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# Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond

JOAN FITZPATRICK\*

## I. INTRODUCTION

The tactics of the United States in the “war against terrorism” have stimulated new interest in the concept of “rendition.” U.S. officials use the term rendition to describe the Bush Administration’s current policies regarding the forcible interstate transfer of suspected terrorists.<sup>1</sup> The adoption of this phrase suggests intent to clothe these enforcement techniques with a veneer of quasi-legal respectability, while acknowledging no binding limits on “operational flexibility.”<sup>2</sup>

States resort to rendition when either they lack extradition relations with a requesting state, or they seek to avoid the legal constraints of formal extradition, in the forcible transfer of suspected persons across national boundaries. As one observer wrote, “Nations sometimes avoid the formalities of the extradition process by using ‘quasi-formal’ methods of rendition . . . . States have increasingly turned to these quasi-formal methods in recent years.”<sup>3</sup> The concept of rendition has no fixed meaning in international law. At a minimum, it implies consent by the

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1. Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Distress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, at A1, Dec. 26, 2002, available at LEXIS, News Library, Majpap File.

2. *Id.*

3. D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT’L L.J. 1, 7 (1988) (citations omitted).

rendering state for the transfer of the individual to the receiving state.<sup>4</sup>

Rendition may take the form of deportation or expulsion, functioning in intent and effect as “de facto extradition.” In such instances, the rendering state may either provide procedural protections (for example, an administrative hearing prior to expulsion), or its officials may summarily expel the individual, often in violation of domestic or international legal obligations.

The general purpose of renditions, however irregular or illegal, is to accommodate the receiving state’s desire to place the individual on trial for recognizable criminal offenses. In the instance of suspected terrorists, however, security concerns of the rendering state are sometimes the sole motivation, with indifference to subsequent prosecution or detention of the person rendered.<sup>5</sup> Tragically, repressive governments have rendered persons with the expectation that they will suffer summary execution, torture, prolonged arbitrary detention, or unfair military trial. “Operation Condor” in the Southern Cone States of Argentina, Brazil, Chile, Paraguay, and Uruguay serves as a notorious example of this type of abusive collaboration among military and police forces against alleged “terrorists.”<sup>6</sup>

Corrupt local officials occasionally cooperate in the abduction of criminal suspects, in collaboration with the receiving state, but without authorization from responsible officials in their own

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4. See GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 337 (1998).

5. For example, in 1996 Sudan attempted to deport Osama Bin Laden to his state of origin, Saudi Arabia, under pressure from the United States. When Saudi Arabia refused to accept Bin Laden and denationalized him, Sudan expelled Bin Laden, who found a safe haven in Taliban-controlled Afghanistan. In the United Kingdom, 2001 anti-terrorist legislation permits interned foreigners suspected of terrorist links, but not charged with any crime or deportable offense, to obtain their release from administrative detention by agreeing to leave the country. See Amnesty International, *Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001*, AI Index: EUR 45/017/2002 (2002) available at <http://web.amnesty.org/library/index/ENGEUR450172002> (Sept. 21, 2003) [hereinafter *Memorandum*]. These departures from the U.K. are technically “voluntary” and to a state of the detainee’s choosing. Thus, they are neither renditions nor expulsions.

6. See Katie Zoglin, *Paraguay’s Archive of Terror: International Cooperation and Operation Condor*, 32 U. MIAMI INTER-AM. L. REV. 57, 64–74 (2001); see also Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT’L & COMP. L. REV. 419, 421–22, 425 (2002).

governments.<sup>7</sup> In other abduction situations, receiving state officials operate without any official collaboration in the territorial state to abduct a suspect. Alternatively, they may abduct the person outside the territory of any state and on the high seas.<sup>8</sup> When democratic states engage in such abductions, even of suspected international terrorists, they generally place the abductees on trial for recognizable criminal charges, with ordinary trial rights.

These practices, prior to 2001, raised important questions concerning the adequacy of the existing system of international extradition to deal with the peculiar threats posed by international terrorists.<sup>9</sup> Yet, until the attacks of September 11, 2001, no one suggested that the subject of international transfer of terrorist suspects should fall under the rubric of humanitarian law. Counterterrorism was located in the realm of international criminal law, in which extradition treaties, refugee law, and human rights norms imposed significant legal constraints. International humanitarian law spoke only tangentially to acts of terrorism and was hardly seen as its primary field of application.<sup>10</sup>

U.S. practice in the “war against terrorism” meshes uneasily with known practices of extradition, rendition, and abduction, and it raises unprecedented legal issues. Approximately 3,000

7. A notorious example is *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992). See also *Öcalan v. Turkey*, 30 Eur. H.R. 231, (2000). Kurdish Workers Party leader Abdullah Öcalan asserted Turkish agents abducted him in Kenya without authorization from responsible Kenyan officials. He argued to the European Court of Human Rights (ECHR) that “[m]ere collusion between unauthorised Kenyan officials and the Turkish Government could not constitute State cooperation.” *Id.* at 243. The ECHR held in March 2003 that, although Turkey had violated several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in its treatment and trial of Öcalan, his arrest in Kenya did not violate Article 5(1) because “Kenyan officials had played a role” in his transfer to Turkish authorities. Thus, no “violation by Turkey of Kenyan sovereignty” had occurred. *Öcalan v. Turkey*, Judgment of 12 March 2003, at <http://www.echr.coe.int/eng/Judgments.htm>, paras. 100, 101 (cite not available).

8. See *United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991) (exemplifying high seas abduction). In the current “war against terrorism,” it is not clear whether U.S. agencies abducted any suspected terrorists without the consent of local officials. Captives were reportedly seized in states including Bosnia-Herzegovina, Gambia, Zambia, Indonesia, and Pakistan.

9. See generally CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* (1992); GILBERT, *supra* note 4, at 337.

10. Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547 (2002).

captives,<sup>11</sup> seized in various circumstances and in a number of different states, have been transferred to detention centers chosen increasingly for their invulnerability to scrutiny by national courts, human rights bodies, and agencies responsible for the application of humanitarian law. Many, although not all, of these captives were forcibly transferred across national borders.<sup>12</sup> The U.S. military operates some of these detention facilities (for example, Camp Delta at Guantánamo Bay, Cuba, and Bagram Air Base in Afghanistan). Press reports indicate that the U.S. Central Intelligence Agency (CIA) may control other extraterritorial detention facilities.<sup>13</sup> Some persons apparently are held in facilities operated by the security services of other states, providing U.S. officials with access to the detainees for purposes of interrogation.<sup>14</sup>

None of the current estimated 3,000 captives was charged with a recognizable criminal offense, although some were held for over one year. No captives were provided access to counsel or

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11. President George W. Bush, State of the Union Address, (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (last visited Sept. 21, 2003). This figure had previously appeared in press accounts. I have chosen to use the term "captives" to describe the persons under detention, in preference to the terms "prisoners" and "detainees." This terminology avoids implications regarding their status as prisoners of war, interned "unlawful combatants," or civilians. Difficulties in applying concepts of international humanitarian law to these captives are addressed in Part IV *infra*. While the term "captives" has a certain medieval connotation, this may not be inappropriate given the suggestions in U.S. policy statements and legal briefs that few if any legal standards govern these captives' seizure, transfer, and indefinite detention. Captives in conflicts and political struggles predating the seventeenth century had few legal rights, and were often executed summarily, enslaved, and ransomed. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 573 n.8 (2002); see also WILLIAM E.S. FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW 10-15 (1942). This Article's primary theme is that the newly conceived "war against terrorism" has not established a similar legal vacuum.

12. No doubt, some of the captives held at Bagram Air Base in Afghanistan were seized in that state. Exact figures are not publicly available. Some captives held at Bagram were apparently seized in Pakistan and possibly other states.

13. Priest & Gellman, *supra* note 1, at A1. The *Washington Post* reported in December 2002 that the CIA was operating detention/interrogation facilities in Diego Garcia (a British island in the Indian Ocean) and in Jordan. The details concerning operational control are unclear. *Id.*

14. Abdul Rahim Al-Nashiri was seized in the United Arab Emirates and transferred to Jordan, where he is either held by U.S. officials or is made available to them for purposes of interrogation. *Top Qaeda Suspect al-Nashiri Arrested During Pilot Training in UAE*, AGENCE FRANCE PRESSE, Dec. 23, 2002, LEXIS, News Library, Curnws File.

family visits.<sup>15</sup> Some, but not all, were granted consular access or visits from the International Committee of the Red Cross (ICRC).<sup>16</sup> The U.S. Government indicated its intent to intern the captives as “enemy combatants” indefinitely during the “war against terrorism;” to subject them to prolonged, intensive interrogation without access to counsel or family visits; and possibly to place them on trial before ad hoc military commissions that do not provide trial rights equivalent to those in ordinary criminal courts or in courts martial.<sup>17</sup>

The forcible transboundary movement of these captives raises important issues concerning international legal norms governing state conduct during the “war against terrorism.” The position of the U.S. Administration appears to be that extradition, refugee, and human rights treaties and customary norms have no application to these captives, with respect to their seizure or interstate transfer, and their subsequent interrogation, detention, or trial.

While the U.S. Administration depicts the seizures and detentions as an effort to capture and intern combatants in an international armed conflict, it simultaneously asserts that these captives have no legal rights either as prisoners of war (POWs) under the Third Geneva Convention or as civilians under the Fourth Geneva Convention, both of which contain detailed rules

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15. One exception is U.S. citizen John Walker Lindh, who was captured as an alleged Taliban soldier at Mazar-e-Sharif in Afghanistan, held briefly at Bagram aboard a U.S. Navy vessel, and then transferred to the United States for his criminal trial in a regular federal court. *United States v. John Walker Lindh*, Crim. No. 02-37A (E.D. Va. July 15, 2002) (plea agreement, July 15, 2002).

