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RENDERED MEANINGLESS: EXTRAORDINARY RENDITION AND THE RULE OF LAW*

MARGARET L. SATTERTHWAITE¹

Introduction

In recent years, the practice of “extraordinary rendition” by the U.S. government has come in for strong critique by human rights advocates, the United Nations, and other governments. Despite the avalanche of protest, U.S. government officials and some scholars have defended rendition, relying on a number of legal arguments. These arguments do not explicitly support the practice of informal transfer to a risk of torture; instead, they imply that the practice is legal by pointing to what defenders claim are lacunae in the relevant legal frameworks. Where lacunae are found, the Administration suggests, prohibitions give way to permission: territories outside the United States are conceptualized as locations where the U.S. may act as it pleases; informal promises between countries replace the absolute prohibition of certain transfers; and the war paradigm is used to deprive individuals of the protection of the law. This Article examines these arguments in close detail, suggesting that they are not only incorrect; they also hide a dangerous shift in policy: a practice purportedly developed to uphold the rule of law against lawless terrorists – rendition to justice – has become a lawless practice aimed at perverting the rule of law in relation to terrorism – extraordinary rendition.

MAP OF THE ARTICLE

The first Section of the Article discusses the information that is publicly available about the practice of extraordinary rendition. It provides a snapshot of the procedure and its elements as reported by human rights organizations, European investigations, and the media.

The second Section examines the U.S. government’s legal arguments related to extraordinary rendition. Not unlike its approach to the torture debate, where the Bush

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Administration has stated repeatedly that the United States “does not torture”² while redefining the norms at issue, the Administration has not constructed legal arguments that explicitly defend extraordinary rendition. Instead, it has worked hard to clear a space for actions free of the legal constraints placed on it by human rights and humanitarian law. In constructing its arguments, the U.S. government has identified and exploited several unresolved dilemmas in human rights law: the challenge of extraterritoriality, the difficult relationship between substantive norms and procedural guarantees, and the indeterminate rule of *lex specialis*. While the Administration’s official positions concerning these challenging areas are not new, the exploitation of the legal uncertainty involved *is*: as the practice of extraordinary rendition demonstrates, the Administration has constructed anti-terror techniques that are intentionally aimed at skirting the rule of law.

The final Section of the Article will suggest that the government’s arguments – which purport to expose the limits of human rights law and thus reveal lacunae in that law – instead underline the importance of returning to basic principles when limits are in sight. The foundational rules of human rights and humanitarian law – the protection of human dignity and the principle of humanity – should guide interpretations as we make our way in the post-9/11 world.

I. Exposing the Practice of Extraordinary Rendition

On December 26, 2002, Dana Priest and Barton Gellman published an article in *The Washington Post* that contained what has become one of the most cited comments made by a U.S. official in the “War on Terror.” Attributing an unnamed U.S. source involved in sending suspects to other countries for interrogation, the story quoted the official as follows: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”³ This comment, which has been

² For example, President Bush insisted that “the United States does not torture,” while explaining that the Central Intelligence Agency had used “an alternative set of procedures” on high value terrorism suspects, which have reportedly included such techniques as water boarding. See George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, September 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. For media accounts of the U.S. use of water boarding, see Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Editorial, *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18; Brian Ross & Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC News, Dec. 5, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1375123>; Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, <http://abcnews.go.com/WNT/print?id=1322866>; Jane Mayer, *A Deadly Interrogation: Can the CIA Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44; and Evan Thomas & Michael Hirsh, *The Debate over Torture*, NEWSWEEK, Nov. 21, 2005, at 32.

³ Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1. Other early reports on the existence of a program of extraordinary rendition include: Rajiv Chandrasekan & Peter Finn, *U.S. Behind Secret Transfer of Terrorist Suspects*, WASH. POST, March 11, 2002 at A1; Sebastian Rotella, *Key to U.S. Case Denies Iraq-Al Qaeda Link*, L.A. TIMES, Feb. 1, 2003, at A1; and DeNeen Brown & Dana Priest, *Deported Syrian Suspect Details Torture in Syria*, WASH. POST, Nov. 5, 2003, at A1.

quoted and cited by numerous human rights reports,⁴ legal filings,⁵ and a handful of law review articles,⁶ is referred to so often because it contains and acknowledges, in an elegant and simple formulation, the elements of a procedure that analysts have frustrated themselves trying to define: the practice of “extraordinary rendition.” Also called torture by proxy⁷ or the outsourcing of torture⁸, this practice is elusive, and much confusion surrounds the term extraordinary rendition. The media and even those fighting the practice do not agree on a clear definition of the term, meaning that any given discussion of the phenomenon called “extraordinary rendition” may involve multiple understandings – often never explicitly set out – concerning the content of the term.

In previous work, I have focused on the strictly definitional and doctrinal issues concerning extraordinary rendition, including the shift from earlier forms to the current-day iteration.⁹ For the purpose of this Article, extraordinary rendition is defined as the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture.¹⁰ These elements have been chosen for analytical clarity, and are based on the most current information about the practice. This Article does not address the entire range of extra-

⁴ See, e.g., Human Rights Watch, *The Road to Abu Ghraib*, at 11, (June 2004), available at <https://www.humanrightswatch.org/reports/2004/usa0604/usa0604.pdf>, and Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Rendition,”*, at 13, (Oct. 2004) [hereinafter *Torture by Proxy*], available at, <http://www.nyuhr.org/docs/TortureByProxy.pdf>.

⁵ See, e.g., Plaintiff Maher Arar’s Memorandum of Law in Opposition to Defendants’ Invocation of the State Secrets Privilege at 6, *Arar v. Ashcroft*, No. 04-CV-0249-DGT-VVP (E.D.N.Y. Mar. 14, 2005).

⁶ See, e.g., John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1235 (2004) [hereinafter *Transferring Terrorists*]; Mirko Bajacic & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable*, 39 U.S.F. L. REV. 581, 595-596 (2005).

⁷ See *Torture by Proxy*, *supra* note 4.

⁸ Torture Outsourcing Prevention Act, H.R. 952, 109th Cong. (2005) (bill introduced by Rep. Ed Markey which has failed to obtain needed votes to pass).

⁹ See *Torture by Proxy*, *supra* note 4 (providing a comprehensive doctrinal analysis of extraordinary rendition under domestic and international law). I directed the *Torture by Proxy* project; Hina Shamsi and Angelina Fisher were the principal authors and researchers of the report. See also Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 THE LONG TERM VIEW 46, 49-52 (2006) (examining the shift from “rendition to justice” to extraordinary rendition and summarizing international law prohibiting the practice), and Margaret Satterthwaite & Angelina Fisher/Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (2005) (defining and analyzing the various forms of extralegal transfer used by the United States in the “war on terror”) [hereinafter CHRGJ, *Beyond Guantánamo*], available at <http://www.nyuhr.org/docs/Beyond%20Guantanamo%20Report%20FINAL.pdf>.

¹⁰ This definition is slightly different than the one used in *Torture by Proxy*. The definition used there was: “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.” See *Torture by Proxy*, *supra* note 4 at 4. The “more likely than not” standard used in that report was chosen to match the U.S. standard for assessing an individual’s risk of torture for the purpose of protection under implementing statutes and regulations; the international standard is more protective.

legal transfers used by the United States in the “War on Terror,” such as the repatriation of detainees held on Guantánamo¹¹, or the transfer of battlefield detainees captured in Afghanistan or Iraq.¹² Further, it does not focus on transfers of secret or “ghost” detainees into unacknowledged U.S. detention centers, except insofar as those transfers were preceded by transfers to coercive interrogation by foreign agents.¹³ While all of these forms of transfer are related, different legal regimes apply, and different justifications have been forwarded to support their legality.¹⁴

Exposing the Practice

The existence of a program of extraordinary rendition has been documented most directly through the first-hand testimony of those who have endured the practice.¹⁵ Such direct accounts are supported by the accounts that have been reported in the press,¹⁶ the

¹¹ For a comprehensive discussion of the legal issues surrounding transfers of detainees from Guantánamo Bay, see Robert Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006) [hereinafter *Leaving Guantánamo*].

¹² For a careful discussion of battlefield transfers, see Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition and International Law*, forthcoming in ____ CASE WESTERN RESERVE J. INT’L L. ____ (2006), available at SSRN: <http://ssrn.com/abstract=886377>. See also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, forthcoming in 47 VA. J. INT’L L. ____ (2007).

¹³ For a discussion of the apprehension, transfer, and secret detention of detainees believed to be in CIA “black sites,” see Center for Human Rights and Global Justice, *Fate and Whereabouts Unknown: Detainees in the “War on Terror”* (2005) [hereinafter CHRGJ, *Fate and Whereabouts*], available at <http://www.nyuhr.org/docs/Whereabouts%20Unknown%20Final.pdf>. See also “Biographies of the High Value Terrorist Detainees Transferred to the US Naval Base at Guantanamo Bay,” released by the Director of National Intelligence in conjunction with President Bush’s September 6, 2006 in an announcement acknowledging U.S. secret detention of fourteen terrorism suspects, available at <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>.

¹⁴ For a discussion of the relevant forms of extra-legal transfers, see CHRGJ, *Beyond Guantánamo*, supra note 9.

¹⁵ These testimonies have been reported in human rights reports (see, e.g. Amnesty International, *Torture and Secret Detention: Testimony of the “Disappeared” in the “War on Terror,”* AI Index: AMR 51/108/2005 (August 2005) (detailing the experiences of three Yemeni men, Muhammed Bashmilah, Salah ‘Ali Qaru, and Muhammed al-Assad, held in secret U.S. detention), court documents (see Decl. of Khaled El-Masri in Support of Pl.’s Op. to the United States’ Mot. to Dismiss or, in the Alternative, for Summ. J. at ¶ 36, No. 1:05cv1417, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D.Va. 2006), and Arar v. Ashcroft, 414 F.Supp.2d 250 (E.D.N.Y. 2006)), as well as governmental investigative documents (see Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations; Factual Background: Volume I*; and *Factual Background: Volume II* (2006) [hereinafter *Arar Commission Report*]).

¹⁶ See, e.g., Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, N.Y. TIMES, July 7, 2006, at A1; Joseph Goldstein, *Court Weighs ACLU Request on CIA Terror Documents*, N.Y. SUN, June 13, 2006, at 4; *Court Will Investigate Alleged CIA Flights*, L.A. TIMES, June 13, 2006, at A23; Editorial, *The Detention Dilemma*, WASH. POST, June 19, 2006, at A20; Barrie Dunsmore, *Ugly portrait emerges dot by dot*, TIMES ARGUS, June 18, 2006; *Euro MP’s to Extend Probe Into CIA Activities*, EXPATICA, June 13, 2006; Anemona Hartocollis, *Judges Press CIA Lawyer Over Withheld Documents*, N.Y. TIMES, June 13, 2006, at A17; Larry

handful of cases which have been made the subject of lawsuits,¹⁷ and the numerous cases under investigation by criminal and parliamentary authorities in allied nations.¹⁸ Summarized here are a few examples that will give context to the analysis in the later sections of the Article.

Neumeister, *Court Urged to Protect CIA Detention Info*, ASSOC. PRESS, June 13, 2006; *Region Still Lacks Support for Torture Victims, Say Observers*, IRIN, June 25, 2006, http://www.irinnews.org/S_report.asp?ReportID=54150&SelectRegion=Middle_East; Scott Shane & Mark Mazzetti, *C.I.A. Crackdown Seeks to Tighten Agency's Secrecy*, N.Y. TIMES, April 24, 2006, at A1; Jan Sliva, *EU Concedes Rendition Flights Took Place*, HERALD (U.K.), June 28, 2006; Jan Sliva, *Probe of CIA Prisons Implicates EU Nations*, ASSOC. PRESS, June 7, 2006, available at <http://abcnews.go.com/International/print?id=2048514>; Ike Seamans, *Above the Law*, MIAMI HERALD, June 25, 2006; Jeremy Smith, *EU Lawmakers Back Report on CIA Terror Kidnappings*, REUTERS, June 12, 2006; Josh White, *Bad Advice Blamed for Banned Tactics*, WASH. POST, June 17, 2006 at A16. See also STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE STORY* (2006) [hereinafter GREY, *GHOST PLANE*].

¹⁷ See, e.g., *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D.N.Y. 2006) (order granting motion to dismiss) *appeal docketed*, No. _____ (2d Cir. _____ 2006); *El Masri v. Tenet*, 437 F.Supp.2d 530 (E.D. Va. 2006) (order granting motion to dismiss), *appeal docketed*, No. _____ (4th Cir., No. _____, 2006).

¹⁸ See, e.g., documents related to (1) the investigation by the Council of Europe's Parliamentary Assembly Committee on Legal Affairs and Human Rights, led by Dick Marty: Eur. Parl. Ass., *Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II*, Comm. On Legal Aff. & Hum. Rts., Doc. No. AS/Jur (2006) 03 rev (Jan. 2006), available at http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124_Jdoc032006_E.htm and Eur. Parl. Ass., *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States, Draft Report- Part II*, Comm. On Legal Aff. & Hum. Rts., Doc. No. AS/Jur (2006) 16 Part II (June 2006) [hereinafter *Council of Europe June 2006 Report*], available at http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf; (2) the inquiry led by the Secretary General of the Council of Europe, Terry Davis: The Secretary General, *Secretary General's Report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies*, Doc. No. SG/inf (2006)5 (Feb. 28, 2006) [hereinafter *Report of Terry Davis*], available at http://www.apt.ch/secret_detention/SG.report.questionnaire.pdf; (3) the investigation by the European Parliament's Temporary Committee on the Alleged use of European countries by the CIA for the transport and illegal detention of prisoners: Interim report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, EUR. PARL. DOC. A6-0213/2006 (June 15, 2006) [hereinafter TDIP, Interim report of June 15, 2006], available at <http://www.europarl.europa.eu/activities/expert/committees/reports.do?committee=2073&language=EN>; (4) the many investigations led by official bodies of European states: see Amnesty International, *Partners in Crime: Europe's Role in U.S. Renditions*, AI Index: EUR 01/008/2006 (June 14, 2006) [hereinafter Amnesty International, *Partners in Crime*], available at [http://web.amnesty.org/library/pdf/EUR010082006ENGLISH/\\$File/EUR0100806.pdf](http://web.amnesty.org/library/pdf/EUR010082006ENGLISH/$File/EUR0100806.pdf) (describing investigations in Italy, Germany, Spain, and Sweden).

*Maher Arar*¹⁹

The story of Canadian citizen Maher Arar has been widely recounted, and is based on his own accounts, legal filings in his federal lawsuit against U.S. officials, and evidence submitted to an official Canadian Commission of Inquiry into his transfer and subsequent torture.²⁰

The basic outlines are this: after arriving at John F. Kennedy Airport in New York City from Zurich on September 26, 2002, Maher Arar stood in line waiting to pass immigration inspection. Arar, a 31-year old Canadian citizen and computer consultant, was headed to Montreal to attend to a business matter following a family vacation in Tunisia. An immigration officer asked him to step aside to answer some questions; he was soon joined by FBI agents, immigration officials and NYPD officers. Arar was detained at the Metropolitan Detention Center in New York City, where he was further interrogated. U.S. officials then demanded that he “voluntarily” agree to be sent to Syria, where he was born, instead of home to Canada. Arar refused, explaining that he was afraid he would be tortured in Syria. After more than a week in detention, U.S. authorities deemed Arar to be inadmissible to the United States based on secret evidence and notified him that he would be deported to Syria. They took him to New Jersey in the middle of the night and loaded him onto a small plane that stopped in Washington and then Rome before proceeding to Jordan.

Local authorities in Jordan chained and beat Arar before bundling him in a van and driving him across the border to Syria, where authorities beat Arar with electrical cables, interrogated him about his acquaintances and beliefs, and kept him in a tiny cell for months at a time. After the Canadian government intervened, Syrian authorities released him in October 2003—more than one year after his ill-fated attempt to change planes in New York City. Three years later, on September 18, 2006, a Commission of Inquiry set up by the Canadian government to investigate the transfer and torture of Maher Arar released a three-volume report.²¹ Summing up the voluminous findings, Commissioner Dennis O’Connor stated that “I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.”²²

¹⁹ The facts in this summary were drawn from: *Arar v. Ashcroft*, 414 F.Supp.2d 250; *Torture by Proxy*, *supra* note 4, at 11-12, and Interview with Maher Arar, Amnesty International, in Canada (Nov. 2005), available at <http://web.amnesty.org/pages/stoptorture-reallives-maherarar-eng>.

²⁰ See generally *Arar Commission Report*, *supra* note 15.

²¹ See generally *Arar Commission Report*, *supra* note 15.

²² “Arar Commission Releases its Findings on the Handling of the Maher Arar Case,” available at http://www.ararcommission.ca/eng/ReleaseFinal_Sept18.pdf.

*Osama Mustafa Hassan Nasr*²³

Egyptian-born Osama Mustafa Hassan Nasr, known also as Abu Omar, had been living in Milan, Italy with his family when he was reportedly abducted by the CIA on February 17, 2003. Abu Omar had been granted political asylum by the Italian government on the basis of his fear of persecution for his membership in the radical Islamic group Al Jama'a al Islamiya. At the time of his abduction, the Italian government had Abu Omar under investigation for possible terrorism-related offenses.

The most detailed accounts of Abu Omar's abduction come from arrest warrants issued by Italian judicial authorities against alleged CIA agents thought to be responsible for the operation. The warrants, which charge the agents with kidnapping, include detailed evidence gathered from cell phone records traced to the alleged agents, flight records, wiretap evidence, and witness statements.

The key facts in the case begin with Abu Omar walking one kilometer from his home to the Viale Jenner Mosque in Milan on February 17, 2003. According to an eyewitness who was present at the time of the kidnapping, a bearded "Arab-looking man" was walking down Via Guerzoni toward a "Western-looking" man in sunglasses, near a light colored van that had parked in such a way that it obstructed the sidewalk.²⁴ After passing the men, the witness stopped with her children on the opposite side of the street, then crossed and heard a loud sound like the slamming of a door behind her. According to her statement, made less than ten days after the event, when the witness turned around, she saw that the Arab man and the Western man were gone, and the van was speeding away; the witness' husband later told the authorities that his wife had actually seen the Arab man struggling and crying for help as he was shoved into the van with force.²⁵

The Italian authorities made little progress investigating the kidnapping until spring 2004, when investigators looking into Abu Omar's potential links to terrorism intercepted several phone calls he placed from Egypt to his wife and a colleague. In those phone calls, Abu Omar explained that on the day of his abduction, he was stopped on the street by Italian-speaking men claiming to be police officers; after demanding his identification, they sprayed him with an unknown substance on his mouth and nose and forced him into the van. He was driven, mouth taped shut, for about five hours to a U.S. airbase; in the van were English- and Italian-speaking individuals and an Arabic interpreter. All the while, his captors "beat him whilst repeatedly asking him questions" about his connections to Al Qaeda, his relationship to Albanian radical Islamists, and whether he was involved in recruiting volunteers to fight against the U.S. in Iraq.²⁶ The

²³ The facts in this summary were drawn from: Arrest Warrant of July 20, 2005, Tribunale Ordinario di Milano, Section XI Criminal Court as Review Judge No. 1413/2005 RG TRD (on file with author; a redacted version of related warrants issued by the judge presiding over the preliminary investigations is available at http://www.washingtonpost.com/wp-srv/world/documents/milan_warrants.pdf) [hereinafter Arrest Warrant of July 20, 2005].

²⁴ Arrest Warrant of July 20, 2005, *supra* note 23, at 24-25.

²⁵ Arrest Warrant of July 20, 2005, *supra* note 23, at 31.

²⁶ Arrest Warrant of July 20, 2005, *supra* note 23, at 49.

following morning, Abu Omar was placed on a military aircraft and flown to another U.S. military base (later identified as Ramstein airbase in Germany) where he was placed on another U.S.-marked aircraft and flown to Egypt. Egyptian officials blindfolded him and took him to a secret services building in Cairo for interrogation. When he refused to act as an informer, he was transported to another building and was tortured; electric shocks were administered to his genitals, and he was hung upside down.

Fourteen months later, Abu Omar was released from prison due to failing health. He was free only long enough to make the phone calls intercepted by the Italian authorities; when the Egyptians learned of the calls, they promptly rearrested him. Abu Omar's Egyptian attorney reported in July 2006 that although an Egyptian court of appeal had recently ordered his client released on the basis that he was being wrongly held, he was later charged under emergency law with being a danger to public safety, allowing for indefinite detention.²⁷ In Italy, meanwhile, intelligence officials were arrested in July 2006, and a broader set of U.S. officials and agents were being sought for the abduction of Abu Omar.²⁸

*Jamil Qasim Saeed Mohammed*²⁹

The story of Jamil Qasim Saeed Mohammed is drawn entirely from press accounts. Still believed to be in foreign custody, Mohammed's case is one of the earliest documented cases of post-9/11 extraordinary rendition. U.S. officials allege Mohammed was an al Qaeda operative who was involved in the bombing of the U.S.S. Cole. He was reportedly apprehended by Pakistani intelligence authorities in October 2001. The microbiology student of Yemeni nationality was reportedly delivered to U.S. authorities at a remote area of Karachi airport, where he was shackled, blindfolded, and bundled aboard a U.S.-registered Gulfstream jet in the middle of the night; he was reportedly flown to Jordan.

The same Gulfstream jet that carried Saeed Mohammed away from Pakistan was later connected to several other rendition operations, including that of Ahmed Agiza and Mohammed Alzery³⁰ from Sweden. The plane's flight logs, obtained by the Sunday

²⁷ See Christine Spolar & Alessandra Maggiorani, *Italy arrests 2 in alleged CIA plot; Spy officials accused in cleric's abduction*, CHI. TRIB., July 6, 2006, at C14.

²⁸ *Id.*

²⁹ Unless otherwise noted, the facts in this summary were drawn from: *Torture by Proxy*, *supra* note 4, at 9; John Crewdson, *Italy probes possible CIA role in abduction*, CHI. TRIB., Feb. 25, 2005, at C4; and Stephen Grey, *US accused of 'torture flights'*, SUNDAY TIMES (U.K.), Nov. 14, 2004, at 24.

³⁰ For discussion of the Agiza and Alzery cases, see Riksdagen (Swedish Parliament), *The Swedish Government's Handling of Matters Relating to Expulsion to Egypt: Extract from Scrutiny Report 2005/06:KU2*, June 2005, http://www.riksdagen.se/templates/R_PageExtended____7639.aspx; Chefsjustitieombudsmannen (Swedish Parliamentary Ombudsman), *A Review of the Enforcement by the Security Police of a Government Decision to Expel Two Egyptian Citizens*, No. 2169-2004, March 22, 2005, http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=Dyna mX_SFS_Decision&Id=1662; *The Broken Promise* (TV4 Kalla Fakta Broadcast, May 17, 2004) (English transcript available at <http://hrw.org/english/docs/2004/05/17/sweden8620.htm>); and

Times of London in 2004, reportedly showed flights to at least 49 destinations, including Afghanistan, Egypt, Iraq, Jordan, Libya, Morocco, and Uzbekistan.

