

# Extraordinary Rendition and the Humanitarian Law of War and Occupation

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## INTRODUCTION

Within months after U.S. President George W. Bush declared the end of “[m]ajor combat operations” in Iraq on May 1, 2003,<sup>1</sup> Kurdish forces captured Hiwa Abdul Rahman Rashul on the territory of coalition-occupied Iraq, transferred him to Central Intelligence Agency (CIA) custody, and then the CIA transported him to Afghanistan for interrogation.<sup>2</sup> Rashul’s transfer shares many characteristics with extraordinary renditions authorized by President Bush and conducted worldwide by the CIA as part of the so-called “war on terror,”<sup>3</sup> but his transfer is distinguished from most others because it directly implicates the humanitarian law of occupation under the Geneva Conventions.<sup>4</sup> This Article

1. Address to the Nation on Iraq from the U.S.S. Abraham Lincoln, 39 WEEKLY COMP. PRES. DOC. 516, 516 (May 1, 2003), available at <http://www.gpoaccess.gov/wcomp/v39no18.html>.

2. See Dana Priest, *Memo Lets CIA Take Detainees out of Iraq; Practice is Called Serious Breach of Geneva Conventions*, WASH. POST, Oct. 24, 2004, at A1. Rashul was returned to Iraq on October 29, 2003. See Edward T. Pound, *Iraq’s Invisible Man*, U.S. NEWS & WORLD REP., June 28, 2004, at 32. As of October 2004, his status was unknown. See Priest, *supra*.

3. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 123–25, 127 (2006); see also David Johnston, *C.I.A. Tells of Bush’s Directive on the Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006 (reporting that the CIA has acknowledged the existence of a classified directive signed by President Bush soon after September 11, 2001 which grants the CIA the authority to set up detention facilities outside of the United States).

4. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S.

concludes that Rashul's transfer, and an uncertain number of other transfers from territory occupied by U.S. forces since 2001,<sup>5</sup> constitute grave breaches of the Geneva Conventions, and proposes several legal mechanisms for addressing those grave breaches.<sup>6</sup>

The Third Geneva Convention (Geneva POW Convention) governs the treatment of Prisoners of War (POWs).<sup>7</sup> Article 130 defines grave breaches to include "any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment,...[and] wilfully causing great suffering or serious injury to body or health...."<sup>8</sup> Article 131 establishes that no High Contracting Party may absolve itself of liability with respect to grave breaches.<sup>9</sup>

The Fourth Geneva Convention (Geneva Civilian Convention) provides protection for civilians during war and occupation.<sup>10</sup> Article 147 defines grave breaches to include, "any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment,...wilfully causing great suffering or serious injury to body or health, [and] unlawful deportation or

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85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva POW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Civilian Convention].

5. See Priest, *supra* note 2.

6. A substantial gap in the analysis of the present article is the omission of a discussion of the applicability of the Additional Protocols of 1977 to the Geneva Conventions of 1949. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006) (opinion joined by four members of the eight-justice panel) ("Many of the [trial protections that have been recognized by customary international law] are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government 'regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'" (quoting William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003))). As the Supreme Court suggests, much of Protocol I and parts of Protocol II are customary international humanitarian law, see Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 88 n.85 (2005); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 187-90 (2005), but the United States is not a party to the protocols, see Cullen, *supra*, at 88 n.85.

7. Geneva POW Convention, *supra* note 4.

8. Geneva POW Convention, *supra* note 4, art. 130.

9. See *id.* art. 131.

10. Geneva Civilian Convention, *supra* note 4.

transfer or unlawful confinement of a protected person....”<sup>11</sup> As with the Geneva POW Convention, Article 148 establishes that High Contracting Parties may not absolve themselves of liability for grave breaches.<sup>12</sup>

A useful framework for identifying grave breaches through application of the Geneva Conventions is set forth in the following sequence of questions:

- (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 the 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 and protections are afforded to those protected persons?<sup>13</sup>

The following four sections address each question in turn, considering both the conflict in Afghanistan and the conflict in Iraq. The fifth section explores mechanisms to address these grave breaches, and the conclusion discusses the broader implications of the government justifications for extraordinary rendition.

## I. IS THERE AN INTERNATIONAL ARMED CONFLICT BETWEEN TWO OR MORE HIGH CONTRACTING PARTIES?

Article 2 is an article common to all four of the Geneva Conventions

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11. *Id.* art. 147. Although Article 147 is referred to as an “Article common to the four conventions,” see INT’L COMM. OF THE RED CROSS, COMMENTARY, IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War 602 n.1 (Jean S. Pictet ed., 1958) [hereinafter Pictet, Civilian COMMENTARY], only the Fourth Geneva Convention includes as a grave breach the “unlawful deportation or transfer or unlawful confinement of a protected person.” See Geneva Civilian Convention, *supra* note 4, art. 147.

12. See Geneva Civilian Convention, *supra* note 4, art. 148.

13. For an example of application of a similar framework, see Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195 (2004). If neither of the conditions in the first two questions is met, one should consider whether Common Article 3 applies to the conflict. The applicability of Common Article 3 to extraordinary rendition has been discussed elsewhere. See Weissbrodt & Bergquist, *supra* note 3, at 151–53. For further discussion of the applicability of Common Article 3 to the so-called “war on terror,” see Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795–97 (2006); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 162–63 (D.D.C. 2004); see also INT’L COMM. OF THE RED CROSS, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 34–37 (Jean S. Pictet ed., 1958) [hereinafter Pictet, POW COMMENTARY]; LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 138–39 (2002); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 195 (2005).

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, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>14</sup>

The primary argument advanced by the Bush administration is that certain armed conflicts with certain combatants are outside of the scope of the Geneva Conventions. A January 9, 2002, draft memorandum authored by John Yoo and Robert Delahunty at the Justice Department's Office of Legal Counsel first articulated this argument with regard to the conflict in Afghanistan.<sup>15</sup> The memorandum first argues that al Qaeda is a non-state actor and not a party to the Geneva Conventions, and the conflict between the United States and al Qaeda is therefore not governed by the Geneva Conventions.<sup>16</sup> The memorandum also contends that Taliban members are not protected parties under the Geneva Conventions because, while Afghanistan is a party to the Geneva Conventions, the Taliban was not widely recognized as the *de facto* government of the country.<sup>17</sup> Instead, they argue, Afghanistan was a "failed state" and the Taliban could not properly invoke the protections of the Geneva Conventions.<sup>18</sup> Most of these arguments were embraced in a subsequent memorandum authored by then-White House Counsel Alberto Gonzales.

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14. *E.g.*, First Geneva Convention, *supra* note 4, art. 2.

15. See Draft Memorandum from John Yoo & Robert J. Delahunty to William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Yoo & Delahunty], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

16. See *id.* at 48–49.

17. See *id.* at 53.

18. See *id.* at 54–62. This argument would establish an ominous precedent and undermine the entire foundation of humanitarian law, for many states initiate wars on the grounds that the government of the state they are attacking is illegitimate. See, e.g., Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT'L L.* 275, 284 (1973) (describing Hitler's unilateral assertions in 1938 that the Czech government's treatment of various nationalities constituted "madness," allegedly justifying German "humanitarian intervention" in Czechoslovakia); 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 justified the invasion of Panama on the grounds that the Noriega government was illegitimate).

les,<sup>19</sup> and ultimately in a confidential memorandum issued by President Bush on February 7, 2002.<sup>20</sup>

The Bush memorandum concludes that the Geneva POW Convention “applies to conflicts involving ‘High Contracting Parties,’ which can only be States.”<sup>21</sup> Bush concedes that the Geneva Conventions governed the U.S. conflict with the Taliban in Afghanistan, in spite of Yoo & DeLahunty’s proposed “failed state” theory.<sup>22</sup> Instead, he excludes the Taliban detainees from protection under the Geneva POW Convention on other grounds.<sup>23</sup>

The Bush administration has maintained that the Geneva Conventions are “fully applicable” to the conflict in Iraq.<sup>24</sup> Beginning with the U.S. invasion of Iraq in March 2003, the United States and Iraq, both High Contracting Parties to the Geneva Conventions, were engaged in armed conflict. Gradually the U.S. and coalition forces began to occupy regions of the country as the armed conflict continued. While it is unclear whether occupation has ended,<sup>25</sup> one may argue that the Geneva Conventions continue to apply to Iraq because they apply to conditions of armed conflict, and their applicability only ceases “on the general close of military operations.”<sup>26</sup> Arguably, Iraq has yet to observe a “general close of military operations;”<sup>27</sup> hence, the Geneva Conventions may

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19. Draft Memorandum from Alberto R. Gonzales to the President, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), in *THE TORTURE PAPERS*, *supra* note 15, at 118.

20. Memorandum from George W. Bush to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), in *THE TORTURE PAPERS*, *supra* note 15, at 134.

21. *Id.* at 134.

22. *See id.*

23. *See id.* at 134–35 (“I determine that the provisions of Geneva will apply to our present conflict with the Taliban.... I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”); *see also* Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 475 (2002) (describing the broader context of this determination).

24. *See* Senior Military Official (unnamed), Interrogation Procedures and Detention Facilities in Iraq, Defense Department Background Briefing in Pentagon Briefing Room, Arlington, Virginia (May 14, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html> (“From the very beginning of the conflict, the Geneva Conventions have been fully applicable. There’s never been any dispute about that, never any doubt. During the initial phase, it was an international armed conflict, to which the Geneva Conventions were applicable. We are now in a state of legal occupation. The Geneva Conventions are applicable to that, as well.”).

25. *See infra* notes 61–64 and accompanying text.

26. Geneva Civilian Convention, *supra* note 4, art. 6.

27. As of November 9, 2006, there have been 2,842 U.S. military casualties in Iraq. Anti-War.com, *Casualties in Iraq*, (Michael Ewens ed.) available at <http://www.antiwar.com/casualties/> (last visited Nov. 12, 2006). Of those casualties, over ninety-five percent have oc-

be in effect. A similar argument applies to Afghanistan, particularly in light of the Supreme Court's recent observation that the U.S. armed conflict with the Taliban and al Qaeda is ongoing.<sup>28</sup>

This observation raises the issue of when the Geneva Conventions cease to be in effect. While the Geneva Civilian Convention is fairly explicit, the authoritative<sup>29</sup> Commentary of Jean S. Pictet notes that it "is the only one of the four Geneva Conventions which contains specific provisions relating to the general cessation of its application. The other Conventions contain clauses dealing with the moment when the Convention ceases to apply to each individual protected person...."<sup>30</sup> The provisions of the Geneva POW Convention, for example, "apply to [protected persons] from the time they fall into the power of the enemy and until their final release and repatriation."<sup>31</sup> The Geneva Civilian Convention contains a similar provision protecting detained or interred individuals until they are released or repatriated.<sup>32</sup> In situations of international armed conflict, the provisions relating to civilians who are not detained cease to have effect on the general close of military operations.<sup>33</sup> The Commentary to the Geneva Civilian Convention indicates

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curred since President Bush announced the end of "major combat operations," and over sixty-nine percent have occurred since Iraq assumed sovereignty. *See id.*

28. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804 (2006) (Breyer, J., concurring) ("[O]ur Nation's armed conflict with the Taliban and al Qaeda...continues as we speak...."); Vance Serchuk, *Dutch Retreat?: The Perils of Turning Afghanistan over to NATO*, WKLY. STANDARD, Jan. 16, 2006, at 18 (describing 2005 as "the deadliest year for U.S. forces in Afghanistan since the post-9/11 invasion" and noting that U.S. forces are advancing into areas of Afghanistan still controlled by the Taliban); Remarks on the War on Terror in Arlington, Virginia, 42 WEEKLY COMP. PRES. DOC. 5, 7 (Jan. 4, 2006), available at <http://www.gpoaccess.gov/wcomp/v42no01.html> (noting that in 2006 the number of international forces in Afghanistan will increase); *CBS Evening News* (CBS television broadcast Aug. 3, 2006) ("The war in Afghanistan has suddenly become more intense...."). As of mid 2006, the United States had approximately 21,000 troops in Afghanistan. *See 4 Suicide Bombers Are Killed*, CHI. TRIB., July 25, 2006, at C11. The government intends to maintain its troop levels in the country. General Peter Pace, Chairman of the Joint Chiefs of Staff, Defense Department Regular Briefing with Secretary of Defense Donald H. Rumsfeld in Pentagon Briefing Room, Arlington, Virginia (Aug. 2, 2006), available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3692>.

29. *See Hamdan*, 126 S. Ct. at 2790 n.48 ("Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions."); *see also id.* at 2789–90, 2794 nn.57–58, 2795 n.62, 2796–97 & nn.63–64; 2832 (Thomas, J., dissenting), 2852, 2854 (Alito, J., dissenting) (citing Pictet's Commentary as an interpretive tool).

30. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 59.

31. Geneva POW Convention, *supra* note 4, art. 5, para. 1.

32. *See* Geneva Civilian Convention, *supra* note 4, art. 6, para. 4 ("Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.")

33. *Id.* art. 6, para. 2 ("In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.")

that “in most cases the general close of military operations will be the final end of all fighting between all those concerned.”<sup>34</sup> Therefore, to the extent that the parties have not yet observed a general close of military operations,<sup>35</sup> the provisions of the Geneva Civilian Convention still apply to Afghanistan and Iraq. Moreover, regardless of whether a general close of military operations has occurred in Afghanistan or Iraq, the Conventions also apply to persons who are still held under the power of U.S. or coalition forces.<sup>36</sup>

If at some point the original international armed conflicts in Afghanistan and Iraq did end, the Geneva Conventions would still apply based on U.S. involvement with the armed conflicts against insurgents in Afghanistan and Iraq. U.S. assistance to the current governments in Afghanistan and Iraq in their armed conflicts with insurgencies suggest that the present conflicts could constitute “internal armed conflicts that have become ‘internationalized’ by virtue of...foreign assistance....”<sup>37</sup> In this case, they would simply be “re-internationalized,” in light of the recognized international armed conflicts existing prior to the current internal armed conflicts. The involvement of an outside government fighting on behalf of one party to a civil war arguably transforms that conflict into an international armed conflict.<sup>38</sup> During the Vietnam War, for example, the United States insisted that it was not an occupying power, and that it was present in the country at the invitation of the government of South Vietnam.<sup>39</sup> Nonetheless, the United States insisted on treating all enemy combatants as prisoners of war,<sup>40</sup> maintaining that the Geneva Conventions were fully in force.<sup>41</sup> By analogy, therefore, the Vietnam War suggests that the full scope of the Conventions should apply to the current conflicts in Afghanistan and Iraq.

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34. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 62.

35. *See supra* notes 27–28.

36. *See supra* notes 30–32 and accompanying text.

37. David Weissbrodt, *The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 21 VAND. J. TRANSNAT'L L. 313, 337 (1988); *see also* W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459, 465 (1988) (rejecting the distinction between internal conflicts and international wars as incompatible with the “thrust” of humanitarian law).

38. *See* George H. Aldrich, *The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT'L L. 42, 63 (2000).

39. *See, e.g.*, U.S. Dep't of State, *Aggression from the North: The Record of North Vietnam's Campaign to Conquer South Vietnam*, Pub. No. 7839, Far Eastern Series 130, (Feb. 1965), *reprinted in* VIETNAM: HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 286 (Marvin E. Gettleman ed., 1965).

40. *See* Aldrich, *supra* note 38, at 62.

41. *See* Joseph W. Bishop, Jr., *Book Note*, 119 U. PA. L. REV. 900, 902 (1971) (reviewing TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970)).

Some commentators have argued that the United States and al Qaeda cannot possibly be “at war” under international law because wars only exist either between states or between a state and a group that meets certain requirements of sovereignty.<sup>42</sup> Because the Geneva Conventions apply not only to “cases of declared war” but also to “any other armed conflict which may arise between two or more of the High Contracting Parties,”<sup>43</sup> for the purposes of the Convention it is irrelevant whether the conflict constitutes a “war” per se. More important is the fact that, as a non-state actor, al Qaeda is not a High Contracting Party.<sup>44</sup> Therefore, the provisions of the Geneva Conventions (other than Common Article 3) do not apply to the conflict between the United States and al Qaeda, except to the extent that the conflict is part of another conflict between High Contracting Parties,<sup>45</sup> such as the conflict between the United States and the Taliban in Afghanistan, or the United States and Iraq prior to occupation.<sup>46</sup> Members of al Qaeda may also receive protections under the Geneva Civilian Convention, particularly during occupation.<sup>47</sup>

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

The term “occupation” as it applies to the Geneva Civilian Convention is intentionally broad.<sup>48</sup> A territory is occupied if forces control it.<sup>49</sup>

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42. See, e.g., *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1012 (2d Cir. 1974) (“The cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty.”); Derek Jinks, *September 11 and the Laws of War*, 28 *YALE J. INT’L L.* 1, 8 n.38 (2002) (collecting citations); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *MICH. J. INT’L L.* 1, 8 n.16 (2001) (arguing that al Qaeda has not met the “insurgent criteria” of controlling defined territory and having other characteristics of a state).

43. Geneva Civilian Convention, *supra* note 4, art. 2, para. 1.

44. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 52 (2002) (stating that non-state actors “have no capacity to become parties to the Conventions as such”); see also Iain Scobbie, *Tom Franck’s Fairness*, 13 *EUR. J. INT’L L.* 909, 923 n.89 (2002) (describing the Palestinian Liberation Organization’s attempt to accede to the Geneva Conventions).

45. Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) (describing the Government’s argument that “Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban,” and therefore the full Geneva Conventions presumably applicable to the conflict with the Taliban in Afghanistan, a High Contracting Party, did not extend to Hamdan).

46. See also Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 *HASTINGS INT’L & COMP. L. REV.* 303, 306 (2002) (noting that the characterization of the nature and scope of the U.S. armed conflict in the “war on terrorism” is unclear and observing that each potential characterization “implicate[s] [a] dramatically different international legal regime[.]”).

47. See *infra* notes 100–17 and accompanying text.

48. See Pictet, *Civilian COMMENTARY*, *supra* note 11, at 60; see also Adam Roberts, *What is a Military Occupation?*, 55 *BRIT. Y.B. INT’L L.* 249, 299–304 (1984) (contending that occupation

Article 49 (which governs only during occupation) even applies to patrols penetrating into enemy territory without any intention of staying.<sup>50</sup> Because both Afghanistan and Iraq are High Contracting Parties, the United States would be governed by the Geneva Civilian Convention because of its obligations as an occupying power.<sup>51</sup>

Some commentators have stated that Afghanistan was, at some point, occupied by U.S. forces.<sup>52</sup> The actions of U.S. forces confirm that those forces were in control of at least parts of the country for some period of time.<sup>53</sup> As demonstrated below, because Afghanistan arguably has yet to

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under the Geneva Conventions is a broad term and should be construed so as to avoid placing armed forces outside their home countries in “something of an international legal limbo”). The Commentary indicates that the term is broader than the meaning of occupation under the Fourth Hague Convention of 1907, which states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Convention Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention].

49. See Pictet, *Civilian COMMENTARY*, *supra* note 11, at 47.

50. See *id.* at 60. Given the Bush administration’s characterization of the “global war on terror,” the Geneva Convention’s provisions governing occupation could arguably apply when CIA forces enter a sovereign state to seize a terror suspect without permission of that state. See Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan*, WASH. POST, Dec. 6, 2005, at A1 (describing CIA efforts to deceive Italian authorities when they seized Abu Omar in Milan).

