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## Methods of the “War on Terror”

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Many speakers in this Symposium have focused principally on “jus ad bellum,” or the international law regulating the decision to resort to armed force. This Article concerns principally “jus in bello,” that is, international humanitarian law or the limits on the methods of war. First, we will provide a brief discussion of the factual and legal setting of extraordinary rendition. Second, we will consider whether and how humanitarian law applies to the war on terror and related conflicts. Third, we will demonstrate how the prohibition of transferring civilians under Article 49 of the Fourth Geneva Convention applies to extraordinary rendition. Fourth, we will discuss several means of addressing the practice of extraordinary rendition, under U.S., international, and foreign law.

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<sup>†</sup> Regents Professor and Fredrikson & Byron Professor of Law. This article draws on David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT'L L. 295 (2007). We have discussed the implications of extraordinary rendition under human rights law in David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006), and we have explored the implications of the practice under the Convention Against Torture and the U.S. Torture Statute in David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006). The authors thank Kendall Bader for his assistance in preparing materials from which this Article is drawn. Copyright (c) 2007 by David Weissbrodt and Amy Bergquist.

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## I. EXTRAORDINARY RENDITION DEFINED

### A. THE FACTUAL SETTING

After the attacks of September 11, 2001, the United States attempted to strengthen its efforts in pursuing alleged terrorist actors by engaging in a covert policy known as "extraordinary rendition." This term was originally a euphemism used to describe an officially recognized but covert policy whereby the United States Government or its agents would capture in a foreign country a person accused of a crime in order to bring that person to justice in the United States. This policy was initially established by the Clinton administration as a means of avoiding some of the problems that are associated with international extradition, such as the absence of extradition treaties and delays in effecting extradition.

The scope of extraordinary rendition has since transformed to encompass the abduction of terror suspects not in order to bring them to justice in the United States, but rather to send them to a third country.<sup>1</sup> It appears that many of the abducted suspects have been subjected to torture and ill-treatment under the direction, or at least acquiescence, of the U.S. Government.<sup>2</sup> The number of extraordinary renditions has accelerated since September 11, 2001,<sup>3</sup> in part because of procedures approved by President Bush for use by the CIA in transferring terror suspects.<sup>4</sup> Egypt appears to be the most frequently used receiving country, and other participants include Jordan, Morocco, Saudi Arabia, Syria, Thailand, and Uzbekistan.

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1. See, e.g., Bob Herbert, Editorial, *It's Called Torture*, N.Y. TIMES, Feb. 28, 2005, at A19.

2. See Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14, 2005, at 106; 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.

3. See, e.g., Craig Whitlock, *Europeans Investigate CIA Role in Abductions; Suspects Possibly Taken to Nations that Torture*, WASH. POST, Mar. 13, 2005, at A1.

4. See Comm. on Legal Affairs & Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, AS/Jur (2006) 03 rev (Jan. 22, 2006); Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1; Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 1.

## B. THE LEGAL SETTING

One way of perceiving extraordinary rendition is to look at the line of cases dealing with the doctrine known by the Latin phrase "*mala captus bene detentus*," which is defined as the process "whereby national courts will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured."<sup>5</sup> In the 1886 decision of *Ker v. Illinois*,<sup>6</sup> the U.S. Supreme Court relied on the *mala captus* doctrine in holding that the requirements of due process were satisfied by the exercise of personal jurisdiction by the State of Illinois over Ker, who was kidnapped in Peru and brought back to the United States to stand trial.

The most visible international case to affirm this principle was *Attorney-General of Israel v. Eichmann*,<sup>7</sup> in which Israeli courts cited to U.S. case law to support the conclusion that Adolf Eichmann's abduction in Argentina did not strip the court of jurisdiction to try him for war crimes.<sup>8</sup> The U.S. Supreme Court reiterated the *mala captus* doctrine in the 1992 case of *United States v. Alvarez-Machain*.<sup>9</sup>

While the *mala captus* doctrine might support the jurisdiction of courts to bring offenders to trial, that doctrine cannot justify the Bush administration's kidnapping of terror suspects for torture and indefinite secret detention.