The Scope of the Practice

It is extremely difficult to determine the number of individuals who have been subject to extraordinary rendition. Investigative journalist Dana Priest has reported that her sources estimate that about 70 detainees have been subject to extraordinary rendition.³¹ One of the most cited estimates is 100-150, a number cited by Jane Mayer in a pathbreaking article published in *The New Yorker*; this number was attributed to Scott Horton of the City Bar of New York and an expert on human rights.³² Other estimates reach several thousand.³³ The Egyptian government alone has stated that “60 or 70” detainees had been transferred to its custody between September 11, 2001 and May 2005.³⁴ Because of the confusion over definitions and the related practices involved in the U.S. government’s “War on Terror” strategy, it is impossible to know with any certainty how many people have been subject to extraordinary rendition.

Investigations into the extraordinary rendition program have focused on the agencies involved in the program, the infrastructure required to carry out renditions, and the role of other governments in assisting with such transfers. Evidence that has emerged in the last several years suggests that a variety of agencies have some involvement in the extraordinary rendition program.³⁵ While the CIA is plainly in the lead, agencies

Human Rights Watch, “*Empty Promises*”: *Diplomatic Assurances no Safeguard Against Torture* (2004) [hereinafter *Empty Promises*].

³¹ See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate is Growing within Agency about the Legality and Morality of Overseas System Set up After 9/11*, WASH. POST. Nov. 2, 2005, at A1.

³² See Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106, available at www.newyorker.com/printables/fact/050214fa_fact6 (citing Scott Horton); see also CIA ‘*Outsourcing Torture*’, AGENCE FRANCE PRESSE, Feb. 7, 2005 (reporting that “Scott Horton - an expert on international law who has examined CIA renditions - estimates that 150 people have been picked up in the CIA net since 2001.”)

³³ See CHRGI, *Beyond Guantánamo*, *supra* note 9, at 3 (quoting and citing Jane Mayer: “one source knowledgeable about the rendition program suggested that the number of renditions since September 11, 2001 may have reached as high as several thousand”).

³⁴ Shaun Waterman, *Terror Detainees Sent to Egypt; Official, U.S. Deny Torture is Condoned*, WASH. TIMES, May 16, 2005 at 4 (quoting the Prime Minister of Egypt).

³⁵ In a recent book, author Ron Suskind describes a protracted debate over what should be done with “high-value” al Qaeda suspects once they were apprehended. This debate focused on the type of treatment to be accorded such detainees, their transfers, their location of detention, and whether they would be placed into the criminal justice system or held outside that system. See RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11* 111-118 (2006). A “turf battle” between the FBI and CIA is described by James Risen in his book *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* 28-29 (2006).

including the Department of Defense³⁶ and the Federal Bureau of Investigations³⁷ reportedly have played a role in these operations. According to reports, the CIA was given authority, shortly after 9/11, to transfer detainees to foreign countries without approval of each individual case by the White House or the Department of Justice.³⁸ Investigations carried out by other national authorities such as the judicial inquiry into the Abu Omar abduction in Italy, as well as regional organizations including the European Parliament and the Council of Europe, have documented the involvement of U.S. Department of Defense agencies in extraordinary rendition operations through the use of military aircraft and airbases, such as Aviano and Ramstein airbases in Italy and Germany.³⁹ These investigations have been backed by news accounts⁴⁰ and the reports of human rights organizations such as Human Rights Watch and Amnesty International.⁴¹ At least one individual who was subject to secret transfer by the U.S. claims to have been questioned by FBI officials during an interrogation session in a country that journalist Stephen Grey has demonstrated was most likely Djibouti.⁴² In his book examining the Bush Administration's "War on Terror" strategy, Ron Suskind explains that the FBI and CIA worked together closely when dealing with suspected al Qaeda detainees, including in a number of rendition operations.⁴³ Given the FBI's role, a larger role for DOJ is likely, since it would most likely have been involved in legal review of such operations. Whether the Department of State has a direct role in post-9/11 renditions is not clear; the use of diplomatic assurances, however, combined with the delicate foreign affairs concerns involved in such transfers and the historical evolution of the practice, suggest that the Department of State is likely to play some role.

One of the most successful lines of inquiry into rendition has been to trace CIA-owned or chartered planes known to have carried specific detainees during rendition

³⁶ The extent of Department of Defense involvement has not been entirely revealed, but the use of military aircraft and airbases in the rendition program has been widely documented. See, e.g., *Council of Europe June 2006 Report*, *supra* note 18, at ¶¶ 42-42.

³⁷ For a discussion of FBI involvement, see Risen, *supra* note 35, at 28-29 and Suskind, *supra* note 35, at 111-118. See also CHRJJ, *Fate and Whereabouts*, *supra* note 13 (describing joint operations by agencies to apprehend and transfer certain suspected terrorists).

³⁸ See Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, March 6, 2005, at A1.

³⁹ See, e.g., *Council of Europe June 2006 Report*, *supra* note 18.

⁴⁰ See, e.g., Tom Hundley, *Europeans Want Answers from U.S.*, CHI. TRIB., Dec. 5, 2005, at C6; Stephen Grey & Elisabetta Povoledo, *Italy Arrests Two in Kidnapping of Imam in '03*, N.Y. TIMES, July 6, 2006, at A1.

⁴¹ See *Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe*, Nov. 7, 2005, available at <http://hrw.org/english/docs/2005/11/07/usint11995.htm>; and Amnesty International, *Below the Radar: Secret Flights to Torture and 'Disappearance'*, at 22-24, AI Index: AMR 51/051/2006 (April 5, 2006) [hereinafter Amnesty International, *Below the Radar*]; and Amnesty International, *Partners in Crime*, *supra* note 18.

⁴² See GREY, *GHOST PLANE*, *supra* note 16, at 281-2. See also Amnesty International, *Below the Radar*, *supra* note 41 (reporting that Muhammed al-Assad was questioned in an East African nation by individuals who identified themselves as FBI agents in a room where a photo of the President of Djibouti hung on the wall).

⁴³ See SUSKIND, *supra* note 35.

operations. Investigative journalists,⁴⁴ human rights organizations, and national and intergovernmental European investigations have all taken this approach. Journalists have reported on the use of CIA-front companies, with the *New York Times* summarizing its findings this way:

Behind a surprisingly thin cover of rural hideaways, front companies and shell corporations that share officers who appear to exist only on paper, the C.I.A. has rapidly expanded its air operations since 2001 as it has pursued and questioned terrorism suspects around the world. An analysis of thousands of flight records, aircraft registrations and corporate documents, as well as interviews with former C.I.A. officers and pilots, show that the agency owns at least 26 planes, 10 of them purchased since 2001. The agency has concealed its ownership behind a web of seven shell corporations that appear to have no employees and no function apart from owning the aircraft.⁴⁵

Amnesty International released a report on rendition in April 2006 that contains an extensive discussion of the CIA's use of private aircraft for rendition operations.⁴⁶ The organization concludes that private aircraft are most likely used for rendition operations because of their ability, under international aviation law, to land and fly over foreign countries without prior authorization.⁴⁷ This conclusion is supported by the Center for Human Rights and Global Justice, which also suggests that the use of private aircraft for secret governmental functions such as rendition flights by the CIA would be an impermissible use of the rules of civil aviation under international aviation law.⁴⁸

The European Parliament, for its part, created a Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (TDIP), on January 18, 2006.⁴⁹ The Committee includes 46 members, with Giovanni Claudio Fava named as Rapporteur. The TDIP was tasked with determining whether the CIA had undertaken secret detentions or extraordinary renditions in EU territory, or had used that territory to further such activities; whether such activities violated human rights law; whether citizens of the EU or its candidate countries were

⁴⁴ See especially GREY, *GHOST PLANE*, *supra* note 16 (book-length exposé of the CIA's rendition program, based in part on extensive research into the CIA's fleet of planes), and TREVOR PAGLEN & A.C. THOMPSON, *TORTURE TAXI: ON THE TRAIL OF THE CIA'S RENDITION FLIGHTS* (2006).

⁴⁵ Scott Shane, Stephen Grey & Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005, at A1. See also Michael Hirsh, Mark Hosenball & John Barry, *Aboard Air CIA: The agency ran a secret charter service, shuttling detainees to interrogation facilities worldwide. Was it legal? What's next?*, NEWSWEEK, Feb. 28, 2005, at 32 (detailing the movements of Boeing 737 N313P, which was traced to the abduction and secret detention of German citizen Khaled El Masri).

⁴⁶ See Amnesty International, *Below the Radar*, *supra* note 41.

⁴⁷ Amnesty International, *Below the Radar*, *supra* note 41, at 22.

⁴⁸ See Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States*, at 4-5 (2006).

⁴⁹ This committee was approved by the European Parliament on Jan. 18, 2006. See Temporary Committee on extraordinary rendition, EUR. PARL. DOC. P6_TA(2006)0012, available at <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+TA+P6-TA-2006-0012+0+DOC+XML+V0//EN&L=EN&LEVEL=2&NAV=S&LSTDOC=Y&LSTDOC=N>.

involved in, or victims of, such practices; and whether any EU Member States were involved in, or complicit in, such activities.⁵⁰ In its April 2006 interim report, the TDIP condemned the practice of extraordinary rendition and expressed incredulity “that certain European governments were not aware of the extraordinary rendition activities taking place on their territory and in their airspace or airports.”⁵¹ Since then, the Committee has met with experts, taken testimony from witnesses, and undertaken missions to the United States and Macedonia.⁵² The Committee has compiled a research document on flights operated by the CIA in Europe, which largely confirmed what had been reported earlier by the media and human rights organizations. Comparing Eurocontrol data and Federal Aviation Administration information, the Committee determined that CIA-linked aircraft have made more than 1,080 stop-overs in Europe since September 1, 2001.⁵³ Although its June 2006 interim report contained a number of strongly worded findings, the Committee requested, and was granted, permission to continue its work until the end of its 12-month mandate.⁵⁴ The Committee plans to “further examine relevant events in order to ascertain whether there has been a violation of article 6 of the Treaty on European Union by one or more Member States.”⁵⁵

The Council of Europe, made up of 46 States Parties, all of which have ratified the European Convention on Human Rights (ECHR), has undertaken two separate inquiries. When allegations surfaced in the news concerning the existence of secret detention centers in Eastern Europe, the Secretary General of the Council, Terry Davis, launched an inquiry under article 52 of the ECHR, which empowers him to require Member States to “furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.”⁵⁶ Member States were asked to explain how they ensure that “foreign agencies” are subject to “adequate controls” on their territory; what safeguards are in place to prevent secret detentions; whether effective investigations and remedies are pursued if the ECHR is violated; and whether any officials had been involved in any way in the “unacknowledged deprivation of liberty” of any person, or the transport of such a person.⁵⁷ In his report on states’ replies, released in March 2006, Davis concluded that States Parties’ legal arrangements for regulating the activities of foreign agencies were lacking; that the legal regime for air traffic is inadequate since states were unable to determine if specific aircraft were being used to violate human rights; that state immunity

⁵⁰ See *id.* (Decision of the European Parliament to set up the TDIP/Temporary Committee).

⁵¹ See, TDIP, Interim Report, of April 24, 2006 at ¶¶ 6, 8 (April 24, 2006) (on file with author).

⁵² See TDIP, Interim report of June 15, 2006, *supra* note 18.

⁵³ See TDIP, Working Document No. 4: On the flights operated by the CIA in Europe, EUR. PARL. DOC. DT\617722EN (June 1, 2006), *available at*:

http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/617/617722/617722en.pdf.

⁵⁴ See Resolution extending mandate: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, EUR. PARL. DOC. P6_TA-PROV(2006)0316 (July 6, 2006), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0316+0+DOC+XML+V0//EN&language=EN>.

⁵⁵ TDIP, Interim report of June 15, 2006, *supra* note 18, at ¶ 41.

⁵⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 52, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

⁵⁷ See *Report of Terry Davis*, *supra* note 18, at 2.

rules inhibited redress for violations; and that “mere assurances that the activities of foreign agents comply with international and national law are not enough.”⁵⁸ Davis reminded states of their legal obligation to investigate any allegation that their territory had been used – with or without the state’s permission, and whether actively or passively – to facilitate extraordinary renditions or secret detentions.⁵⁹

While the Secretary-General was undertaking his inquiry, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe appointed a rapporteur to look into the role of European governments in relation to extraordinary rendition and secret detention. Swiss politician Dick Marty was appointed to undertake this investigation. His interim report, published on January 22, 2006, reported on the numerous national-level investigations then underway in European countries such as Italy, Germany, and Poland, and detailed allegations of rendition and secret detention documented by the media and non-governmental organizations. Relying heavily on NGO and media sources, Marty’s interim report did not break new ground and was criticized for failing to provide evidence of its allegations.⁶⁰ His June 2006 report demonstrated a significantly more rigorous methodology, relying on flight data, witness accounts, interviews with credible sources (including ex-CIA officers), careful case studies, and satellite photographs. The June 2006 report concludes that existing evidence “indicate[s] that secret detention centres have indeed existed and unlawful inter-state transfers have taken place in Europe”; that specific named European states bore responsibility for violating the rights of particular, named individuals; and that other named states were responsible for collusion with these activities.⁶¹

Marty’s findings were supported by a report he had requested from the European Commission for Democracy Through Law (the Venice Commission), which prepared a legal opinion on secret detention centers and extraordinary renditions. This opinion, released on March 17, 2006, concluded that Member States of the Council of Europe had extensive affirmative obligations to prevent their territory or airspace from being used to host a secret detention center, or to transfer an individual to a country where he faces a risk of torture.⁶²

⁵⁸ See *Report of Terry Davis*, *supra* note 18, at 21, ¶ 101.

⁵⁹ See *Report of Terry Davis*, *supra* note 18, at 22, ¶ 102 (“Under the Convention, every State Party must ensure that its territory is not used for abducting or transferring any person to a country where there is a real risk that he or she may be subjected to torture or inhuman or degrading treatment.”)

⁶⁰ It should be noted, as Marty himself pointed out in his second report, he was appointed as a *rapporteur*, not an *investigator*: “I do not enjoy any specific investigatory powers and, in particular, am not entitled to use coercive methods or to require the release of specific documents. My work has consequently consisted primarily of interviews and analysis.” *Council of Europe June 2006 Report*, *supra* note 18.

⁶¹ *Council of Europe June 2006 Report*, *supra* note 18, at p. 66, ¶¶ 287-289.

⁶² See European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligation of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, ¶¶ 154-159, CDL-AD(2006)009 (March 17, 2006), available at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp).

Despite these strong condemnations by its European allies, the U.S. government has remained steadfast in its denial of wrongdoing concerning extraordinary rendition. Stressing technical legal points and the novelty of the “War on Terror,” the U.S. has indicated that it is not violating relevant law.

II. Tortured Logic: Extraordinary Rendition and the Law

Instead of simply acting as a scofflaw in the “War on Terror,” the U.S. government has systematically turned out legal analyses in the last several years aimed at clearing legal space for its actions in the “War on Terror.”⁶³ This Section examines the legal arguments supporting extraordinary rendition, which have exploited several pressing dilemmas in human rights law: the challenge of extraterritoriality, the difficult relationship between substantive norms and procedural guarantees, and the problem of *lex specialis*. This section will demonstrate that the government’s arguments – which purport to expose the limits of human rights law and thus reveal lacunae in that law – instead reveal the importance of returning to the foundational bases of that law. By focusing on the object and purpose of human rights law and the overarching principle of the rule of law, human rights arguments prevail over formalistic approaches. This section addresses the three main arguments the Administration has made in defending rendition. The contention that human rights treaties – or at least their relevant provisions – do not apply to extraterritorial transfers like those reportedly undertaken by the United States, is examined first. The argument that the use of “diplomatic assurances” – promises obtained from the receiving government before an individual is handed over – immunize the U.S. from wrongfulness, is analyzed next. And finally, the argument that renditions are legal as “wartime transfers” free of limits imposed by international human rights treaties or humanitarian law, is discussed. None of these arguments directly support the practice of extraordinary rendition; instead, they seek to clear space for the U.S. government to design such a program absent the strictures of any international law.

A. *Out of State, Out of Luck*

One of the most direct routes the U.S. government has taken to suggest that extraordinary rendition is not unlawful is to invoke the argument that human rights treaties, or particular provisions in such treaties, do not apply to geographical spaces outside the territory of the United States. This argument attempts to exploit the ongoing debate about the proper scope of application of international human rights treaties by carving out a space where no human rights law applies. While this argument is not new, its deployment in this manner is unprecedented.

⁶³ The public versions of these analyses tend to be indirect defenses of programs such as extraordinary rendition, while the behind-the-scenes defenses are more direct. For example, the famous debate over interrogation techniques unfolded in public as a debate over whether the Geneva Conventions applied as a technical legal matter to al Qaeda and Taliban fighters captured in Afghanistan; the President determined—and publicly stated—that the spirit of the Geneva Conventions would always apply. Meanwhile, behind the scenes, a debate raged in which the merits of departing from the humane treatment standards were weighed against possible liability under the War Crimes Act.

1. Scope of Application of Human Rights Treaties⁶⁴

In general, human rights treaties set out their scope of application in one of three ways:

- Some treaties direct states to protect the human rights set out in the text of the instrument in relation to *individuals in specific locations or with a particular relationship to the state*. This is usually done in a single jurisdictional provision. For example, the International Covenant on Civil and Political Rights states that “Each State Party to the present Covenant undertakes to respect and to ensure to individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant. . .”⁶⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “[t]he High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms” guaranteed by the Convention.⁶⁶ The American Convention on Human Rights applies to “*all persons subject to [a state Party’s] jurisdiction*.”⁶⁷
- Other treaties instruct states to “take steps” or “adopt measures” aimed at achieving certain outcomes instead of directing states to protect the rights of specific individuals; such treaties are silent on their geographical scope of application. For example, the International Covenant on Economic, Social and Cultural Rights⁶⁸, and the Convention on the Elimination of All Forms of Discrimination Against Women⁶⁹ do not include specific provisions defining their scope of application but instead speak broadly about the kinds of measures states must adopt to respect, protect, and fulfill the rights set out in those treaties.
- A final set of treaties contain language about the scope of application for some provisions within the treaty, while they remain silent in relation to others. The Convention Against Torture and Other Cruel, Inhuman or

⁶⁴ For an excellent discussion of the question of scope of application of human rights treaties, see John Cerone, *Out of Bounds? Considering the Reach of Human Rights Law*, (CHRGJ, Working Paper No. 5, 2006), available at http://www.nyuhr.org/docs/WPS_NYU_CHRGJ_Cerone_Final.pdf.

⁶⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR].

⁶⁶ See ECHR, *supra* note 56, at article 1 (emphasis added).

⁶⁷ American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 at art. 1 [hereinafter American Convention on Human Rights].

⁶⁸ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 2, 21 U.N. GAOR Supp. (No. 16), UN Doc. A/6316 (1966), 993 U.N.T.S. 3 (Dec. 16, 1966).

⁶⁹ See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), *reprinted in* 19 ILM 33 (1980).

Degrading Treatment or Punishment⁷⁰ follows this model, speaking in some provisions about “territory under [the State Party’s] jurisdiction”⁷¹; in others directing the state to “establish jurisdiction” over actions in specific instances⁷²; and in still others giving no guidance concerning scope of application.

In its reports to the United Nations treaty bodies charged with monitoring the implementation of human rights treaties, the U.S. has consistently maintained that, unless explicitly specified otherwise, the human rights treaties it has ratified are limited in their application to U.S. territory.⁷³ In these reports, the U.S. has explained that the only space it considers to be “under its jurisdiction” are the fifty states plus the insular areas, which include Puerto Rico, Guam, and other similar spaces.⁷⁴ It has indicated that all provisions that do not specifically provide for extraterritorial application are construed as applying only to U.S. territory. The effect of this approach can be illustrated by reference to the obligation to *prevent* cruel, inhuman or degrading treatment or punishment, which is expressly imposed on states by article 16 of the Convention Against Torture with respect to “territory under [a State Party’s] jurisdiction.”⁷⁵ Thus, President Bush made the following statement on International Day in Support of Victims of Torture, June 26, 2004:

America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction....⁷⁶

To the uninitiated, this statement may sound quite natural. To an international human rights lawyer, it was clearly crafted to avoid acceptance of the obligation to prevent ill-treatment, even by U.S. officials, outside U.S. territory. Given the context of repeated allegations of mistreatment of detainees held outside the United States, it appears that the

⁷⁰ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* December 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51, at 197, UN Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85 [hereinafter CAT or Convention Against Torture].

⁷¹ Articles 2, 5, 6, 7, 11, 12, 13, and 16 contain language concerning their scope of application. See CAT, *supra* note 70.

⁷² Articles 5 and 7 speak of such instances. See CAT, *supra* note 70.

⁷³ See United States, *Initial Report of the United States of America*, ¶¶ 12-25, submitted to the U.N. Human Rights Comm., U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) [hereinafter *U.S. Initial Report to HRC*], and United States, *Initial Report of the United States of America to the Committee Against Torture*, submitted to the U.N. Comm. Against Torture, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter *U.S. Initial Report to CAT Committee*].

⁷⁴ See *U.S. Initial Report to HRC*, *supra* note 73, at ¶¶ 12-25, and United States, *Second and Third Periodic Report of the United States of America*, submitted to the U.N. Human Rights Comm., U.N. Doc. CCPR/C/USA/Q/3 (Oct. 21, 2005) at Annex [hereinafter *U.S. Second and Third Reports to HRC*].

⁷⁵ Article 2(2) and Article 16(1), CAT, *supra* note 70.

⁷⁶ United States of America, *Second Periodic Report of the United States of America to the Committee Against Torture*, submitted by the U.S. to the U.N. Committee Against Torture, May 6, 2005, ¶ 5 (citations omitted) [hereinafter *U.S., Second Report to CAT*].

President was attempting to reserve the right to *refrain from preventing* cruel, inhuman or degrading treatment on territory where the U.S. acts that it does not consider to have occurred under U.S. jurisdiction.⁷⁷ Of course, it is completely legitimate for a state to make clear that it cannot prevent cruel treatment all over the world – indeed, a reasonable limit was written into the text of the Torture Convention, where the obligation applies to “any territory under [the state’s] jurisdiction.”⁷⁸ The question here is what does “territory under U.S. jurisdiction” mean under international human rights law? And if U.S. agents commit cruel acts in places that cannot be legitimately understood to be “under U.S. jurisdiction,” will the alternative jurisdictional formulation, used in the ICCPR in relation to the prohibition on torture and *non-refoulement* – extending protections to individuals “subject to the jurisdiction” of the United States – apply to protect people captured by the U.S.? Will any of these formulations prohibit extraordinary rendition? Or do the Bush administration’s policies illustrate the legitimate limits of human rights law?