51. The International Court of Justice issued an advisory opinion in 2004 concluding that as long as an occupation is subsequent to a conflict between two High Contracting Parties, it is irrelevant whether the occupied territory itself falls under the sovereignty of a High Contracting Party. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 174 (July 9). For a thoughtful criticism of the court’s reasoning in this part of the opinion, see Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT’L L. 102, 103–05 (2005). Because both Afghanistan and Iraq are High Contracting Parties, the present article does not need to rely on the court’s broad interpretation of Article 2.

52. See, e.g., Steve Sheppard, *Propter Honoris Respectum: Passion and Nation: War, Crime, and Guilt in the Individual and the Collective*, 78 NOTRE DAME L. REV. 751, 751 (2003) (“At the time of this writing, U.S. soldiers guard the recently occupied capital of Afghanistan...”). The United States has resisted being characterized as an occupying power. See Drew Brown, *Official Says More Troops Could Have Kept Fewer Terrorists from Escaping*, KNIGHT RIDDER WASH. BUREAU, June 27, 2002 (“The United States and its allies have been anxious to avoid being perceived as foreign occupiers or invaders in Afghanistan.”); cf. Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 349 (2002) (contending that the United States deliberately chose not to occupy Afghanistan). The terms of the conventions, however, do not allow the United States to decide whether it is an occupying power. See *supra* notes 48–50 and accompanying text. To permit a country to make such a unilateral determination would undermine the provisions in the Civilian Convention governing the actions of the occupying power.

53. See Gerard Baker & James Kynge, *Bombing Raids “May Have Killed bin Laden,”* FIN. TIMES (London), Dec. 24, 2001, at 7 (noting that interim President Hamid Karzai was sworn in on December 22, 2001); Craig Gordon, *Marines Hold Prisoners/FBI to Interview al-Qaida Fighters*, NEWSDAY, Dec. 19, 2001, at A7 (reporting that the United States had constructed a prison at Kandahar by December 18, 2001); Thomas E. Ricks, *War Shifts from Combat Sweeps to*

see the general close of military operations,<sup>54</sup> the United States may still be bound by the Conventions as an occupying power.<sup>55</sup> The fact of U.S. occupation of Iraq is not in dispute.<sup>56</sup>

With respect to either occupation, the Bush administration may assert that the United States is no longer an occupying power,<sup>57</sup> and accordingly the Conventions have ceased to apply. This argument hinges on the language of Article 6 of the Geneva Civilian Convention, which 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>58</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. Moreover, even if there were a consensus that Afghanistan or Iraq has observed a general close of military operations,<sup>59</sup> and that one year has passed since that time, the Bush administration’s view that occupation has ceased ignores the remainder of Article 6 of the Geneva Civilian Convention, which provides:

[T]he Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.<sup>60</sup>

While it is unclear whether or to what extent occupation has in fact ended, as long as the United States exercises functions of government in

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*Small Units Probing Shadows*, WASH. POST, July 7, 2002, at A1 (“[T]he intention now is that almost all of the 7,000 U.S. soldiers in the country should increasingly play less a purely military role and more a political one, in effect acting as a reassuring presence to deter challenges to the Karzai government and to the international peacekeeping force in Kabul.”); *see also* Tim Golden, *U.S. Says It Fears Detainee Abuse in Repatriation*, N.Y. TIMES, Apr. 30, 2006 (“The United States is paying \$12 million to refurbish part of an old Soviet-built prison outside Kabul to house transferred detainees....”); *cf. supra* note 28 (noting that, as of mid-2006, there are 21,000 U.S. troops in Afghanistan and that the United States expects to maintain those numbers).

54. *See supra* note 28.

55. *See supra* notes 24–36 and accompanying text.

56. *See supra* note 24.

57. *Cf.* Press Release, Security Counsel, Press Statement by Security Council President on Handover of Sovereignty to Iraq, U.N. Doc SC/8136 (June 28, 2004) (stating that the handover of authority on June 28, 2004 ended the occupation of Iraq).

58. Geneva Civilian Convention, *supra* note 4, art. 6.

59. *But see supra* notes 27 and 28 and accompanying text.

60. Geneva Civilian Convention, *supra* note 4, art. 6.

Afghanistan or Iraq, the United States is bound by the above-listed Articles.

The administration may argue that Iraq assumed sovereignty on June 28, 2004,<sup>61</sup> but the United States still exercises certain functions of government in Iraq, including the maintenance of security forces<sup>62</sup> and detention facilities,<sup>63</sup> as well as border control.<sup>64</sup> Hence, the United States

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61. See The President's News Conference with Prime Minister Tony Blair of the United Kingdom in Istanbul, 40 WEEKLY COMP. PRES. DOC. 1170, 1170 (June 28, 2004), available at <http://www.gpoaccess.gov/wcomp/v40no27.html>. But see CIA, WORLD FACTBOOK (2005), available at <https://www.cia.gov/cia/download2005.htm> (stating that as of October 20, 2005, the "government type" of Iraq was "none"). For a useful discussion applying property law's "bundle of sticks" analogy to sovereignty, see Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 115-18 (2003). U.S. involvement in Iraq reveals some of these layers of sovereignty and control. See Associated Press, *Saddam's Lawyers Want France to Force U.S. to Permit Access to Client*, FRONTRUNNER, July 23, 2004 (noting that in June 2004 U.S. forces transferred "legal custody" of Saddam Hussein and his top lieutenants to Iraq's interim government, thereby allegedly stripping them of their POW status, but that "[t]he men remain detained, with U.S. forces as their jailers"); see also *infra* note 131 (demonstrating that a transfer designed to strip a person of POW status and protections violates Articles 1 and 12 of the POW Convention).

62. See *Accelerating Economic Progress in Iraq: Hearing Before the S. Foreign Rels. Comm.*, 109th Cong. (July 20, 2005) (statement of Frederick D. Barton, Senior Advisor, Center for Strategic and International Studies), available at <http://foreign.senate.gov/testimony/2005/BartonTestimony050720.pdf> ("Right now the U.S. military controls 70% of the \$18 billion Iraq Relief and Reconstruction Fund."); Alan Cowell & David S. Cloud, *British Memo Details a Plan to Cut Troops*, N.Y. TIMES, July 11, 2005, at A7 (reporting that a classified British memo indicated that the U.S. military hoped to hand over control of fourteen of Iraq's eighteen provinces to Iraqi forces by the end of 2006). As of early 2006, the United States had about 138,000 troops in Iraq. See *Inquiry to Hear Election Complaints*, WASH. POST, Jan. 1, 2006, at A3.

63. See Associated Press, *U.S. to Expand Prison System in Iraq*, FRONTRUNNER, June 28, 2005 (reporting U.S. military plans to expand its prisons in Iraq to detain up to 16,000 people); see also U.S. DEP'T OF STATE, UPDATE TO ANNEX ONE OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE (Oct. 21, 2005), available at <http://www.state.gov/g/drl/rls/55712.htm> (stating that U.S.-led coalition forces were detaining approximately 13,000 persons in Iraq as of September 2005); Ellen Knickmeyer, *Inspectors Find More Torture at Iraqi Jails*, WASH. POST, Apr. 24, 2006, at A1 (reporting that U.S. troops in November 2005 transferred Iraqi-held detainees into U.S. military custody after discovering signs of torture); Nancy A. Youssef, *Last Days at Abu Ghraib*, STAR TRIB. (Minneapolis), Aug. 27, 2006, at A6 (noting that U.S. authorities had removed approximately 3,600 prisoners from Abu Ghraib and had transferred most of them to two other U.S.-run detention centers in Iraq). But see Knickmeyer, *supra* (noting that the Iraqi Justice Minister insisted that U.S. troops "'don't have the right' to transfer detainees from detention centers operated by Iraqi ministries"). There is some inconsistency regarding who is responsible for detentions in the U.S. military's three main detention facilities in Iraq. Compare *Americans Held for Aiding Insurgents*, CHI. TRIB., July 7, 2005, at 12 ("The U.S. military in Iraq has detained five Americans for suspected insurgent activity, Pentagon officials said Wednesday."), with Daily Press Briefing, Sean McCormack, Spokesperson, U.S. Dep't of State (July 7, 2005), available at <http://www.state.gov/r/pa/prs/dpb/2005/49027.htm> ("Mr. Kar is being held by the multinational force in Iraq and the U.S. Defense officials from the multinational force have been in regular contact with him.").

maintains a high level of control over Iraq, even after official transfer of sovereignty.<sup>65</sup> In Afghanistan, the United States still retains control over certain detention facilities and detainees in Afghanistan, and the United States controls the transfer of those detainees.<sup>66</sup> Because the Geneva POW and Civilian Conventions protect detained persons until they are released or transferred, those persons held in detention are potentially protected by one of those two Conventions while in U.S. control in Afghanistan.<sup>67</sup> Therefore, regardless of the status of occupation, protected persons who are not yet released or repatriated continue to be protected until their release or repatriation.<sup>68</sup> In summary, the Geneva Civilian Convention's provisions regulating occupation are still in force in both Afghanistan and Iraq, particularly as they relate to detainees in each country, as well as border control and security operations in Iraq.

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64. See CIA, *WORLD FACTBOOK*, *supra* note 61 (“[C]oalition forces assist Iraqis in monitoring boundary security.”); Michael Barone, *Getting Specific*, U.S. NEWS & WORLD REP., Dec. 12, 2005, at 44 (reporting that the Iraqi army has been redirected “from border control to internal policing”); Hernán Rozemberg, *U.S. Border Patrol Helping Iraqis Set Boundaries*, SAN ANTONIO EXPRESS-NEWS, June 23, 2005, at 1A (“The [U.S.] border support teams will be dispatched as long as the [Coalition] military says they’re needed.... The military has no plans to call them off anytime soon, [Lt. Col. Fred] Wellman, [spokesman for the Multi-National Security Transition Command in Baghdad] said.”).

65. See Patrick Cockburn, *The True, Terrible State of Iraq and the London Link*, INDEPENDENT, July 20, 2005, at 29 (“The much-resented presence of U.S. troops in Iraq has helped fuel the insurgency and tainted Iraqi governments as puppets of the US.”); Jeffrey Gettleman, *Iraqis Start to Exercise Power Even Before Date for Turnover*, N.Y. TIMES, June 13, 2004, at 1 (“[A] large United States Embassy is being built on the grounds of the occupation authority in central Baghdad, essentially to serve as a shadow government.”); Fox News Sunday, Dec. 25, 2005 (Gen. Peter Pace, Chairman of the Joint Chiefs of Staff, interview with Chris Wallace, Washington, D.C.), available at [http://www.jcs.mil/chairman/speeches/051225\\_CJCS\\_FOX-NEWS-SUNDAY.html](http://www.jcs.mil/chairman/speeches/051225_CJCS_FOX-NEWS-SUNDAY.html) (reporting that U.S. forces will be “turning over more and more territory on the ground” to Iraqi forces and predicting that territories “currently controlled, mostly by coalition forces” will be handed over to Iraqis).

66. See Jimmy Burns & Rachel Morarjee, *US Plans Afghan Jail for Terror Suspects*, FIN. TIMES (London), Jan. 5, 2006, at 1 (reporting that approximately 500 people are held by the U.S. military at the Bagram and Kandahar bases in Afghanistan, that others are believed to be held in secret locations elsewhere in the country, and that the United States plans to construct a new high-security prison in Afghanistan to receive Guantánamo detainees and other terror suspects); Daily Press Briefing, Scott McClellan (May 23, 2005), available at <http://www.whitehouse.gov/news/releases/2005/05/20050523-9.html> (noting that the United States maintains control over detainees at Bagram, and will only transfer them to the custody of the government of Afghanistan after certain security measures are in place); see also Council of Europe, Committee on Legal Affairs and Human Rights, *Draft Report: Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, at 18, para. 65, AS/Jur (2006) 16 Part II (June 7, 2006) (prepared by Dick Marty), available at [http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf) (noting that “[t]he axis between Tashkent and Kabul was well known for detainee transfers”).

67. See *supra* notes 30–60 and accompanying text.

68. See *supra* note 60 and accompanying text.

### III. WHO IS AFFORDED PROTECTED PERSON STATUS?

People who are detained after being engaged in combat are typically protected as prisoners of war, while civilians enjoy a separate set of protections. Part A describes who is entitled to prisoner of war protections, and Part B explores the contention that some fighters are “unlawful combatants” and therefore unprotected by the Geneva Conventions. Part C sets forth the categories of civilians protected by the Geneva Conventions, and Part D addresses the relationship between the Geneva Civilian and POW Conventions that ensures that no individual falls outside the scope of Geneva’s humanitarian law protections.

#### A. *Prisoners of War*

Article 4 of the Geneva POW Convention describes the people protected by that Convention.<sup>69</sup> Section A(1) of Article 4 defines POWs as

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69. Article 4 reads:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. 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.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) That of being commanded by a person responsible for his subordinates;
  - (b) That of having a fixed distinctive sign recognizable at a distance;
  - (c) That of carrying arms openly;
  - (d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

...

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

Geneva POW Convention, *supra* note 4, art. 4.

“[m]embers 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” who have fallen into enemy hands.<sup>70</sup> Section A(2) qualifies another category of persons for POW protections:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil

four conditions, including carrying arms openly and wearing a uniform or other identifiable marker.<sup>71</sup> There is some debate as to whether the four conditions detailed in Section A(2) also apply to individuals in Section A(1).<sup>72</sup> A careful reading, however, supports the conclusion that the four conditions constitute stricter requirements for individuals who are not members of the armed forces of a party to the conflict, rather than general requirements for all individuals seeking POW status.<sup>73</sup>

#### B. “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 ineligible for the protections offered under the Geneva Conventions.<sup>74</sup> The Yoo and Delahunty memorandum mentioned above argues that al Qaeda members do not comply with the four requirements listed in Article 4(A)(2) of the Geneva POW Convention, and therefore are not entitled to POW status.<sup>75</sup> The Bush memorandum

70. Geneva POW Convention, *supra* note 4, art. 4(a)(1).

71. The conditions are: “(a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.” Geneva POW Convention, *supra* note 4, art. 4(2).

72. Compare Kretzmer, *supra* note 13, at 191 (arguing that the conditions do not apply to the armed forces of a High Contracting Party) with Adam Roberts, *Role of Law in the “War on Terror”: A Tragic Clash*, 97 AM. SOC’Y INT’L L. PROC. 18, 22 (2003) (contending that all combatants must satisfy the four criteria in order to receive POW protections).

73. Pictet’s Commentary on the Geneva Civilian Convention confirms this conclusion: “There are certain cases about which some hesitation may be felt. We may mention, first, the case of partisans, to which Article 4, A (2), of the Third Convention refers. Members of resistance movements must fulfill certain stated conditions before they can be regarded as prisoners of war.” Pictet, *Civilian COMMENTARY*, *supra* note 11, at 50.

74. See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006).

75. Yoo & Delahunty, *supra* note 15, at 49–50.

determined that the Taliban were excluded from protection under the Geneva POW Convention because they were “unlawful combatants.”<sup>76</sup> The Bush memorandum also argues that the Geneva POW Convention “assumes the existence of ‘regular’ armed forces fighting on behalf of States.”<sup>77</sup> In fact, the Convention makes no mention of “unlawful combatants,” “unlawful belligerents,” or “enemy combatants,”<sup>78</sup> and by its terms does not envision a category of fighters in an international armed conflict that would be excluded from all Geneva protections. Additionally, the Convention only uses the term “regular armed forces” to describe a third category of POWs in Article 4(A)(3).<sup>79</sup> Article 4(A)(2) actually presumes the existence of “organized resistance movements, belonging to a Party to the conflict.”<sup>80</sup> It is nonsensical to imagine that organized resistance movements are only protected POWs if they are members of the regular armed forces of a High Contracting Party. Indeed, Pictet’s reference to “partisans” in his Commentary on Article 4(A)(2)<sup>81</sup> indicates that these are not “regular” armed forces fighting on behalf of states. Moreover, the underlying purpose for the four Article 4(A)(2) requirements is to enable participants in an armed conflict to know whom they may target for armed violence.<sup>82</sup> To the extent that United States forces knew whom to target in Afghanistan, for example, the principles embodied in Article 4(A)(2) were met, and hence those individuals should be afforded POW protections.

Additionally, several observations support the conclusion that the word “belonging” in Article 4(A)(2) logically refers to nationality and

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76. See Bush, *supra* note 20 at 134–35 (“I determine that the provisions of Geneva will apply to our present conflict with the Taliban.... I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”).

77. *Id.* at 134.

78. In *Hamdi v. Rumsfeld*, Justice O’Connor borrowed from a government brief to define, for the purposes of the case, the term “enemy combatant,” but noted that the administration had failed to provide the Court with the criteria it uses to determine whether an individual qualifies as such. See 542 U.S. 507, 516 (2004); see also *Hamdan*, 126 S. Ct. at 2761 n.1 (citing a military order defining “enemy combatant” as an individual belonging to or supporting the Taliban or al Qaeda forces or other forces engaged in hostilities against the United States or its allies); cf. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1509 (2003) (noting that the Bush Administration’s insistence on the “enemy combatant” label is “driving a wedge” between the United States and its allies).

79. Geneva POW Convention, *supra* note 4, art. 4(A)(3) (stating that Prisoners of War include “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”).

80. *Id.* art. 4.

81. See *supra* note 73.

82. Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT’L L. 209, 224–25 (2005).

not armed forces affiliation. First, Article 4(A)(1) makes reference to “members of the armed forces of a Party to the conflict,” as contrasted with “members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict...”<sup>83</sup> The text therefore suggests that those persons included in (A)(2) are *not* members of the armed forces of a Party to the conflict. Second, the language of Article 4 indicates a difference between “belonging to a Party to the conflict,” and belonging to the *armed forces* of a Party to the conflict. Article 4(B)(1) makes reference to “persons belonging, or having belonged, to the armed forces of the occupied country.”<sup>84</sup> Article 4 envisions groups of individuals who are not members of the armed forces and who are not operating under the direction of a High Contracting Party, but who still may be afforded the protections of POW status. President Bush’s interpretation of Article 4 ignores this category of fighters protected as POWs under Article 4(A)(2). Hence, the President’s conclusion that, “the war against terrorism ushers in a new paradigm” not imagined by the Geneva Conventions<sup>85</sup> is inaccurate; the Geneva POW Convention makes provisions for combatants who are not part of the regular armed forces of a High Contracting Party, affording them POW status if they identify themselves in accordance with Article 4(A)(2).<sup>86</sup>

During the armed conflict between the United States and Iraq, the United States held hearings to determine whether individuals qualified as POWs under Article 4, as required by Article 5.<sup>87</sup> These “Article 5 Hearings” are required under the Geneva POW Convention, “[s]hould any doubt arise” as to whether a person belongs to any of the categories of fighters in Article 4.<sup>88</sup> Unlike the conflict in Afghanistan, during which the President issued a blanket determination that no Taliban or al Qaeda fighters were protected persons under the Geneva POW Convention,<sup>89</sup> determinations of POW status in Iraq have been made on an indi-

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83. Geneva POW Convention, *supra* note 4, art. 4(A).

84. *Id.* art. 4(B)(1).

85. Bush, *supra* note 20, at 134.

86. *See also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 n.61 (2006) (reserving the question of whether Hamdan’s potential status as a prisoner of war entitles him to an Article 5 hearing).

