied Iraq.

This Article concludes that extraordinary rendition is not permissible under existing, applicable and well-established norms of international human rights law and international humanitarian law. Renditions are carried out in secret, employ extralegal means, and typically result in prisoner abuse, including cruel treatment, torture, and sometimes death – making them 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. Moreover, 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, government

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See infra notes 176-80 and accompanying text. The United States “turned over” sovereignty to Iraq on June 28, 2004. U.S. transfers sovereignty to Iraq 2 days early, available at <http://www.msnbc.msn.com/id/5312795/>. The Security Council issued a Statement on the same day welcoming “the full handover of full responsibility and authority for governing Iraq to the fully sovereign and independent Interim Government of Iraq, thus ending the occupation of the country.” Press Release SC/8136 IK/443, June 28, 2004, available at <http://www.un.org/News/Press/docs/2004/sc8136.doc.htm>. Security Council Resolution 1546 had set out June 30th as the “handover” date, and states that it “Welcomes that . . . by June 30 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.” Security Council Resolution 1546, para. 2, S/RES/1546 (June 8, 2004). However, the United States has continued to maintain very large numbers of troops in Iraq, which are formally present as part of a Multinational Force (MNF) requested by the government of Iraq and mandated by Security Council Resolution 1546, a mandate that was renewed until December 31, 2006 by Resolution 1637, Security Council Resolution 1637, S/RES/1637 (Nov. 11, 2005). Many have argued, however, that the U.S. is still in de facto occupation of Iraq, meaning that provisions of international humanitarian law related to occupation are still applicable.

officials have sought to redefine legal norms in ways that are neither particularly plausible nor persuasive.24 This use of legal subterfuge is deeply troubling in and of itself, as well as in regards to it potentially harmful consequences. Finally, the Essay rebuts the charge that Geneva is “obsolete” and needs revision, arguing that adhering to the Nuremberg consensus is still the best way to enforce not only the laws of war, but the crime of international terrorism.

II. The Nuremberg Precedent and its Legal Implications

During the Second World War, when the Allied powers were horrified by the scope of the atrocities committed by the Nazis in Europe, the temptation to torture or kill Nazi prisoners was great, just as the temptation now exists to grossly mistreat prisoners in the GWOT. Instead, the United States actively promoted the view that criminal trials of the Nazi leaders should be held and the Nuremberg trials were the result. Justice Robert Jackson was ultimately tapped to lead the U.S. prosecution team at Nuremberg, and summarized the position of the United States in his report to President Roosevelt on June 7, 1945:

What shall we do with [these men]? . . . [W]e could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.25

It is true that the Allies’ trial of the major German war criminals at Nuremberg, as well as the subsequent proceedings, are sometimes derisively referred to as “victor’s justice.” Yet because the trials were conducted in a manner that was fair and transparent, they ultimately were viewed as one of the most significant events of modern history and a turning point, indeed a “Constitutional moment” for international law.26 Germany came to accept the importance of the trials, as

24A more recent example is provided by the government’s assertion that the Authorization for the Use of Military Force (AUMF) gives the President authority to engage in warrant less surveillance.

25ROBERT JACKSON, THE NUREMBERG CASE 8, 10 (1971).

evidenced by its fervent plea during the Rome Diplomatic Conference for the International Criminal Court that the Court be situated in the City of Nuremberg itself, and the Nuremberg principles were adopted by the General Assembly immediately upon the establishment of the United Nations itself.27 Those principles remain part of the Constitutional structure of modern international law. They eschew collective responsibility in favor of individual criminal responsibility; provide that no human being (even a Head of State or other responsible Government official) is above the law with respect to the most serious crimes of concern to humanity as a whole—war crimes, crimes against humanity and the crime of aggressive war; and provides that reliance upon internal law is no defense to a crime for which he may have responsibility under international law.28 The prohibition on aggressive war found its way into article 2(4) of the United Nations Charter which forbids attacks upon the territorial integrity or political independence of another Member State.29 (The flip side of the Nuremberg principle of individuals having duties under international law is the idea that they may also acquire rights thereunder, which was the scaffolding upon which was erected international human rights law following World War II as well.) The notion of individual criminal responsibility and the idea of individual human rights improved upon the Westphalian notion that only States could be subjects of international law, for they addressed the situation where Heads of State so abused their position that they endangered the lives of their citizens own (as in the case of the Holocaust) as well as those in other States.

The Nuremberg principles became the basis for the codification of international criminal law following the war, beginning with the Genocide Convention of 1948,30 the four Geneva Conventions of August 12, 1949,31 and the


29U.N. Charter art. 2(4).


June 8, 1977 Protocols thereto; adoption of the Apartheid Convention of 1973; and adoption of the Convention Against Torture on December 10, 1984. They also served as the precedent for the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda by the Security Council, the Special Court for Sierra Leone, and, ultimately, the establishment of the permanent International Criminal Court. (They also form the legal framework upon which rest the 12 anti-terrorism treaties upon which the United States relies in apprehending and prosecuting international terrorists, a point that the government seems to have overlooked in its haste to rewrite the laws of war). The Bush Administration has effectively repudiated the Nuremberg principles in its conduct of the GWOT, apparently attempting to eviscerate the corpus of international instruments and regimes based upon those principles (except perhaps insofar as they might apply to


34Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].


international terrorists, a point I will come back to later), suggesting that they need to be narrowed or eliminated in order to keep Americans safe. Thus the GWOT has not only been a campaign against international terrorism, but a sortie against the laws of war themselves and even the most fundamental norms of the U. N. Charter – an effort to radically reshape U.S. participation in the international organizations and regimes that emerged from the ashes of Nuremberg. This extraordinary burst of “executive activism,” has led to the de facto (and sometimes de jure) repudiation of international treaties to which the United States is a party or a signatory, as well as the organization of a system of detention based upon the creation of secret detention centers, the holding of “ghost detainees,” not registered in the prisons, the widespread use of torture and cruel, inhuman and degrading treatment, the use of extraordinary rendition with respect to some terrorist suspects, and the use of judicial procedures that violate the Geneva Conventions and international human rights law. It was also found to be in at least partial noncompliance with domestic law by the Supreme Court of the United States. Ironically, however, it is not as if lawyers were excluded from policy making by the administration. Instead, they were relied upon to provide theories and memos supporting Bush administration initiatives and dictates. During the past few years, government lawyers and “conservative” academics have penned an extraordinary number of memoranda and articles arguing either for the inapplicability of particular norms of international law or for interpreting particular norms so that they have little or no effect on U.S. activity. This penchant for narrowing (or writing out of existence) international constraints on U.S. action has been combined in much of this legal corpus with a theory of an omnipotent President – largely unconstrained so long as he is acting as the


41It seems odd to use the appellation “conservative” to describe individuals arguing for radical new interpretations of the law, but the term is often applied to Bush administration lawyers and their academic colleagues and is used in this Essay accordingly. It is worth noting, however, that other U.S. scholars have also taken positions either supporting the view that the laws of war are in need of radical change, see, e.g., Rosa Ehrenreich Brooks, War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror, 153 U. Pa. L. REV. 675 (2004), or that international law should be recast to support the Bush administration’s positions. See, e.g., Anne-Marie Slaughter, Good Reasons for Going Around the U.N., N.Y. TIMES, Mar. 18, 2003, at A33. But see Antonio Cassese, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, 12 EUR. J. INT’L L. 993 (2001) and sources cited infra note 45.
Commander in Chief during a war. Very little of either this government lawyering or academic work has made much reference, even as regards the interpretation of international treaties ratified by hundreds of nations, either to the practice of other States as regards the treaty norms at issue or the practice and decisions of the treaty monitoring bodies set up by treaties duly ratified by the United States, treaties that U.S. officials have pressed other countries to ratify. Where international sources are cited, their use has been highly selective and often misleading.