16. The ICRC publicly reports on its visits to Guantánamo. *Guantanamo Bay: 06-01-2003 Operational Update*, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5G2GT7?OpenDocument> (last visited Sept. 21, 2003). Some detainees held at Guantánamo received visits from officials of their state of origin. However, it is not clear if these officials provided consular services or collaborated on interrogations. The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs, [2002] EWCA Civ. 1598 (Judgment of 6 Nov. 2002). The ICRC has “no comment” on its access to captives held in Diego Garcia. The ICRC has an agreement with Jordan that it may visit all security detainees, but it cannot publicly reveal whether access was given to specific persons.

17. *Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter *Military Order*].

on transfer and wartime internment.<sup>18</sup> As a matter of “policy,” the U.S. Government asserts that it treats these captives humanely, but its interrogation and detention practices have come under increasingly critical scrutiny.<sup>19</sup> This Article addresses only the legality of the forcible interstate transfers and does not address issues relating to conditions of detention.

The U.S. Government operates as if there are no legal constraints on its flexibility to transfer captives from one state to another in order to maximize their isolation and susceptibility to interrogation. As seizures occur more frequently in locations far removed from any conventional battlefield, the dangers of erosion of extradition, refugee, and human rights norms for suspected terrorists loom ever larger. Prior to September 11, 2001, counterterrorism had been approached as an issue of international criminal law and mutual criminal assistance. The renditions analyzed here highlight gaps and ambiguities in international legal principles arising from the attempted reconceptualization of the current struggle against terrorism as an international armed conflict.<sup>20</sup>

Part II of this Article provides concrete examples of irregular transfers of captives in the “war against terrorism,” in order to provide context for the legal analysis. Part III examines established extradition, refugee protection, and human rights principles applicable to interstate transfer of suspected terrorists. These norms continue to be applied in extraditions of suspected Al Qaeda operatives and other alleged terrorists arrested in democratic states. Part IV analyzes humanitarian law rules concerning transfers of prisoners of war, unprivileged combatants, and interned civilians in light of the highly ambiguous status of the captives in the “war against terrorism.” The Article concludes with recommendations for striking a proper balance to preserve the fundamental rights of the captives while accommodating the security interests of states collaborating in counterterrorist measures.

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18. White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> [hereinafter White House Fact Sheet] (last visited Sept. 21, 2003).

19. *Id.* (describing “policy”); see also *Ends, Means and Barbarity—Torture*, ECONOMIST, Jan. 11, 2003, LEXIS, News Library, Curnws File.

20. See Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT’L L. 241 (2003).

## II. RENDITION, TRANSFER, AND EXTRADITION IN THE “WAR AGAINST TERRORISM”

There are 3,000 distinct stories behind the seizure and detention of the 3,000 captives currently held by the United States in the “war against terrorism.” Many follow a rather conventional scenario involving battlefield seizures of Taliban combatants during the internationalized internal armed conflict in Afghanistan beginning in October 2001.<sup>21</sup> Some of these captives never crossed an international boundary and remain in U.S. military custody in Afghanistan. Other captives, however, were transferred thousands of miles away to Guantánamo Bay and other remote detention centers. There, they are held as unprivileged combatants and denied prisoner of war status pursuant to a controversial February 2002 Order by U.S. President George W. Bush.<sup>22</sup> A number of persons alleged to be Al Qaeda fighters, and not members of the Taliban armed forces, were also seized in battlefield settings and are being denied prisoner of war status.

On the assumption that some of the captives meet the definition of the Third Geneva Convention for prisoners of war and others do not, the transfers of those captured in battlefield situations in Afghanistan will be examined in Part IV, in light of humanitarian law norms relating to the transfer of prisoners of war and of unprivileged combatants. In addition, assuming some of the captives were not combatants, humanitarian law rules on internment, transfer, and deportation of civilians during international armed conflict will also be examined.<sup>23</sup>

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21. George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002). The internal armed conflict in Afghanistan persisted for a quarter-century by 2001. From time to time, this conflict became internationalized through the direct intervention of other states, such as the Soviet Union and, more recently, the United States. When the United States launched a massive military attack upon the Taliban regime in October 2001 in collaboration with the Northern Alliance and various Afghan warlords, experts on international humanitarian law generally accepted that the conflict changed its character from an internal armed conflict to an international armed conflict. This characterization is significant, especially with respect to the treatment of captured combatants, because humanitarian law rules for international and internal armed conflict are distinct.

22. Military Order, *supra* note 17, at 833.

23. Two elderly Afghan men, who claimed not to have engaged in acts of combat, were released from Guantánamo in October 2002, after nearly a year in detention. David Rohde, *Afghans Freed from Guantánamo Speak of Heat and Isolation*, N.Y. TIMES, Oct. 29, 2002, at A14. In March 2003 an additional twenty-two Guantánamo captives were



The second general scenario involves persons who allegedly participated in the armed conflict in Afghanistan, later fled that state, and were seized in other states and then transferred to U.S. custody across international boundaries. One such example may be Martin Mubanga, a citizen of the United Kingdom who was reportedly seized in Zambia and subsequently transferred to Guantánamo.<sup>24</sup> Two other captives were also seized in Gambia, although it is unclear whether they are suspected of fighting in Afghanistan.<sup>25</sup> Two prominent alleged Al Qaeda operatives, Abu Zubaydah and Ramzi Bin al Shibh, were reportedly captured in Pakistan with the cooperation of Pakistani officials and later transferred to U.S. detention in an unknown location.<sup>26</sup> Some Guantánamo captives were possibly seized in Pakistan and the U.S. Government controversially asserted its right to cross into Pakistani territory in “hot pursuit” of Taliban or Al Qaeda fighters.<sup>27</sup>

The third scenario arises from the expansive geographic scope of the “war against terrorism,” as conceived by U.S. officials.<sup>28</sup> Six

repatriated to Afghanistan. Neil Lewis, *Detainees From the Afghan War Remain in a Legal Limbo in Cuba*, N.Y. TIMES, Apr. 24, 2003, at A1.

24. Ian Burrell, *Britons at Camp Delta Make a Sorry Bunch of Warriors*, INDEPENDENT, Aug. 3, 2002, at <http://www.news.independent.co.uk/world/Americas/story.jsp?story=320983> (last visited Sept. 21, 2003).

25. Amnesty International, *USA: One Year On – the Legal Limbo of the Guantánamo Detainees Continues*, AI Index: AMR 51/002/2003, Jan. 10, 2003, available at <http://web.amnesty.org/library/index/ENGAMR510022003> (last visited Sept. 21, 2003) (here Amnesty International investigates reports that two men of Iraqi and Jordanian nationality were rendered from Gambia to Guantánamo).

26. *Pakistan Trying to Identify Al-Qaeda Suspects, No Extradition Plans Yet*, AGENCE FRANCE PRESSE, Jan. 11, 2003, available at LEXIS, News Library, Curnws File. Pakistan has rendered 420 Al Qaeda suspects to the United States since September 11, 2001, including Abu Zubaydah and Ramzi Bin al Shibh. *Id.*

27. *Rumsfeld Meets with Pakistani Foreign Minister*, AGENCE FRANCE PRESSE, Jan. 28, 2003, available at LEXIS, News Library, Curnws File.

28. The National Security Strategy issued by President Bush describes the geographic scope of the “war against terrorism” in the following terms:

The United States of America is fighting a war against terrorism of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents.

...

The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time. Progress will come through the persistent accumulation of successes—some seen, some unseen.

Algerian nationals, several of whom possess dual Bosnian nationality, were arrested in Sarajevo on suspicion of terrorist involvement in October 2001, but were ordered released for lack of evidence in January 2002 by the Bosnian Supreme Court. The next day, however, Bosnian police rendered them to U.S. forces attached to the NATO Stabilization Force (SFOR), which immediately transferred them to Guantánamo. There is no evidence that any were involved in the international armed conflict in Afghanistan. Their irregular rendition was found to violate human rights treaties and domestic Bosnian law by the Human Rights Chamber for Bosnia-Herzegovina.<sup>29</sup> U.S. officials asserted that the rendered men were involved in Islamist terrorist activities, but no evidence was submitted to Bosnian judicial authorities during the abortive extradition proceedings.

Abdul Rahim Al-Nashiri, an alleged Al Qaeda operative complicit in the bombing of the USS Cole, was seized in the United Arab Emirates and rendered to Jordan for purposes of interrogation and detention. It is unclear if he is under detention by Jordanian authorities, and on what basis, or if he is being held in a portion of Jordanian territory ceded to the U.S. CIA.<sup>30</sup> Omar Al-Faruq, allegedly a leader of Jemaah Islamiyya in Indonesia, was reportedly arrested in Jakarta in June 2002 and is being detained by the United States at an undisclosed location.<sup>31</sup> Mohammed

Today, our enemies have seen the result of what civilized nations can, and will, do against regimes that harbor, support, and use terrorism to achieve their political goals. Afghanistan has been liberated; coalition forces continue to hunt down the Taliban and al-Qaida. But it is not only this battlefield on which we will engage terrorists. Thousands of trained terrorists remain at large with cells in North America, South America, Europe, Africa, the Middle East, and across Asia.

THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Sept. 21, 2003) [hereinafter NATIONAL SECURITY STRATEGY].

