

Extraordinary Rendition: A Human Rights Analysis

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INTRODUCTION

On September 13, 1995, local police in Croatia seized Egyptian national Talaat Fouad Qassem, and then handed him over to CIA agents.¹ Qassem had fled Egypt after the Egyptian government accused him of involvement in the assassination of Anwar Sadat; the Egyptian government subsequently sentenced him to death in absentia.² The CIA agents took him on board a ship in the Adriatic Sea and interrogated him.³ Then, they delivered Qassem to Egypt, where he disappeared.⁴ A human rights reporter in Egypt believes he has been executed.⁵

In the summer of 2003, Kurdish soldiers in Iraq captured Iraqi national Hiwa Abdul Rahman Rashul somewhere in Iraq.⁶ They handed him over to CIA agents, who flew him to Afghanistan for interrogation.⁷ When a legal advisor for the U.S. administration balked at the transfer, Rashul was flown back to Iraq, but, at the request of CIA director George J. Tenet, Secretary of Defense Donald Rumsfeld ordered that Rashul be hidden from Red Cross officials and not be given a prisoner number.⁸ According to *The Washington Post*, “[h]is current status is unknown.”⁹

In December 2003, Kuwaiti-born German national Khaled el Masri boarded a bus in his home of Ulm, Germany, to travel to Skopje, Macedonia.¹⁰ When

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1. Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, 109.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq: Practice Is Called Serious Breach of Geneva Conventions*, WASH. POST, Oct. 24, 2004, at A1.

7. *Id.*

8. *Id.*

9. *Id.*

10. Details of Khaled el Masri's abduction are reported in numerous sources. See Bruce Zagaris, *U.S. Extraordinary Renditions Subject to Foreign and U.S. Investigations and Oversight*, 21 INT'L ENFORCEMENT L. REP. 188 (2005); Michael Hirsh et al., *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, at 32; Scott Shane et

he arrived at the Macedonian border on December 31, Macedonian police took him off the bus, confiscated his passport, and detained him for three weeks. On January 23, 2004, a jet with tail number N313P, registered to Premier Executive Transport Services, a CIA front-company, arrived in Macedonia from the island of Majorca. El Masri was driven to the Skopje airport, where he was handed over to CIA officials. Men wearing black masks and black gloves beat him, cut off his clothes, and then injected him with drugs. He was then placed on the airplane and flown, first, to Baghdad, and then to Kabul. When he arrived in Afghanistan, U.S. officials interrogated him and held him in solitary confinement for nearly five months. In May 2004, he was flown back to Central Europe and released near a checkpoint on the Albanian border, on the order of U.S. Secretary of State Condoleezza Rice. His detention was apparently a case of mistaken identity. When el Masri returned home to Germany, he learned that his wife and children had gone to stay with her family in Lebanon; his wife thought he had abandoned the family.

The stories of Qassem, Rashul, and el Masri are not unique. They describe a human rights abuse called “extraordinary rendition”; a strategy that a series of U.S. administrations developed and refined, and in which numerous countries now participate.

Under the Clinton administration, most extraordinary renditions appeared to be subject to strict procedures. First, the receiving country had to have an outstanding arrest warrant for the person.¹¹ Second, each extraordinary rendition was subject to extensive administrative scrutiny before it was approved by senior government officials.¹² Third, the local government was notified.¹³

al., *CIA Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005, at A1; Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, Mar. 13, 2005, at A1; CBS News: *CIA Flying Suspects to Torture?* (CBS television broadcast Mar. 6, 2005) [hereinafter *CBS News*].

11. See Mayer, *supra* note 1, at 106–07 (“[Extraordinary rendition] began as a program aimed at . . . people against whom there were outstanding foreign arrest warrants.”). Mayer notes that in some cases in the 1990s, the United States successfully pressured potential receiving countries to issue arrest warrants. *Id.* at 110.

12. See Stephen P. Cutler, *Building International Cases*, FBI L. ENFORCEMENT BULL., Dec. 1, 1999, at 5 (“Forcible return, known as extraordinary rendition, also may be an option but poses special considerations The U.S. Department of Justice prohibits forcible returns without prior approval by senior U.S. government officials.”); Alan J. Kreczko, Deputy Legal Adviser, U.S. Dep’t of State, *The Alvarez-Machain Decision: U.S. Jurisdiction over Foreign Criminal Humberto Alvarez Machain*, Statement Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee (July 24, 1992), in 3 U.S. DEP’T ST. DISPATCH 616, Aug. 3, 1992 (“These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter-agency coordination and that they be considered at the highest levels of the government.”); Tracy Wilkinson & Bob Drogin, *Missing Imam’s Trail Said to Lead from Italy to CIA*, L.A. TIMES, Mar. 3, 2005, at A1 (“Each one had to be built almost as if it’s a court case in the United States,” said [Michael] Scheuer, who from January 1996 to July 1999 ran the [Central Intelligence Agency’s] clandestine unit searching for Osama bin Laden. ‘I always assumed if I had 15 lawyers’ signatures, it was probably fine.’”).

13. See, e.g., Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 (describing U.S. cooperation with Albanian security forces in 1998 to gather intelligence on five individuals suspected of being members of the Egyptian Islamic Jihad, and then to transfer those individuals to Egypt); Mayer, *supra* note 1, at 109–10.

Further, the CIA was required to obtain an assurance from the receiving government that the individual would not be ill-treated.¹⁴ Although the total number of extraordinary renditions to date remains unclear,¹⁵ there is a wide consensus that the program has accelerated since September 11, 2001.¹⁶ In part, the acceleration can be attributed to expedited procedures approved by President Bush, affording additional flexibility to the CIA.¹⁷ For example, charges are sometimes brought only after the CIA has seized the suspect and requested cooperation.¹⁸ The strategy of extraordinary rendition evolved and expanded as the United States attempted to strengthen its efforts in the "war on terror."¹⁹ In its present form, extraordinary rendition usually involves a person who is not formally charged with any crime by the country conducting the abduction. Instead, the person is seized abroad and transported to a third country.

The twentieth century movement to establish international human rights standards emerged as a reaction to the horrors of the Second World War.²⁰ Since that time, as new human rights violations have been identified, the human rights community has responded: first by naming and describing the violations, and then by establishing standards to prohibit the abuses.²¹ "Crimes

14. Wilkinson & Drogin, *supra* note 12.

15. See Mayer, *supra* note 1, at 107 (noting that Representative Markey complained that after repeated requests of CIA officials to provide an accurate count of the number of people transferred, "[t]hey refuse to answer. All they will say is that they're in compliance with the law"); Dana Priest & Barton Gellman, *U.S. Denies Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1 ("Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners, the officials said.").

16. See Shannon McCaffrey, *Canadian Sent to Syrian Prison Disputes U.S. Claims Against Torture*, KNIGHT RIDDER/TRIB. NEWS SERVICE, July 29, 2004; Whitlock, *supra* note 10; Wilkinson & Drogin, *supra* note 12.

17. See Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1; Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005, at 1.

18. See Priest & Gellman, *supra* note 15 ("[F]ive officials acknowledged, as one of them put it, 'that sometimes a friendly country can be invited to "want" someone we grab.' Then, other officials said, the foreign government will charge him with a crime of some sort.").

19. See generally "War on Terror" Is "Inaccurate" Label for War on Insurgency, 18 INSIDE NAVY (Inside Washington Publishers, Crystal City, Va.), June 20, 2005. *But see* Richard W. Stevenson, *President Makes It Clear: Phrase is "War on Terror,"* N.Y. TIMES, Aug. 4, 2005, at A12.

20. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 36–91 (1999) (explaining the role of World War II as a catalyst for the human rights protections in the Universal Declaration of Human Rights); Asbjørn Eide & Gudmundur Alfredsson, *Introduction*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT*, at xxv–xxxv (Asbjørn Eide & Gudmundur Alfredsson eds., 1999) ("[T]he Universal Declaration [of Human Rights] draws on deep and widespread historical roots."). The United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) are typically viewed as the basis for modern international human rights protections, which have subsequently been articulated in numerous human rights instruments. See DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 8–10 (3d ed. 2001).

21. See MANFRED NOWAK, *INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME* 273 (2003) (noting that international human rights protections developed "during the second half of the 20th century in reaction to specific threats," resulting in "reactive and event-driven human rights policies").

against humanity,"²² genocide,²³ and torture²⁴ are all examples of human rights violations that have been addressed through this process.²⁵ Over time, however, new types of human rights violations, such as extraordinary rendition, have emerged.²⁶ While human rights instruments may not mention these new offenses by name,²⁷ various provisions within existing instruments nonetheless usually address and prohibit the offenses.²⁸ When the practice of disappearances, for example, became widespread in some countries,²⁹ the human rights community was compelled to examine human rights instruments to determine which of their provisions were implicated.³⁰ Ultimately, interna-

22. See THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 193 (1998) (reporting that the Nuremberg Charter defined crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts . . . or persecutions on political, racial or religious grounds"); William A. Schabas, *Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 *NEW ENG. L. REV.* 287, 297-98 (2001) (describing the official adoption of the term crimes against humanity for use in the charges at the Nuremberg Tribunals).

23. See, e.g., RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79-94 (1944) (defining the crime of genocide); Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951; see also Linnea D. Manashaw, Comment, *Genocide and Ethnic Cleansing: Why the Distinction? A Discussion in the Context of Atrocities Occurring in Sudan*, 35 *CAL. W. INT'L L.J.* 303, 317 (2005) (observing that the crime of genocide was not defined prior to World War II, and therefore Nazi officials at Nuremberg were tried for "crimes against humanity").

24. See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 13-15 (1988) (noting that widespread use of torture after World War II was the impetus for the elaboration of standards prohibiting torture, culminating in the Convention against Torture); *infra* note 180 (describing the Convention against Torture's prohibition on torture).

25. See Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 3, 10 (Hurst Hannum ed., 4th ed. 2004) (noting that torture and genocide, along with several other traditional human rights violations, are now regarded as violations of customary international law).

26. For example, Nowak observes that these new human rights violations include violations committed by non-state actors and intergovernmental organizations. See NOWAK, *supra* note 21, at 275. Ethnic cleansing and the use of rape as a weapon of war are other examples of newly addressed human rights violations. See MERON, *supra* note 22, at 47-48, 205 (1998) (observing that rape was tolerated and even used as a policy tool during the Second World War, and was also prevalent in the conflict in the former Yugoslavia); *id.* at 208-09 (noting that rape has been designated a punishable offense by the Yugoslav war crimes tribunal).

27. See, e.g., NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 243 (2d ed. 1999) ("[T]he phenomenon [of disappearances] is a special one, with its own characteristics, and no single international standard has been framed to encompass it.").

28. See, e.g., BURGERS & DANIELIUS, *supra* note 24, at 1 ("Many people assume that the *Convention's* principal aim is to outlaw torture On the contrary, the *Convention* is based upon the recognition that the . . . practice[] [is] already outlawed under international law."); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 7 (2000) (describing the interpretation and expansion of the term genocide to include ethnic cleansing).

29. See NOWAK, *supra* note 21, at 290 (describing the "Dirty War" in Argentina between 1976 and 1983, in which the government was responsible for thousands of disappearances). Rodley notes that disappearances first became widespread in Guatemala in the 1960s. See RODLEY, *supra* note 27, at 245. The practice has since been documented in at least seventy-six countries, with over 1000 cases reported in Argentina, Colombia, El Salvador, Guatemala, Iraq, Peru, and Sri Lanka. *Id.* at 272.

30. See UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *HUMAN RIGHTS FACT SHEET* No. 6 (rev. 2), *ENFORCED OR INVOLUNTARY DISAPPEARANCES* 2-3 (1997) (describing the various human rights implicated by the practice of enforced disappearance); AMNESTY INT'L, "DISAPPEARANCES" AND POLITICAL KILLINGS 97-107 (1994) (same).

tional bodies drafted new documents to directly address the practice of involuntary disappearances,³¹ but they drew on existing instruments to demonstrate that the practice violated long-standing human rights law.³²

As noted above, another novel human rights violation has emerged—a practice commonly referred to as extraordinary rendition.³³ Extraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals. It involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country,³⁴ and the subsequent transfer of that person to another country for detention and interrogation.³⁵ As is the case with state-sponsored disappearances,³⁶ extraordinary rendition appears to be a practice in which perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses.³⁷ For example, when Amnesty International launched campaigns on behalf of prisoners of conscience during the

31. See Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (Dec. 18, 1992).

32. See RODLEY, *supra* note 27, at 255–64 (describing successful challenges to the practice of disappearance that drew on the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the European Convention on Human Rights, and various prohibitions on torture and other forms of cruel, inhuman or degrading treatment); cf. Manashaw, *supra* note 23, at 317 (noting that the people conducting the Nuremberg Tribunals were reluctant to charge Nazi officials with genocide because a common understanding of the term as a criminal offense had only begun to gain currency in 1944).

33. The U.S. Department of Justice has used this term since the late 1980s. See Richard Sisk & Patrice O'Shaughnessy, *Streetwise Sافر's Return*, DAILY NEWS (New York), Apr. 14, 1996, at 7. At that time, however, the term referred to the practice of abducting suspects abroad and bringing them to the United States or another country to stand trial. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 189–90 (2d rev. ed. 1987). Today, the term is an euphemism describing abduction designed not only to circumvent extradition procedures, but also to avoid the protections of United States or other judicial authorities. See Gloria Cooper, *State of the Art*, COLUM. J. REV., July 1, 2005, at 13.

34. Some countries facilitate extraordinary rendition by seizing suspects and delivering them to the custody of officials from another country, who then transfer the detainees. See, e.g., Chandrasekaran & Finn, *supra* note 13 (describing Indonesia's cooperation with the United States in the extraordinary rendition of Muhammad Saad Iqbal Madni). In other cases, extraordinary rendition may take place without the assistance of local authorities or in violation of local laws. See Whitlock, *supra* note 10.

