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## Leaving Guantánamo: The Law of International Detainee Transfers

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# ARTICLES

## LEAVING GUANTÁNAMO: THE LAW OF INTERNATIONAL DETAINEE TRANSFERS

*Robert M. Chesney* \*

*“The real problem is not Guantánamo Bay. The problem is that, to a large extent, we are in unexplored territory with this unconventional and complex struggle against extremism. Traditional doctrines covering criminals and military prisoners do not apply well enough.”*

—Secretary of Defense Donald Rumsfeld, June 14, 2005<sup>1</sup>

The United States military has had custody of more than 68,000 detainees since 9/11 as a consequence of the war on terrorism and the war in Iraq.<sup>2</sup> The legality of these detentions under

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1. News Transcript, Donald Rumsfeld, U.S. Sec’y of Def., DoD News Briefing with Secretary Rumsfeld and General Pace (June 14, 2005), *available at* <http://www.defenselink.mil/transcripts/2005/tr20050614-secdef3042.html>.

2. *See* News Release, U.S. Dep’t of Def., Guantánamo Provides Valuable Intelligence Information (June 12, 2005), *available at* <http://www.defenselink.mil/releases/2005/nr20050612-3661.html> (observing that “[m]ore than 68,000 detainees have been held in Afghanistan, Iraq and Guantánamo”). Iraq-related detainees outnumber those from Afghanistan

domestic and international law has been explored exhaustively in scholarship<sup>3</sup> and has been the subject of extensive litigation.<sup>4</sup> Until recently, however, relatively little attention has been paid to a closely related issue: What domestic and international legal frameworks apply to the transfer of a detainee from U.S. custody to the custody of another state, particularly where fear of torture is a concern?

This once obscure topic has become the subject of intense debate in recent months in connection with the CIA's extraordinary rendition program.<sup>5</sup> But the issue also is significant for the U.S. military's detention facility at the U.S. Naval Station at Guantánamo Bay, Cuba ("GTMO").<sup>6</sup> Significant numbers of GTMO detainees already have been transferred to the custody of their own governments, and the Pentagon intends eventually to transfer most of those who remain. Meanwhile, dozens of detainees have filed motions seeking advance notice of any such transfers, on the theory that such notice will give them an opportunity to then seek a court order barring the transfer on risk-of-torture grounds.<sup>7</sup> These preliminary motions have met with mixed results, with the judges largely able to avoid coming to grips with the substantive issues raised by the risk-of-torture issue. Eventu-

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and elsewhere. See News Transcript, Donald Rumsfeld, U.S. Sec'y of Def., News Conference at the Meeting of NATO Defense Ministers, Brussels, Belgium (June 9, 2005), available at <http://www.defenselink.mil/transcripts/2005/tr20050609-secdef3021.html>.

3. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005).

4. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (imposing due process requirements on the determination of enemy combatant status with respect to citizens).

5. See, e.g., Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14 & 21, 2005, at 106; Matthew Rothschild, *Stripping Rumsfeld and Bush of Impunity*, THE PROGRESSIVE, July 1, 2005.

6. The issue is, of course, also significant for other military detention contexts such as the detention facilities in Iraq and Afghanistan. But it is only in the context of GTMO that the law of international detainee transfers has become the subject of extensive litigation on behalf of non-citizen detainees, as described in more detail in Part I, *infra*. Cf. *Omar v. Harvey*, No. 05-2347 (D.D.C. Feb. 3, 2006) (granting temporary restraining order enjoining the military from transferring a U.S. citizen detainee held in Iraq to the custody of the Iraqi government); Respondents' Opposition to Petitioners' *Ex Parte* Motion for a Temporary Restraining Order, *Omar v. Harvey*, No. 05-2347 (D.D.C. Feb. 7, 2006) (urging court to dissolve TRO on ground that persons detained by U.S. military in Iraq are in legal custody of the Multi-National Force-Iraq ("MNF-I") and that U.S. courts lack jurisdiction over MNF-I activities).

7. See *infra* Part I.

ally, though, these same judges may be forced to determine whether they have authority to regulate or perhaps even prohibit the custodial transfer of a GTMO detainee.<sup>8</sup> The relevant law is not well-understood, unfortunately, and the existing legal scholarship on the topic is too sparse, polarized, and out-of-date to provide guidance.<sup>9</sup>

This article fills the resulting gap in the literature by examining the full range of legal issues—both domestic and international—presented when the military seeks to transfer a detainee from GTMO to the custody of another state and the detainee objects on risk-of-torture grounds.<sup>10</sup> Part I begins by describing the “first wave” of GTMO transfer litigation—a veritable flood of motions filed by detainees in 2005 seeking preliminary relief in anticipation of potential transfers. These motions and the conflicting opinions they generated are harbingers of litigation to come, and Parts II–IV explore the laws that will be relevant to that litigation. Part II takes up the topic of international human rights law, focusing on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the related issue of “diplomatic assurances.” Along the way, I identify complex issues of statutory implementation associated with the Convention Against Torture, including potential Department of Defense obligations under the Administrative Procedure Act. Against this backdrop, Part III addresses the relationship of international human rights law to the law of war when both apply simultaneously, with particular reference to the *lex specialis* rule. With this relationship in mind, Part IV then considers the extent

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8. For a discussion of the impact of the Detainee Treatment Act of 2005 on this issue see Epilogue, *infra* Part VII.

9. There are just two articles that directly grapple with the issues raised by GTMO transfers. See Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457 (2003) (arguing that detainees are not subject to armed conflict concepts with respect to detainee transfers, at least when captured outside a zone of actual combat operations); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004) (arguing that Article II empowers the Executive branch to dispose of the liberty of wartime detainees, in keeping with practices in past, traditional armed conflicts). Both articles are insightful, but have been superseded in important respects by post-publication developments such as the Supreme Court's 2004 decision in *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that GTMO detainees may invoke federal habeas corpus statute).

10. I do not in this article address these issues as they arise in the context of “extraordinary renditions.” Cf. *Arar v. Ashcroft*, No. 04-cv-249 (E.D.N.Y.) (filed Jan. 22, 2004) (pending lawsuit filed by Canadian citizen who was allegedly tortured after being rendered by United States to Syria).

to which any GTMO detainees may be protected by the handful of transfer rules provided by the law of war. Part V is perhaps the most unexpected section of the article, as it addresses the extent to which substantive due process may provide an alternative restraint on GTMO transfers—a discussion necessitated by the Supreme Court's 2004 decision in *Rasul v. Bush*<sup>11</sup> and the possibility that the detainees, though non-citizens, have been invested with fundamental constitutional rights by virtue of their location at GTMO. Part VI, originally intended as the conclusion of this article, criticizes the current state of the law of international detainee transfers both from the perspective of the government and of the detainees, and offers preliminary suggestions for statutory reform. Finally, the article concludes with an epilogue that address the impact of the Detainee Transfer Act of 2005—enacted just prior to publication—on the issues raised by custodial transfer of GTMO detainees.

## I. THE FIRST WAVE OF GTMO TRANSFER LITIGATION

The question of what law comes into play when the military seeks to transfer a detainee from GTMO to the custody of his own government is not merely academic. Dozens of such custodial transfers have taken place, and the first wave of litigation raising the risk-of-torture issue already is well-underway.

### A. *GTMO Transfers Before and After Rasul*

The decision to house detainees at GTMO was not made lightly. Policymakers sought a location that would provide greater security and convenience than would be available in Afghanistan.<sup>12</sup> GTMO would satisfy both interests, but given the relatively comprehensive and perpetual nature of U.S. control there, it also raised the possibility of enabling federal judicial oversight of the detentions. The General Counsel of the Department of Defense turned to the Department of Justice's Office of

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11. 542 U.S. 466 (2004).

12. See DoD News Briefing with Secretary Rumsfeld and General Pace, *supra* note 1 (“The detention facility at Guantánamo Bay was established for the simple reason that the United States needed a safe and secure location to detain and interrogate enemy combatants. It was the best option available.”).

Legal Counsel (“OLC”) for an opinion on whether use of GTMO would lead to federal court involvement, and was told that “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [GTMO].”<sup>13</sup> OLC cautioned, however, that a “detainee could make a non-frivolous argument that jurisdiction does exist” and that “there remains some litigation risk that a district court might reach the opposite result.”<sup>14</sup>

Eventually, these expectations would be dashed by the Supreme Court’s decision in *Rasul*. But in the interim, approximately 748 detainees were sent to GTMO on the assumption that the change of scenery would not involve a change in legal status as well.<sup>15</sup>

Notably, the military began releasing some detainees on its own initiative long before the pace of GTMO litigation accelerated in mid-2004. Eighty-four detainees were released during GTMO’s first two years of operation,<sup>16</sup> and 55 more were released during the first six months of 2004,<sup>17</sup> bringing the total to 146. Only 129

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13. Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., & John C. Yoo, Deputy Assistant Attorney Gen. to William J. Haynes, II, General Counsel, Dep’t of Def., Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba 1 (Dec. 28, 2001) [hereinafter OLC Memo] (on file with the author).

14. *Id.*

15. It is possible to calculate the approximate number of detainees sent to GTMO during the period based on information disclosed in periodic Department of Defense press statements concerning releases from GTMO. Initially the Department of Defense did not issue press statements announcing the release of detainees from GTMO. It began to do so in October 2002. See News Release, U.S. Dep’t of Def., Transfer of Detainees Completed (Oct. 28, 2002), available at [http://www.defenselink.mil/releases/2002/b10282002\\_bt550-02.html](http://www.defenselink.mil/releases/2002/b10282002_bt550-02.html). By the middle of 2003, it also began providing information about the total number of detainees still present at GTMO. Then, in January 2004, it began to provide information about the total number of detainees previously released. See News Release, U.S. Dep’t of Def., Transfer of Juvenile Detainees Completed (Jan. 29, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040129-0934.html>. A careful reconstruction of these releases indicates that eighteen detainees had been released or transferred as of November 23, 2003, on which date the Department of Defense described the remaining population at GTMO as consisting of approximately 660 detainees. See News Release, U.S. Dep’t of Def., Transfer of Guantánamo Detainees Complete (Nov. 24, 2003), available at <http://www.defenselink.mil/releases/2003/nr20031124-0685.html>.

16. See Transfer of Guantánamo Detainees Complete (Nov. 24, 2003), *supra* note 15; Transfer of Juvenile Detainees Completed (Jan. 29, 2004), *supra* note 15.

17. See News Release, U.S. Dep’t of Def., Detainee Transfer Completed (Apr. 2, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040402-0505.html>; News Release, U.S. Dep’t of Def., Transfer of Afghani and Pakistani Detainees Complete (Mar. 15, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040315-0462.html>; News Release, U.S. Dep’t of Def., Transfer of British Detainees Complete (Mar. 9, 2004), avail-

of these detainees were released outright, however. The other 17 were transferred from U.S. custody to the continuing custody of their own governments, as described in Table 1 below:

Table 1—Custodial Transfers (1/2002–6/2004)<sup>18</sup>

Country of Origin & Transfer	Number
Saudi Arabia	4
Spain	1
Russia	7
United Kingdom	5

These custodial transfers did not occasion much commentary, nor were questions raised at the time regarding their legality.

The situation grew more complicated in June 2004, after the Supreme Court held in *Rasul* that the federal habeas corpus statute, 28 U.S.C. § 2241, “confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantánamo Bay Naval Base.”<sup>19</sup> There were approximately 595 detainees at GTMO at that time, the flow of new detainees having largely ceased back in November

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able at <http://www.defenselink.mil/releases/2004/nr20040309-0443.html>; News Release, U.S. Dep’t of Def., Transfer of Detainees Complete (Mar. 1, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040301-0389.html>; News Release, U.S. Dep’t of Def., Transfer of Detainee Complete (Feb. 25, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040225-0365.html>; News Release, U.S. Dep’t of Def., Transfer of Detainee Complete (Feb. 13, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040213-0981.html>; Transfer of Juvenile Detainees Completed, *supra* note 15. See generally News Release, U.S. Dep’t of Def., DoD Announces Draft Detainee Review Policy (Mar. 3, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040303-0403.html> (describing the administrative review process for enemy combatants held at GTMO).

18. See Transfer of Detainee Complete (Feb. 13, 2004), *supra* note 17; Transfer of Detainees Complete (Mar. 1, 2004), *supra* note 17; News Release, U.S. Dep’t of Def., Release/Transfer of Detainees Completed (May 16, 2004), available at [http://www.defenselink.mil/releases/2003/b05162003\\_bt338-03.html](http://www.defenselink.mil/releases/2003/b05162003_bt338-03.html). The language of the press release associated with the U.K. transfer is ambiguous as to the detainees’ status, and the numbers provided along with it suggest that at first it was deemed an outright release. Transfer of British Detainees Complete (Mar. 9, 2004), *supra* note 17. Subsequent press releases concerning other detainees, however, made clear that the release of the British detainees had been classified as a custodial transfer. See News Release, U.S. Dep’t of Def., Transfer of French Detainees Complete (July 27, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040727-1062.html>.

19. *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

2003.<sup>20</sup> Within a year of *Rasul*, approximately half of these detainees would have habeas corpus petitions pending in federal district court in the District of Columbia.<sup>21</sup>

During the same post-*Rasul* period, large numbers of detainees continued to be released. Fifty additional detainees were released outright in the sixteen months following *Rasul*, bringing the all-time total for outright releases (as opposed to custodial transfers) to 179.<sup>22</sup> This reflects a slower pace than before June 2004. In

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20. See News Release, U.S. Dep't of Def., Transfer of Detainees Completed (July 18, 2003), available at <http://www.defenselink.mil/releases/2003/nr20030718-0207.html> (announcing arrival of ten detainees); Transfer of Guantánamo Detainees Complete (Nov. 24, 2003), *supra* note 15 (announcing arrival of twenty detainees). Only ten more detainees were sent to GTMO in the months following *Rasul*. See News Release, U.S. Dep't of Def., Transfer of Detainees Completed (Sept. 22, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040922-1310.html> (announcing arrival of ten detainees). After September 2004, the government placed further transfers "on hold while officials await the outcome of . . . legal challenges in U.S. federal courts by detainees seeking their release." Robin Wright & Josh White, *U.S. Holding Talks on Return of Detainees*, WASH. POST, Aug. 9, 2005, at A13.

21. A table listing these petitions is provided in the online appendix to this article. See Robert M. Chesney, Online Appendix Table A [hereinafter Table A], available at <http://www.wfu.edu/~chesner/NationalSecurityLaw/GTMO/OnlineAppendix.doc>. In addition to the individual petitions, the Center for Constitutional Rights ("CCR") has filed a "John Doe" petition on behalf of the class of all GTMO detainees who have not yet filed their own habeas petition. See *John Does 1-570 v. Bush*, No. 05-313 (D.D.C. Mar. 13, 2005).

22. See News Release, U.S. Dep't of Def., Detainee Transfer Announced (Oct. 1, 2005) (describing release of Egyptian detainee, raising total to 179), available at [www.defenselink.mil/releases/2005/nr20051001-4826.html](http://www.defenselink.mil/releases/2005/nr20051001-4826.html); News Release, U.S. Dep't of Def., Detainee Transfer Announced (Sept. 12, 2005) (describing release of Afghan detainee, raising total to 178), available at [www.defenselink.mil/releases/2005/nr20050912-4722.html](http://www.defenselink.mil/releases/2005/nr20050912-4722.html); Fact Sheet, U.S. Dep't of Def., Guantánamo Detainees by the Numbers, available at [www.defenselink.mil/news/Aug2005/d20050831sheet.pdf](http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf) (last visited Feb. 22, 2006) (identifying 177 outright releases as of August 31, 2005). Approximately twenty-eight of these recently released detainees had been found to be "no longer enemy combatants" ("NLEC") by a Combatant Status Review Tribunal ("CSRT"). See *Detention Policies and Military Justice: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Servs.*, 109th Cong. 3 (July 14, 2005), available at <http://armed-services.senate.gov/statemnt/2005/July/McGarrah%2007-14-05.pdf> (testimony of Rear Admiral James M. McGarrah, Director, Office of the Admin. Review of Detention of Enemy Combatants, U.S. Navy) [hereinafter McGarrah testimony] (explaining that twenty-three of the thirty-eight exonerated detainees had been released at that point); U.S. Dep't of Def., Combatant Status Review Tribunal Summary, available at <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf> (describing CSRT proceedings and exonerated of thirty-eight detainees); News Release, U.S. Dep't of Def., Detainee Transfer Announced (July 20, 2005) (describing release of two detainees exonerated by a CSRT), available at [www.dod.mil/releases/2005/nr20050822-4501.html](http://www.dod.mil/releases/2005/nr20050822-4501.html); News Release, U.S. Dep't of Def., Detainee Transfer Announced (July 20, 2005) (describing release of three detainees exonerated by a CSRT), available at [www.dod.mil/releases/2005/nr20050720-4122.html](http://www.dod.mil/releases/2005/nr20050720-4122.html); Guantánamo Detainees by the Numbers, *supra*. Approximately ten detainees exonerated by the CSRT process, more-



contrast, the pace of custodial transfers has accelerated, with 51 such transfers occurring during the same post-*Rasul* period. These transfers are described in Table 2, below:

Table 2 – Custodial Transfers (7/2004–7/2005)<sup>23</sup>

Country of Origin & Transfer	Number
Sweden	1
France	7
Morocco	5
Pakistan	29
Kuwait	1
United Kingdom	4
Australia	1
Belgium	2
Spain	1

over, still await their outright release. See McGarrah testimony, *supra*, at 3. These individuals most likely are Chinese nationals from the Uighur minority group. The United States is unwilling to return them to China out of concern that they will be abused, and is attempting to place them instead with a third country. See Wright & White, *supra* note 20; Jackie Northam, *Chinese Detainees at Guantánamo Get Hearing* (National Public Radio broadcast Aug. 25, 2005), available at <http://www.npr.org/templates/story/story.php?storyID=4815020>. In any event, some twenty other detainees also have been released during this period, in some, but perhaps not all, cases in connection with Administrative Review Board proceedings. See, e.g., Detainee Transfer Announced (July 20, 2005), *supra* (describing release of three detainees based on ARB determinations, but not indicating the grounds for releasing one Saudi detainee).

23. See News Release, U.S. Dep't of Def., Detainee Transfer Announced (July 20, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050720-4122.html>; News Release, U.S. Dep't of Def., Detainee Transfer Announced (Apr. 26, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050426-2821.html>; News Release, U.S. Dep't of Def., Detainee Transfer Announced (Mar. 7, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050307-2263.html>; News Release, U.S. Dep't of Def., Detainee Transfer Announced (Jan. 16, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050116-1986.html>; News Release, U.S. Dep't of Def., Guantánamo Detainees to Be Transferred (Jan. 11, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050111-1945.html>; News Release, U.S. Dep't of Def., Transfer of Australian Detainee Complete (Jan. 28, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050128-2028.html>; News Release, U.S. Dep't of Def., Transfer of British Detainees Complete (Jan. 25, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050125-2007.html>; News Release, U.S. Dep't of Def., Transfer of Detainees Completed (Sept. 18, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040918-1363.html>; News Release, U.S. Dep't of Def., Transfer of Five Moroccan Detainees Complete (Aug. 2, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040802-1081.html>; News Release, U.S. Dep't of Def., Transfer of French Detainees Complete (July 27, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040727-1062.html>; News Release, U.S. Dep't of Def., Transfer of Swedish Detainee Complete (July 8, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040708-0994.html>.

Combined with the 17 custodial transfers that occurred before *Rasul*, these transfers bring the all-time total for custodial transfers to 68 (and the absolute number of releases of both varieties to 247).<sup>24</sup>

It is now clear, moreover, that even larger numbers of additional custodial transfers are on the horizon. In August 2005, the United States disclosed that it is negotiating with at least thirteen governments whose nationals are held at GTMO, in hopes of transferring to them the burden of custody for some 400 of their own nationals and thus reducing GTMO's population to a group of some 100 "hard-core detainees."<sup>25</sup> Unnamed senior U.S. government officials have explained that these transfers will take place "gradual[ly], happening over months or years."<sup>26</sup> It is doubtful that these will go unchallenged.

### B. *Transfer Litigation Begins*

Since the spring of 2005, the docket of the district court in the District of Columbia has been flooded with motions by GTMO detainees seeking preliminary relief associated with the possibility

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24. See *Detainee Transfer Announced* (Oct. 1, 2005), *supra* note 22. Notably, not all detainees transferred to home-state custody remain in custody long. Pakistan, for example, released a group of seventeen transferees, after nine months detention, "after their parents and guardians furnished guarantees that they would not indulge in terrorist activities." *Former Guantánamo Prisoners Freed by Pakistan Allege Abuse of Koran*, AGENCE FRANCE PRESSE ENGLISH WIRE, June 27, 2005, available at <http://freedom4um.com/cgi-bin/readart.cgi?ArtNum=7514> (last visited Feb. 22, 2006). Additionally, at least one transferee who was prosecuted after his return—Nasser al-Mutairi, of Kuwait—has been acquitted and released. See Associated Press, *Ex-Gitmo Inmate Acquitted on All Charges*, FOX NEWS, June 29, 2005, available at <http://www.foxnews.com/story/0,2933,160999,00.html>. It also is worth noting that in a few instances, individuals released from GTMO have returned to combat. See John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A1.

25. See Wright & White, *supra* note 20, at A13 (describing negotiations with Afghanistan, Saudi Arabia, Yemen, Bahrain, Egypt, Kuwait, and Morocco, among others); see also Josh White & Robin Wright, *Afghanistan Agrees to Accept Detainees: U.S. Negotiating Guantánamo Transfers*, WASH. POST, Aug. 5, 2005, at A1 (describing progress in the negotiations with Afghanistan, and, in particular, concerning Afghan nationals held both at GTMO and at Bagram).

26. Andrea Koppel & Elise Labott, *U.S. Officials: Gitmo Transfer Talks Active*, CNN.COM, Aug. 9, 2005, available at <http://www.cnn.com/2005/US/08/09/detainee.release/>. Even where agreement already has been reached—as is the case with respect to Afghanistan—transfer is expected to be "gradual," according to the Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxman, Op-Ed, *Beyond Guantánamo*, WASH. POST, Aug. 20, 2005, at A17.

of a transfer.<sup>27</sup> Specifically, detainees have requested thirty-days advance notice of any custodial transfer, for the specific purpose of enabling them to make ex-ante challenges to such transfers should the need arise.<sup>28</sup> By the end of July 2005, at least thirty-six motions fitting this general description had been filed on behalf of some ninety-three individual detainees.<sup>29</sup> In every instance, the argument turns in significant part on the claim that the detainees face an unacceptable risk of torture if transferred.<sup>30</sup>

Are the detainees simply conflating the risks associated with a custodial transfer at the direction of the U.S. military with those associated with the CIA's much-criticized program of extraordinary rendition?<sup>31</sup> Possibly. But then again, it is worth noting that in November 2002, an FBI official at GTMO wrote a memo to a senior FBI attorney describing a laundry list of interrogation methods under consideration, and noting that one option involved sending GTMO detainees, either temporarily or permanently, "to Jordan, Egypt or an unspecified third country" to allow those countries to employ interrogation techniques that will enable

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27. These motions are summarized in Table A of the online appendix. See Table A, *supra* note 21.

28. Hard copies of the motion papers are on file with the author and available online through PACER by reference to the docket numbers and other information provided in Table A, *supra* note 21. In four instances, the detainees initially sought an outright transfer ban rather than mere notification. See Petitioners' Motion for Preliminary Injunction, Batarfi v. Bush, No. 05-409 (D.D.C. Mar. 15, 2005); Petitioners' Motion for Preliminary Injunction, el-Banna v. Bush, No. 04-1144 (D.D.C. Mar. 15, 2005); Petitioners' Motion for Preliminary Injunction, el-Mashad v. Bush, No. 05-270 (D.D.C. Feb. 4, 2005); Application for Temporary Restraining Order, Habib v. Bush, No. 02-1130 (D.D.C. Nov. 24, 2004); Motion for Temporary Restraining Order, *id.* (Jan. 5, 2005).

29. See Table A, *supra* note 21. Some request relief in the form of a stay, others in the form of a preliminary injunction, and still others pursuant to the All Writs Act. There also is a motion brought on behalf of a purported class action consisting of all GTMO detainees who have not yet filed a habeas petition. See John Does 1-570 v. Bush, No. 05-313 (D.D.C. Mar. 13, 2005). I have not included this petition or this motion in my data due to uncertainty as to the viability of that attempt.

30. See *supra* note 10. The motions also argue in the alternative that transfers may be unlawful attempts to circumvent judicial review of the detainees' underlying habeas corpus petitions. The merits of that argument are beyond the scope of this Article, but for compelling criticism of this view, see O.K. v. Bush, 377 F. Supp. 2d 102, 116-17 (D.D.C. 2005). *But cf.* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 45-51 (D.D.C. 2004) (declining to dismiss habeas petition alleging that United States had constructive custody of United States citizen detained by Saudi Arabia).

31. Extraordinary rendition refers to a CIA program in which noncitizens in U.S. custody, usually captured and held overseas, are transferred to the custody of an allied government such as Egypt for interrogation purposes. See Mayer, *supra* note 5, at 106; Katherine Hawkins, *The Practice and Legality of Extraordinary Renditions* (forthcoming) (manuscript on file with author).

them to obtain the requisite information.<sup>32</sup> It is anything but clear that the transfer-for-interrogation proposal ever was adopted; indeed, a contemporaneous memo to Secretary of Defense Rumsfeld seeking his approval for various interrogation methods refers to every one of the methods described in the FBI memo, except the transfer proposal.<sup>33</sup> Nor does it follow automatically that those who proposed transfers for interrogation purposes did so in hopes that torture would be used.<sup>34</sup> But the fact that interrogation-oriented transfers at least were under consideration should at least give pause to those who otherwise might be tempted to dismiss the risk-of-torture argument out of hand.

In any event, by the end of June 2005, judges had decided thirty-four of the GTMO transfer motions,<sup>35</sup> with twenty-seven pro-detainee decisions imposing the requested notice requirement and six pro-government decisions denying that relief (one split decision granted relief to one petitioner but denied it to two others).<sup>36</sup> The first four decisions in this line managed for the most part to avoid the fear-of-torture issue, relying instead on the argument that transfers might unlawfully circumvent review of pending habeas petitions.<sup>37</sup> But the torture issue was central to most of the rulings that followed.<sup>38</sup>

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32. Michael Isikoff, *Exclusive: Secret Memo—Send to Be Tortured*, MSNBC.COM, Aug. 8, 2005, available at <http://www.msnbc.msn.com/id/8769416>.

33. Memorandum from William J. Haynes II, General Counsel, Department of Defense to Secretary of Defense (Nov. 27, 2002), available at [http://www.npr.org/documents/2004/dod\\_prisoners/20040622doc5.pdf](http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf).

34. U.S. officials have repeatedly noted that interrogation of noncitizen detainees by non-U.S. personnel may be more effective because of language considerations and matters of cultural affinity.

35. One motion became moot after the petitioner was transferred to Australian custody (the detainee had been moved to prevent transfer to Egypt). See Motion for Temporary Restraining Order, *Habib v. Bush*, No. 02-1130 (D.D.C. Jan. 5, 2005). The decision in one other case was pending at the time of this writing. See *Batarfi v. Bush*, No. 05-409 (D.D.C.) (filed Mar. 1, 2005).

36. See Table A, *supra* note 21. One such ruling—*Aboassy v. Bush*, No. 05-748 (D.D.C. Jan. 27, 2006)—was not a ruling on the merits, but instead, a denial of all motions in that case (without prejudice) in light of a pending determination by the D.C. Circuit on jurisdictional issues. For a discussion of these jurisdictional issues, see Epilogue, *infra* Part VII.

37. See *Abdah v. Bush*, No. 04-cv-1254, 2005 WL 711814 (D.D.C. Mar. 29, 2005) (granting relief on habeas avoidance grounds); *al-Oshan v. Bush*, No. 05-cv-0520 (D.D.C. 2005) (same); *al-Shihry v. Bush*, No. 05-490 (D.D.C. Apr. 1, 2005) (same); *al-Wazan v. Bush*, No. 05-329 (D.D.C. Apr. 1, 2005) (same).