2. *Non-refoulement*, Scope of Application and Extraterritorial Transfers

Before seeking answers, it is important to identify the human rights norms relevant to extraordinary rendition. Since rendition involves arrest or abduction, relevant norms include prohibitions on arbitrary arrest and detention as well as due process rights allowing individuals to challenge the basis for their detention.⁷⁹ Because it concerns the forcible movement of an individual across state boundaries, the rights to freedom of movement and the right to challenge removal from the territory of a state are also implicated.⁸⁰ And finally, since the practice includes transfers to countries where torture is likely, the right to be free from torture and its attendant norms are brought into play.⁸¹ This article focuses on the post-9/11 form of informal transfer known as extraordinary rendition, which is distinguishable from earlier versions of the practice through its relationship to the risk of torture.⁸² This article therefore focuses on a specific subset of anti-torture standards set out in numerous human rights treaties: rules outlawing transfers to a risk of torture (rules prohibiting *refoulement*).⁸³ Such rules sit alongside norms prohibiting the direct commission of torture and cruel, inhuman or degrading treatment or

⁷⁷ This reading is supported by the lobbying effort launched by the Administration to defeat portions of the Detainee Treatment Act of 2005 aimed at prohibiting cruel, inhuman or degrading treatment by Department of Defense officials anywhere in the world. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (to be codified at 42 U.S.C. 2000dd to 2000dd-1).

⁷⁸ Article 16, CAT, *supra* note 70.

⁷⁹ For a discussion of the range of human rights implicated by extraordinary rendition, see David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006). For a discussion of the rights due individuals facing any form of informal transfer, see Amicus Curiae Brief of the International Human Rights Clinic, NYU School of Law, *submitted to the Inter-American Commission on Human Rights*, October 20, 2006 and sources cited therein, *Alikhani v. United States*, Case 4618/02, Report No. 63/05, Inter-Am. C.H.R., http://www.nyuhr.org/docs/NYU_IHRC_Brief_to_IACHR_Oct_20_2006.pdf.

⁸⁰ See Weissbrodt & Bergquist, *supra* note 79.

⁸¹ *Id.*

⁸² For a discussion of the historical transformation from “rendition to justice” to “rendition to torture,” see Satterthwaite & Fisher, *supra* note 9.

⁸³ For a discussion of the entire range of rights violated by extraordinary rendition, see Weissbrodt & Bergquist, *supra* note 79.

punishment, rules requiring states to criminalize, investigate and prosecute torturers, and rules prohibiting states from using the fruits of torture as evidence. While all of these anti-torture norms are relevant to rendition, the *non-refoulement* norm is under examination today, since its full and proper implementation would alone prevent extraordinary rendition.⁸⁴

The obligation not to send individuals to countries where they face persecution or torture – known as the *non-refoulement* obligation – is contained explicitly or implicitly in a variety of treaties that are binding on the United States. These treaties include the Convention on the Status of Refugees and its Protocol,⁸⁵ the International Covenant on

⁸⁴ *Torture by Proxy* demonstrates that extraordinary rendition can amount to conspiracy to torture and/or aiding and abetting in torture under U.S. criminal law. See *Torture by Proxy*, *supra* note 4, at 103-115. See also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 45 Va. J. Int'l L. 1, 65 (2006) (providing a careful analysis of how “the executive branch policy of extraordinary rendition violates the [U.S. federal] Torture Statute”).

⁸⁵ Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259 at 6261, 189 U.N.T.S. 150 at 152. Although the United States did not ratify the Refugee Convention, it is a party to it through its accession to the 1967 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *entered into force* Oct. 1967, which adopted and extended the Refugee Convention’s protections. The Refugee Convention prohibits states from expelling or returning a refugee to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152, *entered into force* Apr. 22, 1954.

Under article 1(F) of the Convention, individuals who have committed war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the purposes of the United Nations may not qualify as refugees. Even those who count as refugees are not protected by the Convention’s *non-refoulement* rule if, under article 33(2), “there are reasonable grounds for regarding [them] as a danger to the security of the country” or if they “constitute[] a danger to the community” because they have been convicted of a “particularly serious crime.” Individuals who have committed certain terrorist crimes may fall within these exclusions; indeed, the exclusion clauses were included in the Convention to ensure that refugee status would not serve as a vehicle of safe haven for certain criminals. See Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457, 472 (2003). Not all terrorism suspects will fall within these categories, however, and refugee law requires safeguards to ensure that individuals have the opportunity to forward a claim for protection on the basis of the Convention. *Id.*

Unlike article 33 of the Refugee Convention, the *non-refoulement* obligation in the ICCPR and the Torture Convention are subject to no exclusions; even individuals who have committed the most grave crimes are protected from return to countries where they may be maltreated. The Committee Against Torture made this clear in the 1997 case *Tapia Paez v. Sweden*, where it held that “[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a [*non-refoulement*] determination under article 3 of the Convention.” *Tapia Paez v. Sweden*, U.N. Comm. Against Torture, U.N. Doc. CAT/C/18/D/39/1996, ¶ 14.5 (April 28, 1997). The Committee’s finding echoed the holding of the European Court of Human Rights, which found in the case of *Chahal v. United Kingdom*, that “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration” in determining whether an expulsion would be legal under article 3 of the European Convention on Human Rights. *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413 (Ser. A) (1996), at ¶ 80.

Civil and Political Rights (“ICCPR”),⁸⁶ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”).⁸⁷ Since only the latter two conventions prevent all transfers to a risk of ill-treatment, they will be the focus of discussion in this Section.

a. *The International Covenant on Civil and Political Rights*

The ICCPR does not include an explicit *non-refoulement* rule. Article 7 provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”; by the terms of the treaty, this article is non-derogable, meaning that it may not be limited during times of emergency or war.⁸⁸ The Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), has interpreted article 7 to include a *non-refoulement* obligation: states may not “expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”⁸⁹ The Committee has also determined that the *non-refoulement* rule is imposed by article 2 of the Covenant, which sets out the general legal obligations included in the Covenant.⁹⁰ The U.S. government has rejected this interpretation:

Despite the protective rules for refugees, claiming protection under the Refugee Convention in the context of extraordinary rendition is made especially difficult since the U.S. Supreme Court held in 1993 that the provision of the Refugee Convention concerning *non-refoulement*— article 33 — does not apply outside the United States. In *Sale v. Haitian Centers Council*, the Supreme Court construed article 33, which is silent concerning its geographical reach, as applicable only to transfers from U.S. territory. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). This holding would appear to decide the case under U.S. law for entirely extraterritorial transfers, including most cases of extraordinary rendition.

It is important to note that the Supreme Court’s holding in *Sale* would probably not exclude refugee protections for individuals being transferred away from Guantánamo Bay naval base. In 2004, the Supreme Court held, in *Rasul v. Bush*, that Guantánamo Bay naval base has a special territorial status which makes it analogous to the territory of the United States. *Rasul v. Bush*, 542 U.S. 466, 480 (2004). For a comprehensive discussion of this issue, see Chesney, *Leaving Guantánamo*, *supra* note 11. Further, the *Sale* holding was widely critiqued by human rights bodies, and the absence of a domestic remedy in no way deprives the U.S. of its international obligations. Indeed, the international human rights community generally felt that *Sale* was wrongly decided as a matter of international law. See, e.g., *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993); *The Haitian Centre for Human Rights v. United States*, Case 10.675, Inter-Am. C.H.R. 51/95, OEA/ser.L/V/II.95 doc. 7 rev. at 550 (1997).

⁸⁶ ICCPR, *supra* note 65.

⁸⁷ CAT, *supra* note 70.

⁸⁸ Article 4 of the ICCPR specifies that rights set out in specific articles may not be limited, even in times of emergency which threaten the life of the nation; article 7 is included in this short list. See ICCPR, *supra* note 65.

⁸⁹ U.N. Human Rights Comm., *General Comment 20, Article 7*, U.N. Doc. A/47/40 (1992), reprinted in *Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

⁹⁰ The Human Rights Committee explains:

the 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

[T]he United States would like to emphasize that, unlike the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. . . the Covenant does not impose a non-refoulement obligation upon States Parties. We are familiar with the Committee's statement [to the contrary]. . . However, the United States disagrees that States Parties have accepted that obligation under the Covenant. . . The totality of U.S. treaty obligations with respect to non-refoulement for torture are contained in the obligations the United States assumed under the Convention Against Torture.⁹¹

One of the reasons the U.S. is concerned about allowing a *non-refoulement* obligation to be read into the ICCPR is that article 7, from which the Human Rights Committee has derived the rule, prohibits both torture and cruel, inhuman or degrading treatment or punishment, whereas article 3 of CAT applies only to torture. The U.S. has argued that applying the *non-refoulement* rule to article 7 "would change the standard regarding the degree of risk the individual must face," thus unacceptably widening the obligations imposed on States Parties to the Covenant.⁹² The Committee's interpretation, however, is supported by an interpretation concerning an almost identical provision in the European Convention on Human Rights and Fundamental Freedoms (ECHR), issued by the European Court of Human Rights in the 1989 case of *Soering v. the United Kingdom*.⁹³ The *Soering* Court determined that the prohibition on torture and inhuman or degrading treatment included in the ECHR would not be "practical and effective" unless states were required to withhold transfers to countries where the individual faces a risk of such mistreatment.⁹⁴ Despite this, the U.S. continues to reject the Committee's *non-refoulement* finding.

The U.S. denies that the purported *non-refoulement* rule would apply to extraterritorial transfers anyway; it has long maintained that the ICCPR applies only to protect individuals within the territory of the United States. The Human Rights Committee, however, has developed a doctrine of extraterritorial application, based on its reading of the treaty's provision setting out its scope of application. Article 2 reads as follows:

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 that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

U.N. Human Rights Comm., *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ¶ 12 [hereinafter HRC, *General Comment 31*].

⁹¹ United States, *List of Issues To Be Taken Up in Connection With the Consideration of the Second and Third Periodic Reports of the United States of America*, at pp. 16-17, available at <http://www.state.gov/g/drl/rls/70385.htm> [hereinafter U.S., *Written Responses to HRC*].

⁹² U.S., *Written Responses to HRC*, *supra* note 91, at p. 18.

⁹³ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

⁹⁴ *Soering*, *supra* note 93, at ¶¶ 86-88.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind. . .

Over the years, the Human Rights Committee has come to read “all individuals within its territory and subject to its jurisdiction” as two separate jurisdictional headings. In other words, the Committee has come to read the “and” as an “or” – extending the protection of the Convention to both (a) all individuals who are within the territory of a State Party, and (b) all individuals who are subject to a State Party’s jurisdiction.⁹⁵ In its first report to the U.N. Human Rights Committee, submitted in 1995, the U.S. rejected this understanding, stating that “[t]he Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a party’s territory.”⁹⁶ During their review of the U.S. report in 1995, Committee members asked the U.S. delegation to elaborate on this understanding. Responding for the U.S. government, Conrad Harper, Legal Adviser of the U.S. Department of State, explained that:

The Covenant was not regarded as having extraterritorial application. . . Article 2 of the Covenant expressly stated that each State Party undertook to respect and ensure the rights recognized “to all individuals within its territory and subject to its jurisdiction”. That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words “within its territory” had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party’s territory.⁹⁷

In response, the Human Rights Committee included the following statement in its concluding observations concerning the United States in 1995:

[th]e Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State’s territory.⁹⁸

Those special circumstances, which had not been carefully elaborated by 1995, had become plain by 2005, when the U.S. submitted its combined second and third periodic reports. There, the U.S. provided an extended analysis for its contention that the

⁹⁵ See generally Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995), and Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72 (Louis Henkin, ed.1981).

⁹⁶ *Id.*

⁹⁷ U.N. Human Rights. Comm., *Summary record of the 1405th meeting: United States of America*, U.N. Doc. CCPR/C/SR 1405 at ¶¶ 7, 20 (April 24, 1995).

⁹⁸ *Concluding Observations of the U.N. Human Rights Committee, United States of America*, U.N. Doc. CCPR/C/79/Add.50 at ¶ 284 (Oct. 3, 1995).

ICCPR does not apply to the actions of a state outside its territory. The U.S. prepared and submitted a separate Annex to its periodic report detailing arguments based on the text of the treaty and on the *travaux préparatoires* of the ICCPR. In this five-page statement, the U.S. repeats its argument that the plain text of article 2 of the treaty indicates that the Convention only applies to individuals who are simultaneously “within its territory” and also “subject to its jurisdiction.” Citing article 32 of the Vienna Convention on the Law of Treaties (which the U.S. has not ratified, but which it accepts as an accurate reflection of the customary law rules of treaty interpretation), the Annex reasons that no further analysis is needed once the “ordinary meaning” of the treaty’s text had been located.⁹⁹ Despite this, the U.S. refers to the *travaux*, noting that the extraterritorial application of the Convention had been explicitly discussed and rejected during the treaty negotiations. Over the objections of France and several other states, the United States had added the phrase “within its territory” to the text of the provision which became article 2, which in 1950 had required each state to extend Covenant rights to all individuals “within its jurisdiction.”¹⁰⁰ The current text, the U.S. suggests, was the result of an explicit agreement among the drafters that the convention would not extend beyond the territory of States parties.

An examination of the *travaux* reveals a more complex picture, however. There was indeed debate over the terms used to describe the Covenant’s scope of application, but the debate may be more properly understood to reflect a desire by the negotiating states to ensure the Covenant reflected public international law, not on an emphasis on shrinking the obligations owed by a state party to individuals outside its territory. The original version of the text as submitted to the treaty’s Drafting Committee in 1947, used the phrase “all persons under its jurisdiction” to describe the scope of application.¹⁰¹ In 1950, the U.S. delegate and then-Chair of the Commission on Human Rights, Eleanor Roosevelt, expressed concern that the U.S. should not be required to extend Covenant rights to “the citizens of countries under United States occupation.”¹⁰² In the ensuing debate, a question was asked about whether a state would protect the Covenant rights of its citizens abroad; Mrs. Roosevelt answered that the U.S. “would be unable to do more than make representations on behalf of its citizens through the normal diplomatic channels. It would certainly not exercise jurisdiction over a person outside its territory.” Both of these colloquies demonstrate that the U.S. aim was to not displace existing rules of public international law. A U.S. proposal to amend the original text to encompass a territorial requirement was passed by 8 votes to 2, with 5 abstentions.¹⁰³

⁹⁹ Article 32 reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹⁰⁰ See U.S., *Written Responses to HRC*, *supra* note 91, at Annex 1.

¹⁰¹ See MARC J. BOSSUYT, GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 49 (1987).

¹⁰² U.N. Commission on Human Rights, U.N. Doc. No. E/CN.4/SR.194 (25 May 1950), at ¶ 14.

¹⁰³ U.N. Commission on Human Rights, U.N. Doc. No. E/CN.4/SR.194 (25 May 1950), at ¶ 46.

During the 1952 drafting session, the debate turned to practicalities. The French delegation sought to strike the words added in 1950 (“within its territory and”) on the grounds that the additional phrase would allow states to treat nationals resident abroad differently from those resident on the national territory.¹⁰⁴ This proposal failed.¹⁰⁵ When the draft Covenant was brought before the General Assembly, several interventions were made developing the point that a state’s jurisdiction under international law was generally understood to operate on the principles of territoriality *and* nationality, and that the Covenant should reflect both bases.¹⁰⁶ Those in opposition expressed the concern that deleting the words could lead to the implication that states were *permitted* to act beyond their authority in international law by exercising their jurisdiction on the territory of other states.¹⁰⁷ In sum, then, the *travaux* reveal that the debate was about what wording would most accurately reflect the public international law rules existing at the time.¹⁰⁸

Both sides of the “territory and jurisdiction” debate emphasized the need to both hold states to preexisting obligations (to protect their citizens abroad, or to follow the law of occupation, for example), and to refrain from justifying invasive acts of one state on the territory of another.¹⁰⁹ It would be illogical, then, to understand the *travaux* as supporting a reading of the treaty that would allow a state to *escape* its Covenant obligations when violating treaty norms abroad.¹¹⁰ As Manfred Nowak explains in his authoritative *CCPR Commentary*:

¹⁰⁴ U.N. Commission on Human Rights, U.N. Doc. No. E/CN.4/SR.329 (27 June 1952), at p. 19.

¹⁰⁵ U.N. Commission on Human Rights, U.N. Doc. No. E/CN.4/SR.329 (27 June 1952), at p. 14 (the amendment was rejected by 10 votes to 4, with 4 abstentions).

¹⁰⁶ U.N. General Assembly, Third Committee, 1257th Meeting (8 Nov. 1963), at ¶¶ 1 (Greece), 10 (Italy), 19 (Japan); and 21 (France).

¹⁰⁷ U.N. General Assembly, Third Committee, 1257th Meeting (8 Nov. 1963), at ¶¶ 5 (United Kingdom) and 39 (Peru).

¹⁰⁸ This reading is supported by Manfred Nowak, who writes in his *CCPR Commentary* that:

An interpretation that seeks to take into account the purpose of this awkwardly formulated provision must aim at the *responsibility of States under international law*. States are basically responsible only for the legal security of the persons who are located on their territory and subject to their sovereign authority. . . this means that States are not responsible for violations against persons over whom they have personal jurisdiction (in particular, nationals), when such violations take place on foreign territory and are attributable to some other sovereign. The motive behind the formulation of Art. 2(1) was to preclude this responsibility of States Parties.

MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 41-42 (1993). For an incisive analysis of the need to disaggregate attribution from “jurisdiction” for the sake of extraterritoriality in the human rights context, see Cerone, *supra* note 64.

¹⁰⁹ Some states also expressed concerns based on the practical limits of a state’s ability to respect and ensure the rights of individuals located outside their territory. See U.N. Commission on Human Rights, U.N. Doc. No. E/CN.4/SR.194 (25 May 1950), at ¶¶ 29-30; and U.N. Commission on Human Rights, U.N. Doc. No. E/CN.4/SR.329 (27 June 1952), at 12. This concern, legitimate in many contexts, is not applicable to the situation of extraordinary rendition, where an individual’s rights may be as easily protected as violated by the custodial state.

¹¹⁰ A similar reasoning leads Christian Tomuschat to conclude, in relation to the U.S. practice of holding detainees on Guantánamo instead of on the U.S. mainland that “Article 2(2) should not be misconstrued as a device designed to open up loopholes permitting manipulative curtailment of

When States Parties, however, take *actions on foreign territory* that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible. It is irrelevant whether these actions are permissible under general international law (i.e. sovereign acts by diplomatic representatives, or in border traffic or by border officials in customs-free zones; actions by occupation forces in accordance with the rules of the law of war) or otherwise constitute illegal interference, such as the kidnapping of persons by secret service agents.¹¹¹

In other words, it is immaterial from the perspective of human rights whether a state is acting contrary to public international law: states must always respect and ensure the human rights of individuals within their jurisdiction – even when that jurisdiction is exercised unlawfully. With this understanding in mind, the U.S. interpretation is cramped and inaccurate.

The Human Rights Committee was not convinced by the U.S. arguments either: in their concluding observations, released in July 2006, the Committee made the following recommendation:

The State party should review its approach and interpret the Covenant in good faith in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. It should in particular . . . acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory. . .¹¹²

The Committee, in other words, stressed different aspects of article 31 of the Vienna Convention on the Law of Treaties, suggesting that the “ordinary meaning” of the Covenant could only be ascertained by a state acting in good faith and considering the plain meaning of words *in their context* and *in light of the object and purpose* of the treaty. For the Committee, the context and purpose of the treaty is the holistic protection of human rights. The Committee looks to its own jurisprudence on the extraterritorial application of the treaty, and the acceptance of that jurisprudence by the International Court of Justice, as guidance for the meaning of article 2.

Broadly, the Committee has developed a doctrine by which it extends the protections of the Covenant to cover anyone under the effective control of a state party.¹¹³

rights and freedoms under the CCPR.” CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 109 (2003).

¹¹¹ MANFRED NOWAK, *supra* note 108. (citations omitted).

¹¹² *Concluding Observations of the U.N. Human Rights Committee, United States of America*, U.N. Doc. CCPR/C/SR.2395 at ¶ 10 (July 27, 2006) [hereinafter HRC, *U.S. Concluding Observations*].

¹¹³ The Committee has summarized its approach this way:

States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if

An individual may come into the effective control of a state by virtue of being present on a territory that is under the effective control of that state,¹¹⁴ or she may come into the direct personal control of the state through detention or abduction.¹¹⁵ Indeed, the Human Rights Committee's earliest jurisprudence concerning the extraterritorial reach of the ICCPR related to the abduction of individuals by officials of Uruguay in Argentina and Brazil. These abductions, followed by detention and mistreatment on foreign and Uruguayan soil, were found to violate the Convention, which was determined to apply to the actions of the Uruguayan officials because article 2 "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."¹¹⁶

In other words, the Committee has tended to focus less on the issue of territorial control, and more on the issue of control over individuals, with the former viewed as a pathway to demonstrating the latter. In either circumstance, the Covenant's protections apply; as the Committee explained, "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."¹¹⁷ In 2002, the International Court of Justice explicitly endorsed the approach of the Human Rights Committee, finding that "the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."¹¹⁸ If the Human Rights Committee and the International Court of Justice are correct, the *non-refoulement* rule contained in article 7 of the ICCPR should apply to all extraterritorial transfers carried out by U.S. personnel.

not situated within the territory of the State party. . . This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. . .

HRC, *General Comment 31*, *supra* note 90, at ¶ 10.

¹¹⁴ For example, the Committee has found that the Covenant applies to: territories under a State Party's occupation (*Concluding Observations of the U.N. Human Rights Committee, Israel*, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) (concerning Israel)); territories under a State Party's effective control as a result of a peacekeeping mission or NATO military mission (*Concluding Observations of the U.N. Human Rights Committee, Belgium*, U.N. Doc. CCPR/CO/BEL) (concerning Belgium)); and any territory under a State Party's *de facto* effective control, "regardless of the circumstances in which such power or effective control was obtained" (HRC, *General Comment 31*, *supra* note 90, at ¶ 10).

¹¹⁵ See *Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 ¶ 12.3 (1981) [hereinafter HRC, *Lopez Burgos v. Uruguay*]; and *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979 U.N. Doc. No. CCPR/C/OP/1 at 92 ¶ 10.3 (1981) [hereinafter HRC, *Celiberti di Casariego v. Uruguay*].