35. See Bob Herbert, Op-Ed, *It's Called Torture*, N.Y. TIMES, Feb. 28, 2005, at A19 (“What it means is that the United States seizes individuals, presumably terror suspects, and sends them off without even a nod in the direction of due process to countries known to practice torture.”); Danielle Knight, *Outsourcing a Real Nasty Job*, U.S. NEWS & WORLD REP., May 23, 2005, at 34 (“What it means is that the CIA or other government agencies can send, or ‘render,’ terrorism subjects for interrogation to other countries, even those with records of human-rights violations and abuse of prisoners.”); *Self-Inflicted Wounds*, Editorial, INT'L HERALD TRIB., Feb. 17, 2005, at 8 (“[E]xtraordinary rendition[] [is] the bureaucratic euphemism for sending prisoners to countries where the public and the press don't kick up a fuss about torture.”).

36. See RODLEY, *supra* note 27, at 244 (“[B]ecause of the official refusal to acknowledge the detention [] and . . . official abandonment of responsibility for the fate of the prisoner . . . all legal and moral constraint on official behaviour is at once removed.”).

37. See Dana Priest, *CIA's Assurances on Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1 (quoting an unnamed U.S. official as saying, “They say they are not abusing them, and that satisfies the legal requirement, but we all know they do”).

1970s,³⁸ governments responded by denying that those individuals had ever been taken into custody.³⁹ Governments used disappearances to shield their own officials from being implicated in extrajudicial executions and other forms of ill-treatment of prisoners.⁴⁰ Extraordinary rendition constitutes an attempt to avoid international condemnation of the use of torture and other forms of ill-treatment as interrogation techniques;⁴¹ officials contend that extraordinary rendition is simply a benign alternative to extradition.⁴²

Reports suggest that Russia,⁴³ Sweden,⁴⁴ and the United States have orchestrated extraordinary renditions.⁴⁵ Other states reportedly have facilitated extraordinary renditions either by providing intelligence or by conducting the initial seizure. These states include Bosnia,⁴⁶ Canada,⁴⁷ Croatia,⁴⁸ Georgia,⁴⁹ Indonesia,⁵⁰ Iraq,⁵¹ Macedonia,⁵² Malawi,⁵³ Pakistan,⁵⁴ and the United

38. See, e.g., JONATHAN POWER, AMNESTY INTERNATIONAL: THE HUMAN RIGHTS STORY 21–22 (1981).

39. See MINN. LAW. INT'L HUMAN RIGHTS COMM., EXPECTATIONS DENIED: HABEAS CORPUS AND THE SEARCH FOR GUATEMALA'S DISAPPEARED 4 (1988) ("Unexplained disappearances also prevent the creation of public martyrs or political prisoners who might serve as a rallying point for the opposition.")

40. See AMNESTY INT'L, *supra* note 30, at 89 ("Impunity for the perpetrators is a common feature of governmental programs of 'disappearances' and political killings. Secrecy helps to ensure impunity by preventing the facts becoming known."); MINN. LAW. INT'L HUMAN RIGHTS COMM., *supra* note 39, at 4 ("[A]s the term *disappearance* implies, the question of responsibility for kidnapping and/or murder is evaded.")

41. See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 32 ("[Former CIA Director George] Tenet suggested [to Congress] it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods."); DeNeen L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria*, WASH. POST, Nov. 5, 2003, at A1 (quoting a senior U.S. intelligence official: "The temptation is to have these folks in other hands because they have different standards").

42. See Priest & Gellman, *supra* note 15 ("American teams, officials said, do no more than assist in the transfer of suspects who are wanted on criminal charges by friendly countries."). *But see* John Crewdson et al., *Italy Charges CIA Agents*, CHI. TRIB., June 25, 2005, at 1 ("There are arrests, and then there are arrests," a senior American intelligence official said with a laugh . . .); Priest & Gellman, *supra* note 15 ("[F]ive officials acknowledged, as one of them put it, 'that sometimes a friendly country can be invited to "want" someone we grab.' Then, other officials said, the foreign government will charge him with a crime of some sort.")

43. See Peter Finn, *Tajik Defendant Details Abduction by Russian Police*, WASH. POST, Aug. 11, 2005, at A18.

44. See Craig Whitlock, *New Swedish Documents Illuminate CIA Action*, WASH. POST, May 21, 2005, at A1.

45. The U.S. government admits to the practice. See R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A3.

46. See Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation*, WASH. POST, May 11, 2004, at A1.

47. See Dana Priest, *Man Was Deported After Syrian Assurances*, WASH. POST, Nov. 20, 2003, at A24.

48. See *supra* notes 1–5 and accompanying text.

49. See HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE 14 (2003), <http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf>.

50. See Chandrasekaran & Finn, *supra* note 13.

51. See *supra* notes 6–9 and accompanying text.

52. See Crewdson et al., *supra* note 42.

53. See Stephen Grey, *America's Gulag*, NEW STATESMAN, May 17, 2004.

54. See Wilkinson & Drogin, *supra* note 12.

Kingdom.⁵⁵ Still other states, including Afghanistan,⁵⁶ Egypt,⁵⁷ Jordan,⁵⁸ Morocco,⁵⁹ Saudi Arabia,⁶⁰ Syria,⁶¹ and Uzbekistan,⁶² have assisted by taking custody of suspects after they are transferred out of the state where they are abducted. In many cases, the receiving states reportedly engage in torture and other forms of ill-treatment of detainees on a systematic basis.⁶³ The use of extraordinary rendition has accelerated since September 11, 2001,⁶⁴ and widespread reports of the United States' use of the practice may now serve as justification for other countries seeking to adopt the tactic.⁶⁵

Drawing on the experiences of the human rights community in addressing disappearances, it is now necessary to examine the practice of extraordinary rendition through the lens of existing human rights instruments. This Article demonstrates that extraordinary rendition violates numerous international human rights standards, including the Universal Declaration of Human Rights,⁶⁶ the International Covenant on Civil and Political Rights,⁶⁷ the International Covenant on Economic, Social and Cultural Rights,⁶⁸ the Convention and Protocol Relating to the Status of Refugees,⁶⁹ the Convention against Torture,⁷⁰ the Vienna Convention on Consular Relations,⁷¹ and the Geneva Conventions.⁷² The following Parts examine each instrument in turn,

55. See Stephen Grey & Andrew Buncombe, *How Britain Helps the CIA Run Secret Torture Flights*, IN-DEP. (London), Feb. 10, 2005, at 8.

56. See *supra* notes 6–9 and accompanying text.

57. See Chandrasekaran & Finn, *supra* note 13.

58. See Priest & Gellman, *supra* note 15.

59. See Don Van Natta, Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at 1.

60. See Priest & Gellman, *supra* note 15.

61. See Peter Finn, *Al Qaeda Recruiter Reportedly Tortured*, WASH. POST, Jan. 31, 2003, at A14.

62. See Stephen Grey, *U.S. Accused of "Torture Flights"*, SUNDAY TIMES (London), Nov. 14, 2004, at 24.

63. See generally U.S. DEP'T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004 (2005), <http://www.state.gov/g/drl/rls/hrrpt/2004> (noting that receiving countries' use of torture is "systematic" [Egypt, Morocco, Saudi Arabia, and Uzbekistan], or "a common occurrence" [Syria]).

64. See Whitlock, *supra* note 10.

65. See, e.g., Finn, *supra* note 43 (quoting a Russian human rights worker as saying, "The West cannot complain [about Russia's reported use of extraordinary rendition], and if they do, our leadership can say, 'Look at you, you do the same thing'").

66. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

67. International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

68. International Covenant on Economic, Social and Cultural Rights, *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3.

69. Convention Relating to the Status of Refugees, *entered into force* Apr. 22, 1954, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, *entered into force* Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

70. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

71. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100-1, 596 U.N.T.S. 261, 292 [hereinafter Vienna Consular Convention].

72. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-

and the conclusion addresses issues of implementing these human rights protections to stop the practice of extraordinary rendition.

I. EXTRAORDINARY RENDITION VIOLATES THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights ("Universal Declaration") is the authoritative interpretation of the human rights obligations contained in the United Nations Charter.⁷³ Many of its provisions have attained the status of international customary law.⁷⁴ In particular, the U.N. Economic and Social Council's Human Rights Commission has affirmed that "the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial" have achieved this status and "cannot be open to challenge by any State as they are indispensable for the functioning of an international community based on the rule of law and respect for human rights and fundamental freedoms."⁷⁵ Moreover, many domestic courts have made reference to the Universal Declaration to describe international human rights obligations,⁷⁶ and the Universal Declaration has also inspired constitutional and legislative provisions in many nations.⁷⁷

Article 3 of the Universal Declaration guarantees the "right to life, liberty and security of person."⁷⁸ The stories of Qassem, Rashul, and el Masri demonstrate that the practice of extraordinary rendition implicates these rights; abduction itself involves a deprivation of liberty and security. As developed and articulated in subsequent human rights instruments, Article 5's prohibition on torture and cruel, inhuman or degrading treatment or punishment is also relevant to extraordinary rendition,⁷⁹ particularly when coupled with the Preamble's proclamation that all nations "shall strive . . . to promote respect" for the provisions of the Declaration and "to secure their universal and effective recognition and observance . . ."⁸⁰ For example, when the United

wrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Conventions].

73. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 352-53 (1996) ("The most important multilateral treaty in the field of human rights is perhaps the U.N. Charter Legally and politically, it is the Universal Declaration of Human Rights which defines the Charter's human rights provisions.")

74. See *id.* at 289.

75. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Preliminary Report by the Special Representative of the Commission, Mr. Andrés Aguilar, Appointed Pursuant to Resolution 1984/54, on the Human Rights Situation in the Islamic Republic of Iran*, ¶¶ 14-15, U.N. Doc. E/CN.4/1985/20 (Feb. 1, 1985).

76. See Hannum, *supra* note 73, at 292-310.

77. See *id.* at 312-17.

78. Universal Declaration, *supra* note 66, art. 3.

79. See *id.* art. 5; *infra* notes 175-207 and accompanying text.

80. See Universal Declaration, *supra* note 66, at pmbl. Because extraordinary rendition involves the forcible removal of individuals from the jurisdiction to which they belong, the practice also violates the provision of Article 2 that provides that "no distinction shall be made on the basis of the . . . jurisdic-

States handed Qassem over to Egypt, a country where he had been sentenced to death in absentia and a country the United States criticizes for its systematic use of torture,⁸¹ the United States was failing to uphold its obligation to protect against torture and other forms of ill-treatment.

Because extraordinary rendition frequently denies individuals access to recognized judicial procedures for extradition,⁸² as well as to legal recognition in the receiving country,⁸³ the procedure violates Article 6's guarantee that "[e]veryone has the right to recognition everywhere as a person before the law."⁸⁴ The subsequent incommunicado detention and denial of access to counsel impede "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"⁸⁵ established in Article 8. Given that the countries responsible for extraordinary rendition sometimes arrest individuals on fabricated charges or with no charges at all,⁸⁶ extraordinary rendition can constitute "arbitrary arrest, detention or exile,"⁸⁷ which is prohibited by Article 9. Extraordinary rendition also violates Articles 10 and 11 which assure the right to a fair and public hearing on criminal charges and the right to be presumed innocent until proven guilty according to law;⁸⁸ the lack of judicial process indicates that countries orchestrating the procedure are operating from a presumption of guilt⁸⁹ and that these countries afford individuals subject to extraordinary rendition little or no opportunity to challenge that presumption.⁹⁰ El Masri's case exposes these flaws in the system of extraordinary

tional . . . status of the country or territory to which a person belongs." *See id.* art. 2.

81. *See* U.S. DEP'T STATE, *supra* note 63 ("The [Egyptian] security forces continued to mistreat and torture prisoners [T]orture and abuse of detainees by police, security personnel, and prison guards remained common and persistent.").

82. *See* Chandrasekaran & Finn, *supra* note 13 (noting that extraordinary rendition "bypass[es] extradition procedures and legal formalities").

83. *See, e.g.*, Shannon McCaffrey, *supra* note 16 (reporting that "most of the detainees are never heard from again").

84. *See* Universal Declaration, *supra* note 66, art. 6.

85. *See id.* art. 8.

86. *See* Jehl & Johnston, *supra* note 17 (observing that criminal charges are not required for extraordinary rendition); Priest & Gellman, *supra* note 15.

87. *See* Universal Declaration, *supra* note 66, art. 9.

88. *See id.* art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."); *id.* art. 11(1) ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."); *cf.* Boudellaa v. Bosnia and Herzegovina, Decision on Admissibility and Merits, Case No. CH/02/8679, Human Rights Chamber for Bosnia and Herzegovina, Oct. 11, 2002, at 69 (holding that extraordinary rendition violated the right to be presumed innocent under Article 6(2) of the European Convention on Human Rights).

89. *See* Helen Thomas, "Ghost Detainees" Should Haunt CIA, SEATTLE POST-INTELLIGENCER, May 5, 2005, at B6 (quoting President Bush defending the program by stating that it is in "our country's interest to find people who would do harm to us and get them out of harm's way").