38. Table A in the online appendix indicates the cases in which the torture issue impacted the judge's ruling. See Table A, *supra* note 21.

The first opinions to come to grips with the torture issue in this context—*al-Marri v. Bush* and *al-Joudi v. Bush*—are illustrative of the approach to the issue taken in the twenty-seven pro-detainee rulings.<sup>39</sup> In neither case did the court identify the sources of law that might give rise to a right not to be transferred based on risk-of-torture concerns, nor did it explain the substantive standard that would have to be met in order to succeed in invoking such a right or the type of evidence that might suffice to meet that standard. Instead, the court implicitly assumed the existence of such a right, and built its analysis of the traditional factors for preliminary injunctive relief (i.e., risk of irreparable harm and probability of success on the merits) on that foundation.<sup>40</sup> Five of the six pro-government rulings on the notice issue reach contrary conclusions, of course, but otherwise resemble the pro-detainee decisions with respect to the depth of their treatment of the substantive law applicable in this context.<sup>41</sup> *Almurbati v. Bush*, for example, notes that the detainees invoked the Geneva Conventions, the Convention Against Torture, and the International Covenant on Civil and Political Rights, but does not in any way explore the many complex issues associated with the claim that these sources create judicially-enforceable rights for GTMO detainees.<sup>42</sup> Ultimately, only one of the thirty-three rulings, *al-Anazi v. Bush*,<sup>43</sup> devotes significant attention to exploring the law applicable to the fear-of-torture issue; and even there, the

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39. See *al-Joudi v. Bush*, No. 05-301 (D.D.C. Apr. 4, 2005); *al-Marri v. Bush*, No. 04-2035, 2005 WL 774843 (D.D.C. Apr. 4, 2005).

40. First, the court determined—not at all unreasonably—that the prospect of torture constituted a threat of irreparable harm. See, e.g., *al-Marri*, 2005 WL 774843, at \*4. In reaching this determination, the court did not specify any particular source for a right not to be subjected to such a risk. In the context of a preliminary injunction ruling, that discussion might be expected to occur instead in the context of the determination of whether the movant has a probability of success on the merits. But under that heading, the court explained merely that the “issues raised in these motions are sensitive and involve complex constitutional questions” that most likely will be resolved in the end by the Supreme Court. *Id.* at \*5.

41. See, e.g., *O.K. v. Bush*, 377 F. Supp. 2d 102, 115 (D.D.C. 2005) (referring briefly to the fact that the Convention Against Torture entails a more-likely-than-not standard for measuring the risk a transferee will be tortured, but not otherwise exploring the issue); *Mammar v. Bush*, No. 05-cv-0573 (D.D.C. 2005) (no discussion of possible grounds for relief related to fear-of-torture). The sixth case—*Aboassy*—did not turn on the merits. See *supra* note 36.

42. See 366 F. Supp. 2d 72, 80 (D.D.C. 2005). The decision in *Almurbati*, like the contrary rulings in *al-Marri* and *al-Joudi*, rested instead on the court’s assessment of whether the proffered evidence supported a finding of a sufficient risk of irreparable harm or of a probability of success on (somewhat unspecified) merits. See *id.* at 75–81.

43. 370 F. Supp. 2d 188 (D.D.C. 2005).

discussion is limited to a brief review of one statute that bears on the analysis.<sup>44</sup>

The government has filed interlocutory appeals from the pro-detainee decisions. Initially, these appeals were held in abeyance pending the D.C. Circuit's resolution of the substantive issues presented by the conflicting decisions in *In re Guantánamo Detainee Cases*<sup>45</sup> and *Khalid v. Bush*,<sup>46</sup> which dealt with the questions of whether GTMO detainees have constitutional rights and whether the Geneva Conventions are judicially enforceable.<sup>47</sup> As described in more detail below, however, subsequent developments have now called into question the jurisdictional basis of this litigation.<sup>48</sup>

With that important caveat in mind, the article proceeds on the assumption that it will remain possible to litigate the transfer issues raised by the GTMO detainees. In that case, the time eventually will come when courts will be obliged to delve deeply into the array of domestic and international law concepts that combine to form the law of international detainee transfers. The precise contours of that law are far from clear and deeply contested, unfortunately, particularly insofar as it concerns the issue of domestic judicial enforceability. In an effort to reduce this uncertainty, I aim in the following pages to identify the many constitutional, statutory, administrative, and international law rules that speak to this issue, and, especially, to determine the extent to which each might apply to GTMO detainees.

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44. See *id.* at 194 (discussing § 2242 of the Foreign Affairs Reform and Restructuring Act). The court in *al-Anazi* notes that § 2242(a) purports to establish a policy against transfers where there are substantial grounds to fear torture, and that § 2242(d) purports to exclude judicial review in most contexts. See *id.* The court does not discuss, however, the substantial authority suggesting that the language of § 2242(d) fails to exclude habeas corpus review. See *infra* Part III.B.3.c.

45. 355 F. Supp. 2d 443 (D.D.C. 2005).

46. 355 F. Supp. 2d 311 (D.D.C. 2005).

47. While these appeals were pending, a panel of the D.C. Circuit addressed the Geneva Convention enforceability issue in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), a case primarily concerned with the legality of the military commission process. The panel held that the Geneva Conventions of 1949 are not judicially enforceable. See *id.* at 39–40. That determination is now before the Supreme Court, see *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005) (granting petition for certiorari), although it is unclear at the time of this writing whether the Court will proceed to the merits. See Respondents' Motion to Dismiss for Lack of Jurisdiction, *Hamdan v. Rumsfeld*, No. 05-184 (Jan. 12, 2006). For a discussion of the issues raised by this motion, see Epilogue, *infra* Part VII.

48. See Epilogue, *infra* Part VII (discussing the potential impact of the Detainee Treatment Act of 2005 on GTMO transfer litigation).

## II. INTERNATIONAL HUMAN RIGHTS LAW

The most significant international human rights instrument addressing the issue of torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").<sup>49</sup> The United States signed CAT in 1988, the Senate consented to it in 1990 subject to a number of reservations, understandings, and declarations, and the United States became a party in 1994 when, after passage of certain implementing legislation, the President deposited the instrument of ratification with the United Nations.<sup>50</sup>

The central features of CAT are its direct prohibitions on torture<sup>51</sup> and cruel, inhuman, or degrading treatment,<sup>52</sup> as well as its requirement that member states take steps to ensure punishment of torturers who come within their jurisdiction.<sup>53</sup> But CAT also attempts to suppress torture indirectly. It does this by limiting the circumstances in which a person may be transferred from one state to another where there is a risk the person will be tortured, a concept often referred to as "*non-refoulement*."<sup>54</sup>

I begin below by examining the substantive scope of CAT's *non-refoulement* rule, and then turn to a series of questions that

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49. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) [hereinafter CAT], *available at* <http://www.ohchr.org/english/law/pdf/cat.pdf>.

50. *See* S. EXEC. REP. NO. 101-30 (1990); Letter of Submittal from George P. Shultz, Sec'y of State, to Ronald Reagan, President (May 10, 1988), *reprinted in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ADOPTED BY UNANIMOUS AGREEMENT OF THE UNITED NATIONS GENERAL ASSEMBLY ON DECEMBER 10, 1984 AND SIGNED BY THE UNITED STATES ON APRIL 18, 1988, S. TREATY DOC. NO. 100-20, at v (1988) [hereinafter MESSAGE FROM THE PRESIDENT]; 136 CONG. REC. 36,625-26 (1990); *see also* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 2-5 (2004), *available at* <http://www.fas.org/spp/crs/misc/RL32438.pdf>.

51. *See* CAT, *supra* note 49, art. 2.

52. *See id.* art. 16.

53. *See id.* art. 5.

54. *See id.* art. 3. Article 3 refers, of course, to extradition and expulsion as well as *non-refoulement*. *See id.* The *non-refoulement* (i.e., non-return) concept derives from Article 33 of the 1951 Convention Relating to the Status of Refugees, which similarly regulates international transfers of refugees where persecution on certain specified grounds is an issue. *See* Convention Relating to the Status of Refugees art. 33, *adopted* July 28, 1951, 189 U.N.T.S. 150 (*entered into force* Apr. 22, 1954) [hereinafter Refugee Convention], *available at* <http://www.ohchr.org/english/law/pdf/refugees.pdf>. Note that CAT does not also attempt to suppress cruel, inhuman, or degrading ("CID") treatment indirectly through a comparable transfer ban. *See id.*

would arise if a GTMO detainee were to invoke this rule in seeking judicial relief. Do CAT obligations apply in this context? If so, can they be judicially enforced in a U.S. court via habeas corpus? If so, is it proper for states to rely on diplomatic assurances to allay fear-of-torture concerns? As it happens, the answers to these questions turn not so much on CAT itself, but instead on the details of the complex statutory-regulatory structure through which the United States has partly implemented its CAT obligations.

### A. *The Nature of the Article 3 Non-Refoulement Obligation*

CAT anticipates the situation in which one state seeks to transfer an individual to the custody of another in circumstances involving a risk of torture. Its third article provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are *substantial grounds* for believing that he would be in danger of being subjected to torture."<sup>55</sup>

This *non-refoulement* prohibition is relatively straightforward on its face, with the exception of the ambiguous phrase "substantial grounds." That ambiguity is critical, however, because the phrase functions as a standard of proof, setting the evidentiary bar for triggering a state's Article 3 obligations.

Recognizing its importance, the President and Senate directly addressed the meaning of "substantial grounds" during the ratification process. In his message submitting CAT to the Senate for advice and consent, President Reagan included the State Department's transmittal letter, which in turn attached a memorandum surveying CAT's provisions and detailing the reservations, understandings, and declarations ("RUDs")<sup>56</sup> recommended by the State Department.<sup>57</sup> With respect to Article 3, the State Department memo recommended that the Senate include an understanding that the phrase "substantial grounds for believing that he would be in danger of being subjected to torture" should

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55. CAT, *supra* note 49, art. 3(1) (emphasis added).

56. For a discussion of RUDs as a mechanism for enabling U.S. participation in multi-lateral human rights instruments, and a defense of their desirability and validity, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (arguing that non-self-execution declarations generally are constitutional).

57. See MESSAGE FROM THE PRESIDENT, *supra* note 50, at vi.



be read "to mean 'if it is *more likely than not* that he would be tortured.'"<sup>58</sup> The memo observed that the more-likely-than-not standard already existed in U.S. immigration law with respect to the analogous practice of withholding deportation of aliens who might be subjected to *persecution* on grounds of race, religion, nationality, membership in a particular social group, or political opinion,<sup>59</sup> and explained that CAT Article 3 should be understood to extend that standard to cases of potential torture (as opposed to persecution) that would not already be covered by the immigration provision.<sup>60</sup>

Ultimately, the Senate ratified CAT subject to an understanding adopting the precise language suggested by the State Department's memo.<sup>61</sup> For purposes of domestic law, therefore, it is well-established that the CAT Article 3 obligation comes into play only where it is more likely than not that an individual will be tortured if transferred.<sup>62</sup>

### B. *Obstacles to Judicial Enforcement*

The fact that the United States is a party to CAT clearly establishes the existence of a *non-refoulement* obligation as a matter of international law. But it does not follow automatically that the GTMO detainees may enforce that obligation in federal court via their habeas petitions. The judicial enforceability of the international law obligations of the United States is a controversial topic, particularly with respect to international human rights law instruments such as CAT. Litigants who seek relief on the ground that the government has breached such obligations encounter a series of obstacles: Does the treaty apply extraterritorially? Is it

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58. See MESSAGE FROM THE PRESIDENT, *supra* note 50, at 6 (citing CAT, *supra* note 49, art. 3(1)).

59. See *id.* (citing *INS v. Stevic*, 467 U.S. 407 (1984) (holding that the standard employed for § 243 of the Immigration and Nationality Act, then codified at 8 U.S.C. § 1253(h)(1), should be understood not as a well-founded fear standard but instead as a likelihood standard)).

60. See MESSAGE FROM THE PRESIDENT, *supra* note 50, at 6.

61. See S. EXEC. REP. NO. 101-30, at 36 (outlining Understanding 2).

62. This construction most likely defines U.S. obligations under Article 3 on the international plane as well, given that no other State Party clearly objected to this understanding. Cf. U.N. Office of the High Comm'r for Human Rights, *Declarations and Reservations*, n.20 (listing German statement on Understanding 2, which asserts the understanding does "not touch upon the obligations of the United States of America as State Party to the Convention"), available at <http://www.ohchr.org/english/law/cat-reserve.htm>.

self-executing, and if not, has it been implemented by statute? Assuming it does apply and is enforceable (either directly or by statute), what sort of showing is required to obtain relief? Below, I consider each of these concerns as they might arise in the context of GTMO transfers and CAT Article 3.<sup>63</sup>

## 1. Non-Extraterritoriality

One of the most significant obstacles facing a GTMO detainee seeking to invoke Article 3 is the argument that CAT obligations do not apply outside U.S. territory.

The United States takes the position that all of its international human rights treaty obligations, including in particular CAT, are non-extraterritorial.<sup>64</sup> This view has been sharply criticized,<sup>65</sup> but it also has been endorsed by the Supreme Court with

63. The only one of these issues to receive any serious attention during the first wave of GTMO transfer litigation is the question of non-self-execution, which was addressed briefly, and somewhat indirectly, by the court's discussion in *al-Anazi*. See *al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193–97 (D.D.C. 2005).

64. See, e.g., THE JAG'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 54 (Maj. Derek I. Grimes ed., 2005), available at <https://134.11.61.26/CD1/Publications/JA/OL/OL%20JA%20422%20OpLaw%20Handbook%20200501.pdf> (stating that international human rights law treaties “do not bind U.S. forces outside the territory of the U.S. because “the United States interprets [them] to apply to persons living in the territory of the United States, and not to any person with whom agents of our government deal in the international community”); Letter from William E. Moschella, Assistant Attorney General, to Sen. Patrick J. Leahy 1 (Apr. 4, 2005) (stating that CAT Article 16 applies only to overseas locations “under U.S. jurisdiction”), available at <http://www.scotusblog.com/movable/type/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf>. The United States takes this position not only with respect to treaties such as CAT that employ relatively narrow geographic scope language such as “any territory under its jurisdiction” but also to more broadly worded language such as “all individuals subject to its jurisdiction.” OPERATIONAL LAW HANDBOOK, *supra*, at 54 n.30. For an overview of the debate, see Michael J. Dennis, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

65. See, e.g., U.N. Gen. Assembly, Human Rights Comm., [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004) (arguing that ICCPR rights apply not only to persons within a member state's territory but also “to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9) (concluding that ICCPR obligations apply “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”); see also Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981) (arguing that the ICCPR applies extraterritorially); Theodor Meron, *Ex-*

respect to a provision of the Refugee Convention analogous to CAT Article 3. In 1993, in *Sale v. Haitian Centers Council, Inc.*,<sup>66</sup> the Court held that the *non-refoulement* requirement of Article 33 of the Refugee Convention simply did not apply to the interdiction and return of Haitians on the high seas en route to the United States.<sup>67</sup> Citing *Sale*, Professor Yoo has written that “[g]iven the Supreme Court’s interpretation of identical language in the Refugee Convention, it makes no sense to view the Torture Convention as affecting the transfer of prisoners held outside the United States to another country.”<sup>68</sup>

Does *Sale* control the interpretation of CAT Article 3?<sup>69</sup> Actually, that question appears to be moot with respect to the GTMO detainees in light of the Court’s 2004 decision in *Rasul v. Bush*. *Rasul* addressed “whether the [federal] habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises *plenary and exclusive jurisdiction*, but not ‘ultimate sovereignty.’”<sup>70</sup> In a critical passage, the majority opinion by Justice John Paul Stevens addressed the argument that the detainees should not be able to invoke the habeas statute because of the canon of construction providing that statutes should not be construed to have extraterritorial effect in the absence of a clear statement of congressional intent.<sup>71</sup> The Court found this canon to be irrelevant with respect to GTMO:

Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained *within* “the territorial jurisdiction” of the United States. By the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.<sup>72</sup>

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*traterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 80 (1995) (stating that the ICCPR “imposes treaty constraints not only on U.S. armed forces abroad, but also on civilian agents and officials exercising power and authority”). *But see* Dennis, *supra* note 64, at 122–27 (criticizing the view that ICCPR protections apply extraterritorially).

66. 509 U.S. 155 (1993).

67. *See id.* at 187–88.

68. Yoo, *supra* note 9, at 1229–30.

69. For the argument that *Sale* was incorrectly decided, and in any event should not be extended to CAT, see Hawkins, *supra* note 31, at 78–80.

70. 542 U.S. 466, 475 (2004) (emphasis added).

71. *Id.* at 480–83.

72. *Id.* at 480 (citation omitted) (emphasis added).

This language strongly implies that GTMO is within the territorial jurisdiction of the United States.<sup>73</sup>

If GTMO is “within ‘the territorial jurisdiction’ of the United States”<sup>74</sup> for purposes of the habeas statute, is there any ground for concluding that it is not also U.S. territory for purposes of U.S. treaty obligations?<sup>75</sup> Nothing in CAT suggests a narrower vision of the concept of “territory” for purposes of that treaty.<sup>76</sup> Nor is this reading in tension with *Sale*, which merely addressed the Refugee Convention’s *non-refoulement* language in connection with U.S. actions that take place on the high seas. The argument that CAT lacks extraterritorial effect, even if correct, should therefore pose no obstacle to finding that CAT’s *non-refoulement* obligation applies at GTMO.<sup>77</sup>

## 2. Non-Self-Execution

This does not mean that litigants necessarily may invoke Article 3 as a rule of decision in federal court. The question of whether they can turn, in the first instance, on whether CAT is a “non-self-executing” treaty, and if so, what consequences follow.

Non-self-execution refers generally to the situation in which U.S. obligations under an international agreement are deemed not to be judicially enforceable without implementing legislation.<sup>78</sup> Precisely because non-self-execution allows the U.S. to

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73. If the Court had meant only that the non-extraterritoriality canon has no application to the federal habeas statute in general, perhaps on the ground that the only significant consideration was whether the court had jurisdiction over the custodian rather than the detainee himself, then it would not have included the language “with respect to persons detained *within* ‘the territorial jurisdiction’ of the United States,” nor the next sentence concerning the nature of U.S. control over GTMO. *Id.* (emphasis added).

74. *Id.*

75. *Cf. Yoo, supra* note 9, at 1230 (referring to a single “canon of construction that statutes and treaties are not to be read to have extraterritorial effect unless Congress clearly states its intentions otherwise in the text”).

76. Article 3, in fact, does not actually have express language imposing geographic restraints, although other articles do. *See, e.g., CAT, supra* note 49, arts. 2, 3, 16. The pattern in the Refugee Convention is comparable. *See, e.g., Refugee Convention, supra* note 54, arts. 32, 33.

77. This may explain why the extraterritoriality argument did not appear in the government’s motion papers in connection with the first wave of GTMO transfer litigation. *See, e.g., el-Banna v. Bush*, No. 04-cv-1144 (D.D.C. Mar. 21, 2005) (consolidated opposition brief in connection with fifteen transfer motions).

78. *See Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995). As Professor Vázquez notes, there are several distinct accounts

avoid at least some of the practical impact of undertaking international obligations, the concept is the subject of considerable controversy.<sup>79</sup> The issue of domestic judicial enforceability has arisen in connection with each of the major international human rights law instruments that the United States has ratified, including CAT. And in each case, the treaty-makers responded to concerns on this score by adopting express declarations to the effect that particular provisions of these treaties are to be understood as non-self-executing.<sup>80</sup> In the case of CAT, for example, the Senate's resolution consenting to the treaty provides that "the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."<sup>81</sup> In light of this declaration, courts have uniformly held that CAT Article 3 is not self-executing.<sup>82</sup>

But what precisely does that mean in practical terms? The question is not as simple as it sounds. Professor Vázquez has observed that the phrase "non-self-execution" has been used indiscriminately by courts and commentators to refer to several distinct grounds for declining to rely on a treaty absent implement-

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of the precise nature of non-self-execution. *See id.*

79. Compare Bradley & Goldsmith, *supra* note 56 (providing a qualified defense of non-self-execution), Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (same), John C. Yoo, *Rejoinder, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (same), and John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (same), with Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 221 (1997) (denying constitutionality of non-self-execution), Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991) (same), Malvina Halberstam, *Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT'L SEC. L. & POL'Y 89 (2005) (arguing that non-self-execution declarations should not be given effect where the treaty text appears self-executing on its face), Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (denying constitutionality of non-self-execution), and David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002).

80. Section 111 of the Restatement of the Foreign Relations Law of the United States identifies several situations in which a treaty should be deemed non-self-executing, including the situation in which the "Senate in giving consent to a treaty . . . requires implementing legislation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111(4)(b) (1986).

81. S. EXEC. REP. 101-30, at 31 (1990).

82. *See Akhtar v. Reno*, 123 F. Supp. 2d 191, 196 (S.D.N.Y. 2000) (collecting cases and observing that "each court that has considered the issue has determined that the Convention is not self-executing").

ing legislation.<sup>83</sup> Two of these approaches have particular relevance in the context of international human rights instruments: the right-of-action model and the rule-of-decision model.<sup>84</sup>

The right-of-action model interprets the impact of non-self-execution narrowly,<sup>85</sup> as meaning merely that the treaty does not itself create the procedural vehicle for its judicial enforcement.<sup>86</sup> Significantly, this model leaves open the possibility that a rule established by a treaty can be judicially enforced in other ways, as when the rule is invoked defensively or a statute provides a right of action.<sup>87</sup> The rule-of-decision model, in contrast, invests non-self-execution with greater significance. Under this approach, non-self-execution precludes courts from relying on a treaty provision as a rule of decision under any circumstances (unless and until the rule set forth by that provision is implemented by legislation, in which case it may be the legislation rather than the treaty that actually provides the rule of decision), even if the litigant has an independent procedural vehicle to raise the treaty issue.<sup>88</sup>

The choice between the right-of-action and rule-of-decision models is particularly significant with respect to GTMO detainees. *Rasul* established their right to initiate habeas corpus proceedings under 28 U.S.C. § 2241, which among other things provides for relief in the circumstance where an individual is held “in custody in violation of the . . . treaties of the United States.”<sup>89</sup> Section 2241 thus constitutes a procedural vehicle for the detainees to attempt to assert claims arising out of U.S. treaty obligations,

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83. See Vázquez, *supra* note 78, at 695 (arguing “that much of the doctrinal disarray and judicial confusion is attributable to the failure of courts and commentators to recognize that for some time four distinct ‘doctrines’ of self-executing treaties have been masquerading as one”).

84. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 137 (1999).

85. See *id.*

86. See *id.*

87. See *id.*

88. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 & cmt. h (1986) (supporting the rule-of-decision model and describing the right-of-action issue as a question distinct from self-execution). Defenders of this approach explain that it reflects rather than limits the treaty-makers’ intentions, and thus is not inconsistent with the Supremacy Clause’s statement that treaties constitute the law of the land. See, e.g., Bradley & Goldsmith, *supra* note 56, at 446–49. *But see* Sloss, *supra* note 84, at 135–36.

89. 28 U.S.C. § 2241(c)(3) (2000) (emphasis added). *Cf.* Epilogue, *infra* Part VII.

eliminating any need to extrapolate a right of action from the treaty itself.<sup>90</sup> Thus, if the right-of-action model is the correct way to view non-self-execution, then the detainees are free to litigate their Article 3 claims in the habeas context.

It is far from clear, however, that the right-of-action model should control with respect to CAT. Which model applies in this context, as in any other, turns on the intent of the treaty-makers in adopting a non-self-execution declaration.<sup>91</sup> The evidence on this point with respect to CAT, unfortunately, is somewhat mixed.

There is considerable reason to believe that the treaty-makers understood the non-self-execution declaration for CAT in the rule-of-decision sense, at least initially. The Reagan Administration submitted CAT to the Senate in May 1988, accompanied by a Letter of Transmittal from the President, a Letter of Submittal from Secretary of State Shultz, and a State Department memorandum providing an article-by-article analysis of CAT and the various RUDs sought by the administration.<sup>92</sup> The President's letter does not specifically address the issue of non-self-execution, but Secretary Shultz's letter does. After noting that "a declaration that the Convention is not self-executing is recommended," Shultz explains that "[w]ith such a declaration, the provisions of the Convention would not of themselves become effective as domestic law."<sup>93</sup> The accompanying State Department memorandum elaborates that "[a]lthough the terms of the Convention, with the suggested reservations and understandings, are consonant with U.S. law, it is nevertheless preferable to leave any further implementation that may be desired to the domestic legislative and judicial process."<sup>94</sup>

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90. OLC had predicted that if courts permitted a GTMO detainee to file a habeas petition, this "would allow [the] detainee to challenge the legality of his status and treatment under international treaties." OLC Memo, *supra* note 13, at 8.

91. As Professor Sloss has observed, the treaty-makers' intent on this point may vary from treaty to treaty. See Sloss, *supra* note 84, at 137-38.

92. See S. TREATY DOC. 100-20 (1988).

93. *Id.* at vi.

94. *Id.* at 2. Professor Sloss points out that the Reagan Administration borrowed its language from near-identical statements made by the Carter Administration in 1978 in connection with a set of four other international human rights instruments. See Sloss, *supra* note 84, at 160. The "basic thrust" of the Carter statements, Sloss explains, was "that the human rights treaties, with NSE declarations attached . . . would require implementing legislation before they could provide a rule of decision for the courts." *Id.* at 159. By the

Because the nature and quantity of the RUDs originally proposed by the Reagan Administration prompted extensive criticism,<sup>95</sup> the Bush Administration submitted a shortened and revised set of recommendations in January 1990.<sup>96</sup> The revised package did not alter the proposed non-self-execution declaration, however, which was “[r]etained without modification from the 1988 transmittal.”<sup>97</sup>

The Senate Foreign Relations Committee held hearings on CAT soon after this revised package arrived, with State Department Legal Adviser Abraham D. Sofaer as the first witness.<sup>98</sup> As Professor Sloss has observed, Judge Sofaer’s testimony is ambiguous with respect to his views on the meaning of non-self-execution in relation to CAT.<sup>99</sup> On one hand, there are clear statements in his testimony that CAT “is not self-executing . . . and thus will require implementing legislation.”<sup>100</sup> On the other hand, Judge Sofaer also stated that the United States will “assume” not only international but also “domestic . . . legal obligations . . . when the Convention is ratified,”<sup>101</sup> and later added that “[i]f you adopt this treaty, it is not just international law. The standard becomes part of our law.”<sup>102</sup>

With respect to Article 3 in particular, Judge Sofaer wrote in his prepared statement that the “provisions of Article 3 would be implemented by ‘competent authorities’ within the Department of

same token, he notes, “one might infer that the Reagan Administration intended to preclude provisions of the Torture Convention [other than those later implemented by statute] from ever having domestic legal effect.” *Id.* at 161.

95. See S. TREATY DOC. NO. 100-20, at 2 (1988); *Convention Against Torture, Hearing on S. Treaty Doc. No. 100-20 Before the S. Comm. on Foreign Relations*, 101st Cong., 8 (1990) (statement of Hon. Abraham D. Sofaer) (describing involvement of the American Bar Association and Amnesty International) [hereinafter CAT Hearing].

96. See S. EXEC. REP. NO. 101-30 at 2, 4 (1990) (commenting that the RUDs, “in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide”).

97. Letter from Janet G. Mullins, Assistant Sec’y, Legislative Affairs, Dep’t of State, to Sen. Claiborne Pell (Dec. 10, 1989) (enclosure), as reprinted in S. EXEC. REP. No. 101-30, at 36 (1990).

98. See CAT Hearing, *supra* note 95, at 4.

99. See Sloss, *supra* note 84, at 162–65.

100. CAT Hearing, *supra* note 95, at 12.

101. *Id.* at 8; see also *id.* at 41 (responding to questions from Senator Helms concerning the impact of CAT with respect to a hypothetical case of torture within the United States, Judge Sofaer stated without explanation that CAT would apply in that scenario).

102. *Id.* at 42.