¹¹⁶ HRC, *Lopez Burgos v. Uruguay*, *supra* note 115, at ¶ 12.3, and HRC, *Celiberti di Casariego v. Uruguay*, *supra* note 115, at ¶ 10.3.

¹¹⁷ HRC, *Celiberti di Casariego v. Uruguay*, *supra* note 115, at ¶ 12.

¹¹⁸ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 130 at ¶ 109 (July 9) [hereinafter ICJ, *Wall Advisory Opinion*].

There is, however, no precedent suggesting that an individual could invoke these provisions in a U.S. Court. When giving its advice and consent to the ratification of the ICCPR, the U.S. Senate declared that the treaty is “non-self-executing,” meaning that individuals may not invoke the treaty as a rule of decision in U.S. courts.¹¹⁹ Numerous courts have since held that individuals may not use the ICCPR as a cause of action in federal court.¹²⁰ This may not decide the matter entirely, since some federal courts have been willing to use, or have stated that it may be possible to use, human rights treaty norms as rules of decision where a separate grant of jurisdiction includes a cause of action.¹²¹ Certainly, using doctrines of statutory construction (such as the *Charming Betsy* rule¹²²), litigants can use the ICCPR as a persuasive or interpretive tool.¹²³ The ability of an individual to challenge rendition directly in U.S. court by using the ICCPR, however, has so far been extremely limited, no matter how clear the U.S. obligation is under international human rights law.

b. *The Torture Convention*

Unlike the ICCPR, many provisions of the Torture Convention have been implemented by Congress through legislation and regulations. The obligations to criminalize and exercise jurisdiction over specific acts of torture, set out in articles 4 and 5 of CAT, have been given effect in part through the criminal torture statute, 18 U.S.C. 2340 and 2340A.¹²⁴ This law fulfills the obligation to criminalize extraterritorial acts of torture, since it is specifically crafted to apply to acts of torture committed abroad.¹²⁵

¹¹⁹ U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781 (daily ed. Apr. 2, 1992).

¹²⁰ See, e.g., *Igartúa-De La Rosa v. U.S.*, 417 F.3d 145 (1st Cir. 2005); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 238 n.35 (2d Cir. 2003); *Ralk v. Lincoln County, Ga.*, 81 F.Supp.2d 1372, 1380 (S.D.Ga. 2000).

¹²¹ In *Cornejo-Barreto v. Seifert*, for example, the 9th Circuit Court of Appeals explained in dicta that, while Congress had prohibited courts from reading an implied cause of action into the federal statute implementing the Convention Against Torture, courts might still apply the relevant human rights principles through “look[ing] to existing jurisdictional statutes to entertain a petition for review under the [Administrative Procedures Act].” 218 F.3d 1004, 1015 (9th Cir. 2000).

¹²² The *Charming Betsy* rule of construction requires that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 119 (1804).

¹²³ See, e.g., *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (interpreting a statute governing post-removal order detention of non-citizens to include a reasonable time limitation in part because “Article 9 of the [ICCPR], which the United States has ratified... provides that ‘[n]o one shall be subjected to arbitrary arrest and detention’”); *Mojica v. Reno*, 970 F.Supp. 130, 151 (E.D.N.Y. 1997) (construing two immigration statutes to avoid conflict with ICCPR Arts. 9 & 13); *Kane v. Winn*, 319 F.Supp.2d 162, 196 (D.Mass. 2004) (commenting, in the context of prisoners’ rights litigation, that U.S. laws must be construed to avoid conflict with relevant human rights treaties, “even when a treaty is not self-executing”).

¹²⁴ 18 U.S.C., § 2340A.

¹²⁵ Section 2340A subjects anyone who commits, or attempts to commit an act of torture outside the United States to imprisonment for up to twenty years and/or a fine. Those who commit torture resulting in death are eligible for the death penalty. Individuals conspiring in torture outside the United States may face the same penalties as those who commit the predicate acts, though they are not eligible for the death penalty. Section 2340A provides for the exercise of United States

This willingness to criminalize acts of torture that take place outside its territory should not be taken as a sign that the U.S. accepts the general extraterritorial application of the Torture Convention, however. Instead, Congressional action in this sphere is a reflection of the treaty's explicit requirement that criminal laws be extended extraterritorially in specific circumstances. Indeed, as mentioned earlier, a variety of provisions in the Torture Convention contain language about their scope of application, while others are silent. Articles 2 and 16, discussed in the introduction to this Section, require each ratifying state to prevent torture (article 2) and cruel, inhuman and degrading treatment or punishment (article 16) in "any territory under its jurisdiction."

An examination of the *travaux préparatoires* of the Convention reveals that this formulation was meant to broadly encompass "territories under military occupation, to colonial territories and to any other territories over which a State has factual control."¹²⁶ The latter test, factual control, would generally be read under international law as utilizing the effective control test familiar to international lawyers. Indeed, the CAT Committee has used that test in its consideration of the reports of a variety of states.¹²⁷ Under the effective control test, the United States is obliged to prevent torture and cruel, inhuman or degrading treatment or punishment in spaces such as Guantánamo, where it exercises effective control, and other locations where the U.S. has factual control over territory.

Article 3 of the Torture Convention sets out the *non-refoulement* obligation and is silent with respect to the provision's scope of application:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.¹²⁸

Under general principles of international law, when a treaty is silent on its scope of application, it is presumed to apply to a state's "entire territory," except when "a

jurisdiction over these crimes if (a) the offender is a U.S. national, or (b) the offender is found within the United States, regardless of the person's nationality. It should be noted that acts of torture that occur within the United States are prosecutable under a wide variety of standard U.S. criminal statutes. The CAT Committee has recently found that these statutes are inadequate, since they only cover torture that occurs *outside the United States*. See *Conclusions and Recommendations of the Committee Against Torture, United States of America*, U.N. Doc. CAT/C/USA/C/2 at ¶ 13 (May 18, 2006) [hereinafter CAT, *U.S. Conclusions*] (expressing concern that "sections 2340 and 2340 A of the United States Code limit federal criminal jurisdiction over acts of torture to extraterritorial cases.").

¹²⁶ See J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 131 (1988).

¹²⁷ See, e.g., *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland - Dependent Territories*, UN Doc. CAT/C/CR/33/3 (Dec. 10, 2004), at ¶ 4(b)] ("the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party's authorities").

¹²⁸ CAT, *supra* note 70, at art. 3(1)

different intention appears from the treaty or is otherwise established.”¹²⁹ The *travaux préparatoires* of the Torture Convention, combined with the protective purpose of the treaty, demonstrate that the treaty as a whole was not intended to be restricted to a state’s territory. As discussed above, certain provisions are extraterritorial on their face, others contain the “any territory under its jurisdiction” qualification, and still others are silent. With respect to those articles that are silent concerning scope, the question is how best to understand the omission.

While article 3’s geographic reach seems not to have been an issue in its drafting, the negotiating states were concerned about reaching the different types of transfer that states were using at the time to move people across borders. This concern is demonstrated through a key amendment made during the drafting process. While the original draft of the Torture Convention included reference only to expulsion and *refoulement*,¹³⁰ states agreed to add a reference to extradition in order to “cover all measures by which a person is physically transferred to another state.”¹³¹ The Convention’s drafters probably did not contemplate the extra-territorial abduction and transfer of persons by a ratifying state – indeed, the U.S. practice of rendition to justice had not yet begun at the time of the treaty’s negotiation, in the late 1970s and early 1980s. This failure of imagination should not be construed as an affirmative decision to exclude such transfers from the scope of the treaty.

Given the wording of article 3’s directive – “No State Party shall” – the most ordinary meaning would be that a state party may not, regardless of where it is acting, “expel, return (‘refouler’), or extradite a person” who is in its custody or control. Article 3 could have been drafted to read “no person may be expelled, returned or extradited from any territory under a State party’s jurisdiction,” using territorial language similar to that found in other articles in the treaty; but it was not so drafted. This reading is not only the best one in light of the object and purpose of the treaty, it is also in line with the rules that have developed concerning extraterritorial application of human rights treaties generally.¹³² As set out above in relation to the Human Rights Committee, human rights bodies have developed a doctrine that encompasses two separate bases for application of treaty norms: the existence of effective control over territory, and the existence of power over an individual.¹³³ Under the effective control test, article 3 – like articles 2, 11, 12,

¹²⁹ Vienna Convention, *supra* note 99, at art. 29 (“unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”).

¹³⁰ BURGERS & DANIELIUS, *supra* note 126, at 125.

¹³¹ BURGERS & DANIELIUS *supra* note 126, at 125. *See also Torture by Proxy, supra* note 4, at 40 (quoting and citing BURGERS & DANIELIUS at 126).

¹³² For an early and authoritative discussion of this issue, *see* Meron, *supra* note 95, at 82 (“Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction.”).

¹³³ *See, e.g.,* Fons Coomans & Menno T. Kamminga, *Comparative Comments on the Extraterritorial Application of Human Rights Treaties*, in FONS COOMANS & MENNO T. KAMMINGA, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 1-7 (2004); Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, supra*, at 73-81; Dominic

13 and 16 – would apply to spaces abroad that are under the control of the United States, as well as to the physical territory of the state itself, a rubric that would encompass transfers from Guantánamo and possibly locations where the U.S. has detention centers, such as Bagram air base and Diego Garcia. If this were the applicable test, article 3 would prohibit extraordinary renditions that took place outside the United States that originated in territory under the effective control of the United States, but it would not prohibit transfers carried out abroad that originated from territories not under U.S. control (such as the rendition of Abu Omar from Italy, for instance). The personal control test, however, would extend to cover *all* extraordinary renditions carried out by the U.S., no matter where they originate.¹³⁴

The personal control doctrine is especially suitable to cases of transfer, which involve direct control of an individual by state agents through physical custody. Moreover, while the extension of the entire range of negative and affirmative human rights duties to all territories under a state's effective control has been somewhat controversial, the application of negative obligations to state agents involved in detentions and abductions abroad has been widely supported.¹³⁵ The difference may lie in the desire to limit a state's obligations to those duties it can clearly fulfill: applying all of a state's human rights obligations to territory abroad – even where it exercises control – brings up thorny problems concerning affirmative duties, as well as the realities of control over spaces in conflict or post-conflict settings.¹³⁶ Those problems do not arise in situations in which state agents have direct physical control over an individual: no one can doubt a state's ability to *prohibit its agents from torturing or killing* an individual, or from *transferring* an individual to a location where they may be tortured or killed. There may, however, be legitimate debate over the ability of a state to ensure that all individuals in territory where its troops are present have adequate educational opportunities, adequate food and water, or access to health care.

McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, *supra*, at 41-72. See also RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 18-24 (2002) (discussing the various tests used to interpret the term “jurisdiction” in different human rights treaties).

¹³⁴ The CAT Committee has recently signaled that it is accepting the effective control over individuals test used by the Human Rights Committee – even in relation to provisions in the treaty that refer to territory. In relation to the United States, the Committee recommended that:

The State party should recognize and ensure 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.

CAT, *U.S. Conclusions*, *supra* note 125, at ¶ 15 (emphasis added).

¹³⁵ For example, see TOMUSCHAT, *supra* note 110, at 109-110, and Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, *supra* note 133, at 59-62.

¹³⁶ For a discussion of the different tests for extraterritorial application of positive and negative obligations, see Cerone, *supra* note 64.

c. *The Regional Human Rights Systems*

Lessons concerning the proper scope of the *non-refoulement* obligation may be drawn from the reasoning of the regional human rights systems, which have wrestled with these problems for many years. The European Court of Human Rights has examined the issue of extraterritoriality in a series of cases concerning the scope of application of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In its 1995 case *Loizidou v. Turkey*, the Court held that Turkey, by virtue of its army's extensive presence and activities in northern Cyprus, had effective overall control of that geographical space, bringing it within the "jurisdiction" of Turkey for the purpose of applying the European Convention on Human Rights, which protects "everyone within [a State Party's] jurisdiction."¹³⁷ The physical presence of large numbers of troops in the case of Cyprus was emphasized in the case of *Bankovic and Others v. Belgium and 16 Other Contracting States*, where the Court distinguished the *Loizidou* case and held that NATO bombings of television and radio stations in Belgrade were not sufficient to bring the victims of those bombings within the "jurisdiction" of the European states members of NATO.¹³⁸ In coming to this conclusion, the Court reasoned that "the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional," and is based on the exercise of governmental functions by the relevant state on the territory of the other state.¹³⁹ In sum, when there is an occupation or near-occupation, jurisdiction will arise; when there is no physical presence of the state acting extraterritorially, or when that presence is more limited, jurisdiction will be harder to establish. In the 2005 case of *Issa and Others v. Turkey*, the Court signaled that even where a state's troops were not numerous enough to compare to an occupation, the state will remain responsible for the violations of the rights of individuals under the authority of the state's agents abroad:

[A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. . . . Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.¹⁴⁰

In *Issa*, the Court referred to two pathways to proving jurisdiction: territorial control and personal control. The Court determined that the applicants – relatives of shepherds

¹³⁷ See ECHR, *supra* note 56, at art. 1, and *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A.) at ¶ 62 (1995) (Preliminary Objections), and *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216 at ¶ 56 (1995) (Merits & Just Satisfaction).

¹³⁸ *Bankovic and others v. Belgium and 16 Other Contracting States*, 2001-XII Eur. Ct. H.R. 335 at ¶ 82 (2001) [hereinafter *Bankovic v. Belgium*].

¹³⁹ *Id.* at ¶ 71.

¹⁴⁰ *Issa and Others v. Turkey*, Eur. Ct. H.R. (2005) at ¶ 71.

resident in Northern Iraq who had allegedly been killed by Turkish troops present in the area – were unable to prove that Turkish troops were so numerous as to establish overall control of the area at the time in question.¹⁴¹ At the same time, the applicants apparently did not bring forward sufficient evidence that the shepherds had been within the personal control or custody of the Turkish troops at the time of their death. Therefore, while the applicants could have satisfied the jurisdictional requirement by demonstrating either extensive military control of the region amounting to “overall control,” or evidence of actual custody by the Turkish troops of the victims, they failed to establish either, and therefore the Court held that the applicants had not demonstrated that the victims had been within Turkey’s jurisdiction at the time of their death.

This interpretation is in line with the Court’s handling of an extraterritorial abduction case, *Öcalan v. Turkey*. There, the Court held that the applicant – a suspected terrorist present in Kenya – came within the jurisdiction of Turkey as soon as he was physically transferred from the custody of Kenyan police to the control of Turkish officials in Nairobi.¹⁴² The Court did not require evidence of control over any particular space by the Turkish authorities in the *Öcalan* case; what mattered for proving jurisdiction was simply the fact that the victim had been physically handed over to the custody and control of the Turkish authorities. The Court’s acceptance of this route to proving jurisdiction in a case of abduction is perfectly consistent with its rejection of jurisdiction over the territory of Belgrade in *Bankovic* and its evidence-driven holding in *Issa*. The thorny questions concerning the extent of occupation necessary to trigger the positive obligations of the state are absent in situations of custody and detention. In other words, while it may be difficult for a state to uphold the affirmative rights of the entire population of an area where it exercises some – but not overall – control, the state has the unencumbered ability to respect (or to violate) the rights of an individual it holds in custody.¹⁴³ In this light, it is clear that a state has the unfettered ability to refrain from transferring an individual it holds in custody to a risk of torture.

The Inter-American Commission on Human Rights has also developed a jurisprudence concerning the extraterritorial reach of human rights norms. The American Convention on Human Rights extends to “all persons subject to [a State Party’s]

¹⁴¹ *Id.* at ¶ 81-82.

¹⁴² *Öcalan v. Turkey*, Eur. Ct. H.R. (Grand Chamber, 2005) at ¶ 91.

¹⁴³ Former Human Rights Committee member Martin Scheinin suggests reformulating both doctrines into a single one that examines the state’s relationship to the potential or actual human rights violation. The question should not be about effective control over a territory; rather it should be about whether the state has effective control over the deprivation or respect of the individual’s right. In situations where the state has the ability to respect or violate an individual’s right, human rights norms should apply to require compliance. See Scheinin, *supra* note 133. Scholars have also expressed concern about the incentives that would flow from a doctrine that fails to apply norms to abductions or detentions that are conducted extraterritorially with the purpose of avoiding the application of protective norms. A doctrine that applies the same rules to both territorial and extraterritorial detentions or abductions will remove the incentive to violate individuals’ rights. See, e.g., TOMUSCHAT, *supra* note 110, at 110-111 (discussing the continuing application of human rights law to U.S. detainees at Guantánamo Bay, which he asserts the U.S. chose “as the place of detention [of “unlawful combatants”] in order to deprive the prisoners of the full protection of American law”).

jurisdiction.”¹⁴⁴ A reference to the territory of the state was included in an early draft of the Convention, but it was deleted during later negotiations.¹⁴⁵ The American Declaration of the Rights and Duties of Man, which is applied in contentious proceedings to members of the Organization of American States that have not ratified the Convention¹⁴⁶ (such as the United States), does not contain a provision setting out its scope of application. The Inter-American Commission’s jurisprudence on the extraterritorial application of human rights norms has developed largely in the context of non-ratifying States (specifically, the U.S. and Cuba), meaning that it has been most clearly enunciated under the American Declaration. In interpreting the extraterritorial application of the Declaration, the Commission has adopted its own version of the personal control doctrine, holding that individuals under the “authority and control” of a state are under that state’s jurisdiction for the purpose of human rights law.

In 1997, the Commission determined that the U.S. had violated the rights of Haitian asylum-seekers by interdicting them on the high seas. Finding that the Coast Guard boats – and by implication, those within them – were “under [U.S.] jurisdiction,” the Commission concluded that the Haitians’ right to liberty was violated when they were intercepted; their right to personal security was abrogated by their forcible return to Haiti; and their right to life was breached when they were subsequently killed by Haitian officials.¹⁴⁷

The 1999 case *Coard et al. v. the United States* presented the Commission with the complaints of individuals who had been detained by the U.S. military when it invaded Grenada in 1983. The petitioners alleged that they had been mistreated and held *incommunicado* by U.S. forces. Although the U.S. did not argue against the

¹⁴⁴ American Convention on Human Rights, *supra* note 67, at art. 1.

¹⁴⁵ The first draft of article 1 of the American Convention referred to “all persons within [a State’s] territory and subject to their jurisdiction.” See HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM PART II, BOOKLET 13, at 2 (Thomas Buergenthal and Robert Norris eds., 1982-1993) (containing the original draft of the Convention). The words “all persons within its territory” were deleted during the negotiating process. See HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, PART II, BOOKLET 12, at 28 (containing later drafts of the Convention).

¹⁴⁶ The Commission applies the American Declaration to States that have not ratified the American Convention. The Commission held, in *James Terry Roach and Jay Pinkerton v. United States*, that the Charter of the O.A.S. indicated the direct application of the Declaration to a Member State which was not a party to the Convention. See *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Rep. No. 3/87, ¶¶ 46-49 (Sept. 22, 1987) (“As a consequence of articles 3(j), 16, 51(e), 112 and 150 of the Charter, the provisions of other instruments of the OAS on human rights [including the American Declaration of the Rights and Duties of Man] acquired binding force.”) The Inter-American Court of Human Rights has approved of this practice, asserting that “given the provisions of Article 29(d) [of the Convention]... States cannot escape the obligations they have as members of the OAS under the declaration, notwithstanding the fact that the Convention is the governing instrument for the State Parties thereto.” *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion, OC-10/89, Inter-Am. Ct. H.R. (ser. A) No.10, ¶ 43 (July 14, 1989).

¹⁴⁷ U.S. Interdiction of Haitians on the High Seas (United States), Case 10.675, Inter-Am. C.H.R., Report No. 51/96, ¶¶ 167-171 (1997).

extraterritorial reach of human rights norms, the Commission commented on this issue, holding that:

Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.¹⁴⁸

Similar reasoning was used in the case of *Alejandro v. Cuba*, where the Commission found that Cuban officials' acts in targeting and shooting down pilots of a civilian plane while they were flying in international airspace placed the pilots under the jurisdiction of the Cuban State. The Commission held that "when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues."¹⁴⁹ This case is different than the rest of the decisions in the extraterritorial jurisprudence of the Inter-American Commission in that it does not concern the physical custody of individuals; despite the difference, the Commission applied the same basic rule.

Finally, in a 2002 decision concerning precautionary measures, the Commission determined that the detainees held by the United States at Guantánamo Bay in connection with the "War on Terror" are within the "authority and control" of the U.S. and thus protected by that state's human rights obligations.¹⁵⁰ No one, the Commission found, who is "under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights."¹⁵¹

3. U.S. View of *Non-Refoulement* Reconsidered

In short, the United States is pointing to the wrong rule of international human rights law when it argues that the norms do not apply to extraordinary rendition. Instead of using the territorial rule of jurisdiction, it should be applying the personal control doctrine. Returning to the object and purpose of human rights treaties, the best interpretation of CAT article 3's silence is the one that ensures that states cannot use formalistic approaches to avoid the application of recognized norms. That understanding

¹⁴⁸ *Coard et al. v. U.S.*, Case 10.591, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev., ¶ 37 (1999).

¹⁴⁹ *Armando Alejandro Jr. et al. v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rev., ¶ 25 (1999).

¹⁵⁰ *Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay)*, Inter-Am. C.H.R., March 12, 2002, 41 ILM 532 (2002).

¹⁵¹ *Id.*

would reveal the clause's "ordinary meaning" in its context¹⁵² to mean that no state party may transfer an individual – by any method or from any place – to a country where she or he is at risk of torture. The CAT Committee adopted this approach in its conclusions and recommendations concerning the United States' 2006 report, recommending that:

The State party should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention.¹⁵³

Curiously, although the United States has argued repeatedly that its *non-refoulement* obligations do not apply outside its territory, it has also stated that it implements the rule *as a matter of policy* in relation to anyone within U.S. custody. This distinction – a rejection of the legal rule alongside an acceptance of the general policy – is reminiscent of the debate over whether the Geneva Conventions' guarantees apply to al Qaeda operatives picked up in Afghanistan. As with interrogation policy, the law v. policy debate appears to be an attempt to mask frank disagreements within the U.S. government about the kind of treatment the U.S. may permissibly use against those suspected of terrorism. Similarly, with extraordinary rendition, the Bush administration is working to obfuscate its practice of transferring individuals to countries where they are at risk of torture.