90. For example, in at least two cases of extraordinary rendition, authorities did not notify the detainees' attorneys of government transfer until after the rendition took place. *See* Complaint ¶ 60, at 18 Arar v. Ashcroft, C.A. No. 04-CV-249-DGT-VVP (E.D.N.Y. 2004) [hereinafter Arar Complaint]; Craig Whitlock, *A Secret Deportation of Terror Suspects*, WASH. POST, July 25, 2004, at A1.

rendition; he was abducted, ill-treated, and interrogated for several months because U.S. intelligence confused him with Khalid Masri, who was believed to have an important role in the Hamburg cell of al Qaeda.⁹¹

Extraordinary rendition also implicates Article 13, which provides that all persons have the right to leave any country and to return to their home country.⁹² More importantly, extraordinary rendition undermines the protection of Article 14 that all persons have “the right to seek and to enjoy in other countries asylum from persecution,”⁹³ because the procedure effectively delivers people like Qassem to countries like Egypt where they are likely to suffer persecution.⁹⁴ In some instances, people are also delivered *from* countries where they had previously sought asylum.⁹⁵ Extraordinary rendition implicates other provisions of the Universal Declaration indirectly, including the right to found a family;⁹⁶ the prohibition against arbitrary deprivation of property;⁹⁷ freedom of thought, opinion, and expression;⁹⁸ and the right to “a social and international order in which the rights and freedoms [of the] Declaration can be fully realized.”⁹⁹

II. EXTRAORDINARY RENDITION VIOLATES THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

While the Universal Declaration established a “common standard of achievement,”¹⁰⁰ the International Covenant on Civil and Political Rights (“ICCPR”) codified many of its provisions.¹⁰¹ First, it is necessary to examine the terri-

91. See Zagaris, *supra* note 10; CBS News, *supra* note 10.

92. See Universal Declaration, *supra* note 66, art. 13.

93. See *id.* art. 14.

94. Reports demonstrate that many receiving countries are more likely to inflict torture and other forms of ill-treatment on people suspected of participation in terrorism, extremism, or other political activities. See U.S. DEPT STATE, *supra* note 63 (reporting that Egyptian, Jordanian, Moroccan, Saudi, Syrian, and Uzbek authorities have targeted political detainees and terror suspects for torture).

95. See, e.g., John Crewdson, *Italy Seeks Arrests of Six More CIA Operatives*, CHI. TRIB., July 21, 2005, at 3 (reporting that Abu Omar had been granted asylum in Italy prior to his abduction and reported extraordinary rendition by CIA agents); Whitlock, *supra* note 90 (noting that Egyptian nationals Ahmed Agiza and Muhammad Zery had applied for political asylum in Sweden prior to their extraordinary rendition).

96. See Universal Declaration, *supra* note 66, art. 16.

97. See *id.* art. 17; cf. Haya de la Torre (Colom. v. Peru), 1951 ICJ Rep. 71, 83 (June 13) (holding that the International Court of Justice lacked authority to instruct Colombia in complying with the court's determination that its grant of asylum was not valid and that Colombia was not obligated to hand Haya de la Torre over to Peruvian authorities).

98. See Universal Declaration, *supra* note 66, arts. 18–19.

99. See *id.* art. 28.

100. See *id.* at pmb1.

101. See ICCPR, *supra* note 67. There are 154 States Parties to the ICCPR. Of the countries mentioned above for their involvement in extraordinary rendition, only Indonesia, Pakistan, and Saudi Arabia are not signatories to the ICCPR. See OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL HUMAN RIGHTS TREATIES 2–11 (2004), <http://www.unhchr.ch/pdf/report.pdf>. Much of the following analysis applies with equal force to similar provisions of the European Convention of Human Rights. See Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1,

torial scope of the ICCPR. While the language of Article 2(1) suggests that a State Party is only obligated to respect and ensure the rights of the ICCPR “to all individuals within its territory *and* subject to its jurisdiction,”¹⁰² the Human Rights Committee has determined that a person need not be located within a State Party’s territory in order for that State Party to have obligations toward that person; the person must merely be “within the power or effective control” of the State Party.¹⁰³ Therefore, once a State Party takes a person into custody through extraordinary rendition, that detaining State Party is required to afford the detainee the rights and protections enumerated in the ICCPR.¹⁰⁴ This provision is particularly important because the U.S. officials who conduct extraordinary rendition never bring the detainees into U.S. territory.

Taking into consideration this territorial scope, several provisions of the ICCPR bind states engaging in the practice of extraordinary rendition. Article 7 prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment.¹⁰⁵ The Human Rights Committee has interpreted this prohibition to require evidence of “a real risk of abusive treatment” in cases of transfer.¹⁰⁶ Article 10 requires States Parties to treat all detained persons

1990, and November 1, 1998 *respectively* [hereinafter European Convention]. Because many extraordinary renditions have taken place in European countries (either as the site of the abduction, a transit point, or a final detention destination), the European Convention applies to certain cases of extraordinary rendition. Moreover, the Council of Europe has taken an active position in investigating allegations of extraordinary rendition among member states. See Eur. Parl. Ass., *Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II*, Comm. On Legal Aff. & Hum. Rts., Doc. No. AS/Jur(2006)03rev, paras. 12–24, 93–99, available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (describing Rapporteur Dick Marty’s investigation).

102. See ICCPR, *supra* note 67, art. 2(1) (emphasis added).

103. See United Nations, Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), ¶ 10 [hereinafter General Comment 31]:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party This principle [that enjoyment of the Covenant is not limited by nationality] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained

104. The Special Rapporteur on torture stated the obligation under Article 2(1) in broad terms: “[I]t is the essential responsibility of States . . . to prevent such acts [of torture and other forms of ill-treatment] by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture.” See Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 27, delivered to the General Assembly, U.N. Doc. A/59/324 (Sept. 1, 2004) [hereinafter Special Rapporteur on Torture].

105. See ICCPR, *supra* note 67, art. 7; cf. European Convention, *supra* note 101, art. 3.

106. See *Ngoc Si Truong v. Canada*, United Nations, Human Rights Committee, 77th Sess., Comm. No. 743/1997, U.N. Doc. CCPR/C/77/D743/1997, ¶ 7.5 (Mar. 28, 2003). The U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution in 2005 confirming that customary international law prohibits the involuntary transfer of a person who “faces a real risk of being subjected to torture, cruel, inhuman or degrading treatment or extrajudicial killing” Transfer of Persons, Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/L.12, ¶ 3 (Aug. 4, 2005) [hereinafter Transfer of Persons]. This

“with humanity and with respect for the inherent dignity of the human person.”¹⁰⁷ Subjecting individuals to torture and other forms of cruel, inhuman or degrading treatment after transfer violates the provisions of Articles 7 and 10, and the process of abduction and transfer itself may violate a detainee’s inherent human dignity.¹⁰⁸ The Human Rights Committee has interpreted Articles 2, 6,¹⁰⁹ and 7 as follows:

[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹¹⁰

In *A.R.J. v. Australia*,¹¹¹ the Human Rights Committee entertained the possibility that “[t]o surrender a prisoner knowingly to another State where there are substantial grounds for believing that he would be in danger of being tortured, while not explicitly covered by the wording of Article 7 of the ICCPR, would run counter to its object and purpose.”¹¹² The Committee has determined that in some cases transfer may create a risk of treatment contrary to Article 7, and, therefore, countries conducting such transfers violate Article 7.¹¹³ This risk is heightened when the State Party has already determined that the detainee has a well-founded fear of persecution upon return.¹¹⁴ In *Ahani v. Canada*,¹¹⁵ the Committee “emphasize[d] that . . . the

“real risk” standard is more stringent than the “substantial grounds” standard articulated in the *non-refoulement* provision of the Convention against Torture. See David Weissbrodt & Isabel Horttreiter, *The Principle of Non-Refoulement*, 5 BUFF. HUM. RTS. L. REV. 1, 55–56 (1999) (comparing the two standards).

107. See ICCPR, *supra* note 67, art. 10(1).

108. Cf. *Agiza v. Sweden*, United Nations, Committee against Torture, 34th Sess., Comm. No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, ¶ 13.3 (May 20, 2005) (determining that Agiza’s treatment during the extraordinary rendition process constituted cruel, inhuman or degrading treatment).

109. Article 6 provides that no person may be arbitrarily deprived of his or her life. See ICCPR, *supra* note 67, art. 6(2); cf. European Convention, *supra* note 101, art. 2.

110. General Comment 31, *supra* note 103, ¶ 12.

111. United Nations, Human Rights Committee, 60th Sess., Comm. No. 692/1996, U.N. Doc. CCPR/C/60/D/692/1996, ¶ 3.3 (July 28, 1997).

112. See *id.* ¶ 3.3 (noting complainant’s argument as quoted above); *id.* ¶¶ 6.6–6.7, 6.14 (finding that if the risk was determined to be “real,” then complainant’s transfer would implicate Article 7).

113. *Byahuranga v. Denmark*, United Nations, Human Rights Committee, 82nd Sess., Comm. No. 1222/203, U.N. Doc. CCPR/C/82/D/1222/2003, ¶ 11.4 (Aug. 15, 2003). The 2005 Sub-Commission resolution also based its conclusion “in particular” on Article 7 of the ICCPR and Article 3 of the Convention against Torture. See *Transfer of Persons*, *supra* note 106, at pmbl.

114. See *Mr. C. v. Australia*, United Nations, Human Rights Committee, 76th Sess., Comm. No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999, ¶ 8.5 (Oct. 28, 2002). The Human Rights Committee was also concerned that Mr. C. would not have access to needed psychiatric medication if he were returned to Iran. See *id.*

115. *Ahani v. Canada*, United Nations, Human Rights Committee, 80th Sess., Comm. No. 1051/2002,

right to be free from torture requires . . . that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.”¹¹⁶ The guidance of the Human Rights Committee indicates that the protections of Article 7 extend to cases of transfer.¹¹⁷ Article 7 is particularly relevant in evaluating Qassem’s extraordinary rendition to Egypt; the United States had substantial grounds to believe that his transfer would place him in danger of being tortured.

The U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment (“Special Rapporteur on torture”) recently reaffirmed that “[t]he condoning of torture is per se a violation of the prohibition of torture.”¹¹⁸ He also noted that “[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights”¹¹⁹ Extraordinary rendition “to facilitate interrogation”¹²⁰ constitutes complicity with, and condoning of, torture, and an abrogation of a State Party’s duty to ensure rights under the ICCPR. The Special Rapporteur on torture also expressed concern with whether the use of diplomatic assurances “is not becoming a politically inspired substitute for the principle of non-refoulement.”¹²¹

The CIA reportedly orchestrated Rashul’s extraordinary rendition to Afghanistan in order to facilitate intelligence-gathering. Given that the United States already controlled substantial territory in Iraq at the time of his extraordinary rendition, the United States seems to have been condoning torture by transferring Rashul beyond territory within its control.

Article 13 of the ICCPR prevents the expulsion of a non-citizen lawfully present in the territory of a State Party unless the expulsion is “in pursuance of a decision reached in accordance with law.”¹²² Prior to expulsion, the non-citizen has the right to have a competent authority review the case, “except where compelling reasons of national security otherwise require.”¹²³ Heightened procedural safeguards are appropriate when there is a risk of torture. The Human Rights Committee has determined that “where one of the high-

U.N. Doc. CCPR/C/80/D/1051/2002, ¶ 10.6 (Mar. 29, 2004).

116. *Id.* ¶ 10.7.

117. *Cf. Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at ¶ 91 (1989) (holding that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, is implicated when there is a real risk that a person will be subjected to such treatment or punishment upon return). The Human Rights Committee has cited favorably to *Soering* in interpreting Article 7 obligations. *See Kindler v. Canada*, Comm. No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991, ¶ 15.3 (July 30, 1993).

118. Special Rapporteur on torture, *supra* note 104, ¶ 15, at 5.

119. *Id.* ¶ 11, at 6.

120. *See* Jack Goldsmith, Draft Memorandum, Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq, Mar. 19, 2004, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 367, 368 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press 2005); Priest & Gellman, *supra* note 15.

121. *See* Special Rapporteur on torture, *supra* note 104, ¶ 31, at 9.

122. ICCPR, *supra* note 67, art. 13; *cf.* European Convention *supra* note 101, art. 5(1)(f).

123. *See* ICCPR, *supra* note 67, art. 13.

est values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture."¹²⁴ Hence, extraordinary rendition violates Article 13 both because it is not grounded in a decision reached in accordance with the law, and because it does not provide adequate review.¹²⁵ While the United States insists that the procedure is vital to national security,¹²⁶ it is unclear why national security would be undermined by review. Since the risk of torture is present after extraordinary rendition, the lack of fair procedures to ascertain whether expulsion is proper runs afoul of Article 13. In the case of Ahmed Agiza, discussed *infra*, Sweden violated its obligation to provide heightened procedural safeguards within the context of the Convention against Torture.

Article 9 states that every person "has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."¹²⁷ As with the protections in Articles 3, 9, 10, and 11 of the Universal Declaration, the lack of adequate judicial procedural safeguards throughout the process of extraordinary rendition indicates that the procedure constitutes a deprivation of liberty and security, as well as an arbitrary arrest and detention, in violation of the ICCPR. Article 9(4) entitles any person deprived of liberty by detention "to take proceedings before a court, in order that that court may decide without delay on the lawfulness" of the detention.¹²⁸ Additionally, Article 16 states that "[e]veryone shall have the right to recognition everywhere as a person before the law."¹²⁹ As demonstrated in the cases of Qassem, Rashul, and el Masri, transferring countries rarely, if ever, provide persons subjected to extraordinary rendition with such judicial recognition or access either prior, or subsequent, to the transfer.¹³⁰ Indeed, one of the purposes of extraordinary rendition appears to be to hold persons outside of the recognized judicial procedures for extradition and criminal trial.¹³¹

Extraordinary rendition implicitly violates Article 14 because detainees are not "equal before the courts and tribunals,"¹³² and, in the first instance, they are not allowed to come before courts and tribunals. Much like the provisions of Articles 10 and 11 of the Universal Declaration, Article 14 of the ICCPR calls for the presumption of innocence and for fair hearing.¹³³ As

124. Ahani v. Canada, *supra* note 115, ¶ 10.6.

125. See *supra* notes 82–83; *infra* note 196 and accompanying text.

126. See Zagaris, *supra* note 10 ("On March 16, 2005, President Bush defended extraordinary renditions as vital to the nation's defense.")