Although many distinguished academics have ably refuted the positions of government lawyers and their academic counterparts, the theories of conservative academics and pundits have largely been translated into U.S. foreign policy and depart dramatically from past practice. This shift in policy has not gone unnoticed in the world: the standing of the United States in world public opinion polls has plummeted since the September 11th attacks, and there appears to have been very little net gain. International terrorist attacks have been on the rise, Osama bin Laden is still at large, Iraq verges on civil war, and U.S. detention and interrogation policies


43See, e.g., UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, ANNUAL REPORT (May 2003) (urging China to ratify the International Covenant on Civil and Political Rights).

44For example, a recent article by John Yoo purporting to elucidate the meaning of the Geneva and Torture Conventions contains no references to the jurisprudence of the Inter-American Court of Human Rights on the question of rendition, the opinions of the ICTY or ICTR (which have extensively interpreted the Geneva and Torture Conventions), the case law of the International Court of Justice or even the practice of the United Nations. See Yoo, Transferring Terrorists, supra note 42.


have created an impossible dilemma by detaining and then mistreating individuals captured as part of the GWOT (either directly or through their rendition to other countries), only to find out that the prisoners had little or no information to offer up, or had been simply captured by mistake.

III. An American Gulag?

The four Geneva Conventions of 1949, have, since World War II, been the gold standard regarding the capture, detention, treatment and trial of prisoners of war and civilian internees. Indeed, the four Geneva Conventions enjoy unparalleled support among States, having been ratified by 194 countries, that is, every country in the world, including the United States, Afghanistan and Iraq, and are, without a doubt, part of the customary laws of war. Indeed, certain provisions of the Geneva Conventions (primarily the grave breaches regime, more about which I will say below) are also considered to be *jus cogens* norms of international law – nonderogable in nature and punishable by international individual criminal responsibility. 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. Of particular importance is the grave breaches regime of the four conventions, whereby certain acts are explicitly deemed war crimes and each Contracting Party

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47This article, thus, does not accept the validity 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 POW Convention under article 4, thereof. See generally GC III, supra note 31; Sadat, *Terrorism and the Rule of Law*, supra note 3, at 140-42. Nonetheless, even if not classified as POWs, they would fall within the provisions of Geneva IV, on Civilians. See generally GC IV, supra note 31; see also IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 51, 595 [hereinafter IV COMMENTARY]. The Bush administration does not agree, which remains a controversial point as regards the Afghan conflict.


50Protocol I elaborates upon the Geneva Conventions, and although it has not been ratified by the United States, many of its provisions, and particularly those regarding the humane treatment of prisoners are considered part of customary international law. See, e.g., Protocol I, supra note 32.

51See, e.g., GC IV, supra note 31, art. 147.
is required to criminalize those actions and search for persons alleged to have committed, or to have ordered to be committed, such grave breaches. Additionally, each State is required to bring such suspects before their own courts, or hand them over to another High Contracting Party for trial, so long as the trials are conducted in proper fashion and are “fair and regular,” and follow the provisions of articles 105 and following of the Geneva Convention relative to the Treatment of Prisoners of War or 12 August 1949. The idea of providing for individual criminal responsibility in an international treaty harkens back directly to Nuremberg, and was a significant improvement over the regime envisaged by the 1907 Hague Convention which provided only for reparations to be paid by the offending State to the complaining State in the case of a breach of the treaty, not individual responsibility for the commission of atrocities.

Early in the GWOT, over the objections of U.S. Secretary of State, Colin Powell, and the State Department’s Legal Advisor, William H. Taft, IV, 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 detention, treatment and trial of enemy prisoners, whether captured in the U.S. 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 . . .”.55

52Id., art. 146.

53Colin Powell, Memorandum to the Counsel to the President, Assistant to the President for National Security Affairs Re: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, January 26, 2002, reprinted in THE TORTURE PAPERS, supra note 10, at 122.


President Bush ultimately accepted DOJs arguments, and issued a memoranda refusing to apply Geneva law to either al Qaeda or Taliban detainees in U.S. custody.56 A diplomatic and legal furor ensued, particularly after the transfer of prisoners from Afghanistan to Guantanamo Bay, Cuba, where bound prisoners were initially held in outdoor cages and were denied any right to challenge the status of their detention or their treatment, pursuant to an emergency Presidential order issued on November 13, 2001.57 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 suggested that the U.S. detention center at Guantanamo Bay had become the “gulag of our times.”58

When Iraq was invaded by the United States and a “coalition of the willing,”59 one justification for which was the continuation of the GWOT,60 although the United States determined that Geneva law applied to the conflict in Iraq,61 the decision not to apply Geneva to the detainees captured in the Afghan conflict appears to have spilled over to the Iraq theater, where, once again, credible allegations of prisoner mistreatment and violations of international law were made against the

56George W. Bush, Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., Re: Humane Treatment of al Qaeda and Taliban Detainees, February 7, 2002, reprinted in THE TORTURE PAPERS, supra note 10, at 134. The memo cryptically concludes that al Qaeda members do not receive the protection of the Geneva Conventions because “al Qaeda is not a High Contracting Party to Geneva.” 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.

57Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter President’s Detention Order].


60Although 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 70 percent of all Americans to believe that Saddam Hussein was responsible in some way for the attacks. See, e.g., BBC News, Americas, Bush administration on Iraq 9/11 link, Sept. 18, 2003, available at <http://news.bbc.co.uk/2/hi/americas/3119676.stm>.

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 Afghanistan or Guantanamo Bay. Second, as the occupying power of Iraq, the U.S. has special duties towards the individuals living within the territory it is administering.62 Finally, unlike Guantanamo Bay, which is at least nominally within federal court jurisdiction,63 relatively proximate to U.S. shores and poses no security risk to U.S. citizens, Iraq is far away and remains an active theater of hostilities in which U.S. soldiers die almost daily. It is also probably not within the jurisdiction of our article III courts, nor is it accessible to public observers.

Perhaps even more problematic than the prisons about which there is at least some public information, have been the human rights abuses with respect to the establishment of secret detention centers and the forced disappearance of terrorist suspects to third countries. News articles, now obliquely confirmed by the President, have alleged 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.64

Although the idea of extraordinary rendition as an investigative tool did not originate with the Bush administration65 there is no doubt that the advent of the Global War on Terrorism has brought with it a significant expansion of the

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63Rasul, supra note 40.
64Dana Priest, CIA Holds Terror Suspects in Secret Prisons, WASHINGTON POST, Nov. 2, 2005, at A1. Similar assertions have been made by journalist Seymour Hersh. See SEYMOUR M. HERSCH, CHAIN OF COMMAND 16-17, 20 (2004) (asserting 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.”)
65Extraordinary rendition was inherited and reauthorized by former President Bill Clinton in a 1995 policy directive, PDD 39. Presidential Decision Directive (PDD 39), June 21, 1995, available at <http://www.fas.org/irp/offdocs/pdd39.htm>. 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. See also NY CITY BAR REPORT, supra note 4 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 17, at 4, n. 7 and sources cited.
practice, and that the emphasis has shifted from obtaining suspects for prosecution, to transferring them for interrogation. The next two sections of this Article briefly explore two particular problems: the question of extraordinary rendition of individuals from the United States (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.

IV. Rendering Prisoners Abroad from the United States

If an individual is apprehended within the territory of the United States, and

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66HRW Report, supra note 17, at 6.

67PDD 39, supra note 65, calls for the return of terrorist suspects that are overseas to the United States “by force” if necessary, if “we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking.”

68Even 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 4, at 9 (renditions to Egypt described).