87. *See* Peter Barker, *U.S. Forces Rounding Up Civilian Suspects; Some Detainees May Be Sent to Cuba*, WASH. POST, Mar. 31, 2003, at A1; Bruce Zagaris, *U.S. Detention Policies Faced Continued Criticism and Legal Challenges*, 21 INT’L ENFORCEMENT L. REP. 11 (2005); *see also* Geneva POW Convention, *supra* note 4, art. 5(2).

88. Geneva POW Convention, *supra* note 4, art. 5(2).

89. Some have asserted that the Combatant Status Review Tribunals (CSRTs) at Guantánamo fulfill the requirements of Article 5 status determination tribunals. *See Detainees: Hearing Before the S. Judiciary Comm.*, 109th Cong. (June 15, 2005) (“The CSRT process...outlines provisions

vidual basis, and when a person's status is in doubt, the person is afforded a hearing to determine whether POW protection is warranted. Yet even if certain Taliban or al Qaeda fighters are not protected as POWs, the following sections demonstrate that they would likely be protected persons under the Geneva Civilian Convention.

### C. *Civilians*

Article 4 of the Geneva Civilian Convention describes the people protected under the scope of the Convention:

Persons protected by the Convention are 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.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.<sup>90</sup>

Pictet's Commentary acknowledges that the meaning of "protected persons" in Article 4 "does not stand out very clearly...."<sup>91</sup>

Article 4 does not afford protection at any time to persons in the hands of a Party to the conflict of which they *are* nationals, such as John Walker Lindh, a U.S. citizen captured by U.S. forces on the battlefield in Afghanistan.<sup>92</sup> Nor does it protect nationals of a country not bound by

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for tribunals that exceed the requirements of tribunals that implement Article 5 of the 1949 Geneva Convention....") (statement of Rear Admiral James McGarrah, Director of the Office for the Administrative Review for the Detention of Enemy Combatants). Yet the purpose of those tribunals is *not* to evaluate whether an individual qualifies as a POW under Article 4, but rather to determine whether an individual is an "enemy combatant" under a definition created by the Bush administration. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) ("[N]owhere do the CSRT records for many of those petitioners reveal specific findings that they committed some particular act or failed to satisfy some defined prerequisite entitling the respondents to deprive them of prisoner of war status."); Gordon England, Combatant Status Review Tribunals, Special Defense Department Briefing with Secretary of the Navy Gordon England (Aug. 13, 2004) available at <http://www.defenselink.mil/transcripts/2004/tr20040813-1149.html> (stating that the sole purpose of CSRTs is to determine detainees' status as "enemy combatants").

90. Geneva Civilian Convention, *supra* note 4, art. 4.

91. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 45.

92. See *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002) (stating that Lindh is a U.S. citizen fighting for al Qaeda). Because Lindh was a combatant, the court held that he did not have lawful combatant immunity due to his status as a member of the Taliban, an organization which did not satisfy the four criteria in Article 4(A)(2) of the POW Convention. As argued be-

the Convention, such as Ali Ahmed Moussa, a civilian from Somalia, which is not a High Contracting Party to the Geneva Civilian Convention.<sup>93</sup> Nationals of a co-belligerent state, such as Feroz Abbasi, a citizen of the United Kingdom seized by U.S. forces on the battlefield in Afghanistan,<sup>94</sup> are also not protected.<sup>95</sup> For all others, however, the analysis is more complex.

During the conflict in Afghanistan, nationals of neutral States who were found in Afghanistan found themselves unprotected under the Geneva Conventions, provided that their home countries maintained normal diplomatic relations with the United States.<sup>96</sup> As noted above, the Bush administration reached this conclusion without drawing on the language of Article 4, by arguing that these individuals are members of al Qaeda and therefore the Geneva Conventions do not apply to them at all, regardless of the diplomatic relations between the United States and their home countries. A more appropriate interpretation of the Conventions is that they are applicable depending on the nature of the particular conflict, rather than on the status of the particular factions who are fighting.<sup>97</sup> Therefore, Afghans captured by U.S. forces during the con-

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low, persons ineligible for protection as POWs should be considered for protection under the Civilian Convention.

93. Somalia is a High Contracting party to all of the 1949 Geneva Conventions except for the Civilian Geneva Convention. See University of Minnesota Human Rights Library, *Ratification of International Human Rights Treaties*, 2004, available at <http://www1.umn.edu/humanrts/research/ratification-index.html>. Moussa was a truck driver for a Kuwaiti company in Iraq. He was captured by the forces of Abu Musab al Zarqawi in Iraq in 2004. See Tom Lasseter, *U.S. Troops, Radicals Clash in Najaf*, Knight Ridder News Service, MIAMI HERALD, Aug. 3, 2004, at 14A.

94. See Carol D. Leonnig & Glenn Frankel, *U.S. to Send 5 Detainees Home From Guantanamo; Australian, Four Britons Allege Abuse*, WASH. POST, Jan. 12, 2005, at A1.

95. Even though these individuals are not protected under the Geneva Conventions, they may have redress in U.S. courts under the "law of nations." See 28 U.S.C. § 2241(c)(4) (2006); WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 188-89* (1980) (discussing the history of this obscure provision of the habeas statute).

96. The rationale behind carving this exception out of the Geneva POW Convention is that diplomatic relations can serve to protect the interests of those individuals: "In the territory of the belligerent States the position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them." Pictet, *Civilian COMMENTARY*, *supra* note 11, at 49. This approach indicates that other agreements govern the treatment of such individuals, including Article 36 of the Vienna Convention on Consular Relations, which requires detaining authorities to grant consular officers access to detainees who are nationals of their state. See Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100, 596 U.N.T.S. 292, 292 [hereinafter Vienna Consular Convention]. For discussion of the ramifications of extraordinary rendition under the terms of the Vienna Consular Convention, see Weissbrodt & Bergquist, *supra* note 3, at 145-47.

97. See, e.g., *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 161 (D.D.C. 2004) ("[T]he government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the

flict in Afghanistan qualify as protected persons under the Geneva Civilian Convention,<sup>98</sup> but non-Afghanis may not.<sup>99</sup>

The preceding analysis, however, is only relevant during armed conflict. Initially, this observation may appear to highlight a distinction without a difference, but it is highly relevant to the protected person status of nationals of neutral states who find themselves in occupied territory. The reason is as follows: nationals of neutral states “who find themselves in the territory of a belligerent State” are not protected persons as defined in Article 4,<sup>100</sup> but because an occupied territory is no longer “the territory of a belligerent State,” nationals of neutral states automatically *gain* the status of protected persons when occupation begins. Therefore, because the United States is no longer engaged in hostilities *against* Iraq or Afghanistan, nationals of neutral states in those countries are no longer in the territory of a belligerent State, even though fighting in those states continues. Pictet explains the distinction:

[I]n occupied territory [nationals of neutral States] are protected persons and the Convention is applicable to them; its application in this case does not depend on the existence or non-existence of normal diplomatic representation....

On the other hand, nationals of a neutral State in the territory of a

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conflict, and not by what particular faction a fighter is associated with.”); Memorandum from William H. Taft, IV to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), in *THE TORTURE PAPERS* *supra* note 15, at 129 (“The structure of the paper suggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict—al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc.”); *see also* Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons”: How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 *FORDHAM INT’L L.J.* 681, 738 (2005).

98. *Contra* Working Group Report on Detainee Interrogations in the Global War on Terrorism, Mar. 6, 2003, in *THE TORTURE PAPERS*, *supra* note 15, at 241 (noting that the Justice Department has concluded that the Geneva Convention for the protection of Civilians does not apply to “unlawful combatants”).

99. Even if an individual is not a protected person as defined by Article 4, certain provisions of the Geneva Civilian Convention are broader in scope. *See* Geneva Civilian Convention, *supra* note 4, art. 4 (“The provisions of Part II are, however, wider in application, as defined in Article 13.”). These provisions “cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on...nationality....” *Id.* art. 13. Part II consists of Articles 13–26, which are not relevant to a discussion of extraordinary rendition. If there is or was a period of time during which the United States could be construed as an “occupying power” of Afghanistan under the Geneva Civilian Convention, non-Afghanis would have protected person status. *See supra* notes 52–60 and accompanying text.

100. Geneva Civilian Convention, *supra* note 4, art. 4.

Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hands they are.<sup>101</sup>

Accordingly, under this interpretation, nationals of neutral states during occupation are persons protected by the Geneva Civilian Convention, and even if occupation may have ended and one year has passed since the general close of military operations, they are still protected as regards the protections afforded by Article 6.<sup>102</sup> Additionally, any persons not nationals of the United States or coalition countries who came into U.S. custody prior to the end of occupation maintain their status as protected persons until their release.<sup>103</sup>

#### D. *Mind the Gap*

The Bush administration memoranda mistakenly did not address the possibility that a person not protected under the Geneva POW Convention would be protected as a civilian by the terms of the Geneva Civilian Convention.<sup>104</sup> Pictet explained the interrelationship between protected person status in each of the Conventions, noting that “[t]hey must be treated as prescribed in the texts which concern them. But if, for some reason, prisoner of war status—to take one example—were denied to them, they would become protected persons under the [Civilian] Convention.”<sup>105</sup> He expressly stated that partisans failing to fulfill the four criteria in Article 4 Section (A)(2) of the Geneva POW Convention “must be considered to be protected persons within the meaning of the [Civilian] Convention.”<sup>106</sup> Pictet concludes his discussion of the classes of individuals protected under the four Geneva Conventions:

In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva

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101. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 48.

102. *See supra* text accompanying note 60. These protections include the prohibition on forcible transfer in Article 49. There are approximately 420 people in U.S. detention facilities in Iraq who are neither U.S. citizens nor Iraqis. *See* Josh White, *5 Americans Held by U.S. Forces in Iraq Fighting*, WASH. POST, July 7, 2005, at A15.

103. *See* Geneva Civilian Convention, *supra* note 4, art. 6, para. 4; *supra* text accompanying notes 30–32.

104. Evidently the administration addressed this issue at some point. *See* Working Group Report on Detainee Interrogations in the Global War on Terrorism, *supra* note 98, at 241 (“The Department of Justice has opined that the Geneva Convention Relative to the Protection of Civilian Personnel in Time of War (Fourth Geneva Convention) does not apply to unlawful combatants.”). To date any written record of the discussion appears to remain classified.

105. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 50.

106. *Id.*

Conventions of 1949. 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 [Geneva POW] Convention, a civilian covered by the [Geneva Civilian] 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.*<sup>107</sup>

This conclusion is confirmed by two other provisions in the Geneva Civilian Convention. First, the language of the fourth paragraph of Article 4 of the Geneva Civilian Convention states that persons protected by one of the other three Conventions are not “considered as protected persons within the meaning of the present convention.”<sup>108</sup> Consequently, the purpose of the Geneva Civilian Convention is to protect persons not otherwise protected by the other Conventions. Second, strong evidence demonstrates that the parties at the diplomatic conference considered whether individuals not complying with the laws of war should be protected persons: “Some people considered that the Convention should apply without exception to all the persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits.”<sup>109</sup> As a product of discussion of these diverging views, the diplomatic conference drafted Article 5.<sup>110</sup> Article 5 of the Geneva Civilian Convention allows for additional limitations on the rights of protected persons who are spies or saboteurs, or otherwise “definitely suspected of or engaged in activities hostile to the security of the State.”<sup>111</sup> Implicit in this provision is the agreement among participants in the diplomatic conference that among those protected persons under the Geneva Civilian Convention are persons not complying with the laws of warfare:

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107. *Id.* at 51. Pictet’s language is slightly over-stated; the Geneva Conventions do not generally afford protection to nationals of co-belligerents, nor do they protect civilians of neutral countries, except in times of occupation. *See supra* text accompanying notes 93–104. Article 75 of the 1977 Protocol I, however, fills this gap and is generally accepted as customary international law. *See supra* note 6.

108. Geneva Civilian Convention, *supra* note 4, art. 4, para. 4.

109. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 52.

110. *See id.* at 52–54.

111. Geneva Civilian Convention, *supra* note 4, art. 5, paras. 1–2. In occupied territory, persons detained as spies or saboteurs are not afforded rights of communication under certain circumstances. *See id.* art. 5, para. 2. During armed conflict, persons “definitely suspected of or engaged in activities hostile to the security of the state” are not entitled “to claim such rights and privileges under the [Fourth] Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.” *Id.* art. 5, para. 1.

It may...seem rather surprising that a humanitarian Convention should tend to protect spies, saboteurs or irregular combatants. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare.... It might therefore have been simpler to exclude them from the benefits of the Convention,...but the terms espionage, sabotage, terrorism, banditry, and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them.<sup>112</sup>

This passage from Pictet's Commentary indicates that the parties at the diplomatic conference were well aware of the danger of allowing a High Contracting Party to categorize a person as an "irregular combatant" or "terrorist" and thus attempt to dispense with any of the provisions of the Conventions. Article 5 was intended to take into account the security interests of the detaining state while guarding against abuses that could result if the simple label of "irregular combatant" would allow a High Contracting Party to place a person outside the scope of the Conventions.<sup>113</sup> The U.S. Army Field Manual confirms that Article 5 is evidence that all hostile individuals who are not protected as POWs are protected under the Geneva Civilian Convention.<sup>114</sup> This conclusion has also been confirmed by the European Commission for Democracy Through Law.<sup>115</sup>

Therefore, based on the above analysis, during armed conflict between High Contracting Parties, the Fourth Convention is clearly in-

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112. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 53.

113. *See id.*; Geoffrey Corn, *Principle 5: Protecting the Force from Unlawful Belligerents*, *ARMY LAW.*, Feb. 1999, at 26, 28.

114. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE para. 247(b) (1956) ("Subject to qualifications set forth in paragraph 248, those protected by [the Geneva Conventions] also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war."); *id.* para. 248(b) ("[A]n individual protected person [who] is definitely suspected of or engaged in activities hostile to the security of the State,...is...not entitled to claim such rights and privileges under [the Geneva Conventions] as would, if exercised in favor of such individual person, be prejudicial to the security of such State."); Kantwill & Watts, *supra* note 97, at 730-31. *But see* Julian E. Barnes, *Army to Use Geneva Rules for Detainees: New Manual Eliminates Secret Tactics and Separate Standards for Questioning Captives*, *L.A. TIMES*, Sept. 6, 2006 (reporting that the new U.S. Army Field Manual interrogation provisions "will not apply to CIA interrogators working in prisons run by other countries").

115. Council of Europe, European Commission For Democracy Through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, (Mar. 17, 2006) at 20, paras. 82-83, available at [http://www.apt.ch/secret\\_detention/venice.commission.pdf](http://www.apt.ch/secret_detention/venice.commission.pdf).

tended to encompass anyone who is not a national of a neutral or co-belligerent State who is not protected under one of the other Conventions. During occupation, protection is also extended to nationals of neutral States.

As demonstrated above, in situations where al Qaeda is fighting in a conflict between two or more High Contracting Parties (e.g., the wars in Afghanistan and Iraq), it seems reasonable to conclude that the Geneva Conventions would still apply to the armed conflict as a whole.<sup>116</sup> Nonetheless, members of al Qaeda would likely fail to qualify as prisoners of war under Article 4.<sup>117</sup> They would, however, still retain protections as civilians under terms of the Geneva Civilian Convention.

#### IV. WHAT RIGHTS AND PROTECTIONS ARE AFFORDED TO THOSE PROTECTED PERSONS?

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

Both civilians and POWs are protected against “willful killing, torture or inhuman treatment”<sup>118</sup> because both the Geneva Civilian and POW Conventions protect against such grave breaches.<sup>119</sup> In addition, the Supreme Court recently found that Common Article 3 applies to individuals not “associated with” High Contracting Parties,<sup>120</sup> and therefore presumably Article 3’s prohibition “at any time and in any place whatsoever” against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular, humiliating and degrading treatment” applies to all individuals detained as part of the “war on terror.”<sup>121</sup> Moreover, Common Article 1 calls on “[t]he High Contracting Parties [to] undertake to respect and to ensure respect for the present

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116. See *supra* note 98 and accompanying text. *But see* Bush, *supra* note 20, at 134–35 (distinguishing between the conflict with al Qaeda and the conflict with the Taliban in Afghanistan, and stating that the conventions only apply to the conflict with the Taliban).

117. See *supra* notes 70–75 and accompanying text.

118. Compare Geneva Civilian Convention, *supra* note 4, art. 147, with Geneva POW Convention, *supra* note 4, art. 131.

119. Compare Geneva Civilian Convention, *supra* note 4, art. 147, with Geneva POW Convention, *supra* note 4, art. 130.

120. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006).

121. See, e.g., Geneva POW Convention, *supra* note 4, art. 3(1)(a), (c); see also Posting of Marty Lederman to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/06/hamdan\\_summary.html](http://www.scotusblog.com/movabletype/archives/2006/06/hamdan_summary.html) (June 29, 2006, 10:37 EST) (concluding that the *Hamdan* Common Article 3 holding extends to protections against inhumane treatment and outrages upon personal dignity).

Convention in all circumstances.”<sup>122</sup> This article is of particular relevance to the U.S. practice of extraordinary rendition, for not only must the United States itself respect the prohibition against torture and inhuman treatment, it must also *ensure respect* for the prohibition *in all circumstances*. These rights and protections are afforded to POWs and to protected civilians, regardless of whether those individuals are detained during armed conflict or during occupation, and regardless of whether they are “associated with” a High Contracting Party.

### B. *Special Protections Prohibiting Transfer of Civilians*

With regard to occupation, the Geneva Civilian Convention also includes as a grave breach “unlawful deportation or transfer...of a protected person...”<sup>123</sup> As the Commentary explains, “unlawful deportation or transfer” includes breaches of Article 49.<sup>124</sup> Article 49 governs deportations, transfers, and evacuations:

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.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

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122. *E.g.*, Geneva POW Convention, *supra* note 4, art. 1.

123. Geneva Civilian Convention, *supra* note 4, art. 147 (“Grave breaches...shall be those involving any of the following acts, if committed against persons or property protected by the present Convention:...unlawful deportation or transfer or unlawful confinement of a protected person...”).

124. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 599. Some commentators have argued that the word “unlawful” in Article 147 suggests that some deportations may be lawful and therefore would not constitute grave breaches. *See, e.g.*, Emmanuel Gross, *Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action Against His Own State?*, 72 *UMKC L. REV.* 51, 85 (2003). This conclusion is contradicted both by the absolute prohibition on deportation in Article 49, and the commentary for Article 147, which states, “The unhappy experiences of the Second World War have made it necessary to prohibit deportation completely in this Convention.” Pictet, *Civilian COMMENTARY*, *supra* note 11, at 599.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.<sup>125</sup>

Because Article 49 may be implicated in cases of extraordinary rendition, it is of particular relevance to the present analysis. Article 49 is one of the articles listed as still binding on an occupying power more than one year after the end military operations, so long as, and to the extent that, the occupying power still exercises the functions of government. Therefore, to the extent that the United States ever was an occupying power, and to the extent that it still exercises any functions of government in that previously or currently occupied territory,<sup>126</sup> it is bound by Article 49. If, in that capacity, it detains individuals initially seized during occupation, it must treat them in accordance with Article 49. U.S. officials responsible for transfers under those conditions are thereby committing grave breaches of the Geneva Civilian Convention.