127. ICCPR, *supra* note 67, art. 9; cf. European Convention *supra* note 101, art. 5.

128. ICCPR, *supra* note 67, art. 9.

129. See *id.* art. 16.

130. See *supra* notes 82–83.

131. See Chandrasekaran & Finn, *supra* note 13.

132. See ICCPR, *supra* note 67, art. 14(1); cf. European Convention, *supra* note 101, art. 6.

133. See ICCPR, *supra* note 67, art. 14(1) (fair hearing); *id.* art. 14(2) (presumption of innocence).

discussed above, a presumption of guilt drives extraordinary rendition, and detainees are not able to challenge that presumption in any “competent, independent and impartial tribunal,” as Article 14 requires.¹³⁴ Of the procedural safeguards articulated in Article 14(3), the most relevant and fundamental is the right to be informed promptly of the charge against the individual.¹³⁵ It is unclear whether authorities actually charge individuals subject to extraordinary rendition with crimes, and, if so, whether authorities provide them with the other procedural guarantees established in Article 14. At the very least, those guarantees are not present prior to their transfer,¹³⁶ and detainees are frequently denied access to counsel.¹³⁷ Moreover, the interrogations that take place after transfer likely violate Article 14(g)’s minimum guarantee that persons “[n]ot . . . be compelled to testify against [themselves] or to confess guilt.”¹³⁸ El Masri’s case shows the consequences when a country ignores its obligations under Article 14.

Extraordinary rendition more indirectly implicates other provisions of the ICCPR, including the right to freedom of association,¹³⁹ the right to hold opinions without interference,¹⁴⁰ and the right to freedom of movement.¹⁴¹

Article 2 requires that persons claiming a violation of their rights under the ICCPR must “have an effective remedy.”¹⁴² Yet, as demonstrated in the cases of Qassem, Rashul, and el Masri, detainees rarely have any effective means to claim their rights under the ICCPR or to challenge their transfer.¹⁴³

Most of the above protections in the ICCPR may be the subject of derogation. Derogation, however, is only allowed “to the extent strictly required by the exigencies of the situation.”¹⁴⁴ If a State Party elects to derogate, it must immediately inform the Secretary-General of the United Nations of the specific provisions from which it has derogated and the reasons for derogation.¹⁴⁵

134. See *id.* art. 14(1).

135. See *id.* art. 14(3) (“[E]veryone shall be entitled . . . [t]o be informed promptly . . . of the nature and cause of the charge against him . . .”).

136. See *supra* notes 82–83.

137. See *supra* note 90.

138. ICCPR, *supra* note 67, art. 14(g); see also, e.g., *Detainees: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (reporting that Mamdouh Habib “signed everything” and “confessed to all manner of allegations” while detained and tortured in Egypt) (testimony of Joseph Margulies, attorney for Mamdouh Habib); McCaffrey, *supra* note 16 (noting that Maher Arar falsely confessed to having terror ties while detained and tortured in Syria). Similar to the terms of the preamble of the Universal Declaration, the ICCPR requires each State Party to take steps “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” and “to give effect to the rights recognized in the present Covenant.” See ICCPR, *supra* note 67, art. 2. Hence, the territorial restriction does not necessarily apply to the obligations to “respect” or “to give effect” to the rights recognized in the ICCPR.

139. See ICCPR, *supra* note 67, art. 22.

140. See *id.* art. 19.

141. See *id.* art. 12.

142. See *id.* art. 2(3)(a); cf. European Convention, *supra* note 101, art. 13.

143. See *supra* notes 82–83.

144. See ICCPR, *supra* note 67, art. 4(1); cf. European Convention, *supra* note 101, art. 15(1).

145. See ICCPR, *supra* note 67, art. 4(3); cf. European Convention, *supra* note 101, art. 15(3). Even in the wake of the attacks of September 11, 2001, the United States has not formally announced that it is derogating from the provisions of the ICCPR. See Kenneth Roth, *The Law of War in the War on Terror*,

One non-derogable provision is the guarantee in Article 7 that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁴⁶ In light of the non-derogability of this provision, as well as the requirement in Article 2 that each State Party give effect to the rights in the ICCPR, it is clear that extraordinary rendition violates Article 7. Another non-derogable provision is Article 16, which guarantees the “right to recognition everywhere as a person before the law.”¹⁴⁷ This provision indicates that under no circumstances may a country transfer persons in a way that strips them of recognition before the law. States Parties also may not derogate from the rights to freedom of thought, conscience, and belief, as articulated in Article 18.¹⁴⁸ Extraordinary rendition of a person based on advocacy of unpopular beliefs may, therefore, violate Article 18.

III. EXTRAORDINARY RENDITION VIOLATES THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The U.N. adopted the International Covenant on Economic, Social and Cultural Rights in 1966 as a companion to the ICCPR.¹⁴⁹ Unlike the rights articulated in the ICCPR, the provisions of the International Covenant on Economic, Social and Cultural Rights are not always immediately enforceable; States Parties are to implement the rights “to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights”¹⁵⁰ Additionally, the International Covenant on Economic, Social and Cultural Rights does not contain any explicit jurisdictional limitations (unlike the ICCPR).¹⁵¹ When a government abducts and transports a person to another country to face torture and other forms of cruel, inhuman or degrading treatment, that government violates the person’s economic, social and cultural rights. Extraordinary rendition violates the Article 11 right to an adequate standard of living for all persons and their families.¹⁵² Some of the transfer methods and interrogation tactics may also violate the right to be free from hunger¹⁵³ and the right to physical and mental

FOREIGN AFF., Jan. 1, 2004, at 2, 6. The United Kingdom and several other countries have filed the requisite derogation documents with the U.N. Secretary-General. *Id.*

146. See ICCPR, *supra* note 67, art. 4(2); cf. European Convention, *supra* note 101, art. 15(2).

147. See ICCPR, *supra* note 67, art. 4(2).

148. See *id.* art. 18.

149. See WEISSBRODT ET AL., *supra* note 20, at 9. There are 151 States Parties to the International Covenant on Economic, Social and Cultural Rights. Of the countries mentioned above for their involvement in extraordinary rendition, only Indonesia and Saudi Arabia have neither signed nor ratified the Covenant. In addition, Pakistan and the United States have signed but not ratified the instrument. See Office of the United Nations High Commissioner for Refugees, Ratifications and Reservations: International Covenant on Economic, Social and Cultural Rights, <http://www.ohchr.org/english/countries/ratification/3.htm> (last visited Feb. 21, 2006).

150. International Covenant on Economic, Social and Cultural Rights, *supra* note 68, art. 2(1).

151. See *supra* notes 102–104 and accompanying text.

152. See International Covenant on Economic, Social and Cultural Rights, *supra* note 68, art. 11(1).

153. See *id.* art. 11(2).

health.¹⁵⁴ El Masri's story demonstrates that extraordinary rendition may also undermine the family rights articulated in Article 10, because the process separates a person from his or her family.¹⁵⁵ As noted above, after el Masri's extraordinary rendition, his family left Germany for Lebanon because they believed el Masri had abandoned them.

IV. EXTRAORDINARY RENDITION VIOLATES THE CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES

The Convention Relating to the Status of Refugees ("Refugee Convention"), adopted by the United Nations in 1951,¹⁵⁶ is relevant to an analysis of extraordinary rendition since officials rarely abduct individuals in their country of origin.¹⁵⁷ While the Refugee Convention applies directly only to persons who have become refugees as a result of events occurring before January 1, 1951,¹⁵⁸ it has been applied to subsequent events by the Protocol Relating to the Status of Refugees ("Refugee Protocol").¹⁵⁹ A refugee is defined as a person outside his or her country of nationality who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and "is unable or, owing to such fear, is unwilling to avail himself to the protection of that country"¹⁶⁰ Therefore, the Refugee Convention and Protocol only protect such persons, and only with regard to their potential transfer to their country of nationality or habitual residence. Rashul and el Masri were not transferred to their countries of nationality, and therefore the Refugee Convention and Protocol would not govern their extraordinary renditions. These instruments are relevant, however, to the extraordinary rendition of Qassem and Agiza, discussed *supra* and *infra*, respectively.

154. *See id.* art. 12(1).

155. *See id.* art. 10.

156. *See* Refugee Convention, *supra* note 69.

157. *See, e.g.,* Mayer, *supra* note 1 (describing numerous cases of extraordinary rendition, none of which involved seizure in the suspect's home country).

158. *See* Refugee Convention, *supra* note 69, art. 1(A)(2).

159. The Refugee Protocol effectively extended all the protections of the Refugee Convention to those who had become refugees as a result of events occurring after January 1, 1951. Therefore, all of the provisions of the Refugee Convention are made applicable to conduct relating to all refugees, regardless of when the events responsible for their refugee status occurred. *See* Refugee Protocol, *supra* note 69, art. 1. The Refugee Protocol also reiterates that Article 16(1) and Article 33 may not be subject to reservations. *Id.* art. 7(1). Of the countries mentioned above for their involvement in extraordinary rendition, Indonesia, Iraq, Jordan, Pakistan, Saudi Arabia, Syria, and Uzbekistan are not parties to either the Refugee Convention or the Refugee Protocol. The United States is not a party to the Refugee Convention, but is a party to the Refugee Protocol. Afghanistan became a State Party to the Refugee Protocol as of August 30, 2005. Both the Refugee Convention and the Refugee Protocol have 143 States Parties. UNITED NATIONS HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b73b0d63> (last visited Feb. 20, 2006).

160. Refugee Convention, *supra* note 69, art. 1(A)(2); Refugee Protocol, *supra* note 69, art. 1(2).

Article 12 of the Refugee Convention states that “[t]he personal status of a refugee shall be governed by the law of the country of his domicile”¹⁶¹ Because extraordinary rendition typically circumvents the extradition laws of the detainee’s country of domicile,¹⁶² it violates Article 12. Article 16 affords refugees free access to the courts of law on the territory of all States Parties and provides that refugees shall enjoy “the same treatment as a national in matters pertaining to access to the courts.”¹⁶³ To the extent that Qassem and Agiza were subjected to deportation or extradition outside of the legal extradition process presumably afforded to nationals of Croatia and Sweden, their transfers violated Article 16. The provision of Article 16 guaranteeing “free access to the courts” may not be subject to any reservations.¹⁶⁴

Extraordinary rendition also potentially violates the Refugee Convention’s Article 32 prohibition on the expulsion of a refugee without due process,¹⁶⁵ and the Article 33 prohibition on the return (“*refouler*”) of a refugee to a place where his or her life or freedom would be threatened.¹⁶⁶ Viewed in light of the definition of refugee, the prohibition on return is limited to the transfer of a person to his or her country of nationality or habitual residence.¹⁶⁷ As demonstrated above, extraordinary rendition denies detainees due process of law prior to expulsion. Although due process of law must always be afforded, under Article 32 a refugee may be denied the right to submit evidence, to appeal, or to have representation before a competent authority, if such denial of rights is required by “compelling reasons of national security.”¹⁶⁸ Yet, if a refugee poses a threat to national security, the country of the refugee’s domicile could simply detain the individual. Therefore, the country of domicile would likely have difficulty presenting “compelling reasons” to curtail the refugee’s procedural rights under Article 32 while pursuing expulsion. Detention is arguably a safer alternative than releasing the individual into the custody of another state. Moreover, Article 32(3) gives refugees subject to expulsion a “reasonable period within which to seek legal admission into another country.”¹⁶⁹ There is no evidence that countries ever honor this provision in the process of extraordinary rendition.

The prohibition on *refoulement* in Article 33 is of particular concern because the countries receiving detainees frequently target political prisoners

161. See Refugee Convention, *supra* note 69, art. 12(1).

162. See Chandrasekaran & Finn, *supra* note 13 (noting that extraordinary rendition “bypass[es] extradition procedures and legal formalities” and involves “few or no legal proceedings”).

163. Refugee Convention, *supra* note 69, art. 16(1)-(2).

164. *Id.* arts. 16(1), 42.

165. See *id.* art. 32(2) (“The expulsion of such a refugee [who is lawfully present in a country] shall be only in pursuance of a decision reached in accordance with due process of law.”).

166. See *id.* art. 33(1) (“No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

167. See Weissbrodt & Hortreiter, *supra* note 106, at 54.

168. Refugee Convention, *supra* note 69, art. 32(2).

169. *Id.* art. 32(3).

and persons accused of extremism or terrorism for particularly harsh conditions of confinement.¹⁷⁰ Extraordinary rendition appears to violate Article 33's prohibition on return when the return will result in threats to an individual's life or freedom on account of political opinion. Such was the case when the United States sent Qassem back to Egypt, where he had been sentenced to death in absentia. Even though Article 33(2) states that the prohibition on *refoulement* does not extend to cases in which a refugee is a danger to the security of the country in which the refugee is located, or where the refugee has been convicted of a particularly serious crime,¹⁷¹ those conditions are unlikely to be relevant when a person is at liberty in his or her country of residence and is subsequently abducted by agents of another state. For example, there is no evidence that the Croatian government found Qassem to be a threat to state security. Article 33 is one of the Refugee Convention provisions to which States Parties may not make reservations,¹⁷² and it is, therefore, non-derogable. Additionally, Article 1(3) of the Refugee Protocol provides that "[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation"¹⁷³ This provision, thus, bars any effort to circumvent the provisions of the Refugee Convention and Protocol by altering the geographic location of a detainee.

Lastly, extraordinary rendition implicates other provisions of the Refugee Convention, including the Article 26 protection of the freedom of movement, and Article 31's allowance that the movement of refugees unlawfully residing in a country may only be restricted until such time that their status is regularized.¹⁷⁴

V. EXTRAORDINARY RENDITION VIOLATES THE CONVENTION AGAINST TORTURE

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person"¹⁷⁵ The Convention against Torture

170. See *supra* note 94.

171. See Refugee Convention, *supra* note 69, art. 33(2).

172. *Id.* art. 42(1).