69For an earlier treatment of this issue see Sadat, Ghost Prisoners and Black Sites supra note 5. The question remains, of course, whether Iraq is still “occupied” for purposes of Geneva’s application. The Iraqi government clearly exercises many aspects of sovereignty, although an argument can be made that the large U.S. troop presence is impeding Iraq’s right to full self-determination. Article 41 of the Laws of War on Land states that “Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there.” The Laws of War on Land, Oxford, Sept. 9, 1880, available at <http://www.icrc.org/ihl.nsf/WebART/140-80042?OpenDocument>. The President’s recent request for more troops might be seen as confirmation that a state of de facto occupation continues to exist. Certainly, the Geneva Conventions continue to apply to U.S. forces stationed in Iraq, as the Conventions themselves require. Article 6 of GC IV provides that the Convention shall apply from the outset of any conflict or occupation until, in the case of occupation, “one year after the general close of military operations,” which are arguably still ongoing. In any event, the Occupied power is bound “to the extent that such Power exercises the functions of government . . . by the provisions of . . . [Article] 49 . . . [of the Convention], the provision at issue in this Article, and would have been bound therefore, even under a narrow reading of the text, until June 30, 2005, one year after the date upon which sovereignty was formally transferred. See GC IV, supra note 31, art. 6. Protocol I provides that detainees in the hands of the occupying power continue to benefit from provisions relevant to them until their final release, repatriation or re-establishment. Protocol I, supra note 32, art. 3(b).

70Manfred Nowak, the U.N. Special Rapporteur on Torture, 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.
transported abroad for the purpose of interrogation, both international and domestic law apply. If the suspect is a U.S. citizen, such an arrest and transfer without legal process is presumably illegal. Whatever confusion may exist in the jurisprudence of the U.S. Supreme Court as to the extraterritorial application of U.S. Constitutional law, one hopes that U.S. law is 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, although it is obviously worrisome that the MCA permits the President to classify even U.S. citizens as “unlawful enemy combatants,” deprived of virtually all rights other than those accorded by the Military Commissions Act. Even to the extent the government has asserted the power to

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71There is nonetheless evidence that this has occurred. Neil A. Lewis, U.S. Court Asserts Authority Over American in Saudi Jail, N.Y. TIMES, Dec. 17, 2004, at A13. Under the U.S. Constitution, the Executive presumably does not have the authority, absent and perhaps notwithstanding Congressional authorization, to exile U.S. citizens even temporarily, for the purposes of interrogation.

72In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme court held that the 4th 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.

73The President has recently asserted the power to deprive U.S. citizens of their Constitutional rights via their classification as “enemy combatants” in the global war on terror, an assertion accepted by the Fourth Circuit Court of Appeals in the Padilla case, but which remains controversial. See Jose Padilla v. Hanft, U.S.N. Commander, Consolidated Naval Brig., (U.S. 4th Cir. Ct. App., Sept. 9, 2005). The government ultimately decided not to retain Padilla in military custody and charged him with several federal crimes, none of which directly related to the initial accusations against him of planning to detonate a radioactive dirty bomb in the United States. He has not yet been tried. Padilla trial gets new 3 month delay, ST. LOUIS POST-DISPATCH, Jan. 13, 2007, at A21. 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. Toyosaburo Korematsu v. U.S., 323 U.S. 233 (1944). The re-categorization of U.S. citizens arrested in the United States 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, and President Bush has reasserted that authority in the MCA.

74MCA, supra note 14, at Section (3), Chapter 47A, § 948a(1). The MCA does not limit the President’s power to classify individuals as unlawful enemy combatants to aliens.
detain U.S. citizens as so-called “enemy combatants”\(^\text{75}\) without charges under the MCA, however, 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.\(^\text{76}\)

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.\(^\text{77}\) Aliens whom the law regards as being within the territory of the United States receive Constitutional protection,\(^\text{78}\) and even those detained in Guantanamo Bay, Cuba have been permitted to file a writ of habeas corpus in order to challenge their detention.\(^\text{79}\) At the same time, particularly following the

\[\text{75}\text{The term unlawful “enemy combatants,” coined by government lawyers based upon a passing reference in the Quirin decision, has no international legal validity under the provisions of the Geneva Conventions to which Bush administration lawyers claims it applies. Indeed, the Supreme Court of Israel recently rejected the Bush administration’s inventive terminology.}\]

\[\text{76}\text{As explained below, only aliens are “deportable” under the U.S. Constitution and federal law. Of course, Yasser Hamdi was a U.S. citizen who was ultimately transferred back to his native Saudi Arabia as the result of his release from Guantanamo Bay.}\]

\[\text{77}\text{It is obviously difficult to contemplate by what authority a person present in the United States may be seized and removed from U.S. territory outside the normal processes of law. If accused of an immigration violation, the individual could be deported pursuant to U.S. immigration laws. If accused of a crime by a foreign State, the individual may be extradited pursuant to a treaty with that State, but may not otherwise be rendered for criminal prosecution abroad. See Valentine v. United States ex rel. Neidecker, 299 U.S. 5(1936); Restatement of Foreign Relations, § 475, Comm. B and Reporters’ Note 3. In the case of rendering a suspect to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, for example, the United States entered into two Congressional-Executive agreements with the tribunals for the purpose of rendering suspects to them. Those agreements were implemented by a federal statute that was sustained in Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), cert. denied, 528 U.S. 1135 (2000).}\]

\[\text{78}\text{Fourteenth Amendment due process and equal protection, for example, expressly extend to every ‘person,’ not just citizens. That choice of language was clearly deliberate; the privileges and immunities clause of the same amendment, in contrast, is confined to U.S. citizens. See, e.g., Plyler v. Doe, 457 U.S. 202, section II of the Court’s opinion (1982) (state action); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (federal action). The fourth amendment similarly extends to aliens in the United States. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032 1984) (refusing to apply exclusionary rule to deportation proceedings but recognizing the applicability of the fourth amendment to aliens in the United States).}\]

\[\text{79}\text{Rasul v. Bush, 542 U.S.466 (2004). The Bush administration’s response to Rasul was to attempt to strip the federal courts of habeas corpus review in both the DTA and MCA.}\]
September 11th attacks, detention of non-citizens has become increasingly common, and some of those detainees may be removed or deported pursuant to federal statutes permitting the government to do so on national security grounds (although none permit seizure and transfer for the purposes of enabling foreign interrogation).

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. This is true even though 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. For example, under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a party, a State shall not expel, return (“refouler”) or extradite an individual to a country “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” 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.\textsuperscript{86} 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,\textsuperscript{87} each of which has been cited by the State Department country reports on human rights practices as engaging in torture.\textsuperscript{88} 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, like the grave breaches regime of the Geneva Conventions, generally been considered to be a peremptory norm of customary international law from which no derogation is permitted.\textsuperscript{89}

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 CAT because at the time of ratification, the United States Senate appended an understanding to the effect that “substantial grounds” under article 3(1) means that it is “more likely than not”

\begin{footnotesize}
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\item \textsuperscript{86}CAT, supra note 34, 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.” Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, at ¶ 35, available at <http://www.state.gov/g/drl/rls/45738.htm> [hereinafter Second U.S. Torture Report].
\item \textsuperscript{87}See, e.g., HRW Report, supra note 17, at 8-11.
\end{itemize}
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that he would be tortured. 90 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. And 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, 91 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. 92 The Committee on Torture itself has stated that “substantial grounds” requires more than “mere theory or suspicion” but need not meet the test of “highly probable.” 93 Finally, all treaties must be interpreted in accordance with their “object and purpose,” 94 and an “understanding” that was inconsistent with that object and purpose would presumably be tantamount to an illegal reservation to the treaty in question. 95 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.” 96

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90U.S. Reservations, Understandings, and Declarations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36194 (1990), Senate Understanding II(2). Professor John Yoo makes a similar argument.

91Second U.S. Torture Report, supra note 86, at ¶ 27.

92Id. at ¶¶ 2, 27.