Since *mala captus* does not provide a basis for extraordinary rendition, we will principally focus on the legality of this practice under the Third<sup>10</sup> and Fourth<sup>11</sup> Geneva Conventions as well as Common Article 3 of all four Geneva

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5. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 250 (4th ed. 2002).

6. *Ker v. Illinois*, 119 U.S. 436 (1886).

7. CrimC (Jer) 40/61 Attorney-General v. Eichmann, [1961] IsrDC 45(3), translated in 36 INT'L L. REP. 5 (1968), *aff'd* CrimA 336/61 Attorney-General v. Eichmann, [1962] IsrSC 16(2033), translated in 36 INT'L L. REP. 277 (1968).

8. *Id.* at 45-52. The court's jurisdiction over Eichmann was facilitated because West Germany used his alleged involvement in crimes against humanity as "a welcome pretext for withholding the customary protection due its citizens abroad" and therefore did not intervene on Eichmann's behalf. See HANNAH ARENDT, EICHMANN IN JERUSALEM 240 (1964).

9. 504 U.S. 655 (1992).

10. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereinafter Third Geneva Convention or Geneva POW Convention].

11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 [hereinafter Geneva Civilian Convention].

Conventions.<sup>12</sup>

## II. APPLICABILITY OF HUMANITARIAN AND HUMAN RIGHTS LAW

In order to apply the Geneva Conventions to a particular conflict, such as the activities of the United States in Afghanistan, Iraq, and the “war on terror” we must consider six questions:<sup>13</sup>

1. Is there an international armed conflict between two or more High Contracting Parties to the Geneva Conventions?
2. Is there a partial or total occupation of territory governed by the Geneva Conventions?
3. If either of the above conditions is met, who is afforded protected person status under the conventions?
4. What rights are afforded to those protected persons?
5. If there is no international armed conflict or occupation, does Common Article 3 apply to the conflict, and what protections does it provide?
6. Regardless of whether humanitarian law applies, does human rights law also provide protections?

### 1. IS THERE AN INTERNATIONAL ARMED CONFLICT BETWEEN HIGH CONTRACTING PARTIES?

Article 2 is common to all four of the Geneva Conventions and identifies situations in which the conventions apply: “The 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 . . .” The Bush administration has argued that since al Qaeda is not a state actor and not a party to the Geneva Conventions, the conflict between the United States and al Qaeda is therefore not governed by the

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12. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950 [hereinafter Second Geneva Convention]; Geneva POW Convention art. 3, *supra* note 10; Geneva Civilian Convention art. 3, *supra* note 11.

13. See Marco Sassoli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195 (2004).

Geneva Conventions.<sup>14</sup> Further, the administration has argued that the Taliban was not widely recognized as the *de facto* government of Afghanistan.<sup>15</sup> Instead, they argued that Afghanistan was a "failed state" and the Taliban could not properly invoke the protections of the Geneva Conventions.<sup>16</sup> This argument would establish an ominous precedent and undermine a principal foundation of humanitarian law, for many states initiate wars on the grounds that the government of the state they are attacking is illegitimate.<sup>17</sup>

The Bush administration has maintained that the Geneva Conventions are "fully applicable" to the conflict in Iraq.<sup>18</sup> Beginning with the U.S. invasion of Afghanistan in 2002 and Iraq in 2003, the United States, Afghanistan, and Iraq—all of which are High Contracting Parties to the Geneva Conventions—were engaged in armed conflict. Gradually the United States and coalition forces began to occupy regions of those countries. In both countries governments friendly to the United States have been established, but tens of thousands of U.S. and related troops are still engaged in military operations in those countries. The Geneva Conventions continue to apply during the period in which there is an armed conflict, and their applicability only ceases "on the general close of military operations."<sup>19</sup> Hence, the Geneva Conventions could still apply to the continuing armed conflicts in Afghanistan and Iraq.<sup>20</sup> Alternatively, one could ask:

14. See John Yoo & Robert J. Delahunty, Draft Memorandum for William J. Haynes II, Application of Treaties and Laws to al Qaeda and Taliban Detainees, Jan. 9, 2002, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 48, 48–49 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

15. See *id.* at 53.

16. See *id.* at 54–62.

17. Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 297 (1991) (noting that U.S. officials have justified the invasion of Panama on the grounds that the Noriega Government was illegitimate).