173. See Refugee Protocol, *supra* note 69, art. 1(3). *But see* *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 186 (1993) (holding that the protections of the Refugee Protocol do not extend to people encountered on the high seas). The Supreme Court's decision in *Sale* has been roundly criticized for undermining the intent and purpose of the Refugee Convention and Protocol. See, e.g., Harold Honju Koh, *Reflections on Refoulement and Haitian Ctrs. Council*, 35 HARV. INT'L L.J. 1, 15-17 (1994). While the Refugee Convention and Protocol have no means by which individuals may bring complaints to an international body, see Weissbrodt & Hortreiter, *supra* note 106, at 27, the Inter-American Commission found that the U.S. practice of returning refugees found on the high seas violated Article 33. See *Haitian Ctr. for Human Rights v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/95, OEA/ser.L/V/II.95 doc. 7 rev. at 550 (1997).

174. See Refugee Convention, *supra* note 69, arts. 26, 31.

175. Convention against Torture, *supra* note 70, art. 1(1). The Convention against Torture has 74 signatories and 140 States Parties. Of the countries mentioned *supra* text accompanying notes 43-62 for

requires only a minimal degree of state action to implicate its provisions; the pain or suffering must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁷⁶ Article 16 requires every State Party to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”¹⁷⁷

If the receiving country tortures the detainee or subjects the detainee to other forms of ill-treatment, that country is violating the Convention against Torture. Article 3 is particularly important with regard to other countries participating in extraordinary rendition since it prohibits *refoulement* to a state where there are substantial grounds to believe that a person would be in danger of being tortured.¹⁷⁸ To determine whether such substantial grounds exist, the article imposes procedural obligations by requiring that “the competent authorities . . . take into account all relevant considerations.”¹⁷⁹ Article 2 explicitly provides that States Parties may not advance any grounds to justify torture.¹⁸⁰ Article 4 requires each State Party to ensure that all acts of torture, as well as attempts to commit, or be compliant in, torture are criminalized.¹⁸¹ The Convention against Torture also requires each State Party to extradite or prosecute accused torturers who are present in any territory under its jurisdiction.¹⁸²

The history of the drafting of the Convention against Torture¹⁸³ and the jurisprudence of the Committee against Torture¹⁸⁴ provide valuable guidance in interpreting the Convention against Torture’s provisions, as applied to the practice of extraordinary rendition. First, the drafting committees discussed the implications of Article 3 on existing extradition treaties.¹⁸⁵ The drafters concluded that a State Party could make a valid reservation to Article 3 on the grounds that it may be incompatible with its existing extradition treaties.¹⁸⁶ However, to the extent that extraordinary rendition circum-

their involvement in extraordinary rendition, only Iraq and Pakistan are not signatories to the Convention against Torture. Syria became a State Party to the Convention against Torture on August 19, 2004. Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited Feb. 20, 2006).

176. Convention against Torture, *supra* note 70, art. 1(1).

177. *Id.* art. 16.

178. *Id.* art. 3(1).

179. *Id.* art. 3(2).

180. *Id.* art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

181. *Id.* art. 4(1).

182. *Id.* arts. 5, 7.

183. See generally BURGERS & DANIELIUS, *supra* note 24, ch. 3 (tracing the actions and deliberations of the United Nations General Assembly and United Nations Commission on Human Rights between 1977 and 1984 that led up to the entry into force of the Convention against Torture).

184. The Committee against Torture was established under the provision of Article 17 of the Convention against Torture. Convention against Torture, *supra* note 70, art. 17.

185. See BURGERS & DANIELIUS, *supra* note 24, at 126–28.

186. *Id.* at 126–27.

vents traditional methods of extradition,¹⁸⁷ a country engaging in extraordinary rendition could not rely on such reservations to avoid implicating Article 3. Indeed, there is no indication that the CIA followed standard extradition procedures in transferring Qassem to Egypt or Rashul and el Masri to Afghanistan. Of the three men, only Qassem was wanted on criminal charges in the receiving country.

Second, the history of the Convention against Torture clarifies that the drafters intended Article 3 to have extraterritorial effect. The drafters modeled Article 3 after Article 33 of the Refugee Convention, but they intended to make the provisions of Article 3 broader in scope.¹⁸⁸ During the drafting process, they added the term “return (*refouler*)” to Article 3 “in order to make the provision more complete As it now reads, the article is intended to cover all measures by which a person is physically transferred to another state.”¹⁸⁹ Therefore, while the CIA removed Rashul from his home country to Afghanistan, the drafting history of the Convention against Torture demonstrates that his transfer nonetheless constitutes *refoulement* and is prohibited by Article 3.

The Committee against Torture has published two findings that are particularly relevant to the practice of extraordinary rendition. In *Khan v. Canada*,¹⁹⁰ the Committee determined that by transferring a person to a country that was not a party to the Convention against Torture, Canada violated Article 3, both because the transfer would subject the person to a danger of torture, and because the transfer would make it impossible for the person to apply for protection under the Convention against Torture.¹⁹¹ In *Agiza v. Sweden*,¹⁹² the Committee against Torture determined that Sweden’s use of extraordinary rendition in December 2001 violated Article 3.¹⁹³ With U.S. assistance, the government of Sweden seized Egyptian asylee Ahmed Agiza and transported him to Egypt.¹⁹⁴ The Committee found that “it was known, or should have been known, to [Sweden]’s authorities at the time of [Agiza]’s

187. See *Talk of the Nation: Policy of Extraordinary Rendition* (National Public Radio broadcast Apr. 7, 2005) (Michael Scheuer).

188. BURGERS & DANIELIUS, *supra* note 24, at 125:

In the Refugee Convention, protection is given to refugees, i.e. to persons who are persecuted in their country of origin for a special reason, whereas article 3 of the present Convention applies to any person who, for whatever reason, is in danger of being subjected to torture if handed over to another country.

189. *Id.* at 126.

190. Comm. No. 15/1994, Report of the Committee against Torture, U.N. GAOR, 50th Sess., Supp. No. 44, at 45, U.N. Doc. A/50/44, Annex V (1994).

191. See *id.* ¶ 12.5, at 55. It is important to note that simply because a receiving country is a party to the Convention against Torture does not ensure that transfer to that country comports with the protections of Article 3. See *Alan v. Switzerland*, Comm. No. 21/1995, Report of the Committee against Torture, U.N. GAOR, 51st Sess., Supp. No. 44, ¶ 11.5, at 75, U.N. Doc. A/51/44, Annex V (1995).

192. Comm. No. 233/2003, Report of the Committee against Torture, U.N. GAOR, 60th Sess., Supp. No. 44, ¶ 13.4, at 227, U.N. Doc. A/60/44, Annex VIII (2003).

193. *Id.* ¶ 14, at 37.

194. See *id.*; see also Whitlock, *supra* note 44 (reporting that CIA transportation assistance was a “friendly favor” to Swedish authorities).

removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.”¹⁹⁵ The Committee also determined that “an inability to contest an expulsion decision before an independent authority . . . [is] relevant to a finding of a violation of article 3” because it violates “the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.”¹⁹⁶ The Committee rejected Sweden’s argument that it had obtained assurances from the government of Egypt to ensure that Agiza would not be ill-treated.¹⁹⁷ A recent report by the Special Rapporteur on torture confirms that extraordinary rendition violates Article 3 of the Convention against Torture.¹⁹⁸

Extraordinary rendition may also constitute a conspiracy to commit torture in violation of the Convention against Torture. Countries not directly committing acts of torture, but facilitating the practice by providing intelligence or material assistance, may violate Article 1’s prohibition on state “consent or acquiescence”¹⁹⁹ to torture. They may also violate domestic laws, enacted in compliance with Article 4 of the Convention against Torture, which criminalize torture. For example, U.S. officials with direct involvement in extraordinary rendition have revealed that they were aware that the transfers were likely to result in torture,²⁰⁰ and many have suggested that the administration was “turning a blind eye”²⁰¹ to that likelihood. In some cases, officials from the country conducting the extraordinary rendition directly participate in the interrogation process after the detainee is delivered to the receiving country.²⁰² El Masri, for instance, reported that his interro-

195. Report of the Committee against Torture, *supra* note 192, ¶ 13.4, at 34.

196. *Id.* ¶¶ 13.7–13.8, at 36.

197. *See id.* ¶ 13.4, at 227 (“The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”); *see also* Transfer of Persons, *supra* note 106, ¶¶ 4–6 (discouraging the use of assurances, and establishing detailed recommendations for states to enforce assurances). One former CIA official described these assurances as a “legal nicety.” *See* Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23.

198. *See* Special Rapporteur on torture, *supra* note 104, ¶ 29, at 9:

The Special Rapporteur is seriously concerned about an increase in practices that undermine th[e] principle [of *non-refoulement*]. One such practice is for the police authorities of one country to hand over persons to their counterparts in other countries without the intervention of a judicial authority and without any possibility for the persons concerned to contact their families or their lawyers. The Committee against Torture . . . found that practice to be in violation of article 3 of the Convention, as well as of the right to due process.

199. Convention against Torture, *supra* note 70, art. 1(1).

200. *See* Grey & Buncombe, *supra* note 55 (“Mr. Scheuer claims there was legal oversight in every rendition case and yet he admitted suspects were tortured.”); Priest & Gellman, *supra* note 15 (“One official who has had direct involvement in renditions said he knew they were likely to be tortured. ‘I . . . do it with my eyes open,’ he said.”).

201. *See* Jehl & Johnston, *supra* note 17 (“[I]n interviews, a half-dozen current and former government officials said they believed that, in practice, the administration’s approach may have involved turning a blind eye to torture.”).

202. *See* Finn, *supra* note 61 (reporting that U.S. officials participated in the questioning of one terror suspect while he was detained in Morocco); Priest & Gellman, *supra* note 15 (noting similar collaboration with authorities in Jordan and Saudi Arabia).

gators in Afghanistan were U.S. officials using an interpreter.²⁰³ At the very least, these reports suggest “consent or acquiescence” to torture in violation of Article 1. Qassem’s extraordinary rendition to Egypt also suggests a heightened level of U.S. involvement: in the 1990s, CIA officers reportedly collaborated with Egyptian interrogators to such an extent that the U.S. officials would provide their Egyptian counterparts with a list of questions in the morning, and they would receive the answers by evening.²⁰⁴ This close cooperation demonstrates that the United States was encouraging and relying upon the Egyptians’ interrogation techniques.

Additionally, Article 1 is implicated when countries such as Sweden attempt to obtain diplomatic assurances that receiving countries will not subject transferred detainees to torture, particularly when the receiving countries systematically practice torture²⁰⁵ and also demonstrate a pattern of denying the existence of torture.²⁰⁶ The Special Rapporteur on torture has expressly stated that when a receiving state engages in a systematic practice of torture, “the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.”²⁰⁷ These comments directly implicate Sweden’s transfer of Agiza to Egypt.

VI. EXTRAORDINARY RENDITION VIOLATES THE VIENNA CONVENTION ON CONSULAR RELATIONS

The Vienna Convention on Consular Relations (“Vienna Consular Convention”) provides special protections for diplomats,²⁰⁸ and also guarantees consular access to individuals not located in their country of nationality.²⁰⁹ Under the terms of Article 36, States Parties must allow consular officers to communicate with nationals of their home country.²¹⁰ If a State Party takes a

203. See *CBS News*, *supra* note 10.

204. Mayer, *supra* note 1, at 110.

205. See McCaffrey, *supra* note 16 (“You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they are making claims to the contrary.”) (quoting former CIA counterterrorism official Vincent Cannistraro); see also *Transfer of Persons*, *supra* note 106, ¶ 4 (confirming that there is a presumption of a real risk of ill-treatment where that treatment is widespread or systematic); U.S. DEP’T STATE, *supra* note 63 (describing U.S. State Department reports of systematic use of torture in many receiving countries).

206. See U.S. DEP’T STATE, *supra* note 63 (reporting that officials in Egypt, Jordan, Morocco, Saudi Arabia, and Uzbekistan have denied allegations that torture is practiced in their countries); Mayer, *supra* note 1, at 118 (noting that one Egyptian official described an Australian detainee’s allegations of torture as “mythology”).

207. Special Rapporteur on torture, *supra* note 104, ¶ 37, at 21.

208. Vienna Consular Convention, *supra* note 71, arts. 31–35, 40–43.

209. *Id.* art. 36. There are 140 States Parties to the Vienna Consular Convention. With the exception of Afghanistan, all of the countries mentioned above for their involvement in extraordinary rendition are States Parties to the Vienna Consular Convention. See U.S. Department of State, Bureau of Consular Affairs, Consular Notification and Access Part 5: Legal Material, http://travel.state.gov/law/consular/consular_744.html (last visited Feb. 24, 2006).

210. Vienna Consular Convention, *supra* note 71, art. 36(1)(a) (“[C]onsular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of

person into custody, it must inform the detainee of the right to consular access.²¹¹ The Vienna Consular Convention requires the detaining authority to notify the detainee's consular post of the detention if the detainee requests such notification.²¹²

It is likely that extraordinary rendition breaches these provisions of the Vienna Consular Convention only with respect to the country in which the person is seized and the country in which the person is ultimately detained (if that country is not the detainee's home country).²¹³ Some commentators have argued that the Vienna Consular Convention's protections may also govern the conduct of a country asserting authority during invasion and occupation;²¹⁴ this conclusion suggests that the Vienna Consular Convention could also apply to the country responsible for orchestrating the transfer, even if that country, technically, is not the one in which the person is seized or detained.

There are at least two documented cases of extraordinary rendition in which government officials, in violation of Article 36, denied individuals access to consular officers. In September 2002, the United States detained Maher Arar, who holds dual Canadian and Syrian citizenship.²¹⁵ For one week, detaining authorities denied Arar access to Canadian consular officials, and after his transfer to Syria, the United States refused to acknowledge the transfer to Canadian authorities.²¹⁶ In November 2002, officials detained British citizen

the sending State . . .").