93Committee Against Torture, General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. A/53/44, annex IX at 52 (1998), available at <http://www1.umn.edu/humanrts/cat/general_comments/CAT_CIXX_Misc1_1997.html>.


The U.S. government argued to the Committee Against Torture that the Convention’s application was suspended by the GWOT, an assertion that the Committee categorically rejected in its Report of May 18, 2006.\textsuperscript{97} Indeed, the Committee noted that the “Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction.”\textsuperscript{98} Similarly, although the Committee noted the presence of positive developments in the United States, such as the enactment of the Detainee Treatment Act of 2005, the Committee nonetheless noted several areas of concerns, and categorically condemned the holding of “ghost” detainees who were unregistered in a particular prison under U.S. jurisdiction outside the United States,\textsuperscript{99} and the establishment of secret detention facilities under its de facto effective control. In the Committee’s words, “Detaining persons in such conditions constitutes, per se, a violation of the Convention.”\textsuperscript{100} Finally, the Committee rejected the government’s assertion that the Torture Convention has no extraterritorial effect, noting that the “provisions of the Convention expressed as applicable to ‘territory under the State party’s jurisdiction’ apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.”\textsuperscript{101}

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 an individual is lawfully within the territory of the rendering State, expulsion requires due process;\textsuperscript{102} meanwhile the individual may choose his or her residence within the


\textsuperscript{98}Id.

\textsuperscript{99}Id. para. 16.

\textsuperscript{100}Id. para. 17.

\textsuperscript{101}Id. para. 15. The U.S. government disputes this position, but has articulated very little in the way of support for its view, which mirrors the opinion (without supporting legal analysis) of conservative legal scholars such as John Yoo (Yoo, Transferring Terrorists, supra note 42, at 1229 (arguing that the Convention has no extraterritorial effect). For an alternate view see Margaret L. Satterthwaite, Rendered Meaningless: Extraordinary Rendition and the Rule of Law, **** GEORGE WASHINGTON UNIV. L. REV. ----- , ----- (2007); David Weissbrodt & Amy Berquist, Extraordinary Rendition: A Human Rights Analysis, 19 HARV. HUM. RTS. J. 123 (2006).

\textsuperscript{102}International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, art. 13 [hereinafter ICCPR].
Furthermore, an extraordinary (extralegal) rendition frustrates the requirements of the Covenant 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. Article 7 of the Covenant prohibits torture, as well as cruel, inhuman and degrading treatment, and the Human Rights Committee has interpreted the Covenant’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 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.

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. 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, as well as articles 4, 5, and 7 of the American Convention, and the Rome Statute for the International Criminal Court identifies them as crimes against

103 Id. art. 12.

104 Id. art. 9.


humanity. As the Inter-American Court emphasized in Velásquez Rodríguez, “those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment.”

To the extent the practice of extraordinary rendition results 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 United States government is engaged. Indeed, the Human Rights Committee this summer issued a report stating that “The [United States] should immediately cease its practice of secret detention and close all secret detention facilities.”

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. Others are apparently not consented to (at least publicly) —as in the widely publicized recent case in which Italian prosecutors filed criminal charges against Italy’s former intelligence chief and twenty-six American citizens, twenty-five of whom were CIA agents, for spiriting a suspect out of Italy to Egypt without the approval of the Italian government. Conducting police operations in the territory of another State without its approval is, as the Permanent Court of International Justice noted in the Lotus

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109 Rome Statute of the International Criminal Court, supra note 37, art. 7(1)(I). 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).

110 Velásquez Rodríguez, supra note 108, at ¶ 156. Although the United States has not ratified the American Convention, it is a member of the Organization of American States.


114 Ian Fisher & Elisabetta Povoledo, Italy Seeks Indictments of C.I.A. Operatives in Egyptian’s Abduction, N.Y. Times, Dec. 6, 2006, at A15. The case is sensitive because it appears that the Italian authorities must have known of the abduction and consented to it.
Case, 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, although Eichmann derived no benefit from that at his trial. The U.S. Supreme Court in *Alvarez Machain* arrived at a parallel result—finding that under the principle of *mala captus, bene detentus* a defendant abducted from Mexico by U.S. agents could be tried in the United States and that the existence of the U.S.-Mexico extradition treaty did not prevent such a result. The Supreme Court’s opinion virtually ignored the question of Mexico’s sovereign rights as a matter of customary international law, 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.” 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.

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117Cr. A. 336/61, Eichmann v. Attorney General, 16(3).

118United 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).

119Statement of Abraham D. Sofaer, the Legal Adviser, U.S. Dept. Of State, on the International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities, before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House Rep., November 8, 1989. 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.*
V. Transfers of Persons from Occupied Iraq: The Application of International Humanitarian Law

One of the features of the GWOT, as conceived by Bush administration lawyers, is the attempt to manipulate legal categories to create law-free zones in which normal rules do not apply. In Section IV, above, this article discussed the application of domestic and international human rights law to the problem of rendition. It must be noted that the government has argued that neither apply to prisoners victimized by rendition; the government’s position being that because the U.S. is at war, the President may supersede domestic and international laws because those laws apply only in peacetime. As a matter of U.S. Constitutional law, these assertions are now being tested in the courts. Although they have found favor with some lower federal courts, the Supreme Court has taken a much more jaundiced view of these extraordinary assertion of Presidential Power. Internationally, the Bush Administration’s position is even more tenuous: the International Court of Justice has been consistent in its jurisprudence to the effect that International Human Rights law continues to apply in war time, as in peace time, and both the Committee on Torture and the Human Rights Committee have rejected the Bush Administration’s claims specifically as regards the application of the Torture Convention and ICCPR during the war on terror. The second half of the Bush administration’s argument as regards detainees with regard to the GWOT, was that prisoners in the war on terror are also not entitled to the protections of the laws of war, because they are “unlawful enemy combatants,” a highly questionable proposition but one which I leave for a later time.

Prisoners in the Iraq conflict, however, because they are protected by Geneva law are not “unlawful enemy combatants,” and would presumably benefit at least from international humanitarian law protections, even if one accepted the U.S. government’s assertion that international human rights law did not apply. 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 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. As General Taguba noted in his report on conditions at Abu

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120 See, e.g., cases cited note 40.

121 Legality of the Use of a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8).

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).”123 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. As to civilian detainees, who apparently comprised as much as 70 to 90 percent of all those arrested in Iraq, according to the ICRC,124 they 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.125

The ICRC Commentary to article 49 states that the “prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2” of article 49,126 which permits the evacuation of an area if “the security of the population or imperative military reasons do demand.”127

On March 19, 2004, a draft opinion by Jack Goldsmith, III, at the U.S.

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123Taguba Report, supra note 16, at pp. 7-8 (summarizing report of MG Ryder).


125GC IV, supra note 31, art. 49.


127GC IV, supra note 31, art. 49(2). See also COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 278-79 (Jean S. Pictet, ed., 1958) [hereinafter PICTET COMMENTARY]. 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 additional grounds for avoiding the application of article 49 applies, and will not be further discussed here.
Department of Justice Office of Legal Counsel\textsuperscript{128} was issued, apparently at the CIA’s request,\textsuperscript{129} suggesting that article 49 permits the deportation and transfer of both aliens and Iraqis out of the occupied zone. The OLC opinion concludes that “the 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 interrogations, for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them.”\textsuperscript{130}

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 Geneva Convention. In the words of General Taguba, “[t]his maneuver was deceptive, contrary to Army Doctrine, and in violation of international law.”\textsuperscript{131} 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 Conventions, and customary international law.\textsuperscript{132} 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

\textsuperscript{128}Dated March 19, 2004, the memo was entitled “Permissibility of Relocating Certain ‘Protected Persons’ from Occupied Iraq, the memorandum was authored by then Assistant Attorney General Jack L. Goldsmith, III, and directed to Alberto R. Gonzales, then Counsel to the President, \textit{reprinted in} \textit{THE TORTURE PAPERS, supra note 10 at 366 [hereinafter OLC Memo].} Goldsmith is now a professor at Harvard Law School.