Justice and State as appropriate.”<sup>103</sup> Mark Richard, then the Deputy Assistant Attorney General for the Criminal Division, elaborated in his testimony that “[u]nder our existing law, the competent authorities for ensuring the execution of this obligation are the Secretary of State for extradition and the Attorney General for deportation.”<sup>104</sup> These statements imply that even with the non-self-execution declaration in place, the obligations imposed by Article 3 would operate directly on executive officials with responsibility for international transfer decisions. This does not mean, however, that Sofaer and Richards understood the obligations to be *judicially* enforceable. On the contrary, Richards emphasized that “Article 3 does *not* require that such determinations be made subject to judicial review. The determiners and *the degree of review, if any*, are left by the Convention to *internal domestic law*.”<sup>105</sup>

Ultimately, the historical record does not provide an obviously correct interpretation of the treaty-makers’ intent with respect to non-self-execution under CAT. At least as far as Article 3 is concerned, however, the weight of the evidence does seem to favor the rule-of-decision rather than the right-of-action model. Accordingly, the better view is that individuals may not request that a court apply Article 3 as a rule of decision unless that provision has been implemented through subsequent legislation. Has it?

### 3. Implementing Article 3

Article 3 has been implemented, but in a manner that raises almost as many questions as it answers.

#### a. Implementation by Regulation

Implementation of Article 3 occurred uneasily. Indeed, the prevailing view initially was that most CAT obligations merely reflected existing United States law and that only Article 5 (requiring states to exercise extraterritorial jurisdiction to prosecute torturers) called for implementing legislation.<sup>106</sup> Thus no effort

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103. *Id.* at 12.

104. *Id.* at 15 (statement of Mark Richard, Deputy Assistant Att’y Gen., Criminal Div., Dep’t of Justice).

105. *Id.* at 18 (emphasis added).

106. *See, e.g.*, S. EXEC. REP. NO. 101-30, at 10 (1990) (report of the Senate Foreign Relations Committee stating that “the majority of the obligations to be undertaken by the

was made to implement Article 3 when Congress set about the task of “implementing” CAT in 1994.

By 1995, some legislators realized their mistake, and efforts to enact implementing legislation for Article 3 began.<sup>107</sup> The precise form that the legislation should take, however, was the subject of disagreement. In 1997, the Senate passed a bill with strong language that would have imposed a straightforward statutory prohibition against *refoulement*,<sup>108</sup> applicable to the United States government as a whole.<sup>109</sup> But the House version of the same legislation merely included hortatory language purporting to establish *non-refoulement* as the “policy” of the United States.<sup>110</sup> During the conference to resolve these and other differences, the conferees reconciled the competing approaches by adopting the House’s policy statement and then adding a watered-down version of the Senate’s prohibitory language, pursuant to which “appropriate agencies” would be obliged to enact “regulations to implement” Article 3.<sup>111</sup>

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United States pursuant to the Convention are already covered by existing law,” and that “additional implementing legislation will be needed only with respect to article 5, dealing with areas of criminal jurisdiction” providing punishment for acts of torture occurring outside the United States). Indeed, according to Judge Sofaer, the Bush Administration did not intend to deposit the instrument of ratification for CAT until after Congress enacted legislation implementing that particular obligation. See CAT Hearing, *supra* note 95, at 12. This is, in fact, what actually happened; the United States instrument of ratification was not deposited until 1994, after Congress enacted implementing legislation specific to Article 5. See 18 U.S.C. §§ 2340-2340B (2000).

107. See, e.g., S. 1058, 104th Cong. § 2 (1995) (recognizing lack of implementation); *id.* § 4 (banning *refoulement* directly); H.R. 1561, 104th Cong. § 2662 (1995); 141 CONG. REC. 13,361–403 (1995) (funding prohibiting); H.R. 1416, 104th Cong. § 4 (1995) (direct ban on *refoulement*); H.R. REP. NO. 104-478, at 158 (1996) (Conf. Rep.) (explaining that H.R. 1561 would “partly implement” CAT).

108. I use the word “*refoulement*” here merely as a shorthand for the CAT Article 3 transfer rule.

109. See S. 903, 105th Cong. § 1606 (1997), 143 CONG. REC. 11,100, 11,116 (1997) (providing that the “United States shall not expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are *reasonable* grounds for believing the person would be in danger of subjection to torture”) (emphasis added). By using the words “reasonable grounds,” in fact, S. 903 would have been more demanding than the more-likely-than-not standard of Article 3 (as ratified).

110. See H.R. 1757, 105th Cong. § 1702(a) (1997), 143 CONG. REC. 9945–46 (1997) (stating that it shall be the *policy* of the United States “not [to] expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of subjection to torture, regardless of whether the person is physically present in the United States”).

111. See H.R. REP. NO. 105-432, at 67 (1998) (Conf. Rep.), 144 CONG. REC. 3080, 3098 (1998). The language adopted by the conferees actually had been adopted by the Senate previously, in November 1997, in connection with amendments to H.R. Res. 2607, an om-

This language became law in 1998 in the form of § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”).<sup>112</sup> Section 2242(a) is the policy statement:

It shall be the *policy* of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.<sup>113</sup>

Section 2242(b) is the regulatory mandate:

Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the *appropriate agencies shall* prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.<sup>114</sup>

## b. Pentagon Regulations?

In response to the regulatory mandate of § 2242(b), the Justice Department promulgated regulations implementing the *non-refoulement* rule in connection with removal proceedings,<sup>115</sup> and

nibus authorization package. See 143 CONG. REC. 25,535, 25,592, 25,660 (1997). When the House disagreed with these amendments, the Senate receded and H.R. 2607 became law without reference to the Article 3 issue. See District of Columbia Appropriations Act, 1998, Pub. L. No. 105-100, 111 Stat. 2161 (1997).

112. FARRA appears as Division G to the 1998 omnibus emergency appropriations bill enacted as Public Law Number 105-277. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, div. G, §§ 1001-2813, 112 Stat. 2681-761 to 2681-854 (1998) [hereinafter FARRA]. Section 2242(a) is codified in the notes following 8 U.S.C. § 1231.

113. FARRA, *supra* note 112, § 2242(a) (emphasis added). As a mere statement of “policy,” § 2242(a) cannot be construed as creating enforceable rights. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454 (finding no intent to create judicially enforceable rights in 42 U.S.C. § 1996, which purported to establish a “policy of the United States to protect and preserve for American Indians” certain expressive and religious rights).

114. FARRA, *supra* note 112, § 2242(b) (emphasis added).

115. See 8 C.F.R. §§ 208.16-208.18 (2005) (implementing *non-refoulement* safeguards in the context of removal proceedings under the immigration laws, for purposes of the Department of Homeland Security); 8 C.F.R. §§ 1208.16-1208.18 (2005) (implementing *non-refoulement* safeguards in the context of removal proceedings under the immigration laws, for purposes of the Executive Office of Immigration Review at the Justice Department). For ease of reference, I will continue to refer simply to the Justice Department despite the

the State Department did the same with respect to extradition proceedings.<sup>116</sup> There is no evidence that anyone at the time thought that other government agencies ought to do likewise, still less that the Department of Defense should.<sup>117</sup> But Congress had not limited the mandate of § 2242(b) to the removal and extradition scenarios. Rather, § 2242(b) applies to all “appropriate agencies” of the government without reference to the particular mechanism of international transfer involved.<sup>118</sup> In this respect, § 2242(b) tracks Article 3, which concerns the actions of the government as a whole rather than any particular instrumentality thereof.

Of course, the fact that the Pentagon did not respond to § 2242(b) by promulgating regulations is understandable. Particularly in light of the views discussed above concerning non-extraterritoriality, it does not seem that anyone in the 1990s anticipated a scenario in which the military would become involved in international transfers of persons from territory over which the United States exercised sufficient control to implicate CAT obligations.<sup>119</sup> Post-9/11 developments, however, have led to precisely that situation at GTMO. The Department of Defense thus may not have been an “appropriate agency” at the time § 2242(b) became law, but it has unwittingly become one since.<sup>120</sup>

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partial transfer of immigration law responsibilities to the Department of Homeland Security. For an overview of immigration law practice under the CAT regulations, see James Feroli, *Trends in Decisions Under the Convention Against Torture*, IMMIGRATION BRIEFINGS, No. 05-05, May 2005, at 1.

116. See 22 C.F.R. §§ 95.1-95.4 (2005) (implementing *non-refoulement* safeguards in the context of removal proceedings under the immigration laws, for purposes of State Department determinations in the context of extradition proceedings).

117. *But see* Exec. Order No. 13,107, 3 C.F.R. 234 (1999) (establishing the Interagency Working Group on Human Rights (including representatives of the Department of Defense and the Joint Chiefs of Staff) to facilitate compliance with obligations under treaties including CAT).

118. FARRA, *supra* note 112, § 2242(b).

119. This explains the statement by Professor Yoo in his article on transfers—written before the Supreme Court ruled in *Rasul*—to the effect that CAT “does not apply extraterritorially” and “[t]hus, the Department of Defense was not required to promulgate regulations with respect to military transfers.” Yoo, *supra* note 9, at 1231 n.207.

120. The *Charming Betsy* canon of statutory interpretation provides additional support, albeit perhaps a bit indirect, for this conclusion. The *Charming Betsy* canon suggests that courts should “construe acts of Congress to avoid violations of international law whenever possible.” Wuerth, *supra* note 3, at 298. Here, the relevant international law provision is the Article 3 *non-refoulement* obligation, which at least as a matter of international law applies to the U.S. government as a whole. Construing § 2242(b) to refer only to a subset of U.S. government agencies involved in international transfers arguably would

If this is correct, what does it mean for the detainees? It may mean that they have the right under the Administrative Procedure Act (“APA”) to compel the Department of Defense to meet its regulatory obligations under § 2242(b).<sup>121</sup>

APA § 706(1) provides that a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed.”<sup>122</sup> APA § 702 clarifies that a “person suffering legal wrong because of agency action [defined to include the ‘failure to act’],<sup>123</sup> or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to seek judicial review thereof.”<sup>124</sup> Thus, assuming that the detainees have a cognizable interest in the promulgation of regulations to implement the *non-refoulement* rule, § 702 establishes a cause of action to present a § 706(1) claim. Under APA § 703, moreover, detainees also may use habeas corpus as a procedural vehicle for asserting such a claim.<sup>125</sup>

The Department of Defense might respond by citing provisions of APA § 701 and § 702 which state that the APA does not override prohibitions on judicial review imposed by other statutes.<sup>126</sup> After all, as discussed in more detail below, FARRA § 2242 contains language purporting to limit judicial review of *refoulement*

not necessarily violate the treaty, but it would be in tension with it. *Cf. Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1014 (9th Cir. 2000) (invoking *Charming Betsy* canon in the course of construing § 2242(b) as imposing a non-discretionary duty on the Secretary of State in extradition proceedings).

121. See generally 5 U.S.C. §§ 551–59, 701–06 (2000). It is important to grasp that the existence of this APA claim does not turn in any way on the question of whether CAT has been implemented; it is simply a question of the APA implications of a federal statute that mandates government agencies to promulgate regulations.

122. Administrative Procedure Act, 5 U.S.C. § 706 (2000).

123. *Id.* § 551(13).

124. *Id.* § 702.

125. *Id.* § 703.

126. See *id.* § 701(a)(1) (stating that judicial review is not available if barred by statute in issue); *id.* § 702 (stating that “[n]othing herein . . . affects other limitations on judicial review”). The government might also contend that APA § 551(1) excludes certain activities from the definition of “agency,” including: “(F) courts martial and military commissions” and “(G) military authority exercised in the field in time of war or in occupied territory.” Clearly § 551(1)(F) applies to APA challenges directed at the military commission process. But the transfer issue of course is distinct from that process. So the question is whether § 551(1)(G) applies. Because GTMO is not occupied territory, the specific issue is whether GTMO transfers take place under the rubric of “[1] military authority [2] exercised in the field [3] in time of war.” 5 U.S.C. § 551(1)(G). Elements one and three may be met, but not two; decisions made with respect to GTMO transfers are not made “in the field.” Accordingly, the Department of Defense is an “agency” within the meaning of the APA for purposes of the GTMO transfer issue.

decisions in certain contexts and precludes review of the regulations that agencies do promulgate.<sup>127</sup> But the careful phrasing of these limitations in § 2242 does not extend to an agency's failure to promulgate regulations in the first place,<sup>128</sup> and thus it appears that detainees could in fact mount an APA challenge.

Whether they would succeed in such a challenge is another matter. "Section 706(1) is rarely used successfully," one treatise observes, because of the difficulty in determining when agency delay is unreasonable in light of the complexity associated with "an agency's process of setting its agenda and allocating its resources among competing tasks."<sup>129</sup> In an effort to come to grips with that complexity and thus identify undue delay, the District of Columbia Circuit employs a multifactor balancing test.<sup>130</sup> Relevant considerations include: whether the amount of delay comports with a "rule of reason," whether Congress has specified a timetable for action, whether the interests at stake involve "human health or welfare," whether compulsory action might prejudice a "higher or competing priority," and the nature of the interests that would be prejudiced by delay.<sup>131</sup>

Applied to the *non-refoulement* issue presented at GTMO, it appears that these factors tilt the balance somewhat in the direction of the detainees. Two considerations stand out. First, the individual interests here at stake, associated with potential physical and mental harm, are highly significant. Second, perhaps in recognition of the magnitude of these interests, Congress imposed a tight 120-day deadline on promulgation of regulations when it originally enacted FARRA § 2242(b).<sup>132</sup> With respect to this second factor, it is wholly understandable that the Department of Defense initially did not view itself as subject to this obligation and so it would not be fair to suggest that the Pentagon is *years* behind in complying with its obligation. At the same time, how-

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127. See FARRA, *supra* note 112, § 2242(d). Section 2242(d) is discussed *infra*.

128. It also is probable that § 2242(d) fails to exclude habeas corpus review, as discussed in more detail below.

129. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 5.9, at 224–25 (4th ed. 2004).

130. *Id.* § 5.9, at 225 (citing Telecomm. Research & Action Ctr. ("TRAC") v. FCC, 750 F.2d 70 (D.C. Cir. 1984)).

131. TRAC, 750 F.2d at 79–80 (quotation marks and citations omitted). Additionally, there is no requirement of "impropriety lurking behind agency lassitude" in order to find unreasonable delay. *Id.* at 80 (quoting PCHRG v. FDA, 740 F.2d 21, 35 (D.C. Cir. 1984)).

132. FARRA, *supra* note 112, § 2242(b).

ever, it has been apparent at the very least since early 2005—when the first wave of GTMO transfer litigation began—that transfers present *non-refoulement* questions. It thus is possible that a § 706(1) claim might result in a court order confirming the Department of Defense's responsibility to promptly promulgate regulations pursuant to FARRA § 2242(b).

Would such an order make any practical difference? It might. APA § 705 specifies that “to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings.”<sup>133</sup> If a reviewing court were to conclude that the Department of Defense has an obligation to promulgate *non-refoulement* regulations under § 2242(b), it might act under § 705 to ensure that in the interim detainees are not transferred in violation of the more-likely-than-not standard. On the other hand, as I discuss in Part II.B.4 below, the military already requires compliance with the more-likely-than-not standard as a matter of policy with respect to GTMO transfers. Thus, a court might conclude instead that the government may continue as before so long as it adheres to this policy. Indeed, at the end of the day, the more important question is not whether the military is carrying out transfers pursuant to policy or regulation, but whether the resulting decisions fairly reflect the more-likely-than-not standard. That raises the issue of whether, and to what extent, judges may review these determinations.

### c. Precluding Judicial Review

At first blush it seems that judges cannot review *non-refoulement* determinations except in very limited circumstances, notwithstanding the fact that § 2242(b) expressly implements Article 3.<sup>134</sup> Section 2242(d) states not only that “no court shall have jurisdiction to review the regulations adopted to implement this section,” but also that:

[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the

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133. Administrative Procedure Act § 705, 5 U.S.C. § 705 (2000).

134. FARRA, *supra* note 112, § 2242(b).

application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).<sup>135</sup>

Relying on this language, courts initially declined to review *non-refoulement* determinations outside the specified context of final orders of removal.<sup>136</sup> A difficult question soon arose, however, with respect to whether the language of § 2242(d), express as it was, sufficed to preclude individuals from raising *non-refoulement* issues via habeas corpus.

In 2000, a divided Ninth Circuit panel held in an extradition case, *Cornejo-Barreto v. Seifert* (“*Cornejo-Barreto I*”),<sup>137</sup> that § 2242(d) did not preclude habeas review of the Secretary of State’s Article 3 determination because the statute lacks a sufficiently clear statement of congressional intent to preclude such review.<sup>138</sup> After all, the language in § 2242 preventing review of CAT regulations (i.e., “no court shall have jurisdiction”)<sup>139</sup> speaks broadly in terms of jurisdiction-stripping, whereas the language regarding review of the actual *non-refoulement* determination itself (i.e., “nothing in this section shall be construed as providing any court jurisdiction”)<sup>140</sup> speaks more narrowly in terms of not affirmatively creating jurisdiction. The next year, moreover, this view received indirect but substantial support from the Supreme Court, which held in *INS v. St. Cyr*<sup>141</sup> that statutes must provide “a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas,” at least where

135. FARRA, *supra* note 112, § 2242(d); see also H.R. Rep. No. 105-432, at 150 (1998) (Conf. Rep.), 144 CONG. REC. 3080, 3123 (1998) (stating that “[t]he provision agreed to by the conferees does not permit for judicial review of [ ] the regulations or of most claims under the Convention”).

136. See, e.g., *Akhtar v. Reno*, 123 F. Supp. 2d 191, 196–97 (S.D.N.Y. 2000) (discussing the limited nature of judicial review under FARRA § 2242); *Sandhu v. Burke*, No. 97 Civ. 4608, 2000 WL 191707, at \*32 (S.D.N.Y. Feb. 10, 2000) (holding that “nothing in [FARRA] confers authority upon the judiciary to enforce [CAT’s] provisions . . . ‘nothing in the policy makes Article 3 of the Convention enforceable in Court’” (quoting FARRA, *supra* note 112, § 2242(d))).

137. 218 F.3d 1004 (9th Cir. 2000).

138. See *id.* at 1015–16 & n.13. Judge Kozinski disagreed with the majority’s position on this point “because the question of whether petitioner would be entitled to judicial review of an extradition decision . . . is not before us.” *Id.* at 1017 (Kozinski, J., concurring).

139. FARRA, *supra* note 112, § 2242(d).

140. *Id.*

141. 533 U.S. 289 (2001) (examining whether a resident alien could use habeas to challenge the Attorney General’s interpretation of discretionary withholding of deportation, notwithstanding statutory language barring judicial review).



pure questions of law are concerned.<sup>142</sup> *St. Cyr* dealt with immigration law provisions rather than FARRA § 2242(d), but the decision had clear implications for the latter statute, particularly since the relevant language in § 2242(d) is nearly identical to the immigration law provisions found to be insufficient to preclude habeas review in *St. Cyr*.<sup>143</sup> Since *St. Cyr*, five circuits (though not the D.C. Circuit) have considered whether § 2242(d) precludes habeas corpus jurisdiction in connection with immigration proceedings other than a final order of removal.<sup>144</sup> Citing *St. Cyr*, all have held that it does not, and that litigants may rely on habeas to challenge *non-refoulement* determinations in that context.<sup>145</sup>

Do these *St. Cyr*-inspired cases set forth a rule that reaches beyond the immigration law context? Several courts have grappled with this issue in the parallel context of extradition proceedings, with mixed results.<sup>146</sup> *Cornejo-Barreto I*, discussed above, was an extradition case in which the court found habeas available notwithstanding § 2242(d).<sup>147</sup> Because the Secretary of State had not

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142. *Id.* at 314; *see id.* at 314 n.38; *see also* Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L. J. 2007 (2004) (anticipating the broad significance of *St. Cyr* for the non-self-execution debate).

143. *See Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 212–13 & nn.12–13 (3d Cir. 2003) (side-by-side comparison).

144. *See Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005) (recognizing habeas jurisdiction to review Board of Immigration Appeals removal determination with respect to CAT); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004); *Singh v. Ashcroft*, 351 F.3d 435 (9th Cir. 2003); *Ogbudimkpa*, 342 F.3d 207; *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

145. *See Auguste*, 395 F.3d at 137–38 & n.13; *Cadet*, 377 F.3d at 1179–83 & nn.7–8; *Singh*, 351 F.3d at 441; *Ogbudimkpa*, 342 F.3d at 216–17; *Saint Fort*, 329 F.3d at 200–02; *Wang*, 320 F.3d at 140–42. Since then, Congress has enacted the REAL ID Act, which among other things amends the immigration laws so as to more clearly consolidate judicial review of removal decisions in most instances to a single petition brought directly to the Circuit Court. *See* REAL ID Act § 106, 8 U.S.C. § 1252(a)(4)–(5) (2000). The impact of these changes on habeas review of CAT determinations has been the subject of inconclusive litigation. *See Malm v. Gonzalez*, No. 04-1678 (4th Cir.) (appellant's brief (on file with author) (raising the issue); *Malm v. Gonzales*, 151 F. App'x 252 (4th Cir. 2005) (dismissing *Malm's* petition on collateral estoppel grounds). *See also* Feroli, *supra* note 115, at 13 (describing potential impact of REAL ID on habeas review of CAT issues in the immigration context).

146. *Compare Cornejo-Barreto v. Siefert*, 218 F.3d 1004, 1015–16 (9th Cir. 2000) [hereinafter *Cornejo-Barreto I*], with *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1086–87 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) [hereinafter *Cornejo-Barreto II*]; *see also Hoxha v. Levi*, 371 F. Supp. 2d 651 (E.D. Pa. 2005) (refusing to consider Article 3 claim on habeas in extradition context on ground that Secretary exercises unreviewable discretion in this area).

147. *Cornejo-Barreto* sought to use habeas to assert a claim under APA § 704, which permits judicial review of “final agency action for which there is no other adequate rem-

yet made an Article 3 determination in that case, the court in *Cornejo-Barreto I* ultimately dismissed the petition without prejudice to refiling after that decision was made.<sup>148</sup> Eventually, the Secretary of State did determine that Cornejo-Barreto could be extradited consistent with Article 3.<sup>149</sup> At that point, Cornejo-Barreto re-filed his petition, and ultimately ended up back before the Ninth Circuit.<sup>150</sup> In *Cornejo-Barreto II*, a different Ninth Circuit panel acknowledged the ruling in *St. Cyr* and the various circuit court decisions that applied its superclear-statement requirement to § 2242(d) in the context of immigration proceedings, but found them all distinguishable.<sup>151</sup> The panel reasoned that in the extradition context, the “rule of non-inquiry” traditionally ensured that the Secretary would have sole discretion to determine whether humanitarian considerations (such as the risk of abuse at the hands of the receiving state) warranted denial of an extradition request.<sup>152</sup> In the view of the court, nothing in FARRA altered this traditional rule, and in fact, the language of § 2242(d) suggested a congressional intent *not* to change it.<sup>153</sup>

The rationale of *Cornejo-Barreto I* is more persuasive than that of *Cornejo-Barreto II*. To illustrate this point, consider how the situation would appear in the absence of § 2242(d). In that case, Cornejo-Barreto’s petition would present a simple clash between the familiar doctrine of the rule of non-inquiry and a more recent statute, § 2242(b), that expressly implements a binding U.S. treaty obligation. The former would give way to the latter and some form of review would be permitted, notwithstanding the fact that the rule of non-inquiry otherwise would have made the risk of torture an off-limits issue for the courts. Enter § 2242(d). If given literal effect, it would prevent this result by precluding judicial review. But under a superclear-statement framework along the lines of *St. Cyr*, one does not give § 2242(d) its literal effect. Instead, the statute is read to still permit habeas corpus review,

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edy in a court.” *Cornejo-Barreto I*, 218 F.3d at 1012 (quoting 5 U.S.C. § 704 (2000)). Under APA § 706, such a decision may be set aside by the reviewing court if it finds that the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2000).

148. *Cornejo-Barreto I*, 218 F.3d at 1016–17.

149. *Cornejo-Barreto II*, 379 F.3d at 1078–79.

150. *Id.* at 1079.

151. *Id.* at 1083–89.

152. *Id.*

153. *Id.* at 1088–89.

thus supplying the vehicle that enables § 2242(b) to have its full effect, which in this case is to override the traditional rule of non-inquiry.

Assuming that the same logic applies by extension in the GTMO transfer context,<sup>154</sup> the next issue concerns the nature and scope of the review that results.<sup>155</sup> *St. Cyr* had emphasized that habeas in that instance was being used merely to enable a court to adjudicate a pure question of law (specifically, whether changes to the immigration laws in 1996 should be applied retroactively). The subsequent decisions applying *St. Cyr* in the context of *non-refoulement* issues raised in immigration proceedings, however, appear to go a step further. These cases involved non-citizens whose CAT arguments did not succeed with the Board of Immigration Appeals (“BIA”) and who were attempting to use habeas to persuade the courts to review the BIA’s determination that they had failed to meet the more-likely-than-not standard. The courts in these cases were unwilling to reexamine fact findings, but were willing to review the application of the law to the facts that had been found.<sup>156</sup> Arguably, this marked an expansion of the scope of habeas review from the *St. Cyr* scenario involving questions associated only with the proper interpretation of a statute. That said, in each case the court approached the review deferentially, and ultimately concluded that the BIA had not erred in its determination.<sup>157</sup>

If the same approach is employed during habeas review of a *non-refoulement* determination in the GTMO transfer context, what result might follow? I address this question in the next section.<sup>158</sup>

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154. The diplomatic concerns identified by the government during the first wave of GTMO transfer litigation are similar in kind, albeit greater in magnitude, to those involved in the rule of non-inquiry. See *supra* Part I.

155. See, e.g., *Mironescu v. Costner*, 345 F. Supp. 2d 538, 549–50 (M.D.N.C. 2004) (describing uncertainty concerning the scope of habeas review in FARRA context); Abra Edwards, Note, *Cornejo-Barreto Revisited: The Availability of a Writ of Habeas Corpus to Provide Relief from Extradition under the Torture Convention*, 43 VA. J. INT’L L. 889, 906 (2003) (same).

156. See, e.g., *Auguste v. Ridge*, 395 F.3d 123, 138 (3d Cir. 2005) (stating that habeas review “is limited to constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts, but does not include review of administrative fact findings or the exercise of discretion”); *id.* at 150 (stating essentially the same).

157. See *supra* notes 146–47 and accompanying text.

158. A question might also arise with respect to FARRA § 2242(c), which states that in

#### 4. Habeas Review & Diplomatic Assurances

In order to anticipate the potential impact of habeas review in the context of GTMO transfers, I begin with an overview of current Pentagon policy regarding the *non-refoulement* issue. This review demonstrates the central role that diplomatic assurances play in such determinations.

##### a. Current Department of Defense Policy

Although the Department of Defense does not necessarily accept that as a matter of domestic law it is bound by Article 3 and § 2242(b) in the sense described above, it nonetheless has stated that “it is the *policy* of the United States, consistent with Article 3 of [CAT], not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured.”<sup>159</sup> Indeed, the government has refused to repatriate a

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promulgating regulations, the agencies “shall exclude” those “aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act [INA],” to the “maximum extent consistent with the obligations of the United States” under CAT. FARRA, *supra* note 112, § 2242(c). The referenced language refers to, among other things, aliens whom the Attorney General reasonably believes to pose a security threat. See 8 U.S.C. § 1231(b)(3)(B)(iv) (2000). Naturally, the Department of Defense might view this as excluding GTMO detainees from the implementation of Article 3. Such an argument most likely would not be consistent with Article 3, however, given that Article 3 contains no such exclusions. By expressly requiring agencies to remain consistent with Article 3 when promulgating regulations, Congress in § 2242(c) effectively precluded the agencies from overriding the *non-refoulement* rule despite the reference to INA § 241(b)(3)(B). This may explain why the extradition regulations do not take up the invitation of § 2242(c), and why the removal regulations do so only in the sense that they provide deferral of removal—i.e., continued incarceration pending an opportunity to remove consistent with *non-refoulement*—for such aliens. See 8 C.F.R. §§ 208.17, 1208.17 (2005). The Department of Justice approach to reconciling the tension inherent in § 2242(c) most likely marks the outer boundary of what the Department of Defense can achieve under that subsection if and when it implements its own CAT regulations.