18. See Senior Military Official (unnamed), Defense Department Background Briefing, May 14, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html>.

19. Geneva Civilian Convention, *supra* note 11, art. 6.

20. As of April 21, 2007, there have been 3,322 U.S. military casualties in Iraq, most of which have occurred since President Bush declared the end of major combat operations. Michael Ewens, Casualties in Iraq, <http://www.antiwar.com/casualties/> (last visited Apr. 22, 2007). One may conclude, however, that the international armed conflict in Afghanistan continued until June 19, 2002, and the international armed conflict in Iraq continued until June 28, 2004. See U.N. Security Council, UN Doc. S/RES/1637 (Nov. 11, 2005) (Iraq); Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRITISH Y.B. INT'L L. 71, 76 (2004) (Afghanistan).

## 2. IS THERE A PARTIAL OR TOTAL OCCUPATION OF TERRITORY GOVERNED BY THE GENEVA CONVENTIONS?

The hostile occupation of one country by another is governed by the Fourth Geneva Convention also known as the Civilian Convention.<sup>21</sup> Article 6 of the Civilian Convention provides that, "In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations . . . ."<sup>22</sup> Hence, by the very language of the Convention, it is irrelevant whether the occupation has ceased; the critical measure is the close of military operations. Occupying powers are bound by many provisions of the Fourth Geneva Convention, including, *inter alia*, Article 49. While it is unclear whether or to what extent occupation has now ended, most of the individuals who have been subjected to extraordinary rendition were abducted during 2002-2004 when the Geneva Conventions clearly applied. Moreover, to the extent that those countries may yet to have seen a "general close of military operations," the humanitarian law of occupation continues to apply.

## 3. WHO IS AFFORDED PROTECTED PERSON STATUS?

### *a. Prisoners of War*

In the case of a conflict of an international character involving two or more High Contracting Parties, the Third Geneva Convention protects prisoners of war detained as a consequence of international armed conflict. Article 4 protects (1) "[m]embers of the armed forces of a Party to the conflict," (2) "members of militias or volunteer corps forming part of [the] armed forces," as well as (3) "members of other militias . . . including those of organized resistance movements." The first two categories of detainees do not need to meet any requirements as to carrying arms openly or wearing uniforms. The third category, that is, "members of other militias . . . including those of organized resistance movements" do need to comply with four additional requirements, including carrying arms openly, "having a fixed distinctive sign recognizable at a

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21. See INT'L COMM. OF THE RED CROSS, COMMENTARY, IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War 47 (Jean S. Pictet ed., 1958) [hereinafter Pictet, Civilian COMMENTARY].

22. Geneva Civilian Convention, *supra* note 19, art. 6.

distance" and "conducting their operations in accordance with the laws and customs of war." The underlying rationale for the four requirements in Article 4(A)(2) is to enable participants in an armed conflict to know whom they may target for armed violence. To the extent that U.S. forces appear to be able to recognize Al Qaeda militia and the Taliban in Afghanistan or Iraq for either attack or capture, they qualify, once detained, as prisoners of war.

*b. Civilians*

Nearly every person who is not protected as a POW automatically acquires protected person status under the Civilian Convention. Article 4 of the Civilian Convention extends protection to "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Article 5 of the Fourth Geneva Convention even extends protection to those persons detained as spies or saboteurs, although they are denied the ability to write home, which of course makes considerable sense.