The Bush administration asserted that no Taliban or al Qaeda fighters in Afghanistan were protected persons under the Geneva POW Convention.<sup>127</sup> Therefore, all such fighters who were not coalition nationals were protected persons under the Geneva Civilian Convention<sup>128</sup> during the occupation period and for one year after the general close of military operations.<sup>129</sup> Accordingly, their forcible transfer outside of Afghanistan, whether for purposes of extraordinary rendition or simply to move them to the detention facility at Guantánamo, constitutes a grave breach of the Geneva Civilian Convention.

In Iraq, any extraterritorial transfer of a person not a POW and not a national of the United States or of another member nation of the coalition forces is also a grave breach. The CIA reportedly transferred a number of detainees out of occupied Iraq.<sup>130</sup> Those transfers could only avoid constituting grave breaches if the detainees were POWs<sup>131</sup> or were

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125. Geneva Civilian Convention, *supra* note 4, art. 49, paras. 1, 2, 6.

126. See *supra* notes 58–60 and accompanying text.

127. See Bush, *supra* note 20, at 135 (“I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”).

128. See *supra* notes 75–87, 105–18 and accompanying text.

129. See *supra* notes 52–68 and accompanying text.

130. See, e.g., Priest, *supra* note 2 (“One intelligence official familiar with the operation said the CIA has used the [Goldsmith Memorandum] as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months.”).

131. Article 12 allows High Contracting Parties to transfer POWs, but only “to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” Geneva POW Convention, *supra* note 4, art. 12, para. 2. It is important to view this article in the context of both Article 1, requiring High Contracting Parties to respect and ensure respect for the POW Convention in all circumstances, and Article 131, which warns that, “No High Contracting Party shall be allowed to

nationals of the United States or other countries participating in coalition forces.<sup>132</sup> Therefore, in all likelihood nearly every forcible transfer of a detainee out of Iraq during occupation is a grave breach.

Despite this clear analysis, the Bush administration has maintained that several gaps exist in the scope of protections afforded to persons protected under the Geneva Civilian Convention.<sup>133</sup> According to a memorandum prepared in March 2004 by Jack Goldsmith, who was then Assistant Attorney General at the Office of Legal Counsel,<sup>134</sup> there are two gaps in the Geneva Civilian Convention as it pertains to Article 49.<sup>135</sup> First, he argues that Article 49 does not prohibit removal of individuals who are not lawfully present in occupied territory.<sup>136</sup> Second, he contends that Article 49 does not prohibit temporary transfers from occupied territory for purposes of interrogation.<sup>137</sup>

### 1. *Goldsmith Gap One*<sup>138</sup>

The first purported gap relates to the status of nationals of neutral states who may be unlawfully present in the occupied territory. Goldsmith first defines the terms deportation and transfer to suggest that they

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absolve itself or any other High Contracting Party of any liability incurred...in respect of [grave] breaches..." *Id.* arts. 1, 131. Pictet's Commentary makes it clear that transfer may not be used to avoid responsibility for adherence to the conventions: "The safeguard contained in [Article 12] is reinforced by Article 131 relating to the responsibilities of the Contracting Parties, which may not absolve themselves of any liability incurred in respect of one of the grave breaches defined in Article 130." Pictet, POW COMMENTARY, *supra* note 13, at 130.

132. See *supra* notes 91–104 and accompanying text.

133. See Draft Memorandum from Jack Goldsmith to Alberto Gonzales, Permissibility of Relocating Certain 'Protected Persons' from Occupied Iraq (Mar. 19, 2004) in THE TORTURE PAPERS 366, *supra* note 15 at 366.

134. Goldsmith has resigned his position with the government and is now a professor at Harvard Law School. See Marcella Bombardieri, *Harvard Hire's Detainee Memo Stirs Debate*, BOSTON GLOBE, Dec. 9, 2004, at A1; Michael Isikoff et al., *Torture's Path*, NEWSWEEK, Dec. 27, 2004, at 54 (noting that Goldsmith resigned "at least partly due to his discomfort about the [August 1, 2002] memo [authored by John Yoo]").

135. See Goldsmith, *supra* note 133, at 380. The memorandum presumes that the Geneva Civilian Convention applies due to occupation, rather than ongoing armed conflict. See *id.* at 366 ("Attached is a draft of an opinion...concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies *in occupied Iraq*.") (emphasis added).

136. *Id.* at 368–71.

137. *Id.* at 374–79.

138. The authors' starting point for analysis of the Goldsmith Memorandum was Professor David Luban's initial reactions to the Goldsmith memorandum, which have been supplemented, expanded, and elaborated upon in the following two sections. David Luban, *The Goldsmith Memorandum* (2005) (unpublished manuscript, on file with authors). Professor Luban has since incorporated and elaborated upon the memorandum in *The Torture Lawyers of Washington*, in DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (forthcoming July 2007). The authors would like to thank Professor Luban for sharing his memorandum.

do not apply to removals of individuals not legally present in a country. Second, he advances policy arguments in favor of allowing deportations. Third, he argues that an occupying power has an obligation to enforce local laws, including local immigration laws. This section examines each of Goldsmith's arguments in turn, and then identifies recent changes in Iraqi immigration laws in light of the historical lessons of World War II as the impetus for Article 49.

a. Goldsmith's Unconventional and Ahistorical Definitions

The Article 49 prohibition on forcible transfers and deportations applies "regardless of [the] motive,"<sup>139</sup> and is viewed as absolute.<sup>140</sup> In spite of the apparent clarity of the language and terms of Article 49, Goldsmith finds an unwritten exception. He argues that the term "deportation" in Article 49 is a term of art which applies exclusively to people with a lawful right to be in the occupied country in the first place.<sup>141</sup> He concludes that people present in Iraq in violation of domestic Iraqi immigration laws are not protected under Article 49.

Goldsmith's conclusion is contradicted by the text of Article 49, as clarified by another article relating to transfers, Article 45. Article 45 provides that "[p]rotected persons shall not be transferred to a Power which is not a party to the Convention."<sup>142</sup> Article 45 does allow for extradition, "in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law."<sup>143</sup> But Article 45 makes no reference to deportation. In fact, Pictet notes that within Article 45 "there is no provision concerning deportation (in French *expulsion*), the measure taken by a State to remove an undesirable foreigner from its territory."<sup>144</sup> Pictet's definition of deportation in his commentary to Article 45 indicates that the term deportation as used by the parties drafting the Geneva Conventions is similar to the ordinary understanding of the term, and quite different from Goldsmith's "term of art" definition.<sup>145</sup>

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139. Geneva Civilian Convention, *supra* note 4, art. 49.

140. See Pictet, Civilian COMMENTARY, *supra* note 11, at 279. *But see* Gross, *supra* note 124, at 83–84 (concluding that the prohibition against deportation is not absolute but rather is limited by the need to maintain public order and safety).

141. Goldsmith, *supra* note 133, at 368–71.

142. Geneva Civilian Convention, *supra* note 4, art. 45.

143. *Id.*

144. Pictet, Civilian COMMENTARY, *supra* note 11, at 266.

145. Goldsmith himself concedes that Pictet's Commentary is "authoritative." See Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249, 258 (2002).

Goldsmith then argues that the prohibition on “individual or mass forcible transfers” also only applies to people who are lawfully present in the country.<sup>146</sup> He asserts that, “[p]assages from the ICRC Commentary and the negotiated record illustrate that the words ‘transfers’ and ‘deportations’ were used loosely and, at times, interchangeably....”<sup>147</sup>

This contention neglects both the rule of construction that each treaty provision should be given meaning,<sup>148</sup> and Pictet’s Commentary on Article 45, which quite clearly distinguishes between the words “transfer” and “deportation”:

Any movement of protected persons to another State...is considered as a transfer for the purposes of Article 45. The term “transfer”, for example, may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition. The Convention makes provision for all these possibilities. On the other hand, there is no provision concerning deportation (in French *expulsion*), the measure taken by a State to remove an undesirable foreigner from its territory.<sup>149</sup>

This discussion of the two terms hardly seems to indicate that they are interchangeable or that the words are used at all “loosely.”

A brief examination of history reflects both the danger of Goldsmith’s definitional argument and the rationale behind the absolute prohibition on deportations in Article 49. In 1935, all German Jews were stripped of their “citizenship,”<sup>150</sup> and in 1941 those German Jews living outside of Germany were deprived of their German “nationality.”<sup>151</sup>

146. Goldsmith, *supra* note 133, at 371–74.

147. *Id.* at 371.

148. *See, e.g.*, Goldsmith, *supra* note 133, at 379 n.13.

149. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 266.

150. Vivian Grosswald Curran, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims*, 25 *FORDHAM INT’L L.J.* 107, 129 n.84 (2001) (referencing the 1935 Reich citizenship law). This decree did not affect all Jews living in Germany, however. *See* HANNAH ARENDT, *EICHMANN IN JERUSALEM* 143 (1963) (“The second problem was the presence in Germany of a few thousand foreign Jews, whom Germany could not deprive of their nationality through deportation.”). Because the 1935 decree rendered stateless German Jews living in other countries, it later facilitated deportations throughout Europe, where stateless Jews were the first to be targeted for deportation. *See id.* at 150 (“As in practically all other countries, the deportations from Holland started with stateless Jews, who in this instance consisted almost entirely of refugees from Germany....”). One exception was in Denmark, where the Danes not only refused to strip Danish Jews of their nationality, but also “explained to the German officials that because the stateless refugees were no longer German citizens, the Nazis could not claim them without Danish assent.” *Id.* at 155.

151. Curran, *supra* note 150, at 129 n.85 (citing the November 25, 1941 decree called the “*elfte Verordnung zum reichsbürgergesetz*”); *see also* Detlev F. Vagts, *International Law in the*

This “denationalization” facilitated the purportedly lawful deportation of many Jews from occupied Europe. As a first step in this deportation program, Adolf Eichmann was charged with effecting the “forced emigration” of Jews from Austria in 1938,<sup>152</sup> which resulted in 45,000 Jews leaving the country in eight months.<sup>153</sup> Eichmann was then moved to Prague, where he instituted a similar program of forced deportations.<sup>154</sup> Once the war began and real (albeit forced) emigration was not possible,<sup>155</sup> deportation became a means both to move Jews to extermination camps and to supply slave workers to German industries.<sup>156</sup> Germany, under Eichmann’s direction,<sup>157</sup> therefore enlisted the cooperation of local authorities to strip Jews of their nationality,<sup>158</sup> so as to transform them into, as Goldsmith would later call the terror suspects, “illegal aliens.” In 1942, the puppet government of Croatia complied with German requests to pass anti-Jewish legislation to bring about the deportation of Jews in that country.<sup>159</sup> In the spring of 1943, Hitler’s forces pressed for changes in occupied France’s local immigration and naturalization laws, thereby transforming Jews who had been lawful citizens of occupied France<sup>160</sup> into deportable aliens.<sup>161</sup> Similar steps were taken

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*Third Reich*, 84 AM. J. INT’L L. 661, 694 (1990) (noting that foreign lawyers at the time debated whether these citizenship rules violated international law).

152. See ARENDT, *supra* note 150, at 38.

153. See *id.* at 39.

154. See *id.* at 60–61.

155. See *id.* at 63, 68–69.

156. *Id.* at 73–74, 141.

157. See *id.* at 171 (noting that Eichmann’s office coordinated evacuations and deportations).

158. See *id.* at 143–44 (“According to the directives of the Wannsee Conference...the Final Solution was to be applied to all European Jews,...and such things as nationality or the rights of allied or neutral countries with respect to their citizens were not mentioned. But since Germany...depended upon local good will and cooperation everywhere, these little formalities could not be sneezed at.”).

159. See *id.* at 165. The legislation included, however, an exception transforming into “honorary Aryans” those Jews who had made contributions to “the Croat cause.” *Id.* This measure served to block the deportation of about 1,500 Jews from the area. See *id.* at 165–66.

160. In the 1930s, France had been a haven for thousands of Jewish refugees. See MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* at xi (1995 Stanford Univ. Press) (1981).

161. See *id.* at 324–28 (describing German plans to “denationalize” all Jews who had been naturalized as citizens of France since 1927 and French resistance to the move that would allow for the deportation of people who were French citizens). Frustrated with this resistance, the German occupation authorities ultimately determined that French citizenship was no bar to deportation. See *id.* at 329. Nonetheless, German plans to deport French Jews from Vichy France were stifled. See ARENDT, *supra* note 150, at 147. Thousands of French Jews in the northern occupied zone had already been deported by the Germans. See *id.* at 135. German occupiers in Slovakia encountered similar resistance and ultimately dispensed with the policy of deference to local law-makers. See *id.* at 186–87.

in occupied Greece,<sup>162</sup> Holland,<sup>163</sup> and Hungary,<sup>164</sup> among other places. As Hannah Arendt observed, the Nazis took “extreme care” to “insist that all Jews of non-German nationality ‘should be deprived of their citizenship either prior to, or, at the latest, on the day of deportation’ ....”<sup>165</sup> A critical feature of the Nazi program was to change legal conditions so that Jews were no longer lawfully in their country of residence, and therefore could be deported.<sup>166</sup> The results of this change in status were horrific; as one concerned observer expressed, “[t]he whole world knows what deportation means in practice.”<sup>167</sup>

This background sheds light on Pictet’s use of quotation marks in the following passage:

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. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these “displaced persons”, among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph,

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162. See ARENDT, *supra* note 150, at 170–71.

163. See *id.* at 150–53.

164. See *id.* at 176–82. International and domestic protests halted the Hungarian deportation program. See *id.* at 182.

165. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 280 (2d enlarged ed. 1958) [hereinafter ARENDT, *ORIGINS*]. Arendt explains that stripping Jews of nationality served two purposes in addition to facilitating deportation: “The legal experts drew up the necessary legislation for making the victims stateless, which was important on two counts: it made it impossible for any country to inquire into their fate, and it enabled the state in which they were resident to confiscate their property.” ARENDT, *supra* note 150, at 102.

166. See *Attorney-General of Israel v. Eichmann*, 45 *Pesakim Mehoziim* 3, para. 63 (D.C. Jerusalem 1961) (Isr.), translated in 36 *INT’L L. REP.* 5, 89 (1968) (“This is like an automated factory.... At the one end you put in a Jew...and he goes through the whole building from counter to counter, from office to office, and comes out the other end without any money, without any rights, with only a passport in which it says: ‘You must leave the country within a fortnight: otherwise—you will go to a concentration camp.’”) (Testimony of a witness who had visited the Vienna Emigration Center).

167. Letter from Angelo Rotta, Papal Nuntio in Hungary, to Döme Sztójay, Prime Minister of Hungary (May 15, 1944), in EUGENE LEVAL, *BLACK BOOK ON THE MARTYRDOM OF HUNGARIAN JEWRY* 197, 197 (1948).

which is intended to forbid such hateful practices for all time.<sup>168</sup>

Here, Pictet is recalling a lesson of recent history: what an occupying power may call a “deportation” under local immigration law may actually be a pretense to serve a sinister purpose.<sup>169</sup> Hence, Article 49 prohibits actual deportations and Nazi-style “deportations,” for during times of occupation, it is not possible to determine which is which.

This historical perspective also explains the rationale for the description in Article 4 of protected persons, which was deliberately worded so as to include stateless persons,<sup>170</sup> who might be unlawfully present in an occupied country. The text, related commentary, and an historical understanding of Nazi practices during World War II indicate that local immigration law should not be used to carve out an exception to Article 49 or any other provision of the Geneva Civilian Convention.<sup>171</sup>

b. Goldsmith’s Appeal to “Common Sense”

Goldsmith contends that his conclusion “comports with common sense,”<sup>172</sup> and that it would be illogical to transform an occupied territory into a shelter for people who enter it in violation of local immigration law.<sup>173</sup> He correctly observes that the occupying power is under a general obligation to maintain and enforce the domestic laws of the oc-

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168. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 278–79. Goldsmith relies heavily on this passage to conclude that persons can only be deported if they are “torn from their homes.” See Goldsmith, *supra* note 133, at 370, 376–77. He fails to account for the quotation marks surrounding the word deportations, which are clearly understood to reference the trumped-up deportations based on Nazi-imposed changes in local immigration laws, which stripped many of their citizenship. If the word “deportation” at the time only meant removal of persons lawfully present in a place, then the heated dispute between the Germans and French authorities in occupied France regarding denaturalization of French Jews would have been pointless. See *supra* note 161. Instead, stripping persons of citizenship, and therefore denying them the lawful right to be in a place, was understood to be a necessary precondition for their deportation. For a discussion of the consequences of statelessness in the twentieth century, both at a societal level and in terms of human rights of those deprived of citizenship, see ARENDT, *ORIGINS*, *supra* note 165, at 276–302.

169. See, e.g., MARRUS & PAXTON, *supra* note 160, at 220 (“[A]ll the Jews of France were to be deported, apparently without distinction or regard for French citizenship. The Final Solution had begun.”).

170. See Pictet, *Civilian COMMENTARY*, *supra* note 11, at 47 (“It will be observed that owing to its negative form the definition [of protected person in Article 4] covers persons without any nationality.”).

171. See also Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 328–30 (2006) (demonstrating that Goldsmith’s interpretation of the terms “deportation” and “transfer” are not consistent with traditional means of treaty interpretation).

172. Goldsmith, *supra* note 133, at 372.

173. *Id.*

cupied country.<sup>174</sup> Yet as Goldsmith concedes, construing Article 49 to prohibit deportations of individuals not lawfully present in a country would still allow the occupying power to enforce local immigration law by imprisoning persons present in the country illegally; they simply would not be deportable.<sup>175</sup> This concession undercuts his conclusion that it would be irrational to require an occupied country to set out a “welcome mat” to people entering the country in violation of local immigration laws.<sup>176</sup>

c. Goldsmith’s Contention That the Occupying Power Is Obligated to Enforce Local Laws Is Deceptive and Contrary To Explicit Provisions in the Conventions

Goldsmith draws on “customary international law as reflected in Article 43 of the Hague Regulations” to conclude that “the occupying power may be *obliged* to enforce Iraqi immigration law....”<sup>177</sup> But Article 43 calls on the occupying power to “respect[], unless absolutely prevented, the laws *in force* in the country.”<sup>178</sup> The Goldsmith memorandum, however, provides no insights as to the content of Iraqi immigration law prior to occupation, nor does it establish that U.S. and other coalition forces in Iraq are in compliance with such laws themselves, or that they are striving to enforce these pre-existing laws.

Yet even if the basis for deportation or involuntary transfer is Iraqi immigration law in existence prior to occupation, an occupying power is prohibited from enforcing such law if enforcement would violate Article 49. Goldsmith draws on the Hague Convention to contend that the occupying power has an obligation to enforce local law, but he curiously fails to mention provisions in the Geneva Civilian Convention itself that relate to the responsibility of the occupying power to respect local laws. Article 64 stipulates that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention....

The Occupying Power may, however, subject the population of

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174. *Id.* at 373.

175. *Id.* at 374.

176. *Id.* at 372.

177. *Id.* at 374 (emphasis added).

178. Hague Convention, *supra* note 48, art. 43 (emphasis added).

the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power....<sup>179</sup>

Pictet clarifies that the entire legal system—criminal and civil—is to be maintained by the occupying power.<sup>180</sup> To the extent that prior Iraqi civil or criminal laws allowed for deportation in certain circumstances, the first paragraph of Article 64 permits the occupying power to repeal or suspend those provisions, because they pose an obstacle to the application of Article 49 of the Geneva Civilian Convention.