159. See, e.g., Declaration of Matthew C. Waxman para. 6., *Abdah v. Bush*, No. 04-1254 (D.D.C. Mar. 8, 2005) [hereinafter Waxman Decl.] (emphasis added). See also Letter from William H. Taft IV, Legal Advisor, Dep’t of State to Mr. Christopher Girod, Head of Delegation, Int’l Comm. of the Red Cross 1–2 (May 11, 2004) (on file with the author) (stating that the United States operates under a law of war framework regarding GTMO detainees, but that U.S. policy is not to transfer where “it is ‘more likely than not’ that [the individual] will be tortured”). Identical declarations by Mr. Waxman have been filed in most, if not all, of the GTMO transfer cases. See Table A, *supra* note 21 for a list of GTMO transfer cases. The existence of a policy-based procedure does not render moot the APA argument for promulgation of regulations, described above. First, so long as the procedure is a mere product of policy, the Executive branch has the option of opting out of the policy in a particular case or even abandoning it altogether. Second, establishing that the Department of Defense falls within the § 2242(b) mandate, at least in this context, provides the basis for

group of Chinese and Uzbek Uighur detainees at GTMO, despite determining that the men are no longer enemy combatants, on the ground that the men cannot be repatriated consistent with this policy; as of February 2006, the men remain at GTMO while the State Department seeks a third-party country willing to take them.<sup>160</sup> Given that the United States has repatriated other detainees to states with poor human rights records, however, questions do arise about the nature of the current *non-refoulement* policy.

We have some insight into the specifics of that policy, thanks to a pair of declarations submitted by government officials in connection with the first wave of GTMO transfer litigation. According to Deputy Assistant Secretary of Defense Matthew C. Waxman, the decision to transfer a GTMO detainee ultimately is made by the Secretary of Defense or his designee after “appropriate assurances regarding the detainee’s treatment are sought from the country to whom the transfer of the detainee is proposed.”<sup>161</sup> That process, in turn, is described in detail by the State Department’s Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper.<sup>162</sup>

Upon request from the Department of Defense, Prosper explains, “my office would initiate transfer discussions with the foreign government concerned.”<sup>163</sup> The purpose of these discussions is two-fold: “to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies and to obtain appropriate transfer assurances.”<sup>164</sup> Although the particular assurances sought depend on the situation, “assurance of humane treatment” and of compliance with “international obligations” are sought “in every transfer case in which continued detention by the government concerned is foreseen.”<sup>165</sup> Where the receiving state is not a

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habeas review of decisions in particular cases. *But see* Epilogue, *infra* Part VII.

160. Wright & White, *supra* note 20; Northam, *supra* note 22.

161. Waxman Decl., *supra* note 159, para. 6.

162. Declaration of Pierre-Richard Prosper, para. 6. *Abdah v. Bush*, No. 04-1254 (D.D.C. Mar. 8, 2005) [hereinafter Prosper Decl.]. Identical declarations by Prosper Ambassador have been filed in most if not all transfer cases. See Table A, *supra* note 21, for a list of transfer cases.

163. Prosper Decl., *supra* note 162, ¶ 6.

164. *Id.*

165. *Id.* ¶ 6, at 4.

party to CAT, or where “other circumstances warrant,” the State Department “pursues more specific assurances.”<sup>166</sup>

According to Prosper, the “essential question in evaluating foreign government assurances is whether the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred.”<sup>167</sup> This determination is made “at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned.”<sup>168</sup> The offices involved include the Office of War Crimes Issues, the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the “relevant regional bureau,” country desk, or embassy.<sup>169</sup> The inquiry considers “matters such as human rights, prison conditions, and prisoners’ access to counsel,” both “in general and as they may apply to a particular case.”<sup>170</sup>

When evaluating assurances from foreign governments, the State Department considers a range of factors. First, officials “consider the identity, position, or other information concerning the official relaying the assurances.”<sup>171</sup> Second, officials take into account “political [and] legal developments in the foreign country” in order to “provide context for the assurances provided.”<sup>172</sup> Third, “officials may also consider U.S. diplomatic relations with the country concerned,” a factor that would include the “foreign government’s incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation with the United States.”<sup>173</sup> Fourth, officials in some instances consider whether to seek “assurance of access by governmental or non-governmental entities in the country concerned to monitor the condition of an individual returned to that country, or of U.S.

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166. *Id.*

167. *Id.* ¶ 8, at 5.

168. *Id.* ¶ 7, at 4.

169. *Id.* ¶ 7, at 4–5.

170. *Id.* ¶ 7, at 5.

171. *Id.* ¶ 8, at 5.

172. *Id.*

173. *Id.* Prosper does not mention the possibility that this same consideration could run the other direction, in the sense that the United States may likewise have incentives related to the need for continued cooperation in other spheres.

Government access to the individual for such purposes.”<sup>174</sup> If in light of these considerations concerns “cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer.”<sup>175</sup>

One may assume that if the Department of Defense were to be obliged to promulgate regulations pursuant to § 2242(b), it might simply codify these procedures. In all likelihood, therefore, a decision to transfer a GTMO detainee notwithstanding fear-of-torture concerns would depend, in at least some instances, on the use of diplomatic assurances.<sup>176</sup>

## b. Diplomatic Assurances

The practice of relying on diplomatic assurances to allay torture concerns did not originate with GTMO transfers. On the contrary, diplomatic assurances have long been available to overcome Article 3 objections in both the extradition and removal contexts.<sup>177</sup> Indeed, the removal regulations specifically provide

174. *Id.* ¶ 8, at 5–6.

175. *Id.* ¶ 8, at 6; *see also* Waxman Decl., *supra* note 159, ¶ 7, at 4 (stating that “[c]ircumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns”).

176. *See* U.S. DEPT OF STATE, SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE, annex I, pt. 1(II)(E) (2005), *available at* <http://www.state.gov/drl/rls/45738.htm> (stating that “[i]f a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved,” and that “[c]ircumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns”); Letter from William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., to Sen. Patrick Leahy 2 (June 25, 2003), *available at* <http://www.org/press/2003/06/letter-to-leahy.pdf> (stating that U.S. “policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country”); Letter from William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., to Kenneth Roth, Executive Dir. of Human Rights Watch (Apr. 2, 2003), *available at* <http://www.hrw.org/press/2003/04/dodltr040203.pdf>.

177. The extradition regulations do not mention diplomatic assurances, but then again they mention almost nothing about required procedures. *See* 22 C.F.R. §§ 95.1–95.4 (2005). The use of diplomatic assurances in the extradition context has been described, however, by a Department of State attorney during litigation of a CAT issue. *See* Declaration of Samuel M. Witten at ¶¶ 6–7, 8–9, *Cornejo-Barreto v. Seifert*, No. 01-cv-662 (C.D. Cal. Oct. 2001) [hereinafter Witten Decl.], *available at* <http://www.state.gov/documents/organization/16513.pdf>. According to the federal public defender involved in that case, the government did not actually assert at any point in that litigation that it in fact had obtained such assurances. *See* Telephone Interview with Craig M. Wilke, Fed. Pub. Defender, Cent. Dist. of Cal. (Aug. 10, 2005). Notably, the Witten Declaration is almost identical, in relevant

for their use: “The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.”<sup>178</sup> In such a case, the Attorney General is then to consult with the Secretary of State in order to determine “whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of [CAT].”<sup>179</sup>

At the time this language was adopted in 1999, the concept of seeking diplomatic assurances in the removal context to assuage Article 3 concerns was thought by at least some senior immigration officials to be a significant step forward for human rights protections.<sup>180</sup> In the wake of revelations about the CIA’s extraordinary rendition program, however, critics today contend that diplomatic assurances, at least in some contexts, are mere formalities designed to enable both the transferring and receiving state to maintain a pose of support for human rights without actually interfering with international transfers.<sup>181</sup>

Human Rights Watch (“HRW”), for example, has published a pair of lengthy reports that summarize the fundamental criticisms of diplomatic assurances.<sup>182</sup> These criticisms boil down to

passages, to the declaration Ambassador Prosper provided in connection with the GTMO transfer litigation.

178. 8 C.F.R. § 208.18(c)(1) (2005); *id.* § 1208.18(c)(1).

179. *Id.* § 208.18(c)(2). The regulations permit delegation to the Deputy Attorney General or Commissioner, Immigration and Naturalization Service, but nothing further. *Id.*

180. Interview with Bo Cooper, former Gen. Counsel of the INS (1999–2003).

181. See, e.g., HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 3 (Apr. 2005) [hereinafter STILL AT RISK], available at <http://hrw.org/reports/2005/eca0405.pdf>; HUMAN RIGHTS WATCH, “EMPTY PROMISES”: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 5 (Apr. 2004) [hereinafter EMPTY PROMISES], available at <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf>; Testimony of Wendy Patten, U.S. Advocacy Director for Human Rights Watch, to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, May 17, 2005.

182. See STILL AT RISK, *supra* note 181; EMPTY PROMISES, *supra* note 181; see also OFFICE OF THE COMMISSIONER FOR HUMAN RIGHTS, REPORT BY MR. ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS, ON HIS VISIT TO SWEDEN, APR. 21–23, 2004 at 9 (2004) (arguing that diplomatic assurances should not be accepted from a state that condones torture), available at [http://www.coe.int/T/E/Commissioner\\_H.R/Communication\\_Unit/Documents/pdf/CommDH%282004%2913\\_E.pdf](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf/CommDH%282004%2913_E.pdf); The Secretary General, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶30, delivered to the General Assembly, U.N. Doc. A/59/324 (Sept. 1, 2004) [hereinafter *Torture Report*] (prepared by Theo van Boven) (same); Interview by BBC Radio 4, *Today* with Manfred Nowak, U.N. Special Rapporteur on Torture (Aug. 9, 2005), available



the following considerations. First, assuming that the receiving state makes systematic use of torture in violation of its international obligations, there is substantial reason to doubt that the state will feel obliged to abide by promises made in the context of mere diplomatic assurances.<sup>183</sup> Second, there also is substantial reason to doubt that compliance-monitoring mechanisms—such as arranging for periodic visits to the detainee by the ICRC or diplomats—will succeed in detecting abuse.<sup>184</sup> Detainees understandably may be reluctant to reveal such abuse for fear of retaliation, and non-experts in some instances will be unable to detect signs of abuse.<sup>185</sup> Third, even in the event that non-compliance is detected, there are no mechanisms in place to impose accountability.<sup>186</sup> Enforcement would depend on the United States deciding to take retaliatory action in another context, a step which in many instances the United States may be reluctant to take because of offsetting concerns in the relationship with the receiving state.<sup>187</sup> The HRW reports reinforce these concerns, moreover, with detailed accounts of torture allegedly suffered by individuals who were transferred on the basis of diplomatic assurances, with a particular emphasis on the much-reported case of Maher Arar.<sup>188</sup> HRW thus concludes that “countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture.”<sup>189</sup>

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at [http://www.bbc.co.uk/radio4/today/listenagain/ztuesday\\_20050809.shtml](http://www.bbc.co.uk/radio4/today/listenagain/ztuesday_20050809.shtml); The High Commissioner for Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 56, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005) [hereinafter *Human Rights Report*] (prepared by Robert K. Goldman) (criticizing reliance on diplomatic assurances on numerous grounds), available at <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf>.

183. See STILL AT RISK, *supra* note 181, at 5.

184. *Id.*; see also *Human Rights Report*, *supra* note 182, ¶¶ 56–57.

185. See STILL AT RISK, *supra* note 181, at 5; see also *Human Rights Report*, *supra* note 182, ¶¶ 56–57.

186. See STILL AT RISK, *supra* note 181, at 6.

187. See *id.*

188. See *id.* at 33–36.

189. *Id.* at 3.

### c. Reviewing Diplomatic Assurances

Two questions arise in light of these criticisms. First, does CAT, FARRA, or any other law preclude the Department of Defense from relying on diplomatic assurances in general? And if not, when if ever may a habeas court second-guess the determination of Executive branch officials that diplomatic assurances suffice to allay torture concerns in a particular case?

The answer to the first question appears to be no. CAT itself has little to say about the mechanics of determining whether a person is likely to be tortured if transferred, and does not speak at all to the diplomatic assurances issue, let alone forbid their use. Article 3(2) begins with a cursory statement to the effect that the *non-refoulement* decision is to be made by “competent authorities.”<sup>190</sup> After articulating the uncontroversial proposition that the decisionmaker should “take into account all relevant considerations,” Article 3(2) concludes by simply noting that these considerations need not all be specific to the individual but may include “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”<sup>191</sup> Beyond these bare-bones specifications, the logistics of the *non-refoulement* determination are left by CAT to be developed by domestic law.<sup>192</sup> FARRA takes up this invitation, but adds nothing that would prohibit a government agency from considering diplomatic assurances as part of the *non-refoulement* determina-

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190. CAT, *supra* note 49, art. 3(2). Reflecting the then-prevailing view that Article 3 issues would tend to arise in the context of extradition and removal proceedings, the Reagan Administration initially proposed a declaration to the effect that “competent authorities” refers to the Secretary of State in cases of extradition and the Attorney General in cases of deportation. See MESSAGE FROM THE PRESIDENT, *supra* note 50, at 7. The Bush Administration subsequently dropped this proposal on the ground that it was unnecessary since Article 3(2) left the issue in the hands of domestic law. See S. EXEC. REP. NO. 101-30, at 2 (1990).

191. CAT, *supra* note 49, art. 3(2).

192. The United States is far from alone in relying on diplomatic assurances to deflect fear-of-torture concerns. The HRW report described previously relates examples of this practice also by Canada, Sweden, the United Kingdom, the Netherlands, Austria, and Turkey. See STILL AT RISK, *supra* note 181, at 47–79. This extensive state practice precludes any argument that there may be a customary international law norm against reliance on diplomatic assurances in the context of *non-refoulement*. See Alan Travis, *Clarke Confronts Judges on Terror Law*, THE GUARDIAN, Sept. 7, 2005, at 2 (describing United Kingdom’s reliance on diplomatic assurances—in the form of a “memorandum of understanding”—to facilitate deportation of noncitizens on incitement-to-terrorism grounds).

tion. Thus, as even some critics have conceded,<sup>193</sup> it appears that as a general rule the Department of Defense would be free to rely on diplomatic assurances in connection with *non-refoulement* determinations.<sup>194</sup>

This does not mean, however, that habeas courts must defer entirely to a *non-refoulement* decision based on such assurances. It remains possible that a habeas court might determine on review of a particular case that the decisionmaker improperly concluded that the Article 3 standard had not been met in light of the available evidence (including diplomatic assurances).

Unless and until Congress elects to become involved in this area,<sup>195</sup> the contours of such review are not likely to please either the detainees or the government. On one hand, habeas review of CAT issues in more conventional contexts, such as removal, already involves considerable deference to Executive branch decisionmakers, and when the same issue arises in the GTMO transfer context—involving much more sensitive issues of foreign policy and diplomacy—the case for deference is stronger.

On the other hand, individualized review would be meaningless if a court did not take into account the particulars of the assurances provided with respect to individual detainees. Generalized descriptions of the diplomatic assurance process as a whole, such as that provided by Ambassador Prosper in connection with the first wave of GTMO transfer litigation, provide little if any basis

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193. See, e.g., STILL AT RISK, *supra* note 181, at 40 (observing that “current U.S. law” permits reliance “on the simplest and vaguest of promises from governments that routinely violate the law”). Cf. U.N. Econ. & Soc. Council, Sub-Comm’n on the Promotion and Prot. of Human Rights, *Question of the Violation on Human Rights and Fundamental Freedoms, Including Policies of Racial Discrimination and Segregation, in all Countries, with Particular Reference to Colonial and Other Dependent Counties and Territories: Report of the Sub-Commission Under Commission on Human Rights Resolution 8 (XXIII)*, at 3, U.N. Doc. E/CN.4/Sub.2/2005/L.12 (Aug. 4, 2005) (accepting the use of diplomatic assurances to assuage torture concerns, but urging that the assurances provide for periodic visits to the transferee, with the possibility of medical exams and private interviews).

194. Cf. *Agiza v. Sweden*, U.N. Comm. Against Torture, Comm’n No. 233/2003, ¶ 13.4, at 35, U.N. Doc. CAT/C/34/D/233/2003 (2005) (arguing that diplomatic assurances do “not suffice to protect against” an otherwise-existing risk of torture where the assurances do not include a “mechanism for their enforcement”). It bears noting that Representative Ed Markey has introduced a bill that would prohibit reliance on diplomatic assurances to assuage fear-of-torture concerns, at least in some circumstances. Press Release, Rep. Ed Markey, Congress Says No to Torture but Still Needs to End the Use of Diplomatic Assurances (June 21, 2005) (discussing H.R. 952) (on file with author).

195. For some preliminary thoughts on useful reforms, see *infra* Part VI.

for determining whether the *non-refoulement* standard has been met in a specific case.<sup>196</sup> In this respect, it should be noted that in connection with ongoing habeas litigation on behalf of the Chinese and Uzbek Uighur detainees mentioned above, the district judge has required the government, in the person of Ambassador Prosper, to provide *in camera* briefings regarding the specific details of diplomatic negotiations regarding the prospect of a transfer.<sup>197</sup> Meaningful review of a GTMO Article 3 determination, even if highly deferential, would seem to require something akin to this individualized inquiry.

In light of the foregoing discussion, it appears that CAT Article 3 does apply with respect to GTMO transfers, and that there is a role, however limited, for federal judges to play in reviewing how the *non-refoulement* obligation is carried out.<sup>198</sup> But is this analy-

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196. Ambassador Prosper identifies a range of harms that might follow from “public” disclosure of the details of diplomatic assurances in particular cases, as might follow from an examination of the issue in open court. See Prosper Decl., *supra* note 162, ¶¶ 9–12. It is far from clear, however, that this aspect of the review would have to be conducted so publicly. Insofar as classified information is concerned, for example, the reviewing court might follow the procedures employed in connection with such information during proceedings in the prosecution of Zacarias Moussaoui. See, e.g., *United States v. Moussaoui*, 65 F. App’x 881, 890–91 (4th Cir. 2003) (ordering that oral arguments be bifurcated to preserve the security of certain classified information).

197. See *Qassim v. Bush*, 382 F. Supp. 2d 126, 129 (D.D.C. 2005); Transcript of Aug. 25, 2005, Oral Argument, *Qassim* (No. 05-0497) (indicating that an *in camera* hearing would take place after the hearing “at the level of detail that [the government attorney had] been authorized to talk about”) (on file with author).

198. The International Covenant on Civil and Political Rights (“ICCPR”) does not contain an express *non-refoulement* provision comparable to CAT Article 3. See International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. Nonetheless, the U.N. Human Rights Committee has on occasion pressed the argument that a *non-refoulement* rule may be gleaned from either Article 2 (addressing the general obligations of parties to ICCPR) or Article 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment). See U.N. GENERAL ASSEMBLY, HUMAN RIGHTS COMMITTEE, GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 3–4, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992). These views are not authoritative. In any event, ICCPR is non-self-executing and its particular provisions have not been implemented by statute. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). But see Halberstam, *supra* note 79, at 91 (criticizing this conclusion). Article 33(1) of the 1951 Convention Relating to the Status of Refugees (as amended by the 1967 Protocol Relating to the Status of Refugees) does contain *non-refoulement* language, but the obligation is qualified by an express national security exception. See Refugee Convention, *supra* note 54, art. 33(1) (prohibiting return of refugees “where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion”). Even assuming that a GTMO detainee might otherwise qualify for refugee status and thus the benefits of Article 33(1), Article 33(2) states that “[t]he benefit of the present provision may not, however, be claimed by a refu-

sis entirely misplaced in light of the fact that it arises against the backdrop of armed conflict? Some have contended that it is.<sup>199</sup> I turn to that issue now.

### III. WHEN IHRL AND IHL BOTH APPLY

The detainees are held at GTMO under color of the President's Article II war powers and the Authorization for Use of Military Force ("AUMF") issued by Congress on September 18, 2001.<sup>200</sup> This implicates the law of war,<sup>201</sup> also known as international humanitarian law ("IHL").<sup>202</sup> And it also raises a question concerning the status of U.S. obligations under CAT in this context. Does the relevance of IHL displace CAT or otherwise alter its impact?

A wartime context might alter international human rights treaty obligations in two distinct ways. First, some treaties have derogation clauses that permit states to opt-out of their obligations during emergencies.<sup>203</sup> Second, some contend that where both an international human rights treaty and IHL address a particular topic, the potential clash between the competing norms should be resolved in favor of IHL. While the United States has

gee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is." *Id.* art. 33(2).

199. See Yoo, *supra* note 9, at 1230–31.

200. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

201. The context of armed conflict implicates the law of war in two ways. With respect to the international obligations of the United States, military operations in the context of armed conflict are governed by the law of war. Simultaneously, in the domestic sphere, the meaning of the President's Article II powers and the AUMF are informed at least to an extent by the law of war. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–20 (2004); see also Bradley & Goldsmith, *supra* note 3, at 2088–102.

202. The terms law of war, law of armed conflict ("LOAC"), and international humanitarian law ("IHL") have come to be used interchangeably in recent years to refer to that body of international law that attempts to regulate armed conflict. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 239 (2000) ("Although the term 'international humanitarian law' initially referred to the four 1949 Geneva Conventions, it is now increasingly used to signify the entire law of armed conflict."); Robert Cryer, *Anthony P.V. Rogers, Law on the Battlefield*, 10 J. CONFLICT & SEC. L. 121, 121 (2005) (book review) (commenting on the distinct viewpoints frequently implied from the use of the varying terms).

203. See, e.g., ICCPR, *supra* note 198, art. 4, (permitting derogation from selected articles during proclaimed emergency threatening the "life of the nation"); Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L. & POL'Y 58, 64–65 (2002) (discussing ICCPR derogation).

not invoked the former argument in connection with Article 3,<sup>204</sup> there is reason to believe that it may subscribe to the latter position.<sup>205</sup>

Generally speaking, the relationship of IHL to international human rights law (“IHL”) is the subject of considerable debate and uncertainty.<sup>206</sup> Some have advanced the view that the two bodies of law are mutually incompatible, that in the context of armed conflict IHL in effect occupies the field and negates obligations imposed by human rights instruments regardless of whether they permit derogation by their own terms.<sup>207</sup> Con-

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204. CAT Article 2 contains a non-derogation clause specifically forbidding states from derogating from the torture prohibition even during war. Article 3 contains no such clause, but conventional wisdom nonetheless holds that the *non-refoulement* rule also is non-derogable. See, e.g., *Tapia Paez v. Sweden*, U.N. Comm. Against Torture, No. 39/1996, ¶ 14.5, U.N. Doc. CAT/c/18/D/39/1996 (1997) (stating that the “nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention”); *Human Rights Report*, *supra* note 182, ¶ 52, at 18; *Torture Report*, *supra* note 182, ¶ 31 cmt.9.

205. See Dennis, *supra* note 64, at 136 n.112 (observing that the United States has contended in litigation that it is the law of war that “covers the detainees,” not international human rights law instruments such as the ICCPR) (citing Brief for Appellees, at 45–46, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 02-55367 (9th Cir. 2002)); cf. Yoo, *supra* note 9, at 1230–31 (observing that application of CAT to the “extraterritorial detention of prisoners of war would create an unacceptable conflict with the GPW”). It is unclear whether Professor Yoo would take the same view regarding a detainee clearly within U.S. territory (e.g., Jose Padilla or Ali Saleh al-Marri, both of whom are held as enemy combatants within the United States itself). His views may be worthy of particular attention, however, in light of the possibility that his 2004 article reflects the contents of an as-yet-unreleased March 13, 2002, memorandum to William J. Haynes, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, titled *The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (March 13, 2002). See Letter from Sen. Patrick Leahy to Alberto R. Gonzales, Counsel to the President (Jan. 4, 2005) (describing the March 13, 2002, memo), available at <http://leahy.senate.gov/press/200501/Gonzales010404.pdf>.

206. See, e.g., U.N. Gen. Assembly, Int’l Law Comm’n, *First Report on the Effects of Armed Conflicts on Treaties*, ¶¶ 86–87, U.N. Doc. A/CN.4/552 (Apr. 21, 2005) (prepared by Ian Brownlie, Special Rapporteur); Dennis, *supra* note 64, at 133 (stating that “there is no clear understanding concerning the precise manner in which the obligations assumed by states under international human rights treaties interact with the *lex specialis* of international humanitarian law”); Memorandum from the Secretariat, International Law Commission, “The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine,” to the General Assembly 22–24 & n.114, U.N. Doc. A/CN.4/550 (Feb. 1, 2005) (surveying the literature).

207. See, e.g., U.N. Human Rights Comm’n, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, *Second Periodic Report Addendum, Israel*, ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (2001) (citing the “well-established distinction between human rights and humanitarian law under international law” and concluding that the Committee’s mandate, tied as it is to the scope of Israel’s ICCPR obligations, “cannot relate to events in the West Bank and Gaza Strip, inasmuch as they are part and parcel of

versely, some have contended that the restraints imposed by human rights instruments not only apply at all times, but that they should also supersede more permissive restraints imposed by IHL.<sup>208</sup> To the extent that there is a prevailing view, however, it may lie between these extremes.

It helps to begin with a brief discussion of the concept of *lex specialis derogate lex generali*. *Lex specialis* addresses the situation in which two different rules apply to the same subject-matter (without respect to whether the competing rules derive from different sources or a common origin). In such cases, a choice may have to be made as to the priority of the competing rules. Where one rule is more specific than the other, the *lex specialis* rule provides that the more specific rule controls.<sup>209</sup> This can be understood as the specific rule outright displacing the general one, or instead as the two rules being harmonized (in the direction of the more specific rule) through interpretation.<sup>210</sup>

Famously, the *lex specialis* rule played a critical role when the International Court of Justice considered the relationship of IHL and human rights law in the course of its 1996 advisory opinion

the context of armed conflict as distinct from a relationship of human rights"). Israel also contends that its ICCPR obligations do not extend to the West Bank and Gaza Strip, on non-extraterritoriality grounds. *See id.* But see U.N. Human Rights Comm'n, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observation of the Human Rights Committee: Israel 21/08/2003*, U.N. Doc. CCPR/CO/78/ISR (2003) (disagreeing with both propositions).

208. *See, e.g.*, David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT'L L.J. 231, 259–63 (2005) (arguing that the law of war and IHRL are “fundamentally incompatible with each other,” and that IHRL could just as well be viewed as the *lex specialis* relative to the *lex generalis* of the Law of War); *Human Rights Report*, *supra* note 182, ¶¶ 22–24 (suggesting that IHRL and the Law of War apply “cumulatively” and “should be interpreted and applied as a whole so as to accord individuals during armed conflicts the most favorable standards of protection”); The Int'l Inst. of Humanitarian L. [“IIHL”] & The Int'l Comm. of the Red Cross [“ICRC”], *Summary Report, International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence 8* (2003) [hereinafter *Summary Report*], available at [http://www.help.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/\\$File/Interplay\\_other\\_regimes\\_Nov\\_2003.pdf](http://www.help.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf) (noting view of some participants, “strongly criticized” by others, that the rule providing the “highest protection” to the individual should apply in the event of inconsistency).

209. *See* Martii Koskenniemi, Int'l Law Comm'n, Study Group on Fragmentation, *Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of “Self-Contained Regimes”: An Outline* at 4 (2003), available at [http://www.un.org/law/ilc/sessions/55/fragmentation\\_outline.pdf](http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf); *see also* U.N. Gen. Assembly, *Report of the International Law Commission*, ¶ 305 at 285, U.N. Doc. A/59/10 (2004) [hereinafter *ILC Report*] (describing the *lex specialis* rule as “widely accepted” and providing policy arguments in support of it).

210. *See ILC Report*, *supra* note 209, ¶ at 287 (asserting that the distinction is not significant).