*c. Unlawful Combatants*

The principal basis for the Bush administration's attempt to deny the applicability of the Geneva Conventions is the claim that certain individuals in U.S. custody are outside of the scope of the Geneva Conventions. The administration has argued that al Qaeda members do not comply with the four requirements listed in Article 4(A)(2) of the POW Convention, and hence they are not entitled to POW status,<sup>23</sup> and should be classified as unlawful combatants. Further, the administration argued that the POW Convention "assumes the existence of 'regular' armed forces fighting on behalf of states."<sup>24</sup>

The Third Geneva Convention, however, makes no mention of the term "unlawful combatants," "unlawful belligerents," or "enemy combatants," and by its terms does not envision a category of fighters or civilians that would be excluded from all Geneva protections.

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23. Yoo & Delahunty, *supra* note 14, at 49–50.

24. George W. Bush, Memorandum for the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, *reprinted in* THE TORTURE PAPERS, *supra* note 14, at 134.



#### 4. WHAT RIGHTS ARE AFFORDED TO THOSE PROTECTED PERSONS?

##### *a. Protection Against Torture and Inhuman Treatment*

Under both the Third and Fourth Geneva Conventions any civilian or prisoner of war is protected from rendition to the extent that they would be subjected to "wilful killing, torture or inhuman treatment."<sup>25</sup> These prohibitions define grave breaches which would make any U.S. soldier or official subject to prosecution for war crimes. Further, the United States must not only avoid engaging in torture and inhuman treatment, but it is responsible for ensuring respect for the prohibition of torture and ill-treatment by other governments.

##### *b. Special Protections Prohibiting the Transfer of Civilians*

With regard to occupation, Article 49 of the Fourth Geneva Convention also includes as a grave breach "unlawful deportation or transfer . . . of a protected person." Article 49 declares: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

#### 5. ARE PERSONS PROTECTED, AND WHAT PROTECTIONS ARE AFFORDED UNDER COMMON ARTICLE 3?

If one cannot find an armed conflict between States parties to the Geneva Conventions and one believes that the U.S. forces are not occupying either Afghanistan or Iraq because the United States is working with established (albeit subservient) new governments in those countries, then one must look elsewhere for applicable rules of international law.

There is one provision of the four Geneva Conventions that may still apply to Afghanistan, Iraq, and the overall war on terror, that is, Common Article 3. Common Article 3 articulates minimum protections for "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" to any of the Geneva Conventions. It

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25. Geneva POW Convention, *supra* note 10, art. 130.

provides "rules of humanity which are recognized as essential by civilized nations" and applies "without any condition in regard to reciprocity." Article 3 protects "[p]ersons taking no active part in the hostilities" from "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." Further, Article 3 provides that those persons "shall in all circumstances be treated humanely."

Under conditions of armed conflict not otherwise governed by the Geneva Conventions, extraordinary rendition violates Common Article 3 if it constitutes an effort to cause or justify torture or cruel, humiliating, or degrading treatment.

#### 6. REGARDLESS OF WHETHER HUMANITARIAN LAW APPLIES, DOES HUMAN RIGHTS LAW ALSO PROVIDE PROTECTIONS FOR VICTIMS OF EXTRAORDINARY RENDITION?

The Bush administration argues that the Geneva Conventions operate as *lex specialis* to the exclusion of other precepts of international law. Under the administration's argument, the "war on terror" can only be viewed within the context of international humanitarian law and not human rights law. But since "unlawful combatants" are not protected under the Geneva Conventions and the Conventions do not apply, they argue, victims of extraordinary renditions are afforded no protection based on humanitarian law or human rights law.<sup>26</sup> To the contrary, as discussed above, at least Common Article 3 applies to victims of extraordinary rendition in the context of the "war on terror." The Supreme Court in *Hamdan v. Rumsfeld* held that Common Article 3 applies to the activities of the Bush administration in detaining suspected enemy combatants in the context of the war on terror.<sup>27</sup> Further, international human rights law protects individuals in all circumstances, even those not governed by humanitarian law. Hence, even if there is no conflict or occupation, individuals are still protected by human rights law. Extraordinary rendition violates numerous international human rights standards, including the International Covenant on Civil

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26. See Fionnuala Ní Aoláin, *The No-Gaps Approach to Parallel Application in the Context of the War on Terror*, 40 ISRAEL L. REV. (forthcoming 2007).

27. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005)).

and Political Rights,<sup>28</sup> the Convention and Protocol Relating to the Status of Refugees,<sup>29</sup> the Convention Against Torture,<sup>30</sup> and the Vienna Convention on Consular Relations.<sup>31</sup>

### III. FURTHER OBSERVATIONS ON THE PROHIBITION OF TRANSFERRING CIVILIANS UNDER ARTICLE 49 OF THE FOURTH GENEVA CONVENTION AS IT APPLIES TO EXTRAORDINARY RENDITION.

If we focus on the Geneva Conventions, however, Article 49 of the Fourth Geneva Convention is the most relevant to extraordinary rendition. Once again, it should be recalled that Article 49 declares, "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

Assistant Attorney General Jack Goldsmith (who subsequently left his post at the Attorney General's office and became a professor at Harvard Law School) advocated a narrow interpretation of the prohibition on deportations and forcible transfers from occupied territories under Article 49 of the Fourth Geneva Convention.<sup>32</sup> Despite the clear and unequivocal language of Article 49, Goldsmith contended that "[T]he United States may, consistent with article 49, (1) remove 'protected persons' who are illegal aliens from Iraq pursuant to local immigration law; and (2) relocate 'protected persons' (whether illegal aliens or not) from Iraq to another country to facilitate interrogation, for a brief but not indefinite period . . ."

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28. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

29. Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* Apr. 22, 1954; Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967.

30. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, G.A. Res. 46, U.N. GAOR 3d Comm., 39th Sess., Annex, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

31. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100, 596 U.N.T.S. 262, 293, *entered into force* Jan. 27, 1980.

32. Draft Memorandum from Jack Goldsmith to Alberto Gonzales, Permissibility of Relocating Certain 'Protected Persons' from Occupied Iraq (Mar. 19, 2004), *reprinted in* THE TORTURE PAPERS, *supra* note 14, at 366.

## 1. EXPLANATION OF "PROTECTED PERSONS" UNDER THE CIVILIAN CONVENTION

An important initial inquiry for each of the Geneva Conventions is a determination of which persons are protected under each convention. Under the terms of the Civilian Convention, nationals of neutral states (such as Jordan, Pakistan, Saudi Arabia, and Syria) "who find themselves in the territory of a belligerent State" are not protected persons as defined in Article Four.<sup>33</sup> Occupied territory, however, is no longer "the territory of a belligerent state"; therefore, nationals of neutral states automatically gain the status of protected persons when occupation begins. Several passages from the authoritative ICRC/Pictet Commentary to the Fourth Geneva Convention directly respond to arguments advanced by Goldsmith in his memorandum. For example, the ICRC/Pictet Commentary explains: "[I]n occupied territory [nationals of neutral States] are protected persons and the Convention is applicable to them . . ."<sup>34</sup>

Accordingly, under this interpretation, nationals of neutral states during occupation are persons protected by Article 49 of the Fourth Geneva Convention and cannot be subjected to transfer or deportation through extraordinary rendition.

It seems appropriate at this juncture to be reminded of the historical context of Article 49. In 1935, all German Jews were stripped of their "citizenship"<sup>35</sup> in preparation for their deportation.<sup>36</sup> This historical background sheds light on Pictet's use of quotation marks in the following passage from the ICRC Commentary on Article 49, which was also quoted by Goldsmith:

There is doubtless no need to give an account here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. . . . The thought of the physical and mental suffering endured by these "displaced persons" . . . can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.<sup>37</sup>

Here, Pictet is recalling a lesson of history: what an

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33. Geneva Civilian Convention, *supra* note 11, art. 4.