\textsuperscript{130}OLC Memorandum, \textit{supra} note 128, at p. 2.

\textsuperscript{131}Taguba Report, \textit{supra} note 16, at 18 (para. 33).

\textsuperscript{132}Article 126 of GC III provides that the ICRC has free 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 nature.” \textit{See also} GC IV, \textit{supra} note 31, arts. 76, para. 6; 143.
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. Although the final footnote (14) 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 therefore recommends “case-by-case” evaluation of potential relocations of “protected persons” from Iraq under the guidance of OLC itself, surely that information would best have been communicated right up front, rather than buried in a footnote at the end of the document.

I have analyzed OLC’s arguments on these issues elsewhere, and will only briefly recapitulate those points here, 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 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 upon in the case of at least one dozen prisoners who were transferred out of Iraq during the U.S. occupation of that country. Moreover, the memorandum is similar in tone and content to many of the other memos 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 memorandum is deficient in three respects: in its approach to the text and spirit of the Geneva Convention itself, in its highly selective approach to the applicable legal authorities combined with reliance upon inapposite legal authority and appeals to “common sense” and in its misapprehension of the historical context that gave rise to the

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134 GC IV, supra note 31, art. 147. This may violate the Convention’s prohibition on unlawful confinement, as well. 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 also GC IV, supra note 31, arts. 27, 42, 78.


136 Jehl, supra note 19.

137 OLC Memorandum, supra note 128, at 7.
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.

Taking Text Seriously: The OLC memo 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. The memorandum 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, the memo 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. (As will be explained below, the Memorandum supports this conclusion by referring to crimes against humanity cases having little or nothing to do with article 49).

As noted earlier, treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the[ir] terms . . . in their context and in the light of [their] object and purpose.” One looks to subsidiary means of interpretation only if the ordinary meaning is either “ambiguous or obscure,” or

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138This identical approach was probably borrowed from one of the authorities cited by the OLC Memorandum, Judge Schomburg’s separate opinion in Prosecutor v. Krnojelac, Judgement, Case No. IT-97-25 (App. Ch. Sept. 17, 2003), paras. 1-17, paragraph 15 of which is cited by the OLC Memorandum on page 5. However, as we shall see infra, citing crimes against humanity cases having little or nothing to do with article 49 is unhelpful, and even misleading.

139The author suggests that Roman law supports this view. OLC Memorandum, supra note 128, p. 2.

140Although 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.

141VCLOT, supra note 94, art. 31(1).

142Id., art. 32(a).
“leads to a result which is manifestly absurd or unreasonable.”

In the case of article 49, the “ordinary meaning” of the term “deport” in English, particularly in conjunction with the term transfers, plainly covers all protected persons, citizens and noncitizens alike (as the ICRC Commentary suggests). In the United States, we do not use the term “deport” in connection with “transfers” of our citizens because U.S. citizens cannot constitutionally be “deported” abroad. 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.

The French text of the Convention, refers to “déportations de personnes protégées.” This might provide some support for OLC’s conclusions that the word “deportation” or “déportation” in article 49, excludes aliens from its purview, because French uses the term expulsion rather than déportation to describe the process of removing aliens from French territory pursuant to immigration laws, and sometimes use the notion of déportation to mean “banishment” (of citizens) in the Roman law sense. Yet neither a linguistic nor a Roman law analysis helps much in this regard because the English and French meanings of the term deportation or déportation are the same as they are used in the Geneva conventions.

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143 Id., art. 32(b).

144 GC IV, supra note 31, art 49 (French version), available at <http://icrc.org/dih.nsf/3355286227e2d29d4125673c0045870d/e8acc1a1e2a34f5fe1256414005dee cc>.


146 This is the argument made by the OLC based upon a citation in Black’s Law Dictionary noting the Roman Law meaning of “deportation” as “banishment.” OLC Memorandum, supra note 128, at 2, n.3. OLC, however, uses a very old Fourth Edition (1951) of Black’s; the most recent edition published in 2004 would seem to directly refute the Memorandum’s argument because it has two separate entries on this question. The first, for “deportation,” refers to the expulsion or transfer of an alien. The second, for “déportatio” refers to the Roman law punishment of permanent exile for citizens. BLACK’S LAW DICTIONARY 471 (9th ed., 2004).

147 The French 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,” without reference to citizenship. J. SALMON, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 323-24 (2001). Harrap’s New Standard Dictionary refers to “déportation” as the “deportation (of undesirable aliens),” I HARRAP’S STANDARD FRENCH AND ENGLISH DICTIONARY D:37 (1980), and Cornu’s vocabulaire juridique defines it essentially as permanent exile from the territory of continental France, making no mention of the nationality of the individual thus banished. GÉRARD CORNU, VOCABULAIRE JURIDIQUE 256 (1987).
If there were a terminological difficulty, the potential linguistic conflict should be examined through the lens of article 150 of the Fourth Geneva Convention, 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.” Such a reconciliation suggests that the term “deport” in article 49 covers both citizens and non-citizens alike.

The Memorandum’s Roman law argument is intriguing, but ultimately equally unpersuasive. Indeed, as I have written elsewhere, it is difficult to imagine how Roman law might be relevant in any way to a contemporary understanding of article 49. Additionally, article 49 refers to “transfers, as well as deportations.” The OLC memorandum is particularly inadequate as it leaps to the conclusion that its restrictive interpretation of the term “deport” also constrains the application of the term “transfer.” The term transfer appears at various places in the 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.”

Humanitarian conventions should be interpreted to

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148GC IV, supra note 31, art. 150.
149VCLOT, supra note 94, art. 33(4).
150According to Smith’s Dictionary, Deportatio was a species of Exsilium, whereby an individual was banished and lost certain elements of his citizenship – if a father, his children ceased to be in his power; and if a son, ceased to be in his father’s power. William Smith, A Dictionary of Greek and Roman Antiquities, Exsilium, available at <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Exsilium.html>. 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 (adopting Christianity or Judaism, for example!). The banishment was generally to either an island or oasis. Patrick Mac Chomhaich de Colquhoun, III A Summary of the Roman Civil Law § 2400 (1854); George Mousourakis, The Historical and Institutional Context of Roman Law 314 (2003).
151Sadat, Ghost Prisoners, supra note 5, at 330.
152GC IV, supra note 31, art. 49(1) (emphasis added).
153OLC Memorandum, supra note 128, at pp. 5-6.
154See also art. 128 on giving notice of transfer and art. 45 (no transfer to a Power not a party to the Convention.)
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.” That breadth is emphasized by an explicit exclusion: for citizens of a neutral state which has normal diplomatic representation with the Occupier.

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 128, at pp. 3-4.

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.

Indeed, despite the legal gymnastics of OLC, 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.

OLC also concludes that it is lawful to “relocate ‘protected persons’ temporarily...to another country temporarily to facilitate interrogation.” 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. Once again, the argument relies upon linguistic ploys directly contradicted by the text of the Geneva Convention itself, and there is an aura of subterfuge about the intended purpose. How can the transfer “facilitate interrogation” except by removing protected individuals

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156 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 128, at pp. 3-4.


158 OLC Memorandum, supra note 128, at p. 2.

159 Id., at 9, citing GC IV, art. 76(1).
from the watchful eye of the ICRC? The Convention requires that the ICRC be notified of all transfers, including ones within the occupied territory or temporary ones. The OLC memo notably does not remind the CIA of that obligation.

**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 interpretation of article 49, and indeed, the Memorandum cites no authorities supporting its proposed reading of that provision, relying instead upon selective and inappropriate 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.