*The Legality of the Threat or Use of Nuclear Weapons*.<sup>211</sup> The ICJ first observed that the right against arbitrary deprivation of life found in human rights law was non-derogable even in the context of armed conflict. But that did not make IHL provisions addressing the same issue irrelevant. On the contrary, the ICJ used those IHL concepts to flesh out the meaning of the IHRL standard—arbitrariness—in that context.<sup>212</sup> In short, the ICJ relied on *lex specialis* not to displace a non-derogable human rights norm but, instead, to interpret that norm to conform to the more particular provisions of IHL.<sup>213</sup> The same approach also was employed by the Inter-American Court of Human Rights in another much-discussed case, *Abella v. Argentina*.<sup>214</sup> Although uncertainty remains with respect to whether the *lex specialis* rule applies equally in the converse situation in which the relevant IHL provision is less specific than the relevant human rights law provision,<sup>215</sup> some degree of consensus has emerged that harmonization via *lex specialis* is the preferable approach to reconciling the tensions raised when IHL and human rights regimes apply simultaneously.<sup>216</sup>

According to this approach, the fact that GTMO transfers may be subject to IHL constraints does not displace CAT. It might, however, impact the manner in which one interprets the CAT Article 3 obligation. That is, if it can be shown that a specific IHL rule speaks to the *non-refoulement* issue in the context of armed conflict, then there is at least an argument for construing Article 3 in conformity with that rule.

211. *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996 I.C.J. 226, 256–57 (July 8).

212. *See id.* at 240.

213. *See id.*

214. *Abella v. Argentina*, Case 11.137, Inter-Am C.H.R. Report No. 58/97, OEA/Ser.L.V/II.98 doc.6 rev. ¶ 161 (1998) (relying on the law of war to inform the meaning of arbitrary deprivation of life).

215. *See Summary Report*, *supra* note 208, at 9 (describing “lively debate” on this topic).

216. *See id.* (describing the “great majority of the participants” as invoking the approach taken by the ICJ in *Nuclear Weapons*); U.N. Gen. Assembly, Human Rights Comm., *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004) (accepting that “more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of [ICCPR] rights”) (citing U.N. Gen. Assembly, Human Rights Comm’n, *General Comment No. 29[72]: Derogation from Provision of the Covenant During a State of Emergency*, 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)); *see also Human Rights Report*, *supra* note 182, ¶¶ 29–31 (surveying authorities and concluding that they are consistent with the ICJ’s approach).



IHL does in fact contain a number of rules that limit international detainee transfers in certain circumstances, including rules specifically concerned with potential abuse of detainees on the part of the receiving state. A careful examination of these rules that fully accounts for the significant variation in the circumstances of the GTMO detainees suggests, however, that none of these particular rules actually apply to these individuals.<sup>217</sup> As a result, the substantive meaning of CAT Article 3 remains unaffected by the wartime context notwithstanding the *lex specialis* rule. I turn now to a discussion of these IHL rules.

#### IV. IHL AND INTERNATIONAL DETAINEE TRANSFERS

Assuming that GTMO detainees are proper subjects of IHL, it is Geneva Law—governing the treatment of persons who are not combatants and those who once were but who have since become *hors de combat*—that concerns them. The phrase Geneva Law refers to the four Geneva Conventions of 1949, the two 1977 Additional Protocols to these treaties, and related principles of customary international law.<sup>218</sup> While the United States is not a party to the Additional Protocols of 1977 and does not accept that all their provisions reflect customary international law,<sup>219</sup> it is a party to all four of the Geneva Conventions of 1949.<sup>220</sup>

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217. Whether and to what extent detainees should receive the benefit of other IHL protections is beyond the scope of this article.

218. See, e.g., Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 281 [hereinafter GC]; Geneva Convention [III] Relative to the Treatment of Prisoners of War of August 12, 1949, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field of August 12, 1949, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

219. See, e.g., Martin P. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L & POLY 415, 420 (1987) (statement by Department of State Legal Adviser, Michael J. Matheson, identifying Protocol I provisions that are accepted as customary international law by the U.S.); Memorandum from W. Hays Parks et al., to John H. McNeil, Assistant Gen. Counsel, U.S. Dept of Def. (May 8, 1986) (on file with author) (same).

220. In discussing certain Geneva provisions in the pages that follow, I do not take a

### A. *Regarding International Detainee Transfers*

The Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 (“GPW”) contains a provision that speaks directly to the transfer issue. GPW Article 12 prohibits all international transfers of prisoners of war (“POWs”) except where two conditions are met: (i) the receiving state also is a party to the Geneva Conventions and (ii) the transferring state is satisfied that the receiving state will actually apply the conventions in its dealings with the transferred prisoner.<sup>221</sup> The first prong of Article 12 has no practical impact, as all but one state—Nauru—are parties to the Geneva Conventions and there is no reason to think that transfers to Nauru are in the offing. The second prong of GPW Article 12 has more bite. GPW expressly prohibits torture and abuse of POWs,<sup>222</sup> and Article 12 requires the transferring state to determine that the receiving state will not violate those prohibitions with respect to transferees.<sup>223</sup> Because the mechanics of this determination are left up to the transferring party,<sup>224</sup> however, it is far from clear that Article 12 protections would impose as much of a restraint as would CAT Article 3’s more-likely-than-not standard.

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position on the question of whether these provisions may be directly enforced in habeas litigation. *See, e.g., Hamdan*, 415 F.3d 33 (D.C. Cir. 2005) (answering “no” to that question). Because CAT Article 3 protections are enforceable on habeas, and because the meaning of those protections may be impacted by the meaning of comparable IHL provisions pursuant to *lex specialis*, the transfer rules of the Geneva Conventions have relevance even if not enforceable in and of themselves.

221. GPW, *supra* note 218, art. 12.

222. Prisoner of war benefits include protection from “acts of violence or intimidation and against insults,” *see id.* art. 13, and also freedom from “physical or mental torture . . . [and] any other form of coercion . . . to secure from them information of any kind whatever,” *see id.* art. 17. With respect to most (though not all) non-POW’s, GC Articles 31 and 32 prohibit all “measures of brutality whether applied by civilian or military agents,” and specify that “[n]o physical or mental coercion shall be exercised against protected persons . . . to obtain information from them or from third parties.” GC, *supra* note 218, arts. 31–32; *cf. Derek Jinks, The Declining Significance of POW Status*, 45 HARV. INT’L L. J. 367, 399–413 (2004) (arguing that non-POW detainees nonetheless receive substantial IHL protections pursuant to GC, Common Article 3, and Article 75 of Protocol I).

223. Article 12 also requires the transferring state to attempt to reacquire custody should it learn that the receiving state is not in fact complying with its convention obligations, but does not specify the nature or amount of evidence required to trigger this obligation. GPW, *supra* note 218, art. 12.

224. *See id.* art. 12 (referring to the transferor satisfying “itself”); *cf. Int’l Comm. of Red Cross, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* 136 (Jean S. Pictet ed., 1960) (arguing that “the future Protecting Power” of the detainee “would seem to be the best qualified authority to effect such an investigation”) [hereinafter Pictet’s *Commentaries, GPW*].

In contrast to GPW, the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("GC") (dealing with certain persons who do not qualify as prisoners of war under the terms of GPW) contains two transfer-related provisions that at the very least match the protections of CAT Article 3. The first is located in Article 45, a provision that appears in the section of GC addressing the rights of protected persons who are aliens located in enemy territory (i.e., persons located in the territory of a state with which their *own* state is at war, such as an Iraqi student in the United States during the 1991 Gulf War or an American journalist in Baghdad during Operation Iraqi Freedom). GC Article 45 not only duplicates the protections of GPW Article 12, but also adds that "[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."<sup>225</sup> The "reason to fear" language of Article 45 arguably connotes a more forgiving standard of proof than the more-likely-than-not rule for CAT Article 3.

GC Article 49 contains even stronger transfer-related language. This article appears in the section of GC addressing the rights of protected persons who are located in occupied territory. Such persons may not be transferred out of that territory for any reason other than protection from encroaching hostilities or "imperative military reasons;" even then, they must be "transferred back to their homes as soon as hostilities in the area in question have ceased."<sup>226</sup>

This mix of potential protections generates interesting possibilities. If GPW Article 12 applies to GTMO detainees, then pursuant to *lex specialis* there would be an argument for harmonizing CAT Article 3 protections *down* to the GPW Article 12 level; at the very least, application of GPW Article 12 would not lead to greater protections than those already afforded in this context by CAT. On the other hand, if GC Articles 45 or 49 apply, they might

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225. GC, *supra* note 218, art. 45. This language is similar to that found in the Refugee Convention, but unlike that convention it does not contain a security exception.

226. GC, *supra* note 221, art. 49. Cf. Memorandum from Jack L. Goldsmith, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Mar. 19, 2004) (draft), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 367 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (discussing other potential grounds for the removal of protected persons from occupied territory) [hereinafter THE TORTURE PAPERS].

exceed the protections afforded by CAT. A careful examination of the circumstances of the GTMO detainees vis-à-vis these particular rules, however, suggests that none of them apply, mooted the IHL issue altogether with respect to risk-of-torture concerns.<sup>227</sup>

### B. *Do the Conventions Apply to GTMO Detainees?*

The protections afforded by the Geneva Conventions are not equally applicable to all persons in all armed conflicts.<sup>228</sup> On the contrary, a series of questions must be answered affirmatively before concluding that a given treaty provision applies in a particular case. The professors at the U.S. Army Judge Advocate General's Legal Center and School refer to this "as the 'Right Kind of Conflict/Right Kind of Person' Inquiry."<sup>229</sup> First, one must examine the type of armed conflict in issue to determine whether it implicates the full range of protections under the Geneva Conventions, the limited protections set forth in Common Article 3 thereof, or—as some would argue—no Geneva Convention protections at all. Second, even assuming that the type of conflict in issue implicates the full range of potential protections, one must also determine whether the particular person in issue actually qualifies for protected status under one of the conventions.<sup>230</sup> These questions have proven particularly difficult with respect to persons captured in Afghanistan in connection with Operation Enduring Freedom and elsewhere around the world in connection with counterterrorism operations,<sup>231</sup> and the Bush Administra-

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227. Chairman of the Joint Chiefs of Staff, Instruction No. 5810.01B, *Implementation of the DOD Law of War Program* (Mar. 25, 2002), applicable to all military personnel, establishes as a matter of policy:

The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations.

*Id.* at 4(a). This leaves open the question, of course, as to what the law of war requires (even if applicable) in a particular context.

228. That said, it bears emphasis that the general thrust of the Geneva Conventions was to expand the range of protections afforded by international humanitarian law.

229. Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons or 'Extra-Conventional Persons': How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 *FORDHAM INT'L L.J.* 681, 722 (2005).

230. *Id.* at 722–25.

231. See JAG'S LEGAL CTR. & SCH., 1 LEGAL LESSONS LEARNED FROM AFGHANISTAN

tion's resolution of them has been the subject of considerable criticism.<sup>232</sup> In the pages that follow, I offer an analysis that concurs in some aspects of the Administration's approach while disagreeing with others.

### 1. The Right Kind of Conflict?

The starting point for categorizing an armed conflict<sup>233</sup> by type is "Common Article 2" of the Geneva Conventions, so-called because it appears in identical format in all four conventions. Common Article 2 functions as a jurisdictional prerequisite, stating that the protections of the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties*."<sup>234</sup> Put simply, Common Article 2 requires that there must be at least one party to the conventions fighting on each side in order to categorize the conflict as "international" in character and thus make possible consideration of the full range of Geneva Convention protections.<sup>235</sup>

On February 7, 2002, President George W. Bush resolved months of uncertainty<sup>236</sup> and internal debate<sup>237</sup> within his ad-

AND IRAQ 51, 53 (2004) ("The legal issues associated with detainee operations in Afghanistan were initially unsettled . . . . As the U.S. began detaining personnel, the most difficult issue was the status of Taliban and al Qaeda detainees.") [hereinafter LESSONS LEARNED], available at [http://www.globalsecurity.org/military/library/report/2004/oef\\_oif\\_volume1.pdf](http://www.globalsecurity.org/military/library/report/2004/oef_oif_volume1.pdf).

232. See, e.g., Kantwill & Watts, *supra* note 229, at 687, 702–08.

233. Some deny that there is an "armed conflict," at least with respect to the relationship between the United States and al Qaeda. See, e.g., Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 8 n.16 (2001). But see Bradley & Goldsmith, *supra* note 3, at 2066–72.

234. See GPW, *supra* note 218, art. 2 (emphasis added). Common Article 2 also is triggered by a case of "partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." *Id.*

235. GPW Article 2 specifically contemplates the possibility that non-parties may also be involved in the armed conflict. *Id.* (stating that in such a case, the parties remain bound vis-à-vis one another, and even are bound in their relations to the non-party "if the latter accepts and applies" the conventions).

236. "The legal issues associated with detainee operations in Afghanistan were initially unsettled . . . . As the U.S. began detaining personnel, the most difficult unsettled issue was the status of Taliban and al Qaeda detainees." LESSONS LEARNED, *supra* note 231, at 51, 53.

237. Detainee status issues were the subject of intense interagency dispute, with the Department of State resisting positions taken by the Department of Justice Office of Legal

ministration by determining that Common Article 2 had been triggered with respect to the Taliban, but not with respect to al Qaeda.<sup>238</sup> It is unclear that either determination is entirely correct.<sup>239</sup>

#### a. Armed Conflict with the Taliban

Both the United States and Afghanistan were High Contracting Parties to the Geneva Conventions at the time combat operations began on October 7, 2001, and thus, insofar as the Taliban had sufficient *de facto* authority to exercise belligerent rights on Afghanistan's behalf, the conflict between the United States and the Taliban was a Common Article 2 conflict as of that date.<sup>240</sup> The President's order thus was correct with respect to the Taliban, at least in retrospect.<sup>241</sup> But by the time the President's or-

Counsel in a series of memoranda that preceded the President's February 7, 2002, order. See Memorandum from Alberto R. Gonzales to President George W. Bush (Jan. 25, 2002) (draft), *reprinted in* THE TORTURE PAPERS, *supra* note 226, at 118 (stating that the President determined on January 18, 2002, that the Geneva Conventions do not apply to al Qaeda and the Taliban, and describing and advising against Department of State requests for reconsideration); Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002) (draft), *reprinted in* THE TORTURE PAPERS, *supra* note 226, at 38 (arguing that the Geneva Conventions did not apply to either); Memorandum from John Yoo, Deputy Assistant Att'y Gen. & Robert Delahunty, Special Counsel to William H. Taft, Legal Advisor, Dep't of State (Jan. 14, 2002) (responding to a January 11th memorandum from Taft commenting on their January 9th draft), *available at* <http://www.cartoonbank.com/newyorker/slideshows/02yootaft.pdf>; Memorandum from Colin L. Powell to Alberto R. Gonzales, Counsel to the President & Condoleeza Rice, Assistant to the President for Nat'l Sec. Affairs (Jan. 26, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 226, at 122 (seeking reconsideration of the January 9th OLC memo); Memorandum from William H. Taft, IV, Legal Advisor, Dep't of State to Alberto R. Gonzales, Counsel to the President (Feb. 2, 2002), *reprinted in*, THE TORTURE PAPERS, *supra* note 226, at 129 (criticizing the January 9th OLC memo).

238. Memorandum from President George W. Bush to Vice President Richard B. Cheney, et al., (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 226, at 134.

239. This is not to say that it necessarily would be proper for a court, having the occasion to consider the President's resolution of these questions, to insist upon a different outcome. *Cf. Hamdan*, 415 F.3d 33, 41-42 (D.C. Cir. 2005) (asserting that courts are bound by the President's conclusion that the conflicts with the Taliban and al Qaeda are distinct, and that the President's interpretation of ambiguous provisions in the Geneva Conventions must control so long as it is reasonable).

240. *Cf. GC*, *supra* note 218, art. 6 ("The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2."). Prior to Operation Enduring Freedom, an internal armed conflict within the meaning of Common Article 3 existed in Afghanistan, between the Taliban and the Northern Alliance.

241. LESSONS LEARNED, *supra* note 231, at 14 (identifying December 17, 2001, as the close of the "first phase"). Notably, the President reached this conclusion notwithstanding

der issued in February 2002, much had changed. Most notably, the Taliban had been deposed as the de facto government of Afghanistan. On December 7, remaining members of the Taliban regime had fled Kandahar,<sup>242</sup> and on December 22, 2001, the Afghan Interim Authority—a provisional government headed by Hamid Karzai—had taken office.<sup>243</sup> With the Taliban removed from power and a friendly government thus in place in Kabul, the United States and its allies at that point no longer were in conflict with a High Contracting Party to the conventions.<sup>244</sup> Nonetheless, the Bush Administration takes the view that hostilities in Afghanistan retained—and continue to retain—their Common Article 2 character.

Can this be correct? The question matters a great deal, given that some detainees were captured before and others after the downfall of the Taliban regime.<sup>245</sup> Some have questioned the administration's view and suggest that the conflict in Afghanistan has evolved into an internal armed conflict in which the United States participates at the invitation of the Karzai Administration.<sup>246</sup> There is a substantial argument, however, to support the

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advice from the Office of Legal Counsel that Afghanistan was a "failed state" whose status as a High Contracting Party had lapsed, and that the Taliban in any event exercised insufficient authority to act on Afghanistan's behalf. Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel to William J. Haynes, II, Gen. Counsel, Dep't of Def. (draft) (Jan. 9, 2002) (*reprinted in* THE TORTURE PAPERS, *supra* note 226, at 38).

242. See LESSONS LEARNED, *supra* note 231, at 14.

243. The Afghan Interim Authority, as well as the Loya Jirga and Transitional Authority that followed it, was the product of a U.N.-sponsored conference of representatives from various Afghan factions who met in Bonn, Germany in December 2001. See International Security Assistance Force (ISAF)—Interim Administration of Afghanistan ("Interim Administration"): Military Technical Agreement, Jan. 4, 2002, 41 I.L.M. 1032.

244. Common Article 3 arguably came into play at that point—hostilities continued but no longer had an "international" character within the meaning of Common Article 2—but for present purposes that issue is moot, as none of the provisions of the "mini-convention" speak to the transfer issue.

245. Note that the issue of whether the conflict with the Taliban continues to have Common Article 2 status is distinct from the issue of when the conflict itself comes to an end. For discussions relating to the latter issue, see Bradley & Goldsmith, *supra* note 3, at 2123–27; Stephen I. Vladeck, *When Wars Don't End*, 1 J. NAT'L SEC. L. & POL'Y (forthcoming 2006) (manuscript on file with author).

246. See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 505 (2003) (stating that the case for treating the conflict in Afghanistan as an internal conflict has become "absolute"); cf. JENNIFER ELSEA, CONG. RESEARCH SERV., *Treatment of 'Battlefield Detainees' in the War on Terrorism* 13 (2005), available at <http://www.fas.org/irp/crs/RL31367.pdf> (noting this possibility).

view that the conflict with the Taliban continues to satisfy the Common Article 2 trigger.

Common Article 2 does not itself purport to describe the circumstances that bring a covered conflict to an end. Other provisions, however, provide at least indirect support for the Bush Administration's perspective. Most notably, GC Article 6 specifies that "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations."<sup>247</sup> According to Pictet's commentaries, the *rapporteur* of the committee that drafted this language understood it to refer to the moment "when the last shot has been fired."<sup>248</sup> Pictet adds that the general close may be identified by "an armistice, a capitulation or simply [a] 'debellatio,'" i.e., "the occupation of the whole of the enemy's territory and the cessation of all hostilities, without a legal instrument of any kind."<sup>249</sup> Pictet concludes that "[i]t must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned."<sup>250</sup> To reinforce the point, he notes that "the armistice which ended the struggle between France and Germany in 1940 did not represent the general close of military operations in the sense in which the phrase is used in the Convention we are discussing."<sup>251</sup>

Although there is no parallel provision in the other Conventions—each contains language to the effect that protected persons continue to receive convention benefits until repatriated—the relatively clear statement in GC Article 6 provides considerable support for the view that an armed conflict may retain its Common Article 2 character, formally even if not functionally, after the hostile regime of the opposing High Contracting Party loses its authority.<sup>252</sup> The question is an ambiguous one, but the Ad-

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247. GC, *supra* note 218, art. 6.

248. See Int'l Comm. of Red Cross, *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, at 62 (Jean S. Pictet ed., 1958) (quoting 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 at 815 (1963)) (internal quotation marks omitted).

249. *Id.* at 62 & n.6.

250. *Id.*

251. *Id.*

252. The relevance of GC Article 6 decreases somewhat if one takes the view that GC protections apply only in two geographic contexts: a belligerent state's own territory and foreign territory that has been formally occupied. See *infra* notes 359–61 and accompanying text. Even if that interpretation is correct, however, Article 6 still demonstrates that



ministration at least arguably is justified in its characterization of the ongoing conflict with the Taliban.<sup>253</sup> The conflict thus both was—and is—of the “right type” insofar as Taliban detainees are concerned.

#### b. Armed Conflict with al Qaeda

The situation with respect to al Qaeda is more complicated. President Bush, in his February 2002 memorandum, drew a sharp distinction between the armed conflict with al Qaeda and the armed conflict with the Taliban. Whereas he found the latter to be a Common Article 2 conflict, he determined that the former was not, at least in part because al Qaeda is not and cannot be a High Contracting Party to the Conventions.<sup>254</sup> The D.C. Circuit, moreover, has recently held that the President is entitled to deference in making this “political-military decision.”<sup>255</sup>

It certainly is true that al Qaeda is not and cannot be a party to the conventions. And *if* it is proper to segregate the entirety of the conflict with al Qaeda from that with the Taliban for purposes of the Geneva analysis, then it does follow that Common Article 2 does not apply to the former. But, it is not entirely clear that all aspects of the conflict with al Qaeda can be so cleanly carved off from the conflict with the Taliban. It is difficult to square that approach with the fact that a key component of the conflict between the United States and al Qaeda took place in Afghanistan in circumstances that were intimately intertwined with the Common Article 2 conflict with the Taliban.<sup>256</sup> One might therefore argue that the conflict with al Qaeda, though not a Common Article 2 conflict standing alone, becomes part of one insofar as combat in Afghanistan is concerned.

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the functional benefits of Common Article 2 status continue to exist, even if limited in geographic scope, beyond the formal collapse of the opposing regime.

253. Similar uncertainty surrounds the status of the armed conflict in Iraq.

254. See Memorandum from President George W. Bush to Vice President Richard B. Cheney, et al., *supra* note 238, at 1–2.

255. *Hamdan*, 415 F.3d 33, 41–42 (D.C. Cir. 2005) (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

256. The same conclusion may apply to the activities of al Qaeda in Iraq, which the Administration also considers to be a Common Article 2 conflict.

Assume for the moment that this argument is correct.<sup>257</sup> It would follow that the conflict is of the “right type” as to some al Qaeda detainees (those captured in Afghanistan) but not others (those captured elsewhere). A careful reconstruction of the publicly available information about the location and circumstances of capture of GTMO detainees suggests that there are substantial numbers of detainees in both categories.<sup>258</sup> With respect to those captured outside Afghanistan, the Common Article 2 trigger is not satisfied and the aforementioned transfer provisions cannot apply.<sup>259</sup> With respect to those captured in Afghanistan, however, it is arguable that the trigger is satisfied. As to that sub-set of al Qaeda detainees, as with the Taliban detainees mentioned above, the analysis must continue.

## 2. The Right Kind of Person?

The next question is whether any of these detainees—those held as Taliban members and those held as al Qaeda members

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257. If it is not correct—if the correct view is that expressed by the majority of the panel in *Hamdan v. Bush*, that the conflict with al Qaeda is not in any respect an international armed conflict within the meaning of Common Article 2—then a question arises as to whether the conflict necessarily should be classified as a Common Article 3 conflict or as a conflict to which the Conventions simply do not speak. The Geneva Conventions each contain an identical Article 3, known as Common Article 3 or the “mini-convention,” designed to provide a set of baseline protections for persons involved in at least some armed conflicts that do not satisfy the Common Article 2 requirement. The textual trigger for application of Common Article 3 is the existence of an armed conflict “not of an international character,” language which could be read in either of two ways. First, it could refer to any conflict not between two states, a reading which draws strength from the Common Article 2 definition of an international armed conflict as a conflict between two or more High Contracting Parties, i.e., state parties to the Convention. Second, it could be read in a narrow geographic sense to refer to conflicts confined within one state’s border, i.e., civil war. The Bush Administration endorses the geographic view, see, e.g., Letter from John Yoo & Robert J. Delahunty to William H. Taft, IV, *supra* note 237 at 1, 3, and this position recently was upheld by a divided panel of the D.C. Circuit in *Hamdan*, 415 F.3d at 41–42. But see *Hamdan*, 415 F.3d at 44 (Williams, J., concurring) (arguing that Common Article 3 does apply). The merits of that important dispute are beyond the scope of this article, however, as Common Article 3 contains no provisions specific to the issue of detainee transfers and thus has no impact on the risk-of-torture issue even if applicable.

258. See Chesney, *supra* note 21, Online Appendix Table B [hereinafter Table B].

259. It may not be so easy to draw a distinction between captures in Afghanistan in connection with Operation Enduring Freedom and captures “elsewhere,” particularly when one considers that many detainees were captured in Pakistan after fleeing from hostilities in Afghanistan. It proves unnecessary to unravel this complication, however, in light of the conclusions set forth below regarding the availability of transfer-related Geneva protections even for those who were clearly detained in the context of a Common Article 2 conflict.

captured in Afghanistan<sup>260</sup>—qualify for protected status under either convention, or if instead they are “extra-conventional” persons who fall into supposed gaps in the conventions’ coverage.

#### a. Prisoner of War Status

GPW provides its protections, including the Article 12 transfer rule, only to those who qualify as POWs. The requirements for obtaining such status are specified in GPW Article 4. Article 4(A) provides that any person who falls “into the power of the enemy” constitutes a POW if he or she falls within any one of the six following categories:<sup>261</sup>

- 4(A)(1) – *Armed Forces of a Party*<sup>262</sup> – “Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.”<sup>263</sup>

- 4(A)(2) – *Unincorporated Militia/Volunteers* – “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, or organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;

- (b) that of having a fixed distinctive sign recognizable at a distance;

- (c) that of carrying arms openly;

- (d) that of conducting their operations in accordance with the laws and customs of war.”<sup>264</sup>

260. The following discussion assumes for the sake of argument that the detainees are in fact Taliban or al Qaeda members. Many, if not most, of the detainees, of course, claim that they are not members of the Taliban or al Qaeda at all, but instead are innocent civilians held by mistake. For discussions of the issues associated with the factual debates regarding classification of detainees, compare Bradley & Goldsmith, *supra* note 3, at 2107–16, with Ryan Goodman & Derek Jinks, *Replies, International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654–58 (2005).

261. Article 4(B) goes on to identify additional scenarios that may result in POW status, but none are at issue here.

262. The italicized labels are mine, added for clarity’s sake.

263. GPW Art. 4(A)(1).

264. *Id.* Art. 4(A)(2) (emphasis added).

- 4(A)(3) – *Armed Forces of Unrecognized Power* – “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>265</sup>

- 4(A)(4) – *Civilians Accompanying the Armed Forces* – “Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization, from the armed forces which they accompany . . . .”<sup>266</sup>

- 4(A)(5) – *Civilian Crew* – “Members of crews . . . of the merchant marine and the crews of civil aircraft of the Parties to the conflict . . . .”<sup>267</sup>

- 4(A)(6) – *Levee en Masse* – “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly to respect the laws and customs of war.”<sup>268</sup>

One of the most notable features of the Article 4(A) categories is the fact that only Articles 4(A)(2) and 4(A)(6) refer expressly to behavioral preconditions for obtaining POW status; the other provisions, by their text, are merely status-based. Thus, Article 4(A)(1) on its face merely requires the detainee to be a member of a state’s armed forces, whereas Article 4(A)(6) requires a member of a levee en masse both to carry arms openly and respect the laws and customs of war, and Article 4(A)(2) requires members of unincorporated militias, volunteer groups, and resistance movements to comply not only with those two criteria but also to have a command hierarchy and to wear insignia visible at a distance. Thus, a pure textualist understandably might conclude that the

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265. *Id.* Art. 4(A)(3). Note that Article 4(A)(3) refers to “regular armed forces,” whereas Article 4(A)(1) refers merely to “armed forces.” Professor Levie concludes that this distinction merely reflects “bad draftsmanship, the intent of the draftsmen having been the same in both cases.” HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 36 n.138 (1978).

266. *Id.* Art. 4(A)(4).

267. *Id.* Art. 4(A)(5).