When it ratified the Torture Convention, the U.S. made a declaration concerning the level of risk required to trigger withholding of transfer under article 3,¹⁵⁴ but it did not enter a reservation concerning the scope of application of article 3.¹⁵⁵ In contrast, the U.S. made an explicit reservation to article 14, stating that the provision – which is similarly silent about its scope of application – would apply only to "acts of torture committed in territory under the jurisdiction of that State Party."¹⁵⁶ Further, Congress signaled its acceptance of the application of article 3 to extraterritorial transfers in its implementing provisions for article 3, contained in the Foreign Affairs Reform and Restructuring Act of 1998. The law sets out U.S. policy concerning *non-refoulement* as follows:

The United States [shall] not ... expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial

¹⁵² Vienna Convention, *supra* note 99, at art. 31 (general rule of interpretation).

¹⁵³ See U.N. Doc. No. CAT/C/USA/CO/2 at ¶ 20.

¹⁵⁴ The United States understands the phrase "where there are substantial grounds for believing that [an individual] would be in danger of being subjected to torture," as used in article 3 of the Convention, to mean "if it is more likely than not that he would be tortured." United States Reservations, Understandings, and Declarations Upon Ratification, *included in U.S. Initial Report to CAT Committee*, *supra* note 73, at Annex 4. It should be pointed out that the more likely than not standard is significantly more rigid than the standard articulated by the CAT Committee.

¹⁵⁵ For the text of U.S. reservations, declarations, and understandings, *see id.*

¹⁵⁶ *Id.*

grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.¹⁵⁷

This policy statement is followed by an instruction to all “relevant agencies” to promulgate regulations enforcing U.S. obligations under article 3 of CAT.¹⁵⁸ The Department of Justice and the Department of State created regulations to uphold the *non-refoulement* obligation in the context of summary removal, removal and extradition (transfers from U.S. territory).¹⁵⁹ The agencies involved in extraterritorial transfers – most notably the Department of Defense, the FBI, and the CIA – have not promulgated formal implementing regulations, however.¹⁶⁰ DOD has accepted that this policy applies to the transfer of individuals detained on Guantánamo to other countries.¹⁶¹ Despite this acceptance, DOD’s procedures for determining whether an individual is at risk of torture upon transfer appear to be extremely flexible and do not fulfill the statutory requirement issued by Congress to transform policy into enforceable regulations. It is unclear, for example, what role the detainee has in making out a claim for relief from transfer under CAT. While the more likely than not standard is specified, nowhere does the agency explain how a detainee’s concerns are specifically taken into account. Instead, DOD retains its flexibility by reiterating that *non-refoulement* is a policy only, and that DOD works with the Department of State to obtain assurances from the receiving country about the treatment of the detainee once he is surrendered.¹⁶² Policies like this, which contain no clear rules or standards, cannot be challenged by individuals in the way that actions pursuant to regulations may be. The situation is even worse in relation to the CIA: the agency has made no official statements concerning its compliance with the Torture Convention, and no publicly available documents discuss the procedures used by the agency to comply with article 3 of the Torture Convention or FARRA.¹⁶³

¹⁵⁷ Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242 (a) (emphasis added).

¹⁵⁸ FARRA, § 2242(b) (“Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.”). The United States has told the U.N. Human Rights Committee that “U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured.” U.S., *Written Responses to HRC*, *supra* note 91, at Annex 1, p. 13.

¹⁵⁹ For a discussion of the regulations, see *Torture by Proxy*, *supra* note 4, at 50-53.

¹⁶⁰ The CIA and DOD may have non-published rules, but none have been publicly promulgated or subjected to the public notice requirements associated with formal regulations.

¹⁶¹ Declaration of Matthew C. Waxman, appended to the *Second Report of the United States of America to the Committee Against Torture*, submitted to the Comm. Against Torture, CAT/C/48/Add.3/Rev.1 (May 6, 2005) [hereinafter Declaration of Matthew Waxman].

¹⁶² Declaration of Pierre-Richard Prosper, appended to the *Second Report of the United States of America to the Committee Against Torture*, submitted to the Comm. Against Torture, CAT/C/48/Add.3/Rev.1 (May 6, 2005) [hereinafter Declaration of Pierre-Richard Prosper].

¹⁶³ The failure to promulgate regulations could leave DOD and CIA vulnerable to suit under the administrative procedure act. For a discussion of this issue, see Chesney, *Leaving Guantánamo*, *supra* note 11.

Maintaining the law – policy split, the Administration, in its submissions to the U.N. Committee Against Torture in May 2006 that article 3 was limited in scope to situations in which the individual was already present on U.S. territory.¹⁶⁴ This argument focused first on a reading of the words “expel, return (‘refouler’) or extradite,” which the U.S. argued all implied the individual’s presence on the territory of the state; and second on the absence of explicit language concerning extraterritoriality in article 3, which the U.S. interpreted to mean that the language should apply only to a State party’s territory.¹⁶⁵ In making these arguments, the U.S. does not use the object and purpose to guide its interpretation. Instead, it refers to internal law, which it erroneously suggests should guide U.N. bodies in construing the meaning of article 3.¹⁶⁶ As demonstrated above, these arguments suggest that there is a gap in protection, and thereby attempt to clear a space for extraterritorial actions that will not be governed by human rights law.

Although the U.S. government has tried to avoid the application of the *non-refoulement* rule in relation to transfers that originate from outside its territory, the arguments it relies upon fail to take into account the object and purpose of human rights law, and attempt to exploit a lacuna that does not exist. Congress was correct when it implicitly recognized that the U.S. must ensure that no one – “regardless of whether the person is physically present in the United States” – should be transferred to a country where she or he is at risk of torture. Under the personal control doctrine, any transfer effected by U.S. officials is covered by the *non-refoulement* obligation. Extraordinary renditions, which contravene article 3 of the Torture Convention and article 7 of the ICCPR, are therefore contrary to binding international human rights law. Human rights advocates should point out the flaws in the U.S. approach to extraterritorial application of human rights law while accepting that the doctrine in this area needs significant improvement. A lack of clarity in doctrine and reasoning is not an excuse for governments seeking an escape hatch.

B. *But They Promised. . .*

While the U.S. government does not accept the application of the rule of *non-refoulement* in relation to extraterritorial transfers, it routinely emphasizes that it obtains promises from receiving countries before transferring individuals to places where they face a risk of torture. This policy is said to obviate the risk the individual faces, thus immunizing the U.S. from wrongfulness in case the rule of *non-refoulement* should apply to such transfers. By pointing to “diplomatic assurances,” the U.S. is again seeking to exploit an area of human rights law that has been less than fully developed. The relationship between substantive norms, such as the *non-refoulement* rule, and the procedural mechanisms required to implement and safeguard those rules, is not always

¹⁶⁴ See United States, *List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America*, at 32-36, available at

http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36_En.pdf [hereinafter U.S., *Response to CAT List of Issues*].

¹⁶⁵ See U.S., *Response to CAT List of Issues*, *supra* note 164, at 32-36.

¹⁶⁶ The U.S. specifically referred to the Supreme Court’s *Sale* decision. See U.S., *Response to CAT List of Issues*, *supra* note 164, at 33-34.

specified in human rights treaties.¹⁶⁷ In the face of this silence, human rights bodies have often taken an ad hoc approach, developing norms about procedural guarantees in an uneven manner.¹⁶⁸ While human rights bodies have recently come to agreement about minimum standards for assurances, their approach to this issue demonstrates the success of the larger U.S. legal move: through a sleight of hand, the human rights community is now focused on assessing diplomatic assurances instead of the fundamental shift underway – attempts by the U.S. to take certain individuals outside any system of law.

1. International Human Rights Norms Concerning Diplomatic Assurances

The U.S. government has explained to the United Nations' human rights bodies that it relies on assurances "as appropriate"; these assurances are balanced against concerns that the individual may be at risk of torture upon transfer.¹⁶⁹

This balancing approach is out of line with emerging human rights standards concerning diplomatic assurances.¹⁷⁰ Historically used in relation to promises not to use capital punishment, assurances have been accepted when used to obtain assurances from a country (often the United States) seeking custody over a fugitive who could face the death penalty if transferred. Countries that have abolished the death penalty, including Canada, France, Germany, Ireland, Mexico, and the United Kingdom, have sought and accepted diplomatic assurances that capital punishment will not be imposed in this context.¹⁷¹ Indeed, many bilateral extradition treaties between the United States and abolitionist countries include explicit provisions governing the use of such assurances,¹⁷² and international and regional human rights bodies have held that abolitionist states

¹⁶⁷ For example, compare the procedural guarantees specified in article 9 of the ICCPR concerning the right to be free from arbitrary arrest or detention with the bald prohibition on torture and cruel, inhuman or degrading treatment or punishment set out in article 7. See ICCPR, *supra* note 65.

¹⁶⁸ This ad hoc approach can be demonstrated, for example, through the comparable novelty of the procedural right to make out a claim against transfer and the well-established requirement that procedural remedies be available for all non-derogable rights, even during times of emergency. For the latter, see Inter-American Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25, and 8 of the American Convention on Human Rights, Advisory Opinion OC-9/87 of October 6, 1987, Series A, No. 9, at ¶ 41 (holding that "the 'essential judicial guarantees which are not subject to derogation, according to . . . the Convention, include habeas corpus. . . amparo, and any other effective remedy before judges or competent tribunals . . . which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.'").

¹⁶⁹ U.S., *Second Report to CAT*, *supra* note 76, at ¶ 30; U.S., *Response to CAT List of Issues*, *supra* note 164, at pp. 36-37, 43, 47; U.S., *Written Responses to HRC*, *supra* note 91, at p. 18.

¹⁷⁰ For an excellent discussion of the factual circumstances and U.S. legal standards pertaining to diplomatic assurances, see Katherine R. Hawkins, *The Promise of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213 (2006).

¹⁷¹ See Amnesty International, *No return to execution: The US death penalty as a barrier to extradition*, AI Index: AMR 51/171/2001 (Nov. 2001), [hereinafter Amnesty International, *No return to execution*], available at <http://web.amnesty.org/library/Index/ENGAMR511712001>.

¹⁷² See generally Amnesty International, *No return to execution*, *supra* note 171 (noting the existence of such provisions in treaties between the United States and Canada, Australia, and Portugal).

commit human rights violations when they transfer fugitives likely to be sentenced to death without seeking assurances.¹⁷³

The acceptance of assurances by human rights bodies in the death penalty context has not translated into their acceptance in the context of torture and ill-treatment.¹⁷⁴ A number of countries have developed a practice of seeking such assurances when they extradite, deport, or expel an individual to a country where the individual may be at risk of torture. In the aftermath of 9/11, Austria, Canada, the Netherlands, Sweden, Turkey, the United Kingdom, and the United States have all sought and accepted assurances concerning torture and ill-treatment in the context of legally regulated transfers from the territory of the country; legal challenges concerning the permissibility, form, and procedure for using such assurances have been mounted in each country with differing results.¹⁷⁵ In the face of this state practice, human rights bodies have developed an emerging rule concerning the use of diplomatic assurances against torture and ill-treatment. This rule begins with the bedrock principle that the norm of *non-refoulement* is a direct outgrowth of the prohibition of torture, and is absolute, applying to everyone in all circumstances.¹⁷⁶ In this context, U.N. human rights bodies have set out minimum procedural rules governing any use of assurances against torture. Assurances not meeting this threshold are considered by U.N. bodies to be violations of the sending state's human rights obligations. According to the Human Rights Committee and the Committee Against Torture, there are three basic requirements for the use of assurances to counter a risk of torture:

- (1) Assurances must be obtained using "clear" and established procedures.¹⁷⁷
- (2) Assurances must be subject to judicial review.¹⁷⁸

¹⁷³ See Soering, *supra* note 93 (holding that the U.K. could not extradite fugitive wanted for murder in the United States without assurances, since he might be subjected to "death row phenomenon"); and Judge v. Canada, U.N. Doc. CCPR/C/78/D/829/1998 ¶ 10.4 (2003) (finding that "For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out," by securing assurances from the receiving state).

¹⁷⁴ There is still a different standard for the acceptance of diplomatic assurances under refugee law. See United Nations High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection* (Aug. 2006).

¹⁷⁵ See Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (2005), at pp. 47-57 (Canada); 57-66 (Sweden); 67-72 (United Kingdom); 72-76 (The Netherlands); 75-79 (Austria); and 79 (Turkey) [hereinafter *Still at Risk*].

¹⁷⁶ See, e.g. *Conclusions and Recommendations of the Committee Against Torture, Canada*, U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005) ("Given the absolute nature of the prohibition against refoulement contained in article 3 of the Convention, the State party should provide the Committee with details on how many cases of extradition or removal subject to the receipt of 'diplomatic assurances' or guarantees have occurred since 11 September 2001. . .").

¹⁷⁷ See CAT, *U.S. Conclusions*, *supra* note 125, at ¶ 21; and HRC, *U.S. Concluding Observations*, *supra* note 112, at ¶ 16.

¹⁷⁸ See CAT, *U.S. Conclusions*, *supra* note 125, at ¶ 21; and HRC, *U.S. Concluding Observations*, *supra* note 112, at ¶ 16.

- (3) Assurances must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.¹⁷⁹

These specific requirements concerning assurances draw upon statements that both the CAT Committee and the Human Rights Committee have made recently supporting a more general procedural right to appeal a state's decision to transfer an individual. In recent decisions concerning the rendition of two Egyptian citizens from Sweden, the two Committees clarified the procedural rules associated with the right to *non-refoulement*.

In *Agiza v. Sweden*,¹⁸⁰ the CAT Committee underlined the importance of both the rule against *non-refoulement* and the procedural guarantees needed to safeguard that prohibition. Ahmed Agiza sought asylum in Sweden, but was excluded from refugee status based on evidence that he was associated with terrorist groups. The Swedish government sought "diplomatic assurances" from the Egyptian government that Agiza would not be tortured when returned. Despite these assurances, Agiza was transported aboard a CIA plane and tortured upon return.¹⁸¹ The CAT Committee found that Sweden had breached its obligations under articles 3 and 22 of CAT when it transferred Agiza to Egypt on the basis of the assurances and without providing Agiza an opportunity to contest the expulsion:

the right to an effective remedy contained in article 3 requires...an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.¹⁸²

The Committee also noted that "[w]hile national security concerns might justify some adjustment to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review."¹⁸³

The *Agiza* decision builds on an earlier decision by the Committee. In *Arana v. France*, the Committee held that article 3 had been violated because, among other

¹⁷⁹ See CAT, *U.S. Conclusions*, *supra* note 125, at ¶ 21; and HRC, *U.S. Concluding Observations*, *supra* note 112, at ¶ 16. The availability of judicial review was also suggested by the CAT Committee's findings in the *Agiza* case against Sweden. See *Agiza v. Sweden*, U.N. Comm. Against Torture, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/¶ 13.4 (2005) [hereinafter *Agiza v. Sweden*].

¹⁸⁰ See *Agiza v. Sweden*, *supra* note 179. Ahmed Agiza sought asylum in Sweden, but was excluded from refugee status based on evidence that he was associated with terrorist groups. The Swedish government sought "diplomatic assurances" from the Egyptian government that he would not be tortured when returned. In his communication to the CAT Committee, Agiza alleged that Egyptian authorities tortured him upon return. The CAT Committee found that Sweden had breached its obligations under articles 3 and 22 of CAT when it transferred Agiza to Egypt on the basis of the assurances and without providing Agiza an opportunity to contest the expulsion.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Agiza v. Sweden*, *supra* note 179, ¶ 13.8

reasons, the transfer of the individual by the French authorities to the hands of the Spanish police had not been subjected to judicial review:

The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police.... At the time of the consideration of the [previous] report..., the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country ...without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.¹⁸⁴

Parallel to the CAT Committee's *Agiza* case, the Human Rights Committee considered the case of Mohammed Alzery, who like Ahmed Agiza had been excluded from asylum protection and expelled from Sweden "for security reasons."¹⁸⁵ Indeed, Agiza and Alzery were transferred aboard the same CIA plane.¹⁸⁶ Like the CAT Committee, the Human Rights Committee found that Sweden had breached Alzery's right against *refoulement* by returning him to Egypt, despite the exchange of diplomatic assurances.¹⁸⁷ Concerning those assurances, the Committee stressed the failure of the Swedish government to insist on post-return monitoring that met "key aspects of international good practice."¹⁸⁸ As to the procedural requirements, the Committee found that a pre-transfer opportunity to challenge the expulsion is required by article 7 of the ICCPR, in conjunction with the general obligation set out in article 2 to provide an effective remedy for rights violations:

By the nature of *refoulement*, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly

¹⁸⁴ *Arana v. France*, Communication No. 63/1997, Committee Against Torture, U.N. Doc. CAT/C/23/D/63/1997 (2000), ¶ 11.5. In *Arana v. France*, an individual who had been convicted in France of belonging to the Basque separatist group ETA was sought by Spanish police on suspicion that he was a member of the ETA leadership. Spain sought deportation from France through an administrative procedure, whereby detainees could be exchanged between the two nations' police forces without judicial oversight or *intervention*.

¹⁸⁵ *Alzery v. Sweden*, Communication No. 1416/2005, Human Rights Committee, U.N. Doc. CCPR/C/88/D/1416/2005 (2005), ¶¶ 3.8, 3.10.

¹⁸⁶ See Stephen Grey, *supra* note 16.

¹⁸⁷ See *Alzery*, *supra* note 185, at ¶ 11.5.

¹⁸⁸ *Id.*

amounted to a breach of article 7, read in conjunction with article 2 of the Covenant.¹⁸⁹

While there is not an extensive jurisprudence supporting these holdings, the Committees' reasoning is supported by a recent case from the European Court of Human Rights. In *Shamayev and others v Georgia and Russia*,¹⁹⁰ several individuals suspected of terrorist crimes were extradited by Georgia to Russia following a request submitted by Russia. The Georgian authorities transferred the individuals to Russian custody without first informing the detainees of the decision to extradite them. The men did not have the opportunity to challenge this decision, even on the basis of a fear of torture. The European Court held that Georgia had violated the applicants' right to an effective remedy, combined with the right to be free from torture, as guaranteed by articles 13 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹¹ The Convention was violated at the moment the Georgian authorities prevented the applicants from seeking relief from transfer on the basis that they feared torture if returned to Russia.¹⁹²

In addition to the procedural requirements set out above, the CAT Committee has also indicated that assurances may not be relied upon when transferring an individual to a country that systematically violates the Torture Convention.¹⁹³ While the Human Rights

¹⁸⁹ *Id.* at ¶ 11.8.

¹⁹⁰ *Affaire Chamaïev et 12 autres c. Géorgie et Russie (Shamayev & 12 Others v. Georgia & Russia)*, ___ Eur. H.R. Rep. ___ (2005).

¹⁹¹ ECHR, *supra* note 56.

¹⁹² *Chamaïev*, *supra* note 190, at ¶¶ 460-461. The 2002 Canadian case *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* supports this reasoning as well. See *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada*, 2002, SCC 1. File No. 27790 (January 11, 2002), available at <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html> (last visited Oct. 8, 2006). In that case, the Court examined the adequacy of procedural safeguards in the context of the *non-refoulement* obligation set out in article 3 of CAT. The Court held that "[g]iven Canada's commitment to the CAT, we find that ... the phrase 'substantial grounds' raises a duty to afford an opportunity to demonstrate and defend those grounds." *Id.* at ¶ 119. The Court added that "[w]here the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances." *Id.* at ¶ 123.

The United Nations High Commissioner for Refugees has recently released a *Note on Diplomatic Assurances and International Refugee Protection*. The Note insists that assurances not be used to bar access to refugee status determination procedures:

Diplomatic assurances should not result in the denial of access to asylum procedures. Only formal grounds, such as the availability of protection in a "first country of asylum" or transfer of responsibility to a "safe third country" could form the basis for declaring an asylum application inadmissible. Diplomatic assurances are concerned with the treatment of the individual concerned in the receiving State and thus affect the substance of the person's asylum application. They could not, therefore, give rise to a declaration of inadmissibility. The significance, if any, of such assurances for the well-foundedness of an applicant's fear of persecution needs to be assessed in the context of the examination of the merits of the claim.

U.N. High Commissioner for Refugees, *supra* note 174 at ¶ 17.

¹⁹³ See CAT, *U.S. Conclusions*, *supra* note 125, at ¶ 21.

Committee has not categorically rejected the use of assurances in relation to such countries, it has indicated that assurances are unlikely to mitigate the risk of torture upon return, thus indicating that they will rarely enable permissible transfers to such countries for states that have ratified the ICCPR.¹⁹⁴ The Special Rapporteur on Torture has set out even more stringent rules, suggesting that *any* use of diplomatic assurances to protect against torture and ill-treatment is impermissible:

It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that states cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.¹⁹⁵

2. U.S. Practice: Assurances in the Context of Extraordinary Rendition

The U.S. approach to obtaining diplomatic assurances in the context of extraordinary rendition does not meet the procedural requirements set out by the treaty bodies. In response to questions posed by the U.N. Committee Against Torture, for example, the U.S. asserted that it was “aware of allegations that it has transferred

¹⁹⁴ See HRC, *U.S. Concluding Observations*, *supra* note 112, at ¶ 16.

(reminding the U.S. that “the more systematic the practice of torture or cruel inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be”).

¹⁹⁵ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Manfred Nowak), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 51, U.N. Doc. A/60/316 (Aug. 30, 2005). This approach is more stringent than that adopted by the previous Special Rapporteur, Theo van Boven, who set out the following “essential requirements for diplomatic assurances” in 2004:

[A]ssurances should as a minimum include provisions with respect to prompt access to a lawyer, recording (preferably video-recording) of all interrogation sessions and recording the identity of all persons present, prompt and independent medical examination and forbidding incommunicado detention or detention at undisclosed places. Finally, a system of effective monitoring is to be put in place so as to ensure that assurances are trustworthy and reliable. Such monitoring should be prompt, regular and include private interviews. Independent persons or organizations should be entrusted with this task and they should report regularly to the responsible authorities of the sending and receiving States.

U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Theo van Boven), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. No. A/59/324 (1 Sept, 2004) at ¶¶ 41-42 (citations omitted).

individuals to third countries where they have been tortured.”¹⁹⁶ Defending itself against these allegations, the U.S. did not deny that it uses rendition, but instead explained that:

[I]n those exceptional cases where the United States conducts renditions of individuals, the United States does not transport anyone to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.¹⁹⁷

President Bush himself has argued that the U.S. does not engage in *extraordinary* rendition by reference to such agreements: “We operate within the law and we send people to countries where they say they’re not going to torture the people.”¹⁹⁸ President Bush is right that “diplomatic assurances” are “within the law” in relation to immigration and extradition proceedings, but there are no explicit rules governing their use in the context of extraterritorial transfers. In relation to removal, U.S. law and regulations allow for the use of diplomatic assurances to deny withholding of removal to an individual who fears torture; once promises are obtained by the Secretary of State and found to be sufficient by the Attorney General,¹⁹⁹ the matter is decided – the alien may not pursue any further protection against deportation on the basis that she fears torture.²⁰⁰ The regulations governing assurances specifically state that aliens may not challenge decisions concerning removal based on article 3 of CAT.²⁰¹ Similarly, the Secretary of State may surrender for extradition an individual who fears torture by transferring the fugitive “subject to conditions.”²⁰² While the regulations do not set out the kinds of conditions that may be obtained, practice demonstrates that they involve promises by the receiving government not to torture the fugitive. For individuals at the threshold of entry, assurances appear to be used,²⁰³ but are not subject to regulation. Individuals who arrive at a port of entry without the documentation required to enter, or who are determined to fit into certain security-related categories are subject to expedited removal;²⁰⁴ diplomatic

¹⁹⁶ U.S., *Second Report to CAT*, *supra* note 76, at ¶ 30.