29. Press Release, Human Rights Chamber for Bosnia and Herzegovina, Human Rights Chamber Delivers 3 Decisions on Admissibility and Merits (Oct. 11, 2002), available at [http://www.hrc.ba/english/press\\_eng/pressEng/october02.pdf](http://www.hrc.ba/english/press_eng/pressEng/october02.pdf) (last visited Sept. 21, 2003); Boudella v. Bosnia, Human Rights Chamber for Bosnia Herzegovina, CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691, ¶ 323 (Oct. 11, 2002).

30. Patrick E. Tyler, *Arrested Qaeda Figure Was Training for Flight*, INT'L HERALD TRIB., Dec. 24–25, 2002, at 1; see generally *Western Agents Provided Tip for Arrest of Top Al-Qaeda Suspect in UAE*, AGENCE FRANCE PRESSE, Dec. 24, 2002, available at LEXIS, News Library, Curnws File.

31. Raymond Bonner and Jane Perlez, *Bali Bomb Plotters Said to Plan to Hit Foreign Schools in Jakarta*, N.Y. TIMES, Nov. 18, 2002, available at LEXIS, News Library, Curnws

Heidar Zammar, a dual German-Syrian national allegedly involved in Al Qaeda activities in Germany, was reportedly seized in Morocco and rendered to Syria at the request of U.S. officials.<sup>32</sup>

The fourth scenario involves irregular rendition from the United States of persons suspected of terrorist links. Maher Arar, a dual Canadian-Syrian national, was arrested at a U.S. airport by U.S. immigration authorities while in transit to his home in Canada and summarily deported to Syria, where he remains in detention without charge or trial. It is unclear if U.S. authorities were given access to Mr. Arar while in Syrian custody. Canada strenuously protested this irregular rendition.

The fifth scenario reverts to conventional extradition. These cases involve persons arrested by democratic governments on the basis of information supplied by U.S. officials relating to alleged terrorist activities. Instances include the cases of Lotfi Raissi and Khalid Al-Fawwaz in the United Kingdom and two Yemenis arrested in Germany.<sup>33</sup> Governments, especially E.U. States, sought assurances that such extraditees will be granted fair trials in ordinary criminal courts and will not face the death penalty. U.S. officials are required in these cases to establish that they have satisfied the traditional requisites for extradition.

### III. TREATMENT OF TERRORIST SUSPECTS UNDER EXTRADITION, REFUGEE, AND HUMAN RIGHTS NORMS

Prior to the attacks of September 11, 2001, the transfer of suspected terrorists across international boundaries was generally regarded as a matter implicating extradition, refugee, and human rights norms. The United States formerly treated even Osama Bin

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File; Derwin Pereira, *Yemeni National a Key Player in Bali Bomb Blasts; The Al-Qaeda Operative Is Suspected of Calling the Shots on the Ground — Under the Orders of Osama Bin Laden*, STRAITS TIMES (Singapore), Nov. 26, 2002, available at LEXIS, News Library, Curnws File (reporting that the United States is detaining Al-Faruq in Afghanistan).

32. Daniel J. Wakin, *Tempers Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicions*, N.Y. TIMES, Nov. 11, 2002, available at LEXIS, News Library, Curnws File.

33. See Daniel McGrory, *US Fails to Win Extradition from Britain of Al-Qaeda Suspect*, THE TIMES (London), July 30, 2002, available at LEXIS, News Library, Curnws File; *In re Al-Fawwaz*, 69 URHL (2001); Ian Fisher and Mark Landler, *Germans Arrest 2 Yemenis at U.S. Request*, N.Y. TIMES, Jan. 12, 2003, at A8.

Laden as a criminal, indicting him for criminal acts and repeatedly requesting his rendition from Afghanistan to stand trial.<sup>34</sup>

The failure of states to render certain terrorist suspects, even in the absence of binding extradition relations between the requesting state and the requested state, however, has come to the attention of the Security Council. In response, the Security Council on occasion has characterized the refusal to render the suspects as a threat to international peace and security, justifying the imposition of economic sanctions pursuant to Article 41 of the U.N. Charter.<sup>35</sup> Major powers, such as the United States, also justified the use of military force against states harboring terrorist suspects on a theory of reprisal or pre-emptive self-defense prior to the events of September 11.<sup>36</sup>

But the “war against terrorism,” as currently implemented by the United States, represents a dramatic change in the legal conceptualization of the bases for seizing, transferring, and detaining suspected terrorists. One of the greatest departures from past practice is the fate of those rendered— indefinite detention without charge or trial. The international criminal law model appears partially abandoned in order to justify this policy shift. As shown below, in its dealings with democratic states, the

34. The United States does not have extradition relations with Afghanistan. Security Council resolutions 1193, 1214, and 1267 state the duty of Afghanistan is to transfer Bin Laden to states that have indicted him, but do not cite any specific treaty obligation to extradite. S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); see also S.C. Res. 1193, 52d Sess., 3921st mtg., U.N. Doc. S/RES/1193 (1998) and S.C. Res. 1214, 53d Sess., 3952d mtg., U.N. Doc S/RES/1214 (1998).

35. The Lockerbie case (involving the bombing of Pan Am flight 103 in 1988) is perhaps the most prominent example. Security Council resolution 748 of March 1992 imposed economic sanctions against Libya for its failure to extradite two Libyan agents to the United Kingdom or the United States. S.C. Res. 748, U.N. SCOR, 46th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992). Libya is a party to the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which has an *aut dedere aut judicare* (extradite or prosecute) provision, but offered to try rather than to extradite the suspects, on the basis that they were Libyan nationals. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177. The suspects were eventually tried in a Scottish court sitting in the Netherlands, in 2000–2001.

36. See Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFS. 901, 921 (1986); Secretary Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, Address Before the Low-Intensity Conference (Jan. 15, 1986) in CURRENT POL’Y NO. 783, BUREAU OF PUB. AFF., U.S. DEPT. OF STATE. The United States bombed Libya in 1986 in reprisal for terrorist attacks in Rome and Vienna the prior year. John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM. J. TRANSNAT’L L. 35, 86–88 (1986).

Bush Administration is largely forced to continue to operate within the established international criminal law framework. Where, as a result of collusion or legal underdevelopment in rendering states, U.S. officials are able to cause the irregular rendition of suspected terrorists, these officials appear to favor incommunicado detention of the suspect, over charge and trial. By depicting the detentions as a form of wartime internment, the United States seeks to silence criticism of the captives' conditions of detention and of its failure to charge and try them for recognizable criminal offenses.

Prior practice was hardly respectful of the rights of terrorist suspects. On the other hand, certain basic principles became widely accepted. These established principles relate to substantive limits and procedural guarantees for extradition; circumstances under which refugee protection was granted or denied; bans on *nonrefoulement* to regimes with serious human rights violations; second state complicity for human rights violations committed in states to which victims are forcibly transferred; and the expectation that the receiving state would grant the suspect a fair trial on recognizable criminal charges. These norms are described in the following sections.

#### A. Terrorism, Extradition, and Rendition

A complex relationship exists between terrorism and extradition. First, a major aim of multilateral counterterrorism treaties is to prohibit states from harboring terrorists by imposing an *aut dedere aut judicare* (extradite or prosecute) obligation.<sup>37</sup> Binding and streamlined extradition obligations were traditionally perceived as a primary counterterrorist strategy.<sup>38</sup>

Second, states keen on effective counterterrorist strategies, especially against Islamists, were not satisfied with the regime

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37. See GILBERT, *supra* note 4, at 320–29.

38. The 1977 European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, Europ. T.S. No. 90, 15 ILM 1272, is a model for counterterrorism treaties that dispenses with the political offense exception and substitutes a discrimination/persecution exception. Otto Lagodny, *The European Convention on the Suppression of Terrorism: A Substantial Step to Combat Terrorism?*, 60 U. COLO. L. REV. 583, 584–86 (1989). The United States and the United Kingdom renegotiated their bilateral extradition treaty in order to eliminate the political offense exception, which blocked the extradition of several IRA suspects, and substituted an alteration in the non-inquiry rule. BLAKESLEY, *supra* note 9, at 74–88.

established under the multilateral counterterrorism treaties. States harboring terrorists tend not to ratify these multilateral treaties and often lack bilateral extradition relations with democratic states interested in prosecuting international terrorists. Irregular rendition figured in democratic state practice regarding terrorist suspects prior to September 2001, but generally with the aim of subjecting the rendered suspect to non-military trial on recognizable criminal charges. Among repressive governments, in contrast, terrorist suspects are sometimes irregularly rendered across national boundaries only to disappear, or be summarily executed, tortured, arbitrarily detained, or subjected to unfair military trials. Such practices were widely regarded as gross human rights violations.

Several principles of extradition law may place obstacles in the way of securing the presence of a suspected terrorist. The rule of double criminality is one such important limit.<sup>39</sup> Especially with respect to complex and recently defined crimes, such as those concerning inchoate offenses, extraterritorial crimes, and the financing of terrorist activities, perfect congruence between the criminal laws of the requesting state and the requested state may be lacking. The rule of specialty also limits the charges upon which an extradited suspect may be tried, preventing the requesting state from prosecuting crimes not included in the warrant of extradition, even if evidence of those crimes is available.

Formerly, the political offense exception prevented a number of extraditions of suspected terrorists, for example members of the Irish Republican Army (IRA). However, this barrier diminishes as treaties are renegotiated to eliminate the exception or to depoliticize certain terrorist acts that endanger civilians or inflict harm out of proportion to the political objectives of the alleged terrorists.<sup>40</sup>

Inconsistencies in evidentiary rules may impede the extradition of suspects from common law to civil law states. This barrier may be lowered by revisions to treaties and statutes to

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39. See, e.g., *In Re Al-Fawwaz*, 69 URHL (2001) (providing extensive discussions on the double criminality rule).