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. The OLC Memorandum is correct 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 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,” the “lawful presence” requirement is specifically excluded from the war crimes element of deportation and forcible transfer (article 8 of the Statute). Curiously, the OLC Memorandum makes no reference whatsoever to article 8 (war crimes) of the Rome Statute, which would be the relevant provision in the instant case.

The Evocation of Common Sense: OLC argues that if article 49 did not permit the deportation of illegal aliens, the Convention would become “a welcome mat to occupied territory,” insinuating that otherwise “a murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction.” Yet the Fourth Geneva Convention clearly anticipates


\(^{163}\)ELEMENTS OF CRIMES, supra note 157, 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.”

\(^{164}\)Article 8(2)(a)(vii) of the Rome Statute for the International Criminal Court makes “unlawful deportation or transfer or unlawful confinement” a war crime, noting that these are grave breaches of the Geneva Conventions. Rome Statute, supra note 37, art. 8(2)(a)(vii). The element of this offense provides that the person “deported or transferred one or more persons to another State or to another location” and that “Such person or persons were protected under one or more of the Geneva Conventions of 1949.” Rome Statute for the International Criminal Court, Elements of Crimes, at Article 8(2)(a)(vii)-1.

\(^{165}\)OLC Memorandum, supra note 128, at 7.

\(^{166}\)Id.
this precise situation, providing in article 45 that there is no “obstacle to the extradition . . . of protected persons accused of offenses against ordinary criminal law.” 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.

Historical Background: It is not surprising that the OLC approach has little or no acceptance in 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 the OLC term) in their countries of refuge. For example, 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…”. Indeed, the most prominent deportees of all, Anne Frank and her family, were Germans living in Holland, who, by the time of their arrest and deportation to Auschwitz, probably did not have legal papers. As Anne wrote in her diary, concerning the fate of the Jews of Holland, particularly those who had sought refuge there:

**Anne Frank, The Diary of a Young Girl:**

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167GC IV, *supra* note 31, art. 45.

168The OLC memorandum discovers many statements about the particular hardship of deporting somebody from his or her country of citizenship. That is not the same as finding that the drafters affirmatively intended to cut aliens out of the protected class.

169ROBERT O. PAXTON, *VICHY FRANCE OLD GUARD AND NEW ORDER 1940-1944* 311-12 (1972). Paxton estimates that of the 50-65,000 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 a camp in Germany under the Commando Order given by Hitler to either execute or deport allied prisoners. For information on the so-called “Commando Order” see <http://en.wikipedia.org/wiki/Commando_Order>. Keitel and Jodl were charged with this crime, as well as enforcement of the Night and Fog decree, and were sentenced to death by the IMT and executed.

170ANNE FRANK, *THE DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION* 6-8 (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.
Countless friends and acquaintances have been taken off to a dreadful fate. Night after night, green and grey 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.  

Scenes like these were fresh in the minds of those who drafted the Geneva Conventions. Indeed, as the OLC Memorandum itself notes, the drafters concerned themselves not only with citizens of occupied territories, but the rights of aliens. 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 reminiscent of the Nazi operation called Nacht und Nebel or “Night and Fog,” although 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. Under this order, individuals were taken from the occupied territories, and spirited away for secret trial.

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, Art. 49 – Deportations, Transfers, Evacuations, available at <http://www.icrc.org/ihl.nsf/bea7ecfla7801c6241256739003e6369/523ba38706c71588c125>.

Footnote 11 of the OLC Memorandum itself 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. Article 70(2) provides:

National 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 offence 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 31, art. 70(2).

by special courts in Germany. The defendants’ 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.” The proceedings often resulted in the torture, ill-treatment and death of those abducted; those who were acquitted were nonetheless kept in the “protective custody” of the Gestapo for the rest of the war. This practice was condemned by the International Military Tribunal at Nuremberg, and was 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.

V. Conclusion

It is well known that the atrocities of September 11th, 2001 resulted in a catastrophic loss of life, billions of dollars of economic damage, and shattered the American psyche. But given the passage of the MCA, the shocking abuses at Abu Ghraib, the establishment of a law-free zone at Guantanamo Bay and the government’s program of extraordinary rendition, the subject of this particular Article, it may also be remembered as the day that the United States lost its soul, or at least its moral high ground. Americans became suddenly fearful that shadowy international terrorists might strike at the hearts of their cities, financial or political

175 Alstoetter, supra note 174, at 1031.

176 Id. at 1032.


178 Paragraph 13 of the indictment (war crimes) charged defendants Alstoetter, von Ammon, Engert, Joel, Klemm, Mettgenberg, and Schlegelberger with responsibility for and participation in crimes committed pursuant to the “Night and Fog” program of the Nazis. Alstoetter, supra note 174, at 21. Alstoetter 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 of the Reich Minister 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. Id. at 3.
institutions, and a sense of imperviousness to the troubles of the world was lost. President Bush was immediately removed to an “undisclosed location,”179 after the attacks became public,180 adding to the nation’s unease. Once it became apparent that the destruction of the World Trade Towers, U.S. Airlines Flight 93 and the Pentagon were the work of Al Qaeda, President Bush vowed to “hunt down” the terrorists,181 ultimately waging war against the nation of Afghanistan,182 and specifically the Taliban, its government, and members of the international terrorist organization, Al Qaeda who were hiding there. Indeed, the President stated that it was the policy of the United States to conduct a “war on terror,” that will “begin[] with al-Qaeda, but . . . does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated,”183 raising the specter of endless war, all over the globe. Fear and anger led to prejudice and hatred, although fortunately not on the scale seen during the Second World War with respect to individuals of Japanese origin living in the United States, and subsequently, racist images of Muslim and/or Arab evildoers became widespread, even if the President


180 Recall, in contrast, that Queen Elizabeth (the Queen Mum) refused to leave London during the London blitz, which killed more than 30,000 Londoners. Elizabeth continued to reside at Buckingham Palace even though it was bombed by the Germans, and she and her husband, King George VI, were an inspiration to the people of London. *See, e.g.*, *Queen Elizabeth, Queen Mother*, available at <http://womenshistory.about.com/od/queenmothers/l/biblio_elizabeth_mum.htm>; *London*, available at <http://en.wikipedia.org/wiki/London>.


182 International lawyers familiar with the manner in which the first President Bush (41) had used the United Nations to obtain resolutions authorizing the use of force in repelling Saddam Hussein’s invasion of Kuwait immediately noticed the deliberate ambiguity of Security Council Resolutions 1368 and 1373, which did not authorize Member States of the United Nations to use “all necessary means” to respond to Mullah Omar’s refusal to hand over Osama bin Laden, as did resolution 678, adopted as a final ultimatum to Saddam Hussein to withdraw from Kuwait, or pay the price of not doing so. Instead, the resolutions adopted in the wake of the 9/11 atrocities reiterate the right of every State to “inherent self defense,” but never actually spell out either self defense or collective action as the proper legal basis for the invasion of Afghanistan, leaving the legal basis for the U.S. response deliberately unclear.

himself did not use racist imagery in his speeches following the events themselves. 184 Americans were also informed by high level government officials such as Attorney General John Ashcroft not only that foreign terrorists were bent upon their destruction, but that any opposition they voiced to the administration’s plan of action was “unpatriotic” and would only serve to aid the terrorists. 185 In short, in spite of the heroism of many, exhibited in their reactions to the tragedies of September 11th itself, the government’s response took an ugly turn. 186

The invasion of Afghanistan in October of 2001 was followed by the invasion of Iraq in March 2003 in clear opposition to the weight of world opinion and international law. The number of Americans killed in these two conflicts has now surpassed the death toll from the September 11th attacks themselves, 187 and, if recent calculations are correct, as many as 600,000 Iraqi civilians 188 and 1000-3000 Afghan civilians. 189 These death tolls are staggering, representing a loss of life and


186 More recently, Charles Stimson, deputy assistant secretary of defense for detainee affairs, suggested that lawyers at top law firms should not represent prisoners at Guantanamo Bay, and that the firms’ corporate clients should consider ending their business ties with law firms that continue to provide pro bono assistance to detainees. Neil A. Lewis, Official Attacks Top Law Firms Over Detainees, N.Y. TIMES, Jan. 13, 2007, at A1. Stimson named the law firms publicly and the Wall Street Journal quickly followed suit. Id. This blacklisting of law firms willing to represent terror suspects (not terrorists, as Stimson incorrectly asserted) was quickly attacked by legal ethics specialists, bar associations and lawyers all over the country who pointed out that lawyers are duty-bound to represent even unpopular or repellent individuals under the terms of their license.