It is unclear precisely which Iraqi immigration laws might justify deportation or involuntary transfer of terror suspects from occupied Iraq. Goldsmith cites two provisions of Iraq's Law on Foreigners Residence<sup>181</sup> to demonstrate that it grants authority to detain and deport foreigners (or "illegal aliens," in Goldsmith's language),<sup>182</sup> but he fails to examine the substance of that law beyond the simple fact that it allows for deportations. Deportation provisions, however, are limited to those foreigners in violation of Articles 3, 6, 8, 11, and 20 of the Law on Foreigners Residence.<sup>183</sup> Those articles include provisions requiring foreigners to: enter with a valid passport, obtain an entry visa, and fill in an arrival form;<sup>184</sup> submit relevant information and photographs when applying for a visa;<sup>185</sup> obtain an exit visa if present in Iraq subsequent to an employment contract;<sup>186</sup> obtain a residence permit if wishing to stay beyond the time prescribed in the visa;<sup>187</sup> and receive permission from the Minister of Interior if they wish to re-enter Iraq after having been deported.<sup>188</sup> But these provisions must be executed consistent with other

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179. Geneva Civilian Convention, *supra* note 4, art. 64.

180. See Pictet, Civilian COMMENTARY, *supra* note 11, at 335 ("The idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory. The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.").

181. Law on Foreigners Residence No. 118 (1978) (*entered into force* Nov. 5, 1978), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssldoc.htm?tbl=RSDLEGAL&page=home&id=3ae6b4ed0> [hereinafter Foreigner Residence Law].

182. Goldsmith, *supra* note 133, at 374.

183. See Foreigner Residence Law, *supra* note 181, art. 24.

184. *Id.* art. 3.

185. *Id.* art. 6.

186. *Id.* art. 8.

187. *Id.* art. 11.

188. *Id.* art. 20.

provisions of Iraqi law, as well as the Constitution of Iraq. In particular, Resolution No. 360 of 1991 eliminates the entry visa requirement for “Arabs and foreigners for which bilateral and multi[-lateral] agreements concluded among their states and the Republic of Iraq have been stipulated to exempt them from condition of getting the entry visa to Iraq on the basis of reciprocity.”<sup>189</sup> An earlier example of this reciprocity is evidenced in Resolution No. 455 of 1989, which eliminated entry and exit visa requirements for nationals of the Arab Cooperation Council.<sup>190</sup> Hence, nationals of countries with visa-waiver reciprocity would rarely be in violation of the handful of Iraqi immigration laws which are considered to be deportable offenses.<sup>191</sup> Also, the Law on Foreigners Residence excludes from its provisions “Arab citizens,” as long as they comply with the exit visa requirement imposed on foreigners present in the country due to work contracts.<sup>192</sup> Therefore, citizens of Arab countries are allowed visa-free entry, and could probably only be deported if they attempted to leave the country while under an employment contract in Iraq without first obtaining an exit visa.<sup>193</sup> Goldsmith makes no reference whatsoever to this substantial limitation on the general power to deport under the Law on Foreigners Residence.

The Iraqi Constitution of 1990 also prohibits the extradition of political refugees,<sup>194</sup> and grants the right of political asylum “for all militants,

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189. Resolution No. 360 of 1991, ¶ 2 (*entered into force* Oct. 30, 1991) available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=RSDLEGAL&page=home&id=3ae6b51d10> [hereinafter Entry Visa Resolution].

190. Resolution No. 455 of 1989, *entered into force* July 17, 1989, para. 1, available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=RSDLEGAL&page=home&id=3ae6b51d4>. Members of the Council were Egypt, Iraq, Jordan, and Yemen. Curtis R. Ryan, “*Jordan First*”: *Jordan’s Inter-Arab Relations and Foreign Policy Under King Abdullah*, 3 ARAB STUD. Q. 43, 52 (July 1, 2004). The Council dissolved in the wake of the 1990–91 Gulf War. *Id.*

191. Presumably they could be in violation of provisions requiring them to enter with a valid passport, fill in an arrival form, obtain an exit visa, or receive permission to re-enter after a previous deportation. See Foreigner Residence Law, *supra* note 181, arts. 3, 8, 20.

192. Foreigner Residence Law, *supra* note 181, art. 2, para. 1 (“Arab citizens shall be excluded from the provisions of this Law with observance of the provisions of para (a) of Article 8 thereof.”). This law may have been changed somewhat. As of 2002, persons carrying passports from Jordan, Syria, and Yemen could enter Iraq without an entry visa. See BBC Monitoring International Reports, *Iraqi Spy Chief Says Abu-Nidal Committed Suicide to Escape Arrest* (Iraqi Satellite Channel television broadcast Aug. 21, 2002) (statement of Tahir Jalil al-Habbushi). Al-Habbushi was then the head of the Iraqi intelligence service. *Id.* Apparently nationals of other Arab countries were automatically granted entry visas at the border. See *id.* (“We also grant other Arab brothers entry visas directly at any border post or when they report to any Iraqi embassy.”).

193. See Foreigner Residence Law, *supra* note 181, art. 2, para. 1; *id.* art. 8, para. 1.

194. IRAQ INTERIM CONST., art. 34(b) (1990), available at [http://expired.oefre.unibe.ch/law/icl/iz01000\\_.html](http://expired.oefre.unibe.ch/law/icl/iz01000_.html), *superseded* by LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (2004), available at <http://www.cpa-iraq.org/government/TAL.html>

persecuted in their countries because of defending the liberal and human principles which are assumed by the Iraqi People in this Constitution.”<sup>195</sup> Another provision of Iraqi law under Saddam Hussein stripped Iraqis of their citizenship if they sought refuge abroad.<sup>196</sup> It is unclear to what extent these immigration provisions have been enforced by the occupying forces,<sup>197</sup> and Goldsmith makes no mention of them in his discussion of “local immigration laws” in Iraq. Notably, the Law on Foreigners Residence makes no mention of “illegal alien” status, on which Goldsmith relies.

d. Changes in Iraqi Immigration Law Since Occupation Began Are Suspect and Not Enforceable

Less than two months after the end of “major combat operations” in Iraq,<sup>198</sup> Paul Bremer, Administrator of the Coalition Provisional Authority (CPA), dramatically changed “local” Iraqi immigration laws by issuing an order in June 2003.<sup>199</sup> It is unclear whether Goldsmith specifically took these changes into account, but they had been in effect in Iraq for nine months prior to the date his memorandum was issued. These laws preempted any conflicting provisions in pre-existing Iraqi immigration laws.<sup>200</sup> The June 2003 CPA Order imposed a permit system on

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[hereinafter LAW FOR THE TRANSITIONAL PERIOD], *superseded by* IRAQ CONST. (2005), *available at* [http://portal.unesco.org/ci/en/files/20704/11332732681iraqi\\_constitution\\_en.pdf/iraqi\\_constitution\\_en.pdf](http://portal.unesco.org/ci/en/files/20704/11332732681iraqi_constitution_en.pdf/iraqi_constitution_en.pdf). The current Iraqi Constitution also prohibits the transfer of political refugees to a foreign body. *See* IRAQ CONST., *supra*, art. 21, para. 2.

195. *Id.* art. 34(a). The Transitional Constitution contained a similar provision: “No political refugee who has been granted asylum pursuant to applicable law may be surrendered or returned forcibly to the country from which he fled.” LAW FOR THE TRANSITIONAL PERIOD, *supra* note 194, art. 19.

196. *See* Hannah Allam, *Drafters of Iraq’s Constitution Grapple with Dual Citizenship*, KNIGHT RIDDER WASH. BUREAU, July 26, 2005. This law is expressly reversed in the current constitution of Iraq. *See* IRAQ CONST., *supra* note 194, art. 18, para. 3.

197. Most members of the interim Iraqi administration are nationals of countries other than Iraq. *See* Allam, *supra* note 196. While a strict application of earlier Iraqi law would consider them not to be dual nationals, that law does not seem to have been an impediment to their entry into the country or to their assumption of leadership positions in the country’s government. *See id.*

198. *See supra* note 27 and accompanying text.

199. *See* COALITION PROVISIONAL AUTHORITY, ORDER NO. 16, TEMPORARY CONTROL OF IRAQI BORDERS, PORTS AND AIRPORTS (*entered into force* June 27, 2003), *available at* [http://www.defenselink.mil/dodgc/ia/docs/CPAORD16iraqi\\_borders.pdf](http://www.defenselink.mil/dodgc/ia/docs/CPAORD16iraqi_borders.pdf) [hereinafter JUNE CPA BORDER ORDER].

200. *See id.* sec. 2, para. 2 (“Wherever a stipulation or provision of this Order or any other CPA Regulation, Order or Memorandum conflicts with a current provision of Iraqi immigration, emigration, customs and quarantine laws, the stipulation or provision contained in such Regulation, Order or Memorandum shall prevail.”).

non-Iraqis who are not Coalition personnel or United Nations officials.<sup>201</sup> Presumably, the CPA Order required non-Iraqis present in Iraq prior to the imposition of the permit scheme to apply for and receive a permit in order to remain in the country.<sup>202</sup> Also, because some had been able to enter the country under the previous laws without a visa,<sup>203</sup> they may have difficulty demonstrating legal presence when applying for a permit. Under the terms of the CPA Order, a permit may be denied if an officer has reasonable grounds to believe that the permit applicant “will commit offenses, or engage in criminal activity,”<sup>204</sup> or:

will engage in or has engaged in an act of terrorism, or is a member of a terrorist organization or an organization that there are reasonable grounds to believe will: i) engage in acts which are offensive to the principles of democratic government, institutes or processes, in Iraq; or ii) engage in or instigate the removal by force of any government.<sup>205</sup>

Permits must be renewed every 90 days,<sup>206</sup> and may be revoked if “the presence of the person in Iraq is, or would be, a risk to the health, safety or good order of the Iraqi community.”<sup>207</sup> Penalties for remaining in the country without a required permit include deportation.<sup>208</sup> Also, even Iraqi nationals may be denied entry “because of security or military necessity.”<sup>209</sup>

It is noteworthy that the CPA Order makes no mention of the Iraqi Constitution’s express grant of the right to political asylum or of the

201. *See id.* sec. 5, para. 2.

202. The June 2003 CPA Order is unclear on this point. The permit requirement is imposed on “[p]ersons seeking entry to Iraq.” *Id.* sec. 5, para. 1. But the CPA Order also lists as an offense, “remaining in Iraq without a permit, where a person requires a permit.” *Id.* sec. 13, para. 1(g). Most non-Iraqis residing in Iraq originally entered the country legally, but their passports may be considered invalid if they have not returned to their home country to renew them. *See Kim Sengupta, Iraqis Claim 85 Rebels Dead in Capture of Training Camp*, BELFAST TEL., Mar. 24, 2005 (“Most of the foreign residents originally possessed valid documents...[b]ut the documents are now deemed to be invalid if they have not returned to their home countries to renew their passports and entry visas, a difficult task in a land racked by years of conflict and shackled by United Nations sanctions.”).

203. *See supra* notes 193–97 and accompanying text.

204. JUNE CPA BORDER ORDER, *supra* note 199, at sec. 7, para. 1(e).

205. *Id.* sec. 7, para. 1(f).

206. *See id.* sec. 5, para. 1 (“Officers shall issue permits valid for up to 90 days....”).

207. *Id.* sec. 9, para. 1(c).

208. *See id.* sec. 13, para. 1(g); *id.* sec. 14.

209. *See id.* sec. 7, para. 2.

prohibition on extradition of political refugees.<sup>210</sup> The Law of Administration for the State of Iraq for the Transitional Period (Law for the Transitional Period), established by the CPA on March 8, 2004, only states that political refugees “who ha[ve] been granted asylum pursuant to applicable law” may not be forcibly returned to the country from which they fled.<sup>211</sup> It is unclear whether there is any such “applicable law,” given that the CPA Order governing border control makes no mention of asylum. The Law for the Transitional Period also grants the Iraqi Transitional Government “exclusive competence” to “[r]egulat[e] Iraqi citizenship, immigration, and asylum.”<sup>212</sup> Even this concession to the authority of the Iraqi Transitional Government is preempted by the CPA-promulgated border regulations allowing officers to deny entry to Iraqi nationals “because of security or military necessity.”<sup>213</sup> Hence, the CPA arguably retained control over immigration for all non-Iraqis, as well as any Iraqis seeking to enter the country.

Less than three months after Goldsmith’s memorandum was issued, and a mere two weeks before sovereignty was restored in Iraq, Paul Bremer changed Iraq’s immigration laws once again.<sup>214</sup> Most of the changes are relatively minor, but two amendments afforded officers new detention powers which did not exist under the original June 2003 CPA Order.<sup>215</sup> First, a person “may be detained for up to forty-eight hours for further examination upon entry and/or pending arrangements for his or her return....”<sup>216</sup> This provision is unusual because it allows for detention not only “upon entry” but also “pending arrangements for...return.” Also, it indicates that the purpose of the detention is “for further exami-

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210. IRAQ INTERIM CONST., *supra* note 194, art. 34, *superseded by* LAW FOR THE TRANSITIONAL PERIOD, *supra* note 194, art. 19, *superseded by* IRAQ CONST., *supra* note 194, art. 21, para. 2.

211. LAW FOR THE TRANSITIONAL PERIOD, *supra* note 194, art. 19.

212. *Id.* art. 25, ¶ 1(F) (emphasis added).

213. See JUNE CPA BORDER ORDER, *supra* note 199, sec. 7, para. 2. The Law for the Transitional Period provides that, “[t]he laws, regulations, orders, and directives issued by the [CPA] pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.” LAW FOR THE TRANSITIONAL PERIOD, *supra* note 194, art. 26(c).

214. COALITION PROVISIONAL AUTHORITY, ORDER NO. 16 (Revised) (Amended), TEMPORARY CONTROL OF IRAQI BORDERS, PORTS AND AIRPORTS (*entered into force* June 13, 2004), *available at* [http://www.iraqcoalition.org/regulations/20040613\\_CPAORD\\_16\\_Temporary\\_Control\\_of\\_Iraqi\\_Borders\\_Ports\\_Airports\\_Rev\\_Amd.pdf](http://www.iraqcoalition.org/regulations/20040613_CPAORD_16_Temporary_Control_of_Iraqi_Borders_Ports_Airports_Rev_Amd.pdf) [hereinafter AMENDED CPA BORDER ORDER].

215. See *id.* sec. 4, para. 3; sec. 7, para. 2.

216. *Id.* sec. 4, para. 3. This provision did not exist in the original order. See JUNE CPA BORDER ORDER, *supra* note 199, sec. 4.

nation.”<sup>217</sup> Accordingly, any person deemed deportable could be detained for examination for up to forty-eight hours under the revised order. Second, while the original order simply allowed for Iraqis to be “denied entry” “because of security or military necessity,”<sup>218</sup> the amended order states that “such a person may be *detained* upon entry into Iraq.”<sup>219</sup>

As demonstrated above, an occupying power may decline to enforce local laws.<sup>220</sup> Yet the Hague Convention calls for enforcement of laws existing prior to occupation “unless absolutely prevented.”<sup>221</sup> Therefore, under the Hague Convention, the Coalition must make every attempt to resolve inconsistencies between Iraqi immigration laws existing prior to occupation and laws imposed by the occupying power during occupation in favor of the previously existing laws.

Hence, under both the Hague and Geneva Conventions, CPA immigration laws could only repeal the provisions of the Law on Foreigners Residence that allowed for deportation. Instead, the CPA immigration laws *expanded* provisions for deportation. Given the fact that Article 49 of the Geneva Civilian Convention expressly prohibits deportations,<sup>222</sup> the CPA immigration laws are clearly not essential to fulfilling the obligations of the occupying power. They are therefore impermissible under the terms of the second paragraph of Article 64 of the Geneva Civilian Convention, which only permits the occupying power to enact “provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, *and* to ensure the security of the Occupying Power.”<sup>223</sup> The absolute prohibition on deportations in Article 49 demonstrates that there can be no circumstances in which deportations may be justified as essential to “maintain[ing] the orderly government of the territory” and “ensur[ing] the security of the Occupying Power.” Article 64 reinforces the principle that any form of deportation—whether under the Law on Foreigners Residence, or under the CPA immigration laws—is not permissible and may not be justified as an attempt to enforce the

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217. AMENDED CPA BORDER ORDER, *supra* note 214, sec. 4, para. 3.

218. See JUNE CPA BORDER ORDER, *supra* note 199, sec. 7, para. 2.

219. AMENDED CPA BORDER ORDER, *supra* note 214, sec. 7, para. 2 (emphasis added).

220. See *supra* notes 177–80 and accompanying text.

221. Hague Convention, *supra* note 48, art. 43; see also RICHARD I. MILLER, THE LAW OF WAR 96 (1975) (noting that Article 43 is based on the premise that “it is conducive to a stable occupation and the quiescence of the inhabitants if the *existing laws*, institutions, and customs are respected to the maximum extent”) (emphasis added).

222. Geneva Civilian Convention, *supra* note 4, art. 49.

223. Geneva Civilian Convention, *supra* note 4, art. 64, para. 2 (emphasis added).

laws of the occupied territory.

An additional provision further strengthens the conclusion that changes in local immigration laws may not be used to bring about deportations. Article 47 of the Geneva Civilian Convention states:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power....<sup>224</sup>

Pictet's Commentary demonstrates that this provision was enacted with the practices of German occupying forces in the forefront of the minds of members of the diplomatic conference:

The position of Article 47 at the beginning of the Section dealing with occupied territories underlines the cardinal importance of the safeguards it proclaims. During the Second World War whole populations were excluded from the application of the laws governing occupation and were thus denied the safeguards provided by those laws and left at the mercy of the Occupying Power. In order to avoid a repetition of this state of affairs, the authors of the Convention made a point of giving these rules an absolute character.<sup>225</sup>

Pictet's Commentary becomes even more specific: "Cases have in fact occurred where the authorities of an occupied territory have, under pressure from the Occupying Power, ...tolerated the forcible...deportation of protected persons by the occupying authorities."<sup>226</sup> This analysis explicitly supports the prohibition on an occupying power altering local laws to deny persons the protection of the Convention. Deportation under CPA immigration laws would deny a person those protections, and accordingly would violate Article 47, as well as Article 49. Therefore, had Goldsmith looked to the Geneva Civilian Convention itself, rather than to his narrow reading of customary international law and the Hague Convention, he would have discovered a clear prohibition of the use of local immigration laws to carve an exception out of Article 49's absolute prohibition on deportation.

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224. Geneva Civilian Convention, *supra* note 4, art. 47.

225. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 273.

226. *Id.* at 275.