34. PICTET, CIVILIAN COMMENTARY, *supra* note 21, at 48.

35. See Vivian Grosswald Curran, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims*, 25 FORDHAM INT'L L.J. 107, n.84 (2001).

36. *Id.* at n.85 (citing the November 25, 1941 decree called the "elfte Verordnung zum reichsbürgergesetz").

37. PICTET, CIVILIAN COMMENTARY, *supra* note 21, at 278-79.

occupying power may call a “deportation” under local immigration law may actually be a pretense to serve some sinister purpose.

## 2. EXPLANATION OF TEMPORARY TRANSFERS

As to Iraqi or Afghan nationals, who are clearly protected persons in the context of an occupation, as well as the assorted other nationals found in those countries, Goldsmith makes a second argument that Article 49 would permit temporary transnational relocation to facilitate interrogation. The ICRC/Pictet Commentary, which was prepared contemporaneously with the drafting of the Geneva Conventions, clearly indicates the erroneous nature of the Goldsmith argument because Article 49 was intended to apply to “the treatment of protected persons accused of offences or serving sentences.”<sup>38</sup>

## IV. ADDRESSING THE PRACTICE OF EXTRAORDINARY RENDITION

### A. HABEAS CORPUS AND THE MILITARY COMMISSIONS ACT OF 2006

In early 2006 we stated that federal habeas statute presents a mechanism enabling persons subjected to extraordinary rendition to challenge their detention in U.S. courts.<sup>39</sup> The Military Commissions Act of 2006 (MCA) alters the availability of habeas corpus as a form of redress in U.S. courts for persons detained in the “war on terror.” A careful examination of the MCA demonstrates, however, that habeas corpus is still a viable mechanism for challenging the practice of extraordinary rendition.

#### 1. *Sources of Rights*

The MCA makes two significant changes to U.S. law which could strip persons of habeas rights. First, it states that “[n]o person may invoke the Geneva Conventions . . . in any habeas

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38. *Id.* at 279 (emphasis added).

39. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006).

corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States."<sup>40</sup> A person alleging that his or her extraordinary rendition is in violation of the Geneva Conventions, however, need not rely on the conventions themselves as a "source of rights," because the War Crimes Act establishes that grave breaches of the conventions are a crime under U.S. law. Hence, a federal statute is the "source of rights," and it makes use of the Geneva Conventions as an interpretive tool, rather than as an independent source of rights. Moreover, the MCA itself confirms that certain acts are grave breaches of the conventions and therefore constitute War Crimes under the federal criminal code.<sup>41</sup> A similar argument could be presented as to the use of the Geneva Conventions to interpret the Due Process clause of the Fifth Amendment.

## 2. *Restrictions on Availability of Habeas Corpus*

The MCA amends the habeas corpus statute to add the following provision:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>42</sup>

There are several reasons why this provision does not strip courts of habeas jurisdiction over persons subjected to extraordinary rendition.

First, a person who has been transferred to the custody of third country is not "detained by the United States." The terms of the habeas statute do not require that a person be "in custody" of a U.S. official in order for habeas rights to apply.<sup>43</sup>

Second, persons subjected to extraordinary rendition have not been determined to be enemy combatants. The MCA specifically provides for persons to be determined to be "unlawful enemy combatant[s]" by a "Combatant Status Review Tribunal or another competent tribunal established under the

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40. Military Commissions Act of 2006, Pub. L. 109-366, § 5(a) (to be codified at 28 U.S.C. § 2241 Note).

41. *See id.* § 6(b) (amending 18 U.S.C. § 2441).

42. *Id.* § 7(a) (to be codified at 28 U.S.C. § 2241(e)).