40. Lagodny, *supra* note 38, at 585–86.

reduce the burden of establishing a prima facie case.<sup>41</sup> Transfers between common law jurisdictions may be impeded by the obligation to make an evidentiary showing, especially where the requesting state is unwilling to disclose confidential information that might establish that an individual is involved in terrorist activities.<sup>42</sup> Overall, statistics on formal extradition of accused terrorists indicate that substantial barriers exist in practice.<sup>43</sup>

Many democratic states participate in the counterterrorist coalition and continue to apply ordinary extradition rules with respect to suspects arrested on their territory or they subject the suspects to an ordinary criminal trial in their own courts.<sup>44</sup> The

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41. For example, European Union treaties from the 1990s supplemented the 1957 European Convention on Extradition, and altered the prima facie case requirement in the United Kingdom in 1990. GILBERT, *supra* note 4, at 127–41.

42. For example, Lotfi Raissi was denied extradition from the United Kingdom to the United States. Magistrate Timothy Workman denied extradition on all eight charges, noting that “[s]everal allegations involving terrorism have been made, but I would like to make it clear that I have received no evidence to support that contention.” Daniel McGory, ‘*Terror Pilot*’ Case Dismissed, THE TIMES (London), Apr. 25, 2002, available at LEXIS, News Library, Curnws File.

43. Kittrie found that from 1970 to 1975, 267 suspected terrorists were arrested, 50 were convicted, 39 freed, 58 were given safe conduct to another state, and 16 were released under pressure of terrorist threats. None was extradited. The fates of 104 others are still unknown. Evans traced 353 persons involved in hijackings from 1977 to 1982; only one was extradited. D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States*, 23 TEX. INT’L L. J. 2, 8 (1988).

44. For example, a suspect was extradited from Spain to France to stand trial for a plot to bomb the Strasbourg Cathedral in December 2000. See Emma Daly, *Spain Arrests 16 Suspected of Ties to Al Qaeda*, N.Y. TIMES, Jan. 25, 2003, available at LEXIS, News Library, Majap File. The extradition of another suspect arrested in Britain is sought with respect to the same plot. *France Seeks Arrest of Man Detained in British Subway Plot*, AGENCE FRANCE PRESSE, Nov. 30, 2002, available at LEXIS, News Library, Curnws File. Other suspects accused of planning terrorist attacks in France are being tried in Germany. Four men were convicted of complicity in the Strasbourg plot in March 2003 by a German court in Frankfurt. Mark Landler, *Germans Convict Four Algerians in Plot to Bomb a French Market*, N.Y. TIMES, Mar. 11, 2003, available at LEXIS, News Library, Majpap File. A Dutch citizen of Ethiopian origin was extradited from Canada in July 2002 to stand trial in the Netherlands with three other men for an alleged plot to bomb the U.S. Embassy in Paris. All four were acquitted for lack of evidence and the Dutch judges expressed surprise that Canada found sufficient evidence to extradite. Peter Finn, *Four Acquitted in Bomb Plot Against U.S. Embassy in Paris; Terror Probe Skirted Normal Procedures, Dutch Panel Rules*, WASH. POST, Dec. 19, 2002, available at LEXIS, News Library. The trial of Mounir El Motassadeq in Hamburg, Germany, for alleged complicity in the attacks of September 11 is especially noteworthy because U.S. officials refused to permit the court to question Ramzi Bin al Shihb, the alleged paymaster of both the September 11 hijackers and of Zacarias Moussaoui. Astrid Geisler, *Final Pleas Expected Next Week in German September 11 Trial*, AGENCE FRANCE PRESSE, Jan. 24, 2003, available at NEXIS, News Library, Curnws File. El Motassadeq was convicted and

refusal of E.U. States to extradite suspects facing capital charges imposes a significant barrier to extradition of terrorist suspects to the United States. Irregular renditions from European states to U.S. operated detention centers for “enemy combatants” do not appear to be occurring and incidents of U.S. organized abductions from European allies were not reported.

Thus, the current picture regarding seizure and transfer of terrorist suspects is quite mixed. Many persons seized in states outside of Europe with the tacit or formal collaboration of local officials are being irregularly rendered to U.S. detention centers. There, they are held indefinitely without charge or trial and without access to counsel or family. In contrast, persons arrested on terrorist charges in European states are rarely rendered to U.S. custody. Established principles of extradition law continue to apply to such persons and serious prosecutions on ordinary criminal charges are frequently undertaken in cases where extradition is not possible. The attempted reconceptualization of the “war against terrorism” as a matter of humanitarian law, rather than as a matter implicating traditional rules of extradition and criminal law, is not accepted by democratic states.<sup>45</sup>

### *B. Terrorism and Refugee Law*

Preventing terrorists from enjoying safe haven, thereby obtaining impunity for past and future crimes, is an objective of counterterrorism. Refugee protection is not available for persons who have committed certain crimes described in Article 1F of the 1951 Convention Relating to the Status of Refugees, namely crimes against peace, war crimes, and crimes against humanity; serious nonpolitical crimes; and acts contrary to the purposes and principles of the United Nations.<sup>46</sup>

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sentenced to fifteen years in prison in February 2003. Desmond Butler, *First Conviction in 9/11 Attacks*, N.Y. TIMES, Feb. 20, 2003, available at LEXIS, News Library, Majpap File.

45. The Australian Prime Minister did suggest to his Asian neighbors that Australia might implement the Bush Administration doctrine of pre-emptive self-defense to take forceful action against states that harbor terrorist cells. This announcement provoked a negative reaction from some governments, including Malaysia, and the policy is not yet in effect. Brendan Nicholson, *The State of Australia's Regional Relations*, SUNDAY AGE (Melbourne), Dec. 29, 2002, available at NEXIS, News Library, Curnws File.

46. Convention Relating to the Status of Refugees, July 28, 1951, art. 1F, 189 U.N.T.S. 137.



The interpretation and application of these exclusion clauses, however, present complex and difficult issues.<sup>47</sup> It is not clear whether every suspected terrorist falls within the scope of Article 1F.<sup>48</sup> Nevertheless, after the attacks of September 11, preventing the grant of asylum to suspected terrorists emerged as an important objective in the “war against terrorism.” This is reflected in the broad language of Security Council resolution 1373.<sup>49</sup> An increasing number of suspected terrorists arrested in Europe appear to be asylees or asylum seekers, a development that could result in a tightening of access to asylum, especially for persons from predominantly Muslim states. More recently, the Security Council in January 2003 cautioned states that they must “ensure that any measure taken to combat terrorism comply with all their obligations under international law, and [states] should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”<sup>50</sup>

Substantive and procedural issues are posed where a person suspected of terrorist involvement seeks to prevent his involuntary transfer from a state in which he sought refuge. This transfer could take the form of extradition, deportation or expulsion, or irregular rendition. The substantive issues primarily relate to the scope of the exclusion clauses, as well as the security-related exceptions to the principle of nonrefoulement, and the extent to which these exclusionary provisions of refugee law encompass

47. See generally *Exclusion from Protection*, 12 INT. J. REF. L. SPECIAL SUPPLEMENTARY ISSUE (2001). This study, undertaken by a Legal Advisory Group convened by the Lawyers Committee for Human Rights, contains a detailed analysis of the complexities of interpreting Article 1F.

48. Walter Kälin and Jörg Künzli, *Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes*, 12 INT. J. REF. L. 46 (2000).

49. Security Council resolution 1373 of 28 September 2001, para. 3(f), calls upon states to:

[t]ake appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts . . . .

S.C. Res 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001); Monette Zard, *Exclusion, Terrorism and the Refugee Convention*, 13 FORCED MIGRATION REV. 32 (2002).

50. S.C. Res. 1456, U.N. SCOR, 57th Sess., 4688th mtg., U.N. Doc. S/Res/1456 (2003).

terrorist acts.<sup>51</sup> The procedural issues encompass how the exclusion clauses should be applied. A key question is whether summary exclusion, without consideration of the risk of persecution, is permitted. Irregular rendition, especially when it takes the form of summary expulsion or abduction, deprives the subject of an opportunity to enjoy protection from potential persecution and serious human rights violations. As such, it poses a serious danger to the international refugee regime and to fundamental human rights.

Article 1F reflects an important, if somewhat surprising, concept in refugee law—that certain persons are undeserving of refugee protection even if their involuntary return results in persecution. The reference to crimes against peace, war crimes, and crimes against humanity in Article 1F(a) is historically grounded in the context of the Refugee Convention's original aim to resolve the problems posed by forced displacement in Europe in the aftermath of World War II. To extend refugee protection to war criminals might undermine public acceptance of the legitimacy of the emerging refugee regime. The text of Article 1F(a), however, adopts a progressive interpretation of the crimes that subject an asylum seeker to exclusion, linking its scope to the evolution of international humanitarian norms and expanding concepts of crimes against humanity.

For example, certain acts of terrorism committed during armed conflict constitute war crimes.<sup>52</sup> Further, the attacks of September 11 illustrate that the current definition of crimes against humanity, as reflected in the Statute of the International Criminal Court (ICC), encompasses some peacetime acts of organized terrorist groups.<sup>53</sup> Thus, even though terrorism per se was excluded from the jurisdiction of the ICC, that body may play an important role in the prosecution of future acts of terrorism

51. Article 1F of the Refugee Convention excludes certain persons from the refugee definition. Convention Relating to the Status of Refugees, July 28, 1951, art. 1F, 189 U.N.T.S. 137. Article 33(2) conditions the principle of nonrefoulement of refugees set forth in Article 33(1). *Id.* art. 33. Article 33(2) permits asylum states to return refugees, even to states in which they fear persecution, if the refugees have committed a particularly serious crime in, and pose a danger to, the asylum state; or if the refugee is a threat to the security of that state. *Id.*

52. Gasser, *supra* note 10.

53. *Rome Statute for the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 52d Sess., art. 7, U.N. Doc. A/CONF.183/9, adopted July 17, 1998 [hereinafter ICC Statute].

committed on a large scale.<sup>54</sup> The ICC's interpretation of its Statute may likewise influence understanding of the scope of Article 1F(a) of the Refugee Convention as applied to suspected terrorists.