As noted above, it is unclear whether the Goldsmith memorandum is attempting to justify deportations under the new immigration provisions enacted by the Coalition Provisional Authority. If Goldsmith was attempting to justify deportations under either of the new deportation laws, his logic could just as easily have been used to justify the changes in local residency and nationality laws effected by German occupying forces in Europe during World War II. While Article 49 clearly prohibits deportations during occupation even when they would otherwise be permissible under pre-existing local laws, there is no doubt that the parties to the diplomatic conference did not intend to allow the occupying power to change local immigration laws to bring about deportations; that tactic is precisely the method used by Nazi Germany to bring about the Holocaust, which was in the minds of the diplomats at Geneva.<sup>227</sup>

Distinctions between the old Iraqi laws and new CPA laws may be of particular importance to Palestinians who made Iraq their home with Saddam Hussein's blessing. Iraq under Saddam Hussein had provided refuge to many Palestinians.<sup>228</sup> In 2000, the Iraqi government granted home-ownership rights to 60,000 Palestinians living in Iraq.<sup>229</sup> Perhaps due to this historical support, most Palestinians living in Iraq were viewed as strong supporters of Saddam Hussein.<sup>230</sup> As the Iraq War commenced in early 2003, some Palestinians were attacked and threatened with expulsion.<sup>231</sup> The fate of Palestinians under Iraq's changed immigration laws is uncertain, particularly if they are suspected of having links to terrorist activities.<sup>232</sup> Given the considerable size of the Pal-

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227. See *supra* note 168 and accompanying text.

228. See Pamela Constable, *In Postwar Iraq, Fortunes of Palestinians Worsen*, WASH. POST, Aug. 3, 2003, at A15 (“[Palestinians] were once part of former president Saddam Hussein’s favorite foreign cause.”); Ahmad S. Moussalli, *The Geopolitics of Syrian-Iraqi Relations*, MIDDLE E. POL’Y, Oct. 1, 2000, at 107. Since 1991, hundreds of thousands of Palestinians have been expelled from Kuwait and other Gulf states as a result of the Palestinian Liberation Authority’s support for Saddam Hussein in the 1990–91 war. See Khaled Abu Toameh, *Bleak Future Awaits Palestinians in Post-Saddam Iraq*, JERUSALEM POST, Apr. 28, 2003, at 3. Many fled to Iraq. *Id.*

229. See Moussalli, *supra* note 228, at 107.

230. See *Palestinians in Iraq Fear Expulsion*, JERUSALEM POST, Apr. 22, 2003 (“The Palestinian community of more than 40,000 is regarded by Iraqi opposition leaders as some of the most faithful followers of Saddam.”).

231. *Id.*; see also *NBC Nightly News: Palestinians Now Facing Homelessness in Iraq* (NBC television broadcast, May 10, 2003).

232. See Constable, *supra* note 228 (noting that three Palestinian diplomats had been taken into custody, and that the United States was investigating possible links between the Palestinian embassy and terrorist activities); *Iraqi Shi’i “Collaborators” Attack Palestinians*, AL-QUDS (Jerusalem), May 25, 2005, reprinted in BBC Worldwide Monitoring, May 28, 2005 (describing recent assaults on Palestinians by the Iraqi Interior Ministry’s “Wolf Brigade”). But see *Iraqi Foreign Minister Comments on Relations with Syria*, AL-SHARQ AL-AWSAT (London), Mar. 23, 2004, reprinted in BBC Worldwide Monitoring, Mar. 23, 2004 (“Regarding the Palestinians liv-

estinian population in Iraq, and the fact that there may not be a country which will accept them upon deportation, this particular category of non-Iraqis may be in grave danger and warrants heightened protection under the Geneva Civilian Convention.<sup>233</sup>

Egyptians living in Iraq are also perceived by the current Iraqi administration as loyal to Saddam Hussein's government,<sup>234</sup> and during the U.S. occupation there were Egyptian detainees in U.S. custody in Iraq.<sup>235</sup> Given perceptions of their allegiance to Hussein, they may be subject to forced transfer out of the country under Iraq's new immigration laws.<sup>236</sup> If they are deported to Egypt, there is a strong likelihood that they will be subjected to torture and other forms of ill-treatment at the hands of the Egyptian government.<sup>237</sup>

Less than one year after the second time that the CPA amended Iraqi immigration laws, the Iraqi government again tightened national residency rules and began detention and deportation of non-Iraqis living in the country.<sup>238</sup> Because the U.S. forces in Iraq arguably are still governed by the Geneva Civilian Convention,<sup>239</sup> these deportations also could run afoul of Article 49.

While it is unclear to what extent Goldsmith's memorandum is providing legal authorization for forced transfer of non-Iraqis based on pre-existing Iraqi immigration laws or the more restrictive immigration laws imposed by the CPA or even the Iraqi government itself, in either case

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ing in Iraq, they will be treated like the Iraqis.") (statement of Iraqi Foreign Minister Hoshiyar Zebari).

233. Cf. *supra* notes 150–69 and accompanying text (discussing the fate of stateless Jews in Europe during World War II).

234. See *Egypt, Iraq Said in Dispute over Treatment of Iraq-Based Egyptians*, AL-HAYAT (London), Oct. 1, 2003, reprinted in BBC Worldwide Monitoring, Oct. 3, 2003.

235. See *id.*

236. See *supra* notes 199–219. The destination of these transfers is unclear. The Egyptian government has demonstrated a high level of cooperation in the extraordinary rendition program, see Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1, and therefore would seem to be a natural destination for transfers of Egyptian nationals. The only officially recognized rendition from Iraq involved Hiwa Abdul Rahman Rashul, who was transferred to Afghanistan for interrogation. See Priest, *supra* note 2. Evidently, Rashul is an Iraqi citizen. See Mark Fass, *Rumsfeld ID's Secret Detainee*, DAILY NEWS (N.Y.), June 20, 2004, at 34 (describing Rashul as an "Iraqi prisoner").

237. See *Agiza v. Sweden*, Decision of the Committee Against Torture, Communication No. 233/203, U.N. Doc. CAT/C/34/D/233/2003 (2005), at 34, ¶ 13.4; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, EGYPT (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41720.htm>; Stephen Grey, *America's Gulag*, NEW STATESMAN, May 17, 2004, at 22.

238. See Alissa J. Rubin, *Iraq Moves to Expel Foreign Arabs*, L.A. TIMES, Mar. 23, 2005, at A1. The policy was established by the Iraqi administration in February 2005. See *id.*

239. See *supra* notes 60–68 and accompanying text.

Article 49's prohibition on deportation and forcible transfer conducted by an occupying power is absolute. Hence, forcible transfer of terror suspects from Iraq violates Article 49, regardless of whether the suspects are in violation of any local immigration law.

## 2. *Goldsmith Gap Two*

Goldsmith attempts to set forth an additional gap in Article 49 of the Geneva Civilian Convention. He contends that protected persons in occupied Iraq may be relocated from Iraq "temporarily, to facilitate interrogation" as long as those persons have not been accused of any offense.<sup>240</sup> Goldsmith presents several arguments in support of his conclusion. First, he argues that the explicit prohibition on removal of protected persons who are accused of crimes suggests that individuals *not* accused of crimes may be removed, provided that the removal is not permanent. Second, he contends that provisions allowing for the transfer of orphaned children demonstrate that the prohibition only applies to individuals who are being permanently uprooted from their homes. Third, he asserts that the terms "deportation" and "transfer" are used in another part of Article 49 to exclude temporary relocations. Fourth, he contends that if Article 49 contained an absolute prohibition on involuntary transfers, then two other provisions in the Geneva Civilian Convention would be rendered superfluous. This section explores each argument in turn, and demonstrates that Goldsmith's reasoning is unpersuasive.

Goldsmith first takes note that Article 76 explicitly provides that, "Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein."<sup>241</sup> For persons not accused of offenses, Goldsmith contends that forcible transfers and deportations prohibited within the context of Article 49 only involve actions that permanently uproot a person from his or her home.<sup>242</sup>

As noted above, Goldsmith's reading of the term deportations as limited to removal of persons lawfully in a place is inconsistent with the text and historical impetus for Article 49. Moreover, while deportation may indeed connote permanence, transfer does not. This distinction is evidenced by Pictet's Commentary to Article 45, which governs the conditions for voluntary transfer. He explains that, "Any movement of protected persons to another State, carried out by the Detaining Power

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240. Goldsmith, *supra* note 133, at 374–79.

241. Geneva Civilian Convention, *supra* note 4, art. 76.

242. Goldsmith, *supra* note 133, at 376.

on an individual or collective basis, is considered as a transfer for the purposes of Article 45. The term ‘transfer’, for example, may mean internment in the territory of another Power....”<sup>243</sup> Because internment is a temporary and prohibited transfer, the drafters of the Conventions did not intend to prohibit only permanent transfers.

Goldsmith then looks to other provisions of the Convention to make the argument that a prohibition on non-permanent transfers would create structural inconsistencies within the Convention.<sup>244</sup> His second argument notes that Article 24 calls for the relocation of orphans under age 15 to neutral countries for the duration of the conflict, and argues that the only reasonable way to reconcile Articles 24 and 49 is that Article 49 only prohibits uprooting persons from their homes, and because orphans have already been uprooted, the two provisions do not conflict.

There are several flaws in his construction of Article 24. First, Article 24’s provisions for “reception of [orphans] in a neutral country” does not govern countries under occupation; it only applies “for the duration of the conflict”<sup>245</sup> and is not one of the articles listed as binding on occupying powers staying beyond one year.<sup>246</sup> Hence, within the context of occupation, rather than ongoing armed conflict, Article 24 creates no inconsistency with the strict interpretation of Article 49 presented above. Second, such reception can be interpreted as a voluntary transfer, because the parties to the conflict are in essence acting *in loco parentis* to determine the best interests of orphaned children.<sup>247</sup> Such a transfer can hardly be considered either a “deportation” or a “forcible transfer” prohibited by Article 49; instead, it is a presumably voluntary transfer consistent with the voluntary transfers allowed under Article 45. This argument is strengthened by the observation that Article 24 does not define orphans as children already uprooted from their *homes*, as Goldsmith asserts,<sup>248</sup> but instead defines them as children “who are orphaned or are separated *from their families*....”<sup>249</sup> An orphan may still be at home and subject to lawful transfer from that home consistent with the provisions of Articles 24 and 49. Further, Goldsmith’s conclusion that transfers not constituting permanent uprooting from one’s home are

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243. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 266 (emphasis added).

244. Goldsmith, *supra* note 133, at 376–79.

245. Geneva Civilian Convention, *supra* note 4, art. 24.

246. *See supra* text accompanying note 60.

247. *See* Luban, *supra* note 138, at 2–3.

248. *See* Goldsmith, *supra* note 133 at 377 (“The children provided for in [A]rticle 24 are precisely those who have been orphaned or separated from their homes already, by the war.”).

249. Geneva Civilian Convention, *supra* note 4, art. 24 (emphasis added).

permissible contradicts Pictet's Commentary on Article 49, which states that "[t]he prohibition [against deportation and forcible transfer] is absolute and allows of no exceptions, apart from the provisions stipulated in paragraph 2."<sup>250</sup>

In advancing his third argument, Goldsmith identifies a second seeming inconsistency within Article 49 itself. The final paragraph of Article 49 provides that, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."<sup>251</sup> He notes that Nazi Germany engaged in permanent resettlement of ethnic Germans into conquered lands as part of the effort to "Germanize" occupied territories.<sup>252</sup> Goldsmith also observes that frequently an occupying power will temporarily relocate civilian personnel into the occupied territory to serve as support staff for the occupying power.<sup>253</sup> Accordingly, he argues, the provisions of Paragraph 6 demonstrate that the terms "deport or transfer" only apply to permanent movement of persons across borders. Goldsmith then asserts that the same words bear the same meaning throughout the same treaty<sup>254</sup> and concludes that the prohibitions on forcible transfers and deportations in Article 49(1) do not include temporary forcible transfers or deportations.

While Goldsmith makes reference to Pictet's Commentary in other parts of his analysis, he fails to mention it in this part of his argument, presumably because Pictet flatly contradicts Goldsmith's conclusion that the words "deportation" and "transfer" in Article 49(6) have the same meaning as those same words in Article 49(1):

[Paragraph 6] provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words 'transfer' and 'deport' is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.

It would therefore appear to have been more logical—and this was pointed out at the Diplomatic Conference—to have made the clause in question into a separate provision distinct from Article 49, so that the concepts of 'deportations' and 'transfers' in that Article could have kept throughout the meaning given them in

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250. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 279.

251. Geneva Civilian Convention, *supra* note 4, art. 49, para. 6.

252. *See* Goldsmith, *supra* note 133, at 377.

253. *See id.* at 378.

254. *See id.* at 377 (citing *Air France v. Saks*, 470 U.S. 392, 398 (1985)).

paragraph 1, i.e. the compulsory movement of protected persons from occupied territory.<sup>255</sup>

Therefore, Pictet's Commentary is sufficient to overcome any presumption that the terms as used in the first paragraph carry the same meaning as the terms as used in the sixth paragraph.

Fourth, Goldsmith indicates that an absolute prohibition on forced transfers and deportations in Article 49 would render Articles 51 and 76 superfluous.<sup>256</sup> Article 51 describes the conditions under which an occupying power may compel protected persons to work.<sup>257</sup> Paragraph 3 provides that, "[t]he work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are."<sup>258</sup> Goldsmith contends that if Article 49 prohibited even temporary transfers, Article 51 would not be necessary. Pictet's Commentary, however, takes into consideration that this provision is subsumed by Article 49, and explains the basis for its repetition:

The stipulation that protected persons may not be employed on work outside the occupied territory is already contained, as has been seen, in Article 49, paragraph 1, which contains a general prohibition of all "deportations", but in view of the unhappy experiences of the last world war it seemed necessary to reaffirm that essential principle here.<sup>259</sup>

This Commentary establishes two critical precepts to defeat Goldsmith's faulty premise. First, the "redundancy" between Articles 49 and 51 is acknowledged and explained. Second, and more importantly, the Commentary tells us that Article 49 prohibits all "deportations," including transfers which might take place solely for the purpose of work outside the occupied territory.

As noted above, the first paragraph of Article 76 provides that protected persons accused of offenses must be detained in the occupied country, and if they are convicted, they must serve their sentences in the occupied country.<sup>260</sup> Goldsmith argues that this article would be redundant if Article 49 prohibited all deportations and involuntary transfers. Instead of being superfluous, Article 76, as Pictet explains, "is based on the fundamental principle forbidding deportations laid down in Article

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255. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 283.

256. Goldsmith, *supra* note 133, at 378–79.

257. Geneva Civilian Convention, *supra* note 4, art. 51.

258. *Id.* para. 3.

259. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 298.

260. *See supra* text accompanying note 241.

49.”<sup>261</sup> Indeed, the Commentary for Article 49 notes the relationship among the three articles in question:

The prohibition [against deportations and forcible transfers in Article 49(1)] is absolute and allows of no exceptions, apart from those stipulated in paragraph 2 [relating to emergency evacuations]. It is, moreover, *strengthened* by other Articles in the cases in which its observance appeared to be least certain: in this connection mention may be made of Article 51, paragraph [3<sup>262</sup>], dealing with compulsory labour, [and] Article 76, paragraph 1, concerning the treatment of protected persons accused of offences or serving sentences....<sup>263</sup>

Rather than construing Articles 51 and 76 as hinting at an unstated exception to Article 49, Pictet confirms that they merely strengthen and reinforce the absolute prohibition for cases in which there might be some remaining uncertainty.

In a footnote on the penultimate page of his memorandum, Goldsmith recognizes that his own conclusion runs contrary to Pictet’s explicit statement, and he responds to the contradiction as follows:

We do not find [Pictet’s] reasoning persuasive. Article 49 may well lay down a fundamental principle, but the scope of this principle must be ascertained by traditional rules of treaty interpretation, including the rule that each provision of a treaty “is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to [to] render it meaningless or inoperative.” *Factor* [v. *Laubenheimer*], 290 U.S. [276,] 303–04 [(1933)].<sup>264</sup>

The interpretation advanced in this footnote, however, renders meaning-

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261. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 363.

262. Pictet appears to be referencing paragraph three and not two.

263. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 279 (emphasis added).

264. Goldsmith, *supra* note 133, at 379 n.13. The use of this particular rule of treaty interpretation is inconsistent with Goldsmith’s own analysis of the distinction between “deportation” and “forcible transfer.” See *supra* note 254 and accompanying text. Indeed, the passage Goldsmith cites from *Factor* makes reference not to treaty “provisions” but to “phrase[s]” and “words.” *Factor*, 290 U.S. at 303–04. Interestingly, the provision interpreted by the court in *Factor* is “stolen or unlawfully obtained.” *Id.* at 303. Using Goldsmith’s reasoning, things that are stolen are not unlawfully obtained because if the two terms meant the same thing, one of the two words would be superfluous. To the contrary, the Supreme Court held that the two terms used in tandem served to strengthen one another, rather than for one to carve an exception out of the other. *Id.* (“Whatever was left vague or uncertain by the use of the word ‘stolen’ was made certain by the added phrase ‘or unlawfully obtained,’ as indicating any form of criminal taking whether or not embraced within the term larceny in its various connotations.”).

less Article 49's language prohibiting forcible transfers "regardless of motive" and ignores the specific explanations offered in Pictet's authoritative Commentary. It is also noteworthy that nowhere in Goldsmith's memorandum does he quote Pictet's clear statement about Article 49, paragraph one: "The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2."<sup>265</sup>

The language of Article 49, viewed both within the larger context of other provisions of the Geneva Civilian Convention and in light of Pictet's Commentary, indicates that there is no exception lurking within the article which allows for temporary forcible removal of protected persons.<sup>266</sup> Hence, there is no exception to Article 49 which allows for temporary removal of any protected person, whether "to facilitate interrogation" or for other purposes—sinister or benign.<sup>267</sup> Except in the rare circumstances where U.S. or Coalition nationals would be subject to forcible transfer, there is no gap in the Geneva Civilian Convention, at

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265. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 279. It would be difficult to argue that Goldsmith simply overlooked these words. In fact, his parenthetical reference to Pictet's conclusion suggests a concerted effort to avoid any reference to the words "The prohibition is absolute and allows of no exceptions" in the above-quoted sentence. Goldsmith dodges this language by using a clever paraphrase: "asserting without analysis that Article 49(1)'s prohibition is 'strengthened by other Articles....'" Goldsmith, *supra* note 133, at 379 n.13.

266. Given the extensive committee work and negotiations relating to the Geneva Conventions in the diplomatic conference prior to their enactment, it seems a stretch of the imagination that the parties intended such an exception to exist without explicitly stating that it did, particularly in light of the absolute language in the first paragraph of Article 49.

267. That Goldsmith's conclusion to the contrary may be motivated by less-than-benign intent is indicated by the failure of any government authority to explain convincingly *how* or *why* interrogations of Iraqis might be facilitated by removing them temporarily from Iraq. See 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 (reporting that U.S. officials assert that foreign allies are better suited for interrogations "because of their cultural affinity with the captives"). In his final footnote, Goldsmith includes an oblique but foreboding reminder to those officials who might seek to use his memorandum:

[A]lthough we have previously indicated that only those who "find themselves...in the hands of a Party to the conflict or Occupying Power" in "occupied territory[...]"...receive the benefits of "protected person" status,...this does not mean that a "protected person" who is captured in occupied territory and then temporarily relocated by the occupying power to a different location thereby forfeits the benefits of "protected person" status.

On the contrary, we believe he would ordinarily retain these benefits.