43. *See* 28 U.S.C. § 2241 (2000).

authority of the President or the Secretary of Defense.<sup>44</sup> There is no process by which these individuals are determined to have any combatant status, and they are generally transferred by the CIA, not the Department of Defense. Yet even if a person has not been determined to be an enemy combatant, the MCA provides that habeas is not available if the person is “awaiting such determination.” Because persons outside of the U.S. detention facility at Guantánamo Bay have no access to any “competent tribunal established under the authority of the President or the Secretary of Defense,” they are not “awaiting” any determination of their enemy combatant status.

Third, even if there is evidence that a person subjected to extraordinary rendition has been properly found to be an “enemy combatant,” the conditions of extraordinary rendition demonstrate that the person is not “properly detained” as an enemy combatant, because the detention resulting from extraordinary rendition violates the Geneva Conventions and presents a serious risk of torture.

Fourth, the “determination” requirement bars applicability of the habeas-stripping provisions to persons subject to extraordinary rendition. The MCA provides that some persons may be determined to be unlawful enemy combatants without a determination by a “competent tribunal.” These individuals are not, however, “determined” to be unlawful enemy combatants; rather, they simply acquire that status because they “ha[ve] engaged in hostilities or . . . ha[ve] purposefully and materially supported hostilities against the United States or its co-belligerents” and are “not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”<sup>45</sup> Yet even if a person could be properly labeled an enemy combatant under those terms, the revisions to the habeas statute only bar jurisdiction for people “who ha[ve] been *determined* by the United States to have been properly detained as an enemy combatant or [are] awaiting such *determination*.”<sup>46</sup> The MCA only uses the words *determined* and *determination* in the context of a finding of a “competent tribunal,” and not in the context of a person simply having engaged in hostilities or supported hostilities against the United States.<sup>47</sup>

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44. Military Commissions Act of 2006, Pub. L. 109-366, § 3(a)(1) (to be codified at 10 U.S.C. § 948a(1)(ii)).

45. *Id.* § 3(a)(1) (to be codified at 10 U.S.C. § 948a(1)(i)).

46. *Id.* § 7(a) (to be codified at 28 U.S.C. § 2241(e)(1)) (emphasis added).

47. Compare 10 U.S.C. § 948a(a)(i) (defining an unlawful enemy combatant as

In conclusion, by the very terms of the Military Commissions Act, habeas corpus is still available as a remedy for persons subjected to extraordinary rendition.

#### B. REMEDIES IN OTHER COUNTRIES

Because extraordinary rendition by definition takes place on the soil of countries other than the United States, U.S. officials involved in the practice are vulnerable to criminal prosecution and civil suits in the countries where they conduct extraordinary rendition activities. Prosecutors in Italy, for example, have brought charges against over twenty CIA agents who are alleged to have conducted an extraordinary rendition on Italian soil. Yet when the Geneva Conventions are implicated, some countries may exercise prosecutorial authority over the responsible individuals regardless of any territorial link. Countries such as Germany recognize universal jurisdiction as a means to fulfill their Geneva Convention obligation to ensure respect for humanitarian law. Therefore, a prosecutor in Germany is presently considering issuing an indictment against Donald Rumsfeld and other U.S. officials for the abuses at Abu Ghraib and Guantánamo. Private individuals or organizations could bring a similar complaint against the officials responsible for extraordinary renditions that violate the Geneva Conventions.

### V. CONCLUSION

The Military Commissions Act arguably eliminates access to U.S. courts for individuals who enjoy a certain level of *bene detentus* status because they have access to competent tribunals to ascertain whether they are enemy combatants. Yet for individuals subject to extraordinary rendition, the *mala detentus* nature of their confinement leaves open the door to U.S. courts. Moreover, foreign jurisdictions are also able to

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"a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)", *with id.* § 948a(a)(ii) (providing in the alternative that an unlawful enemy combatant may be "a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been *determined* to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense" (emphasis added)).



address the illegal practice of extraordinary rendition through prosecution of the responsible individuals—either through standard domestic criminal law, by invoking universal jurisdiction, or by using civil suits.