268. *Id.* Art. 4(A)(6).

four criteria specified in Article 4(A)(2) as preconditions for POW status (or the two listed in Article 4(A)(6)) are not also preconditions for POW status under the other categories.

This is perhaps what one would expect with respect to Articles 4(A)(4) and (5), both of which refer to civilians who presumably ought not to be engaging in the types of activities regulated by the four conditions in the first place. But the same is not true with respect to Articles 4(A)(1) and (3), which refer to the members of the armed forces. Is it really the case that members of the armed forces obtain POW status even when they or their group do not comply with one of the four conditions? This issue is the subject of considerable controversy, and it bears directly on the question of whether Taliban or al Qaeda detainees might plausibly claim POW status.

#### i. Taliban Members

Should any members of the Taliban have POW status in light of these provisions? President Bush in his February 7, 2002, memorandum determined that they may not, although he did not specify the grounds for this determination other than to say that the Taliban are “unlawful combatants” according to facts supplied by the Department of Defense and advice supplied by the Department of Justice.<sup>269</sup> Office of Legal Counsel memoranda from January 9 and January 22, 2002, however, describe the basis for this conclusion.<sup>270</sup>

In light of the fact that the United States and its allies did not recognize the Taliban as the legitimate government of Afghanistan, OLC’s treatment of this issue began by considering whether Taliban members could qualify under Article 4(A)(3), which extends POW status to “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by

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269. Memorandum from President George W. Bush to Vice President Richard B. Cheney et al., *supra* note 238, at 2. For the contrary view, see *The Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9–10 (2005) (statement of Harold Hongju Koh) (criticizing Attorney General Gonzales’s position that Taliban fighters, essentially acting as Afghanistan’s army, were not entitled to POW status).

270. See Memorandum from John Yoo & Robert J. Delahunty to William J. Haynes II, *supra* note 237; see also Memorandum from Jay S. Bybee, Assistant Att’y Gen. to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 22, 2002) [hereinafter Bybee Memo], *reprinted in* THE TORTURE PAPERS, *supra* note 226, at 81.

the Detainee Power.”<sup>271</sup> According to the memo, the Taliban failed this test for several reasons.

First, OLC questioned whether the Taliban itself could qualify as a “government or an authority” within the meaning of Article 4(A)(3), in light of the fact that no other state in the world recognized the Taliban as the government of Afghanistan once Pakistan had withdrawn its recognition.<sup>272</sup> At first blush, this argument appears to conflict with the manifest purpose of Article 4(A)(3) to eliminate lack of diplomatic recognition as a grounds for denying POW status. It finds direct support, however, in Pictet’s commentary on Article 4(A)(3). Pictet recognized the potential for Article 4(A)(3) to be abused by self-recognized armed bands such as the unaffiliated “Great Companies” that plagued Fourteenth Century France during the 100 Years’ War.<sup>273</sup> He also observed that Article 4(A)(3) was a direct response to the status issues that arose during the Second World War with respect to members of the Free French Forces and, also, certain Italian forces that fought against Germany from late 1943 onward.<sup>274</sup> Synthesizing these concerns, Pictet viewed a third-party recognition requirement as an implicit component of Article 4(A)(3): “It is not expressly stated that this Government or authority must, as a minimum requirement, be recognized by third States, but this condition is consistent with the spirit of the provision, which was founded on the specific case of the forces of General de Gaulle.”<sup>275</sup>

If Pictet’s interpretation is correct, then the lack of any diplomatic recognition of the Taliban as a legitimate governing authority counts heavily against application of Article 4(A)(3). However persuasive that argument is in the abstract, though, President Bush’s February 7 memorandum foreclosed it by determining that a Common Article 2 conflict exists with respect to the Taliban. That determination necessarily presumed that the Taliban constituted the government of Afghanistan and thus qualified as a High Contracting Party (or at least this was so in 2001). That being the case, it is difficult, if not impossible, to argue that the Taliban simultaneously was not a “government or an authority” within the meaning of Article 4(A)(3).

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271. Memorandum from John Yoo & Robert J. Delahunty to William J. Haynes II, *supra* note 237, at 25.

272. GPW, *supra* note 218, art. 4(A)(3).

273. Pictet’s *Commentaries*, GPW, *supra* note 224, at 63.

274. *Id.* at 61–62.

275. *Id.* at 63.

It does not follow, however, that the Taliban's armed members receive the benefit of Article 4(A)(3). In fact, the OLC memorandum argues in the alternative that Taliban fighters cannot so qualify, apparently taking the view that the four conditions expressly stated in Article 4(A)(2), i.e., having a command hierarchy; wearing of fixed insignia; carrying arms openly; and complying with the laws of war, should be read into Article 4(A)(3) as well.<sup>276</sup> This argument directly engages the controversy mentioned above.

Notwithstanding the awkward fact that the four conditions are expressly stated only in connection with Article 4(A)(2), there is considerable authority for the proposition that they ought to be read into Articles 4(A)(1) and (3) as well, on the theory that they are inherent in the definition of the term "armed forces" used in those categories. The argument boils down to the claim that the drafters of Article 4(A), following the practice under various predecessors to the 1949 Geneva Conventions, assumed that it would be understood that an "armed force" was a group that had these characteristics.<sup>277</sup> We might call this the "implicit inclusion" interpretation.

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276. See Memorandum from John Yoo & Robert J. Delahunty to William J. Haynes II, *supra* note 237, at 90 (stating that the Article 4(A)(2) requirements "also apply to any regular armed force under other treaties governing the laws of armed conflict"). In support of that statement, the OLC memorandum cites the 1907 Hague Convention, relevant portions of which are discussed *infra* at notes 295-97 and the accompanying text. See also ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE* 161-62 (2005) (describing presentation given to GTMO personnel on the detainee status issue, during which the presenter emphasized, without distinguishing between al Qaeda and the Taliban, the detainees' lack of a command structure, their failure to comply with IHL, and their failure to wear uniforms).

Many commentators have observed that two additional criteria are implicit additions to the list of four criteria in Article 4(A)(2): that the group be organized and that it be subordinate to a government of a State involved in the armed conflict. See, e.g., G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, reprinted in *REFLECTIONS ON LAW AND ARMED CONFLICT: THE SELECTED WORKS ON THE LAW OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER*, OBE 206, 217 (Michael A. Meyer & Hilaire McCoubrey eds., 1998). For ease of reference in this article, however, I will continue to refer to the "four" conditions of lawful belligerency.

277. See, e.g., MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 234 (1982) ("It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered to be unnecessary and redundant to spell them out . . ."); JOSEPH BAKER & HENRY CROCKER, *DEPT OF STATE, THE LAWS OF LAND WARFARE CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS* 24 (1919) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces.").

The implicit inclusion interpretation has received an impressive array of support, having been endorsed by commentators including John Yoo,<sup>278</sup> Yoram Dinstein,<sup>279</sup> W. T. Mallison,<sup>280</sup> and, most recently, the International Committee of the Red Cross (in its multi-volume attempt at a restatement of the customary aspects of international humanitarian law).<sup>281</sup> It also has normative appeal. Requiring compliance with the four conditions as a prerequisite to status even for members of the armed forces increases their incentives to distinguish themselves from civilian populations and more generally to comply with the law of war.

But does the implicit inclusion interpretation reflect the actual intent of the United States in becoming a party to GPW? The ratification history associated with the issue is inconclusive. The one direct reference appears to be a passage in the 1955 report of the Committee on Foreign Relations urging Senate consent to the Conventions, which raises the topic in connection with the issue of whether the Conventions would extend POW status to members of organized resistance movements known as “partisans.”<sup>282</sup> The report observes that under GPW Article 4, “[s]uch movements are placed on the same footing as militia and volunteer corps not forming part of the regular armed forces,” and thus that “[b]oth these groups and partisans must conform to [the four conditions].”<sup>283</sup> There is a plausible argument that the specific reference to militia and volunteer corps not forming part of the regular armed forces supports the reading that the four conditions apply only to those groups as to whom the conditions are expressly

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278. See John C. Yoo & James C. Ho, *Status of Terrorists*, 44 VA. J. INT'L L. 207, 219–20 (2003).

279. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 36 (2004) (stating that “regular forces are not absolved from meeting the cumulative conditions binding irregular forces,” and that there is a “presumption that regular forces would, by their very nature, meet those conditions.”).

280. See Remarks of Professor W. T. Mallison, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 532 (1987) (arguing that Article 4(A) “insufficiently emphasizes that the criteria for regular combatants are identical with the criteria for irregular combatants”).

281. See 1 INT'L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 15 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

282. Geneva Conventions for the Protection of War Victims, Report of the Committee on Foreign Relations on Executives D, E, F and G, Ex. Rep. No. 9, 84th Cong., 1st Sess. (June 27, 1955), at 5.

283. *Id.*



stated in Article 4(A)(2), although the evidence is hardly conclusive on the point.

The extent to which the implicit inclusion interpretation finds support in the actual practice of the U.S. or other states is unclear,<sup>284</sup> in part because we lack research into the actual application of Article 4 (with respect to this issue) in the contexts of POW status determinations by the U.S. in Vietnam and in the first Gulf War. Another problem is the fact that many states, including the U.K. but not the U.S., have acceded to Protocol Additional (I) to the Geneva Conventions of 1949 ("AP I"), which departs in some ways from the GPW Article 4 framework. For this reason, discussions of status and compliance issues in recent editions of law of war manuals from other countries may provide only limited insight into the Article 4 interpretation issue.<sup>285</sup> This problem may also undermine the utility of the ICRC's "restatement" of CIL, mentioned above.

What of U.S. military manuals? U.S. Army Field Manual No. 27-10, the Law of Land Warfare, was published in 1956, shortly after U.S. accession to the Geneva Conventions. Unfortunately, the Manual does not take an express position on the issue of whether the four criteria specified in Article 4(A)(2) ought to be read into Articles 4(A)(1) and (3). In its paragraph on the definition of "prisoners of war," it merely quotes the entirety of Article 4.<sup>286</sup> It may be significant that the Manual goes on to provide in-

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284. Some commentators have rejected the implicit inclusion interpretation. *See, e.g.*, ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR* 328 (1976); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 *YALE J. INT'L L.* 325, 333-34 (2003).

285. *Cf.* U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* (2004) [hereinafter U.K. MILITARY MANUAL]. The newly minted U.K. Manual is, in any event, itself somewhat unclear on this issue. In its chapter on POW status, the Manual provides an outline of qualifying categories that seems to specify only two conditions as prerequisites to status for armed forces members (existence of a command hierarchy and an internal disciplinary system obliging compliance with the laws of war), while expressly listing all four of the Article 4(A)(2) conditions only with respect to the status of members of militias, volunteer corps, and resistance movements. *See id.* at 143-44. Elsewhere, however, the Manual states that failure to distinguish one's self from the civilian population (by, for example, not bearing arms openly and wearing a visible insignia) results in the denial of POW status. *See id.* at 43-44. *Cf.* UNITED KINGDOM WAR OFFICE, *MANUAL OF MILITARY LAW* 240 (1914) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces.").

286. *See* DEP'T OF THE ARMY, *FM 27-10, THE LAW OF LAND WARFARE*, ¶ 61 (1956) ("Prisoners of War Defined") [hereinafter *THE LAW OF LAND WARFARE*].

terpretive discussions of the four conditions, however, under a paragraph solely addressed to the “Qualifications of Members of Militias and Volunteer Corps.”<sup>287</sup> The interpretations provided in that section provide considerable insight into the Army’s understanding of what constituted compliance with each condition, but in keeping with the title of the paragraph, the interpretations are specifically geared to militias and volunteer groups, not the armed forces.<sup>288</sup> This arguably suggests that these criteria were not understood by some law of war experts at the time to apply to Articles 4(A)(1) and (3).<sup>289</sup>

The most significant problem with the implicit inclusion interpretation, however, concerns the negotiating history behind GPW Article 4. When the delegates assembled in April 1949 to begin the work that would become GPW, they had before them a draft convention produced in Stockholm, Sweden at the XVIIth International Red Cross Conference (1948) (the “Stockholm Draft”).<sup>290</sup> Article 3 of the Stockholm Draft closely resembled what ultimately would become GPW Article 4, although it ordered its categories in slightly different fashion. In relevant part, Article 3 of the Stockholm Draft read:

“Article 3. – Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

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287. *Id.* ¶ 64. The content of the interpretations under this heading—referring repeatedly to the activities of militias and volunteer corps, not the armed forces—reinforces the view that paragraph 64 has implications only for Article 4(A)(2). *See id.* So too does the express reference to Article 4(A)(2) as the source of the four conditions, at the outset of the paragraph. *See id.*

288. *See id.*

289. The Navy’s law of war manual—THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS—provides a degree of support for the view that the four conditions do not constitute preconditions to POW status for members of the regular armed forces. In a brief passage addressing POW status, the Handbook first observes that such persons are entitled to POW status on capture, and then in the next sentence observes that “[m]ilitia . . . and other partisans not fighting in association with the regular armed forces qualify for [POW] status upon capture, provided they [comply with the four conditions].” DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 11-2.

290. The Stockholm Draft is contained in 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 73 (2004) [hereinafter FINAL RECORD]. The Stockholm Draft, in turn, reflected the work of the ICRC at the Preliminary Conference of National Red Cross Societies in 1946 and the Conference of Government Experts in 1947. *See Pictet’s Commentaries, GPW, supra* note 224, at 6.

(1) Members of the armed forces of the Parties to the conflict, including members of voluntary corps which are regularly constituted.

(2) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.

...  
 (6) Persons belonging to a military organization or to an organized resistance movement constituted in an occupied territory to resist the occupying Power, on condition:

(a) That such organization has, either through its responsible leader, through the Government which it acknowledges, or through the mediation of a Party to the conflict, notified the occupying Power of its participation in the conflict.

(b) That its members are under the command of a responsible leader; that they wear at all times a fixed distinctive emblem, recognizable at a distance; that they carry arms openly; that they conform to the laws and customs of war; and in particular, that they treat nationals of the occupying Power who fall into their hands in accordance with the provisions of the present Convention.<sup>291</sup>

Consideration of Draft Article 3 at Geneva began on April 26th, 1949, at the second meeting of the relevant committee.<sup>292</sup> Rene-Jean Wilhelm, an ICRC legal expert assisting the committee in its deliberations, observed that Draft Article 3(6)—that which ultimately would become GPW Article 4(A)(2)—“was the trickiest part of Article 3.”<sup>293</sup> He explained that the Conference of Government Experts, convened in Geneva in 1947 to assist in the production of what became the Stockholm Draft, “had come to the conclusion that strict rules should be laid down governing the conditions which civilian combatants captured by the enemy should fulfil [sic] in order to be treated as prisoners of war.”<sup>294</sup> He added that most of the proposed conditions—including the four that would survive into Article 4(A)(2)—“had been accepted by all the Government experts without difficulty; they were the traditional conditions contained in the 1907 Hague Convention.”<sup>295</sup>

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291. 1 FINAL RECORD, *supra* note 290, at 74 (2004).

292. *See* 2-A *id.* at 237.

293. *Id.* at 240.

294. *Id.*

295. *Id.* The problematic suggestions were proposals to require the group to exercise control over territory and to provide notice to the Occupying Power of their intended belligerency. *See id.* Neither of these provisions are included in GPW Article 4(A)(2).

At this point, it is necessary to point out that the drafters in Geneva were not writing on a blank slate. On the contrary, a treaty regime governing POW status had been in place since 1907: the Regulations Respecting the Laws and Customs of War on Land, found in the Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (the "Hague Regulations").<sup>296</sup> Article 1 of the Hague Regulations read as follows:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."<sup>297</sup>

Returning to Geneva, then, Wilhelm's point with respect to Draft Article 3(6) seemed to be that the conditions listed therein had not raised objections among the Government experts because they already were familiar with the comparable provisions in Article 1 of the Hague Regulations. But even with that clarification, ambiguity remained. Did this mean that the conditions were traditional with respect to all claims of POW status, or merely with respect to claims by militia and volunteer corps? The phrasing of Hague Regulation Article 1 permits both readings. No one raised this question at the time of Wilhelm's statement on April 26th, but the question eventually would have to be addressed.

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296. The POW status portions of the Hague Regulations were incorporated by reference in the Geneva Convention Relative to the Treatment of Prisoners of War of 1929.

297. Hague Regulations, art. 1. The four conditions did not originate here, but can be traced back at least as far as the Brussels Conference of 1874, the unratified declaration from which contains quite similar language in its ninth article. See Brussels Declaration of 1874, art. 9 ("The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions . . . [listing the four conditions]."). Cf. W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 43-44 (1977) (describing origins of the four conditions in response to Prussian treatment of French irregulars during the Franco-Prussian war, but also asserting—without citation—that the conditions "are equally applicable to regulars").

On May 2, 1949, the delegates formed a special committee with a mandate to revise the wording of Draft Article 3.<sup>298</sup> Shortly after it began its work, the U.K. delegation offered an amendment to Draft Article 3 that would bring the four traditional conditions from the Hague Regulations directly into the draft text in additional locations.<sup>299</sup> In particular, the first category of Draft Article 3 would be changed to refer to those:

who . . . are in the service of an adverse belligerent as members of the armed forces including militia and volunteer corps, fulfilling the following conditions:

- (I) that of being commanded by a person responsible for his subordinates;
- (II) that of wearing a fixed distinctive sign recognizable at a distance;
- (III) that of carrying arms openly;
- (IV) that of conducting their operations in accordance with the laws and customs of war.<sup>300</sup>

Further, the proposed amendment also called for the four criteria to be stated as express preconditions to POW status under the second category of Draft Article 3.<sup>301</sup> Because this second category refers only to the regular armed forces and not also to militias and volunteer corps, there is little doubt that the U.K.'s proposal was meant to suggest that the four conditions were to be seen as prerequisites to POW status even for members of the armed forces.<sup>302</sup>

The fate of the U.K. proposal remained to be seen, as the special committee turned its attention to a range of other disputes arising under Draft Article 3, most of which concerned the effort under category (6) to extend POW status to at least some resistance groups in light of the recent experience of the Second World War.<sup>303</sup> An early sign that not all delegations agreed with the U.K. perspective on the broad reach of the four conditions of the Hague Regulations emerged on May 18th, however, when the

298. See 2-A FINAL RECORD, *supra* note 290, at 255 (2004).

299. See *id.* at 413-14.

300. See 3 *id.* at 61. Note that in the minutes of the committee meeting itself, there is a transcription of the U.K. delegate's oral rendition of this language, and in the transcription there is no comma between "corps" and "fulfilling." See 2-A *id.* at 414.

301. See 3 *id.* at 61.

302. This view was consistent with the interpretation of the Hague Regulations stated in the then-existing U.K. Military Manual. See *supra* note 285.

303. See 2-A FINAL RECORD, *supra* note 290, at 418-27.

head of the Soviet delegation, General Nikolai Slavin, mentioned in connection with a related point that the four conditions specified in the Hague Regulations were "conditions with which combatants *not belonging to the armed forces* must comply in order to qualify as belligerents."<sup>304</sup>

Subsequently, on June 23, 1949, the Rapporteur of the special committee produced a new working text meant to "sum[] up the previous discussions on Article 3."<sup>305</sup> Most notably, this working text incorporated the U.K. proposal described above. In relevant part (i.e., with respect to the members of the armed forces), POW status would be available to:

(1) Members of armed forces who are in the service of an adverse belligerent, as well as members of militia or volunteer corps belonging to such belligerent, and fulfilling the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of wearing a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

(2) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power, and who fulfil [sic] the conditions set out in sub-paragraphs (a), (b), (c), and (d) above.<sup>306</sup>

Not surprisingly, in light of his earlier remarks, the reading of this text prompted an immediate objection from the Soviets.<sup>307</sup> Slavin observed that under "the working text it would appear that members of the Armed forces would have to fulfil [sic] the four traditional requirements mentioned in (a), (b), (c) and (d) in order to obtain prisoner of war status."<sup>308</sup> This, he stated, "was contrary to the Hague Regulations."<sup>309</sup>

The first response came from Major-General Rene H.G. Devijver from Belgium, who contended not that Slavin was wrong

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304. See *id.* at 428 (emphasis added).

305. See *id.* at 465.

306. See *id.*

307. See *id.* at 466.

308. *Id.*

309. *Id.*

about the Hague Regulations but, instead, that Slavin was misreading the working text. Contrary to how Slavin had read it, Devijver claimed that "the working text carefully specified that only members of the militia or volunteer corps should fulfil [sic] all four conditions."<sup>310</sup> The special committee's chairman, Philippe Zutter of Switzerland, then intervened to propose an amendment that would eliminate the confusion.<sup>311</sup> In Zutter's formulation, POW status would apply to:

(1) Members of the armed forces who are in the service of an adverse belligerent.

(2) The militia and volunteer corps of this belligerent provided they fulfil [sic] the following conditions . . . . [listing the four conditions].<sup>312</sup>

This did not satisfy Slavin, who pointed out that under the Hague Regulations, some militia and volunteer corps could constitute part of the armed forces.<sup>313</sup> What was needed, he said, was text that imposed the four conditions only on militia and volunteer corps that were not incorporated within the armed forces.<sup>314</sup> That suggestion was taken up by a U.K. delegate, William Gardner from the War Office, who at this point proposed the language that (with a few alterations not bearing on this issue) exist today as GPW Articles 4(A)(1) and (2).<sup>315</sup> This mollified the Soviets, who moved for appointment of a working group to prepare a formal version of Gardner's language.<sup>316</sup> When that group later presented the special committee with the final revision of Draft Article 3—incorporating Gardner's solution to the Slavin objection—there was much discussion of other issues, but not a word said in opposition to citing the four conditions as conditions of POW status to be met only by militias and volunteer groups not constituting part of a state's armed forces.<sup>317</sup>

While none of the delegates had joined Slavin in stating expressly that the four conditions from the Hague Regulations are not preconditions to POW status for members of the regular

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310. *Id.*

311. *See id.*

312. *Id.* at 467.

313. *See id.*

314. *See id.*

315. *See id.*

316. *See id.*

317. *See id.* at 477-80.

armed forces, everyone who did respond to Slavin's objection did so in a way that clearly accepted his premise.<sup>318</sup> To the extent that any weight should be accorded to this negotiating history,<sup>319</sup> it contradicts the implicit inclusion interpretation of Article 4(A)(2).<sup>320</sup>

Not all of the arguments run entirely against the implicit inclusion interpretation, however. Notwithstanding the textual and historical arguments set forth above, at the end of the day there must be some criteria for recognition of the military entities that count as the "armed forces" within the meaning of Article 4(A)(1) and (3).<sup>321</sup> For states that have adopted AP I, identification of the

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318. Interestingly, this history has elicited relatively little scholarly comment. Although some have observed the significance of these exchanges, *see, e.g.*, ROSAS, *supra* note 284, at 328 (recognizing the rejection of the implicit inclusion interpretation during the special committee proceedings), many observers have offered accounts that somewhat miss the mark. *See, e.g.*, Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT. L. STUD., at 37 n.142 (1977) (observing only that "the Delegate of the Soviet Union . . . appeared to argue that none of the four requirements was applicable to members of the armed forces," but concluding that "it is believed that the interpretation here given [that the four requirements apply to all categories under Article 4] is more appropriate and much more widely accepted"); Mallison, *supra* note 280, at 532-33 (stating that "it was proposed on the floor of the conference that the four criteria for irregulars in article 4(A)(2) be amended and specified as applying to regulars under article 4(A)(3)," and that the "response was that it was so well-known that these same four criteria applied to regular combatants that it was actually not necessary to specify it at all"); *see also* Mallison & Mallison, *supra* note 297, at 48 (acknowledging failure of British effort to have the four conditions stated expressly with respect to regular forces, but concluding that this effort failed not because it was rejected on the merits but because the point was taken to be understood already).

319. One can object, of course, that little weight should be accorded these negotiating details because they do not necessarily reflect the views of the states involved as signatories to the GPW. *But see* The Vienna Convention on the Law of Treaties, art. 32, Nov. 8, 1972, 23 U.S.T. 3227, 8 I.L.M. 679 (indicating that one may resort to preparatory work in the event of textual ambiguity).

320. None of this is to suggest, of course, that members of armed forces have no obligation to obey the laws of war. On the contrary, whether granted POW status or not, violations of the laws of war may result in criminal prosecution. *See* G. I. A. D. Draper, *The Legal Classification of Belligerent Individuals*, in REFLECTIONS ON LAW AND ARMED CONFLICT 196, 203 (Michael A. Meyer & Hilaire McCoubrey eds. 1998) (observing that "[r]egular soldiers who systematically conduct their operations contrary to the law of war . . . are still entitled to POW status upon capture although they may be tried, as POW, for their war criminality before capture," in contrast to "fighters who are not soldiers" who must comply with the four factors); Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, in *id.* at 213 (similar). *Cf.* Levie, *supra* note 164, at 37 n.144 (drawing a distinction "between a conventional war crime," the commission of which does not deprive the person of POW status, at least until conviction, and "other types of offenses such as acting as a spy or saboteur while wearing civilian clothes").

321. Some have argued that the matter can be resolved by reference to the domestic law of the state in question. *See* LEVIE, *supra* note 265, at 36. This is a plausible approach with respect to a modern state with a relatively developed framework of laws, but will not



relevant criteria is relatively simple. Article 43 of AP I provides an express definition of "armed forces." These consist of all units "which are under a command responsible to that Party for the conduct of its subordinates" and which are "subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."<sup>322</sup> While the United States is not a party to AP I (for other reasons),<sup>323</sup> the Article 43 approach may reflect the manner in which the same term is understood under the GPW framework, and goes a long way toward reconciling the disagreements set forth above.<sup>324</sup> On this view, at least two of the four traditional conditions (the existence of a command hierarchy, and the existence of a disciplinary structure enforcing compliance with the law of war) end up being read into Article 4(A)(1) and (3) after all.<sup>325</sup>

Assuming this to be the best interpretation of Article 4, further questions arise. When assessing compliance with the criteria discussed above, should the inquiry be carried out solely with reference to the conduct of the individual in question? Should the inquiry also take into account the activities of that individual's unit? The conduct of the entire enemy force? Some combination of the above factors?

Some elements of the POW status inquiry do not seem to be solely a question of an individual's particular activities or affiliations.<sup>326</sup> Consider the requirement of conducting operations in ac-

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help in cases such as Taliban-era Afghanistan.

322. AP I, art. 43(1).

323. See S. TREATY DOC. NO. 100-2, 100th Cong., 1st Sess. (summarizing problems with AP I, particularly Article 44 thereof).

324. See LEVIE, *supra* note 265, at 36 n.138 (citing Article 43 for this point).

325. According to U.S. ARMY FIELD MANUAL 27-10, persons who would qualify for POW status under Article 4(A)(1) lose that privilege if they "deliberately conceal their status [as combatants] in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces." THE LAW OF LAND WARFARE ¶ 74. Does this rule effectively read the fixed insignia condition into Rule 4(A)(1)? Arguably so, at least to a limited extent.

326. It is important here to distinguish between two distinct concerns that may arise with a detainee. One concern is whether the detainee merits POW status, which is to say that the detainee is properly detained but is entitled to the privileges associated with that status. The second, distinct question is whether the detainee is properly detained in the first place, which is to say that the detainee might be an innocent civilian who has not committed a belligerent act. In an ideal world, Article 5 would have been drafted to ac-

cordance with the laws and customs of war. According to U.S. Army Field Manual 27-10, the Law of Land Warfare, this condition “is fulfilled if *most of the members of the body* observe the laws and customs of war, *notwithstanding the fact that the individual member concerned may have committed a war crime.*”<sup>327</sup> The U.K.’s military manual goes a step further on a closely related point, stating explicitly that “[t]he decision to deny an armed group the status of ‘armed force’ under international law” for failure to maintain a disciplinary system enforcing law of war compliance “*must be taken at governmental level.*”<sup>328</sup> As to this factor, it may make little sense to envision an exclusively individualized inquiry during the status determination process; such procedures could result in an array of conflicting decisions about the same entity. The other conditions also arguably partake of a dual-character in this regard, as they too seem amenable to a reading that gives them both individual-compliance and group-compliance aspects.<sup>329</sup>

How do Taliban detainees fare under these standards? It is important to be frank about how indeterminate this inquiry actually is. Precisely how many IHL violations must occur before one can conclude that a force lacks systemic adherence? How recent must they have been? How serious in magnitude? Does it matter if the particular individual involved has strictly adhered to IHL, even if the group has not? There simply are no clearly dispositive legal answers to these questions.<sup>330</sup>

The United States government’s position is that the Taliban—as a group—failed to sufficiently adhere to IHL to warrant “armed forces” status. The OLC’s January 22, 2002, memorandum refers to a “series of ‘fact sheets’ issued [by the State Department] during the [Afghan] campaign,” providing descriptions of “atrocities committed by the Taliban and al Qaeda before and

count expressly for both concerns, but it was not so drafted. In actual practice during the first Gulf War, though, Article 5 tribunals did address the “innocent civilian” issue.