¹⁹⁷ See U.S., *Response to CAT List of Issues*, *supra* note 164, at 37.

¹⁹⁸ See George W. Bush, Press Conference of the President (April 28, 2005), <http://www.whitehouse.gov/news/releases/2005/04/20050428-9.html>.

¹⁹⁹ The determination of sufficiency is probably now carried out by the Department of Homeland Security, since the Immigration and Naturalization Service was moved out of the jurisdiction of the Department of Justice and is now a component of DHS. See Stephen W. Yale-Loehr & Jeffrey C. O’Neill, *The Legality of Maher Arar’s Treatment Under U.S. Immigration Law*, Submission to the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, at note 84, May 16, 2005, http://www.ararcommission.ca/eng/Yale-Loehr_may16.pdf.

²⁰⁰ 8 C.F.R. § 208.18 (c) (2005).

²⁰¹ 8 C.F.R. § 208.18 (e) (2005).

²⁰² 22 C.F.R. § 95 (2005).

²⁰³ The most famous case relevant to this article is that of Maher Arar. Arar was subject to expedited removal when U.S. immigration authorities determined that he was a member of a “foreign terrorist organization” – Al-Qaeda – and therefore inadmissible pursuant to INA Sec. 212(a)(3)(B)(i)(V). See Decision of the Regional Director in the Matter of Arar, Oct. 7, 2002; available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar%20Complaint_Exhibits.pdf (Exhibit D).

²⁰⁴ INA § 235 (b) and (c), 8 U.S.C. § 1225 (b) and (c).

assurances are not mentioned in the regulations governing such summary removals.²⁰⁵ Instead, the rules simply provide that a transfer may not be completed if it would violate article 3 of the Torture Convention.²⁰⁶ Most importantly for cases of extraordinary rendition, none of the relevant agencies have regulated their actions when conducting transfers that take place entirely extraterritorially. Like all other aspects of such transfers, diplomatic assurances in this context are not governed by explicit rules.

There is very little known about the process for obtaining diplomatic assurances – even in circumstances where their use is regulated. Similarly, the content of such assurances are largely unknown, since the promises themselves are never publicly revealed.²⁰⁷ In March 2005, the U.S. government made public some of the procedures the Department of Defense and the Department of State use in obtaining such assurances. Two officials involved in obtaining promises from governments accepting released Guantánamo detainees explained in broad strokes the steps they follow.²⁰⁸ In his statement, Matthew Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs, explains that the DOD seeks the views of “interested United States Government agencies” when a transfer from Guantánamo is proposed.²⁰⁹ In order to ensure compliance with U.S. *non-refoulement* policy, assurances are obtained from the country receiving the detainee.²¹⁰ This process “typically” involves the Department of State.²¹¹ Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, gives a bit more detail concerning the role of the Department of State. He explains that the Department of State seeks assurances from foreign governments when they are deemed necessary, and that they generally entail promises that the detainees will not be tortured or persecuted.²¹² Assurances may be “more specific” where warranted (including where the receiving state is not a party to the Torture Convention).²¹³ Ambassador Prosper explains that the following offices within the Department of State may be involved in assessing the need for assurances: the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the Department of State Office of War Crimes Issues.²¹⁴ The role

²⁰⁵ 8 C.F.R. § 235.8 & § 208.18 (d) (2005).

²⁰⁶ 8 C.F.R. Sec. 235.8 (officials must “assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3 [of CAT]”).

²⁰⁷ The ACLU and the Columbia University School of Law’s International Human Rights Clinic have filed a set of requests under the Freedom of Information Act seeking the text of diplomatic assurances, as well as legal and procedural information about the use of such assurances. The requests are available online at http://www.aclu.org/images/torture/asset_upload_file884_26103.pdf.

²⁰⁸ See Declaration of Matthew Waxman, *supra* note 161 and Declaration of Pierre-Richard Prosper, *supra* note 162. These declarations, which were appended to the U.S. report to the Committee Against Torture in May 2005, were prepared as part of litigation brought by detainees seeking notice before they were transferred away from Guantánamo. See *Sherif al-Mashad et al. v. George W. Bush*, Civil Action No. 05-0270 (JR), (Feb. 25, 2005), *available at* <http://www.state.gov/documents/organization/45850.pdf>.

²⁰⁹ See Declaration of Matthew Waxman, *supra* note 161 at 3.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Declaration of Pierre-Richard Prosper, *supra* note 162, at 3-5.

²¹³ *Id.* at 4.

²¹⁴ *Id.* at 5.

of each of these offices is to advise on the reliability and credibility of the assurances offered, using the following criteria: the identity and position of the foreign official making the assurances; political and legal developments in the receiving country; U.S. diplomatic relations with the receiving country; and the receiving government's "incentives and capacities to fulfill its assurances to the United States."²¹⁵ While these criteria sound reasonable, none of the indicators used, or facts underlying such assessments have been discussed publicly. Further, the U.S. may request mechanisms for monitoring conditions in "appropriate cases," but the criteria for determining which cases qualify, or how the monitoring takes place, are not described.²¹⁶ Finally, Ambassador Prosper asserts that the U.S. "would pursue any credible report and take any appropriate action, if it had reason to believe that [a]ssurances would not be, or had not been, honored."²¹⁷ What such appropriate actions might be are left unstated; public reports have not once indicated that the U.S. sought the return of individuals who were subjected to torture upon transfer.

The procedures described in the Waxman and Prosper declarations are those used with detainees being held "by the Department of Defense at Guantánamo Bay."²¹⁸ It appears that similar procedures may be undertaken in the context of extraterritorial renditions. Officials speaking to the media on condition of anonymity have explained that CIA-initiated transfers have routinely been accompanied by assurances.²¹⁹ It is likely that the procedures in the rendition context are even more informal than those used with DOD detainees, since there is often no acknowledgement that the U.S. is even conducting such transfers. Moreover, when transfers are initiated through abduction, as with the case of Abu Omar, who was rendered from Italy to Egypt by CIA agents, there is little hope of obtaining any meaningful assurances.

In a striking statement, one intelligence official specified that assurances are used whenever renditions are carried out with the purpose of delivering the detainee for interrogation, and not for trial.²²⁰ Indeed, retired CIA officers who did not wish to be identified have told *The Washington Post* that verbal assurances are required by the CIA's Office of General Counsel whenever a rendition is carried out; these assurances – which are sought from the receiving country's security services – are cabled back to CIA

²¹⁵ *Id.* at 5-6.

²¹⁶ *Id.* at 5. In its written replies to the U.N. Committee Against Torture, the U.S. has provided a bit more information, but did not give details about monitoring arrangements:

Monitoring by the United States (typically U.S. political or consular officers at U.S. embassies overseas) or a third party may also be warranted. . . the decision whether to seek a monitoring arrangement is made on a case-by-case basis, based on the circumstances of a particular case, which could include the identity of the requesting State, the nationality of the fugitive, the groups or persons that might be available to monitor the fugitive's condition, the ability of such groups or persons to provide effective monitoring, and similar considerations.

See U.S., *Response to CAT List of Issues*, *supra* note 164, at p. 47.

²¹⁷ *Id.*

²¹⁸ Declaration of Pierre-Richard Prosper, *supra* note 162, at 1-2.

²¹⁹ Waterman, *supra* note 34.

²²⁰ *Id.*

headquarters in order to demonstrate U.S. compliance with anti-torture laws.²²¹ Instead of reducing the risk of torture, however, these assurances are “a farce,” according to a CIA officer who has participated in the rendition program.²²² Certainly, the procedures for obtaining diplomatic assurances in the context of extraordinary rendition cannot be said to be pursuant to “clear” and established procedures, as required by human rights law.

Similarly, there is little chance that such assurances will be found to be subject to judicial review, as required by human rights law. While two federal courts have held that a fugitive may seek review through a habeas corpus petition challenging the Secretary’s decision to surrender him on the basis of assurances in the extradition context,²²³ no such petition has ever been reviewed on the merits. Since extraordinary renditions are carried out informally – indeed, extra-legally, they are not subject to any form of pre-transfer judicial oversight. The right to review of assurances is therefore entirely absent, even if current challenges to rendition are allowed to proceed.²²⁴

Finally, there is little evidence that the U.S. has set up effective post-return monitoring of the treatment of individuals rendered subject to assurances. Though the U.S.²²⁵ (and more specifically, both the DOD²²⁶ and the CIA²²⁷) have asserted that they sometimes set up monitoring processes as part of assurance arrangements, such efforts have been discredited by officials speaking on condition of anonymity, as well as by human rights organizations.²²⁸ Indeed, the CIA Director Porter Goss has admitted the substantial shortcomings of any monitoring program in testimony to Congress in 2005, explaining that “of course, once they’re out of our control, there’s only so much we can do.”²²⁹

Human Rights Watch has reported extensively on cases in which assurances were followed by torture or extrajudicial execution in the receiving state.²³⁰ For example, the United States has asserted that it obtained diplomatic assurances from Syria concerning

²²¹ Dana Priest, *CIA’s Assurances on Transferred Suspects Doubtful; Prisoners Say Countries Break No--Torture Pledges*, WASH. POST, Mar. 17, 2005, at A1 [hereinafter *CIA’s Assurances*].

²²² *Id.*

²²³ *Cornejo-Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000), *disapproved in later appeal* by *Cornejo-Barreto v. Siefert*, 379 F.3d 1075 (9th Cir. 2004), *reh’g en banc granted* by *Cornejo-Barreto v. Siefert*, 386 F.3d 938 (9th Cir. 2004), *opinion vacated on reh’g* by *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (en banc); and *Mironescu v. Rice*, 2006 WL 167981 (M.D.N.C. Jan. 20, 2006) (following *Cornejo* 2000).

²²⁴ As noted, *supra* note 15, the two main cases challenging rendition (*Arar v. Ashcroft* and *El Masri v. Tenet*) have been dismissed, but are pending appeal. Neither case focuses on the issue of diplomatic assurances.

²²⁵ See U.S., *Response to CAT List of Issues*, *supra* note 164, at 47.

²²⁶ See Declaration of Pierre-Richard Prosper, *supra* note 162, at 6.

²²⁷ See Priest, *supra* note 221 (reporting that “CIA Director Porter J. Goss told Congress a month ago that the CIA has ‘an accountability program’ to monitor rendered prisoners. But he acknowledged that ‘of course, once they’re out of our control, there’s only so much we can do.’”).

²²⁸ See Human Rights Watch, *Still at Risk*, *supra* note 175, at 24-27 and 36-39.

²²⁹ Quoted and cited by Priest, *CIA’s Assurances*, *supra* note 221.

²³⁰ See generally Human Rights Watch, *Still at Risk*, *supra* note 175, and *Empty Promises*, *supra* note 30.

the treatment of Maher Arar. Arar was subjected to numerous forms of torture during his many months of detention in Syria. Similarly, in the case of Egyptian nationals Ahmed Agiza and Mohammed Alzery, the Swedish government had obtained assurances that the men would not be tortured, and that Swedish authorities would have access to the men once they were in Egyptian custody.²³¹ Despite these safeguards, both men have alleged that they were tortured upon return to Egypt.²³² Ahmed Agiza told his mother that he was subjected to electric shocks during interrogation.²³³

In addition to documenting these specific cases, Human Rights Watch and others have pointed out several inherent weaknesses in any diplomatic assurances regime. First, the need for assurances only arises in relation to a state where there is an acknowledged risk of torture; they are, in effect, an admission by the sending state that the receiving state is viewed as a potential abuser of a specific individual.²³⁴ Indeed, the extraordinary renditions that have reportedly been carried out by the CIA in the post-9/11 context have almost all been to countries with a record of official torture.²³⁵ Second, as “diplomatic” promises, assurances are not legally enforceable and are often secret, making them hard to monitor.²³⁶ Third, as agreements between states, the individual’s interests are subordinated to the need to maintain good relations between the parties to the assurances.²³⁷ Finally, both states in the relationship have an incentive to keep any abuses under wraps: the receiving state does not want its abusive practices exposed, and the sending state does not want its violation of the rule of *non-refoulement* to be discovered.²³⁸

If renditions are being conducted with the intent of subjecting an individual to coercive interrogations, the incentive structure is even more perverse: the sending country has an investment in the receiving country’s abusive practices, and both states want those abuses to remain secret. Some officials have alleged that this kind of perverse incentive structure has indeed been in play with respect to renditions carried out by the CIA; this view alleges that the assurances the U.S. has sought have been aimed not at preventing

²³¹ Human Rights Watch, *Still at Risk*, *supra* note 175, at 57-62.

²³² *Id.*

²³³ *Agiza v. Sweden*, *supra* note 179, at ¶ 2.6.

²³⁴ See Human Rights Watch, *Still at Risk*, *supra* note 175, at 17-19 (discussing and quoting the report of the U.N. Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, which found that “the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated.”) See also Report by Alvaro Gil-Robles, Commissioner for Human Rights on his Visit to Sweden, CommDH 2004, at ¶ 19 (“The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment.”).

²³⁵ See *Torture by Proxy*, *supra* note 4, at 37-40 (noting that the Department of State’s own human rights reports for the years 2001, 2002, and 2003 all documented the use of torture by officials in Egypt, Jordan, Morocco, Syria, Saudi Arabia, and Yemen).

²³⁶ *Id.* at 19-20. See also Julia Hall, *The Treatment of Asylum-Seekers and Migrants in the Context of the Global “War on Terror,”* PROC. 98TH ANN. MTG. AM. SOC’Y INT’L L. 258, 260 (2004) (arguing that “diplomatic assurances and post-return monitoring are inadequate safeguards against torture”).

²³⁷ *Id.* at 19-21.

²³⁸ *Id.* at 21-23.

torture so much as they are intended to reduce U.S. liability for what is in fact a very foreseeable consequence of transfer. As one official told *The Washington Post*, "They say they are not abusing them, and that satisfies the legal requirement, but we all know they do."²³⁹

Some officials have pointed to the use of diplomatic assurances to counter allegations that U.S. officials have not conspired in, or aided and abetted, acts of torture by agents of receiving states. Jeffrey Smith, who served as General Counsel to the CIA from 1995-1996, has asserted that the U.S. has been committed to ensuring that transferees were treated humanely, and has never acted as an accomplice to torture.²⁴⁰ Others have directly contradicted this, insisting that assurances were a cover for a covert program that involved either the intentional subjection of an individual to coercive interrogation, or the knowing disregard of a very high risk of such treatment.²⁴¹ *The Washington Post* reported that:

[An] Arab diplomat, whose country is actively engaged in counterterrorism operations and shares intelligence with the CIA, said it is unrealistic to believe the CIA really wants to follow up on the assurances. "It would be stupid to keep track of them because then you would know what's going on," he said. "It's really more like 'Don't ask, don't tell.' "²⁴²

Either level of awareness – actual knowledge or willful blindness – would satisfy the mental state element of the crime of conspiracy or aiding and abetting in acts of torture under federal criminal law.²⁴³ Although evidentiary problems may preclude criminal prosecution of U.S. agents, the high level of awareness concerning the likelihood of torture in countries to which terrorism suspects have been rendered suggests that some U.S. officials may have committed the crime of conspiracy in, or aiding and abetting of, torture. Indeed, an FBI agent familiar with plans to transfer individuals from Guantánamo to third countries for interrogation warned his superiors that agents involved in this so-called "Level IV" interrogation technique could be guilty of conspiring in torture.²⁴⁴

C. "Rendered Quaint"?

The United States and many other countries are waging a war against terrorism. For our country this war often takes the form of conventional military operations in places like Afghanistan and Iraq. Sometimes this is a political struggle, a war

²³⁹ See Priest, *CIA's Assurances*, *supra* note 221.

²⁴⁰ See Waterman, *supra* note 33 ("Smith maintains that the United States would never knowingly have aided or abetted in torture. 'We always took into account the question, 'How will this person be treated?' he said.'").

²⁴¹ See the statements discussed in Section I of this article.

²⁴² Priest, *CIA's Assurances*, *supra* note 221.

²⁴³ For a comprehensive discussion of the theories of criminal liability, the level of *mens rea*, and possible defenses to conspiracy or aiding and abetting the crime of torture for acts of extraordinary renditions, see *Torture by Proxy*, *supra* note 4, at 102-119.

²⁴⁴ Memo written by unnamed Supervisory Special FBI agent concerning transfers from Guantánamo (on file with author).

of ideas. It is a struggle waged also by our law enforcement agencies. Often we engage the enemy through the cooperation of our intelligence services with their foreign counterparts. . . One of the difficult issues in this new kind of conflict is what to do with captured individuals who we know or believe to be terrorists. . . The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt. . . – Secretary of State Condoleezza Rice²⁴⁵

One of the ways the U.S. seems to have “adapted” to the new war is by sending suspected terrorists to countries with a history of torture for the purpose of interrogation. Secretary of State Condoleezza Rice delivered this statement, in which she declared that “[r]enditions take terrorists out of action, and save lives,” on December 5, 2005, as she left on a trip to Europe;²⁴⁶ the statement was a response to the maelstrom of criticism that erupted following media reports linking the U.S. extraordinary rendition program to secret CIA detention facilities in Eastern Europe.²⁴⁷ The statement is remarkable for a number of reasons; this Section will consider the Administration’s arguments concerning the laws of war, and their interaction with international human rights law, in the context of extraordinary rendition.

The Secretary’s statement contains the clearest articulation of the Administration’s defense of extraordinary rendition using the laws of war. In brief, the Administration argues, via an often unconnected set of assertions, that extraordinary rendition exists in a legal vacuum; hovering between international human rights law and the law of armed conflict, the Administration suggests that rendition is lawful because not explicitly prohibited. This defense of rendition is therefore one strand of the broader argument that the “War on Terror” is not a metaphor, but a real war – a new type of armed conflict.

The contours of the Administration’s main arguments concerning the laws of armed conflict are well known. In launching its attacks on Afghanistan, the administration declared that it was engaged in an international armed conflict. At first, this approach was largely accepted by the international community: the magnitude of the attacks on the World Trade Center and the Pentagon were deemed sufficient to trigger the inherent right of self-defense, and few countries argued that it was unlawful or inappropriate to target the Taliban as well as al Qaeda in response. The controversy began when the United States declared that detainees picked up on the battlefield in Afghanistan were not entitled to protection under the Geneva Conventions – neither the Third Geneva Convention (which protects prisoners of war) nor the Fourth Convention (which protects civilians).²⁴⁸

²⁴⁵ Condoleezza Rice, U.S. Sec’y of State, Remarks Upon Her Departure for Europe (December 5, 2005), <http://www.state.gov/secretary/rm/2005/57602.htm> [hereinafter Rice, Remarks].

²⁴⁶ See Rice, Remarks, *supra* note 245.

²⁴⁷ Secretary Rice explained in her statement that she was responding, in part, to “inquiries from the European Union, the Council of Europe, and from several individual countries about media reports” concerning the “war on terror” generally, and rendition specifically. See Rice, Remarks, *supra* note 245.

²⁴⁸ See, e.g., Alberto Gonzales, *Memorandum for the President: Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*, (January

The President determined on February 7, 2002, that the Geneva Conventions applied to the “present conflict with the Taliban,” but found that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under article 4 of Geneva [III].”²⁴⁹ This decision was based on a series of memos prepared by Bush Administration officials, the State Department, and the military concerning the proper interpretation of several technical provisions of Geneva III.²⁵⁰ Relevant here, John Yoo, then Deputy Assistant Attorney General, and Jay S. Bybee, then Assistant Attorney General, argued in memos dated January 9, 2002 and February 7, 2002 respectively, that conditions included in article 4(A)(2) of that Convention concerning members of militias and “other volunteer corps” applied to the Taliban, despite the Taliban’s generally accepted status as the official armed forces of the *de facto* government of Afghanistan.²⁵¹ The status of such forces are normally analyzed under a different provision of article 4 – article 4(a)(1), which indicates that “members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” are to be accorded prisoner of war status. By also applying the criteria relating to militias – requiring such corps to follow the rules of war, to carry their arms openly, and to use a “fixed distinctive sign” that ensures they are distinguishable from the civilian population – Yoo and Bybee argued, and the President subsequently determined, that *neither* the Taliban nor al Qaeda (the latter of which all commentators agree would be subject to this criteria) deserved the status of prisoner of war. With respect to al Qaeda, the President determined that “none of the provisions of Geneva [III] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world.”²⁵² More controversially, the President made his determinations concerning the status of captured Taliban and Qaeda detainees categorical, eliminating the need to convene – or the right to access – status review tribunals as required by article 5 when “any doubt arise[s]” about the status of a detained individual.²⁵³ Finally, at least before the June 2006 *Hamdan* ruling (discussed below), the U.S. had denied that Common Article 3 or Geneva Convention IV standards applied to detainees it determined were unlawful combatants, apparently concluding that such individuals are not protected by the Geneva Conventions at all, but instead, that as “enemy combatants” they essentially fall outside the laws of war.²⁵⁴

25, 2002), *reprinted in* THE TORTURE PAPERS 118, 119 (Greenberg & Dratel, eds., 2005) (“In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning and renders quaint some of its provisions. . .”).

²⁴⁹ President George W. Bush, “Humane Treatment of al Qaeda and Taliban Detainees,” *reprinted in* THE TORTURE PAPERS, *supra* note 248, at 134 (determining that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world. . .”).

²⁵⁰ See generally memos reprinted in THE TORTURE PAPERS, *supra* note 248, at 38-143.

²⁵¹ THE TORTURE PAPERS, *supra* note 248, at 60-62 (Yoo), and 135-143 (Bybee).

²⁵² See President George W. Bush, *supra* note 249 at 134.