188 Sabrina Tavernise & Donald G. McNeil, Iraqi Dead May Total 600,000, Study Says, N.Y. TIMES, Oct. 11, 2006, at A16. The methodology of the study is disputed, some government officials suggesting that the death toll may be substantially lower. The United Nations recently released a figure of 34,452 Iraqi civilian deaths for 2006 alone, a number that was criticized by the Iraqi government as too high. According to the media, both the Iraqi government and U.S. officials record casualty figures, but neither the U.S. nor Iraqi government will release official figures. Sabrina Tavernise, Iraqi Death Toll Exceeded 34,000 in 2006, U.N. Says, N.Y. TIMES, Jan. 17, 2007, at A1.

It is difficult to obtain reliable casualty and injury figures for Americans. According to unofficial published sources, the Pentagon has confirmed more than 3000 U.S. military deaths in Iraq 47,657 casualties, including 22,834 wounded, 18,183 soldiers stricken by disease. In 2006, the Washington Post reported that the ration of wounded to killed among U.S. forces in Iraq was 8 to 1, versus 3 to 1 in Vietnam. Ann Scott Tyson, U.S. Casualties in Iraq Rise Sharply, WASH. POST, Oct. 8, 2006, at A01. No official U.S. government website appears to either confirm or deny these figures.

But it is not just the terrible loss of life and destruction of lives and property that has resulted from the Iraq and Afghan wars that has given many pause. It has also been the policies of the United States with respect to individuals taken prisoner during these conflicts. Although human rights groups have probably over-estimated the total number of prisoners to be as high as 70,000; and the President recently admitted that some unknown number of detainees are being held in undisclosed locations, the number of known prisoners in Iraq, Afghanistan, Guantanamo Bay, and U.S. prisons according to available published sources is more consistent with a figure of 12,000 or 15,000. We now know that a significant number of these detainees are not treated consistently with either international human rights or international humanitarian law, and the government has yet to offer a coherent explanation why. Indeed, although acts of international terrorism pose a genuine danger to the safety and well being of Americans that the U.S. government is required to meet, the Geneva Conventions and international human rights law did not create the threat, and eviscerating those legal regimes will not eliminate it. Rather, 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. International

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193See, e.g., Isabel Hilton, The 800lb Gorilla in American Foreign Policy, THE GUARDIAN, 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 3000 arrested in 100 countries elsewhere). A recent United Nations report stated that approximately 26,398 detainees were being held around the country, 13,000 of which were in the custody of the MNF. Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004), S/2006/706, para. 36, Sept. 1, 2006.
Protocol I, supra note 32, art. 44(2).

Id. art. 44(4).

196 Protocol I does not address the problem of international terrorism for the simple reason that terrorism is not properly treated as a problem of armed conflict, but international and transnational criminal activity. Nonetheless, Protocol I's negotiation and adoption suggests that the international community might be open to multilateral negotiations that could address the administration's concerns. Most States have resisted the U.S. attempt to recast terrorism as a war crime, however, suggesting that the government has little support in the international community for its legal position.

John Yoo & Robert J. Delahunty, Memorandum for William J. Haynes II Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, reprinted in THE TORTURE PAPERS supra note 42, at 38. Yoo and Delahunty argued that "neither the Geneva Conventions nor the [war crimes act] regulate the detention of al Qaeda prisoners . . . . or the Taliban militia" captured during the Afghan conflict, id. at 39, and that "customary international law has no binding legal effect on either 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 11th, 2001 (but which the United States has not done). If the administration is sincere in its claim that new international legal paradigms must be adopted in order to successfully combat the scourge of international terrorism, new multilateral discussions, perhaps of a new treaty instrument, would be the appropriate vehicle to do so, not creative "reinterpretations" of the law that are patently inconsistent with prior U.S. and international understandings. Indeed, Protocol I Additional to the Geneva Conventions of 12 August 1949 attempted to address in part the issue the Bush administration has focused upon, namely the alleged failure of U.S. "enemies" in the war on terror to fail to comply with the rules of international law applicable in armed conflict by providing that "violations of these rules shall not deprive a combatant of his right to be a combatant . . . or a prisoner of war," unless certain exceptions apply, and even those do not deprive the individual of the right to humanitarian treatment. Although the United States has not ratified Protocol I, 167 States are Parties to it and it represents an effort to address the concerns of both developed and developing States with regard to international armed conflict, which increasingly involves guerilla forces, militias and other non-traditional armed forces.

The OLC Memorandum, like many of the other memos issued to cover GWOT policies, raises very troubling human rights concerns. 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 memoranda penned by Yoo, Delahunty, and Gonzales,
determining that Geneva law would not apply to the GWOT, and the “torture memos” that followed. The theories articulated in these documents have each enhanced Executive branch authority, often leaving detainees in U.S. custody few, if any, opportunities to challenge either the legality of their detention, or the treatment they have received. The Detainee Treatment Act of 2005, adopted by an indignant Congress in response to the growing evidence that torture and cruel, inhuman and degrading treatment were becoming institutionalized aspects of U.S. prisoner of war treatment appeared to reverse the trend for a time. However, the Military Commissions Act of 2006 codified much of the Bush Administration’s policies as a matter of federal law, including the absolute authority of the President to classify individuals as “unlawful enemy combatants,” thereby stripping them of the protection of the Geneva Conventions and the U.S. Uniform Code of Military Justice, and deprives the federal courts, for the most part, of authority to review claims of detainees of abuse or wrongful detention. While one must be careful not to overstate the degree to which the rendition program and U.S. POW policies resemble the Nazi Nacht und Nebel program, there is nonetheless a chilling resemblance in the degree to which legal doctrines have been employed, not to provide stability and fairness, but to terrorize and dehumanize. What could be more terrifying than to be a Canadian citizen with an Arab name who is picked up in Kennedy Airport and rendered to Syria or whisked off the street in Italy and sent to Egypt to be mercilessly tortured for months or even years?

Even more troubling is that most of those presently held in U.S. detention facilities appear not to be terrorists at all. Recall that the catalog of abuses at Abu Ghraib prison included physical violence, videotaping and photographing naked male and female detainees, posing detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and remain naked for several days at a time, and using dogs without muzzles to intimidate and frighten detainees. Yet in 2004, the Red Cross report suggested that between 70 and 90 percent of the thousands of prisoners held at Abu Ghraib prison by the United States

the President or the military because it is not federal law.” Id.