327. THE LAW OF LAND WARFARE ¶ 64.d (emphasis added).

328. U.K. MILITARY MANUAL, *supra* note 285, at 39 n.13 (emphasis added).

329. Writing on this point in 1973, Professor Draper stated that “[i]t is not possible to say with confidence that any one view is accepted as representing an established and accepted legal position.” See Draper, *The Status of Combatants*, *supra* note 320, at 217.

330. See Col. Kenneth W. Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 ISRAEL DEF. FORCES L.R. 69, 82 (2003) (stating, with respect to both GPW and AP I, that there “appears to be no firm consensus as to which of the conditions are collective and which are individual”).

during the United States' military operations."<sup>331</sup> With respect to the Taliban, these dispatches assert that Taliban forces had executed POWs, hid military personnel and equipment in civilian areas (including mosques), and intentionally attacked civilian populations.<sup>332</sup> From this, OLC concluded that "the Taliban militia regularly refused to follow the laws of armed conflict."<sup>333</sup> On this basis, it appears that the government has concluded that the Taliban's forces were not "regular armed forces" within the meaning of Articles 4(A)(1) or (3) for lack of systemic adherence to IHL principles, a conclusion that also would dispose of a claim of status under Article (4)(A)(2).<sup>334</sup> Given the indeterminacy of the quantitative issues associated with this determination,<sup>335</sup> it is dif-

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331. See Bybee Memo, *supra* note 270, reprinted in THE TORTURE PAPERS, *supra* note 226, at 100.

332. See *id.* It is unclear, however, what particular events support these claims.

333. *Id.* OLC made this assertion in support of the claim that the President could suspend the Conventions as to the Taliban, or alternatively, that the Taliban's Afghanistan was a "failed state" ineligible to claim High Contracting Party Status. See *id.* Regardless of those arguments, the assertion speaks directly to the Article 4(A)(3) issue.

334. See *Detention Policies and Military Justice: Hearing Before the Pers. Subcomm., Armed Servs. Comm.*, 109th Cong., July 14, 2005, 2005 WLNR 11115327 (statement of Daniel Dell'Orto, Principal Deputy Gen. Counsel, Dep't of Def., stating in response to a question from Senator John McCain that the decision was made to deny status to the Taliban on the ground that "across the board" they failed to comply with IHL); cf. LESSONS LEARNED, *supra* note 231, at 54 n.144 (observing that "much of the legal analysis underlying the presidential decisions remains classified," but also citing a memorandum from the Office of the Staff Judge Advocate stating that the Taliban "do not possess the attributes of regular armed forces, which requires distinguishing themselves from the civilian population and conducting their operations in accordance with [the] laws and customs of war") (alteration in original). This line of argument is not without risks. While the U.S. military clearly satisfies the requirements of having an internal disciplinary system and use of that system to require compliance with IHL, there nonetheless is a risk that opponents may seize on alleged IHL violations by the U.S. as grounds for denying POW status to some or all captured United States personnel.

335. Colonel Watkin concludes that, "[w]hile it is not without controversy it is open to a state to deny all the members of a group combatant status if that group does not 'enforce compliance with the rules of international law applicable to armed conflict.'" Watkin, *supra* note 330, at 32 (citing, *inter alia*, ICRC Commentaries to art. 44, para. 1688, stating that "armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such force, within the meaning of Article 43"); see also U.K. MILITARY MANUAL, *supra* note 285, at 39 n.13 ("The decision to deny an armed group the status of 'armed force' under international law is not one for the commander in the field and must be taken at governmental level."). Applying a group-oriented standard is not necessarily inconsistent with the existence of the Article 5 tribunal process under GPW. Article 5 provides that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4," they shall be given POW status until a contrary status is "determined by a competent tribunal." GPW, *supra* note 218, art. 5. At first blush, this language appears to contemplate an individualized in-

difficult to say that the government's conclusion is wrong as a legal matter.<sup>336</sup>

## (ii) al Qaeda Members

It is comparatively easy to resolve the status of al Qaeda members detained in Afghanistan.<sup>337</sup> Al Qaeda does not constitute part of the regular armed forces of Afghanistan, meaning that neither Article 4(A)(1) or (3) have application. On the other hand, al Qaeda did provide personnel to fight alongside the Taliban<sup>338</sup> and to protect its senior leadership, suggesting the possibility that an al Qaeda member captured in Afghanistan might claim POW status under Article 4(A)(2), which extends that status to certain militias and volunteer groups that "belong[] to a Party" but which are not incorporated into the Party's regular armed forces.<sup>339</sup> Any such argument, however, is certain to fail because of the four conditions requirement.<sup>340</sup> Given that al Qaeda as an organiza-

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terpretation. And certainly it is true that the questions of whether a particular detainee is in fact associated with an enemy force such as al Qaeda or the Taliban must be determined on an individual basis. It is less clear, however, that the existence of the Article 5 process compels the conclusion that particular prerequisites for members of an enemy force to obtain POW status cannot be determined with reference to at least some group characteristics.

336. See also *United States v. Lindh*, 212 F. Supp. 2d 541, 558 (E.D. Va. 2002) (rejecting lawful combatant defense on ground that Lindh had failed to carry burden of proof with respect to application of three of the four criteria with respect to Taliban forces).

337. Cf. *Watkin*, *supra* note 330, at 83 (observing that "[e]xclusion of a group from combatant status is perhaps most easily applied in respect of terrorist organizations that by definition do not respect the fundamental distinction between combatants and civilians in their actions and sometimes overtly reject any requirement to do so").

338. The Taliban's "elite" 55th Brigade may have been an al Qaeda unit. Cf. Ann Scott Tyson, *Strikes Inflict Little Harm on Terrorist Group*, CHRISTIAN SCI. MONITOR, Oct. 29, 2001, available at <http://www.csmonitor.com/2001/1029/p2s1-usmi.html> (questioning whether the 55th Brigade should be viewed as an al Qaeda unit).

339. GPW, *supra* note 218, art. 4(A)(2). OLC contended, in its January 22, 2002, memorandum, that no al Qaeda member could possibly invoke Article 4(A)(2) because the conflict with al Qaeda is not an international armed conflict in the first place. See *Bybee Memo*, *supra* note 270, reprinted in *THE TORTURE PAPERS*, *supra* note 226, at 89-90. This argument conflates the right-kind-of-conflict and right-kind-of-person inquiries.

340. Bradley and Goldsmith assert that "it is unlikely that al Qaeda 'belongs to' Afghanistan (which is a Party to the conflict)" and thus that "one need not even reach the issue of whether it has satisfied the four traditional criteria." Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder, The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2691 n.48 (2005); cf. LEVIE, *supra* note 265, at 40-43 (discussing uncertainty associated with the "belonging to" requirement).

tion<sup>341</sup> affirmatively rejects the core precept of the Law of War—the principle of distinction between lawful and unlawful targets—there is little prospect for satisfying Article 4(A)(2).<sup>342</sup> Al Qaeda members thus would not receive POW status even if captured in the context of an international armed conflict.<sup>343</sup>

In the final analysis, therefore, neither al Qaeda nor Taliban<sup>344</sup> members qualify for POW treatment. Ironically, from the detainees' perspective, this conclusion has a silver lining with respect to the transfer issue: if the detainees are not POWs, then GPW Article 12 does not apply to them, and thus there is no ground for using *lex specialis* to harmonize the CAT Article 3 standard down to the arguably more permissive standard implicit in GPW Article 12.

The Geneva analysis does not end here, however. It remains to be seen whether any detainees may qualify as “protected persons” subject to the distinct transfer-related provisions found in GC.

#### b. Protected Persons Status under GC

If a person detained in an international armed conflict does *not* qualify as a POW under GPW, it does not follow automatically that he or she receives no protection under the Geneva Conventions; on the contrary, in *most instances* such persons will qualify as “protected persons” within the meaning of GC.<sup>345</sup> Remarkably,

341. Throughout this article I have referred to the al Qaeda “organization.” Whether al Qaeda is best understood as a discrete organization or instead as a network of groups and individuals with varying degrees of affiliation has been the subject of much debate since 9/11. Adding to the confusion, the answer to that question may vary depending on the point in time at which one asks it, as it probably is accurate to say that al Qaeda in late 2001 had more of an organizational structure than it does in the fall of 2005.

342. See GPW, *supra* note 218, art. 4(A)(2). Al Qaeda also violates the requirements of bearing arms openly and wearing a fixed insignia visible at a distance with respect to its terrorist operations outside the context of the ground war in Afghanistan, although a question might arise as to whether those actions should enter into the Article 4 analysis within the context of *OEF*.

343. Cf. Bradley & Goldsmith, *supra* note 340, at 2691 n.48 (observing that al Qaeda “almost certainly has not” satisfied the criteria); Goodman & Jinks, *supra* note 260, at 2657 (“Although militant groups could satisfy these criteria in theory, it is unlikely that many, if any, will do so in fact.”).

344. The case concededly is much less clear with respect to the Taliban.

345. See Kantwill & Watts, *supra* note 229, at 738; see also *Human Rights Report*, *supra* note 182, ¶¶ 19–21 (stating that persons captured in Afghanistan should be classified either as POWs or protected persons); cf. Jinks, *supra* note 222, at 380, 399–413 (emphasizing protections afforded to non-POW detainees under GC, Common Article 3, and Arti-

though, neither the President's February 7, 2002, order nor the underlying legal memoranda giving rise to it provide any discussion of this issue en route to the conclusion that Taliban and al Qaeda members are, in effect, "extra-conventional" persons.<sup>346</sup>

The scope of "protected person" status under GC is described in Article 4, which begins by defining the category in broad terms: "Persons protected by the Convention are those who . . . find themselves . . . in the hands of a Party to the conflict or occupying Power of which they are not nationals."<sup>347</sup> Article 4 then goes on to carve out three situations in which such persons will not receive protected person status. Two of these exceptions are inapplicable here. First, status will be denied to those who qualify as POWs under GPW (a situation not implicated by the GTMO detainees, for the reasons stated above).<sup>348</sup> Second, status also will be denied to persons who are nationals of a state not bound by the Geneva Conventions (a situation applicable only in the unlikely event of a detainee from Nauru).

The remaining exception, in contrast, is quite meaningful when applied to Taliban detainees and al Qaeda members captured in Afghanistan. In two situations, GC Article 4 denies protected person status to a person who is a citizen of a government that "has normal diplomatic representation in the States in whose hands" the detainee is.<sup>349</sup> First, status automatically is denied in those circumstances if the person is a citizen of a state that is a co-belligerent of the detaining power.<sup>350</sup> Second, if the person instead is a citizen of a state that is neutral in the conflict, status will be denied if the person is found "in the territory of a belligerent State."<sup>351</sup>

In a traditional armed conflict between states, this "diplomatic-relations exclusion" would have relatively little impact. It is the peculiar nature of the conflict with al Qaeda—in which most of

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cle 75 of Additional Protocol I).

346. See Kantwill & Watts, *supra* note 229, at 705–08 (making this point, and discussing possible explanations for the omission). As Kantwill and Watts explain, the term "extra-conventional" indicates the view that a person is not within the categories of persons who benefit from treaty protections. See *id.* at 681 n.1.

347. GC, *supra* note 218, art. 4.

348. See *id.*

349. *Id.*

350. See *id.*

351. *Id.*

those who fight for the enemy are citizens of friendly states—that gives it such bite.

The clearest effect of the diplomatic-relations exclusion is to preclude GTMO detainees who are citizens of co-belligerent states (such as the United Kingdom and Australia) from asserting protected person status, as citizens of co-belligerents are covered by this rule wherever captured. The tougher question is the extent to which the diplomatic-relations exclusion for neutral-state citizens applies.

Certainly there are large numbers of detainees captured in Afghanistan who are citizens of neutral states having ordinary diplomatic relations with the United States. But unlike citizens of co-belligerents, the location of capture for citizens of neutrals does matter. And so the critical question is whether capture in Afghanistan (for the reasons discussed previously, only Taliban members and al Qaeda members captured in Afghanistan are held in connection with the “right kind of conflict” to render GC protections potentially available) satisfies the GC Article 4 requirement that they be found “in the territory of a belligerent State.”<sup>352</sup>

A literal reading of the Article 4 language suggests that the answer to that question must be yes. Afghanistan, after all, is a belligerent state insofar as the Common Article 2 conflict there is concerned. But, an argument exists that the language “territory of a belligerent State” should be understood narrowly to refer only to the territory of the *detaining* belligerent state, which in this case would mean only the territory of the United States.<sup>353</sup>

The plain text of Article 4 does not clearly mandate one construction or the other. But Pictet’s commentaries on Article 4, although far from dispositive, weigh in favor of the more expansive reading. The Commentaries state that “nationals of a neutral

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352. *Id.*

353. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 819 n.28, 851 n.149 (2005) (arguing that the exception applies only to neutral-state citizens found in the United States itself). On this theory, the only person excluded from GC protected person status by the “neutral state” aspect of Article 4 would be the Qatari citizen Ali Saleh Kahlah al-Marri, who was arrested in the United States and is now held as an enemy combatant, though not at GTMO. See Eric Lichtblau, *Detainee at Brig in Charleston Accuses His Jailers of Abuse*, N.Y. TIMES, Aug. 9, 2005, at A13.

State in the territory of a Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hand they are."<sup>354</sup> The general thrust of the commentary is that where the ordinary diplomatic process for protection of the interests of nationals is available, it must be relied upon.<sup>355</sup>

Understood in this way, the only GTMO detainees arguably qualifying for protected person status would be the Afghan citizens among the detainees (presumably including most or all Taliban detainees) and any detainees who are citizens of states lacking ordinary diplomatic relations with the United States,<sup>356</sup> such as Iran, Iraq, Libya, or—least likely—North Korea.<sup>357</sup> Moreover, with ordinary diplomatic relations now having resumed between the United States and both Iraq and Afghanistan (as indicated, for example, in the actual ongoing negotiations with the Karzai government regarding repatriation of these very individuals), there is an argument that those detainees too should not be considered protected persons under GC.

This would leave only Iranian, Libyan, and North Korean citizens captured in Afghanistan as potentially qualifying for protected person status. Do any GTMO detainees fit this description? It appears that the vast majority do not, but that at least half a dozen do.<sup>358</sup> As to them, a further question arises. Does protected person status in this context actually entitle detainees to the benefits of Articles 45 or 49 in particular?<sup>359</sup> Remarkably, the answer to that question appears to be no.

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354. PICTET, *supra* note 248, at 48.

355. *See id.* at 48–49.

356. *See* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1070 (2004).

357. The fact that most detainees are precluded from protected person status by the diplomatic relations exception does not mean that they are wholly unprotected by IHL. Derek Jinks has argued, for example, that the protections of Common Article 3 and Article 75 of Additional Protocol I apply in this scenario. *See* Jinks, *supra* note 222, at 399–413; *see also* Dupuis et al., *supra* note 219, at 427–28 (Remarks of Michael J. Matheson) (identifying the fundamental guarantees contained in Article 75); Parks et al., *supra* note 219 (identifying Article 75's fundamental guarantees as a reflection of customary international law). Even assuming that this is correct, however, neither provision contains a transfer-related rule.

358. *See* Table B, *supra* note 258 (listing one Iranian and five Libyan detainees).

359. This question becomes all the more pressing, of course, if (i) Afghani and Iraqi detainees remain protected persons despite the subsequent resumption of diplomatic relations between those states and the United States, or (ii) if the better view is that the dip-



Whereas GPW provides relatively undifferentiated protections to POWs, the benefits provided by GC do not apply uniformly to all persons protected under that convention. On the contrary, GC is divided into sections that provide different benefits in different scenarios.

Both Articles 45 and 49 appear in Part III of GC, which describes the benefits owed to protected persons.<sup>360</sup> But Part III itself is divided into three subsections. One deals with protected persons who are located in occupied territory, another addresses protected persons who are aliens located in the territory of their state's enemy, and a third provides rules that apply in both scenarios (or perhaps in all circumstances). Notably, Article 45 is located in the enemy territory subsection, while Article 49 is found in the subsection concerned with occupied territory.

Arguably, this format introduces geographic limitations to the benefits afforded by GC to protected persons.<sup>361</sup> If so—and it is hard to see what point the subsection structure has if not—then GTMO detainees captured in Afghanistan are not covered by GC's transfer-related provisions even if they qualify as protected persons. These individuals were not aliens located in the territory of their state's enemy, nor were they located in occupied territory.

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lomatic-relations exception has no application outside the territory of the detaining state itself.

360. Part II of GC describes the benefits afforded to whole populations, while Part IV governs the process of internment. GC, *supra* note 218, pts. II, IV.

361. See Kantwill & Watts, *supra* note 229, at 729 (noting that GC Part III "seems to overlook protections for hostile protected persons in their own territory"). Rejection of this interpretation, notably, opens up other complications. Unlike GPW, GC contains a derogation clause that enables the detaining state to deprive protected persons of convention benefits under certain conditions. That clause, Article 5, actually contains two derogation provisions, both of which are defined with reference to the same geographic criteria described above. GC, *supra* note 218, art. 5. If the geographic limits imposed by the subdivisions of Part III are disregarded, this might support an argument to disregard the comparable limits imposed on the derogation option as well. In this respect, it is worth bearing in mind that the U.S. ARMY FIELD MANUAL ON THE LAW OF LAND WARFARE already asserts a right to derogate from GC protections where neither of the geographic conditions (occupied or enemy territory) is met, notwithstanding lack of support in the text of GC Article 5 for this proposition. See FM 27-10, *supra* note 286, ¶ 248(b); Letter from Gen. Janis Karpinski to ICRC Eva Svoboda, Protection Coordinator, Dec. 24, 2003 (on file with author) (writing in connection with Abu Ghraib that "as you will have noted, while the armed conflict continues, and where 'absolute military security so requires' security internees will not obtain full GC protection as recognized in GCIV/5, although such protection will be afforded as soon as the security situation in Iraq allows it"); cf. Kantwill & Watts, *supra* note 229, at 730-31 (commenting that the FIELD MANUAL position implies a belief that protected persons can exist outside the contexts of enemy and occupied territory).

They were, instead, located in what might be called contested territory—the territory of a non-detaining belligerent state, not yet under occupation—a scenario to which Articles 45 and 49 simply do not apply on this reading of GC.<sup>362</sup>

In the final analysis, therefore, it appears that the particular circumstances of the GTMO detainees do not trigger any of the provisions of the Geneva Conventions concerning detainee transfers. As a result, the contemporaneous applicability of CAT and IHL with respect to the GTMO detainees neither adds to nor subtracts from the *non-refoulement* safeguards previously discussed. There is, however, one additional source of law pertaining to the transfer issue that requires discussion.

## V. CONSTITUTIONAL CONSTRAINTS

When the United States began transferring detainees from Afghanistan to GTMO in January 2002, it certainly was not with the expectation that by doing so the detainees would thereby be invested with federal constitutional rights. But in light of the Supreme Court's 2004 decision in *Rasul* concerning the nature and extent of United States's control over GTMO, one court has held that this is precisely what has happened and that, as a result, detainees at the very least have fundamental rights such as due process.<sup>363</sup> The issue is currently on appeal before the D.C. Circuit, and will undoubtedly be litigated before the Supreme

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362. Cf. Callen, *supra* note 356 (arguing that most GC protections do not apply to persons captured in the zone of combat operations unless an occupation is underway). Significantly, if one were to read the "enemy territory" limitation in a broad way so as to provide GC Part III protections to persons captured *outside* the territory of the detaining state, it would then become all the more difficult to reject taking a similarly broad approach to the interpretation of the neutral-state citizen aspect of the diplomatic-relations exception.

363. Judge Leon and Judge Green disagreed on this issue in their conflicting opinions *Khalid v. Bush* and *In re Guantánamo Detainees Cases*. For Judge Leon, the *Rasul* decision means only that federal habeas jurisdiction extends to GTMO, not that non-citizens detained there are endowed with any constitutional rights by virtue of their location. *Khalid v. Bush*, 355 F. Supp. 2d 311, 322–23 (D.D.C. 2005). In his view, noncitizens at GTMO are no more able to invoke constitutional rights than noncitizens seized by U.S. personnel anywhere else overseas. *See id.* Judge Green held otherwise, on two grounds. First, she reasoned that the Supreme Court in *Rasul* did not intend to extend a meaningless formality to the detainees when it granted them access to the federal courts. *See In re Guantánamo Detainees Cases*, 355 F. Supp. 2d 443, 453–64 (D.D.C. 2005). Second, she found that the degree of control exercised by the United States at GTMO made that location analogous to other U.S.-controlled territories in which mere presence endows noncitizens with "fundamental" constitutional rights. *See id.*

Court.<sup>364</sup> In the interim, assuming for the sake of argument that GTMO detainees do have due process rights under the federal constitution,<sup>365</sup> the question arises whether due process provides protection relevant to the issue of *non-refoulement* and, if so, whether that protection exceeds the protections afforded by CAT Article 3.<sup>366</sup> Put in practical terms, the issue is whether a due process analysis would require a more exacting standard for measuring the risk of torture than the more-likely-than-not test of CAT Article 3 or, alternatively, whether a reviewing court relying on due process grounds would be less deferential to the Executive than a court considering a CAT Article 3 argument.

The applicability of due process protections in this context can be understood most usefully through the lens of substantive due process.<sup>367</sup> Substantive due process prohibits the government in at least some circumstances from depriving a person of certain protected interests without regard to the procedural safeguards

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364. This remains likely despite the passage of the Detainee Treatment Act of 2005, for reasons set forth in the Epilogue, *infra* Part VII.

365. See, e.g., Kermit Roosevelt III, *Guantánamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2018–30 (2005); cf. Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1660 n.43 (1997) (describing the *Knauff/Mezei* doctrine that non-citizens who have not “entered” the United States lack due process rights even if physically in U.S. territory, and discussing the possible impact of statutory reforms on this doctrine); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339–40 (2d Cir. 1992) (affirming determination of a serious question on the merits as to whether Haitian would-be immigrants found on the high seas en route to the United States and taken to GTMO obtain due process rights by virtue of their presence there), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).

366. OLC clearly anticipated a result along these lines when it vetted GTMO back in December 2001, warning that “[i]f a federal district court were to take jurisdiction over a habeas petition, it could review the constitutionality of the detention and the use of a military commission . . . .” Memorandum from Patrick F. Philbin & John C. Yoo to William J. Haynes, II, *supra* note 13, at 1; see also *id.* at 8 (“We are aware of no basis on which a federal court would grant different litigant rights to a habeas petitioner simply because he is an enemy alien, other than to deny him habeas jurisdiction in the first place.”). If true, then by the same token a court could review the constitutionality of a detainee transfer. *But see infra* note 386.

367. I do not provide a separate discussion of the potential impact of a *procedural* due process challenge because, on close inspection, such an argument simply collapses back into the substantive due process analysis presented below (in the sense that the substantive due process argument ultimately turns on the fact that the government relies on a process—diplomatic assurances—to overcome fear-of-torture concerns). For a discussion of procedural due process in the post-9/11 context, see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and compare *Sayne v. Shipley*, 418 F.2d 679, 686 (5th Cir. 1969) (opportunity for habeas review of an administrative determination of eligibility for extradition satisfied procedural due process).

involved. Although the precise scope of the interests protected by substantive due process is unclear, it is uncontroversial that the doctrine at least protects a person's interest in freedom from physical harm. Substantive due process thus imposes categorical restraints on the ability of government agents to inflict such harm themselves. But does it also restrain the government's ability to place a person in a situation that poses a risk that third parties will harm them?

### A. *The State-Created Danger Rule*

Not surprisingly, there is no precedent exactly on point with respect to the situation in which a military detainee of the federal government argues that substantive due process precludes transferring him to the custody of a foreign government that might torture him. There is, however, a substantial body of caselaw addressing somewhat analogous situations in which individuals have argued that the government is responsible, albeit indirectly, for harms inflicted by private actors.<sup>368</sup>

The leading case in this area is the Supreme Court's 1989 decision in *DeShaney v. Winnebago County Department of Social Services*.<sup>369</sup> *DeShaney* dealt with a substantive due process claim asserted on behalf of a boy who had been badly beaten by his father.<sup>370</sup> The boy and his mother alleged that state officials were aware for some time that the father was abusive, and that the government's failure to remove the boy from the home despite this knowledge constituted a deprivation of his interest in freedom from bodily harm.<sup>371</sup> The Court rejected this argument, concluding "[a]s a general matter . . . that a State's failure to protect an individual against private violence simply does not constitute

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368. This case law arises in the context of lawsuits under 42 U.S.C. § 1983 (2000), which provides a statutory vehicle to seek civil damages for violations of constitutional rights occurring under color of state law. Although the § 1983 context concededly introduces many wrinkles that have no relevance for the situation of the GTMO detainees (in particular, concerns about constitutionalizing state tort law), the actual content of substantive due process protections should not vary depending on whether the issue arises in the § 1983 or habeas corpus contexts. For a general overview of § 1983 litigation in this area, see Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1139, 1159–81 (2005).

369. 489 U.S. 189 (1989).

370. *Id.* at 191.

371. *Id.* at 192–93.

a violation of the Due Process Clause.”<sup>372</sup> But the Court did not entirely foreclose the possibility of state responsibility for third-party violence.

First, the Supreme Court acknowledged that a different rule might apply in the situation in which “the State takes a person into its custody” and “renders him unable to care for himself.”<sup>373</sup> In that case, an “affirmative duty to protect” the individual “arises . . . from the limitation which [the State] has imposed on his freedom to act on his own behalf.”<sup>374</sup> This caveat is sometimes referred to as the “custody exception.”<sup>375</sup> Second, the Court also implied that the result might have been different in *DeShaney* had the State played a part in the creation of the threatened harms, or if it had done “anything to render [the victim] any more vulnerable to them.”<sup>376</sup> This exception has become known as the “state-created danger” rule.<sup>377</sup>

Any uncertainty about the status of the state-created danger rule<sup>378</sup> was put to rest after every single circuit court adopted it as a potential basis for finding a substantive due process violation.<sup>379</sup> The last circuit to do so—the D.C. Circuit—has particular relevance for purposes of the GTMO transfer cases. Fortunately, when the D.C. Circuit adopted the state-created danger rule in 2001 in *Butera v. District of Columbia*, it went to great lengths to clarify the analytical framework associated with the rule.

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372. *Id.* at 197; see also *Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005) (holding that respondent lacked cognizable interest in police enforcement of a protective order).

373. *DeShaney*, 489 U.S. at 199, 200.

374. *Id.* at 200.

375. See, e.g., *Butera v. District of Columbia*, 235 F.3d 637, 648 (D.C. Cir. 2001).

376. *DeShaney*, 489 U.S. at 201. It had not done so in *DeShaney*, despite the fact that the State at one point had custody of the boy before returning him to his father, because this “placed [Joshua DeShaney] in no worse position than that in which he would have been had it not acted at all.” *Id.*

377. Oren, *supra* note 366.

378. The concept of state-created danger as grounds for a substantive due process violation in the context of privately-inflicted violence actually pre-dated *DeShaney*, see *Butera*, 235 F.3d at 649 n.11 (describing circuit precedent predating *DeShaney*), but the reference to it in *DeShaney* was quite oblique and, in any event, dicta.

379. *Butera*, 235 F.3d at 649 n.10 (listing cases).