Article 1F(b), excluding persons who are suspected of serious non-political crimes as refugees, implicates many of the same issues that arise with respect to the applicability of suspected terrorists to the political offense exception from extradition. Refugee protection is not intended to shield fugitives from accountability for serious crimes that they committed prior to seeking refuge, or to interfere with appropriate extradition of such offenders. The addition of the qualifier "non-political," however, suggests that certain political offenders should receive refugee protection.

The difficulty is that no common understanding of the political offense exception exists. Practice in the extradition context is quite diverse, even among states with similar political traditions.<sup>55</sup> A trend toward depoliticizing serious terrorist crimes appears to be emerging, following two different models. The first is to negotiate new extradition instruments that abolish the political offense exception among certain democratic states or for certain terrorist crimes.<sup>56</sup> The second is to apply in practice a proportionality concept that holds certain terrorist crimes against civilians as unjustified by any political objectives of the perpetrator. The case of *Eain v. Wilkes* is an example of the latter approach.<sup>57</sup> A similar proportionality principle was utilized to depoliticize certain politically motivated crimes for the purpose of excluding an asylum seeker from refugee protection.<sup>58</sup>

Although there is apparent congruence between the political offense exception to extradition and Article 1F(b) of the Refugee Convention, disparity in outcomes between extradition proceedings and deportation proceedings involving the same

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54. The ICC's jurisdiction is limited to crimes committed after its Statute's entry into force on July 1, 2002.

55. GILBERT, *supra* note 4, at 203-46. For example, Britain uses the "incidence" test, the French limit extradition to purely political offenses, and the Swiss use the proportionality test. *Id.* See also John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998).

56. See Lagodny, *supra* note 38, at 585

57. See, e.g., *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981).

58. See, e.g., *T v. Secretary of State for the Home Department*, 2 All E.R. 816 (1996).

individual occurs. For example, in the *Doherty* case, the extradition of a suspected IRA member was repeatedly rejected under the previous U.S.-U.K. extradition treaty, although Doherty was later denied asylum and deported to the United Kingdom.<sup>59</sup>

The third category of excludable conduct, acts contrary to the purposes and principles of the United Nations set out in Article 1F(c), is the vaguest. This is because the United Nations acted vigorously in adopting a dozen counterterrorism treaties and in placing the “war against terrorism” high on the collective security agenda. Some argue that Article 1F(c) mandates denial of asylum to suspected terrorists. Similar arguments were raised regarding drug traffickers, also the target of much U.N. crime-control activity.<sup>60</sup> The U.N. High Commissioner for Refugees (UNHCR) suggested that, in keeping with the appropriately restrictive application of the exclusion clauses, that Article 1F(c) should be limited to political leaders who misuse their authority. Launching an aggressive war would be an example of misuse.<sup>61</sup> So interpreted, Article 1F(c) is inapplicable to nonstate terrorist groups such as Al Qaeda.

Procedurally, the key issues implicated by the application of the exclusion clauses to suspected terrorists concern: (1) the evidentiary burden, which involves clarification of the “reasonable grounds to believe” standard of Article 1F; (2) whether refugee status determination officials are required to balance the risk of persecution against the seriousness of the excludable act; and (3) whether asylum applications in which excludability for terrorist acts is in issue can be pretermitted or channeled to summary processes.

Conviction of a crime is not needed to qualify for exclusion under Article 1F. In the case of suspected terrorists, sensitive or confidential information may be the sole source of “grounds to believe” that an asylum applicant is excludable. No clear consensus exists on the burden of proof, with practice varying from a low “probable cause” standard, to a “preponderance of the

59. *United States v. Doherty*, 506 U.S. 1002 (1992).

60. *Pushpanathan v. Canada* [1998] 1 S.C.R. 982; *see also*, Edward Kwakwa, *Article 1F(c): Acts Contrary to the Purposes and Principles of the United Nations*, 12 INT’L J. REF. L. 79 (2000).

61. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, ¶¶ 149, 163, U.N. Doc. HCR/1P/4/REV.2 (1992).

evidence” standard, to a more protective “clear and convincing” approach.

In many cases, refugee status determination officials lack detailed knowledge concerning the applicant. The exclusion issue may arise based upon information supplied by the applicant. For example, an asylum seeker may try to bolster his application by asserting that officials in his state of origin suspect him of involvement with a terrorist group and will consequently persecute him if deported. Thus, a serious risk exists that terrorist suspects will be denied refugee protection on the basis of evidence with little probative value, since the evidence is not subject to careful examination in a rigorous procedure. This is especially true where a consensus emerges that all persons suspected of any direct or indirect terrorist involvement should categorically be denied asylum. If this occurs, a dilution of evidentiary standards in the application of the exclusion clauses could result.

The second procedural issue, the debate over balancing, is also likely to affect asylum of suspected terrorists. UNHCR urges that status determination officials consider both evidence relating to the degree and risk of persecution as well as evidence of possible involvement in excludable conduct.<sup>62</sup> The balancing requirement is not uniformly accepted in state practice.<sup>63</sup> Thus, categorical bars to asylum for persons suspected of terrorist involvement might be applied to require disposition of the exclusion issue prior to any consideration of the risk of persecution.

Similarly, categorical bars to refugee protection for suspected terrorists might result in the denial of any procedural protections to such persons, or the summary rejection of their asylum claims as manifestly ill founded. The consequence of denying asylum hearings to such persons and their subjection to summary expulsion or irregular rendition is that suspects may be deprived of an opportunity to establish bona fide claims to refugee protection or to the mandatory bars on forced return to serious human rights violations.

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62. *Id.* ¶ 156.

63. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (rejecting balancing).

### *C. Terrorism and the Human Rights Bars to Refoulement*

Pursuant to several widely ratified human rights treaties, persons may not be expelled or extradited to states in which they would suffer certain severe human rights violations. The most prominent human rights bars to refoulement can be found in Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention Against Torture);<sup>64</sup> in Article 7 of the International Covenant on Civil and Political Rights (ICCPR);<sup>65</sup> and in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).<sup>66</sup> A concern to prevent extradition or expulsion that would result in torture is the primary focus of these provisions. The prohibition on torture is regarded as nonderogable, not subject to any exclusions, and also binding where the rendering state is a party to the treaty but the receiving state is not.<sup>67</sup> The ICCPR and the European Convention go further than the Convention Against Torture in extending the nonrefoulement principle to persons who face a risk of cruel, inhuman, or degrading treatment or punishment in the state in which they face involuntary return.<sup>68</sup>

The human rights bars to refoulement are implicated by additional human rights, but in a less clear or categorical fashion. The European Court of Human Rights and the Human Rights Committee have required that state parties cancel certain deportations where the consequence would be a denial of the right to family life resulting from forced separation from family members.<sup>69</sup> Unlike refoulement to torture, the right to family life

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64. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 9, 1975, 1465 U.N.T.S. 113, 114.

65. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 174 [hereinafter ICCPR].

66. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

67. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, 414 (1996). The *Chahal* case, involving a Sikh suspected of terrorist involvement and facing deportation from the United Kingdom to India, contains an extensive discussion of these principles. *Id.* at 424–25.

68. *See, e.g., Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

69. *See, e.g., Hendrik Winata v. Australia*, Hum. Rts. Comm., 72d Sess., U.N. Doc. CCPR/C/72/D/930/2000 (2001); *Mehemi v. France*, Eur. Ct. H.R. 1959 (1997); *Boultif v. Switzerland*, App. No. 54273/00, Eur. Ct. H.R. Judgment, Aug. 2, 2001, at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1122011130&Notice=0&Noticemode=&RelatedMode=0> (last visited Sept. 21, 2003).

is subject to certain limitations and balances the applicant's interest in preserving his family against the state's interest in removing him. Thus, persons involved in serious acts of terrorism would likely face difficulty in establishing that their extradition or expulsion was disproportionate to the deprivation of their right to family life.

Another area of potential development of human rights bars is the risk of return to unfair trial or to arbitrary detention. As Geoff Gilbert notes, the jurisprudence on this point is not as developed as the anti-torture principle.<sup>70</sup> This issue has obvious relevance to the renditions of captives to U.S. detention centers operating in the "war against terrorism." These persons are subjected to indefinite incommunicado detention. Further, the captives are at risk of being placed on trial, not before ordinary courts, but before ad hoc military commissions applying trial standards that fall short of humanitarian law norms and of human rights obligations applicable in states of emergency.<sup>71</sup>

Substantive deprivation of freedom of movement rights is also implicated in irregular renditions and forced interstate transfers. Among the complex of rights embraced by the freedom of movement is the right to return to one's own country. During civil conflicts and military dictatorships in South America, for example, some persons were sentenced to forced exile, giving rise to claims that they were deprived of the right to return to their own country. The right to return is also seen as creating a reciprocal obligation on the part of the state of nationality to accept the return of its citizens, for example in the deportation context.<sup>72</sup>

This issue may have special relevance with respect to Afghans detained in centers such as Camp Delta at Guantánamo. Afghans

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70. GILBERT, *supra* note 4, at 169–70.