Goldsmith, *supra* note 133, at 379 n.14. In other words, any "facilitation of interrogation" occurring outside of Iraq must not be derived from an attempt to escape the other provisions of the Geneva Civilian Convention, including the prohibitions of torture and inhuman treatment, listed as grave breaches in Article 147. Perhaps Goldsmith foresaw that human rights organizations would view his legal justifications for forcible transfer from Iraq as complicity in war crimes, and therefore inserted this footnote in an attempt to shield himself from culpability. See *infra* note 302.

least as regards Article 49.<sup>268</sup> Use of extraordinary rendition forcibly to transfer persons protected under the Geneva Civilian Convention out of Afghanistan or Iraq subsequent to occupation is therefore a war crime, and no exceptions are allowed under the Convention for those persons not lawfully present in the occupied territory or for temporary transfer.

## V. MECHANISMS TO CHALLENGE THE PRACTICE OF EXTRAORDINARY RENDITION

When a High Contracting Party commits a grave breach of the Geneva Conventions, there are several means to hold the offenders accountable. First, there may be mechanisms within the domestic legal system of the offending High Contracting Party. Second, international judicial bodies may be able to assert jurisdiction over the offenders. Third, other individual countries may initiate criminal prosecution of the responsible officials. This Part addresses each of these approaches in turn.

### A. *Mechanisms Within the U.S. Legal System*

The United States ratified the 1949 Geneva Conventions in 1955 and they entered into force for the United States on February 2, 1956.<sup>269</sup> Congress formally criminalized grave breaches in the War Crimes Act of 1996.<sup>270</sup> Section 2441(c)(1) of Title 18 defines war crimes to include

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268. Evidently this view was close to Goldsmith's original position. *See* Priest, *supra* note 2 ("In October [2003], White House counsel Alberto R. Gonzales asked the Office of Legal Counsel to write an opinion on 'protected persons' in Iraq and rule on the status of [Hiwa Abdul Rahman] Rashul[, who had already been turned over to the CIA in June or July of 2003 and taken to Afghanistan for interrogation].... Goldsmith...ruled that Rashul was a 'protected person' under the [Civilian] Geneva Convention [in a one-page interim ruling].... 'That case started the CIA yammering to Justice to get a better memo,' said one intelligence officer familiar with the inter-agency discussion.").

269. Congress did not enact implementing legislation at the time. The Attorney General's office had concluded that it was unnecessary because all requisite legislation was already in existence. *See Geneva Conventions for the Protection of War Victims: Hearing Before the S. Comm. on Foreign Rels.*, 84th Cong. 28-29 (1955) [hereinafter *Geneva Convention Hearing*] (statement of Assistant Attorney General J. Lee Rankin); *id.* at 58 ("A review of existing legislation reveals no need to enact further legislation in order to provide effective penal sanctions for those violations of the Geneva [C]onventions which are designated as grave breaches.") (letter from Assistant Attorney General J. Lee Rankin to Senator Walter F. George, June 7, 1955). Rankin concluded that only three statutory changes were required to implement the treaty: an amendment relating to the use of the Red Cross emblem, renewal of a statute relating to imports of items for prisoners of war, and possibly some worker's compensation legislation. *See id.* at 59.

270. Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified at 18 U.S.C. § 2441 (2006)). Congress deemed the 1996 implementing legislation necessary because legislators had identified many situations in which prosecution of individuals committing grave breaches would have been

a “grave breach in any of the international conventions signed at Geneva 12 August 1949.”<sup>271</sup>

There are convincing indications that the Bush Administration intended to carve out an exception to allow the CIA to conduct interrogations and renditions without being bound by any requirements that the administration imposed on the Defense Department to afford detainees humane treatment.<sup>272</sup> Additionally, the Bush administration exerted concerted (but ultimately unsuccessful) efforts to force Congress to exempt the CIA from an amendment sponsored by Senator John McCain prohibiting cruel, inhuman, and degrading treatment of detainees in U.S. custody.<sup>273</sup> There is strong evidence to indicate that the CIA engages in

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impossible under existing law, particularly when war crimes were committed outside of the United States. H.R. REP. NO. 104-698, at 4 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2166, 2169.

271. 18 U.S.C. § 2441(c)(1).

272. *See, e.g.*, Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 §§ 3(b), 2(a) (Nov. 13, 2001) (requiring that individuals subject to the order be “treated humanely” while detained by the Department of Defense, but providing that an individual is only subject to the order if “it is in the interest of the United States”); Bush, *supra* note 20, at 135 (“As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely...”); Noah Feldman, *Ugly Americans*, NEW REPUBLIC, May 30, 2005, at 23 (observing that the CIA is not bound by the Uniform Code of Military Justice, and therefore “[i]t would follow that the CIA, unlike the military, would be authorized to do anything except violate the U.S. anti-terror statute—which is precisely the statute whose reach the memoranda sought to diminish”); *Nomination of Alberto Gonzales to Be the Attorney General of the United States: Hearing of the S. Comm. on the Judiciary*, 109th Cong. (Jan. 6, 2005) (“It has always been the case that everyone should be treated—that the military would treat detainees humanely, consistent with the [P]resident’s February order.”) (statement of Attorney General nominee Alberto Gonzales); Priest, *supra* note 2 (noting that the Goldsmith memorandum of March 2004 was drafted “at the request of the CIA”); Status of Legal Discussions re Application of Geneva Convention to Taliban and al Qaeda, *in* THE TORTURE PAPERS, *supra* note 15, at 130, 132 (“CIA lawyers believe that, to the extent that [Geneva POW Convention’s] protections do not apply as a matter of law but those protections are applied as a matter of policy, it is desirable to circumscribe that policy so as to limit its application to the CIA. The other lawyers involved did not disagree with or object to CIA’s view.”) (unsigned record of a discussion among administration lawyers); Understanding the OLC Torture Memos (Part I), Posting of Marty Lederman, attorney-advisor at the Office of Legal Counsel from 1994–2002, to Balkinization, [http://balkin.blogspot.com/2005\\_01\\_02\\_balkin\\_archive.html](http://balkin.blogspot.com/2005_01_02_balkin_archive.html) (Jan. 7, 2005) [hereinafter Lederman, Part I] (“All of this is [fairly] strong evidence that the Administration has gone to significant lengths to preserve a significant CIA loophole.”).

273. *See* Dep’t of Defense Appropriations Act, 2006, Pub. L. No. 109-148, tit. X, § 1003, 119 Stat. 2680, 2735 (2005) (codified at 42 U.S.C. § 2000dd); Eric Schmitt, *President Backs McCain on Abuse*, N.Y. TIMES, Dec. 16, 2005, at A1; Jonathan Weisman, *Senators Agree on Detainee Rights*, WASH. POST, Nov. 15, 2005, at A1. *But see* Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005), available at <http://www.gpoaccess.gov/wcomp/v41no52.html> (stating that the executive branch shall construe the provisions “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent

extraordinary rendition in part to facilitate the use of degrading treatment and torture,<sup>274</sup> and in part as an attempt to avoid culpability for violations of the War Crimes Act. Legal memoranda for the CIA advise that if they are contemplating procedures that may constitute violations of U.S. law, “they will not be responsible if it can be argued that the detainees are formally in the custody of another country.”<sup>275</sup> In spite of this formality, the CIA does retain control, because the governments accepting the prisoners are expected to comply with CIA requests,<sup>276</sup> and because of collaboration between CIA officials and the authorities who interrogate individuals who have been subjected to extraordinary rendition.<sup>277</sup> Therefore, the rendition of POWs or persons whose POW

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with the constitutional limitations on the judicial power, which will assist in...protecting the American people from further terrorist attacks”).

274. See European Parliament Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation 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 at 7–12 (June 15, 2006) [hereinafter Fava Report] (reported by Giovanni Claudio Fava), available at <http://www.europarl.europa.eu/oeil/file.jsp?id=5309292>.

275. James Risen et al., *Harsh CIA Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1.

276. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT’L L. 585, 619 (2006); see also Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1 (noting that Pentagon officials assert that their transfers do not qualify as “renditions” “because the governments that accept the prisoners are not expected to carry out the will of the United States”). Presumably, therefore, governments accepting prisoners in the CIA rendition program are expected to carry out the will of the United States. This distinction was reiterated in two rulings in the District Court for the District of Columbia when petitioners applied for injunctive relief to require thirty days’ notice before transfer out of Guantánamo. See *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 195–96 (D.D.C. 2005) (noting that Defense Department transfers are distinguished from CIA transfers because the foreign countries are not expected to carry out the will of the United States when they accept Pentagon detainees); *Almurbati v. Bush*, 366 F. Supp. 2d 72, 76–77 (D.D.C. 2005) (acknowledging the “admittedly disturbing” newspaper reports of extraordinary rendition, but noting that Pentagon officials had provided declarations that the Defense Department obtains assurances and will not transfer people to countries where the Pentagon believes it is more likely than not that they will be tortured). Other judges hearing similar cases were not so trusting. See, e.g., *Kurnaz v. Bush*, No. 04-1135, 2005 WL 839542, at \*2 (D.D.C. Apr. 12, 2005); *Al-Joudi v. Bush*, No. 05-301, 2005 U.S. Dist. LEXIS 6265, at \*21 (D.D.C. Apr. 4, 2005); *Al-Marri v. Bush*, No. 04-2035, 2005 U.S. Dist. LEXIS 6259, at \*1–2 (D.D.C. Apr. 4, 2005); *Abdah v. Bush*, No. 04-1254, 2005 WL 711814, at \*6 (D.D.C. Mar. 29, 2005).

277. Weissbrodt & Bergquist, *supra* note 276, at 619–21; Craig Whitlock, *In Letter, Radical Cleric Details CIA Abduction, Egyptian Torture*, WASH. POST, Nov. 10, 2006, at A23; see *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 68–69 (D.D.C. 2004) (describing evidence of U.S./Saudi collaboration in the interrogation of a U.S. citizen detained by Saudi authorities); Jane Mayer, *Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program*, NEW YORKER, Feb. 14, 2005, at 106, 110 (reporting that CIA officials would give Egyptian interrogators a list of questions in the morning, and receive a list of answers the same evening); Priest & Gellman, *supra* note 267 (noting that the CIA gives intelligence services in Egypt, Jordan, and

status is in doubt<sup>278</sup> is likely to constitute a violation of the War Crimes Act in nearly every circumstance where the detainee is kept incommunicado or subjected to great suffering, inhuman treatment, or torture.<sup>279</sup> Moreover, forced transfer of persons protected under the Geneva Civilian Convention is a grave breach no matter whether the transferring authorities retain control over the individuals after transfer and regardless of what happens to those individuals after leaving occupied territory. Certainly the CIA is part of the U.S. government, and therefore any statutory or treaty obligations imposed on U.S. officials with regard to transfers or interrogations would extend to CIA personnel, despite this apparent attempt to create an exception. Therefore, the CIA officials and others in the U.S. government responsible for forcible transfers from occupied Iraq and Afghanistan should be held accountable for their criminal activities under the terms of the War Crimes Act. Nonetheless, U.S. prosecutors are unlikely to pursue criminal prosecution of those officials at a time when such actions would be regarded as highly unpopular.<sup>280</sup> Moreover, Congress has enacted legislation that reduces the likelihood that U.S. personnel will be held accountable for violations of the

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Morocco lists of questions it wants answered when it hands suspects over to authorities in those countries); *id.* (reporting that in Saudi Arabia CIA officials observe live investigations through one-way mirrors); Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1 (“[Terror suspects’] fate [when detained in Saudi Arabia] is largely controlled by Saudi-based joint intelligence task forces, whose members include officers from the CIA, FBI and other U.S. law enforcement agencies.”); *id.* (“[The United States and Saudi Arabia] are not ‘cooperating’ anymore; we’re doing it together.”).

278. For persons not protected under the POW Convention, rendition may violate other provisions of the Geneva Conventions, the Convention Against Torture, the International Covenant on Civil and Political Rights, or other treaties. *See* Weissbrodt & Bergquist, *supra* note 3, at 132–47, 149–53.

279. *See* Geneva POW Convention, *supra* note 4, art. 130–31.

280. Individuals who are currently being held in violation of Article 49 may be able to invoke the writ of habeas corpus to challenge their illegal transfer and subsequent detention. *See* Weissbrodt & Bergquist, *supra* note 3, at 158; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 n.57 (2006) (suggesting that rights under the 1949 Geneva Conventions may be individually enforceable). *But see* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(2) (to be codified at 28 U.S.C. § 2241(e)(2)) (“[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”); *id.* § 5(a) (amending the Uniform Code of Military Justice to provide that “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories”).

War Crimes Act.<sup>281</sup> As a result, criminal prosecution within the United States is probably not a viable means to address extraordinary rendition in violation of the Geneva Conventions.<sup>282</sup>

### B. *International Criminal Court*

In October 2005, Mexico became the one-hundredth country to ratify the Rome Statute establishing the International Criminal Court (ICC).<sup>283</sup> The ICC may have jurisdiction over officials responsible for extraordinary rendition based on the territory where the crime occurs,<sup>284</sup> and the crime may be construed as occurring both in the country where the detainee originates and in the country where the detainee is ultimately held. The Rome Statute explicitly establishes jurisdiction over “unlawful deportation or transfer” “when committed as a part of a plan or policy.”<sup>285</sup> Exercise of ICC jurisdiction over U.S. nationals would likely draw harsh criticism from the United States,<sup>286</sup> but it may also be a more palatable means of bringing people to justice by not drawing attention to one country’s prosecutorial zeal.<sup>287</sup> While the United States has been successful in negotiating bilateral agreements with many countries to

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281. See Military Commissions Act of 2006, Pub. L. No. 109-366 § 6 (to be codified at 18 U.S.C. § 2441(c),(d)) (revising retroactively the definition of grave breaches in the War Crimes Act); *id.* § 8 (to be codified at 42 U.S.C. 2000dd-1 Note (b)) (mandating that the U.S. government provide counsel and pay for fees and costs relating to any civil action or criminal prosecution relating to the detention or interrogation of suspected terrorists); see also Detainee Treatment Act of 2005 § 1004, 42 U.S.C. § 2000dd-1 Note (a) (2006) (establishing as a defense that the individual did not know that the practices were illegal, and establishing “[g]ood faith reliance on advice of counsel” as an important factor in the defense).

282. But see R. Jeffrey Smith, *Worried CIA Officers Buy Legal Insurance*, WASH. POST, Sept. 11, 2006, at A1 (reporting that growing numbers of CIA counterterrorism officers have signed up for a private insurance plan that would pay their civil judgments and legal expenses if they face civil suits or criminal prosecutions, and that the CIA is encouraging officers to take out these insurance policies out of fear that “subpoenas could be coming”).

283. See *U.S. and Mexico at Odds over Tribunal; International Criminal Court Pact Seen as Threat to American Troops*, SEATTLE TIMES, Oct. 29, 2005, at A13 [hereinafter *U.S. and Mexico at Odds*].

284. See Rome Statute of the International Criminal Court art. 12(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute... (a) The State on the territory of which the conduct in question occurred...”). The Court also has jurisdiction over people who are nationals of States Parties. See *id.* art. 12(2)(b).

285. See *id.* art. 8.

286. See Weissbrodt & Bergquist, *supra* note 3, at 157 & n.294.

287. See Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT’L CRIM. JUST. 400, 420 (2005) (“[T]he major problem currently remains countries who, despite having undertaken international obligations, continue to drag their feet and default on their duty to initiate and carry out prosecution, whether they are unwilling or unable to do so. The ICC was established precisely to counter such pitfalls.”).

prohibit surrender of members of the U.S. military to the ICC,<sup>288</sup> European and some Latin American countries have rejected these attempts to evade criminal responsibility.<sup>289</sup> Afghanistan has signed a non-surrender agreement with the United States, however, and Iraq is not a party to the ICC.<sup>290</sup> Therefore, it is difficult to ascertain any basis for ICC jurisdiction based on the territory where the crime occurs.<sup>291</sup> If there is ICC jurisdiction (perhaps because a protected person was transferred to a country that is a party to the ICC), invoking the authority of the ICC could prompt the United States to initiate extradition of its own nationals for prosecution in U.S. courts.<sup>292</sup> If there is not, countries with some degree of universal jurisdiction over grave breaches of the Geneva Conventions have a strong incentive to take action to investigate and prosecute the people responsible for the transfers, as required by Common Article 2.<sup>293</sup>

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288. One commentator referred to U.S. efforts to negotiate such bilateral non-surrender agreements as “a massive, worldwide campaign.” See Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT’L L. REV. 1115, 1122 (2004). By October 2005, the United States had signed 101 such agreements with other countries. See *U.S. and Mexico at Odds*, *supra* note 283; see also Sean D. Murphy, *Efforts to Obtain Immunity from ICC for U.S. Peacekeepers*, 96 AM. J. INT’L L. 725 (2002) (describing U.S. efforts to obtain ICC immunity for forces involved in UN “established or authorized” operations). For a description of the agreements, see Human Rights First, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute* at 4, (June 5, 2003), available at [http://www.lchr.org/international\\_justice/Art98\\_061403.pdf](http://www.lchr.org/international_justice/Art98_061403.pdf).

289. See *Threats to the International Criminal Court*, EUR. PARL. RES. 1336 (2003), para. 12 available at <http://www.amicc.org/docs/COE1336.pdf> (stating that the agreements violate the Rome Statute and the Vienna Convention on the Law of Treaties); Jackson Diehl, *Our Latin Conundrum*, Editorial, WASH. POST, Jan. 2, 2006, at A13 (describing U.S. threats to cut off aid to Chile and Mexico after those countries refused to sign bilateral treaties exempting citizens from ICC enforcement); see also Salvatore Zappalá, *The Reaction of the U.S. to the Entry into Force of the ICC Statute: Comments on U.N. S.C. Resolution 1422 (2002) and Article 98 Agreements*, 1 J. INT’L CRIM. JUST. 114, 126–28 (2003) (explaining the European Union’s reaction to these agreements and the importance of preserving the integrity of the ICC).

290. See *Protecting U.S. Troops*, Editorial, WASH. TIMES, July 1, 2004, at A18.

291. The Rome Statute also allows the Security Council to refer a case directly to the ICC. See Rome Statute, *supra* note 284, arts. 12–13.

292. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 160 (2001) (noting that in deciding whether to prosecute or extradite, a country must consider “the likelihood, good faith, and effectiveness of the prosecution in the requesting state”); Jennifer Trahan, *Trying a bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 HOUS. J. INT’L L. 475, 495 n.100 (2002) (observing that complementarity regimes allow the United States to extradite its own servicepeople in order to avoid prosecutions in foreign courts).

293. See also Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT’L L.J. 445, 447 (2003) (noting that the ICC serves to “signal[] to domestic courts that they should prosecute”).

C. *Filling the ICC Gap: Criminal Prosecution in Countries Other than the United States*

Sovereign states have the authority to punish criminal acts occurring on their territory. In cases of extraordinary renditions initiated in occupied Afghanistan and Iraq, the close ties between the United States and the current governments of those countries suggest that criminal prosecution for violations of the Geneva Conventions will not be initiated by Afghani or Iraqi authorities. Some states, however, afford broader jurisdiction to punish criminal acts committed against their citizens and nationals, regardless of the location of the criminal acts. Still others have experimented with forms of universal criminal jurisdiction for particularly serious crimes.<sup>294</sup> Countries recognizing broader criminal jurisdiction may be more likely than other nations to honor their obligations under the Geneva Conventions and pursue criminal prosecution of the perpetrators of extraordinary rendition subsequent to occupation.