211. *Id.* art. 36(1)(b) ("The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."). The duty to inform "without delay" has been interpreted by the International Court of Justice to be imposed "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *See Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. No. 128 ¶ 63, at 33 (Mar. 31, 2004). The International Court of Justice has held that a delay of forty hours after realization that a person is a foreign national constitutes a violation of Article 36(1)(b). *See id.* ¶ 89, at 39. Moreover, the rights in Article 36 are interrelated, and when a detainee is not informed of his or her rights under Article 36(1)(b), the other provisions of Article 36 may also be implicated. *See id.* ¶ 99, at 41. By failing to inform a detainee of the right to consular access, a detaining authority may also deny the detainee's country of nationality the right to access the detainee. *See id.* In cases of extraordinary rendition, the detaining authorities undoubtedly have good reason to believe that the detainee is a foreign national, and certainly the delay in notification is at least forty hours, if not indefinite. Therefore, the rights of both the detainee and the detainee's country of citizenship are implicated by the practice of extraordinary rendition.

212. Vienna Consular Convention, *supra* note 71, art. 36(1)(b) ("[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is . . . detained in any . . . manner.").

213. The language of Article 36(1)(b) applies to the "receiving State" of the consular official, but the obligations of Article 36(1)(b) only apply when the detainee is present "within [the] consular district [of the sending State]." *See id.*

214. *See* Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 AM. J. INT'L L. 104, 108–09 (1991) (arguing that the Vienna Consular Convention could have allowed Iraq to expel diplomats in occupied Kuwait); John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 115 (1991) (demonstrating that the Vienna Consular Convention applies during times of war, and, therefore, occupying and invading powers must comply with the Convention's provisions).

215. *See* Michael Hirsh et al., *supra* note 10, at 32.

216. *See* Arar Complaint, *supra* note 90, ¶¶ 39–40, at 13 (noting that the Canadian consulate was only informed of Arar's detention one week after it had begun, and even then only due to a communica-

Wahab al Rawi in The Gambia.²¹⁷ While being interrogated at the headquarters of the country's secret police, al Rawi requested and was denied consular access.²¹⁸

Due to the secrecy surrounding the practice of extraordinary rendition, there is no direct documentation of other instances of violations of the Vienna Consular Convention. However, since persons subjected to extraordinary rendition evidently have not made use of consular assistance, it is likely that, in many instances, officials are denying detainees their right to consular communication. El Masri's captors, for instance, told him, "You're in a country without laws and no one knows where you are. Do you know what that means?"²¹⁹ Such a statement suggests that officials are using extraordinary rendition to deny individuals their rights under the Vienna Consular Convention.

VII. EXTRAORDINARY RENDITION VIOLATES THE GENEVA CONVENTIONS

The Geneva Conventions of 1949 primarily articulate protections for persons involved in armed conflict.²²⁰ Within those protections are several provisions relevant to the practice of extraordinary rendition. They include the prohibition on torture and inhuman treatment of prisoners of war, the prohibition on forcible transfer of civilians during occupation, and the prohibitions on torture and cruel or humiliating treatment under Common Article 3. The following sections examine each of these provisions in turn.

A. *Protections Afforded to Prisoners of War*

The Geneva Convention Relative to the Treatment of Prisoners of War ("POW Convention") protects prisoners of war ("POWs") detained as a consequence of international armed conflict.²²¹ Several categories of persons are protected as POWs. "Members of the armed forces of a Party to the conflict" are granted POW protection when they fall into enemy hands.²²² Article 4 also affords protected person status to "members of militias or volunteer corps forming part of [the] armed forces" and "members of other militias . . . including those of organized resistance movements."²²³ Persons falling under

tion from Arar's family); *id.* ¶ 60, at 18 (indicating that the United States refused to acknowledge Arar's transfer after Canadian consular officials made inquiries).

217. Grey, *supra* note 62.

218. Grey, *supra* note 53. Grey reports that al Rawi made his request to a U.S. official who was interrogating him. However, al Rawi was detained in a Gambian facility and therefore Gambian officials would still be bound by the Vienna Consular Convention, even if the U.S. official technically might not.

219. See CBS News, *supra* note 10.

220. All of the countries mentioned above as participants in extraordinary rendition, including Afghanistan and Iraq, where the most recent armed conflicts have occurred, are High Contracting Parties to all four Geneva Conventions. See U.S. DEP'T STATE, TREATIES IN FORCE 3 (2004), <http://www.state.gov/documents/organization/38569.pdf>.

221. See POW Convention, *supra* note 72, art. 2.

222. *Id.* art. 4(a)(1).

223. *Id.* art. 4(a)(1)-(2).

the latter category, however, must comply with four additional requirements in order to be eligible for protection. Those requirements include carrying arms openly and “having a fixed distinctive sign recognizable at a distance.”²²⁴ Nearly every person who is not protected as a POW, however, automatically acquires protected person status under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Civilian Convention”).²²⁵ If a person’s status as a POW is in doubt, that person retains the protections of the POW Convention until a competent tribunal, as defined by Article 5, determines his or her status.²²⁶

Grave breaches under the POW Convention include “willful killing, torture or inhuman treatment, . . . [and] willfully causing great suffering or serious injury to body or health.”²²⁷ Under the terms of Article 131, States may not derogate from the provisions of the POW Convention.²²⁸ Although the Geneva Conventions leave “torture” undefined,²²⁹ Pictet’s authoritative commentary states that inhuman treatment may include “being brought down to the level of animals” and “[c]ertain measures . . . which might cut prisoners of war off completely from the outside world and in particular from their families”²³⁰ Pictet observes that the prohibition on causing great suffering includes “moral suffering” and he notes that a perpetrator may cause great

224. The four requirements are, “(a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.” *Id.* art. 4(a)(2). The authoritative commentary of Jean S. Pictet confirms that these requirements are only imposed on members of resistance movements, and not on members of the armed forces of a Party to the conflict. *See* 4 INT’L COMM. OF THE RED CROSS, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 50 (Jean S. Pictet ed., 1958) [hereinafter Pictet, CIVILIAN COMMENTARY].

225. *See* Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 50 (“[I]f, for some reason, prisoner of war status—to take one example—were denied to them, they would become protected persons under the [Fourth] Convention.”). Members of resistance movements who failed to fulfill the four criteria in Article 4(a)(2) “must be considered to be protected persons within the meaning of the [Fourth] Convention.” *Id.*; *see also* Civilian Convention, *supra* note 72, art. 5 (allowing authorities to limit some of the communication rights of protected civilians who are “spies or saboteurs”); Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 53 (observing that the drafters of the Geneva Conventions decided to protect “irregular combatants” who “act[] deliberately outside the laws of warfare” because “the terms espionage, sabotage, terrorism, banditry, and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them”). Recall, however, that persons detained by their own country or a co-belligerent state are not protected. *See* POW Convention, *supra* note 72.

226. *See* POW Convention, *supra* note 72, art. 5, ¶ 2.

227. *Id.* art. 130.

228. *See id.* art. 131.

229. In the absence of a definition of torture within the Convention itself, other international instruments may be used to demonstrate customary understanding of the term. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, ¶ 111 (July 21, 2000) (holding that the definition of torture in Article 1 of the Convention against Torture “reflects customary international law”).

230. III INT’L COMM. OF THE RED CROSS, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 627 (Jean S. Pictet ed., 1958) [hereinafter Pictet, POW COMMENTARY].

suffering in order to effect punishment or revenge, or simply to satisfy the perpetrator's sadistic desires.²³¹

High Contracting Parties may transfer POWs into the custody of other nations, but only "to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."²³² Common Article 1 of the Geneva Conventions states that "[t]he High Contracting Parties undertake to respect and to *ensure respect* for the present Convention *in all circumstances*."²³³ Hence, the use of extraordinary rendition, which does not ensure respect for the provisions prohibiting torture, inhuman treatment, and the infliction of suffering by the receiving country, violates both Article 1 and the substantive provisions prohibiting ill-treatment. Additionally, "[t]he safeguard contained in [Article 12] is reinforced by Article 131 relating to the responsibilities of the Contracting Parties, which may not absolve themselves of any liability incurred in respect of one of the grave breaches defined in Article 130."²³⁴ The obligations of Article 12 persist after transfer; if the receiving power "fails to carry out the provisions of the Convention in any important respect," the transferring power must "take effective measures to correct the situation."²³⁵ A transferring power may commit a grave breach either if the ill-treatment the transferee receives after transfer is "willful,"²³⁶ or if the transferring power receives notice of torture or inhuman treatment in the receiving country and fails to take subsequent corrective action.²³⁷ Additionally, regardless of any ill-treatment a detainee may suffer after transfer, extraordinary rendition cuts detainees off from the outside world and hence constitutes inhuman treatment, itself a grave breach of the Geneva Conventions.²³⁸

B. *Protections Afforded to Civilians*

The Civilian Convention protects civilians during times of armed conflict and occupation.²³⁹ Article 4 of the Civilian Convention denies protected person status to persons who are in the hands of their own government²⁴⁰ and, during armed conflict, to nationals of co-belligerent and neutral states.²⁴¹ The Civilian Convention protects all other civilians held during armed conflict from torture and other ill-treatment, just as the POW Convention protects POWs from such abuses.²⁴² Thus, Rashul, an Iraqi national, is a protected

231. *See id.* at 628.

232. POW Convention, *supra* note 72, art. 12, ¶ 2.

233. *See, e.g., id.* art. 1 (emphasis added).

234. Pictet, POW COMMENTARY, *supra* note 230, art. 12, ¶ 1.

235. POW Convention, *supra* note 72, art. 12, ¶ 3.

236. *Id.* art. 130 (defining grave breaches to include "wilful killing, torture or inhuman treatment").

237. *See id.* art. 131.

238. *See* Pictet, POW COMMENTARY, *supra* note 230, at 627.

239. *See* Civilian Convention, *supra* note 72, art. 4.

240. *See id.* art. 4, para. 1.

241. *See id.*

242. *Compare* Civilian Convention, *supra* note 72, art. 147, *with* POW Convention, *supra* note 72, art.

person under the Civilian Convention during the conflict in Iraq. This is because during occupation,²⁴³ nationals of neutral states become protected persons,²⁴⁴ and special provisions of the Civilian Convention, such as Article 49, apply. Article 49 prohibits the transfer or deportation of protected persons out of the occupied territory, regardless of the occupier's motive, except when an occupying power evacuates an area for security or military reasons.²⁴⁵

The Civilian Convention defines the same grave breaches as the POW Convention, but also includes "unlawful deportation or transfer or unlawful confinement of a protected person."²⁴⁶ Therefore, the Civilian Convention incorporates the provisions of Article 49 into its grave breaches. Extraordinary rendition violates Article 49 when it originates in an occupied territory and involves a person protected as a civilian under the Civilian Convention.²⁴⁷ Hence, the CIA's removal of Rashul from Iraq during the U.S. occupation of Iraq violated Article 49.

The United States, which plays a major role in orchestrating extraordinary renditions, has argued that forcible transfer of civilians out of occupied territory is not always a violation of Article 49. In particular, U.S. officials argue that Article 49 does not prohibit forcible transfers that comport with existing immigration laws.²⁴⁸ Moreover, they argue that Article 49 allows for short-term transfers out of the occupied territory to "facilitate interrogation."²⁴⁹ Presumably, this argument was the justification for Rashul's transfer to Afghanistan. Nevertheless, such claims ignore the plain language of Article 49, the

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243. Iraq became an occupied territory after the U.S.-led invasion in March 2003. See Senior Military Officials, U.S. Department of Defense, Defense Department Background Briefing (May 14, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html> ("From the very beginning of the conflict, the Geneva Conventions have been fully applicable We are now in a state of legal occupation. The Geneva Conventions are applicable"). Arguably, Afghanistan was occupied by U.S. forces after the invasion in the fall of 2001. See Steve Sheppard, *Propter Honoris Respectum: Passion and Nation: War, Crime, and Guilt in the Individual and the Collective*, 78 NOTRE DAME L. REV. 751, 751 (2003) ("At the time of this writing, U.S. soldiers guard the recently occupied capital of Afghanistan"). But see Drew Brown, *Official Says More Troops Could Have Kept Fewer Terrorists from Escaping*, KNIGHT RIDDER/TRIB. BUS. NEWS, June 27, 2002 ("The United States and its allies have been anxious to avoid being perceived as foreign occupiers or invaders in Afghanistan. About 14,000 U.S. and allied troops are in the country."). Allowing a High Contracting Party to make a unilateral determination that it is not an occupying power would undermine the special protections afforded under the Civilian Convention during times of occupation. The protections afforded during occupation extend as long as the occupying power is exercising functions of government. See Civilian Convention, *supra* note 72, art. 6.

244. See Civilian Convention, *supra* note 72, art. 4 (stating that nationals of neutral states "who find themselves in the territory of a belligerent State" are not protected). When occupation begins, those nationals of neutral states are no longer in "the territory of a belligerent State." Therefore, they gain the status of protected persons. See Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 48.

245. Civilian Convention, *supra* note 72, art. 49.

246. *Id.* art. 147.

247. The CIA reportedly transferred as many as twelve detainees out of occupied Iraq in 2004. See Priest, *supra* note 6 ("One intelligence official familiar with the operation said the CIA has . . . secretly transport[ed] as many as a dozen detainees out of Iraq in the last six months.").

248. See Goldsmith, *supra* note 120, at 372.

249. See *id.* at 376-79.

historical impetus for the prohibition on involuntary transfer, and Pictet's authoritative commentary.

First, Article 49 prohibits forcible transfers and deportations "regardless of their motive."²⁵⁰ Article 49 only allows for forcible evacuations under the limited circumstances articulated in the second paragraph, and the *expressio unius* interpretive canon suggests that Article 49 permits no other forcible transfers or deportations. Moreover, Article 49 was drafted in response to Nazi Germany's policy of stripping Jews of their citizenship to render their presence in occupied territories unlawful, thereby forcing their deportation.²⁵¹ Hannah Arendt noted that the Nazis took "extreme care" to insist that all Jews of non-German nationality "should be deprived of their citizenship either prior to, or, at the latest, on the day of deportation."²⁵² Furthermore, Pictet's commentary states definitively that "[t]he prohibition [against deportations and forcible transfers in Article 49(1)] is absolute and allows of [sic] no exceptions, apart from those stipulated in paragraph 2."²⁵³ Article 49 is intended to prohibit all forms of forcible transfer of persons protected under the Civilian Convention, regardless of their legal status within the occupied territory, and regardless of the length of time that the transfer will last. Therefore, extraordinary rendition of protected civilians, such as Rashul, from occupied territory violates Article 49 and is a grave breach of the Civilian Convention.