71. *General Comment on Article 4*, U.N. GAOR, Human Rights Comm., 55th. Sess., 1950th mtg., at 4–5, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter *General Comment*]; Report on Terrorism and Human Rights, Inter-Am. C. H. R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002) [hereinafter Report on Terrorism].

72. This obligation is codified in the recent U.N. Protocols on trafficking in human beings and migrant smuggling. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, U.N. Doc. A/55/383 Annex II, art. 8(1) (2000); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, U.N. Doc. A/55/383 Annex III, art. 18(1) (2000).

appear to comprise one of the largest nationality groups confined at Guantánamo. Many Afghans probably had civil or military links to the Taliban, while others may have been active in Al Qaeda. Still others appear to be noncombatant civilians with no links to the Taliban.<sup>73</sup> The Northern Alliance apparently continues to detain large numbers of persons alleged to be Taliban or Al Qaeda fighters inside Afghanistan. Still other Afghans are detained at Bagram Air Base under U.S. control. Why many were transported 8,000 miles to Guantánamo (and possibly to other remote U.S. detention camps) and the criteria of selection for transfer remains unclear.

Whatever their status under humanitarian law, each of the remotely held captives has a right to repatriation at the cessation of active hostilities in Afghanistan, unless they are fairly tried and convicted for violations of the laws of war or recognizable criminal offenses.<sup>74</sup> Whether they may simultaneously, or at an earlier stage in their captivity, also claim a right to return to their own country under international human rights law is also unclear.

Those who truly are noncombatants have the strongest claim. As noted in Part IV.C *infra*, civilians are subject to internment during international armed conflict only under narrow criteria of necessity, and then only if they are located in occupied territory or if they are enemy aliens on the territory of a party to the conflict. Neither of these situations exists in the “war against terrorism,” nor did either situation arise in the Afghan conflict. Thus, civilians among the 3,000 captives must be regarded not as wartime internees, but as persons subjected to a form of administrative detention governed by human rights norms.

The current practice of irregular rendition in the “war against terrorism” risks undermining the absolute prohibition on forced return to torture or cruel, inhuman, or degrading treatment or punishment. The case of Maher Arar, for example, raises issues of grave concern. U.S. immigration authorities took him into custody in September 2002, apparently based on unverified information that he was involved in terrorism. He was arrested without a visa at John F. Kennedy Airport in New York. Arar was attempting to return to his home in Montreal from a flight that had originated in

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73. See Rohde, *supra* note 23, at A14.

74. The right to timely repatriation of POWs, unprivileged combatants, and interned civilians is further developed in Part IV *infra*.



Switzerland.<sup>75</sup> A dual Canadian-Syrian national, he was interrogated and detained under strict conditions at the Metropolitan Detention Center in New York before being summarily expelled to Syria on October 10, 2002.<sup>76</sup>

Since his return to Syria, Arar was held without charge or trial. Canada strenuously protested his expulsion from the United States and even Syrian officials expressed surprise that he was not permitted to return to Canada.<sup>77</sup> It does not appear that Arar was given an opportunity to seek relief under the Convention Against Torture or the ICCPR or to seek refugee protection, even though torture in Syria is widely practiced by the security forces against suspected political opponents.<sup>78</sup>

Persons who are transferred as "enemy combatants" to detention facilities operated by the United States or to collaborating states, such as Jordan, are similarly deprived of any opportunity to claim protection under the human rights bars to refoulement. Since the captives are denied access by the press, by human rights monitors, by counsel, and by family, it cannot be reliably determined whether they were subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Recent press reports, however, indicate that certain interrogation techniques used by U.S. officials may violate the provisions of the Convention Against Torture and the ICCPR.<sup>79</sup> Indefinite incommunicado detention itself may contravene human rights norms because of the debilitating psychological effects.<sup>80</sup>

The applicability of human rights protections to these captives is a matter of vigorous debate. The position of the U.S.

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75. Daniel J. Wakin, *Tempers Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicions*, N.Y. TIMES, Nov. 11, 2002, available at LEXIS, News Library, Curnws File.

76. *Id.* His family retained a lawyer in Ottawa, who was not notified prior to Arar's removal.

77. *Id.*

78. See U.S. Dep't of State, *Country Reports on Human Rights Practices for 2001*, 107th Cong., 2nd Sess. at 2267-68 (2002). The United States has implemented its obligations under Article 3 of the Torture Convention. Foreign Affairs Reform and Restructuring Act, Pub.L. 105-277, Div. G, Title XXII, §2242, 112 Stat. 2681-822 (1998). It is possible, however, that Arar was denied a removal hearing due to special security-related provisions of the immigration laws. Aliens and Nationality, 8 U.S.C. §1225(c) (1999).

79. See Priest & Gellman, *supra* note 1.

80. According to press reports, twenty-five Guantánamo captives have attempted to commit suicide. See Lewis, *supra* note 23.

Administration appears to be that humanitarian law does not forbid these transfers and that human rights treaties have no application. The territorial scope of human rights treaties is a contested issue and standards may be clarified in light of U.S. practice in the “war against terrorism.”<sup>81</sup> Effective mechanisms to assess U.S. compliance, however, appear to be unavailable.<sup>82</sup>

Some of the states transferring captives to U.S. custody are not parties to major human rights treaties and, thus, cannot be held to account for their own violations in depriving the captives the opportunity to contest their transfer based on human rights nonrefoulement principles. The United States appears indifferent to its own treaty obligations not to render persons to states where there are substantial grounds to fear that these persons will be subjected to torture.

These transfers, especially of persons seized in territories remote from a conventional battlefield, also raise important procedural issues. The six persons irregularly rendered from Bosnia-Herzegovina to Guantánamo established that their rights under human rights obligations incorporated into the Dayton Peace Accords were violated.<sup>83</sup> The European Court of Human Rights held that Bulgaria violated Article 5(4) of the European Convention when it detained and summarily expelled a stateless Palestinian without providing him an opportunity to contest the lawfulness of his expulsion. The Court held:

The Court reiterates that everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental

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81. See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995).

82. The United States did not ratify the First Optional Protocol to the ICCPR, which permits individual communications. The United States did accept the mechanism for interstate complaints under Article 42, but no complaints were filed. The U.S. Senate complicated domestic litigation by attaching a declaration of non-self-execution to the U.S. instrument of ratification of the ICCPR. The extraterritorial location of the captives also raises questions whether they are protected by the ICCPR. These factors are not true legal barriers, but they diminish the certainty of litigation success.

83. Human Rights Chamber for Bosnia and Herzegovina, *Human Rights Chamber Delivers 3 Decisions on Admissibility and Merits*, Press Release, Oct. 11, 2002 at [http://www.hrc.ba/english/press\\_eng/pressEng/october02.pdf](http://www.hrc.ba/english/press_eng/pressEng/october02.pdf) (last visited Sept. 21, 2003); *Boudella v. Bosnia*, Human Rights Chamber for Bosnia Herzegovina, CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691, ¶ 323 (Oct. 11, 2002).

importance . . . to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals as well as their personal security.

. . .

National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . .<sup>84</sup>

Article 13 of the ICCPR states that persons facing expulsion must be given an opportunity to present reasons why they should not be expelled. This provision, however, includes an exception for cases in which “compelling reasons of national security” require expulsion without an opportunity to contest the grounds. Thus, the risk that an individual may be subjected to torture or other serious human rights violations will not categorically guarantee procedural fairness in expulsion under the ICCPR. Suspected terrorists are most likely to encounter Article 13’s limitation for security threats. Article 7 of the ICCPR, however, imposes a substantive nonrefoulement bar to torture or cruel treatment that operates independently of Article 13.

#### IV. HUMANITARIAN LAW AND THE TRANSFER OF CAPTIVES IN THE “WAR AGAINST TERRORISM”

The extraordinary practices of the United States in the “war against terrorism” are claimed by the U.S. Administration to be justified as necessary and proper in a new type of international armed conflict between states and nonstate transnational terrorist groups. Due to the fact that such conflict is not cognizable under international humanitarian law, few clear rules exist concerning the seizure, transfer, and detention of the 3,000 captives currently held under U.S. authority. The “war” is conceived by the U.S. Administration as being worldwide, of indefinite duration, and against an enemy of unclear and variable definition.<sup>85</sup> This section will explore norms concerning internment and transfer of prisoners of war, unprivileged combatants, civilians, and probe their applicability to these captives.

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84. *Al-Nashif v. Bulgaria*, Eur. Ct. H.R. App. No. 50963/99 ¶¶ 92, 94 (2002).

85. NATIONAL SECURITY STRATEGY, *supra* note 28, at 5.

### A. Internment and Interstate Transfer of Prisoners of War

President Bush denied prisoner of war (POW) status to all captives held in the “war against terrorism,” whether they were members of the Taliban armed forces in Afghanistan, suspected Al Qaeda fighters, or persons seized outside of Afghanistan.<sup>86</sup> This policy is highly controversial and the denial of hearings by competent tribunals to determine if these captives meet the definition of POWs under the Third Geneva Convention received severe criticism.<sup>87</sup>

Assuming that some of the captives are POWs by definition, especially those seized during the internationalized internal armed conflict in Afghanistan, it is necessary to examine the humanitarian law rules relating to the internment and transfer of such. Several issues become relevant such as the availability of judicial supervision over internment, duration of internment, the right to repatriate at the cessation of active hostilities, and interstate transfer of POWs.