## B. *The Analytical Framework for State-Created Danger Claims*

The fundamental prerequisite for a state-created danger argument, according to *Butera*, is that the government must engage in “affirmative conduct . . . to increase or create the danger that results in harm to the individual.”<sup>380</sup> Not all such risk-increasing conduct violates due process, of course. The Supreme Court’s 1998 opinion in *County of Sacramento v. Lewis*<sup>381</sup> held that a substantive due process challenge to executive action is never actionable unless it concerns conduct that is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”<sup>382</sup>

In practical terms, this threshold requirement means that a substantive due process claim can never be premised on government *negligence* with respect to the risk of harm.<sup>383</sup> On the other hand, government action *intended* to cause harm clearly can satisfy the shocks-the-conscience test.<sup>384</sup> This leaves open the question of whether an intermediate level of culpability also could satisfy the shocks-the-conscience threshold inquiry.<sup>385</sup> In particular,

380. *Butera*, 235 F.3d at 650; see also *id.* at 651 (holding that “an individual can assert a substantive due process right to protection . . . from third-party violence when . . . officials affirmatively act to increase or create the danger that ultimately results in the individual’s harm”). The language in *Butera* is retrospective, as one would expect given that most § 1983 litigation arises in the aftermath of the harm. If a state-created danger claim were to arise concerning GTMO transfers, in contrast, the claim would be prospective in nature.

381. 523 U.S. 833 (1998).

382. *Id.* at 847 n.8. For an overview of the impact of *Lewis* on substantive due process analysis generally, see Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 981–86 (2000).

383. *Butera*, 235 F.3d at 651 (quoting *Lewis*, 523 U.S. at 848–49 (stating that negligent government action is “categorically beneath the threshold of constitutional due process”).

384. *Id.* at 651.

385. It is worth emphasizing that the shocks-the-conscience test is *not* the end of the inquiry. Its purpose is merely to screen out claims that are not sufficiently serious to warrant further constitutional scrutiny. According to *Lewis*, actions that are found to shock the conscience then should be examined using a fundamental rights framework. See Chesney, *supra* note 380, at 981–86. The *Lewis* approach has been called into question to a degree, however, by the Court’s subsequent decision in *Chavez v. Martinez*, 538 U.S. 760 (2003), addressing aggressive police interrogation of a severely wounded suspect. See John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 822–23 (2005) (discussing impact of *Chavez* on the *Lewis* approach). Justice Thomas, writing for four justices, including himself, described the shocks-the-conscience test as an alternative to the fundamental rights approach. See *id.* Justice Souter (the author of *Lewis*) wrote an opinion for the majority on

can a litigant satisfy this standard where the government acted not with negligence or intent but, instead, with the intermediate mens rea of recklessness or deliberate indifference to the risk of harm to the individual?

The answer is yes, but only in the limited circumstance “where the State has a heightened obligation toward the individual.”<sup>386</sup> Such special circumstances arise, to give a pertinent example, when the government (i) has custody of the individual (thus re-connecting the state-created danger exception with the “custody exception” mentioned above) and (ii) has leisure to make “unhurried judgments, upon the chance for repeated reflection.”<sup>387</sup>

How might this framework apply to a substantive due process claim by GTMO detainees objecting to transfer on fear-of-torture grounds?<sup>388</sup> One must begin by acknowledging the significant distinctions between the GTMO detention context and the civilian contexts in which state-created danger claims previously have arisen. This suggests, at the very least, that a reviewing court will proceed deferentially. That said, the general contours of the state-created danger doctrine map onto the *non-refoulement* scenario reasonably well. The detainees, obviously, are held in government custody, creating the requisite special relationship with the individuals involved. And in light of the pace and methods through which transfer decisions have been made in the past, it seems probable that the time-for-deliberation factor also would be

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this issue that did not contest Justice Thomas’s description but instead simply remanded the case for further consideration of the substantive due process issue. *See id.* On remand, the Ninth Circuit appears to have followed Justice Thomas’s formulation, although the brief opinion is far from clear. *See Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (finding that the interrogation both shocked the conscience and that the investigating officer deprived the suspect of a fundamental right).

386. *Butera*, 235 F.3d at 651.

387. *Id.* at 651–52 (quoting *Lewis*, 523 U.S. at 853); *see also Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1145–46 (D.C. Cir. 2004) (holding that the deliberate indifference standard could not be invoked by prison guards objecting to city decision to increase prisoner-to-guard ratios, although officials had leisure to deliberate in making the decision, because no special relationship existed).

388. It should be noted that non-citizens subject to removal under the immigration laws have had little success in invoking the state-created danger doctrine as an alternative or supplement to CAT Article 3 protections. *See, e.g., Enwonwu v. Gonzales*, \_\_\_ F.3d \_\_\_, 2006 WL 321186, No. 05-2053, slip op. at \*6–7 (1st Cir. Feb. 13, 2006) (rejecting state-created danger argument on the ground that recognition of it would impermissibly interfere with the plenary power of Congress to regulate immigration); *Kamara v. Att’y Gen. of the United States*, 420 F.3d 202, 217–18 (3d Cir. 2005) (same). *But see Builes v. Nye*, 239 F. Supp. 2d 518, 525–26 (M.D. Pa. 2003) (prohibiting removal of a noncitizen on fear-of-torture grounds under the state-created danger doctrine).

satisfied. Detainees accordingly would not have to show that the government *intended* to subject them to physical harm (at the hands of the receiving state), but could instead argue that the government has deliberately disregarded the *prospect* of such harm.

This raises a further definitional question, however: What counts as deliberate indifference? Put another way, what level of risk renders it inappropriate for the government to place the individual in a potentially harmful situation? In the CAT Article 3 context, the requisite level of risk is fixed by the more-likely-than-not standard. Does the substantive due process approach result in a different standard?

The D.C. Circuit has not spoken directly to this issue of the meaning of “deliberate indifference.” Other circuits have, however, in the context of claims brought on behalf of children injured or killed after the state placed them with abusive foster families. Two formulations have emerged from these cases. The Fifth Circuit, for example, has stated that deliberate indifference requires that the relevant decision-maker “must [have been] both aware of facts from which the inference could be drawn that a *substantial risk of serious harm* exists, and he must also [have] draw[n] that inference.”<sup>389</sup> The Seventh Circuit, on the other hand, has simply stated that the individual must establish that the officials involved “knew or suspected that abuse was occurring or *likely*.”<sup>390</sup>

It is not clear whether either formulation rises to the level of a more-likely-than-not standard, even in the child abuse context, although both are capable of being read as consistent with that approach. Even assuming that one or both formulations refers to a less-demanding standard, however, it does not necessarily follow that a court would apply the same approach if the state-created danger issue were to arise in the quite distinct context of a GTMO transfer. True, the foster home abuse scenario does have significant parallels with the GTMO scenario; in both cases the government compels an individual into the hands of a potentially

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389. *Hernandez v. Tex. Dep't of Protective & Reg. Servs.*, 380 F.3d 872, 881 (5th Cir. 2004) (quoting *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998) (emphasis added)). In this passage, the court is borrowing definitional concepts from the parallel area of Eighth Amendment doctrine.

390. *Lewis v. Anderson*, 308 F.3d 768, 776 (7th Cir. 2002) (emphasis added).



abusive custodian in circumstances where the government may have reason to anticipate abuse. But the GTMO scenario introduces constitutionally significant considerations wholly lacking in the foster-placement scenario, including in particular the deference afforded to the Executive Branch with respect to foreign relations.<sup>391</sup> Accordingly, it is doubtful that a court would adopt anything less than a more-likely-than-not standard of deliberate indifference in the context of a substantive due process argument by a GTMO detainee hoping to avoid custodial repatriation.

Assuming that the risk-of-torture judgments thus required by both due process and CAT Article 3 involve the same substantive standard,<sup>392</sup> there is little to recommend one approach over the other from the point of view of the government or the detainees.<sup>393</sup> Most notably, with respect to the most critical issue—i.e., the permissibility of relying on diplomatic assurances—there is no reason to believe that the requirements of substantive due process would be any more or less forgiving than those of CAT.

## VI. CONCLUDING THOUGHTS

Notwithstanding calls by some critics to shut down the detention facilities at GTMO, there is no reason to believe that the government will in fact do so any time in the near future. It is clear, however, that the government frequently will be transferring individual detainees from U.S. custody there to the custody of foreign states—and these states often will be among those as to whom we may have legitimate concerns about the prospect of torture.

As with so much else related to the conflict with al Qaeda since 9/11, the legal aspects of this development are in significant respects unprecedented. They cannot be resolved simply by refer-

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391. See, e.g., Prosper Decl., *supra* note 162, at ¶ 12.

392. Technically, the shocks-the-conscious standard for substantive due process challenges is only the first step in the analysis, with the litigant next being obliged to demonstrate the existence (and violation of) a fundamental right. See *supra* note 385. Presumably this would not present an obstacle in the event that the litigant succeeded in the deliberate indifference inquiry.

393. From the point of view of a court considering an attempt by a detainee to assert both kinds of arguments, of course, the existence of equivalent options under substantive due process and CAT present an opportunity for declining to engage the issues presented by one or the other.

ence to familiar legal frameworks such as formal extradition, on the one hand, or the traditional rights of belligerents, on the other. Instead, ascertaining the law of international detainee transfers requires a patient and nuanced examination of a host of issues, some esoteric, and most freighted with implications for other factual scenarios.

It is unclear, for now, whether and to what extent the courts will come to grips with these difficulties. The initial stage of GTMO transfer litigation was not much more than a brief foray into uncharted territory. Because none of the dozens of motions involved an actual attempt to transfer a detainee, the issue was framed in case after case in terms of prophylactic relief designed merely to ensure that the underlying substantive issues could be raised if the need were to arise; the courts were not obliged in this first wave to explore the full range of arguments and issues related to *non-refoulement*, and did not come anywhere close to doing so. But the time may come when a court must decide whether or not to regulate or perhaps even prohibit a particular transfer on risk-of-torture grounds.

Under the law of international detainee transfers as it currently stands, and in light of the unusual territorial status of GTMO recognized in *Rasul*, the central issues in this determination most likely will be the impact of Article 3 of the Convention against Torture, as implemented by § 2242 of the Foreign Affairs Reform and Restructuring Act, and the state-created danger aspect of substantive due process doctrine under the Fifth Amendment. Both sources of law establish an obligation not to transfer detainees if it is more likely than not that the detainee would be tortured by the receiving state. Indeed, it appears that the Department of Defense has come into an obligation to promulgate regulations to operationalize this standard. In contrast, although international humanitarian law contains several transfer-related provisions, none of these appear applicable to the circumstances of the GTMO detainees.

Many of the topics explored in this article call for further discussion, including, in particular, the scope of habeas review in connection with *non-refoulement* where diplomatic assurances are at issue (as they almost always will be). It is readily apparent that the use of diplomatic assurances can lead to abuse, yet it is equally apparent that some form of assurances is a necessary part of international cooperation in the current conflict. In any

event, there does not appear to be any ground in current law for precluding their use.

Ultimately, the problem with the GTMO transfer scenario is that it involves a clash between competing interests that neither side can simply dismiss. On one hand, the government in its military aspect must have sufficient latitude to determine for itself when it would be desirable to allow a detainee's own government to take custody, and in its diplomatic aspect, must have similar latitude to effectively negotiate the transfer of such detainees back to their home states. On the other hand, the United States has legal and moral obligations to take reasonable steps to ensure that in carrying out transfers, it does not take undue risks that the detainee will be tortured—a risk that is particularly acute with respect to states that often will be on the receiving end of GTMO transfers.

These competing interests are not irreconcilable, but it is far from clear that the current law of international detainee transfers does an adequate job of striking the balance. The framework described in this article is at once too deferential and too intrusive. Because of the discretion permitted to the government by the current CAT and substantive due process regimes—particularly with respect to diplomatic assurances—there is relatively little prospect that these legal frameworks could actually result in a transfer prohibition in a particular case. At the same time, however, the unspecified nature of judicial review of the risk-of-torture determination creates too much opportunity for unnecessary public disclosure of the details of negotiations with foreign states on this most delicate of issues.

As to both points, it would be far better to permit a more searching form of review, but to have that review carried out in a classified environment akin to the Foreign Intelligence Surveillance Court ("FISC"). FISC review of surveillance applications, of course, has been much criticized on the grounds that it takes place *ex parte*, and thus lacks the adversarial quality that tends to generate accuracy. To avoid a similar problem while still preserving confidentiality, legislation creating a classified forum for review of risk-of-torture judgments relating to GTMO could provide for the detainee's interests to be represented by a specially appointed federal public defender with the requisite clearances. In this way, Congress could step in to provide a more balanced and effective regime for enforcing the law of international detainee transfers than that described in this article.

## VII. EPILOGUE: THE DETAINEE TREATMENT ACT OF 2005

Writing on the topic of national security law in the post-9/11 world has its disadvantages. One is the risk that unforeseen events will render an article partially or even completely moot between the completion of a draft and its publication in hard copy some nine months later. I was well aware of this risk in early 2005 when I took up the drafting of what eventually became *Leaving Guantánamo: The Law of International Detainee Transfers*. In a very real sense, the article had been made possible by the Supreme Court's 2004 decision in *Rasul v. Bush*,<sup>394</sup> which held that statutory habeas corpus jurisdiction extended to noncitizen detainees held at GTMO. This was an exceedingly important ruling, opening the door to actual litigation of a wide range of complex, even exotic, legal issues such as the *non-refoulement* topic upon which my article concentrates. But it was also a statutory ruling, and as such, its continuing impact depended upon acquiescence from Congress.

Enter the Detainee Treatment Act of 2005 ("DTA"), which became law on December 30, 2005.<sup>395</sup> The DTA contains six sections, most of which pertain to interrogation standards.<sup>396</sup> One section, however, deals instead with the litigation rights of GTMO detainees. This provision—DTA § 1005—constitutes a direct response to *Rasul*.

Section 1005 begins in a relatively uncontroversial manner, with a series of provisions relating to Congressional oversight of the procedures used by the military at GTMO and elsewhere to determine the status of detainees (at GTMO, the relevant process is called a Combatant Status Review Tribunal, or "CSRT") and the need for their continued detention, as well as the rules gov-

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394. 542 U.S. 466 (2004) (holding that the federal habeas corpus statute, 28 U.S.C. § 2241, applies to noncitizens held by the U.S. military at GTMO).

395. The Detainee Treatment Act appears in both the Defense Department appropriations and authorization legislation for Fiscal Year 2006. See Pub. L. No. 148, Div. A, Tit. X, 119 Stat. 2739 (enacted Dec. 30, 2005) (Department of Defense Appropriations Act, 2006) (to be codified at 28 U.S.C. § 2241); Pub. L. No. 163, Div. A, Tit. XIV, 119 Stat. 3136 (enacted Jan. 6, 2006) (National Defense Authorization Act for Fiscal Year 2006 (to be codified at 28 U.S.C. § 2241)).

396. Section 1001 provides the DTA's title. Sections 1002 through 1004, descendants of the McCain Amendment, address interrogation standards. Section 1006 imposes certain training requirements relating to interrogation standards for Iraqi forces. I discuss § 1005 below.

erning war crimes trials before military commissions.<sup>397</sup> Section 1005, however, is not limited to Congressional oversight.

DTA § 1005(e), entitled “Judicial Review of Detention of Enemy Combatants,” contains a series of subsections that appear to have the net effect of imposing narrow limits on the jurisdiction of federal courts to entertain claims by GTMO detainees. Section 1005(e)(1) begins by adding a new, jurisdiction-stripping section to the federal habeas corpus statute, 28 U.S.C. § 2241.<sup>398</sup> Notwithstanding its placement in the habeas statute, however, the jurisdiction-stripping language is not limited to habeas petitions. Section 1005(e)(1) provides not only that “no court, justice or judge shall have jurisdiction to hear or consider” habeas corpus petitions filed by GTMO detainees held as enemy combatants, but also that courts lack jurisdiction over “any other action against the United States or its agents relating to any aspect of the detention” of such persons by the military.<sup>399</sup> DTA § 1005(e)(1), in short, reverses *Rasul*’s habeas holding as to GTMO detainees.<sup>400</sup>

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397. Section 1005(a), for example requires the Secretary of Defense to produce a report for various congressional committees detailing the procedures used at GTMO in Combatant Status Review Tribunals (CSRT’s are proceedings to determine whether a detainee has been properly categorized as an enemy combatant) and in Administrative Review Boards (“ARB’s” are annual proceedings to determine whether a detainee should be released or transferred to the custody of his country of origin notwithstanding his enemy combatant status), as well as for detainee status determinations in Iraq and Afghanistan. See DTA § 1005(a). See Deputy Secretary of Defense Wolfowitz, Memorandum for the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004), (describing CSRT procedures), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Department of Defense News Release, *Administrative Review Implementation Directive Issued* (Sep. 15, 2004) (describing ARB procedures) available at <http://www.defenselink.mil/releases/2004/nr20040915-1253.html>. The DTA does not dictate the content of these procedures, other than to require (i) that the Defense Department official with final review authority in CSRT and ARB proceedings be a civilian holding an office subject to Senate confirmation, see DTA § 1005(a)(2); (ii) that the rules for CSRT’s and ARB’s permit consideration of new evidence that may emerge over time concerning a detainee’s enemy combatant status, see *id.* at § 1005(a)(3); and (iii) that the decision-making bodies in CSRT and ARB proceedings take into account whether statements from the particular detainee in issue were obtained through coercion and, if so, whether they have probative value, see *id.* at § 1005(b)(1). This last provision does not require exclusion of such evidence.

398. See DTA § 1005(e)(1) (enacting 28 U.S.C. § 2241(e)).

399. *Id.* The latter aspect of § 1005(e)—the aspect concerned with forms of judicial review other than habeas—is written so as to apply only to GTMO detainees who are “currently in military custody” or, even if no longer in military custody, who had been “determined . . . to have been properly detained as an enemy combatant” pursuant to a review procedure established elsewhere in the DTA. *Id.* Note that this language arguably leaves open the possibility of a suit brought by a former detainee who is not in military custody and whose detention was never ratified pursuant to the D.C. Circuit-review procedure.

The matter does not come to rest there. On the contrary, the DTA then goes on in § 1005(e)(2) and (3) to restore a degree of judicial review by granting “exclusive jurisdiction” to the D.C. Circuit to consider some, but not all, detainee claims.<sup>401</sup> The scope of this exclusive jurisdiction is limited, however, in two important respects. First, this jurisdiction arises only in two specific contexts: appeals from (i) CSRT detainee status determinations and (ii) final decisions in war crime trials before military commissions.<sup>402</sup> Second, the D.C. Circuit’s review in either context is limited to consideration of two categories of argument:

- (i) whether the government actually applied the same “standards and procedures” for CSRT’s or military commissions as were reported by the Secretary of Defense to Congress pursuant to the DTA’s oversight provisions,<sup>403</sup> and
- (ii) whether such “standards and procedures” are “consistent with the Constitution or laws of the United States.”<sup>404</sup>

Section 1005 concludes with a general statement in § 1005(h)(1) to the effect that the “section shall take effect on the date of the enactment of this Act, followed by a more specific admonition that “[p]aragraphs (2) and (3) of subsection (e) [i.e., the paragraphs that invest the D.C. Circuit with “exclusive jurisdiction” to consider CSRT and military commission appeals] shall apply with respect to any claim whose review is governed by one

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Even if this is correct, of course, it would not provide a mechanism for current detainees to litigate transfer-related issues.

400. Curiously, Congress did not take this occasion to impose an affirmative bar against habeas petitions (and other claims) that might be asserted by noncitizen detainees held in locations *other* than GTMO. While *Rasul* dealt only with GTMO detentions, some might argue that the scope of the majority’s rationale in finding statutory habeas jurisdiction in that case is not so limited; arguments for and against such a reading can be drawn from the majority’s opinion. *Compare Rasul*, 542 U.S. 466, 483–84 (2004) (emphasizing that “[n]o party questions the District Court’s jurisdiction over petitioners’ custodians,” and stating that “Section 2241, by its terms, requires nothing more”), *with id.* at 480 (concluding that the presumption against extraterritorial application of a statute has no bearing in this case in light of the particular degree of U.S. control at GTMO). One possible explanation for the narrow focus of § 1005 is that, in the government’s view, persons detained by U.S. forces in Iraq (and possibly also in Afghanistan) are not actually in U.S. custody but, instead, in the custody of a multinational force. *See supra* note 6.

401. *See id.* § 1005(e)(2)–(3).

402. *See id.*

403. DTA § 1005(e)(2)(C)(i) (CSRT appeals); *id.* § 1005(e)(3)(D)(i) (commission appeals) (to be codified at 28 U.S.C. § 2241).

404. *Id.* § 1005(e)(2)(C)(ii) (CSRT appeals); *id.* § 1005(e)(3)(D)(ii) (commission appeals) (to be codified at 28 U.S.C. § 2241).

of such paragraphs and that is pending on or after the date of the enactment of this Act."<sup>405</sup>

Not surprisingly, questions concerning the impact of the DTA already have become the subject of intense litigation in connection with the pending GTMO habeas cases. Indeed, at the time of this writing in February 2006, the government and GTMO detainees are engaging these issues simultaneously before both the Supreme Court and the D.C. Circuit.<sup>406</sup> Accordingly, definitive answers to these questions are likely to emerge from the courts in the coming months. In light of this prospect, what ultimate impact might the DTA have on the detainee transfer issues that are the focus of this article?

It helps to distinguish the individual issues—each the subject of sharp dispute—that must be resolved in order to flesh out the DTA's impact for this (or any other) purpose.

First, the DTA will have little or no impact on transfer litigation unless its jurisdiction-stripping aspect—§ 1005(e)(1)—is construed to apply to the many pending habeas petitions. Assuming that it is so construed, however, the next task would be to determine whether § 1005(e)(1) strips jurisdiction over all possible claims by GTMO detainees or just some of them. Looking closely at the language that § 1005(e)(1) engrafts upon the federal habeas statute, there is at least an argument that transfer-related claims might still be brought. The new language in 28 U.S.C. § 2241 very clearly removes jurisdiction for courts to consider habeas petitions brought by GTMO detainees, without reference to

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405. *Id.* § 1005(h)(2).

406. Issues concerning the DTA have arisen in the Supreme Court pursuant to the government's January 2006 motion to dismiss for lack of jurisdiction in *Hamdan v. Rumsfeld*, No. 05-184, a case that on the merits presents questions about the President's power to establish military commissions and the judicial enforceability of the Geneva Conventions. Issues concerning the DTA have arisen in the D.C. Circuit in connection with that court's parallel consideration of a number of appeals that each challenged the legality of the CSRT process on constitutional and international law grounds. *See Boumediene v. Bush*, No. 05-5062 (D.D.C. 2005); *Khalid v. Bush*, No. 05-5063 (D.D.C. 2005); *al Odah v. United States*, No. 05-5064 (D.D.C. 2005), and consolidated cases Nos. 05-5095 through 05-5116 (D.D.C. 2005). DTA issues have also arisen in *Qassim v. Bush*, No. 05-5477 (D.D.C. 2005), involving a habeas petition by Chinese Uighur detainees who, though no longer classified as enemy combatants, remain in custody at GTMO while the government strives—so far fruitlessly—to locate a third country willing to accept them (as noted elsewhere in this article, the government declines to repatriate these individuals to China out of concern for how they will be treated by Chinese authorities).

the subject-matter of the petition.<sup>407</sup> As to the removal of jurisdiction over *other* forms of judicial review, however, the new language conspicuously adds a subject-matter qualifier; jurisdiction is removed over “any other action against the United States or its agents relating to *any aspect of the detention* by the Department of Defense” of a GTMO detainee.<sup>408</sup> One can certainly argue that a challenge to a custodial transfer relates to an aspect of detention, of course, but the contrary claim is not frivolous. Accordingly, it is possible that a reviewing court might find that it continues to have jurisdiction over such challenges when presented not via habeas but instead via some alternative vehicle, such as the federal question jurisdiction approach spoken of with approval by the majority in *Rasul*.<sup>409</sup>

Assume that a reviewing court rejects this possible interpretation of § 1005(e)(1). The next requirement is to determine which claims remain viable in connection with the special appellate jurisdiction granted to the D.C. Circuit by § 1005(e)(2) and (3), and which (if any) are instead excluded from that mechanism and thus rendered nugatory for want of a forum for judicial enforcement. Whatever else may be said about the scope of judicial review permitted to the D.C. Circuit by § 1005(e)(2)(C) and (e)(3)(D),<sup>410</sup> it is at least clear that to be included in that scope a

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407. DTA § 1005(e)(1) (to be codified at 28 U.S.C. § 2241(e)(1)).

408. *Id.* (to be codified 28 U.S.C. § 2241(e)(2)).

409. *See* 542 U.S. 466, 484–85 (2004).

410. Counsel for Salim Hamdan, a detainee who has been designated for trial before a military commission and whose habeas petition challenging the commission process currently is pending before the Supreme Court, has argued that the narrow scope of review permitted to the D.C. Circuit under the DTA would not permit inquiry into such matters as the constitutional or statutory authority for creating the commissions in the first place. *See* Petitioner’s Opposition to Respondents’ Motion to Dismiss, *Hamdan v. Rumsfeld*, No. 05-184, at 1–2 (U.S. Jan. 31, 2006) (arguing that “if Hamdan were permitted only to proceed . . . under the procedures specified by the DTA, no court would have jurisdiction to consider his principal claims that the President’s Nov. 13, 2001 order establishing his commission lacks legislative authorization . . . or that his commission violates the Geneva Conventions”). Hamdan also contends that he would be unable to assert treaty-based claims in the D.C. Circuit. *See id.* It is far from clear that such crabbed interpretations of the scope of D.C. Circuit review under the DTA are correct. The presidential authority issue goes to the legality of the commission itself, and though not a challenge to the factual or legal conclusions of a commission proceeding, a broad reading of the consistent-with-law standard under § 1005(e)(3)(D)(ii) might encompass it. Similarly, it is not at all obvious that the phrase “laws of the United States” in § 1005(e)(3)(D)(ii) would exclude treaty-based claims, assuming, that is, that the treaty in issue is otherwise capable of judicial enforcement. In any event, it does at least appear that the D.C. Circuit could reach other significant threshold issues such as the question of whether GTMO detainees have constitutional rights in the first place. *Cf.* DTA § 1005(f) (stating that “[n]othing in this section



claim must have some kind of nexus either with the CSRT or the military commission processes. Claims that attempt to block transfers on *non-refoulement* grounds most likely would not qualify under either heading.<sup>411</sup>

Even assuming that all the foregoing is correct—that § 1005(e)(1) strips all federal courts of jurisdiction over all detainee claims (other than as provided in § 1005(e)(2) and (e)(3)) and that § 1005(e)(2) and (e)(3) do not provide a judicial forum for litigating transfer-related claims—yet another issue arises. Is it constitutional to bar all federal courts from adjudicating a category of claims such as those raised in the transfer context? Resolving this issue will require answers to a range of subsidiary questions. What is the nature and scope of the constitutional (as opposed to statutory) habeas corpus right? What is the territorial status of GTMO,<sup>412</sup> and to what extent does that status invest noncitizens present there with constitutional rights? Is *Johnson v. Eisentrager* still good law on the issue of “constitutional habeas?” Finally, does the DTA constitute a valid suspension of the writ?

By the end of 2006, many if not all of these questions will have been answered, possibly by the Supreme Court itself.<sup>413</sup> Even then, however, the law may remain unsettled, particularly if Congress returns to the field in response to the manner in which the courts interpret the DTA. This latest wave of GTMO litigation may be proceeding to resolution more quickly than prior ones, but it almost certainly will not be the last.

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shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States,” with the “United States” being defined in § 1005(g) as not including GTMO for purposes of § 1005).

411. Significantly, much the same could be said about claims pertaining only to conditions of detention, including those pertaining to interrogation standards. In this respect, the pairing in the DTA of § 1005(e) with the McCain Amendment provisions setting standards for interrogations in §§ 1002–03 is particularly noteworthy.

412. The *Rasul* majority all but declared that GTMO is not extraterritorial for purposes of interpreting the federal habeas corpus statute, though it ultimately refrained from stating this in direct terms. See 542 U.S. at 480.

413. See Order, *Hamdan v. Rumsfeld*, No. 05-184 (U.S. Feb. 21, 2006) (deferring consideration of the DTA jurisdictional issues until the hearing on the merits).