The Geneva Conventions contain explicit provisions requiring High Contracting Parties to take actions when the Conventions are breached in any nation. All four Geneva Conventions share a common article on penal sanctions.<sup>295</sup> The first paragraph requires High Contracting Parties to enact legislation to provide effective penal sanctions for people committing any grave breaches under the Geneva Conventions.<sup>296</sup> The second paragraph imposes an obligation on every High Contracting Party:

to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>297</sup>

Pictet explains the affirmative duty imposed on High Contracting Parties under the provision:

As soon as a Contracting Party realizes that there is on its terri-

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294. See *infra* notes 295–301 and accompanying text (discussing the requirement of universal jurisdiction under the Geneva Conventions).

295. See First Geneva Convention, *supra* note 4, art. 49; Second Geneva Convention, *supra* note 4, art. 50; Geneva POW Convention, *supra* note 4, art. 129; Geneva Civilian Convention, *supra* note 4, art. 146.

296. See, e.g., Geneva POW Convention, *supra* note 4, art. 129, para. 1.

297. E.g., *id.* para. 2.

tory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.<sup>298</sup>

Hence, the Conventions impose an affirmative obligation on the governments of nearly every country in the world to arrest and prosecute those U.S. officials who ordered or carried out orders to commit extraordinary renditions which constitute grave breaches of the Geneva Conventions.<sup>299</sup> The obligation is incurred as soon as those individuals are on the territory of a High Contracting Party, but if that High Contracting Party is a party to the conflict and prefers, it may request an enquiry concerning alleged violations of the Conventions.<sup>300</sup> An article common to all four Geneva Conventions provides guidance as to how the enquiry should take place.<sup>301</sup> In situations in which a High Contracting Party is unsure of whether there has been a grave breach that must be prosecuted, or of the identity of the responsible parties who should be prosecuted for the grave breach, such an enquiry could help to establish the necessary facts prior to criminal prosecution.

The common penal sanctions article offers strong medicine to compel the global community to take action to stop U.S. abuses in violation of the Conventions.<sup>302</sup> Moreover, in tandem with the obligations directly

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298. Pictet, *Civilian COMMENTARY*, *supra* note 11, at 593.

299. See Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 792 (1995) ("The obligations of repressing grave breaches are imposed on any High Contracting Party, including a neutral state."); Tan, *supra* note 288, at 1170 (noting that the Geneva Conventions do not limit the obligation of Article 2 to countries with some connection to the acts constituting grave breaches). The rationale for these heightened obligations is that "other remedies, such as those provided by the political branches, are most often ineffective and inadequate." Francisco Forrest Martin, *The International Human Rights and Ethical Aspects of the Forum Non Conveniens Doctrine*, 35 U. MIAMI INTER-AM. L. REV. 101, 117 (2003).

300. First Geneva Convention, *supra* note 4, art. 52; Second Geneva Convention, *supra* note 4, art. 53; Geneva POW Convention, *supra* note 4, art. 132; Geneva Civilian Convention, *supra* note 4, art. 149.

301. See, e.g., First Geneva Convention, *supra* note 4, art. 52 ("At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.").

302. Amnesty International has called on state bar associations to investigate Jack Goldsmith and other government officials for failure to meet professional responsibility standards. See Amnesty International, *Statement of Dr. William F. Schulz, Executive Director, Amnesty International USA*, in *Amnesty International Annual Report* (May 25, 2005), available at <http://www.amnestyusa.org/annualreport/statement.html>. Recognizing that the U.S. government

imposed by the Geneva Conventions, many States have domestic statutes criminalizing grave breaches of the Geneva Conventions,<sup>303</sup> and the principle of complementarity under the ICC has motivated ratifying countries to review and update domestic laws to bring them into conformity with the crimes under the Rome Statute.<sup>304</sup>

The Belgian court system has experienced difficulty in pursuing universal criminal jurisdiction.<sup>305</sup> Learning from the challenges encountered by the Belgians,<sup>306</sup> Germany in 2002 enacted a limited form of universal jurisdiction under its *Völkerstrafgesetzbuch*, or Criminal Code of Crimes Against International Law (CCAIL).<sup>307</sup> The CCAIL estab-

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is unlikely to investigate and prosecute administration attorneys for their role in creating the legal justification for policies promoting torture, Amnesty International has called on foreign governments to initiate investigations. *See id.* Some may contend that it is unfair to single out OLC attorneys such as Goldsmith for international prosecution as war criminals. After all, they may argue, he was simply answering a narrow question as to the applicability of one article of one convention to the case of U.S. occupation of Iraq. Yet it is precisely this compartmentalization of duties that is endemic in the Department of Justice; each memorandum has a narrow focus that sorely neglects the larger picture and the profound ramifications of the narrow decision for human rights and humanitarian law. *See infra* notes 332–36 and accompanying text; *cf.* Richard A. Daynard, *Lawyer Management of Systems of Evil: The Case of the Tobacco Industry*, 5 ROGER WILLIAMS U. L. REV. 117, 120 (1999) (“Facilitation of evil can never entirely escape the taint of evil, despite the bureaucratic and professional rules that define one’s job, such as ‘just making the trains run on time.’”).

303. *See* ICRC, International Humanitarian Law, National Implementation Database, <http://www.icrc.org/ihl-nat.nsf/WebLAW2?OpenView> (providing excerpts of national implementing legislation from dozens of countries criminalizing war crimes) (last visited Mar. 26, 2006).

304. *See* Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT’L L. 215 (2002); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 89 (2003).

305. *See* Steven R. Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AM. J. INT’L L. 888, 889–92 (2003). *See generally* Vandermeersch, *supra* note 287.

306. *See* Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld Under the German Code of Crimes Against International Law*, 6 GERMAN L.J. 689, 719 (2005) (“[I]n the summer of 2003 Belgium gave-in to U.S. political pressure and changed the relevant law such that acts can only be prosecuted according to the principle of international law if the victim has lived at least three years in Belgium.”). The original Belgian policy on universal jurisdiction was considered to be problematic because it afforded universal criminal jurisdiction and allowed victims to initiate criminal suits. *See* Ratner, *supra* note 305, at 890. Belgium subsequently altered its universal jurisdiction law to require that: (1) most cases have a “tie to Belgium,” (2) the other states with links to the crime not have an independent system of justice, and (3) the accused not be an immunized governmental official. *See id.* at 891. These conditions are not imposed “if Belgium has an obligation under treaty or customary law to submit cases to its authorities for proceedings.” *Id.* at 892. For further discussion of the changes in Belgian law, see Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT’L CRIM. JUST. 679 (2003).

307. *Völkerstrafgesetzbuch* [Code of Crimes against International Law] June 30, 2002 BGBl. I [hereinafter CCAIL]. An English translation of the CCAIL is available at the homepage for the

lishes universal jurisdiction in German courts for several violations of the Geneva Conventions and human rights law, including: torture,<sup>308</sup> enforced disappearance,<sup>309</sup> certain forms of degrading and humiliating treatment,<sup>310</sup> severe deprivation of liberty in contravention of a general rule of international law,<sup>311</sup> and forced transfers and deportations of persons lawfully present in an area.<sup>312</sup> The CCAIL is viewed as “an important complement to the International Criminal Court.”<sup>313</sup> The Code provides jurisdiction for these crimes “even when the offence was committed abroad and bears no relation to Germany.”<sup>314</sup> Hence, it serves to “fill the gaps” where the ICC does not have jurisdiction and where other domestic courts fail to act. Nonetheless, the Chief Federal Prosecutor has discretion to refuse to undertake an investigation on a complaint raised under the CCAIL.<sup>315</sup> In particular, the principle of subsidiarity may discourage prosecution of crimes pursuant to the CCAIL under certain circumstances.<sup>316</sup> The principle of subsidiarity holds that if the CCAIL is not needed for its “gap-filling” function, then the German investigative authorities will decline to pursue the complaint.<sup>317</sup> If judi-

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Max Planck Institute for Foreign and International Criminal Law, <http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf>.

308. CCAIL, *supra* note 307, art. I, § 7(5); *see also id.* art. I, § 8(3) (under international humanitarian law).

309. *Id.* § 7(7).

310. *Id.* § 8(1)(9) (“[Whoever] treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner shall be punished....”).

311. *Id.* § 7(1)(9).

312. *Id.* § 7(1)(4); *see also id.* § 8(1)(6) (under international humanitarian law).

313. Fischer-Lescano, *supra* note 306, at 695. International Criminal Court jurisdiction is limited to States Parties. *See supra* note 284.

314. CCAIL, *supra* note 307, art. I, § 1.

315. In Germany a criminal complaint under the CCAIL may be raised by a private party. *See* Fischer-Lescano, *supra* note 306, at 693 (reporting that the Center for Constitutional Rights (CCR) raised a complaint under the CCAIL alleging war crimes on behalf of several of victims of torture at Abu Ghraib); *see also* Criminal Indictment Against Donald Rumsfeld et al., at 69–73 (Nov. 30, 2004), *available at* [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/German\\_COMPLAINT\\_English\\_Version.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/German_COMPLAINT_English_Version.pdf) [hereinafter CCR Criminal Indictment] (describing the plaintiffs in the case) (English translation).

316. *See* Fischer-Lescano, *supra* note 306, at 710 (explaining that the Chief Federal Prosecutor declined to investigate the Abu Ghraib complaint primarily on this basis). Nonetheless, some procedural opportunities remain to pursue the complaint. *See id.* at 716–18 (describing the “indictment enforcement procedure” and potential review by Germany’s Constitutional Court).

317. *See* Letter from General Prosecuting Attorney of the Federal Court to Wolfgang Kaleck, Attorney for Complainants 3 (Feb. 10, 2005), *available at* [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/german\\_appeal\\_english\\_tran.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf) [hereinafter German Prosecutor’s Dismissal] (English translation). The letter states:

The aim of CCAIL is to close gaps in punishability and criminal prosecution. This must, however, occur in the framework of non-interference in the affairs of foreign countries.... Accordingly, the jurisdiction of the ICC is subsidiary with respect to

cial proceedings have not commenced in a more appropriate forum, however, other prudential concerns are less important.<sup>318</sup> Prosecutorial discretion in Germany is guided in part by political concerns, however, and therefore prosecutors may be reluctant to pursue transnational criminal cases.<sup>319</sup> Also, in some civil law jurisdictions with universal jurisdiction provisions in their domestic law, prosecutorial discretion is subordinated to the conclusions of an investigating judge.<sup>320</sup> In Spain, the chief prosecutor has greater political independence and may be more likely to pursue such prosecutions.<sup>321</sup> Hence, use of universal jurisdiction may be possible to initiate criminal prosecution in civil law countries where those tools are available. Prosecutions can be brought against individuals present in the jurisdiction who have aided and abetted extraordinary renditions. Courts in Spain and Germany, however, have sometimes expressed a preference for refusing cases that have no nexus with the country in which the court sits.<sup>322</sup>

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the competence of the state of the perpetrator or of the perpetrated act; the ICC can only be active if the nation-states first called upon to adjudicate are unwilling or unable to prosecute.

318. See Fischer-Lescano, *supra* note 306, at 715 (“[T]he only decisive factor is that no judicial proceedings have been initiated in the United States against the accused for the occurrences in Abu Ghraib and the related concrete charges of superior responsibility.”); see also Peter Spiegel, *A Top Abu Ghraib Officer Is Charged*, L.A. TIMES, Apr. 29, 2006, at A4 (reporting that the U.S. Army had brought criminal charges against the former head of the interrogation center at Abu Ghraib).

319. See Fischer-Lescano, *supra* note 306, at 715 (“Prosecutors in the Federal Republic enjoy little political independence.... [T]he Chief Federal Prosecutor must function as a ‘political official’ [and thus] is expected to be in continuous agreement with the fundamental political objectives of the Federal government....”).

320. See Antonio Cassese, *The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case*, 1 J. INT’L CRIM. JUST. 437, 438 (2003); Judge Marilyn Justman Kaman, *To Live and Work in Kosovo*, CRIM. JUST., Winter 2004, at 5, 7–8 (2004); Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT’L CRIM. JUST. 124, 133 (2005). But see Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 27 (2004) (noting that “a significant number of countries have eliminated the preliminary investigation judge....”).

321. See Fischer-Lescano, *supra* note 306, at 715 (describing the political independence of Spanish examining magistrate Baltasar Garzón, which enabled him to pursue cases against Augusto Pinochet, Adolfo Scilingo, and Ricardo Miguel Cavallo).

322. See Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1115 (2004) (noting that in several cases German courts have imposed a “judicially-developed” requirement that there be a nexus between the crime and Germany, but concluding that the courts’ “application of this requirement was inconsistent, and in any event the requirement does not appear on the face of [the CCAIL], at least in respect of genocide, war crimes and crimes against humanity”); see Ntanda Nsereko, *supra* note 320, at 127 (noting that while the CCAIL allows for prosecution of war crimes, the public prosecutor has discretion not to prosecute where the crimes have no nexus with Germany). Spanish courts have imposed a similar nexus requirement. Orentlicher, *supra*, at 1073–74.

In late 2004, the Center for Constitutional Rights brought a complaint in a German Court against Donald Rumsfeld and others on behalf of four Iraqi detainees who allegedly had been subjected to torture at Abu Ghraib.<sup>323</sup> The German prosecutor dismissed the complaint under the principle of subsidiarity on the grounds that the United States, as the home country for the defendants, was the primary jurisdiction for the case.<sup>324</sup> While the involvement of a German national is not required under German law, the prosecutor noted that no German national was involved as either a perpetrator or a victim of the alleged torture,<sup>325</sup> and that “there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint.”<sup>326</sup> Relevant to the decision not to pursue prosecution was the fact that several proceedings had already been initiated within the U.S. military to punish alleged perpetrators.<sup>327</sup>

While use of Germany’s CCAIL has not yet been successful in prosecuting officials who are alleged to be responsible for the torture at Abu Ghraib, the prosecutor’s decision in that suit provides some suggestions about potential use of the Code to pursue individuals who are responsible for extraordinary rendition. On November 14, 2006, the Center for Constitutional Rights and several other organizations brought a new complaint against Donald Rumsfeld and other U.S. officials on behalf of several Iraqis detained at Abu Ghraib and one Saudi held at Guantánamo.<sup>328</sup> German prosecutors may still invoke the CCAIL in response to this complaint if they find that the United States is not inves-

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323. See CCR Criminal Indictment, *supra* note 315, at 3.

324. See German Prosecutor’s Dismissal, *supra* note 317, at 4; see also Adam Zagorin, *Exclusive: Charges Sought Against Rumsfeld over Prison Abuse*, TIME.COM, Nov. 10, 2006, available at <http://www.time.com/time/nation/printout/0,8816,1557842,00.html> (noting that the German prosecutor dismissed the case one day before a major conference in Munich in which Rumsfeld was scheduled to be the keynote speaker).

325. See *id.*

326. *Id.* at 5.

327. See *id.*; see also Spiegel, *supra* note 318 (noting that the Army has filed criminal charges against the head of the interrogation center at Abu Ghraib).

328. Complaint Against Donald H. Rumsfeld et al., Bundesgerichtshof (Nov. 11, 2006), available at <http://www.diefirma.net/index.php?id=84,232,0,0,1,0>; see also Associated Press, *Group Sues to Have Rumsfeld Investigated*, N.Y. TIMES, Nov. 14, 2006 (reporting that the complaint had been filed); cf. Craig Whitlock, *supra* note 277 (reporting that Italian judges have issued arrest warrants for twenty-five CIA officers involved in an extraordinary rendition from Italy to Egypt and have said that they will try the officers in absentia if necessary).

tigating or prosecuting the abuses in those detention facilities.<sup>329</sup> Similarly, in spite of the lack of reports that the CIA transferred German nationals from Iraq or Afghanistan, U.S. officials may face prosecutions in Germany for extraordinary rendition, particularly if the United States fails to investigate or prosecute the illegal transfers, or if neither Afghanistan nor Iraq has a basis to pursue action with the ICC. Moreover, similar criminal jurisdiction provisions in other countries may prompt other prosecutors to take action against U.S. officials responsible for extraordinary rendition.<sup>330</sup>

### CONCLUSION

At the time the current extraordinary rendition policy was being developed, former Chief White House lawyer Alberto Gonzales pushed his team of attorneys in the White House and the Department of Justice to be “forward-leaning.”<sup>331</sup> In other words, he wanted to see how far the CIA and the military could go without breaking the law, and how far the law could be stretched to move the line farther forward still. One member of that team was Assistant Attorney General Jack Goldsmith. He wrote a “forward-leaning” memorandum that distorted the meaning of the Geneva Civilian Convention in an attempt to carve gaping exceptions out of Article 49’s absolute prohibition on forcible transfers, resulting in extraordinary rendition of individuals from Iraq which constituted grave breaches of the Geneva Conventions and war crimes under the federal War Crimes Act.<sup>332</sup> The Goldsmith memorandum demonstrates the effect of this “forward-leaning” approach: clear statutory and treaty directives are distorted and manipulated to reach conclusions that may presumably have a policy justification, but certainly lack a valid legal foundation.

In the context of recently released White House memoranda relating to torture, some commentators have recalled that attorneys providing advice to a client regarding how to circumvent the law may be held

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329. See Zagorin, *supra* note 324 (noting that Rumsfeld’s resignation makes prosecution easier because he will lose immunity, and because the Military Commissions Act demonstrates that there likely will be no prosecutions in the United States for Rumsfeld’s alleged war crimes).

330. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211, 281 (2005) (noting that in the past decade universal jurisdiction has been used to prosecute foreign nationals in ten countries).

331. Isikoff et al., *supra* note 134.

332. 18 U.S.C. §§ 2340, 2340A (2000).

complicit in the resulting criminal conduct.<sup>333</sup> Moreover, such attorneys may be violating their professional obligations to make a good faith effort to determine the scope of the law, and to refer to relevant moral and ethical considerations when giving advice.<sup>334</sup> A recent comment by two editors of the *American Journal of International Law* took note of the unique responsibilities of government attorneys, and suggested that the lawyers behind the torture memoranda had shirked those responsibilities.<sup>335</sup> Also, government lawyers who provide legal cover for illegal acts foster a dangerous lack of conscience among the officials responsible for implementing government policy.<sup>336</sup> If U.S. prosecutors take no action to investigate and prosecute the government officials responsible for the illegal transfers of protected persons from Afghanistan and Iraq, it will be up to prosecutors in other countries to hold those officials to the standards of international humanitarian law.

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333. See Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 693–94 (2004); see also Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 654–57 (2005) (describing the ethical implications of the Bybee memorandum); Lederman, Part I, *supra* note 272 (arguing that the lack of rigorous review of the arguments set forth in OLC memoranda provides evidence that the OLC was attempting to provide legal cover for government actors).

334. See Bilder & Vagts, *supra* note 333, at 692–93; see also Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005) (examining whether the OLC memoranda violate the Model Rules of Professional Conduct).

335. See Bilder & Vagts, *supra* note 333, at 693–94.

336. See *CBS News: CIA Flying Suspects to Torture?* (CBS television broadcast Mar. 6, 2005), available at <http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml> (quoting Michael Scheuer, former CIA counterterrorism official); see also Dep't of Defense Appropriations Act, 2006, Pub. L. No. 109-148, tit. X, § 1004, 119 Stat. 2680, 2740 (2005) (codified at 42 U.S.C. § 2000dd Note) (protecting U.S. personnel who, in good faith, rely on legal advice to conclude that their actions were not unlawful).