The U.S. Administration argues that humanitarian law does not make provision for judicial supervision of the internment of “enemy combatants.”<sup>88</sup> This is only partially true and not convincing in the context of current internment and transfer policies. POWs, who are granted full POW privileges under the Third Geneva Convention during the course of active hostilities in a genuine international armed conflict, do not have any rights under that Convention to challenge the lawfulness or necessity of their internment in a judicial or administrative forum.<sup>89</sup> None of the current 3,000 captives, however, was granted POW status. Moreover, some were seized in circumstances that cast doubt on

86. White House Fact Sheet, *supra* note 18.

87. Aldrich, *supra* note 21, at 892–96; Naqvi, *supra* note 11, at 572–73; see generally Robert K. Goldman and Brian D. Titemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, (Dec. 2002) (paper for the American Society of International Law Task Force on Terrorism), available at <http://www.asil.org/taskforce/goldman.pdf> (last visited Sept. 21, 2003).

88. This issue of lack of judicial supervision is argued in pending cases involving two U.S. citizens in indefinite incommunicado detention in the United States, as well as in pending litigation on behalf of various Guantánamo captives.

89. See *In re Territo*, 158 F.2d 142, 148 (9th Cir. 1946) (denying a writ of habeas corpus to a POW transferred from Italy to the United States, who claimed to be a U.S. citizen).

whether they may be legally characterized as “combatants” under humanitarian law.

Where a person claiming to be a POW is interned, he is entitled to a hearing before a competent tribunal to establish his POW status pursuant to Article 5 of the Third Geneva Convention. These hearings may be conducted by military tribunals.<sup>90</sup> The Administration denied Article 5 hearings to all of the current captives. This policy marks a sharp departure from U.S. practice in earlier conflicts, including the Gulf War and Vietnam.<sup>91</sup> If an alleged unprivileged combatant is tried for conduct that would constitute a lawful act of war if committed by a POW, he may raise a claim to POW status during his trial, essentially claiming the combatant’s privilege.<sup>92</sup>

Under the Geneva Convention of 1929, POWs could be interned until the conclusion of formal peace agreements. Considerable concern was expressed in 1949 concerning the lengthy internment of POWs following the end of hostilities in World War II.<sup>93</sup> Thus, Article 118 of the Third Geneva Convention requires that POWs be “released and repatriated without delay after the cessation of active hostilities.” Even in a conventional international armed conflict, however, determining when hostilities have ceased can be quite difficult.<sup>94</sup> An even greater challenge is posed in the “war against terrorism” because it will never conclude if it lasts as long as a credible threat of

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90. U.S. military regulations provide for a tribunal of three commissioned officers. Naqvi, *supra* note 11, at 584–97.

91. Gasser, *supra* note 10, at 567. During the Iraq war in 2003, status hearings were held to distinguish Iraqi POWs from unprivileged combatants. U.S. Dep’t of Defense News Briefing – Secretary Rumsfeld and Gen. Myers, Friday, April 25, 2003, at <http://www.dod.gov/transcripts/2003/tr20030425-secdef0126.html> (last visited Sept. 21, 2003). U.S. soldiers were captured in the war in Iraq. The desire to ensure that U.S. POWs are treated in a humane manner creates a strong incentive for U.S. compliance with the Third Geneva Convention. Concern about the treatment of U.S. POWs in Vietnam shaped U.S. behavior in that war. Aldrich, *supra* note 21, at 892–96. No U.S. prisoners, however, were seized in the Afghan conflict. Gasser, *supra* note 10, at 567.

92. Protocol Additional I of 1977, art. 45(2).

93. ALAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR* 486 (1976).

94. India’s continued detention of Pakistani POWs following the liberation of Bangladesh is an example of the ambiguity of this rule. See R.C. HINGORANI, *PRISONERS OF WAR* 180–82 (2d ed. 1982). A detailed analysis of the application of Article 118 is contained in CHRISTINE SHIELDS DELESSERT, *RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1 OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR* (1977).

international terrorism persists. Peace negotiations or a formal armistice with nonstate groups and individuals who comprise the “enemy” are virtually inconceivable, and no one anticipates the rapid and permanent eradication of international terrorism.

Generally, the right of a POW to repatriate arises when active hostilities cease. Repatriation, however, can be delayed for POWs properly convicted of war crimes or other crimes. For the captives in the “war against terrorism” who are eligible for protection under the Third Geneva Convention as POWs seized in an international armed conflict in Afghanistan, the right to repatriate should be assessed when active hostilities in the Afghan war cease. To hold POWs until victory is secured in the worldwide “war against terrorism” would violate POW rights under Article 118 of the Third Geneva Convention. The United States should only be permitted to intern POWs beyond the end of active hostility in Afghanistan, if these POWs are charged and tried for war crimes or other crimes.

The legality of interstate transfers of POWs is assessed under Article 12 of the Third Geneva Convention. Such transfers are permitted only to states that are parties to the Third Geneva Convention and that will fully protect the rights of such POWs. Where it appears that POW privileges will be denied, the original Detaining Power is under an obligation to take custody back and to transfer the POWs to a place of internment where their rights will be respected.

For example, during World War II, many POWs were transferred out of combat zones to internment in Allied States and were put to work in agriculture and other economic activities. So long as POW privileges are respected, including repatriation at the conclusion of active hostilities, such interstate transfers are lawful under contemporary rules of humanitarian law. No judicial supervision of such transfers is required. World War II also involved clearly illegal interstate transfers, such as the notorious “death marches” of POWs by Axis States.<sup>95</sup> Current practice does not involve conduct of such extreme illegality and inhumanity.<sup>96</sup>

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95. A.J. BARKER, *PRISONERS OF WAR* 44–58 (1975).

96. A large number of prisoners held by forces of Northern Alliance warlord Abdul Rashid Dostum in Afghanistan were reportedly killed during inhumane intrastate transfers in shipping containers in late 2001.

The United States is the Detaining Power at both ends of the spectrum for most transferred captives from the Afghan conflict, so it is difficult to apply humanitarian law. Coalition forces in Afghanistan, however, appear to shape their behavior to avoid violations of Article 12 by declining to transfer potential POWs to U.S. custody.<sup>97</sup>

### *B. Internment and Interstate Transfer of Unprivileged Combatants*

The defined rights of unprivileged combatants under humanitarian law are more limited than the rights of POWs. Commentary on the “war against terrorism” tends to focus on denial of POW status, failure to provide Article 5 status hearings, and the prospect of unfair trial and death sentences for those tried by the proposed ad hoc military commissions.<sup>98</sup> Little if any attention is paid to irregular rendition of terrorist suspects or to interstate transfers of persons labeled unlawful combatants.

Article 75 of the Protocol Additional I of 1977 provides a basic set of rights for unprivileged combatants in international armed conflict. In particular, Article 75(3) guarantees that interned unprivileged combatants shall be released and repatriated “with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” This language is not identical to Article 118 of the Third Geneva Convention. Therefore, it is not clear whether Article 75 authorizes internment beyond the duration of active hostilities.<sup>99</sup> Moreover, it does not explicitly address the interstate transfer of unprivileged combatants.<sup>100</sup>

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97. Once the United States began transferring captives from the Afghan conflict to Guantánamo and concerns were raised about denial of rights under the Third Geneva Convention, other foreign forces in Afghanistan reportedly began to decline transferring captured combatants to U.S. custody, in order to prevent violations of Articles 5 and 12 of the Third Geneva Convention. Carlotta Gall, *British to Hand Captives to Afghan Courts*, N.Y. TIMES, Apr. 30, 2002, available at LEXIS, News Library, NYT File.

98. See, e.g., *Agora: Military Commissions*, 96 AM. J. INT'L L. 320 (2002); Aldrich, *supra* note 21, at 892–96; Gasser, *supra* note 10, at 567; Goldman & Tittlemore, *supra* note 87; Naqvi, *supra* note 11, at 572–73.

99. In a cryptic statement, an editorial in the INTERNATIONAL REVIEW OF THE RED CROSS suggested in September 2002 that “[t]he status of a captured person has far more than theoretical implications: in particular, conditions of internment, the length of detention and the question of repatriation depend upon it.” *Editorial*, 84 INT'L REV. RED CROSS 518 (2002) (emphasis added). One difference between POWs and unprivileged combatants is that the latter can be tried for the crime of engaging in acts of war that

Common Article 3 of the Geneva Conventions of 1949 provides a set of basic rights and obligations during internal armed conflict, ensuring protection for insurgents and other unprivileged combatants. Common Article 3 does not set limits on duration of internment. Interstate transfer of captured combatants is not an issue that generally arises during internal armed conflict and it is not addressed in Common Article 3 or in Protocol Additional II of 1977.

The absence of legal authority suggests one of three things. The first possibility, which the Bush Administration might argue, is simply that no legal rules constrain the discretion of U.S. authorities to seize persons any place in the world, to label them as “enemy combatants” on the basis of suspicion of involvement in terrorist activities, or to transport them thousands of miles away to indefinite incommunicado detention. The second possibility is that persons seized in situations that do not constitute a recognizable international armed conflict should be protected by established norms of extradition, refugee, and human rights law. To the extent that any of the current captives are unprivileged combatants seized during a cognizable international armed conflict, a third option exists. This option urges that humanitarian law norms be applied and that the duration of internment be linked to the continuation of active hostilities, the same rule that applies to POWs.

Unprivileged combatants may be prosecuted for engaging unlawfully in acts of war or for common crimes. The frequently cited *Quirin* case reflects this rule. Note, however, that the laws of war applied in that case were superceded by more protective rules in the Geneva Conventions of 1949 and the Protocols Additional of 1977.<sup>101</sup> The captives in the “war against terrorism” are disadvantaged because they are held in indefinite detention, without charge or trial before any tribunal, and are also denied Article 5 status hearings. Thus, they are not able to establish their status as POWs, as noncombatants protected by the Fourth

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would be lawful if committed by a privileged combatant. Perhaps this is the import of the ICRC’s language in this editorial.