C. Protections Provided Under Common Article 3

Common Article 3 articulates minimum protections for "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" to any of the Geneva Conventions.²⁵⁴ It provides "rules of humanity which are recognized as essential by civilized na-

250. Civilian Convention, *supra* note 72, art. 49.

251. See Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 278:

There is doubtless no need to give an account here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country

252. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 280 (2d enlarged ed. 1958).

253. Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 279.

254. See First Geneva Convention, *supra* note 72, art. 3; Second Geneva Convention, *supra* note 72, art. 3; POW Convention, *supra* note 72, art. 3; Civilian Convention, *supra* note 72, art. 3. In all other armed conflicts that might not be governed either by the entirety of the Geneva Conventions or Common Article 3, the Additional Protocols of 1977 provide similar protections. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. Much of Protocol I and parts of Protocol II are customary international humanitarian law. See Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 88 n.85 (2005); see also Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 187-90 (2005).

tions" and applies "without any condition in regard to reciprocity."²⁵⁵ Article 3 protects persons taking no active part in hostilities, including those who have laid down their arms.²⁵⁶ While some officials argue that Common Article 3 does not apply to international conflicts,²⁵⁷ Pictet explains that the article was rooted in "the idea of applying the principle to *all* cases of armed conflict, including internal ones."²⁵⁸ It seems illogical that greater international safeguards might govern a purely internal armed conflict than would govern an armed conflict that is international in character.²⁵⁹ Moreover, the Additional Protocols to the Geneva Conventions are designed to extend Article 3 protections to all persons.²⁶⁰

255. Pictet, POW COMMENTARY, *supra* note 230, at 34–35.

256. See, e.g., POW Convention, *supra* note 72, art. 3(1). Common Article 3 makes no distinction based on nationality or other status. The only persons unprotected in an armed conflict governed by Article 3 are those actively engaged in the hostilities. They become protected when they cease active engagement for any reason.

257. See Memorandum from George W. Bush, President of the United States, to Dick Cheney, Vice President of the United States, et al., Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), reprinted in THE TORTURE PAPERS, *supra* note 120, at 134–35 ("[C]ommon Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and Common Article 3 applies only to 'armed conflict not of an international character.'").

258. Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 26.

259. See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 195 (2005) ("There is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory."); see also *Hamdan v. Bush*, 415 F.3d 33, 41 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) ("It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies international human norms, and that it sets forth the most fundamental requirements of the law of war." (citations and internal quotation marks omitted)). The Court of Appeals engages in a selective reading of Pictet's Commentary, quoting the last three words of the following paragraph:

Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.

Pictet, POW COMMENTARY, *supra* note 230, at 37. The Court does not make reference to the immediately preceding paragraph, which reads:

We think . . . that the scope of application of the Article must be as wide as possible. There can be no drawbacks to this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.

Id. at 36–37.

260. See Protocol I, *supra* note 254; see also Protocol II, *supra* note 254. Of the countries involved in extraordinary rendition, Afghanistan, Indonesia, Iraq, Morocco, Pakistan, and the United States are not States Parties to Protocols I and II. Syria is not a State Party to Protocol II. See International Committee of the Red Cross, States Party to the Main Treaties, available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_](http://www.icrc.org/IHL.nsf/(SPF)/party_)

Article 3 protects “[p]ersons taking no active part in the hostilities” from “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”²⁶¹ Article 3 also provides that those persons “shall in all circumstances be treated humanely.”²⁶² Additionally, Article 3 “prohibit[s] at any time and in any place whatsoever . . . cruel treatment or torture”²⁶³ and “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁶⁴ Pictet observes that “no excuse, no attenuating circumstances” can justify these acts.²⁶⁵ Pictet’s comment suggests that authorities may not use extraordinary rendition to excuse or avoid responsibility for torture or for cruel, humiliating, or degrading treatment. Therefore, under conditions of armed conflict not otherwise governed by the Geneva Conventions, extraordinary rendition violates Common Article 3 if it constitutes an effort to cause or justify torture or cruel, humiliating, or degrading treatment.

VIII. CONCLUDING OBSERVATIONS REGARDING IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS PROTECTIONS

A thorough examination of extraordinary rendition in light of available human rights instruments is only the first step in addressing the gross human rights violations involved with extraordinary rendition; implementing these instruments presents a tremendous challenge. One traditional tool for preventing or discouraging human rights violations is embarrassment.²⁶⁶ By revealing that governments are acting in flagrant violation of customary international law and human rights instruments to which they are parties, the international community can exert pressure on the offending governments to halt their practices. Countries should not expect that the world community will look away or excuse human rights violations simply because of the threat of global terrorism. If the struggle against terror is being conducted as part of a larger effort to win people’s hearts and minds all over the world, governments must uphold international human rights standards in order to maintain legitimacy in that effort. Terrorists use abduction and kidnapping to instill fear. Governments who pay lip service to the rule of law should not themselves resort to tactics employed by the very terrorists they battle. By using such reprehensible tactics, countries risk alienating valuable allies and open-

main_treaties/\$File/IHL_and_other_related_Treaties.pdf.

261. See, e.g., First Geneva Convention, *supra* note 72, art. 3(1); Second Geneva Convention, *supra* note 72, art. 3(1); POW Convention, *supra* note 72, art. 3(1); Civilian Convention, *supra* note 72, art. 3(1).

262. First Geneva Convention, *supra* note 72, art. 3(1); Second Geneva Convention, *supra* note 72, art. 3(1); POW Convention, *supra* note 72, art. 3(1); Civilian Convention, *supra* note 72, art. 3(1).

263. First Geneva Convention, *supra* note 72, art. 3(1)(a); Second Geneva Convention, *supra* note 72, art. 3(1)(a); POW Convention, *supra* note 72, art. 3(1)(a); Civilian Convention, *supra* note 72, art. 3(1)(a).

264. First Geneva Convention, *supra* note 72, art. 3(1)(c); Second Geneva Convention, *supra* note 72, art. 3(1)(c); POW Convention, *supra* note 72, art. 3(1)(c); Civilian Convention, *supra* note 72, art. 3(1)(c).

265. Pictet, CIVILIAN COMMENTARY, *supra* note 224, at 38.

266. See Robert Kent, *Julie A. Mertus' Bait and Switch: Human Rights and U.S. Foreign Policy*, 18 HARV. HUM. RTS. J. 300, 301 (2005) (book note) (“Civil society’s traditional mechanism for promoting human rights has been publicity campaigns to shame those who breach human rights obligations.”).

ing the door to further human rights abuses by other governments. Extraordinary rendition can subvert the rule of law and, hence, undermine essential international law enforcement cooperation.

National and international human rights concerns can operate in tandem to expose violations and spark criticism of government involvement in extraordinary rendition.²⁶⁷ International attention can also lay the groundwork for encouraging formal enforcement.²⁶⁸ When abductions take place without the consent or authorization of the local government, prosecutors may bring criminal charges of kidnapping and assault.²⁶⁹ Civil suits may also exert pressure on governments participating in extraordinary rendition.²⁷⁰

Universal criminal jurisdiction may provide yet another tool for challenging the practice.²⁷¹ In 2004, the New York-based Center for Constitutional Rights relied on Germany's universal jurisdiction law to initiate a criminal prosecution on behalf of several Abu Ghraib detainees against Donald Rumsfeld and other high-ranking U.S. officials.²⁷² Although this proceeding was dismissed under the principle of subsidiarity,²⁷³ Germany is currently investi-

267. For example, the Canadian government has been conducting a public investigation of the Maher Arar case for over a year. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, <http://www.ararcommission.ca/eng/>. After conducting an investigation of the extraordinary renditions of two Egyptian-born asylum seekers, Swedish authorities have promised that they will never participate in extraordinary renditions with U.S. or other foreign agents again. See Whitlock, *supra* note 44 (noting that Sweden has completed an investigation of the incident); see also Whitlock, *supra* note 10 (reporting that one Swedish official has stated that the country will no longer participate in extraordinary renditions with the United States or other governments). *But see* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE?: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 83 (2005), <http://www.hrw.org/reports/2005/us0405/us0405.pdf> ("Given that the two people who can trigger investigations and prosecutions for the alleged war crimes and acts of torture . . . have been deeply involved in the policies leading to these alleged crimes, if not in the crimes themselves, it is extremely unlikely that any such investigations will be undertaken."). A detailed analysis of the role of domestic courts in enforcing international human rights law is beyond the scope of this Article. For further information see generally Ralph Steinhardt, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 267–89 (Hurst Hannum ed., 4th ed. 2004).

268. See Kathryn Sikkink, *A Typology of Relationships Between Social Movements and International Institutions*, 97 AM. SOC'Y INT'L L. PROC. 301, 303 (2003) ("[O]nce a state's human rights misconduct has been exposed, more damaging bilateral or multilateral enforcement may follow.").

269. See, e.g., Crewdson, *supra* note 95 (noting that Italy issued arrest warrants for several CIA operatives alleged to have conducted an extraordinary rendition on Italian territory without the consent of local authorities).

270. See, e.g., *Boudellaa v. Bosnia and Herzegovina*, Case No. CH/02/8679, Human Rights Chamber of Bosnia and Herzegovina, ¶ 18 (Oct. 11, 2002) (awarding compensation and restoration of citizenship to several individuals who were subjected to extraordinary rendition under the assistance of the Federal Ministry of the Interior of Bosnia and Herzegovina).

271. See, e.g., V.30.6.2002 (Budesgesetzblatt 1. I S. 2254) [German Code of Crimes Against International Law, hereinafter GCCAIL], *English version available at* Max Planck Institute for Foreign and International Criminal Law, <http://www.iuscrim.mpg.de/forsch/legaltext/VStGBEngl.pdf> (last visited Jan. 8, 2006).

272. See generally Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld under the German Code of Crimes Against International Law*, 6 GERMAN L.J. 689 (2005) (describing the legal background for the suit).

273. See General Prosecuting Attorney of the Federal Court, Rough English Translation of German Prosecutor's Dismissal, at 3 (Feb. 10, 2005), *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/german_appeal_english_tran.pdf. The principle of subsidiarity holds that if the GCCAIL is not necessary

gating the extraordinary rendition of el Masri, a German national.²⁷⁴ This time, because a German national is the victim of the crime, and because the United States has initiated no effort to punish the perpetrators, German authorities may prove more willing to invoke universal jurisdiction and to prosecute the individuals responsible for el Masri's extraordinary rendition.²⁷⁵

Several of the human rights instruments implicated by extraordinary rendition, either explicitly or implicitly, require States Parties to take affirmative steps to address the practice. For example, the Preamble of the Universal Declaration directs countries to "strive . . . to secure . . . universal and effective recognition and observance"²⁷⁶ of the rights it articulates. Because the Universal Declaration obligates nations to strive to secure the "right to recognition everywhere as a person before the law"²⁷⁷ for all people, presumably it also obligates countries to provide individuals with a legal mechanism to challenge their extraordinary rendition. A similar logic applies to the non-derogable right to recognition everywhere as a person before the law under the ICCPR.²⁷⁸ Should a country refuse to assert jurisdiction over a person who has been subjected to extraordinary rendition, that country would be violating these provisions.

The Convention against Torture requires each State Party to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."²⁷⁹ While it is unlikely that governments participating in extraordinary rendition will follow this provision, other safeguards in the Convention against Torture suggest that the obligation to investigate allegations of torture extends more broadly. For instance, the Convention against Torture requires States Parties to extradite or prosecute persons suspected of engaging in torture.²⁸⁰ The Convention against Torture's drafters considered and rejected a proposal to permit a State Party to wait for an extradition request.²⁸¹ They concluded that other States Parties who can potentially prosecute alleged torturers would often decline to assert jurisdiction.²⁸² Therefore, if a State Party finds a suspected torturer on its terri-

in order to fill gaps where the International Criminal Court does not have jurisdiction and where other domestic courts fail to act, then the German investigative authorities will decline to pursue the complaint.

274. See Whitlock, *supra* note 10.

275. Cf. Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. 124, 127 (2005).

276. Universal Declaration, *supra* note 66, art. 6.

277. *Id.*

278. See ICCPR, *supra* note 147, art. 4(2).

279. See Convention against Torture, *supra* note 70, art. 12.

280. See *id.* arts. 5, 7.

281. See BURGERS & DANIELIUS, *supra* note 24, at 137.

282. See Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368–69 (2001) ("Crimes subject to the universality principle occur . . . in situations in which the territorial State and State of the accused's nationality are unlikely to exercise jurisdiction, because, for example, the perpetrators are State authorities or agents of the State.").

tory, that State Party is obligated to take the alleged offender into custody or to take other measures to ensure the presence of the alleged offender.²⁸³ Next, the State Party must make an immediate preliminary inquiry into the facts.²⁸⁴ Then, if the suspect's home country makes no effort to bring about extradition, the State Party must prosecute the suspect.²⁸⁵

The Geneva Conventions contain a common article that establishes the obligation of High Contracting Parties to enact penal sanctions criminalizing grave breaches.²⁸⁶ In addition to this obligation, each High Contracting Party is required "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."²⁸⁷ This affirmative duty reflects the obligation in Article 1 "to respect and to *ensure respect* for the present Convention *in all circumstances*."²⁸⁸ It is apparent that the Geneva Conventions require High Contracting Parties to search for and punish persons alleged to have committed grave breaches of its provisions.²⁸⁹ As demonstrated above, extraordinary rendition can constitute a grave breach both because it results in torture and other forms of ill-treatment, and because it is an involuntary transfer in violation of Article 49. Countries seeking to avoid the responsibility to prosecute officials responsible for grave breaches may themselves be violating the Geneva Conventions.