²⁵³ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

²⁵⁴ See President George W. Bush, *supra* note 249. This decision has been widely critiqued on the basis that – to use the words of Jean Pictet, writing in 1958:

Every person in enemy hands must have some status under international law; he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by

The U.S. has largely accepted the application of the Geneva Conventions to its operations in Iraq, though some U.S. practices concerning foreign insurgents have been plainly contrary to the laws of war. Among these policies is the technique of “ghosting” detainees – taking them off the regular detainee rolls and hiding them from the International Committee of the Red Cross²⁵⁵ – as well as the technique of “removing” or “relocating” individuals who are protected under the Geneva Conventions, a form of extraordinary rendition that will not be examined here. The application of the Geneva Conventions to the transfer of individuals captured on the battlefield in Afghanistan or Iraq will be left to other commentators.²⁵⁶

The transfers under discussion in this article are those that take place far from any traditional battlefield: an imam is abducted in Milan and sent to Egypt; a microbiology student is picked up in Pakistan and deposited in Jordan; a dual Canadian-Syrian national is diverted while transferring planes in New York and sent to Syria. Whether these operations qualify as part of an armed conflict which is governed by humanitarian law – either its authorizing norms or its limiting rules – is hotly contested. Briefly, the heart of the matter is this: humanitarian law authorizes – or at least accepts – the use of lethal force by privileged combatants (armies and militias that follow the rules of war), and limits the use of force and coercion in relation to protected persons (including prisoners of war, civilians, and those placed *hors de combat* because of injury or sickness). In a number of ways, the Bush Administration has laid claim to the authorizing rules without accepting the limits as well. For example, the Administration claims it can detain individuals on Guantánamo until the “close of hostilities,” but it does not accept the internationally accepted definitions of “hostilities,” instead referring to the broader “War on Terror” as the relevant armed conflict. In relation to extraordinary rendition, the question is what law applies to transfers of individuals the U.S. asserts are unlawful combatants in a new kind of war – is the U.S. correct that it may adopt extraordinary new measures in this unprecedented situation?

the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.

INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958).

²⁵⁵ Many of the documents released by the Department of Defense pursuant to the FOIA lawsuit brought by the Center for Constitutional Rights, ACLU and other human rights organizations, available at <http://www.aclu.org/torturefoia/released/030905/>, describe torture and mistreatment of individuals held secretly by the C.I.A. in military facilities. See, e.g., Sworn Statement of SGT, Member of GTMO team, “Shut Up Group,” Annex to Fay/Jones/Kern Report (June 4, 2004); Sworn Statement of SGT, 372nd MP, Annex to Fay/Jones/Kern Report (May 7, 2004); Sworn statement of CW2, A/519th MI Bn, Annex to Fay/Jones/Kern Report (May 19, 2004); Statement of B/Co, 470th MI Grp. SGT, Annex to Fay/Jones/Kern Report (May 18, 2004); see also Douglas Jehl & Tim Golden, *C.I.A. is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, at 6; Jane Mayer, *A Deadly Interrogation: Can the C.I.A. legally kill a prisoner?*, NEW YORKER, Nov. 14, 2005, at 44.

²⁵⁶ For a discussion of such transfers, see Sadat, *supra* note 12, and Weissbrodt & Bergquist, *supra* note 12.

Among the most controversial arguments the U.S. has made is that it is engaged in an armed conflict against al Qaeda – or more broadly, against terrorism²⁵⁷ – in which the entire world is literally a battlefield where unlawful combatants are subject to being killed, captured or detained without notice. This argument, implicit in the findings discussed above, is aimed at legitimating the administration’s use of military or military-like techniques against a non-state enemy, while insulating its actions against that enemy from assessment under international humanitarian or human rights law. The argument proceeds generally as follows: the U.S. is engaged in an international armed conflict against a non-state enemy. As such, the conflict is not regulated by the protective norms of humanitarian law, which applies either to armed conflicts between nations (“international armed conflict,” as described in Common Article 2 of the Geneva Conventions, and covered by Geneva law and relevant customary international law) or to intrastate armed conflict (“non-international armed conflict,” as described by Common Article 3 of the Geneva Conventions, and covered only by the standards set out in that provision, Additional Protocol II, and customary international law relevant to civil wars). Entirely outside that framework are armed conflicts of an international scope between a state and a non-state actor such as al Qaeda. Because this new kind of armed conflict is not covered by the “quaint” provisions of international humanitarian law, the U.S. is entitled to adapt its techniques to the circumstances without running afoul of the rules. One of these adaptations is the use of extraordinary rendition.

In its interactions with United Nations human rights bodies, the United States has asserted that it is engaged in a “war on terror” that is governed exclusively by the laws of armed conflict. In making this assertion, the U.S. has argued that international humanitarian law is the applicable *lex specialis*. For example, in defending its detention of individuals on Guantánamo, the U.S. has explained:

The law of armed conflict is the *lex specialis* governing the international law obligations of the United States regarding the status and treatment of persons detained during armed conflict.²⁵⁸

Unlike its arguments defending its detention policy through humanitarian law, the U.S. has rarely mounted a defense of rendition in this way. Secretary Rice’s December 2005 statement is the exception, and her words reveal a great deal about the Administration’s legal strategy.

²⁵⁷ As Marco Sassòli explains:

Astonishingly. . . the administration proceeded to declare that it was engaged in a single worldwide international armed conflict against a non-State actor (al-Qaeda) or perhaps also against a social or criminal phenomenon (terrorism) if not a moral category (evil). This worldwide conflict started – without the United States characterizing it as such at that time – at some point in the 1990s and will continue until victory.

Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQUALITY 195, 197-198 (2004).

²⁵⁸ United States, *Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba*, Mar. 10, 2006, <http://www.asil.org/pdfs/ilib0603212.pdf>.

We consider the captured members of al-Qaida and its affiliates to be unlawful combatants who may be held, in accordance with the law of war, to keep them from killing innocents. . . . For decades, the United States and other countries have used "renditions" to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.²⁵⁹

In combination, the Administration's reference to the *lex specialis* rule and its argument that it can "render" suspected terrorists as part of its "war on terror," seem to indicate that that no law applies to protect individuals against such transfers. The legal vacuum is constructed as follows: since the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al Qaeda members, however, are unprivileged combatants, and thus unprotected by rules found in the Geneva Conventions concerning the transfer of prisoners of war or other protected persons. Finally, the argument concludes, the rules of human rights law do not apply either, since humanitarian law operates as *lex specialis* to oust such rules from application. For this reason, suspected terrorists may be informally transferred from place to place without those transfers being unlawful, since no law applies.

Professor John Yoo has made the most detailed defense of the policy of rendition²⁶⁰ using the discourse of war. Although his main argument concerns the powers of the President as Commander-in-Chief under the U.S. constitution, Professor Yoo suggests that the laws of armed conflict allow for the rendition of terrorist suspects. In an article entitled *Transferring Terrorists*, Professor Yoo argues that the President has the authority to order the transfer of terrorist suspects to other countries without concern about the limits set out in treaties to which the U.S. is a party, including the Torture Convention. This argument rests on several bases. The first is the distinction Professor Yoo draws between what he calls "the peacetime regime for transfers" and the wartime regime.²⁶¹ The former regime encompasses the forms of transfer from the United States or its borders that are regulated by federal law, including removal, summary removal, and extradition.²⁶² The regime for "wartime transfers" is not so easily defined; it includes the powers granted to the president as Commander-in-Chief, and is checked only by the limits imposed by the Constitution and the laws of war. With respect to the Constitution, Professor Yoo argues that the Commander-in-Chief authority, combined with those powers described in the Constitution's Vesting Clause, means that the authority

to dispose of the liberty of individuals captured and brought under the control of U.S. armed forces during military operations remains in the hands of the President alone unless the Constitution specifically commits the power to Congress.²⁶³

²⁵⁹ Rice, Remarks, *supra* note 245.

²⁶⁰ For an additional defense of rendition, alongside some recommendations for changes in the procedure to make it more "regular," see A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L.R. 1 (2006).

²⁶¹ Yoo, *Transferring Terrorists*, *supra* note 6, at 1185.

²⁶² Yoo, *Transferring Terrorists*, *supra* note 6, at 1185-1192.

²⁶³ *Id.* at 1200-1201 (citations omitted).

Professor Yoo finds that the Constitution has not committed the power to “dispose of the liberty” of wartime detainees specifically to Congress,²⁶⁴ and that historical practice demonstrates that the President, as Commander-in-Chief and Chief Executive, has the authority to transfer enemy prisoners as he sees fit, including into the custody of “other sovereign nations.”²⁶⁵ This authority is limited by the treaties to which the U.S. is a party: Professor Yoo concedes that the President may not contravene relevant humanitarian or human rights standards.²⁶⁶ He quickly finds that Geneva Convention protections are not applicable to individuals who are connected to the Taliban or al Qaeda, however, and that the Torture Convention “is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained outside of U.S. territory.”²⁶⁷ Thus free of any international law constraints, Professor Yoo argues, the President is free to order the transfer of terrorists wherever he feels is wise. Tracing the contours of the legal constraints on the Commander-in-Chief in the “War on Terror” will be left to other scholars.²⁶⁸ As this

²⁶⁴ Briefly, the argument is that while the Constitution provides that Congress may “make Rules concerning Captures on Land and Water,” this clause refers only to *property* if understood historically. Yoo, *Transferring Terrorists*, *supra* note 6, at 1202. Congress is also given the power to “raise and support Armies” and to “make Rules for the Government and Regulation of the land and naval forces.” Here, Professor Yoo argues that Congress may not be able to tie the President’s hands even under these clauses, but argues that even if it can, it has not acted to do so, making the point moot. *Id.*

²⁶⁵ Yoo, *Transferring Terrorists*, *supra* note 6, at 1221-1222.

²⁶⁶ *Id.* at 1226 (conceding that “the [Third Geneva Convention] imposes substantial international law constraints on the President’s ability to effect military transfers”) and 1229 (“the Torture Convention imposes international law constraints on the ability of the United States to effect transfers”). Both of these affirmative statements are embedded in discussions that ultimately conclude that the limits are not relevant to detainees connected to al Qaeda or the Taliban. *Id.* at 1226-1230.

²⁶⁷ Yoo, *Transferring Terrorists*, *supra* note 6, at 1229.

²⁶⁸ It is not necessary to resolve these debates to locate limits imposed by treaty norms on the president’s ability to transfer prisoners to countries where they are likely to face torture. The Torture Convention, which even Professor Yoo admits is applicable, as implemented by Congress, does in fact limit the power of the President to authorize transfers of individuals to countries where they risk torture. The Constitution gives the President broad authority to wage war through his power as Commander-in-Chief (U.S. Constitution, art. II, sec. 2). That power is not unchecked, however, and is limited by the Constitution’s own “take care” clause, which specifies that the President “shall take Care that the Laws be faithfully executed” (*id.* at sec. 2). The extent to which the take care clause modifies the Commander-in-Chief power has been the subject of much controversy over the centuries. The Restatement summarizes the situation in this way: it is not clear “to what extent Congress can control decisions of the President as Commander in Chief in the conduct of wars authorized by Congress.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., sec. 1 (1987). For the purposes of assessing the legality of extraordinary renditions, the appropriate rule can be located in the 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Avoiding bright line rules, the Supreme Court explained that the President’s power is at its apex when he “acts pursuant to an express or implied authorization of Congress”; his power is in a “zone of twilight” when he acts in the absence of Congressional authorization or denial of authority; and it is “at its lowest ebb” when the President “takes measures incompatible with the expressed or implied will of Congress.” With respect to

Article has already explained above, Professor Yoo's international law argument concerning the extraterritorial effects of human rights treaties should be rejected in favor of a construction that would apply the protective rules of *non-refoulement* to extraterritorial transfers.

With respect to international humanitarian law, there are three main responses to Professor Yoo, and more broadly, the administration's "War on Terror" approach to rendition. All begin with the common agreement that the current struggle against al Qaeda and other transnational terrorist groups is not neatly governed by the laws of war. This is because international humanitarian law applies only to situations of armed conflict, and the definition of "armed conflict" is not easy to apply to the disparate circumstances of the "War on Terror" in a uniform manner. Article 2 common to all four of the 1949 Geneva Conventions, provides for the following rule of application:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.²⁶⁹

the forcible movement of an individual by the U.S. to a country where he is at risk of torture, Congress has made its will clear through the passage of the Foreign Affairs Reform and Restructuring Act of 1998, which included the policy statement that "[t]he United States [shall] not ... expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." (FARRA, § 1242(a) (emphasis added).) Professor Yoo treats this Congressional statement as merely precatory:

This provision largely tracks the language of the Torture Convention, but if legally binding it would also significantly extend the Convention's protections to persons who are not physically present in the United States. Congress expressly referred to this proclamation as a "policy statement," however, indicating that it should not be construed as an actual interpretation of the treaty language or as a provision creating judicially enforceable rights. Thus, it would seem that [this provision does not] . . . impose[] binding domestic law limitations on the President's power to effect military detainees.

Yoo, *Transferring Terrorists*, *supra* note 6, at 1231-1232 (citations omitted). Professor Yoo ignores the *Youngstown* rule when he argues against the implications of FARRA's policy statement. To bring the President's power to its "lowest ebb," Congress need not create a judicially enforceable right; instead, it must simply indicate its will. 343 U.S. at 635-638. Certainly, a clear statement of policy – even if not fully implemented by the relevant agencies – is sufficient to signal the "implied will of Congress." 343 U.S. at 637. The criminal torture statute is also relevant to this analysis: the President certainly cannot authorize criminal activity, and any directive that purports to authorize activities that would amount to conspiracy in, or aiding and abetting of, torture, would be illegal.

²⁶⁹ See article 2 common to Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287.

The ICRC *Commentary* explains that the term “armed conflict” was chosen to avoid the potentially “endless” arguments that would arise if the word “war” were instead used; the emphasis was to be on the factual situation – the Conventions should apply to “[a]ny difference arising between two States and leading to the intervention of members of the armed forces” – not on the legal circumstances for such intervention.²⁷⁰ Beyond cases in which two or more states’ armies face off on a traditional battlefield, an armed conflict exists for the purposes of international humanitarian law only under the following circumstances:

- a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified.²⁷¹

When these characteristics are absent, international humanitarian law treaties are not the controlling law, since their minimum threshold of applicability will not have been reached. These characteristics, which are drawn from treaty and customary law governing non-international armed conflicts, are not uniformly present in the “War on Terror.”

In the face of this mismatch, the Administration suggests that there is a legal vacuum. International legal scholars and advocates reject this approach, and tend to make three alternative arguments. The first asserts that the laws of war are not applicable to the “War on Terror,” but that human rights law continues to apply. A second argument posits that although the law is not perfectly suited to the current situation, the U.S. conflict with al Qaeda is best viewed as a non-international armed conflict, to which the minimum rules applicable to such conflicts apply. The final argument accepts the Administration’s view that the U.S. is engaged in a new type of war. Instead of accepting that international humanitarian law is silent about this new form of conflict, however, this line of reasoning asserts that IHL should be read in conjunction with other rules of international law to protect the basic rights of all – including suspected terrorists. The remainder of this Section will examine these arguments and the status of extraordinary rendition under each approach. It will conclude with a discussion of the continuing application of international human rights law, and a reconsideration of the doctrine of *lex specialis*.

1. *The “War on Terror” is a Metaphor*

The first argument, supported by a variety of scholars and non-governmental organizations, is that outside of traditional military actions such as the war in Afghanistan

²⁷⁰ See COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 26 (Jean S. Pictet ed., 1960) article 2, at p. 23.

²⁷¹ Gabor Rona, *When is a War not a War? The Proper Role of the Law of Armed Conflict in the “War on Terror,”* Presentation at Workshop on the Protection of Human Rights While Countering Terrorism, Copenhagen, 15-16 March 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5xcmnj?opendocument> (summarizing the general rules of applicability for international humanitarian law) [hereinafter Rona, *When War is not a War*].

and the invasion and occupation of Iraq, the “War on Terror” is not an armed conflict at all.²⁷² Hostilities in this new war tend to wax and wane, with armed attacks like the one on September 11, 2001 followed by bouts of intense armed conflict in some locations and long silences in others. One party – the United States, its armed forces and intelligence services – is clearly identifiable, while the other – al Qaeda and its associates – is much harder to define. It is generally agreed that there are no territorial boundaries to the “War on Terror” – it occurs anywhere an al Qaeda operative can be found. The temporal limits on it are similarly unclear; it has been called “the long war,” since it will terminate only once terrorism is no longer aimed at the United States.²⁷³ Because of these uncertainties, the “War on Terror” is best understood as a metaphor, or a rallying cry, much like the earlier “War on Drugs” of the Reagan era, or the 1960s’ “War on Poverty.” Of course, this view recognizes that some campaigns in the long war are in fact armed conflicts that trigger the application of international humanitarian law. No serious commentator contests that the Geneva Conventions applied to the 2003 U.S. invasion of Iraq. But beyond this, the war metaphor has no explanatory power, and certainly no *legal* significance. Thus, the International Committee of the Red Cross has explained:

When and where the "global war on terror" manifests itself in either of these forms of armed conflict [national or non-international], international humanitarian law applies. . . . For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. . . . Whether or not an international or non-international armed conflict is part of the "global war on terror" is not a legal, but a political question. The designation "global war on terror" does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict.²⁷⁴

Similar statements can be found in materials published by Amnesty International,²⁷⁵ Human Rights First,²⁷⁶ the International Commission of Jurists,²⁷⁷ and other leading

²⁷² See generally Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817 (2005), and Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349 (2004).

²⁷³ Josh White & Ann Scott Tyson, *Rumsfeld Offers Strategies for Current War*, WASH. POST, Feb. 3, 2006, at A08.

²⁷⁴ International Committee of the Red Cross, *The Relevance of IHL in the Context of Terrorism*, July 21, 2005, <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList488/8C4F3170C0C25CDDC1257045002CD4A2>.

²⁷⁵ Amnesty International, *Military Commissions for “War on Terror” Detainees*, AI Index: AMRR 51/050/2006 (Mar. 27, 2006), available at [http://web.amnesty.org/library/pdf/AMR510502006ENGLISH/\\$File/AMR5105006.pdf](http://web.amnesty.org/library/pdf/AMR510502006ENGLISH/$File/AMR5105006.pdf).

²⁷⁶ Gabor Rona (International Legal Director of Human Rights First), Remarks at the Boston Federalist Society: Constitutional and Policy Implications of Military Tribunals for Terrorism Detainees (Feb. 2, 2006), <http://www.humanrightsfirst.info/pdf/06209-usls-boston-federalist-society.pdf>.

²⁷⁷ Press Release, International Commission of Jurists, ICJ Calls For Full Acceptance of Rights Under the Geneva Conventions and International Human Rights Law, July 13, 2006, http://www.icj.org/IMG/US_DOD.pdf.

human rights and humanitarian organizations.²⁷⁸ These organizations stress that the actions the U.S. takes in its war, when they occur outside the traditional battlefield, are governed by domestic law, where relevant, and most significantly for our purposes, by the international law of human rights. Since no special authorizing rules are present, the U.S. does not have the right to kill or capture al Qaeda operatives except insofar as such actions are permissible under domestic law and the international law of human rights. Further, while the United States may have been entitled to derogate from certain human rights standards based on the emergency it faced on September 11, it has not officially done so, and thus cannot claim the privilege of limiting even those rights which are lawfully derogable during emergencies that “threaten the life of the nation.”²⁷⁹

Under this approach, extraordinary rendition is plainly unlawful, since it violates the *non-refoulement* rule, in addition to guarantees concerning the right to liberty of person, freedom from arbitrary arrest, and a variety of other relevant rights.²⁸⁰ Moreover, rendition would not be made legal through derogation, since the *non-refoulement* rule is understood to be an integral part of the prohibition on torture, one of the core rights which may not be derogated or limited during an emergency.²⁸¹ Indeed, the prohibition on torture is one of a small handful of human rights considered to have achieved the status of a peremptory, or *jus cogens* norm, suggesting that the right to be protected from *refoulement* is similarly applicable in all circumstances.

2. The “War on Terror” is a Non-International Armed Conflict

International humanitarian law applies to two distinct types of war: international and non-international. The most detailed and extensive rules, set out in the four Geneva Conventions of 1949 and supplemented by Additional Protocol I to those conventions, apply to conflicts between states – international armed conflicts – which have been comparatively easy to define and identify. The category *non-international armed conflict* is significantly more difficult to define. Article 3 common to the Geneva Conventions applies to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” and by its terms defines the minimum standards applicable to non-international armed conflict.²⁸² The main area of contention relevant to the “War on Terror” is whether the category non-international armed conflicts is confined to conflicts that occur within a state, or whether they include all armed conflicts that are not fought between states – i.e. “not of an international character.” The Bush administration, at least before the *Hamdan* decision, had adopted the view that the United States was engaged in an armed conflict of international scope against a non-state actor.

²⁷⁸ See, e.g., International Federation for Human Rights (FIDH), *Counter-Terrorism versus Human Rights, Keys for Compatibility*, Oct. 24, 2005, <http://www.fidh.org/IMG/pdf/counterterrorism429a.pdf>; Gabor Rona, *When is a War not a War?*, *supra* note 271.

²⁷⁹ See ICCPR, *supra* note 65, at art. 4 (setting out procedural and substantive requirements for derogation).

²⁸⁰ See *Torture by Proxy*, *supra* note 4, at 5-6. See also Weissbrodt & Bergquist, *supra* note 79.

²⁸¹ See generally, Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-Refoulement*, 15 INT’L J. REFUGEE L. 5 (2003).

²⁸² See Geneva Convention Relative to the Treatment of Prisoners of War, art 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Article 3 common to the Four Geneva Conventions].

The conflict with al Qaeda thus did not fall within the scope of either the four Geneva Conventions, or within Common Article 3.

This reasoning was rejected by the Supreme Court, which analyzed the language of Common Article 3 in the *Hamdan* decision, concluding that it does apply to suspected al Qaeda detainees picked up on the battlefield in Afghanistan:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being “‘international in scope,’” does not qualify as a “‘conflict not of an international character.’” That reasoning is erroneous. The term “conflict not of an international character” is used here in contradistinction to a conflict between nations. . . . Common Article 3. . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory “Power” who are involved in a conflict “in the territory of” a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase “not of an international character” bears its literal meaning.²⁸³

In brief, then, the Supreme Court concluded that the struggle against al Qaeda – at least in relation to the conflict in Afghanistan – is a non-international armed conflict, governed by Common Article 3. The Supreme Court’s approach is also the one urged by many scholars.²⁸⁴ Derek Jinks, for example, wrote in an influential 2003 article that Common Article 3 “applies to all armed conflicts not covered by Common Article 2 of the Geneva Conventions,” and should be the yardstick for measuring the legality of U.S. actions against al Qaeda.²⁸⁵ Scholars including Milt Bearden, Ryan Goodman and Anne-Marie Slaughter, and organizations such as the New York City Bar Association and the International Bar Association submitted *amicus* briefs making similar arguments in the *Hamdan* case.²⁸⁶

It is not clear whether the Supreme Court endorsed the broader view in *Hamdan* that the conflict with al Qaeda – no matter where it occurs in the world and outside of any

²⁸³ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2795-96 (2006) (citations omitted).