100. The United States has not ratified Protocol Additional I of 1977. Officials, however, during the Reagan Administration indicated that Article 75 reflects binding customary norms of humane treatment of unprivileged combatants. Goldman & Tittmore, *supra* note 87, at 36–39.

101. *Ex parte Quirin*, 317 U.S. 1, 12 (1942).



Geneva Convention, or as ordinary criminal suspects not subject to wartime internment.

Where prosecution of unprivileged combatants is infeasible during a genuine international armed conflict, these combatants may be interned without POW privileges. Internment conditions are partially addressed in Article 75 of the Protocol Additional I.

That provision, however, does not address interstate transfer of unprivileged combatants. By analogy to Article 12 of the Third Geneva Convention, one may assume that unprivileged combatants should not be transferred to a state that will deny them Article 75 protections, such as deliberate denial of medical care. Violations of this principle were reported in press accounts.<sup>102</sup>

The rationale for interning unprivileged combatants (who are not charged or tried for any crime) is the same as that for internment of POWs. Their internment is supposedly not punitive, but preventive and designed to incapacitate them as combatants for the duration of the conflict. Thus, unprivileged combatants seized in the Afghan conflict should be released and repatriated when active hostilities cease in Afghanistan.

To hold unprivileged combatants beyond that time is not authorized by humanitarian law. Repatriation might be delayed for POWs and unprivileged combatants charged and fairly tried for a criminal offense. Such persons may be imprisoned for the duration of their sentences.

To intern unprivileged combatants in the Afghan conflict for the duration of the "war against terrorism" is to impose a form of administrative detention not authorized by humanitarian law. The United States has never administratively detained suspected terrorists, unlike its ally, the United Kingdom.<sup>103</sup> The current practices regarding noncombatant captives violate human rights norms, especially in relation to the denial of judicial remedies to challenge the lawfulness of their detention.<sup>104</sup>

Those captives who are not combatants should either be protected under internment and transfer rules of humanitarian law applicable to civilians or, depending on the circumstances of their

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102. Priest & Gellman, *supra* note 1.

103. *Memorandum*, *supra* note 5. The United Kingdom filed notices of derogation under the ICCPR and the European Convention when the 2001 Anti-terrorism legislation was adopted by Parliament, recognizing the human rights implications.

104. *General Comment*, *supra* note 71, at 4-5; Report on Terrorism, *supra* note 71. The United States has filed no notice of derogation under the ICCPR.

seizure, be protected by ordinary rules of extradition, refugee, and human rights law. Rules concerning interned civilians are described Part IV.C *infra*, while rules applicable to suspected terrorists not seized during international armed conflict are described in Part III *supra*.

### C. Internment, Transfer, Deportation, and Repatriation of Civilians

Powers may intern civilians under limited circumstances and states engaged in international armed conflict may intern enemy aliens present in their territory. Detailed rules concerning conditions of internment, duration, transfer, and deportation of civilians are contained in the Fourth Geneva Convention. These norms are quite restrictive and require periodic proceedings to assess the necessity of continued internment.<sup>105</sup> Civilians may be transferred out of combat zones solely for the purpose of insuring their safety and they must be repatriated as soon as the danger ceases, which may precede the conclusion of active hostilities for the conflict as a whole.<sup>106</sup> In light of Nazi atrocities, the deportation or unlawful confinement of civilians who do not pose a threat constitutes a grave breach and a crime against humanity.<sup>107</sup>

The applicability of the Fourth Geneva Convention to the current captives is complicated by a number of factors. First, the United States never became an Occupying Power in Afghanistan. Second, there are no enemy aliens among the 3,000 captives in the “war against terrorism” because the United States was not engaged in international armed conflict with any other state.<sup>108</sup>

105. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, arts. 41, 42 (internment authorized only where “absolutely necessary”), 43 (internment order must be reconsidered if civilian internee requests, “as soon as possible by an appropriate court or administrative board” and periodically “at least twice yearly”), 45 (transfer only to a Detaining Power that is a party to the Convention), 78 (internment for “imperative reasons of safety”), 79–126 (detailed rules on treatment of civilian internees), 127–28 (transfers of internees), 129–31 (death of internees), 132–35 (repatriation of civilian internees).

106. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, arts. 127–128, 132–135.

107. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, arts. 49, 147; ICC Statute, *supra* note 53, arts. 7(1)(e), 7(2)(d); see Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT’L L. 469, 470–72, 485, 518 (1993).

108. U.S. law restricts the definition of “alien enemies” to persons fourteen years of age or older who are citizens or subjects of a foreign state with which the United States is engaged in a declared war. Such persons may be interned, if they are located in the

Third, whether any of the current captives is a noncombatant civilian cannot be determined. Without status hearings under Article 5 of the Third Geneva Convention or prosecutions for violations of the laws of war, it is impossible to determine whether civilians are among those being interned.<sup>109</sup>

The United States does not acknowledge any of the current 3,000 captives as interned civilians and, instead, labels them all as “enemy combatants.” Those who were captured in situations that do not amount to international armed conflict would not be protected by the Fourth Geneva Convention. Their renditions are governed by the norms of extradition, refugee, and human rights law delineated in Part III *supra*.

## V. CONCLUSION

In his State of the Union Address on January 28, 2003, President Bush mentioned the 3,000 captives who are the subject of this Article:

All told, more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Let’s put it this way—they are no longer a problem to the United States and our friends and allies.

...

We have the terrorists on the run. We’re keeping them on the run. One by one, the terrorists are learning the meaning of American justice.<sup>110</sup>

There are several notable aspects to these remarks. First, the terminology—“terrorists,” “arrested,” “American justice”—is unusual for a President discussing the wartime internment of captured combatants. This is the language of seizure and rendition

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United States during the war. 50 U.S.C. §21. Internees, however, are entitled to seek a writ of habeas corpus to challenge their categorization as alien enemies. *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 900 (2d Cir. 1943) (ordering release of internee upon proof that he was no longer a citizen of Germany and thus no longer met the definition of an alien enemy in World War II). Even Iraqi nationals could not be interned as alien enemies in the absence of a formal declaration of war.

109. During the Gulf War, a number of captured Iraqis were found in the course of Article 5 hearings to be noncombatants, and were released from captivity and transferred to camps for internally displaced persons or refugee camps. Goldman & Tittmore, *supra* note 87, at 32.

110. Bush, *supra* note 11.

of persons suspected of transnational crimes. Second, the apparent reference to terrorist suspects who were summarily executed (perhaps in targeted assassinations such as the one carried out by an unmanned CIA drone in Yemen) is chilling.<sup>111</sup> It suggests a disregard for the humanity and fundamental rights of terrorist suspects that perhaps mirrors actual terrorists' attitudes toward their perceived enemies in the West, but which is antithetical to established human rights principles. Third, the concept of "American justice" reflected in these remarks and in the renditions and detentions of the 3,000 "war against terrorism" captives is both new and alien. The current practices are unprecedented and they conflict with legal values reflected in established principles of extradition, refugee, and human rights norms.

The threat posed by international terrorists is greater and higher on the foreign policy agenda than it was prior to September 11, 2001. The internationalization of the Afghan conflict in October 2001 also complicated the legal picture by plunging counterterrorism into the midst of an international armed conflict and implicating the rules of humanitarian law. But, the time has now come to clarify the rules that should govern the seizure, rendition, detention, and trial of suspected terrorists.

First, combatants captured in the Afghan conflict should be given hearings pursuant to Article 5 of the Third Geneva Convention as soon as possible. The Bush Administration damaged its credibility by departing from the practices implemented in the Gulf War and in Vietnam. Those who prove to be POWs (regular Taliban soldiers) should be given their full rights under the Third Geneva Convention, including Article 12 on transfer and Article 118 on repatriation. The rectification of the mistaken policy announced in February 2002 will reassure the international community that the world's hegemon is committed to preserving respect for international humanitarian law. Giving this reassurance is imperative, as the United States battles another international armed conflict in Iraq.

Those who prove to be unprivileged combatants—for example, Al Qaeda fighters who engaged in combat in

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111. James Risen and Marc Santora, *Man Believed Slain in Yemen Tied by U.S. to Buffalo Cell*, N.Y. TIMES, Nov. 10, 2002, available at LEXIS, News Library, NYT File. One of the six men killed in the drone attack was a U.S. citizen. *Id.*

Afghanistan—should be protected by Article 75 of Protocol Additional I of 1977 as a matter of customary international law. Thus, they should also be repatriated when the Afghan conflict ceases and not interned indefinitely until international terrorism is eradicated from the face of the earth. They should not be transferred to states that will not respect their basic rights as defined in Article 75. If their further incapacitation is required, they should be charged with criminal offenses and given fair trials. Alternatively, they could be subjected to administrative detention, implemented consistently with the treaty obligations of the United States under the ICCPR.

Those who prove to be noncombatants should be treated in one of two ways. First, civilians captured in the Afghan conflict should receive the full protections of the Fourth Geneva Convention, including the rules relating to internment, transfer, deportation, and repatriation of protected civilians. Second, suspected terrorist seized in situations that do not amount to international armed conflict (for example, in Bosnia and Indonesia) should receive the full protection of extradition, refugee, and human rights norms. If further detention is desired, they must be charged with criminal offenses and granted fair trials in ordinary courts or be subjected to administrative detention. Administrative detention is not wartime internment. It is governed, instead, by the provisions of the ICCPR, including the derogation norms and the absolute prohibition of violation of nonderogable rights.<sup>112</sup>

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112. See *General Comment*, *supra* note 71, at 4–5; Report on Terrorism, *supra* note 71.