The justification for this obligation to arrest and prosecute is similar to that regarding violators of the Convention against Torture: "[O]ther remedies, such as those provided by the political branches, are most often ineffective and inadequate."²⁹⁰ This is so for several reasons. First, high-level officials in the political branches are themselves often responsible for orchestrating grave breaches. Second, the country serving as the location of the ill-treatment is not likely to take action to challenge its own interrogation practices. Third, the country of nationality of the person subjected to extraordinary rendition may be unlikely to step forward in defending that person. Extraordinary rendition is commonly characterized as an effort to detain and question terror suspects. Governments may therefore be reluctant to intervene on behalf of per-

283. See Convention against Torture, *supra* note 70, art. 6(1).

284. See *id.* art. 6(2).

285. See *id.* art. 7(1).

286. See First Geneva Convention, *supra* note 72, art. 49; Second Geneva Convention, *supra* note 72, art. 50; POW Convention, *supra* note 72, art. 129; Civilian Convention, *supra* note 72, art. 147.

287. POW Convention, *supra* note 72, art. 129.

288. See, e.g., Civilian Convention, *supra* note 72, art. 1 (emphasis added).

289. See Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L L. REV. 1115, 1170 (2004):

[The Geneva Conventions] also vest[] this prerogative to prosecute in states that were not a party to the war in question. The treaty makes no distinctions based on whether or not there is a nexus between the accused, the alleged acts constituting grave breaches of the Geneva Conventions, and the state that exercises jurisdiction over the case.

290. Francisco Forrest Martin, *The International Human Rights and Ethical Aspects of the Forum Non Conveniens Doctrine*, 35 U. MIAMI INTER-AM. L. REV. 101, 117 (2003-04).

sons reported to be supporters of terrorism.²⁹¹ For example, because U.S. officials suspected that Rashul was involved in the Iraqi insurgency, the interim Iraqi government would have had little motivation to petition the United States for his release. Further, there is a substantial risk that the detainee's relatives and officials of the detainee's country of origin are unaware of the detention and transfer, as evidenced by the departure of el Masri's family for Lebanon. All of these factors combine to demonstrate that other High Contracting Parties have a heightened obligation to intervene, prosecute, and punish persons responsible for grave breaches when the grave breaches involve extraordinary rendition.

The International Criminal Court ("ICC") may also present a viable means for bringing the perpetrators of extraordinary rendition to justice.²⁹² The crime may be construed as occurring both in the country from which the detainee originates and in the country where the detainee is ultimately held. Either location, therefore, would provide ICC jurisdiction over those responsible for extraordinary rendition based on the territory where the crime occurs.²⁹³ The United States is likely to criticize harshly any attempt to exercise ICC jurisdiction over U.S. nationals,²⁹⁴ but this mechanism may also be a more palatable means of bringing people to justice since it avoids drawing attention to one country's prosecutorial zeal.²⁹⁵ While the United States has negotiated bilateral agreements with many countries to prohibit surrender of members of the U.S. military to the ICC,²⁹⁶ European nations have rejected

291. *CNN Live From: Saudi Arabia Speaks Out About Terrorism* (CNN television broadcast May 16, 2003) ("We are on board 200 percent to find the criminals who did this [and] those who support them, and justify them, and bring them to justice. We will work with the United States and every other country that can provide assistance in order to unravel this terrorist network.") (statement of Adel al-Jubeir, Saudi Foreign Affairs Advisor).

292. *See* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, U.N. Doc. 32/A/CONF. 183/9.

293. *See id.* art. 12(2) ("[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute . . . (a) The State on the territory of which the conduct in question occurred . . ."). The International Criminal Court [hereinafter ICC] also has jurisdiction over people who are nationals of States Parties. *Id.* art. 12 (2)(b).

294. In fact, it could lead to war. *See* American Servicemembers' Protection Act, Pub. L. No. 107-206, Title II, § 2008, 116 Stat. 905 (2002) (codified at 22 U.S.C. § 7427 (2005)) (granting "[a]uthority to free members of the Armed Forces of the United States and certain other persons detained or imprisoned by or on behalf of the [ICC]"); *see also* Benjamin B. Ferencz, Letter to U.S. Senators Regarding the American Servicemembers Protection Act (ASPA) (June 24, 2002), <http://www.globalpolicy.org/intljustice/icc/2002/0624ben.htm> ("[ASPA] contains the largest grant of war-powers by Congress to the Executive since the 1964 Gulf of Tonkin resolution.").

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

296. One commentator referred to United States efforts to negotiate such bilateral non-surrender agreements as "a massive, worldwide campaign." *See* Tan, *supra* note 289, at 1122. As of May 2005, the United States had signed 100 such agreements with other countries. *See* Press Statement by Richard Boucher, U.S. Department of State Spokesperson, U.S. Signs 100th Article 98 Agreement (May 3, 2005), <http://www.state.gov/t/pa/prs/ps/2005/45573.htm>.

these attempts to evade criminal responsibility.²⁹⁷ As with the exercise of universal jurisdiction in domestic courts, invoking the authority of international criminal law could prompt the United States to extradite and prosecute its own nationals.²⁹⁸

Other international tribunals may also play an important role in ending extraordinary rendition. The jurisprudence of the Human Rights Committee and the Committee against Torture suggests that those bodies would find that extraordinary rendition violates their respective instruments. Moreover, the International Court of Justice may serve as a useful forum for addressing some violations of the Vienna Consular Convention.²⁹⁹

Because the U.S. government is a primary architect of extraordinary rendition, examining domestic U.S. law for means of implementing relevant international norms is useful. The federal habeas corpus statute³⁰⁰ provides a mechanism by which persons subjected to extraordinary rendition can challenge their detention in a U.S. court.³⁰¹ Because the statute affords habeas relief to persons held in custody "in violation of the Constitution or laws or treaties of the United States," Qassem, Rashul, el Masri, or their relatives³⁰² can challenge their detentions as violating any of the instruments described above to which the U.S. is a party.³⁰³ Moreover, federal statutes criminalize war crimes under the Geneva Conventions,³⁰⁴ as well as extraterritorial torture and the conspiracy to commit torture.³⁰⁵ While it is presently unlikely that U.S. prosecutors will initiate prosecutions against U.S. officials in U.S. courts for those crimes, a person could petition for habeas relief on the

297. Counsel of Europe Parliamentary Assembly, Threats to the International Criminal Court, Eur. Parl. Res. 1336, at 2 (2003), available at <http://www.amicc.org/docs/COE1336.pdf> (stating that the agreements violate the Rome Statute and the Vienna Convention on the Law of Treaties); see also Salvatore Zappalà, *The Reaction of the U.S. to the Entry into Force of the ICC Statute: Comments on U.N. S.C. Resolution 1422 (2002) and Article 98 Agreements*, 1 J. INT'L CRIM. JUST. 114, 126–28 (2003) (explaining the European Union's reaction to these agreements and the importance of preserving the integrity of the ICC).

298. Cf. Tan, *supra* note 289, at 115.

299. See *supra* note 71.

300. 28 U.S.C. § 2241(c)(3) (2000) (providing habeas relief for persons "in custody in violation of the Constitution or laws or treaties of the United States"). The 2005 amendment to the federal habeas statute eliminates habeas jurisdiction only for persons "detained by the Department of Defense at Guantanamo Bay, Cuba." See Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Tit. X, § 1005(e)(1), 119 Stat. 2680, 2742 (2005) (to be codified at 28 U.S.C. § 2241(e)). Therefore, the protections of the habeas statute are still available to persons detained either by the CIA or outside of Guantanamo Bay.

301. See *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004). *But cf.* *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005); *Qassim v. Bush*, No. Civ. A. 05-0497(JR), 2005 WL 3508654, at *3–*5 (D.D.C. Dec. 22, 2005) (mem.) (holding that even though the indefinite detention of two Muslim Uighur detainees at the Guantanamo detention center is unlawful, the court "has no relief to offer" under the habeas statute because the government has failed to find a country to accept them).

302. See *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (explaining the standard for "next friend" habeas standing).

303. For example, all three could have valid claims under the Convention against Torture, while Rashul alone would be able to invoke the protection of the Geneva Conventions.

304. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified at 18 U.S.C. § 2441 (2000)).

305. 18 U.S.C. § 2340–2340A (West 2000 & Supp. 2005).

grounds that the detention violates those statutes. Criminal prosecution may be more likely in the future.

Tort actions may also provide a remedy. In *Sosa v. Alvarez-Machain*³⁰⁶ the Supreme Court concluded that illegal detention for less than one day did not violate a norm of customary international law sufficient to invoke jurisdiction under the Alien Tort Statute.³⁰⁷ The torture and long-term detention involved in extraordinary rendition, however, still remain valid claims after the *Sosa* decision.³⁰⁸

The thematic procedures established by the Commission on Human Rights constitute one other prompt mechanism for responding to human rights violations occurring in the context of extraordinary rendition. For example, the Special Rapporteur on the promotion and protection of human rights while countering terrorism,³⁰⁹ the Special Rapporteur on torture,³¹⁰ the Working Group on Enforced or Involuntary Disappearances,³¹¹ and the Working Group on Arbitrary Detention³¹² can assist persons wishing to challenge extraordinary rendition by “function[ing] as a means of communication between governments and victims of human rights abuses.”³¹³ Special Rapporteurs and Working Groups are authorized to make urgent appeals to governments, to conduct fact-finding, and to work to end specific human rights abuses.³¹⁴ Moreover, the mandate of the Working Group on Enforced or Involuntary Disappearances is “to assist families in determining the fate and whereabouts of their relatives who, having disappeared, are placed outside the protection of the law,”³¹⁵ and to investigate such cases.³¹⁶

Additionally, on September 23, 2005, negotiations were completed on the new International Convention for the Protection of All Persons from Enforced Disappearance (“Enforced Disappearance Convention”).³¹⁷ While the

306. 542 U.S. 692 (2004).

307. *See id.* at 738.

308. *See id.* at 732 (citing with approval *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)), that “the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind”).

309. *See* Office of the United Nations High Commissioner for Human Rights, Special Rapporteur on the promotion and protection of human rights while countering terrorism, Introduction, <http://www.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm> (last visited Feb. 21, 2006).

310. *See* Office of the United Nations High Commissioner for Human Rights, Special Rapporteur on torture, <http://www.ohchr.org/english/issues/torture/rapporteur/index.htm> (last visited Feb. 21, 2006).

311. *See* Office of the United Nations High Commissioner for Human Rights, Working Group on Enforced or Involuntary Disappearances, Introduction, <http://www.ohchr.org/english/issues/disappear/index.htm> [hereinafter Working Group on Enforced Disappearances] (last visited Oct. 25, 2005).

312. *See* Office of the United Nations High Commissioner for Human Rights, Working Group on Arbitrary Detention, Introduction, <http://www.ohchr.org/english/issues/detention/index.htm> (last visited Oct. 25, 2005).

313. WEISSBRODT ET AL., *supra* note 20, at 247.

314. *See id.*

315. Working Group on Enforced Disappearances, *supra* note 311.

316. *See id.*

317. International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. E/CN.4/2005/WG.22/WP.1/REV.4 (Sept. 23, 2005), available at <http://www.ohchr.org/english/issues/disappear/docs/E.CN.4.2005.WG.22.WP.1.REV.4.pdf>.

draft convention has not yet opened for signature, it “represents significant progress in international law for the protection of persons from enforced disappearance.”³¹⁸ In particular, it establishes an explicit definition of enforced disappearance consistent with the elements of extraordinary rendition.³¹⁹ The Enforced Disappearance Convention could be a useful tool to protect against and stop the practice of extraordinary rendition. It is also helpful in its current form because it provides further evidence that state-sponsored secret abductions violate fundamental human rights. The Enforced Disappearance Convention is likely to draw attention to the issue of extraordinary rendition as it opens for signature in 2006.

The countries directly involved in extraordinary rendition may themselves provide the most effective means of addressing the practice. Countries that have orchestrated extraordinary renditions have sacrificed the moral authority to be leaders in promoting the rule of law and respect for human rights.³²⁰ Countries with poor human rights records that have been enlisted to receive suspects may react with hostility when their partners in torture persist in criticizing their human rights practices.³²¹ In order to regain international legitimacy, the architects of extraordinary rendition may need to take dramatic steps to show the world that they intend to play by the rules.³²² Only then will they have a genuine opportunity to compel other countries to comply with the important obligations embodied in contemporary human rights instruments.

318. Statement, Working Group on Enforced or Involuntary Disappearances, United Nations Commission on Human Rights, Working Group on Disappearances Welcomes Conclusion of Drafting of Convention on Enforced Disappearances (Sept. 23, 2005), <http://www.unhcr.ch/hurricane/hurricane.nsf/0/C4C046A3919202FEC12570A0002F01B6?opendocument>.

319. International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 317, art. 2 (defining enforced disappearance as “the arrest, detention, abduction, or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”).

320. See, e.g., Tom Malinowski, Wash. Advocacy Dir., Hudson Inst., America’s Mission: Debating Strategies for the Promotion of Democracy and Human Rights, State Department Briefing, FED. NEWS SERVICE (June 20, 2005) (reporting that when the Prime Minister of Egypt was confronted with allegations of torture, he responded, “Well, you know, we do what we have to, just like the United States”).

321. See, e.g., Alec Russell, *Quit Terror War Base, Uzbekistan Dictator Orders US Special Forces*, DAILY TELEGRAPH (London), Aug. 1, 2005, at 10 (confirming that Uzbekistan ordered the United States to abandon a military base on its territory as “tensions with Washington over the country’s human rights record . . . abruptly c[a]me to a head”).

322. See Noah Feldman, *Ugly Americans*, NEW REPUBLIC, May 30, 2005, at 23 (“[I]f the United States aimed to demand accountability with international norms, it had better begin by actively and visibly upholding those norms itself.”).