²⁸⁴ *But see* HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* (2005) (rejecting the view that the conflict with Al Qaeda is a non-international armed conflict).

²⁸⁵ Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 41 (2003).

²⁸⁶ Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (No. 05-184), *available at* <http://www.hamdanvrumfeld.com/GeneralsandAdmirals.pdf>; Brief of the Association of the Bar of the City of New York & the Human Rights Institute of the International Bar Association as Amici Curiae in Support of Petitioner, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (No. 05-184), *available at* <http://www.hamdanvrumfeld.com/16620pdfLucas.pdf>; Brief of Professors Ryan Goodman, Derek Jinks & Anne-Marie Slaughter as Amicus Curiae Supporting Reversal, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (No. 05-184), *available at* <http://hamdanvrumfeld.com/GoodmanJinksSlaughter-FINALHamdamAmicusBrief-Jan52006.pdf>.

other nexus to a traditional armed conflict – is in fact an armed conflict for the purpose of international humanitarian law.²⁸⁷ That analysis will be left to other commentators. The legal question relevant here is this: presuming that the fight against al Qaeda is governed by the rules of non-international armed conflict, what rules are applicable to the apprehension and transfer, by the United States, of an individual from one foreign country to another, where the U.S. has reason to believe that the individual is an al Qaeda operative? The answer is not simple, since the rules applicable to non-international armed conflict are very limited in comparison to those governing international armed conflicts. Common Article 3, which is regarded as the “convention within the convention” applicable to non-international armed conflict, provides that with respect to “persons taking no active part in the hostilities,”

[T]he following acts are and shall remain prohibited at any time and in any place whatsoever. . . :

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Two major issues must be dealt with in relation to extraordinary rendition. First, are apprehended individuals who are suspected of being Qaeda operatives considered to be “taking no active part in the hostilities,” making them eligible for protection under Common Article 3? Second, and if so, is the *non-refoulement* norm contained within the prohibition against torture and cruel treatment included in Common Article 3? The

²⁸⁷ The Department of Defense and the Department of State have read the decision this way. On July 7, 2006, Deputy Defense Secretary Gordon England issued a memo stating that “The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda.” Gordon England, *Memorandum for Secretaries of the Military Departments*, July 7, 2006, available at http://graphics8.nytimes.com/packages/pdf/politics/060711pentagon_memo.pdf. Although Secretary England stated that all Department of Defense operations other than the military commissions found to be impermissible by the Supreme Court were in line with Common Article 3, he ordered DOD officials to review all policies and directives to ensure they were in compliance with this provision. See also Donna Miles, *England Memo Underscores Policy on Humane Treatment of Detainees*, AMERICAN FORCES INFORMATION SERVICE, July 11, 2006, available at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=114>. John Bellinger, Legal Adviser to the Department of State, has indicated that his Department understands the *Hamdan* decision to have extended Common Article 3 to the general “conflict with al Qaeda.” See State Department Foreign Press Center Briefing, FED. NEWS SERVICE, October 19, 2006, at 1, 5. Soon after the *Hamdan* decision, the media reported that the White House had indicated that the CIA is bound by Common Article 3 under the *Hamdan* rule; this issue has not been definitively resolved, since the CIA has declined to comment on the issue. See Mark Mazzetti & Kate Zernike, “White House Says Terror Suspects Hold Basic Rights,” N.Y. TIMES, July 12, 2006, at A1.

answer to each question is yes. First, anyone who is captured or otherwise detained will fall within the protections of Common Article 3, since the article applies to anyone who is *hors de combat*.²⁸⁸ A significantly more complex antecedent question would be whether the U.S. is *obliged to apprehend instead of killing* suspected Qaeda operatives under Common Article 3. Since non-state fighters are not entitled to combatant's privilege in the context of non-international armed conflict, they lose their civilian immunity when taking an "active part in the hostilities." Serious debate rages over what types of activities trigger this loss of immunity, and whether individuals deemed to be "enemy combatants" by the U.S. government have, by definition, been found to have taken such an active part, making them legitimate targets for military marksmen or CIA drones. This question will be discussed briefly in the next Section, but it need not be resolved here, since the operations under discussion – renditions – presuppose capture. Once detained, all individuals are protected by Common Article 3.²⁸⁹

The second question, concerning the *non-refoulement* rule, will also be answered affirmatively: the protection contained in Common Article 3 should be read to include protection against transfer to a country where the individual is at risk of torture or cruel treatment. First, applying the same logic used by the Human Rights Committee and the European Court of Human Rights, the protection against torture and cruel or degrading treatment in Common Article 3 should be interpreted to include a protection against *non-refoulement* to the same kind of treatment; this is necessary to ensure the prohibition on torture, and the human principles on which it is built, has real meaning.²⁹⁰ Further, it is not significant that Common Article 3 does not include an explicit *non-refoulement* rule: indeed, at the time it was drafted, this provision was largely designed for application in the context of civil wars and other intra-state conflicts. Unlike Geneva III and IV, which contain explicit rules concerning inter-state transfer of protected persons, therefore, Common Article 3 contains only the most basic guarantees required for situations of non-international armed conflict. Although it was not envisioned at the time that states would transfer among themselves fighters in non-international armed conflicts, this failure of imagination should not be taken as a limitation on the protection against *refoulement*. In conclusion, then, extraordinary rendition is prohibited by Common Article 3.

²⁸⁸ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 107-113 (2005).

²⁸⁹ See COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR *supra* note 270, at pp. 40-41.

²⁹⁰ See *Soering*, *supra* note 93 (holding that "It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).") at ¶ 88], *see also* discussion of Human Rights Committee's construction of article 7 of the ICCPR, *supra* notes 89 - 90 and accompanying text.

3. The “War on Terror” is a New Type of Armed Conflict

If international humanitarian law recognizes only two categories of armed conflict – international and “non-international” – are the laws of war woefully out of date? Doesn’t the emergence of new forms of conflict, between states and non-state actors with worldwide reach, take us outside the realm of existing rules? Many thoughtful scholars and advocates have concluded that this is the case. For example, Rosa Brooks explains that the old rules, which relied on easily distinguishable “zones of war and zones of peace,” temporal boundaries “between war and nonwar,” and identifiable distinctions between civilians and combatants, “have lost their analytical and moral underpinnings.”²⁹¹ Others suggest that a new regime is needed to regulate “extra-state armed conflict,”²⁹² in which states fight non-state enemies outside their borders; while still others argue that international humanitarian law is simply unable to entirely account for new conflicts between states and transnational terrorist groups.²⁹³

While these scholars would agree with the Administration that the conflict with al Qaeda – or transnational terrorist groups more generally – is a neither an international nor a “non-international” armed conflict for the purposes of international humanitarian law, they reject the idea that this new kind of conflict is not governed by *any* law. Instead, they insist on a number of protections, drawing on different frameworks. Schöndorf, for example, rejects both the formal application of Common Article 3 and the more general law of non-international armed conflict to extra-state armed conflict, since that law was designed to apply to wars within the territorial boundaries of a single state party to the Geneva Conventions.²⁹⁴ He also rejects as inadequate (because insufficiently tailored) the rules which are applicable to both international and non-international armed conflict. Again, these rules are generally viewed as encompassing the standards included in Common Article 3 (if not Common Article 3 as a formal matter), which has been found by the International Court of Justice to constitute “a minimum yardstick” applicable as a matter of customary international law to all armed conflicts.²⁹⁵ Schöndorf feels this approach is inadequate, and he feels similarly about international humanitarian law generally. Drawing on the *lex specialis* rule, he dismisses human rights law as effectively unhelpful:

²⁹¹ 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, 721, 727, 731, 744 (2004).

²⁹² Roy Schöndorf, *Extra-State Armed Conflict: Is there a Need for a New Legal Regime?* 37 N.Y.U. J. INT’L L. & POL. 1 (2004).

²⁹³ See David Kretzmer, *Targeted Killing of Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUR. J. INT’L L. 171 (2005).

²⁹⁴ See Schöndorf, *supra* note 292, at 50.

²⁹⁵ *Nicaragua v. U.S.*, 1986 ICJ Rep. 14, ¶ 218 (27 June 1986).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, ¶ 25 (July 8, 1996) (finding that “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’”) (citations omitted)].

[T]he exact content and interpretation of international human rights law in the context of extra-state armed conflict depends on the rules of international humanitarian law, as they constitute the relevant *lex specialis*. In turn, the application of international human rights law does not solve the questions at stake, as it refers back to international humanitarian law, which is, and should be, the focus. . . ²⁹⁶

The solution, Schörndorf suggests, is to look to general humanitarian principles as gap-fillers while a new set of state practices accumulates concerning extra-territorial armed conflict.

Kretzmer, in contrast, suggests that the best approach is to adopt a “mixed model,” in which both humanitarian law and human rights law play a role in determining the types of state action which are lawful when confronting transnational terrorism:

Following the dramatic development of international human rights law, it is no longer the case that if IHL is not applicable to non-international armed conflicts, states will have *carte blanche* to fight those conflicts as they see fit. On the contrary, in the type of non-international armed conflicts contemplated by Common Article 3 and APII, the state’s freedom of action will be constrained by the standards of international human rights law. . . Any consideration of the legal regime applying in armed conflicts in general, and especially in non-international armed conflicts, must take these standards into account. ²⁹⁷

Brooks also looks to international human rights law for “some partial, interim solutions,” and as a guide for “reinventing the law of armed conflict.”²⁹⁸ Each author examines the lawfulness of targeted killings in the context of the war on terror as a method for illustrating the implications of their new models. All three agree that, as individuals who have taken a direct role in hostilities, suspected terrorists may become legitimate targets for killings under Common Article 3.²⁹⁹ They also all agree that this rule cannot be applied without some checking mechanism drawn from (according to Schörndorf) principles of international humanitarian law or (according to Kretzmer and Brooks) international human rights law. Most relevant here, Kretzmer and Schörndorf argue that states *must* prefer apprehension of terrorist suspects to killing them.³⁰⁰ Such a preference is utterly absent in the context of international humanitarian law; combatants may prefer to kill rather than to capture their enemies who are taking part in hostilities, and so long as they obey the rules of distinction and proportionality, humanitarian law will not bar

²⁹⁶ Schörndorf, *supra* note 292, at 61-62.

²⁹⁷ Kretzmer, *supra* note 293, at 202.

²⁹⁸ Brooks, *supra* note 291, at 747. *See also* Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT’L L. & POL’Y 58, 67 (2002) (arguing that “international human rights law recognizes the bare minimum of standards necessary to protect the safety and integrity of individuals from abuses of power. As such, it governs how states treat all people in all circumstances-- even in time of war”).

²⁹⁹ *See* Schörndorf, *supra* note 292, at 62-65; Kretzmer, *supra* note 293, at 203-204, 211-212, and Brooks, *supra* note 291, at 752.

³⁰⁰ Schörndorf, *supra* note 292, at 64-65; Kretzmer, *supra* note 293, at 203-204 & 211-212.

such actions. There is an unresolved debate in the context of non-international armed conflict over how “direct” direct participation must be, and whether there is a distinct period of time during which a state may lawfully target those taking a direct part in hostilities, or whether such persons permanently lose the protection of humanitarian law once they have taken part in hostilities.³⁰¹ While Article 13(3) of Additional Protocol II specifies that civilians are immune from attack “unless and for such time as they take a direct part in hostilities,” Common Article 3 has no temporal specificity.³⁰² Since the U.S. has not ratified Additional Protocol II, it is therefore plausible to conclude that if the “War on Terror” is a non-international armed conflict, the U.S. is not prohibited by IHL from targeting anyone who has taken part in hostilities against it at any time or in any place.

Without the additional ingredient of humanitarian principles and human rights law, then, the application of Common Article 3 standards to the “war on terror” would not bar the United States from killing members of al Qaeda, even if the U.S. had not attempted to arrest or detain them. While such freedom of action would not directly allow for the rendition of suspected terrorists (indeed, as set out earlier, extraordinary rendition is prohibited by Common Article 3), such a mismatch (the U.S. is not barred from killing a suspected operative, but is prohibited from transferring the individual to a risk of torture) would certainly act as a perverse incentive for U.S. decisions in the “War on Terror.” Fortunately, the weight of international legal opinion supports the argument that international humanitarian law must be read in conjunction with international human rights law.

Indeed, returning to the rule of *lex specialis*, the normative structure of international law *requires* such harmonization. The International Court of Justice explained the relationship between humanitarian law and human rights law in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, where it stated plainly that international human rights law continues to apply in times of armed conflict. The *lex specialis* rule, operating as a conflicts of law norm, requires that when rights have incongruous content in times of war and times of armed conflict, humanitarian law must necessarily inform the interpretation of such rights. In the *Nuclear Weapons* case, the ICJ determined that the test for arbitrariness in relation to the right not to be arbitrarily deprived of life as protected by article 6 of the ICCPR must be supplied by IHL:

³⁰¹ See, e.g., International Committee of the Red Cross, *Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities* (2005) (concluding that “There appeared to be agreement among the experts that it was not feasible to come up with an abstract definition that would cover all conceivable instances of ‘direct participation in hostilities’”); and ICRC, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 22-23* (2005) (stating that there is “a lot of practice which gives little or no guidance on the interpretation of the term ‘direct participation,’” and concluding that “a clear and uniform definition of direct participation in hostilities has not been developed in State practice”).

³⁰² See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 ILM (1977) 1442-9, art. 13(3); and See Article 3 common to the Four Geneva Conventions, *supra* note 282.

Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³⁰³

This approach was clarified somewhat by its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the Court explained that “[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”³⁰⁴ While the ICJ’s approach leaves much to be desired (its reasoning is obscure and incredibly sparse), the principles the Court sets out have been widely accepted.³⁰⁵ Thus, when a right is a “matter of both branches of international law,” the rights must be read in harmony to the degree possible. Only when an actual conflict arises will the *lex specialis* rule require application of IHL norms. In such cases, IHL allows for the justification of what would otherwise be a violation of human rights law.³⁰⁶ A soldier shooting an enemy on the battlefield looks like a human rights violation (the deprivation of life without due process) until the IHL rule is applied (lawful combatants may kill other combatants, or civilians taking a direct role in hostilities). In the context of extraordinary rendition, there is no conflict between norms: the rules of non-international armed conflict prohibit torture and cruel treatment. Human rights law prohibits the same kind of treatment, but also provides more specific – and harmonious – content, prohibiting not only torture and cruel treatment, but also adding precision by prohibiting *refoulement* to such treatment.

The United States has asserted that in relation to the “War on Terror,” the *lex specialis* rule operates effectively as a doctrine of preemption. If IHL applies to a particular situation, the U.S. suggests, human rights law is ousted, irrelevant and inapplicable.³⁰⁷ Thus, in its reports and statements to the U.N. Committee Against Torture and the U.N. Human Rights Committee, the U.S. has repeatedly referred to IHL norms instead of human rights treaties to explain its actions, and has asserted that the

³⁰³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, ¶ 25 (July 8, 1996).

³⁰⁴ ICJ, *Wall Advisory Opinion*, *supra* note 118, at ¶ 106.

³⁰⁵ For a discussion of the general and widespread acceptance of the principle set out in the *Nuclear Weapons* case – both before and after the advisory opinion was written, see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 266-273 (2000).

³⁰⁶ See Keike Krieger, *A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265, 272 (2006) (“According to the ICJ, the lawfulness of conduct under humanitarian law is a justification in relation to what are *prima facie* violations of human rights treaties.”)

³⁰⁷ This approach to the *lex specialis* rule is out of step with the most well-known analyses of the maxim. For example, Martti Koskeniemi, Chairman of the International Law Commission’s study group on fragmentation, has written that *lex specialis* is “an informal part of legal reasoning, that is of the pragmatic process through which lawyers go about interpreting and applying formal law.” Martti Koskeniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of ‘Self-Contained Regimes,’* 4 ILC, 5 May 2004, ILC(LVI) SG/FIL.CRD.1 (2004).

laws of war were the *lex specialis* applicable to its conflict with al Qaeda.³⁰⁸ Only by clearing the decks can the United States find an opening for the practice of extraordinary rendition. The reasoning behind this move – the use of the *lex specialis* maxim as a doctrine of preemption, and the ousting of one set of rules for a blank slate – is contrary to the international legal order.

III. Conclusion

On September 6, 2006, President Bush finally acknowledged what human rights advocates, investigative journalists, and European investigative bodies have been saying for years³⁰⁹: that the U.S. government has created a secret program aimed at detaining and interrogating so-called “high-value” terrorism suspects outside the public eye.³¹⁰ In this

³⁰⁸ See, e.g., U.S., *Second Report to CAT*, *supra* note 76, at Annex, p. 1 (explaining that “the United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities.”), and U.S., *Written Responses to HRC*, *supra* note 91, at p. 107 (stating in response to a question about indefinite detention without charge, that “Under the law of war, there is no question that a State is authorized to detain combatants – whether lawful or unlawful – for the duration of the armed conflict without charges.”), and HRC, U.S. *Concluding Observations*, *supra* note 112, at ¶ 10 (calling on the U.S. to recognize the applicability of the ICCPR during times of armed conflict).

³⁰⁹ See, e.g., Joseph Goldstein, *Court Weighs ACLU Request on CIA Terror Documents*, N.Y. SUN, June 13, 2006, at 4; *Court Will Investigate Alleged CIA Flights*, L.A. TIMES, June 13, 2006, at A23; Editorial, *The Detention Dilemma*, WASH. POST, June 19, 2006, at A20; Barrie Dunsmore, *Ugly portrait emerges dot by dot*, TIMES ARGUS, June 18, 2006; *Euro MP’s to Extend Probe Into CIA Activities*, EXPATICA, June 13, 2006; Anemona Hartocollis, *Judges Press CIA Lawyer Over Withheld Documents*, N.Y. TIMES, June 13, 2006, at A17; Larry Neumeister, *Court Urged to Protect CIA Detention Info*, ASSOC. PRESS, June 13, 2006; *Region Still Lacks Support for Torture Victims*, Say Observers, IRIN, June 25, 2006, http://www.irinnews.org/S_report.asp?ReportID=54150&SelectRegion=Middle_East; Scott Shane & Mark Mazzetti, *C.I.A. Crackdown Seeks to Tighten Agency’s Secrecy*, N.Y. TIMES, April 24, 2006, at A1; Jan Sliva, *EU Concedes Rendition Flights Took Place*, HERALD (U.K.), June 28 (2006); Jan Sliva, *Probe of CIA Prisons Implicates EU Nations*, ASSOC. PRESS, June 7, 2006, available at <http://abcnews.go.com/International/print?id=2048514>; Ike Seamans, *Above the Law*, MIAMI HERALD, June 25, 2006; Jeremy Smith, *EU Lawmakers Back Report on CIA Terror Kidnappings*, REUTERS, June 12, 2006; Josh White, *Bad Advice Blamed for Banned Tactics*, WASH. POST, June 17, 2006 at A16.

³¹⁰ President Bush stated that “[i]n some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks . . . In these cases, it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts, and -- when appropriate -- prosecuted for terrorist acts,” and said that “a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency . . . I can say that questioning the detainees in this program has given us information that has saved innocent lives by helping us stop new attacks -- here in the United States and across the world.” Press Release, Office of the Press Secretary, President Discusses Creation of Military Tribunals to Try Suspected Terrorists (Sept. 6, 2006) [hereinafter President Bush Speech Sept. 6, 2006], available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>; see also Press Release,

statement and others since, the President used the term “The Program” to describe a network of secret detention sites and “alternative procedures” for interrogation.³¹¹ What has been remarkable in the time since is the way the President has repeatedly acknowledged – even after his administration refused, for years, to disclose any information about The Program – that the U.S. government has set up a secret system with world-wide reach.³¹²

While surprising, this acknowledgement was in many ways a direct result of the Supreme Court’s *Hamdan* decision, which suggested that all activities carried out in the “war on terror” must pass at least the minimum standards set out in Common Article 3 of the Geneva Conventions. The Program, with its heightened interrogation techniques, secret detention, and extraordinary renditions, was vulnerable under these standards. Weeks after President Bush announced the existence of The Program, Congress passed the Military Commissions Act³¹³ (MCA) which sets out procedures for detaining, interrogating, and trying “unlawful enemy combatants” as defined in the Act. Although President Bush has since stated that the CIA-run Program may continue pursuant to the MCA,³¹⁴ there is in fact no authorization for secret detention or extraordinary rendition in the law.³¹⁵

Meanwhile, the government continues to assert that these practices are not prohibited: because they take place outside the United States; because our partner governments promise decent treatment; and because the procedures are part of a new kind of war, they exist in a grey area that precludes wrongfulness. These arguments, constructed on the difficult to navigate shores where international humanitarian and human rights law begins to lose its clarity, sound logical on their face. It is true that the extraterritorial application of human rights law brings with it complex challenges. It makes sense that the U.S. would want to obtain promises from its diplomatic partners. And the horrifically violent actions of our latest opponents do call into question the best way to fight this “war.” But, as argued in this Article, complexity cannot defeat the law’s basic principles.³¹⁶ When the limits are in sight, it is important to return to the law’s

Office of the Press Secretary, Press Conference of the President (Sept. 15, 2006) [hereinafter President Bush Speech Sept. 15, 2006], *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>.

³¹¹ See, e.g., President Bush Speech Sept. 6, 2006, *supra* note 310, and President Bush Speech Sept. 15, 2006.

³¹² For a discussion of the post-9/11 world-wide detention policy, see JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

³¹³ Military Commissions Act of 2006, S. 3930, 109th Cong. (2006).

³¹⁴ See Press Release, President Bush Signs Military Commissions Act of 2006 (October 17, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> (stating that “This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives”).

³¹⁵ Even John Bellinger, Legal Adviser to the Department of State, has recognized that the CIA’s program must still pass legal review, above and beyond the text of the MCA. See Bellinger, *supra* note 287 (quoting John Bellinger as stating that “The act itself does not specifically address the CIA program”).

³¹⁶ See Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT’L L. 686 (2004) (arguing that although

origins. For human rights and humanitarian law, those origins lie in the principles of human dignity and humanity.³¹⁷ As demonstrated in this paper, rigorous analysis of the law with these principles in mind unquestionably reveals that certain actions – here, extraordinary rendition – are impermissible. While these principles may not provide new bright line rules, they should guide our interpretations when those rules seem fuzzy. Anything less would do violence to the rule of law.

terrorism presents new challenges, the rule of law must not be abandoned in finding ways forward).

³¹⁷ As the International Tribunal for Yugoslavia has explained:

The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person. . . . The general principle of respect for human dignity is. . . the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.

Prosecutor v. Furundzija, No. IT-95-17/1-T, Judgment, ¶ 183 (1998).