198See Gonzales Geneva Memo, supra note 55. In fairness to Gonzales, his memorandum includes a “balance sheet” of positive and negative implications regarding the decision not to apply Geneva law to the Afghan conflict. Id. at 119-20.


may have been brought there by mistake. 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, as does the release of Yasser Hamdi, the accused Taliban fighter who was held in Guantanamo for nearly three years without charges. The government also held Jose Padilla, a U.S. citizen, in military custody after accusing him of a plot to detonate a “dirty bomb” in a U.S. city, only to transfer him suddenly on quite different charges to federal court in 2005, when it appeared that his status as a U.S. citizen posed a problem to the President’s authority to detain him indefinitely without charges on U.S. soil. There have also 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.” Laid Saidi’s story is even more devastating. Arrested in Tanzania, he was jailed and subsequently taken to Malawi, where he was blindfolded, a plug inserted into his anus, fitted with a disposable diaper, shackled his hands and feet and flown to Afghanistan where he was tortured. According to The New York Times, his arrest was based upon a taped conversation in which interrogators mistakenly believed he was talking about airplanes (but was in fact discussing tires). He was held for 16 months and allegedly subjected to torture and cruel, inhuman and degrading treatment before his captors realized their error.

Proponents of rendition, torture and the establishment of overseas prisons no doubt sincerely believe that these actions are justified. Yet as I hope this Article has

\footnotetext{201}{ICRC February Report, supra note 124, at p. 8, para.7.}


\footnotetext{204}{Although the government prevailed in the Fourth Circuit to have Padilla detained as an “unlawful enemy combatant,” the transfer to federal custody was seen by many as an effort to avoid a showdown with the Supreme Court over Padilla’s classification and indefinite detention. Shannon McCaffrey, Indictment of Padilla unveiled, Nov. 23, 2005, available at <http://www.ocregister.com/ocregister/news/homepage/article_852377.php>.

\footnotetext{205}{NY CITY BAR REPORT, supra note 4, at 18.}

\footnotetext{206}{Algerian Tells of His Dark Odyssey, supra note 1, at A10.}
demonstrated, they were surely not “legal” as that term is customarily understood at the time when they were carried out, although lawyers were employed to pen legal justifications in their defense. Nor do they seem to have been particularly effective. International terrorism appears unabated,\(^{207}\) Osama bin Laden remains at large, Iraq borders on civil war, and well-seasoned interrogators have questioned the efficacy of torture and cruel-treatment in obtaining useful and reliable evidence from prisoners.\(^{208}\) Opinion polls show international respect for the United States has been falling steadily over the past few years, as human rights abuses in the GWOT and detainee mistreatment have become public. U.S. actions have been scrutinized and condemned by international bodies all over the world: the Committee Against Torture, the Human Rights Committee, the Parliament of the European Union, several national Parliaments and the Council of Europe. Lawsuits have been filed against U.S. government officials in U.S. courts\(^{209}\) and in foreign courts, most recently against Donald Rumsfeld, former Secretary of Defense, Alberto Gonzales, John Yoo and William Haynes.\(^{210}\)

Many experts have applied themselves to an understanding of the deeper logic of terrorism and its causes, which is not our subject here.\(^{211}\) However, those studies in no way suggest that the kind of human rights abuses that currently taint the conduct of the GWOT are necessary for a better outcome. Secret prisons, secret prisoners, indefinite detention and the use 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, particularly by

\(^{207}\)The State Department produced figures in 2005 showing a sharp rise in international terrorist incidents. Susan B. Glasser, *U.S. Figures Show Sharp Global Rise in Terrorism*, Wash Post, Apr. 27, 2005, at A01. Those figures showed 651 attacks in 2004, nearly triple the year before. These, however, were never officially reported even though the State Department has historically published figures on *Patterns of Global Terrorism*, for many years. It stopped doing so in 2005 when the National Counterterrorism Center started publishing its own reports. Now the State Department produces only country reports, similar to those published on human rights and religious freedom, reports that do not include any useful statistical analysis that would help define international trends. See Country Reports on Terrorism, available at <http://www.state.gov/s/ct/rls/crt/>.


\(^{209}\)Both Maher Arar and Khalid el Masri filed lawsuits in the United States seeking recompense for their abduction, detention and torture. Neither suit has been successful to date.

\(^{210}\)On November 14, 2006, a criminal complaint was filed in Germany, <http://www.cerny.org/v2/GermanCase2006/Docs/Table%20of%20Contents%20for%20German%20Complaint.pdf>.

\(^{211}\)See, e.g., ROBERT PAPE, *Dying to Win: The Strategic Logic of Suicide Terrorism* (2006).
lawyers, who understand the complexities of the law and its central role in holding a society together when tested by adversity. 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. . . . .212

The Nuremberg principles, with their emphasis on individual criminal responsibility rather than collective punishment of entire nations or ethnic groups suggests an alternative vision of the GWOT: one that would permit the United States to retain both legal and moral clarity as it combats the very deadly scourge of international terrorist attacks. Indeed, following the September 11th attacks, the United Nations Security Council adopted a series of resolutions building upon the Nuremberg precedent by mandating, for all nations, that the crime of international terrorism be treated as other jus cogens crimes, such as genocide and war crimes, over which all States may exercise universal jurisdiction. The Resolutions emphasized the duty of all States to prevent as well as punish acts of international terrorism, and set out a framework for the continued elaboration of international norms and prosecutions of international terrorist crimes. Whatever qualms one might have about the Security Council adopting this kind of international “legislation,” undoubtedly the September 11th attacks themselves were so horrifying in scale that they unified States’ desire to finally make progress regarding the definition of terrorism, and the prosecution of major international terrorist figures. Many commentators suggested the need for international terrorist courts, not a new idea (an international terrorism convention, complete with a court, was elaborated in 1937 although it never came into force), but one worth seriously considering, particularly given the desire of many States to see the International Criminal Court eventually assume such a task.

The Bush administration’s approach has appeared hypocritical and confused, attempting on the one hand to extricate the “war” on terror from the application of international humanitarian law, while arguing on the other hand, as a matter of domestic law, that because terrorism is problem of war, not crime, the President may establish military commissions, detain individuals indefinitely without charges, eliminate the possibility of federal court supervision and substantially aggrandize his own authority. Moreover, the President’s approach appears to have been remarkably short-sighted. Most international terrorists do not live in the United States or even

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212 U.K. House of Lords Decisions, supra note 23, para. 96 (opinion of Lord Hoffman).
in countries whose citizens are favorably disposed towards Americans. Intergovernmental cooperation is essential for the apprehension of terrorist suspects, and getting other nations to prevent and punish international terrorists will assist the United States considerably in its efforts. The kind of “universal jurisdiction by treaty” regimes, found in all the antiterrorism treaties alluded to earlier, require all contracting States to try or extradite suspected terrorists. The Security Council resolutions adopted after September 11th suggest that they may, in addition, be enforceable as a matter of customary international law against non-Party (or uncooperative) States by the Security Council assuming the United States was willing to do so in a manner that gave assurances to other States that American efforts would be cabined by law. The use of secret prisons, the holding of “ghost prisoners,” and the endemic use of torture and cruel, inhuman and degrading treatment against detainees in U.S. custody, however, gives States political cover for refusing to cooperate with the U.S. when they might otherwise have done so, even relatively quietly.

American leadership at Nuremberg showed the formerly warring States of Europe a new way to conceptualize international relations and instill the rule of law. The administration has cited no evidence that Geneva and the other treaties elaborated at that time are obsolete; rather the government has made what is, at best, a tenuous case that they are inconvenient. Shattering the consensus that produced them has serious consequences not only for the conduct of the GWOT but the stability of all the institutions established under U.S. leadership after the Second World War. International law, like domestic law, is a system whose component parts are deeply intertwined. Unraveling portions of the legal fabric has unintended consequences for the whole. The war that was launched from the nightmare of September 11th has produced the nightmare of Guantanamo, the horror of Abu Ghraib, the broken lives of the U.S. soldiers killed or wounded in Iraq and Afghanistan, the deaths of tens, maybe hundreds of thousands of Afghan and Iraqi civilians, and the shattered psyche’s of America’s torture and rendition victims. The damage done has been considerable, but is perhaps not yet insurmountable if the United States government changes course and resumes its rightful place as a proponent, rather than an opponent, of the rule of law.

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213 See supra note 38 and accompanying text.